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July 9, 2021

Michael Kessler
mikepkes@gmail.com [via email only]

Jenifer Johnston
Sr. Deputy City Attorney
Portland City Attorney's Office
1221 S.W. Fourth Avenue, Suite 430
Portland, Oregon 97204

Re: Petition of Michael Kessler seeking a response to a public records request

Dear Mr. Kessler and Ms. Johnston:

Petitioner, Michael Kessler, has appealed the Portland Police Bureau (PPB) decision not to fulfil a public records request for:

> all nightly reports documenting the activity of the officer currently identified as #67, including, but not limited to, documents on the use of force, time logs, disciplinary action[.]

Petitioner's request specified a time constraint of March 1, 2020 to August 25, 2020.

For context, the late spring and summer of 2020 saw near nightly unrest on the streets of Portland. PPB's Rapid Response Team (RRT) was routinely deployed in response. RRT officers, commonly known as "crowd control" or "riot" officers, are clad in body armor. The back of each RRT helmet has a number on it, which, during this period, may have been one of the only unique identifiers attached to each officer. See, *Petition of Alan Kessler*, MCDA PRO 20-24 (2020) (providing context for PPB officers obscuring their name badges while engaged in crowd control assignments). "Officer #67" has been the subject of multiple media reports that allege aggressive conduct. Given the public coverage and context we readily understand the reference in this request to mean the RRT officer who has "#67" appearing on the back of their police helmet.

Citing our decision in *Petition of Merrick*, MCDA PRO 16-05 (2016), PPB asserted that petitioner's request was a question ("Who is Officer #67?") and not a records request to which it had to respond. Petitioner disputes this characterization and has appealed to this office seeking an order compelling PPB to respond to his request. For the reasons discussed below, we grant the petition.

DISCUSSION

In the years since our decision in *Merrick*, we have been called with increasing frequency to resolve disputes as to whether a public records request is, in fact, a records request or is actually a question to which a public body is not obligated to respond. The present case offers an

opportunity to elaborate the distinction and, we hope, provide some meaningful guidance to public bodies and requestors moving forward.

A. Background principles

In the public records law there is a subtle, but critical, distinction between "information" and "records." A record is a "writing that contains information." ORS 192.311(5). Public bodies are required to provide records; they are not required to provide information. See, *Petition of Schwarz*, Att'y Gen PRO (11/13/03) ("The public records law does not confer a right upon persons to request disclosure of *information*, as opposed to public records") (emphasis in original). That many public bodies employ Public Information Officers who routinely do provide information on request can confuse this distinction.

It is likewise well-settled that the public records law does not require a public body to perform analysis of records or information in its possession or create new records in response to a public records request. ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2019) at 7; *Petition of Kessler*, MCDA PRO 19-13 (2019) ("The public records law does not require a public body to create new records in response to a request, nor does it require it to produce records that it does not have.")

B. Is it a question?

The general, and well-settled, proposition that a public body need not answer questions about its records derives from the distinction between information and records. Answering a question requires a public body to synthesize existing records (or undocumented knowledge) and create a new record containing information that may or may not be documented anywhere. See, e.g., *Petition of Cashman*, MCDA PRO 19-17 (2019) ("[T]he public records law requires only that public bodies produce existing records. It does not require that they answer questions about their processes or reduce to writing information that is, or may be, known to city officials.")

Some cases involve literal questions asked of public bodies, and are easily disposed of. See, *Petition of Walton*, Att'y Gen PRO (11/7/12) ("How did the employment department determine I was out of the labor market?" is a question that does not require a response). The reframing of a question in terms of "records that show…" does not change its essential nature as a question. *Petition of Merrick*, MCDA PRO 16-05 (2016) ("records indicating who is responsible to maintain the sidewalks under the I-405 bridge" is a question notwithstanding its formulation); *Petition of Alan Kessler*, MCDA PRO 20-28 (2020) ("any document […] sufficient to identify the name and email address for the person in the attached photo" is a question).

In this case, PPB asserts that petitioner's records request is truly a question, specifically "who is Officer #67?" That is, by providing responsive documents PPB will have to use its knowledge as to who this officer is and, by producing the documents will disclose that knowledge to petitioner.[1]

[1] Petitioner has disclaimed any interest in the identity of Officer #67 and has specified in his request that any identifiers may be redacted from the production in this case.

The fact that a response to a public records request will have the effect of answering a question does not mean that the request itself is a question. Indeed, open government laws are intended to allow people to answer questions about the operation of their government. In *Merrick* (16-05), we wrote that what distinguishes a question from a records request is "who must analyze the question being asked and determine what categories or types of documents might be responsive." In this case, petitioner has complied with this mandate by requesting "use of force" reports, "time logs," and disciplinary actions. This is not a question; it is a request for specific records.

C. Does responding require analysis?

Having concluded that the request in this case is not a question does not resolve the matter entirely. As the Attorney General interprets the Public Records Law, it does not "require public bodies to disclose the reasoning behind their actions; answer questions about their records; analyze their records; or perform legal research in order to identify records that are responsive to a request." ATTORNEY GENERAL'S PUBLIC RECORDS MANUAL (2019) at 7.

The Attorney General's only case-specific opinions applying this principle in the context of research and analysis relate to legal research and analysis. See *Petition of Kane*, Att'y Gen. PRO (2/23/2006) (a request for all documents pertaining to whether or not certain revenue streams may lawfully be used for certain purposes, "requires the exercise of legal judgment and thus would require us to engage in legal analysis not required by the Public Records Law") and *Petition of Andrade*, Att'y Gen PRO (5/26/2005) (same). But, as noted in the Manual, the "analysis" principle is not limited to legal matters.

This office has held that the Public Records Law does not require subjective analysis by agency staff to determine if a record is, or is not, responsive. *Petition of Merrick*, MCDA PRO 18-37 (2018). In *Merrick* (18-37), the petitioner sought "data on deaths occurring at, or associated with [Bud Clark Commons]" from the county medical examiner. We found that sorting the medical examiner's data into responsive and non-responsive bins would require subjective work by agency staff to interpret free form text fields and decide if a particular death was in any way "associated with" the Bud Clark Commons. Having so concluded, we relied on the principle that a public body is not required to analyze its records on request and denied the petition.

The commonality in *Merrick*, *Kessler*, *Kane*, and *Andrade* is that each asked the public body to engage in subjective analysis, either of its own records or of the law, in order to provide a response. The present case, however, does not involve subjective analysis. Reading these opinions together with the Attorney General's advice in the MANUAL leaves us to conclude that a public body may be required to do non-legal research within its own records in order to identify a clearly described responsive record so long as that research does not involve subjective analysis. Determining where responsive records are located, or even which records are responsive in the first place, may be laborious but that does not excuse an agency from doing that work. ORS 192.324(4) provides a means of addressing burdensome requests.

In the present case, petitioner has put forth concrete criteria to frame what records are and are not responsive to his request. We understand that the records department employee who did,

or will, process this request may not have personal knowledge of which RRT officer or officers were assigned a helmet bearing the identifier "#67" on any given date. But the request was not made to a particular records technician, the request was made to the Portland Police Bureau.

In sum, records responsive to petitioner's request almost certainly exist.[2] Petitioner has identified them as precisely as he is able to. Responding to this request will not require subjective analysis by PPB. Nor will it require PPB to produce anything more than "records." Consistent with Oregon law, PPB need not explain these records or provide to petitioner any information beyond the bare records themselves. If PPB cannot, after a reasonable and good faith search, determine which officer(s) were assigned helmet #67 during this period then its obligation will be complete as it will not have been able to locate responsive records.[3]

ORDER

Accordingly, the petition is granted. The Portland Police Bureau shall, within seven days, either 1) complete its response to this request, 2) provide a fee estimate as authorized by ORS 192.324(4), 3) provide a written estimate as to when it will reasonably complete its response under ORS 192.329(5)(b), or 4) give notice of its intent to initiate further proceedings as authorized by ORS 192.411 and 192.431(3).

To be clear, we are not ordering PPB today to produce records, as it may or may not be able to identify any. We are ordering it to promptly process this request, conduct a good faith search for responsive records, and produce any non-exempt responsive records it locates, subject to the payment of fees to cover its actual costs.

Very truly yours,

MIKE SCHMIDT
District Attorney
Multnomah County, Oregon

Notice to Public Agency

Pursuant to ORS 192.411(2), 192.415, and 192.431(3) your agency may become liable to pay petitioner's attorney's fees in any court action arising from this public records petition (regardless whether petitioner prevails on the merits of disclosure in court) if you do not comply with this order and also fail to issue within seven days formal notice of your intent to initiate court action to contest this order, or fail to file such court action within seven additional days thereafter.

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[2] Responsive records may or may not be exempt from disclosure, and we express no opinion on that issue.

[3] A plain text search through police reports for variants on "Officer #67" starts, but does not complete, PPB's effort to make a good faith search.