MIKE SCHMIDT, District Attorney for Multnomah County

1200 SW First Ave, Suite 5200 • Portland, Oregon 97204 • 503 988-3162 • FAX 503 988-3643
www.mcda.us

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Ryan Hartkopf
ryanhartkopf@gmail.com [via email only]

D. Raghav Shan
Oregon Health & Science University
Legal Department
3181 S.W. Sam Jackson Park Road, L585
Portland, Oregon 97239

Re: Petition of Ryan Hartkopf requesting records of blocked keywords from OHSU's social media accounts

Dear Mr. Hartkopf and Mr. Shan:

Petitioner, Ryan Hartkopf, has asked this office to order Oregon Health & Science University (OHSU) to produce records in response to his public records requests for "the records of blocked keywords for the OHSU Facebook page (https://www.facebook.com/OHSUedu) and the @ohsunews Instagram account."

In response to this request, OHSU stated that it did not possess any responsive records. Based on the communication history provided to this office it is clear that OHSU's determination that it did not possess any responsive records was not intended as a statement that there were no blocked keywords on its social media profiles, rather was based on a legal conclusion that the rules applicable to a public body's internal databases do not apply to social media accounts.

In the course of his exchange with OHSU, petitioner made three versions of his records request. First, he asked for screenshots from 6/13/21 of all the blocked keywords. Second, he clarified that he was not seeking screenshots that already existed from that date, rather he was requesting OHSU to take new screenshots. Third, he made the updated request quoted above for "records" more generally. We agree with OHSU's position that it did not have to create a new record, a screenshot, in response to the first two versions of the request. See, *Petition of Kessler*, MCDA PRO 20-06 (2020) (finding that taking a screenshot of a software interface necessitated creating a new record, which the public body was not required to do). Accordingly, we write only to address the third records request. For the reasons discussed below, we grant the petition.

DISCUSSION

A. Response to a records request – ORS 192.329(2)

We ordinarily do have the ability to adjudicate a public body's claim that it does not possess any records responsive to a public records request. However, where "[t]he facts are undisputed [and] only the legal import of those facts is at issue" we will evaluate the public body's legal determination that it does not possess responsive records. *Petition of Kessler*, 18-35 (2018). Here it is undisputed that OHSU operates the Facebook and Instagram accounts

referenced in the request. And OHSU's position that it is not the custodian of records is based on its legal conclusion that the Attorney General's guidance relating to electronically stored data does not apply to social media sites. Accordingly, whether or not OHSU is in possession of responsive records is a question of law that does not require resolving disputed facts. We turn, then, to the merits.

i. Is it a public record?

Facebook and Instagram are, at their core, massive databases to which account holders can upload data in the form of text, images, and video to communicate with others. Accounts are available to anyone for free. Account holders can also upload data as part of their profile, information that the public can view about them, or settings that control the way that they view materials that other people have posted to their account as comments.

One such settings is a list of "keywords" that an account holder can create. If a comment on their page made by a third party contains one of these keywords, the comment will be hidden from public view. Facebook describes this feature as follows:

> **Block keywords**
>
> You can choose up to 1,000 keywords in any language (example: words, phrases or emojis) to block from your Page. When people include a keyword you've blocked in a comment, we'll hide the comment so that it doesn't appear on your Page.
>
> We'll also automatically hide variations of the keywords that you want to block so that the variations don't contribute to the 1,000 keyword limit. Variations include common misspellings, plurals, abbreviations and words that use numbers or symbols.[1]

OHSU cites *Petition of Brosseau*, Att'y Gen. PRO (July 1, 2015) in support of its position that these keywords are outside the public records law. Specifically, in the concluding remarks of that order, the Attorney General wrote:

> Although the Public Records Law does not require public bodies to create new records, we believe that the law requires public bodies to use existing software, *acquired and developed at public expense*, to retrieve and make available electronically stored information through the software or program in used by the public body.

Id. at 9 (emphasis added). Because, OHSU argues, Facebook and Instagram are available free of charge, the public records rules regarding treatment of electronically stored data do not apply. We disagree.

A "public record" as defined in ORS 192.311(5) is "any writing that contains information relating to the conduct of the public's business, […] prepared, owned, used or retained by a

[1] Facebook Help Center, "How can I proactively moderate content published by visitors on my Facebook Page?" https://www.facebook.com/help/131671940241729/ (accessed 9/21/21)

public body regardless of physical form or characteristics." A "writing" is defined in relevant part as "every means of recording, including letters, words, […] or electronic recordings." ORS 192.311(7).

The "keywords" in OHSU's social media profile, if any, are "prepared" and "used" by OHSU.[2] They are, self-evidently, "words" or "combinations of letters." They are public records as that term is defined.

We decline to adopt OHSU's "freely available software" limiting construction as applied to data contained in social media accounts operated by public bodies for two reasons. First, although *Brosseau* does state that data in a software suite that *was* acquired and developed at public expense was subject to disclosure, it is not plausible in context to suggest that this also holds, beyond the facts of the case, that software acquired or used free of charge somehow provides a loophole to the public records law. Were we to adopt OHSU's reading, a public body could shield its records from public disclosure by using a service like GoogleDocs or other freely available cloud storage and document editing software. Second, the textual analysis of the definition of public record, discussed above, clearly reaches recorded information "used" by a public body "regardless of physical form or characteristics."

ii. Is OHSU the custodian?

OHSU has asserted that it is not the "custodian" of these records. We disagree. Although the keywords are stored on a private company's servers, OHSU retains the ability to access, review, and edit them at will. ORS 192.311(2) defines "custodian" as "[a] public body mandated, directly or indirectly, to create, maintain, care for or control a public record." The Attorney General instructs that this means that, "[i]n general, any public body that possesses or owns a public record for purposes related to one or more of its particular functions is a custodian of that record." PUBLIC RECORDS AND MEETINGS MANUAL (2019) at 11. OHSU controls its social media profiles and preferences and has sole authority to alter them. It is reasonable to conclude that OHSU created these accounts, posts, and profiles for purposes of communicating with the public, a core mission of any public health agency. The fact that these data are stored on Facebook's servers is of no importance to the public records analysis; ability to access and control is.

In *Petition of Kessler*, MCDA PRO 20-12 (2020), we addressed the scope of a public body's control of and access to data held by a private software service provider on its behalf. In that case petitioner sought a full export of a commercial database used by the City of Portland. We denied the petition, finding that the City's obligation under the public records law extended only to accessing the data on petitioner's behalf on the same terms it did for its own purposes.

Unlike in *Kessler* (20-12), here OHSU does not deny that it has the ability to access the specific data that petitioner seeks. As noted above, we agree with OHSU that it was not mandated to create a *new* record in response to petitioner's initial request. However, the fact that OHSU is not required to create a screenshot of the data in question does not mean that the data is not a public record or that OHSU is not the custodian.

[2] OHSU has not confirmed if it does or does not have responsive data on its social media profiles. This order addresses the question of whether, if they exist, if they are subject to release as a matter of law.

OHSU points to our decision in *Petition of Kessler*, MCDA PRO 20-06 (2020), in which we held that the City of Portland was not required to take screenshots of the user interface of its software at petitioner's request. This case is distinguishable. Here, petitioner is seeking the *data* that OHSU created and entered into the software, data that we have just concluded is a public record that already exists. In *Kessler* (20-06) petitioner was not seeking data or records, rather he requested that the City of Portland generate new documentation (screenshots) of the structure of existing software and provide it to him.

B. Format of Response – ORS 192.324(3)

The public records law requires an agency to provide records in "the form requested, if available" and, if not so available, then "in the form in which the custodian maintains the record." ORS 192.324(3). In this case, petitioner has specified that OHSU can provide the data to him "in whatever format is expedient for the execution of this request." This simplifies matters greatly.

In this case, OHSU "maintains" the record by accessing it from a computer or other device that logs in to Facebook or Instagram with OHSU's access credentials. For a number of practical reasons OHSU may not wish to provide petitioner with the ability to inspect the data on a computer actively logged in to OHSU's social media accounts, and it is not required to do so. See, *Petition of Babcock*, MCDA PRO 16-32 (2016) ("the public records law does not require an agency to make its databases open to direct public access; it does require an agency to provide any non-exempt data contained in those databases to the public.") However, OHSU must provide access to these data and it may do so by providing a copy in any appropriate format.

ORDER

Accordingly, the petition is granted. OHSU shall, subject to the payment of any fees authorized by ORS 192.324(4), provide petitioner with either a copy of the requested data, an opportunity to inspect the responsive data on OHSU's computers, or a statement that no such data exists.

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.