



MIKE SCHMIDT, District Attorney for Multnomah County

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October 26, 2021

Alan Kessler
805 S.W. Broadway, Suite 1580
Portland, Oregon 97205

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

Re: Petition of Alan Kessler seeking a punitive fee waiver against the Portland Police Bureau for improper delay/closure of a public records request

Dear Mr. Kessler and Ms. Johnston:

Petitioner, Alan Kessler, has asked this office to order the Portland Police Bureau (PPB) to promptly, and at no cost, respond to his records request for “all records related to Robert King created or received prior to April 1, 2019.” Petitioner seeks this remedy under ORS 192.407(3)(c), which grants the district attorney the discretionary authority to sanction a public body for unduly delaying its response to a records request by ordering a full or partial waiver of fees.

Petitioner submitted the request quoted above to PPB on March 11, 2021. The same day, by way of automated response, PPB acknowledged the request and requested prepayment of its standard \$30 research fee. Petitioner did not pay this fee, nor did he request a fee waiver.

On May 4, 2021 PPB further responded to the request with a request for clarification: “which specific records regarding Robert King are you seeking?” Petitioner promptly responded that he was seeking personnel files and any email or text message archives. PPB then, on May 17, 2021, asked him to clarify the date range. However, before petitioner could respond, PPB sent a message on May 18, 2021, closing the request on account of petitioner’s “lack of payment or communication.”¹

On October 13, 2021, petitioner filed this appeal. Shortly afterwards, PPB reopened petitioner’s initial request.

PPB now asks that we either find that the petition is moot, on account of it being reopened, or, alternatively, that PPB properly closed this request on May 18, 2021, pursuant to ORS 192.329(3)(b). Petitioner disagrees and disputes both the propriety of PPB’s automated \$30

¹ ORS 192.329(3)(b) and (4)(b) collectively provide that a public body “shall” close a public records request if a requestor has not responded to a communication seeking clarification, or paid an estimated fee, within 60 days from the point the public body sent the requestor the fee estimate or request for clarification.

fee estimate and the uniformity of the City's application of the 60-day rule in ORS 192.329(3)(b).

As discussed below, we find that PPB has not violated the timelines set out in ORS 192.329 and, thus, that we lack the authority to grant the relief petitioner seeks. We need not address whether or not this request was properly closed in May because resolving that issue does not inform our dispositive analysis under ORS 192.407 and 192.329.

DISCUSSION

A. ORS 192.329 – Timeliness

In this case PPB acknowledged petitioner's request the same day he made it, in compliance with the five-day deadline provided in ORS 192.324. This acknowledgement also contained its standard estimate for initial research costs: \$30. According to ORS 192.329(3)(b) the timelines set out in ORS 192.329 are tolled upon issuance of a fee estimate, until payment or waiver of that amount.

Petitioner does not dispute this point of law, rather he challenges the legality of an automatic and automated \$30 estimate. Rather, he argues that this is not "a fee permitted under ORS 192.324" and thus does not serve to toll PPB's obligation to respond. Under Oregon's public records law a sub-judicial adjudicator, either the district attorney or Attorney General, lacks authority to evaluate whether or not a fee estimate represents an agency's "actual cost" under ORS 192.324(4). *Petition of Babcock*, MCDA PRO 15-22 (2015); *Petition of Mayes*, Att'y Gen. PRO (Mar. 29, 2000).

All that we are empowered to determine is whether a fee estimate is so grossly excessive that it constitutes a constructive denial of the request. *Petition of Wright*, MCDA PRO 16-29 (2016). In this case, with a request for potentially decades of records relating to a retired PPB employee, it is implausible that \$30 so grossly overestimates the actual cost as to constitute a constructive denial of petitioner's request.

Because this fee estimate was issued, and neither paid nor waived, none of the time from March 11, 2021 to present counts against PPB for purposes of the timelines in ORS 192.329. As such, we cannot find that PPB has unduly delayed its response.

B. ORS 192.407 – Sanctions

ORS 192.407(3) provides,

If the Attorney General, the district attorney or a court grants a petition filed under this section, the order granting the petition [...] [m]ay order a fee waiver or a fee reduction if a public body has responded to the request with undue delay or has failed to respond to the request in the time and manner prescribed in ORS 192.329.

This section provides the district attorney's sole authority to impose a punitive fee reduction. It also expressly states that such a sanction is only authorized if we find that a public body has violated the timelines set out elsewhere in the public records law. Because, as discussed above, we do not find such a delay, we are without authority to grant the relief petitioner seeks.

ORDER

Accordingly, the petition is denied.

Very truly yours,

A handwritten signature in black ink, appearing to read "Mike Schmidt", written over a horizontal line.

MIKE SCHMIDT
District Attorney
Multnomah County, Oregon