



**MIKE SCHMIDT**, District Attorney for Multnomah County

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

October 7, 2020

Erik Gunderson  
Gunderson Employment Law  
1050 S.W. Sixth Ave., 11<sup>th</sup> Floor  
Portland, Oregon 97204-1136

Raghav Shanmugasundaram  
OHSU Legal Department  
3181 S.W. Sam Jackson Park Rd.  
Portland, Oregon 97239

Re: Petition of Erik Gunderson - determination of appropriate sanction for undue delay

Dear Mr. Gunderson and Mr. Shanmugasundaram:

In our opinion on the petition of Mr. Gunderson regarding his request for public records of Oregon Health & Science University (OHSU), we determined that OHSU's response to petitioner's request constituted undue delay (PRO 20-29). We ordered OHSU to complete its response to petitioner by providing a fee estimate within seven days of our order. OHSU complied with this order.

We retained jurisdiction over this matter to determine the appropriate sanction to address OHSU's undue delay. Both parties have submitted additional information and argument on the issue. Because we find that OHSU's months-long delay in fully responding to petitioner's request was both significant and inexplicable, we find that a substantial sanction is warranted.

### **DISCUSSION**

ORS 192.407 provides two options for a monetary sanction when the district attorney has determined that a responding agency has engaged in undue delay:

- “require the public body to pay a penalty of \$200 to the requestor,” ORS 192.407(3)(b); or
- “order a fee waiver or a fee reduction,” ORS 192.407(3)(c).

In our previous order we determined that a penalty for undue delay was appropriate. The question here is which of the statutory penalties to impose and, if we select the fee reduction, in what amount should fees be reduced.

OHSU argues that because petitioner has expressed that his request is essentially pre-litigation discovery in advance of a potential civil lawsuit, the request is therefore private in nature and not related to a public interest that would warrant a fee reduction. OHSU's reliance on the principle of waiving or reducing fees on the basis that disclosure would serve the public interest as described in ORS 192.324(5), is misplaced. Statutory authority to impose a fee reduction in this case does not depend on a finding of the public interest, rather it is intended as a mechanism for assessing a financial penalty for a public body's failure to timely respond to a public records request.

In petitioner's submission on the issue of a penalty, he requests compensation for his time working on this matter. He calculates his time at 9.1 hours, of which he rates the market value at \$350/hour for a total of \$3,185. This request is also misplaced. Oregon law provides no authority to the district attorney to order attorney's fees on a public records petition. *Petition of Jeff Merrick, MCDA PRO 17-63 (2018)*.

The penalty provision under ORS 192.407(3) was added to the statute in 2019 and, as such, there are few precedents to refer to in determining its appropriate use. The statute points us to craft a penalty that is reasonably calculated to address the failure on the part of the public body. OHSU argues that if we impose a sanction, that we should impose only the \$200 penalty under ORS 192.407(3)(b). This does not meet the gravity of their failure in the present matter.

As we discussed in our original opinion PRO 20-29, OHSU failed to fully respond to petitioner's request for 215 days before he filed his petition with this office, and only after we issued an order for OHSU to complete its estimate of fees did the organization do so. In all of their submissions to this office, OHSU has provided no explanation for its failure. In OHSU's favor, their correspondence does evidence attempts to work with petitioner to refine his requests and they did provide him with estimates of the number of hours it would take for staff to produce the documents he requested. As such, petitioner had some basis on which to assess the costs of his individual requests.<sup>1</sup> However, given that OHSU plainly failed to meet its statutory obligation and has provided no explanation why this failure should be excused, we find that a substantial fee reduction is warranted. We find that a 20% reduction is appropriate under the totality of circumstances.

## ORDER

For the reasons stated above, OHSU is ordered to reduce any fees assessed to petitioner by 20% as penalty for its undue delay.

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<sup>1</sup> Even assuming use of the minimum wage of \$11.25/hour, the 340 hours quoted by OHSU in June would amount to \$3,825 – a substantial cost for document production even as an absolute minimum. OHSU eventually quoted \$19,441.45 in total to compensate 305 hours of staff time to produce the requested documents. Petitioner has since withdrawn two individual requests, which brings the total to \$15,664.45.

Regards,

A handwritten signature in black ink, appearing to read "Mike Schmidt". The signature is fluid and cursive, with a large initial "M" and a stylized "S" at the end.

MIKE SCHMIDT  
District Attorney  
Multnomah County, Oregon

**Notice to Public Agency**

Pursuant to ORS 192.411, 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.

**20-29(2)**