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July 31, 2020

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Jenifer Johnston
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Portland City Attorney's Office
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Portland, Oregon 97204

Re: Petition of Alan Kessler seeking imposition of punitive sanctions for non-retention of public records

Dear Mr. Kessler and Ms. Johnston:

On June 9, 2020, at 11:30 pm, petitioner made a public records request of the City of Portland for video that the Portland Police Bureau (PPB) was currently livestreaming online through YouTube. At times during the ongoing unrest and demonstrations, PPB has decided to broadcast live video depicting the situation as their officers were perceiving it. The evening of June 9, 2020 PPB was one such instance.

Petitioner had previously made a public records request for video from a different night's livestream and had been told that the video had not been retained. This time, petitioner made his request while the stream was ongoing and included the comment "PLEASE DO NOT DESTROY THIS PUBLIC RECORD." He additionally posted about this request on Twitter, and tagged the official Twitter accounts of the Portland Police, Portland City Auditor, and Mayor Wheeler, as notification that he had made this request and exhorted them not to delete it.

By the time the City public records staff processed the request, the video was no longer available. This appeal ensued. Petitioner acknowledges the reality that the video does not exist anymore, but requests that we impose a punitive sanction under ORS 192.407 for the City's willful destruction of a public record. For the reasons set out below we decline to do so and deny the petition.

DISCUSSION

A. Punitive Sanctions – ORS 192.407

When PPB livestreams through YouTube, upon concluding its stream, the City employee in charge of running it is given an option to retain the livestream as a recording or not. The City elects not to retain that video.

A public body is generally free to retain or not retain public records in accordance with its established policies and protocols. Although the Attorney General advises against continuing

with routine purging of records where a public records request for them is outstanding, here the question is not as simple as an elective decision to retain or not retain. PUBLIC RECORDS AND MEETINGS MANUAL (2019) at 7. The City asserts that it is affirmatively *prohibited* from retaining these livestreams by operation of ORS 181A.250. Counsel for PPB explains:

PPB was livestreaming so the community could understand what was occurring at the protest. However, PPB was not permitted to retain the video because PPB was not recording acts that they believed were criminal. ORS 181A.250 states that no law enforcement agency may collect or maintain information about political activities of a group “unless such information directly relates to an investigation of criminal activities, and there are reasonable grounds to suspect the subject of the information is or may be involved in criminal conduct.” ORS 181A.250. This statute provides the legal authority for PPB to not retain the livestream in question.

ORS 181A.250 is designed to protect the free exercise of first amendment rights for those protesting. PPB has taken steps to ensure it only retains video of suspected criminal activity. PPB does not retain video of a person engaged in the lawful exercise of their first amendment activities. This clear legislative intent evidenced in ORS 181A.250 on the retention of these records required PPB to not keep copies of the livestream in question.

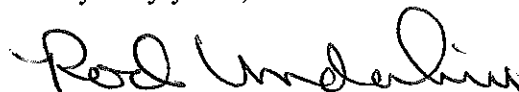
Since this petition was filed, the petitioner and the ACLU of Oregon have filed suit against the City alleging that livestreaming the demonstrations, even without retention, is a violation of ORS 181A.250. See, “Circuit Court Issues Restraining Order on Police Surveillance of Protesters in Response to ACLU Lawsuit,” ACLU of Oregon, Press Release (July 30, 2020) (<https://www.aclu-or.org/en/press-releases/circuit-court-issues-restraining-order-police-surveillance-protesters-response-aclu>).

The precise requirements of ORS 181A.250 vis-à-vis livestreaming of protests will undoubtedly be explored at more length in the pending litigation. For our purposes here of evaluating solely public records-based arguments, it is sufficient that the City has adequately articulated that it was attempting to comply with an affirmative legal obligation imposed outside the public records law in taking the actions that it did. Assuming that we have the authority to sanction under ORS 192.407(3), we decline to exercise our discretion to do so.

ORDER

Accordingly, the petition is denied.

Very truly yours,



ROD UNDERHILL
District Attorney
Multnomah County, Oregon