



**ROD UNDERHILL**, District Attorney for Multnomah County

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August 29, 2019

Richard Ellmyer  
richard@goodgrowthnw.org (via email only)

Jenny Madkour  
Multnomah County Attorney's Office  
501 S.E. Hawthorne, Suite 500  
Portland, Oregon 97214

Re: Petition of Richard Ellmyer seeking a determination of undue delay and imposition of punitive sanction

Dear Mr. Ellmyer and Ms. Madkour:

In his public records petition dated August 23, 2019 Mr. Ellmyer asks this office to find that Multnomah County has unduly delayed its response to a public records request and impose a fine against the county as authorized by ORS 192.407 (as amended by HB 2353 (2019), effective June 4, 2019).

On July 21, 2019 at 4:08 pm Petitioner sent two public records requests to Multnomah County by email. One was addressed to Commissioner Vega Pederson and the other, which is the subject of this petition, to Chair Kafoury.<sup>1</sup> The Vega Pederson request sought email addresses in the commissioner's possession to which she had distributed a newsletter. The Kafoury request sought a list of the email addresses for all county employees. The county responded to the Vega Pederson request by indicating that many of the emails would be exempt and quoting fees to segregate the exempt from the non-exempt.<sup>2</sup> The county did not respond to the Kafoury request and that forms the basis for the present petition.

The county explains that its failure to respond to the Kafoury request was an administrative oversight caused by the similar nature and identical time of receipt between it and the Vega Pederson request. The county attorney writes that,

Because the emails had the exact same date and time stamp, County staff incorrectly assumed the requests were identical. On July 23, 2019, I communicated directly with Mr. Ellmyer on the request sent to District 3. Mr. Ellmyer never inquired into the status of July 21st request addressed to Chair

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<sup>1</sup> Both were also addressed to the county's communications director, who is the designated recipient of public records requests for the county.

<sup>2</sup> The request of Commissioner Vega Pederson was the subject of a separate public records appeal to this office, which we dismissed for lack of jurisdiction on August 27, 2019 in order 19-43.

Kafoury, and it was only upon receipt of this petition that County staff discovered that the July 21st email to Chair Kafoury differed from the request made to District 3.

The county has now informed petitioner that it does not possess any document responsive to his request. The county further points out that it has provided petitioner with the same response previously (once in 2015, once in 2014) to requests for the same record.

### DISCUSSION

#### A. Penalty for Untimely Response – ORS 192.407

ORS 192.407 gives the district attorney the authority to impose against a public body a penalty of \$200, or order a waiver or reduction of quoted fees, if the district attorney determines that the body's response, or lack of response, to a properly presented public records request violated the timeliness provisions of ORS 192.329.<sup>3</sup> Here, petitioner followed the county's posted procedure for submitting a public records request, so ORS 192.407(1) permits him to file a petition seeking the relief specified in ORS 192.407(3).

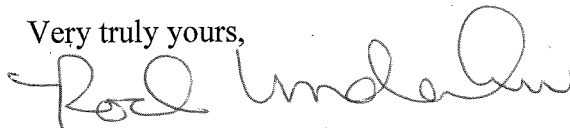
Absent certain exceptions not relevant here, ORS 192.329 requires that a public body complete its response to a request within 15 business days of the public body's receipt of the request. Here the county acknowledges that it did not do that, and has explained why.

The authority to impose a financial penalty against a public body in ORS 192.407 is discretionary. The county has provided a reasonable explanation for its failure to promptly process petitioner's request. Because the county has now responded on the merits—that it does not possess a responsive record—the petition is moot as to the substantive request. As to the request for a financial sanction, the circumstances of this case do not warrant such a penalty.

### ORDER

Accordingly, the request for a \$200 fine under ORS 192.407(3)(b) is denied.

Very truly yours,



ROD UNDERHILL  
District Attorney  
Multnomah County, Oregon

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<sup>3</sup> ORS 192.324 requires a public body to acknowledge a request within five business days, however ORS 192.407 only provides the district attorney with authority to evaluate violations of the timelines provisions of ORS 192.329, which sets out the timeline for a completed request.