



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

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January 18, 2022

Arthur Preston  
arthurpreston@protonmail.com [via email only]

Krista Stearns  
Assistant General Counsel  
Portland State University  
P.O. Box 751  
Portland, Oregon 97207

Re: Petition of Arthur Preston seeking an order compelling Portland State University to respond to his public records request.

Dear Mr. Preston and Ms. Stearns:

Petitioner Arthur Preston, a former student at Portland State University (PSU), made a public records request to PSU seeking multiple categories of records. Only one remains at issue in this petition: “all e-mails from Clair Wheeler's (Professor) official school e-mail from January 1st 2020 to August 8 2021.”

After receiving the initial request, which included many other categories of records, PSU sent petitioner a fee estimate, which he paid. PSU then provided him records under that estimate. However, as to the specific portion of the request at issue here, PSU responded:

With respect to the request for emails from the account of Dr. Wheeler, the University will not be providing all email correspondence from Dr. Wheeler's email account. Given the broad scope of the request—all emails sent or received over a 19-month period with no subject matter limitation--and your refusal to engage in an invited conversation to tailor the request, the University has concluded that this is not a genuine request for records. It appears, instead, to be an attempt to use the public records process for the improper purpose of engaging in prohibited harassment of Dr. Wheeler and a subversion of the no contact order the University issued between you and Dr. Wheeler.

Petitioner appealed this denial, arguing that PSU was required to fulfill his request. PSU responded that there is concerning history between petitioner and Dr. Wheeler, that the Federal Education Rights and Privacy Rights Act (FERPA) precludes it from elaborating on that history to us, and that release of *any* of Dr. Wheeler's email to this requester constitutes an unreasonable invasion of her privacy under ORS 192.355(2). Without prejudice to PSU later asserting that specific emails are “personal” to Dr. Wheeler and would unreasonably invade her privacy, we reject PSU's blanket assertion of exemption and order it to proceed with processing this portion of petitioner's records request.

## DISCUSSION

### A. Responses to a public records request – ORS 192.329(2)

As a preliminary matter, we reject PSU's initial position that the motive they impute to petitioner's request (whether accurate or not) rendered this "not a genuine request for records." A requestor's motive in seeking records may be relevant to assessing whether a public interest fee waiver should be granted or in evaluating the public interest in disclosure of records that are subject to a conditional exemption from disclosure. A requestor's motives, however, have no bearing on whether something is a public records request to which a public body must respond.

Having received a public records request, PSU was thus obligated to complete its response in one of the ways set out in ORS 192.329(2). This could involve providing records, asserting records are exempt in whole or part, or indicating it did not possess responsive records. PSU did none of those things. Based on counsel's response to us, we understand it has altered its position somewhat to now assert that all records responsive to petitioner's request for 19 months of Dr. Wheeler's email are exempt from disclosure.

### B. Information of a Personal Nature – ORS 192.355(2)

ORS 192.355(2) exempts from disclosure:

Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if public disclosure would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance. The party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy.

Analyzing a claim of exemption under this section involves three questions: 1) is the information of a personal nature; 2) would disclosure constitute an unreasonable invasion of privacy; and 3) if yes to both one and two, does the public interest nonetheless require disclosure. *Jordan v. MVD*, 308 Or 433 (1989).

Of dispositive importance to our resolution of PSU's position, this section must be asserted on an individualized basis. *Mail Tribune v. Winters*, 236 Or App 91 (2010). That is, to be exempt from disclosure, each specific piece of information must be both "personal" and release must constitute an "unreasonable invasion of privacy."

There is no reasonable possibility that every single one of the over 3,000 emails that Dr. Wheeler sent or received during this period would reveal personal information about her. For example, an "all campus" email from the PSU President's Office likely would have gone to petitioner and Dr. Wheeler, not to mention the likely hundreds of unsolicited conference announcements or mass-marketing emails that are almost certainly contained within the scope of this request. This is why a blanket claim of exemption cannot stand. PSU must process the request, taking the time to review each individual email and determine whether or not it is exempt from disclosure in whole or part.

ORS 192.324(4) provides that the costs incurred to complete this review may lawfully be passed on to petitioner. As such, it may well be in his interest to work with PSU to narrow the scope, and attendant cost, of the request. However, the public records law does not require that he do so.

### **ORDER**

Accordingly, the petition is granted. PSU must proceed with processing the request for Dr. Wheeler's emails. PSU may require payment of additional fees for reviewing, redacting, and producing any responsive records if its costs to conduct an individualized review will exceed the fees already paid by petitioner.

Very truly yours,

A handwritten signature in black ink, appearing to read "Mike Schmidt", with a large, stylized flourish at the end.

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.

**21-65**