MIKE SCHMIDT, District Attorney for Multnomah County

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Jon Bial
Deputy General Counsel
Oregon Public Broadcasting
7140 S. Macadam Avenue
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Fallon Niedrist
Deputy City Attorney
Portland City Attorney's Office
1221 S.W. Fourth Avenue, Suite 430
Portland, Oregon 97204

Re: Petition of Jon Bial, on behalf of OPB, requesting records relating to the Portland Police Bureau's investigation of leaked investigative materials

Dear Mr. Bial and Ms. Niedrist:

Jon Bial, on behalf of Oregon Public Broadcasting, has petitioned this office for an order requiring the Portland Police Bureau (PPB) to produce records under the public records law.

OPB had initially sought two specific records relating to the internal investigation of PPB officers accused of leaking information to the media that implicated City Commissioner Hardesty in a hit-and-run. On December 21, 2021, we ordered some of these records released. See Petition of Bial, MCDA PRO 21-63 (2021).

OPB subsequently requested the complete investigation files relating to this matter. PPB denied their request and OPB again appealed. After OPB appealed, PPB imposed discipline on the three involved officers and released the underlying investigative materials to OPB and the public at large. As the matter stands now there are two issues for us to decide:

1) OPB specifically challenges the redaction of a single line from a contract retaining the services of an outside contractor relating to the investigation; and

2) OPB asserts that, notwithstanding the provision of substantially all the records it is seeking, this office should still rule on whether or not the initial denial of its request by PPB was lawful.

For the reasons discussed below, we conclude that the redacted sentence must be disclosed and that we have no authority to review the propriety of a public body's decision to withhold records if the records at issue are released prior to issuance of an order.

DISCUSSION

A. Attorney-client privilege – ORS 192.355(9), ORS 40.225

ORS 192.355(9) exempts from disclosure under the public records law:

> Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law.

The attorney-client privilege extends to public agencies, except as expressly provided otherwise by the legislature. *Port of Portland v. Or. Ctr. For Envtl. Health*, 238 Or App 404, 409 (2010). As applied to the public records law by ORS 192.355(9), this creates an unconditional exemption from disclosure.

We need not, however, decide if the redacted line is subject to attorney-client privilege because, even assuming that it is, we find that any privilege has been waived. OEC 511 provides that a privilege is waived if the holder of the privilege "voluntarily discloses […] any significant part of the matter or communication."

The City redacted one line in a contract with an outside consultant from the "scope of work" section. It is fair to infer from context that this sentence addresses the duties the City expects the contractor, Michael Gennaco of the OIR Group, to perform for the City. However, the City has also publicly released a memo from Mr. Gennaco, in which he describes why he was retained and, in much more detail than the redacted sentence, what his involvement in this matter was.

The memo, Bates numbered COP0000123 and freely available on the City's website, states:

> On March 12, 2021, the City of Portland engaged this writer, Michael Gennaco of OIR Group, to participate in the internal investigation into this matter.

The memo goes on to recount that Mr. Gennaco participated in all subsequent interviews, questioned involved parties, reviewed documents, provided feedback on additional witness or allegations, participated in regular status meetings, and attended initial stages of the Police Review Board proceedings. In this context, with specific reference to the information contained in the redacted sentence, we find this constitutes a voluntary disclosure of a "significant part of the matter." There is no information contained in the redacted sentence that is not readily discernable from the voluntarily released and publicly available materials.

B. Mootness

Petitioner argues that, the release of records notwithstanding, the City has engaged in a practice of regularly issuing blanket denials of records requests and then walking back denials on select cases when challenged in order to avoid adverse rulings. He urges that this is a situation "capable of repetition, yet evading review" that warrants the issuance of an order.

We have consistently held that we evaluate the circumstances of a public records matter at the time we issue our order, not the time the petition was filed. See, *Petition of Kessler*, MCDA PRO 19-56 (2019). In *Kessler*, we wrote:

> Where, as here, the public body has provided the record at issue between the time of the filing of a petition and our order, we have dismissed such petitions (or the portions of them relating to the disclosed record) as moot. See, for example, *Petition of van der Voo for InvestigateWest*, MCDA PRO 15-12 (2015); *Petition of Kerensa*, MCDA PRO 19-20 (2019); *Petition of Barnes for The Oregonian*, MCDA PRO 17-03 (2017).
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> Petitioner disagrees that this petition should be dismissed and requests that we nonetheless order the City to provide the record. He argues that the situation he was in is capable of repetition, yet likely to evade review. Petitioner asserts that the City "has a bad habit of making bogus claims of privilege and then withdrawing those claims only when challenged." […] [T]his office lacks the inherent authority of a court of law to enter injunctions or grant punitive or declaratory relief. Our only authority to sanction is found in ORS 192.407, and there is no colorable claim in this case that the prerequisites for exercising such authority have been met.

In the present petition, OPB urges that we reconsider this position and argues that ORS 14.175 and ORS 192.407 together grant us the authority to address this situation. This is not an argument that was raised in *Kessler*.

ORS 14.175 grants authority to a court to "issue a judgment on the validity of the challenged act, policy or practice even though the specific act, policy or practice giving rise to the action no longer has a practical effect on the party." Self-evidently, this office is not a court and is invested with no inherent judicial authority. OPB acknowledges this but asserts that ORS 192.407 grants the district attorney identical authority to a court in this particular context.

The section cited, ORS 192.407(2), provides that "the Attorney General, the district attorney and the court have the same authority with respect to petitions under this section as when inspection of a public record is denied." This does not purport to grant identical authority to each named entity. Rather it extends the authority that each is separately granted elsewhere in the public records law and applies it, on the terms it already exists, to the review of a public body's timeliness in responding to a records request.

To read this section as a grant of co-extensive authority in the realm of public records review, would grant the district attorney the authority to review the actions of state agencies (an authority solely vested in the Attorney General) and the courts the ability to review all matters in the first instance (an authority solely vested in the sub-judicial review process absent exceptions not relevant here). We decline to interpret this section to so significantly expand our well-defined statutory authority.

Lastly, ORS 192.407(2) only applies to "petitions under this section," that is ORS 192.407. Even if we assumed that this section did grant us co-extensive authority with the court, that authority would extend only to petitions alleging undue delay, not improper denial of requests as is alleged here.

Because we do not believe that ORS 192.407(2) renders this office the functional equivalent of a court of law, we do not find ORS 14.175 grants us any authority to engage in the review and remedial action requested by OPB. We reject OPB's similar argument under ORS 28.020 for the same reason without further discussion.

C. ORS 192.407 – Sanctions

Lastly, petitioner argues that this matter is not moot because the City took longer than 15 business days to complete its response to his request and, thus, we have authority to impose a sanction on the City pursuant to ORS 192.407(3) for that delay. The authority in ORS 192.407 is both discretionary and is tied solely to the issue of unreasonable delay. That is, we may not impose sanctions for conduct other than delay and, even if there has been delay, whether to issue sanctions at all is discretionary.

Consistent with our prior rulings under this section, we decline to impose a token monetary sanction for a delay of four business days beyond the statutory period, particularly where the City has already provided all responsive materials at no cost to the public. See, e.g. *Petition of Mario Sarich*, MCDA PRO 19-40 (2019) (declining to impose sanctions for six days of delay); compare *Petition of Gunderson*, MCDA PRO 20-29(2) (Oct. 7, 2020) (imposing substantial fee reduction sanction for over 200 days of delay in responding to request).

ORDER

Accordingly, the petition is granted in part. PPB is ordered to promptly provide petitioner with a version of the contract at issue with the "Scope of Work" section in unredacted form. The petition is otherwise denied.

Regards,

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.