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October 25, 2022

Alan Kessler
805 S.W. Broadway, Suite 1580
Portland, Oregon 97205

Anika Bent-Albert
Deputy City Attorney
Portland City Attorney's Office
1221 S.W. Fourth Avenue, Suite 430
Portland, Oregon 97204

Re: Petition of Alan Kessler seeking records from the Portland Police Bureau

Dear Mr. Kessler and Ms. Bent-Albert:

On October 7, 2022, Mr. Kessler, petitioned this office for a public records order compelling the Portland Police Bureau (PPB) to promptly respond to his public records request. At issue is a request petitioner made to PPB on September 14, 2022, seeking the following data: “[f]or each database containing automatic license plate reader (APLR) data, please provide only those columns related to the location, date, and time for every license plate read event.”

Petitioner asserts that PPB has failed to follow the timeline set out in ORS 192.329(5), which generally requires responses to public records requests be completed within 15 business days, and is thus in violation of its obligations under the public records law. PPB acknowledges it did not follow those timelines, but asserts that ORS 192.329(6), which provides a safety valve for overwhelmed public bodies excuses non-compliance with that timeline in this instance.

DISCUSSION

ORS 192.329 provides that a public body must comply with two independent timelines when responding to a public records request.

The first, in ORS 192.329(1), provides that “[a] public body shall complete its response to a written public records request [...] as soon as practicable and without unreasonable delay.”

The second, in ORS 192.329(5), provides that “[a]s soon as reasonably possible but not later than 10 business days after the date by which a public body is required to acknowledge receipt of the request under ORS 192.324, a public body shall complete its response to the public records request; or provide a written statement that the public body is still processing the request and a reasonable estimated date by which the public body expects to complete its response based on the information currently available.” ORS 192.324(2) gives the public body five days from the receipt of the request to acknowledge the request. Read together, the ordinary course under ORS 192.329 requires a written response from the public body within 15 business days of the receipt of the request.

The public records law does not specifically set out how days are to be counted. However, ORS 174.120, which is generally applicable to other procedural statutes, sets out the generally used rules for counting time. ORS 174.120 provides that the day a time period starts to run is not counted. That is to say, the day on which a request is made is “day zero.”

As to this matter, PPB’s deadline under ORS 192.329(5) was the fifteenth business day after September 14, 2022, or October 5, 2022. At the time petitioner filed his petition with this office on October 7, 2022, PPB had not provided a written response beyond its initial automated acknowledgment.

PPB does not dispute this, rather it points to ORS 192.329(6), which provides that the timelines in ORS 192.324 and ORS 192.329(5) “do not apply to a public body if compliance would be impractical because: (a) The staff or volunteers necessary to complete a response to the public records request are unavailable; (b) Compliance would demonstrably impede the public body’s ability to perform other necessary services; or (c) Of the volume of public records requests being simultaneously processed by the public body.”

As we have previously held, it is clear that ORS 192.329(5)(c) was intended to exempt overwhelmed public bodies from compliance with the 15-day response time. *Petition of Winterling*, MCDA PRO 18-26 (2018). In that opinion, we wrote:

We also note that the legislature was aware of PPB’s particular situation and its volume of requests when it adopted the “safety valve” in ORS 192.329(6)(c). Feb. 22, 2017, Oregon Committee Minutes, Senate Committee on General Government and Accountability (Statement of Scott Winkels). This does not grant PPB free reign to take as long as it pleases to produce records, but we do find it persuasive that, at least in part informed by the substantial volume of requests faced by PPB, the legislature created a safety valve for inundated agencies.

Id. at 3. In *Winterling* we went on to conclude that a request that is excused from the 15-day compliance period is governed by ORS 192.329(1)’s mandate that a request be fulfilled “as soon as practicable and without unreasonable delay.” Given the staffing issues articulated at length in *Winterling* and prior decisions from the Attorney General’s office construing “unreasonable delay” we concluded that a period of 21 business days from the filing of the request did not constitute unreasonable delay. The period at issue here is 17 business days.

In evaluating the objective reasonableness of a delay, we consider any unusual or remarkable circumstances facing an agency as distinct from a failure to staff its public records response team sufficiently to handle the ordinary flow of requests. *Petition of Buchal*, MCDA PRO 18-38 (2018). In *Buchal*, we wrote:

It would not be reasonable for an agency to dedicate resources to maintain the capacity to handle unusually large public records requests without at least some delay. It must still handle them, of course, but to have the staffing in place to address an unexpected spike in records requests resulting from a discrete event, or the rare massive request, without some amount of delay would mean that most of

the time those personnel would be idle. We emphasize *unexpected*; an agency must devote sufficient resources to respond to its routine flow of public records requests in a timely manner.

Id. at 2. See also, *Petition of Monahan*, MCDA PRO 16-23 (2016) (agencies may not justify their delay by chronically understaffing records responses). Some situations may require a public body to outsource its public records response to a law firm to handle surge capacity. *Buchal* at 3.

Here PPB, at time of this petition, was two business days beyond the timeline in ORS 192.329(5). PPB articulates in detail in its submission to this office the coincidence of staffing shortages, workplace logistical problems as a result of the pandemic, and a consistent and significant increase in public records requests that have caused its response time to grow. At the time of *Winterling* in 2018 PPB was receiving 1,886 requests per month and was informing requesters to expect a four week wait for records. In PPB's current submission it tells us that it now is averaging 2,237 public records requests per month and is estimating a 12-week response time.

Having reviewed PPB's submission in detail, including the factual explanations for its staffing, other mandated duties, and this office's own knowledge of the staffing-related delays in essential Records Division work outside the areas of public records production, we cannot say that a delay of 17 business days in responding to this request is objectively unreasonable.

Although we do not decide here what time would be objectively reasonable under our precedent, we would likely agree with petitioner, that whatever PPB's explanation, a delay of twelve weeks to *begin* to process his public records request is not objectively reasonable. It is the obligation of a public body to staff its public records team sufficiently to handle the ordinary expected flow of records requests. See *Buchal*.

To say that the pandemic has been disruptive to the workplace is a gross understatement, however it has also been two and a half years. PPB must find the internal resources, or hire external resources, necessary to meet its ongoing obligation to respond to public records requests subordinated only to its primary mission of protecting public safety and co-equal with other statutorily mandated duties. The Attorney General has made clear that responding to public records requests is a statutory mandate, which must take precedence over non-mandated tasks an agency may wish to spend its resources on. *Petition of Budnick for The Oregonian*, Att'y Gen. PRO (Jan. 14, 2014).

The problem of resource allocation is not unique to Oregon and Oregon's Public Records Law. In interpreting the equivalent provisions of the Federal Freedom of Information Act, the Ninth Circuit Court of Appeals remarked that,

[A]gency heads, such as the Attorney General in this case, can be forced by the Freedom of Information Act to divert staff from programs they think more valuable to Freedom of Information Act compliance. It may be that people with ulterior motives can use Freedom of Information Act requests to interfere with the proper functioning of federal agencies. Arguably taxpayers are providing an

excess of free research and copying services to authors and investigators. But these policy concerns are legislative, not judicial, and we intimate no views on them.

Fiduccia v. United States DOJ, 185 F.3d 1035, 1041 (9th Cir. 1999).

In sum, the staffing issues detailed by PPB are significant and well-documented, the increase in requests has been substantial, and it does indeed appear on this record that compliance with the timelines in ORS 192.329(5) is impracticable at present under ORS 192.329(6)(b). Applying the standard in ORS 192.329(1), and the significant history of opinion interpreting that section, to the facts of this case we do not find that a 17 business day delay in responding to this request is objectively unreasonable. See e.g., *Petition of Sordyl*, MCDA PRO 16-24 (2016) (one month not unreasonable); *Petition of Kellington*, Att’y General PRO (3/23/2009) (two months not unreasonable on these facts); *Petition of Ringo*, Att’y General PRO (1/16/2009) (no response other than acknowledgement of request for two months was unreasonable); *Petition of Forrester*, Att’y Gen. PRO (July 2, 2010) (one month delay unreasonable where no unusual circumstances other than vacations by staff ordinarily assigned to handle public records duties).

ORDER

Accordingly, the petition is denied.

Regards,

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

MIKE SCHMIDT
District Attorney
Multnomah County, Oregon