



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

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October 3, 2024

*via email only*

Alan Kessler  
ak@alankessler.law

Trevor Byrd  
Deputy City Attorney  
trevor.byrd@portlandoregon.gov

Re: Petition of Alan Kessler challenging the City of Portland's denial of a records request pending receipt of additional information

Dear Mr. Kessler and Mr. Byrd:

On August 14, 2024, petitioner submitted a public records request to the City of Portland for: “an export from the City’s SMARSH archive system including, for every message archived since June 7, 2020, the following data: ‘ThreadID,’ ‘MessageID,’ ‘Date,’ ‘Network,’ ‘Message Type,’ ‘Sender,’ and ‘Recipients.’”<sup>1</sup> After petitioner paid the deposit on the city’s estimated fee, the city responded on September 16, 2024, that, because personal information, specifically personal phone numbers, of city employees were included in the responsive data, petitioner would need to comply with the requirements of ORS 192.363 or affirmatively exclude from his request city employee personal phone numbers. Petitioner declined to so limit his request, and this appeal ensued.

For the reasons discussed below, we conclude that the City has not denied petitioner’s records request and, as such, deny the petition.

## **DISCUSSION**

### **A. Contents of Certain Requests for Disclosure – ORS 192.363**

ORS 192.363 requires that an individual making a public records request for “records described in ORS 192.355(3)”, which as relevant here, includes public employee “personal cellular phone numbers” must provide in their request:

1. The names of the individuals for whom personal information is sought;
2. A statement describing the personal information being sought; and

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<sup>1</sup> The SMARSH system archives text message activity on city cell phones and includes among other things the phone numbers to and from which messages were sent. The parties are well aware of the details of the system; a more detailed discussion is found in *Petition of Kessler*, MCDA PRO 20-41 (2020).

3. A statement that shows by clear and convincing evidence that the public interest requires disclosure in a particular instance.

Employee personal phone numbers may be released in response to a public records request only if the requestor demonstrates by clear and convincing evidence that the public interest so requires and the request complies with ORS 192.363. In this case, petitioner's request did not include the names of the involved public employees as required by ORS 192.363 because it could not. Petitioner has no way of knowing which public employees' personal phone numbers appear in the data he requested.

We have previously analyzed this section and noted the impossible situation in which this places certain records requesters. *Petition of Kessler*, MCDA PRO 20-24 (2020) (noting that the statute was unambiguous and "the plain language of the statute controls against an as applied absurdity challenge").

The legislature recently amended ORS 192.355(3) to expand its reach. HB 3111 (2023). As construed by this office, the Attorney General, the Multnomah County Circuit Court, and (subsequently) the Court of Appeals, ORS 192.355(3) only exempted information about public employees contained in personnel records. In light of those determinations, the City sought and obtained a statutory amendment to extend the section's reach beyond personnel records of a public body to all records of public body. Given the dependence of ORS 192.363 on ORS 192.355(3), the former is now likewise expanded in reach. Petitioner does not challenge the association between these two statutes, rather he argues that HB 3111 did not create as broad an expansion of the exemption as the City asserts.

Although acknowledging that this amendment was intended by its primary proponent, the League of Oregon Cities, to address precisely the records at issue here, petitioner argues that there is a narrower plausible interpretation of the text and an absence of an in-the-record legislative intent to enact such a broad rule. Rather, petitioner urges a reading that as amended ORS 192.355(3) only exempts information that is immediately identifiable as belonging to a city employee and that is connected with their identity within the record in which it appears.

The City rejoins that, in fact, the legislative record includes precisely that information. Specifically, the Open Government Summary states that the purpose of the amendment was to exempt the enumerated types of information from disclosure "regardless of [the] record in which [the] information is maintained."

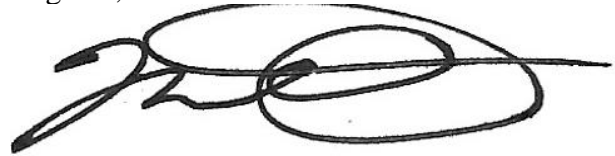
We agree that the City's interpretation of the statute is the correct one. Further this office has reviewed the full legislative record of this bill and does not find petitioner's proposed narrow reading consistent with the presentation of the bill to the legislature by the League of Oregon Cities. Legislators did not question or challenge the presentation or framing of the problem to be fixed during any of the public hearings. The most natural and logical interpretation of the legislature's actions is that it intended to do exactly what the immediate context shows it was being asked to do: supersede this office's order in *Petition of Kessler*, MCDA PRO 20-41 (2020) and the subsequent court ruling affirming our order in *City of Portland v. Kessler*, Mult. Co. Cir Ct. 20CV38625.

The City is under no obligation to, and indeed is prohibited from, fulfilling petitioner's request pending receipt of the information set out in ORS 192.363. See ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2019) at p.101 ("Even though the Oregon Public Records Law typically gives a public body the discretion to disclose exempt public records, we note that under this exemption the public employer "shall disclose requested information only if [it] determines that the party seeking disclosure has demonstrated by clear and convincing evidence that the public interest requires disclosure.") Alternatively, as the City has proposed, a clarification from petitioner that he does not seek the personal phone numbers of any City employee as part of this request, would permit the City to process the request without obtaining the additional information from petitioner required by ORS 192.363.

**ORDER**

Accordingly, the petition is denied.

Regards,

A handwritten signature in black ink, appearing to read "MIKE SCHMIDT", with a large, stylized flourish extending to the right.

MIKE SCHMIDT  
District Attorney  
Multnomah County, Oregon