



Nathan Vasquez, Multnomah County District Attorney

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January 21, 2025

via email only

Jon Bial
Deputy General Counsel
Oregon Public Broadcasting

Sarah Ames
Assistant City Attorney
City of Portland

Re: Petition of Troy Brynerson, on behalf of Oregon Public Broadcasting, challenging the City of Portland's withholding of a draft report

Dear Mr. Bial and Ms. Ames:

Troy Brynerson, a reporter acting on behalf of Oregon Public Broadcasting (OPB), submitted a public records request to the City of Portland on August 8, 2024, for a copy of a final monitoring report drafted by Independent Monitor LLC, which he believed had been submitted to the City that day.¹ The City responded on August 9, 2024, that it did not possess any responsive documents. Mr. Brynerson, believing the City had received documents that day, followed up the same day with that specific question: "Did the city not recently take into its possession documents from IM LLC?" The City had, in fact, received a draft of the report Mr. Brynerson sought the morning of August 8, 2024, and treated the follow-up question as a new records request for the draft. On August 12, 2024, the City denied that request, citing multiple public records law exemptions.

On November 7, 2024, the City publicly released the final version of the Independent Monitor report and also provided a copy directly to OPB. On December 31, 2024 counsel for OPB submitted a public records petition to this office challenging the City's withholding of the draft that OPB had requested in August.

Subsequent to the petition in this case the City released the draft report to OPB.² Notwithstanding the decision to release the record, the City maintained that it had lawfully withheld the record in August. The City asks us to dismiss the petition as moot because it has now provided all requested records to OPB. OPB responds that, because the City still asserts that its initial withholding was lawful, there remains a live issue to adjudicate. OPB further argues that

¹ This report related to the City's response to 2020 demonstrations in downtown Portland. The contents and context of the report are not relevant to any issue necessary to the disposition of this petition, so are not discussed further. The full text of the report is available here: <https://www.portland.gov/council/documents/report/accepted/1020-2024>

² There were no changes between the draft and final reports, so the "final" copy provided in November to OPB was identical to the "draft" copy received by the City in August and provided to OPB during the course of this litigation.

the City's initial claim of exemption was pretextual and, thus, that the City unduly delayed in producing the draft report. OPB requests a \$200 financial sanction for this delay as allowed by ORS 192.407(3)(b).

For the reasons discussed below, I deny the petition.

DISCUSSION

A. Mootness

This office has previously rejected OPB's argument that the City's practice of changing its position on exemptions after a petition is filed with the district attorney is redressable in this forum. *Petition of Bial*, MCDA PRO 22-10 (2022). In *Bial* we concluded that the district attorney lacked authority to issue an order evaluating the prior actions of a public body where, by the time of our order, it had turned over the responsive records. That decision, made on a robust briefing record, remained consistent with precedent. See, for example, *Petition of Kessler*, MCDA PRO 19-56 (2019) ("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.") *Clapper v. Oregon State Police*, 228 Or App 172, 178 (2009) (where records are produced prior to adjudication, dismissal of a court case is proper).

OPB acknowledges these prior decisions, but asserts that the present case is distinguishable because, unlike in *Clapper*, *Kessler*, and *Bial*, here the City continues to assert the validity of its original claims of exemption notwithstanding its decision to release the draft. While it is true that the City continues to defend its initial claim of exemption, I disagree that that provides any authority to issue a declaratory judgment or advisory opinion.

The only remedies that public records law grants this office the authority to order are:

1. production of improperly withheld records (ORS 192.411(1) by way of ORS 192.415);
2. the granting a of a full or partial fee waiver (ORS 192.324(6));
3. required disclosure of records within a specific time period (ORS 192.407(3)(a)); and
4. punitive sanctions, upon a finding that a public body has unduly delayed in responding (ORS 192.407(3)(b) – (c)).

None of these sections authorize a remedy if I were to conclude that the now-withdrawn exemptions were improperly asserted. Because no remedy is available, the petition is moot as to the substantive issue of the City's August 9, 2024 decision to withhold the draft Independent Monitor report. *State v. K. J. B.*, 362 Or 777, 785 (2018) ("a case becomes moot when a court's decision will no longer have a practical effect on the rights of the parties.")

B. Delay / Sanctions – ORS 192.407

ORS 192.329(2)(a) provides that a public body’s response to a records request is complete when it “[a]sserts any exemptions from disclosure that the public body believes apply to any requested records[.]” OPB argues that the exemptions asserted in the August 9, 2024 response were pretextual and, as such, did not constitute a valid response under ORS 192.329. Accepting that premise for purpose of argument, this would then mean that the City took 151 days to produce the record, the time between August 8, 2024 and January 6, 2025.

However, I see nothing in ORS 192.329(2), and have been pointed to no other authority, to conclude that an evaluation of the merits of a public body’s assertion is part of determining whether or not a response “completes” a public records request for purposes of ORS 192.329. The City of Portland asserted that exemptions applied on August 12, 2024, which was either the first or second business day after the request, depending on which date is used to count the “start” of the request.

The public records law does not count against a public body the period of time between performing one of the actions enumerated in ORS 192.329(2) and a requestor’s decision to seek review of that action. See *Petition of Kessler*, MCDA PRO 23-156 (2023) (finding it improper to evaluate the propriety of a fee estimate for purposes of assessing the timeliness of a public body’s response). A requestor facing a dubious claim of exemption has a prompt and direct remedy: a petition to the district attorney challenging that decision under ORS 192.411. As applied here I do not find that the City of Portland’s response to this records request violated the timeliness provisions of ORS 192.329.

Given this finding, the question of sanctions under ORS 192.407 is readily resolved. The district attorney’s authority to impose sanctions is “tied solely to the issue of unreasonable delay.” *Petition of Bial*, MCDA PRO 22-10 (2022) at 4. That is to say, I may not impose sanctions absent a finding of undue delay. As discussed above, I cannot make that finding on this record.

ORDER

Accordingly, the petition is denied.

Regards,

NATHAN VASQUEZ
District Attorney
Multnomah County, Oregon

By: 

Adam Gibbs
General Counsel