



MICHAEL D. SCHRUNK, District Attorney for Multnomah County

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April 21, 2011

Jessica L. Goldman
Summit Law Group
315 Fifth Ave S Suite 1000
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Lori J. Kraut
Deputy City Attorney
Office of City Attorney
1221 SW 4th Avenue, Suite 430
Portland, OR 97204

Re: Petition of Jessica L. Goldman on behalf of *The Portland Mercury* received April 12, 2011 for a waiver of fees associated with the disclosure of certain records of the City of Portland

Dear Ms. Goldman and Ms. Kraut:

BACKGROUND

On this public records petition, ORS 192.410 et. seq., petitioner Jessica L. Goldman on behalf of *The Portland Mercury* requests the District Attorney to order the City of Portland Bureau of Human Resources (BHR) to waive the fees charged for the production of the following records:

Emails and text messages Steve Herron and Jerrell Gaddis sent to—or received from—Will Aitchison, Daryl Turner, and Dave Dobler from September 15, 2010, through Feb. 2, 2011, especially those messages that pertain to the scheduling of meetings.

Personal and official calendars maintained by Herron and Gaddis in that span.

Emails and text messages that Herron and Gaddis sent to one another in that span, re: the scheduling of any meetings with Aitchison, Turner, or Dobler.

Denis Theriault, the news editor of *The Portland Mercury*, submitted his written request on March 14, 2011 to the Bureau of Human Resources. He included a plea for consideration of a fee reduction or waiver in the public interest on the ground that the request benefited the general public. "It concerns the process used to negotiate a new contract with the Portland Police Association –and whether substantial discussions with the union were held outside public view, and without public awareness, before the bargaining process moved to mediation."

Mr. Theriault first heard from a BHR employee, Wayne Farrell, who was assembling a list of search items and quoted a fee of \$314.88. Mr. Theriault then asked in a March 31, 2011 email that the fees associated with the request be waived. Yvonne Deckard, BHR Director, responded in an April 1, 2011 email. She agreed with Mr. Theriault that "it would be wrong for the City 'to reap any political capital from its stated commitment to transparency.' In fact, our perspective is just the opposite relative to the pure costs of doing business, which are passed on to *any* requestor (citizen, media, public/private sector, etc.)"

Petitioner argued that it is "apparent that BHR's position is that fees will not be waived under any circumstances." Ms. Goldman noted that the Attorney General has made plain that agencies may not simply refuse all requests and contends that a "policy, like that of BHR, which dictates denial of all waiver requests does not comply with the statute."

The City replied to the petition in a letter dated April 19, 2011. Deputy City Attorney Lori Kraut explained that since emails were sought, HR technician Wayne Farrell had to define the parameters of the computer search before requiring the involvement of the City's Bureau of Technology Services (BTS). "This required Mr. Farrell to research and identify the various (and sometimes multiple) email addresses for the specific individuals identified in the request." It was then necessary "to develop a list of search terms to filter the email messages to locate documents specifically related to the subject matter of the request." This was then reviewed by BHR Director Deckard.

According to Ms. Kraut, BTS then provided "a good faith estimate of the actual amount of time it would take to search and locate the requested documents." The estimated cost of \$229.35 would be charged by BTS to BHR "and that BHR would have to pay."

A review by a paralegal in the City Attorney's Office to "exclude or redact confidential and/or privileged communications" was an additional \$87.09. Again, this would be charged to BHR. Ms. Kraut pointed out that the actual estimate total is \$316.44.

The City pointed out that the "reasonableness" of the fees is not disputed by petitioner. The City also assumed (as will this office) that the petition satisfies the public interest test.

DISCUSSION

The Public Records Law expressly authorizes a public body to establish fees "reasonably calculated to reimburse it for its actual cost in making such records available." ORS 192.440(4). The public body is permitted to include in its fees "costs for summarizing, compiling or tailoring [a] record, either in organization or media, to meet the person's request." ORS 192.440(4).

Petitioner does not appear to dispute the amount of the fee and this office will accept the figures provided by the City. The question is whether BHR has properly exercised its discretion in its decision not to grant a fee waiver.

A public agency may provide the records without charge or at a reduced fee "if the custodian determines that the waiver or reduction is in the public interest because making the record available primarily benefits the general public." ORS 192.440(4). The Attorney General has recognized that even if making the record available is in the public interest, a public body may still deny a fee waiver or reduction if warranted by certain factors:

...any financial hardship on the public body, the extent of time and expense and interference with the business of the public body, the volume of the records requested, the necessity to segregate exempt from non-exempt materials, and the extent to which an inspection of the records is insufficient for the public interest or for the particular needs of the requestor. Attorney General's Public Records Manual, 2008, page 21.

The Court of Appeals decision cited by petitioner, In Defense of Animals v. OHSU, 199 Or App 160, 189-190 (2005), noted the "strong policy in favor of the public's right to inspect public records." The public body's decision whether to grant or deny a fee waiver or reduction must be reasonable. "Reasonableness is an objective standard, under which we examine the totality of the circumstances presented."

Mr. Theriault admitted that his public records request was "substantial." The process to identify and locate email correspondence between five people over a six month period is not a simple matter. The parameters for the search first would have to be established by BHR, the documents then would have to be obtained by BTS, and finally a review by the City Attorney's Office would have to be accomplished.

The question is whether BHR Director Deckard exercised agency discretion or did she, as petitioner insists, categorically deny a fee waiver. The answer lies in the somewhat awkward response of Director Deckard:

As you mentioned, yours is a "substantial public records request." The amount of time required to evaluate the project and develop the quote/timeline has

been relatively labor-intensive to-date, *though that time investment is never part of our fee structure.* [Emphasis added].

The City's charges are based solely on computer run time and the time investments (hourly rates x hours worked) by the employees who write/run the program, provide due diligence to finalize the information, and prepare the documents for release.

What is implicit in Director Deckard's statement is that BHR did not include its own staff time incurred in the cost estimate. Deputy City Attorney Kraut explained that by "excluding BHR staff time, the bureau essentially granted a fee reduction." The costs to create and run the search program and conduct a review by a paralegal for the City Attorney were outside the control of the BHR Director. As stated by Ms. Kraut, "a[s] stewards of the public trust, and particularly in these dire economic times, it would have been reasonable for BHR to charge Mr. Theriault its actual costs, which would have included costs incurred from BTS, the City Attorney's Office and its own staff time."

Under the totality of the circumstances, we conclude that the Bureau of Human Resources acted reasonably in granting a fee reduction and not a fee waiver.

ORDER

Accordingly, it is ordered that the petition of Jessica L. Goldman on behalf of *The Portland Mercury* for a waiver of fees for the production of records of the Portland Bureau of Human Resources is denied.

Very truly yours,

MICHAEL D. SCHRUNK
District Attorney