



**MICHAEL D. SCHRUNK**, District Attorney for Multnomah County

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May 15, 2000

Stacey A. Walters  
Davis Wright Tremaine LLP  
1300 SW Fifth Ave Ste 2300  
Portland, OR 97201

Debra Haugen  
Manager Records Division  
City of Portland  
Bureau of Police  
1111 SW 2<sup>nd</sup> Avenue  
Portland, OR 97204

Re: Petition of Stacey Walters on behalf of KPTV Television News received April 28, 2000 to disclose certain records of the City of Portland

Dear Ms. Walters and Ms. Haugen:

#### BACKGROUND

On this public records petition, ORS 192.410 et. seq., petitioner Stacey Walters, counsel for KPTV Television NEWS, requests the District Attorney to order the Portland Police Bureau and its employees to waive the fees charged for the production of the following records:

**[A] computerized copy of every crime committed in Portland during 1999.**

Kurt Ludlow, KPTV news anchor and reporter, initially made a request for the above information in a letter to Portland Police Chief Mark Kroeker dated January 18, 2000. After numerous telephone conversations with several persons including Debra Haugen, Records Division Manager, Mr. Ludlow modified his request in a February 9 letter to Ms. Haugen. He requested the 1999 crime data to include "the type of crime, the zip code where it occurred, sex of victim (or year born), age of victim (or year born), time the crime was reported, and officer's name and/or ID number." In each letter, Mr. Ludlow requested a fee waiver under ORS 192.440(4).

Petitioner submitted a letter request for a fee waiver to deputy city attorney David Lesh on March 14, 2000. Three grounds were urged as the basis for a finding of public interest. First, the public always benefits when public records are released to members of the press because one of the most important roles of the press is to report on government activities. Second, KPTV plans to provide the information to the public in a comprehensive report. KPTV provides a public service by disseminating crime information to a large portion of the community and saves the police department from being overwhelmed with individual requests. Third, KPTV is attempting to serve the public interest by giving viewers a complete picture of public safety in Portland.

Deputy City Attorney Lesh responded to petitioner in an April 12 letter denying the fee waiver. Mr. Lesh noted that the \$562.40 cost for programming support was, in fact, reduced to \$500. The denial of a fee waiver was based on a number of factors: the information provided in petitioner's own letter request for a fee waiver, the current financial pressures on the Portland Police Bureau, and that much of the requested information was already in the public domain.

On receipt of the City Attorney's letter denial, petitioner filed this fee waiver petition. Records Manager Haugen submitted a letter response to the petition on May 3, 2000. Ms. Haugen recalls that she had both written correspondence and telephone calls from Mr. Ludlow, which culminated in the February 9, 2000 request. Ms. Haugen contacted William Wesslund, the Police Bureau Data Processing Manager, "for an estimate of the costs involved in producing the data and an estimated completion date." According to Ms. Haugen, Mr. Wesslund advised her that "the job would likely require ten hours of programmer time, at a cost of approximately \$500.00." Mr. Wesslund further estimated the completion date at "two to four weeks out, as several priority projects would need to be completed before he could assign someone to this job."

Records Manager Haugen was asked in Mr. Ludlow's February 9 letter to "respond to this request in writing." Unfortunately, there was no such written correspondence. Instead, Ms. Haugen relates in her May 3 letter to this office that she then contacted Mr. Ludlow by telephone and advised him of the estimated costs and expected time frame for completion. "I then asked him if, considering the costs and time involved, he wanted us to proceed. He indicated that he understood the costs involved, and did want us to move ahead with production of the data."

Ms. Haugen indicates in her May 3<sup>rd</sup> letter that the actual cost of the programmer's work was \$562.40. KPTV was not being charged "for the Data Processing Supervisor's time or the time I spent working with Mr. Ludlow to craft his request. Had that time been added in, the fee would have been well over \$600.00."

In a telephone conversation with this office, Mr. Ludlow advises that the only response to his February 9 letter request was a telephone call from Ms. Haugen indicating that his disks were ready to be picked up and that the cost was \$500. In a follow-up letter dated May 11, Mr. Ludlow reiterates his contention that "there was never a 'meeting of the minds' regarding precisely what data would be delivered to us, and what it would cost us." Mr. Ludlow also expresses his concern that the Bureau never responded in writing to his public records request.

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Whatever the case, there does not appear to have been any substantive discussion of the public interest aspect of a fee waiver. Ms. Haugen advises me that the Portland Police Bureau does not "routinely" grant fee waivers. Mr. Ludlow asserts that Ms. Haugen told him that her office has never granted a fee waive to anyone.

Petitioner has submitted a three-page letter response to the position taken by the Police Bureau. Ms. Walters asserts quite correctly that the Bureau and KPTV are in complete disagreement regarding whether or not a contract was entered into concerning the cost of the requested Portland crime statistics for 1999. We would doubt that the Police Bureau would seek to enforce such an oral contract. It will be assumed that the Bureau simply notified KPTV that the requested disks were available for pick-up at a cost of \$500. We agree with petitioner that the issue of alleged fee negotiations between the parties is irrelevant to this public records petition.

## DISCUSSION

### **I. Actual cost.**

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(3). 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(3).

"Actual cost" may include a charge for the time spent by the public body's staff in locating the requested records and "a public body may preliminarily estimate charges for responding to a records request and require prepayment of the estimated charges before acting on the request." Attorney General's Public Records Manual, 1999, page 12.

The Portland Police Bureau has, at least by its calculation, already provided a fee reduction in excess of \$100. According to Ms. Haugen (and confirmed in a telephone conversation with Mr. Wesslund), the programming process is involved and time consuming. "The programmer must analyze the request, determine the various delimiters, write the program, run the program, validate the data, possibly re-write, re-run and re-evaluate, and then create the data on the requested media." According to both Ms. Haugen and Mr. Wesslund, it is the practice of Data Processing to never charge more than the original estimate.

We have not been provided with any reason to disbelieve the representations made by the Portland Police Bureau as to the actual costs involved in complying with KPTV's customized public record request. We conclude that the fees are reasonably calculated to reimburse the public agency for its actual costs in complying with the specific request of petitioner. For future reference, Ms. Haugen has advised this office that the cost of reloading the disks next year with the year 2000 crime statistics would be \$50.00, or less than an hour of programmer work.

## II. Public interest.

The 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 Bureau takes the position that much of the data requested by petitioner is "already in the public domain in other forums and formats." Ms. Haugen has provided this office with several statistical formats including weekly crime statistics by precinct and monthly crime figures by neighborhood. The weekly data is available in hard copy at the various precincts and the monthly statistics are available at the various neighborhood coalition offices. Both sets of data can also be obtained by mail (The Oregonian is reportedly on the mailing list). Finally, the monthly crime statistics can (although not in the format desired by KPTV) be downloaded from the Police Bureau website.

Petitioner has cited two federal cases in support of her contention that crime statistics benefits the public interest. In Badhwar v. United States Dept. of Air Force, 615 F Supp 698 (1985), the court reviewed the withholding of portions of certain safety reports. It also reviewed the Air Force's refusal to waive the \$167 fees made on the ground that it was not in the public interest to have investigative reporters inquire into the effectiveness of the Air Force policy of imposing secrecy on military aircraft accident safety reports. The court rejected the claim by the Air Force that the petitioner's private interests outweighed the benefit to the general public.

In Diamond v. F.B.I., 548 F Supp 1158 (SDNY 1982) the court reviewed an FBI refusal to waive a \$62.00 document reproduction fee for documents to be used in connection with lectures and articles on the history of the labor movement in the United States. "A decision not to waive fees is not arbitrary and capricious if it is based on some factor shedding light on whether the information will primarily benefit the public or the individual recipient of the documents." Diamond v. F.B.I., 548 F Supp at 1160. The court noted that the FBI never determined that the research was not of public interest.

The motive of petitioner in seeking the records is irrelevant except as a factor in determining the public interest. We have no reason to doubt that KPTV has the best of public intentions in seeking to provide crime statistics on its website. We are satisfied, however, that the public already has sufficient access<sup>1</sup> to crime records either at the local police precinct or neighborhood coalition office, or through the mail or on the Internet. The decision of the Portland Police Bureau to charge for the creation of another form of crime statistics is neither arbitrary nor capricious.

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<sup>1</sup> Mr. Wesslund advises us that the Portland Police Bureau is currently working on a program to increase Internet availability of its crime data. In addition, we are aware that Portland area criminal justice agencies are taking steps to increase public access to crime statistics through the development of the Decision Support System (DSS).

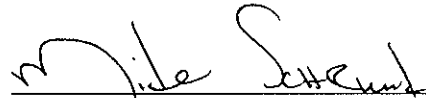
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One underlying problem in this controversy is the lack of effective (let alone documented<sup>2</sup>) communication between KPTV and the Portland Police Bureau and their respective counsel. Given the low dollar cost involved, we have some concerns about the parties' considerable expenditure of resources arguing over fees without any words of compromise. However, we are not prepared to say there has been an abuse of discretion in the decision of the City of Portland not to expend its limited financial resources by granting petitioner a fee waiver. We urge the Police Bureau and KPTV to begin a dialogue in the spirit of cooperation and in the knowledge that there will be similar public record requests in the future.

ORDER

Accordingly, it is ordered that the petition of Stacey Walters on behalf of KPTV Television News for a waiver of fees for the production of records of the Portland Police Bureau is denied.

Very truly yours,



MICHAEL D. SCHRUNK  
District Attorney  
Multnomah County

Cc: David Lesh, Deputy City Attorney

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<sup>2</sup> The Portland Police Bureau should not assume that this office would reach a similar decision on a future petition if the record under review does not contain better documentation for its position.