



ROD UNDERHILL, District Attorney for Multnomah County

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June 17, 2015

John Tierney
Executive Producer
KGW News
1501 SW Jefferson St
Portland, OR 97201

Jenifer Johnston
Deputy City Attorney
Portland Office of City Attorney
1221 SW 4th Ave Ste 430
Portland OR 97204

Re: Petition of John Tierney for KGW requesting a waiver of fees associated with the disclosure of certain records of the City of Portland.

Dear Mr. Tierney and Ms. Johnston:

BACKGROUND

In his public records petition under ORS 192.410 et seq., petitioner John Tierney, on behalf of KGW, requests the District Attorney to order the City of Portland to waive or reduce the fees charged for the production of the following records:

Any emails, memos, notes or other correspondence between Mayor Charlie Hales and his staff members mentioning Pembina between January 1, 2015 and May 20, 2015; and

Any emails, memos, notes or other correspondence between the Mayor's office and Port of Portland employees mentioning Pembina between January 1, 2015 and May 20, 2015.

Mr. Tierney requested these records on May 20, 2015. The City responded that they would produce the records, but indicated that a fee of \$649.50 was required to cover their costs in producing the documents.

On May 27, Mr. Tierney requested a fee waiver from the City asserting that the records requested were primarily in the public interest and that as a news organization KGW was in a position to disseminate the information to the general public. In an email dated June 8, Deputy City Attorney Johnston stated that the Mayor's office had balanced the public's interest in the

records against the burden on the City to produce the requested records and was denying the fee waiver request. This appeal ensued.

After the filing of Mr. Tierney's petition, Ms. Johnston indicated via email that the Mayor was asserting his right under ORS 192.480 to divest the District Attorney of jurisdiction to review the decision of an elected official. Through subsequent communication Ms. Johnston made clear that "the Mayor made the decision."

DISCUSSION

The District Attorney generally has jurisdiction to review denials of requests for fee waivers relating to requests for public records. Oregon law grants this office "the same authority in instances when a fee waiver or reduction is denied as it has when inspection of a public record is denied." ORS 192.440(6). This statute incorporates by reference the limitations of ORS 192.480 in its grant of jurisdiction to this office:

A person who believes that there has been an unreasonable denial of a fee waiver or fee reduction may petition [...] the district attorney in the same manner as a person petitions when inspection of a public record is denied under ORS 192.410 to 192.505.

ORS 192.480 provides that the District Attorney may not consider a petition to review a denial of a public records request either 1) when the records at issue are in the custody of an elected official, or 2) the records at issue are in the custody of any other person and the elected official claims the right to withhold disclosure. Likewise, this office may not consider a denial of a request for a fee waiver as to records in those same circumstances.

The Attorney General has recognized that this right may be asserted at any point during the proceeding: "If the elected official orders nondisclosure even after a petition for review has been filed with the [...] district attorney, the reviewing officer is deprived of jurisdiction and the petitioner's recourse is to the court only." Attorney General's Public Records Manual, p.125 (2014).

The Mayor has asserted, via counsel, that this office does not have jurisdiction regarding this petition. The records at issue in this case are sought from the Mayor's office and are thus in his custody. Petitioner responds that the Mayor must personally and publicly assert this right in order to activate ORS 192.480. This statute applies anytime an elected official "claims the right to withhold disclosure."¹ In general, rights and privileges may be asserted by counsel on behalf

¹ In an expansive reading of this provision, the Attorney General has taken the position that a denial of a public records request by the Department of Justice is only reviewable by the Circuit Court by operation of ORS 192.480 and the Attorney General's status as an elected official. *Attorney General Public Records Order in the Matter of Petition of Barker*, p. 2 (1/7/2004).

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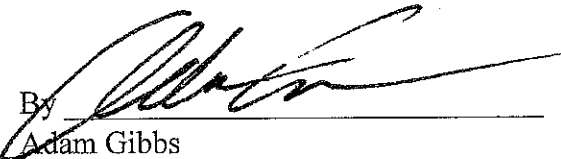
of any person whom he or she represents. As an attorney for the Mayor, Ms. Johnston's assertion that the Mayor made the decision to deny this fee waiver is sufficient for these purposes.

Accordingly, this office may not consider this matter and expresses no opinion on the merits of Mr. Tierney's petition.

ORDER

Mr. Tierney's petition is dismissed for lack of jurisdiction.

Very truly yours,
ROD UNDERHILL
District Attorney
Multnomah County

By 
Adam Gibbs
Deputy District Attorney