



**ROD UNDERHILL**, District Attorney for Multnomah County

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November 16, 2016

Jason Wright  
Folawn Alterman & Richardson LLP  
805 S.W. Broadway, Suite 470  
Portland, Oregon 97205

Stephanie Harper  
Portland Public Schools  
General Counsel's Office  
501 N. Dixon Street  
Portland, Oregon 97227

Re: Petition of Jason Wright seeking emails and text messages from Portland Public Schools relating to Kim Sordyl.

Dear Mr. Wright and Ms. Harper:

In his public records petition, dated November 7, 2016, petitioner Jason Wright requests this office to order the Portland Public School District (PPS) to provide records responsive to an expansive public records request he filed on July 28, 2016. Mr. Wright itemized his request in what he referred to as Exhibit A. In summary, items 1-14 request all text message and email communications between each present member of PPS' board and Ms. Sordyl. Item 15 requests all emails between any pps.net email address and Ms. Sordyl from January 1, 2012 to present. Items 16 and 17 request emails and text messages between current board members and PPS staff relating to Ms. Sordyl. Items 18 and 19 request emails and text messages between current board members that relate to Ms. Sordyl.

On August 5, 2016, PPS quoted Mr. Wright \$500 as the cost for producing these records. A week later, that fee was paid.

On October 3, 2016 PPS provided Mr. Wright with around 400 pages of records containing one board member's responsive emails and indicated additional records would be forthcoming.

On October 10, 2016, PPS quoted Mr. Wright an additional \$500 to proceed with work on the request. Two weeks later that fee was also paid.

On November 7, 2016 Mr. Wright filed an appeal with this office requesting that, consistent with our October 14, 2016 opinion resolving the petition of Rachel Monahan, we find that PPS had constructively denied his request and order the records produced.

On November 8, 2016 PPS provided Mr. Wright, and this office, with a five-page letter detailing the steps taken to date to fulfill his request as well as an estimated cost of \$16,500 to produce the remaining responsive documents (\$7,500 for the emails and \$9,000 for the text messages.)

## DISCUSSION

### A. Elected Officials – ORS 192.480

With respect to any records in the custody of a school board member this office lacks the authority to intervene. ORS 192.480 provides that when a public record is in the custody of an elected official “no petition to require disclosure may be filed with the [...] district attorney.” As we have recently held, ORS 192.480 prohibits us from considering a public records petition relating to text messages of school board members. *In re petitions of Kearns Moore and Sordyl*, MCDA PRO 16-22 (2016). We believe that this same reasoning likewise applies to email messages of a school board member.

Although an archived email is not in the literal custody of a school board member, the way a cell phone might be, the legislative purpose behind ORS 192.480 is clear: to avoid conflict between the attorney general or district attorney and other elected officials within their jurisdictions. Minutes, Joint Committee on Professional Responsibility, HB 2157/SB 15 (Apr. 16, 1973). There is no question to us that an elected official who had an assistant file a letter in a filing cabinet would still be in “custody” of that letter despite the fact that he or she might not know its exact location or be able to retrieve it without that same assistant’s help. In a modern office environment the letter has largely been replaced by the email, and the file cabinet by the computer server. Those changes in technology do not alter the essential nature of who has “custody” of that record for purposes of ORS 192.480. Emails generated by or sent to an elected official, as they are retained by his or her agency, remain in the official’s custody for purposes of ORS 192.480.

We may not consider Mr. Wright’s petition as to any records he requested, except for item 15, which requests: “All e-mail communications between any pps.net e-mail address and Ms. Sordyl from January 1, 2012 to present.” And that item we can only consider to the extent it addresses emails from email accounts not controlled by school board members.

### B. Constructive Denial

In this case, the timeline outlined by petitioner, and acknowledged by PPS, is extended beyond what it should be. We have previously discussed at length the situation at PPS with respect to public records responses. *In re petition of Monahan for Willamette Week*, MCDA PRO 16-25 (2016). PPS has taken some steps since our *Monahan* decision to bring additional staff on board to address the excessive backlog of records requests. However, this petition does not require that we assess if those steps are sufficient or whether a delay of over three months, in the context of this expansive a request, constitutes a constructive denial. As of November 8, 2016, PPS has quoted a cost to petitioner to proceed with his request.

Whether or not, as of November 7, 2016, Mr. Wright’s request had been constructively denied is now immaterial. ORS 192.440 permits an agency to charge for its time in responding to a public records request. We may not use our authority to review the denial of a records request to order records produced at no cost. Once an agency quotes a fee for responding, it is not obligated to perform further work on the request until it has received payment of that fee. ATTORNEY GENERAL’S PUBLIC RECORDS MANUAL (2014) at 17 (hereinafter “MANUAL.”)

A fee estimate of \$16,500 is very high. On the other hand, a request for what amounts to over 9,000 emails and up to three years of text messages from seven board members is likewise

expansive. This office has met with PPS to discuss the fees in this case and, whether or not they represent PPS' actual costs (something we are without authority to consider), they are not so grossly disproportionate to the work involved as to announce that the true purpose of the fee quote is to deny access to records.<sup>1</sup> Based on the number of responsive emails located, it appears that the shifting number on fees is a result of substantial misestimates by PPS and not an affirmative attempt to hide records with excessive fees.

To be clear, as we have previously recognized, "the Public Records Law does not grant jurisdiction to the attorney general or district attorney to review whether or not a requested fee represents the 'actual cost' of an agency in complying with a public records request." *In re petition of Robert Babcock*, MCDA PRO 15-22 (2015). Such a challenge may be brought in the circuit court. *In Defense of Animals v. OHSU*, 199 Or App 160 (2005).

### C. Fee Waiver

In a submission subsequent to PPS' November 8, 2016 letter, petitioner now asks us to review whether or not PPS acted unreasonably in denying his request for a fee waiver or reduction.

If a public records request would primarily benefit the general public an agency "may" reduce or waive its fees. ORS 192.440(5). A person believing an agency's decision on a fee waiver is unreasonable may petition this office for review. ORS 192.440(6). Our standard of review as to fee waiver issues amounts to an abuse of discretion review. *In Defense of Animals v. OHSU*, 199 Ore App 160, 189 (2005) ("the public body has discretion whether or not to grant a fee waiver or reduction.") That is, we do not evaluate whether or not we believe PPS' decision was correct, but rather whether its decision "exceeds the bounds of reason" or is "clearly against reason and evidence." *Far West Landscaping, Inc. v. Modern Merchandising, Inc.*, 287 Or 653 (1979) (discussing abuse of discretion standard).

Petitioner discusses at some length why the public should and would be interested in the information he is seeking. However, he does not appear to have provided PPS with any indication that he intends to turn the records over to a media outlet or otherwise publish this information to the general public. Even on a matter of intense public interest, if the requestor does not demonstrate the ability and intent to disseminate the information, the public interest test is not met. MANUAL at 21, citing *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1314 (DC Cir. 2003) (interpreting analogous provisions of the federal Freedom of Information Act). For this reason, we cannot say that PPS' decision to deny a fee waiver was unreasonable.

If petitioner were to develop and inform PPS of a plan to release the requested records to the public, thereby meeting the public interest test, PPS would still be entitled to weigh the general public's interest in the information against the interference with its operations and decide whether or not to waive or reduce its fees. *Petition of Marr/Rees*, Att'y Gen. PRO (7/8/1991).

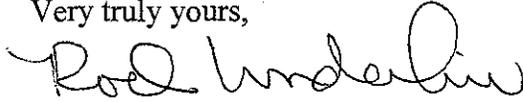
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<sup>1</sup> PPS, as a school district, presents a unique case in that it is prohibited by the Family Educational Rights and Privacy Act (FERPA) from releasing any information about a student without informed consent from the student's parent. Ms. Sordyl's advocacy has run the gamut from the general to the specific and a review of all involved emails is indeed necessary to ensure that FERPA protected information is not released. This review may be cursory as to many or most involved records, but it must still be done.

**ORDER**

The petition is dismissed for lack of jurisdiction as to items 1-14 and 16-18. The petition is denied as premature as to item 15. The petition for waiver or reduction of fees is denied.

Very truly yours,

A handwritten signature in black ink, appearing to read "Rod Underhill". The signature is written in a cursive style with a large initial "R".

ROD UNDERHILL  
District Attorney  
Multnomah County, Oregon

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