



ROD UNDERHILL, District Attorney for Multnomah County

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March 31, 2017

Carli Brosseau
The Oregonian
1500 S.W. First Avenue, Suite 400
Portland, Oregon 97201

Jason Loos
Deputy City Attorney
City Attorney's Office
1221 S.W. Fourth Avenue, Suite 430
Portland, Oregon 97204

Re: Petition of Carli Brosseau, on behalf of The Oregonian, seeking review of a fee waiver denial from the Portland Police Bureau

Dear Ms. Brosseau and Mr. Loos:

In her public records petition, dated March 20, 2017, petitioner Carli Brosseau requests this office to order the Portland Police Bureau (PPB) to reduce or waive its fee request in relation to a public records request for the narrative sections of all Gang Designation Reports (GDRs) from a three year period in which a juvenile was designated as a gang member.

A GDR is a short, usually one page, report that documents a police officer's determination that a person is a member of a gang. The report documents the signs and factors that lead the officer to so designate the individual, the personal identifiers of the designated individual, and a few sentences to a couple of short paragraphs of narrative text describing the encounter that led to the designation.

PPB quoted Ms. Brosseau a fee estimate of \$1,170 based on an estimated 39 responsive GDRs and its standard \$30 per report fee to locate, review, redact, and produce a police report. Ms. Brosseau requested a public interest waiver or reduction in fees, which PPB considered, and denied. This appeal followed.

DISCUSSION

A. Fee Waivers – ORS 192.440

ORS 192.440(5) provides that:

The custodian of any public record may furnish copies without charge or at a substantially reduced fee if the custodian determines that the waiver or reduction of fees is in the public interest because making the record available primarily benefits the general public.

ORS 192.440(6) provides that:

A person who believes that there has been an unreasonable denial of a fee waiver or fee reduction may petition the Attorney General or 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. The Attorney General, the district attorney and the court have the same authority in instances when a fee waiver or reduction is denied as it has when inspection of a public record is denied.

An agency evaluating a requested fee waiver faces a two-step analysis. First, would making the records available primarily benefit the general public, that is, is it in the public interest. Second, if the request is in the public interest, the agency must then exercise its reasonable discretion to decide if it is going to waive or “substantially reduce” the fees. The courts have provided little guidance as to what factors to examine in assessing the reasonableness of a decision. The Attorney General has suggested a public body’s fee-waiver decision should consider:

- (1) The character of the public interest in the particular disclosure, (2) the extent to which the fee impedes that public interest, and (3) the extent to which a waiver would burden the public body.

ATTORNEY GENERAL’S PUBLIC RECORDS MANUAL (2014) at 23.

i. The public interest in this instance

PPB asserts that there is no public interest in these particular records, the narrative section of the GDRs, because petitioner has already been provided with demographic information about the designated individuals. We respectfully disagree. That a reporter is requesting the records is a strong, although not dispositive, indication that release would be in the public interest. We are all aware of recent unrest and protests in our national and local communities regarding police interactions with minority youth; we are likewise well aware of the toll that gang violence takes on our community. Against this backdrop, petitioner cites previously released data showing 81% of individuals designated as gang members by PPB during the time period of interest were racial minorities. There are many perspectives and voices on the underlying issues, but records that can inform this conversation are unquestionably of great public interest. Because release would primarily benefit the general public, we move on to the second step of the analysis.

ii. The amount of the fee

This office is not empowered to determine if the fees at issue accurately reflect PPB’s actual costs in responding to this public records request. See, *Petition of Babcock*, MCDA PRO 15-22 (2015). And, here, PPB’s application of its standard fee schedule belies the suggestion that an inflated cost estimate was prepared for the purpose of denying access. It may, of course, have that practical effect, but since there is a reasonable and defensible justification for the quote we cannot find that the quote was made for the purpose of denying access.

Petitioner argues that the standard \$30 per report fee is unreasonable as applied to GDRs because they rarely exceed a single page.¹ As stated above only a court may assess if the quoted fee accurately captures the actual costs at issue. *In Defense of Animals v. OHSU*, 199 Or App 160

¹ Petitioner also argues that other local jurisdictions charge substantially less than PPB’s \$30 flat fee for providing similar records.

(2005). However, whether or not \$1,170 represents PPB's actual costs to produce these records, we conclude that a waiver of or substantial reduction to this amount should reasonably have been granted under ORS 192.440(6). Where fees in excess of a thousand dollars have been found reasonable, they usually involved requests for thousands or tens of thousands of pages of records. See, e.g., *Petition of Wright*, MCDA PRO 16-29 (2016) (\$16,000 to produce over 9,000 emails and three years of text messages from seven people); *Petition of Karp*, MCDA PRO 13-18 (2013) (\$18,208 fee for thousands of pages of handwritten elephant care records); *Petition of Kellington*, Att'y Gen. PRO (3/23/2009) (\$7,800 to review and produce 17,000-21,000 pages of records). This case involves 39 pages of records, involving a matter of importance to present public discourse, requested by a reporter.

ORDER

Accordingly, the petition is granted in part. Taking into consideration our determination that release of these records would be in the public interest, PPB is ordered to proceed to the second step of the analysis and exercise its reasonable discretion and determine the extent of the appropriate waiver or reduction of fees. Once a revised fee estimate has been prepared, to the extent there remains a dispute between the parties, petitioner has leave to refile at that time.

Very truly yours,



ROD UNDERHILL

District Attorney

Multnomah County, Oregon

Notice to Public Agency

Pursuant to ORS 192.450(2), 192.460, and 192.490(3) your agency may become liable to pay petitioner's attorney's fees in any court action arising from this public records petition (regardless whether petitioner prevails on the merits of disclosure in court) if you do not comply with this order and also fail to issue within seven days formal notice of your intent to initiate court action to contest this order, or fail to file such court action within seven additional days thereafter.