



ROD UNDERHILL, District Attorney for Multnomah County

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August 28, 2018

Alan Kessler
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Portland, Oregon 97205

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

Re: Petition of Alan Kessler seeking access to metadata from certain emails

Dear Mr. Kessler and Ms. Johnston:

In his public records appeal, dated August 16, 2018, petitioner Alan Kessler, asks this office to order the City of Portland to disclose the metadata of emails sent or received from any one of six identified email accounts. "Metadata" here means the addressing and contextual information that goes along with an email, but does not include the actual contents of the message or any attachments. This would include, among other things, the date an email was sent, the recipients, and the subject line.

The city acknowledged petitioner's initial records request and responded that, although it likely had emails responsive to his search parameters, it did not maintain any records that just contained the metadata and, as such, its formal response was that it did not possess any responsive records and would close the request.

Petitioner asserts that the city attorney possesses and regularly uses digital document review software capable of extracting just the metadata he seeks from the responsive emails. For purposes of this opinion we assume the factual accuracy of this assertion. The city responds that it does not use its document review software in that manner for its own purposes, so it is not required to determine if it can do so in this case to tailor the response to conform to petitioner's request. The city has stated that it is willing to provide the emails in their native format if petitioner makes a new public records request specifically asking for them.

For the reasons discussed below, we grant the petition in part.

DISCUSSION

A. Response to a records request – ORS 192.329(2)

The city concluded in this instance that, because it did not maintain a record that only contained email metadata, it did not possess a record responsive to petitioner's request. The native format in which the City of Portland manages its archived email is either as an MSG file

for individual messages or as a PST file for a collection of messages. These file formats contain all information associated with an email, both metadata and content.

Had the city provided petitioner with a PST file containing each email he sought it would have satisfied every element of his request. Nothing prevents an agency from releasing a record that contains more information than a requestor has asked for.

While we ordinarily are not in a position to evaluate a public body's declaration that it does not possess a responsive record, this case is different. The facts are undisputed; only the legal import of those facts is at issue. On this record the statement that no responsive record existed constituted an erroneous denial of petitioner's request.

B. Format of a records response – ORS 192.324(4)

This is really a dispute about the format in which a record must be provided. Each "record" at issue here is an individual email. As discussed above, the city's emails are stored in a native file format although, for convenience, they are frequently converted to PDF files for release. Petitioner has requested the email record be presented to him in a different format, specifically that the metadata be extracted and presented to him alone. This is not a format in which the City of Portland stores its emails nor one into which it converts them for its own purposes.

The public records law requires an agency to provide records in "the form requested, if available" and, if not so available, then "in the form in which the custodian maintains the record." ORS 192.324(4). We do not interpret "available" to mean "capable of being created."¹

Unlike in the opinions cited as persuasive authority by petitioner, email archives are not a database that can be queried as to distinct fields with the tools the city regularly uses to retrieve email for its own purposes; the email is the record retrieved by a query and the customization of a query would only define which particular emails were retrieved.

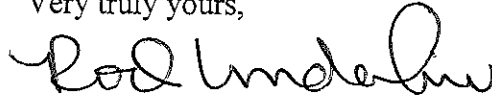
ORDER

Accordingly, the petition is granted in part. The City of Portland is ordered to provide petitioner with non-exempt records responsive to his request, subject to the payment of fees, if any, not to exceed the city's actual cost in producing the records. Petitioner has requested the records formatted as metadata only, a format the city states it does not have available. Pursuant to ORS 192.324(3), unless the city elects to create new record containing only metadata, the city must provide any non-exempt responsive emails in the form in which they are maintained.

¹ While we need not, and do not, decide here whether the formatting work requested by petitioner constitutes "analysis" of records, as the city urges, it is relevant that the software and expertise to potentially do what petitioner seeks lies with the legal staff in the city attorney's office and not with any individual city bureau that maintains records.

The city shall continue with, and complete, its response to petitioner's request as soon as practical and without unreasonable delay pursuant to ORS 192.407(3) and ORS 192.329. The period between the closure of petitioner's request by the city on August 14, 2018 and the date of this order shall not be counted against any applicable timeline.

Very truly yours,



ROD UNDERHILL

District Attorney

Multnomah County, Oregon

Notice to Public Agency

Pursuant to ORS 192.411(2), 192.415, and 192.431(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.