IN THE CIRCUIT COURT OF THE STATE OF OREGON

COUNTY OF MULTNOMAH

ALAN LLOYD KESSLER, Plaintiff, vs. CITY OF PORTLAND, an Oregon Municipal corporation, Defendant.	**CASE NO. 18CV43134** **OPINION AND ORDER**

THIS MATTER came before the Court from Nov. 4, 2019, for trial to the bench. Plaintiff appeared by and through his attorneys Charlie Gee. Defendant appeared by and through its attorney Karen Moynahan. The Honorable Shelley D. Russell presided.

The Court, having reviewed the memoranda, the cited case law, and heard the oral arguments of the parties, makes the following findings:

FINDINGS OF FACT

1. On August 7, 2018, plaintiff submitted a public records request to the City seeking the production of the "metadata" contained in emails sent or received by four specified email accounts. Plaintiff provided the City with a detailed definition of the "metadata" he sought.
2. On August 7, 2018, the City acknowledged plaintiff's public records request. The City also acknowledged the request on August 10, 2018 and stated that it was preparing an estimate of the time and fees necessary to respond to the request. Ex. 101, pp. 21-22.
3. On August 14, 2018, Senior Deputy City Attorney Jenifer Johnston informed plaintiff that the City was unable to respond to his request because the City did not maintain the

information requested in the format requested and the City was not required to create documents in response to a public records request. Ex. 101, p. 19.

4. On August 16, 2018, Ms. Johnston and plaintiff had a telephone conversation discussing how the records might be produced. Ms. Johnston memorialized this conversation on that same date. Ultimately, Ms. Johnston denied the request because the City could not produce the records in the format requested. Ms. Johnston instructed plaintiff to issue a new request for the emails in their native format. Ex. 101, p. 16.
5. On August 16, 2018, plaintiff appealed the denial to the Multnomah County District Attorney.
6. On August 28, 2018, the District Attorney granted plaintiff's appeal in part, noting that public records laws require the public body to provide records "in the form in which the custodian maintains the record," if records are not available in the form requested. ORS 192.324(4). The District Attorney ordered the City to "provide petitioner with…records responsive to his request, subject to payment of fees, if any, not to exceed the city's actual cost in producing the 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." (emphasis added). Ex. 102.
7. On August 28, 2018, Ms. Johnston informed plaintiff that the City was preparing a time and cost estimate for production of the public records and that the records would be produced "within a reasonable time." Ex. 101, p. 13. Johnston also expressed concern that the request could return a large number of emails and plaintiff might wish to narrow his request by date or specific search terms to reduce costs. Plaintiff never responded to Johnston's inquiry.

8. On August 29, 2018, the City provided plaintiff a cost estimate for records production, estimating 1.5 hours for an employee of the Bureau of Technology Services ("BTS") to run a search of the relevant email accounts, and 0.5 hours for "oversight and recordkeeping" services. Ex. 3, Ex. 108. The estimate totaled was $205.61.
9. The City calculates fees for non-sworn staff responding to public records requests by adding 39% to the staff member's hourly pay rate and multiply that number by the actual time spent on the request. Portland City Code 5.48.030. The City claims that the 39% rate, which is supposed to cover employee overhead costs, often does not cover the actual staff and overhead costs.
10. Mike Nichols, an Information Systems Technical Analyst V, conducted the search of relevant email accounts. The City's estimate for Nichols wage rate was $78.15 per hour. This rate was incorrect. The actual wage rate plus 39% should have been $66.09 per hour. Ex. 117. Nichols' actual time billed for the search was 1.25 hours. Ex. 112, 113, 116. Nichols' time record attributed 1 hour to the search. Ex. 118.
11. During the records search, Nichols watches the search progress so that if any errors or glitches occur he can resolve them. Unless a search indicates that it will be very lengthy, Nichols does not work on other projects while conducting a records search.
12. Paul Rothi, the City Enterprise Architect Manager, conducted the oversight and record keeping at a rate of $91.92 per hour for 0.5 hours. Rothi's records show the time he billed to plaintiff's request totaled 37 minutes, rather than 30.
13. On August 30, 2018, plaintiff paid the cost estimate in full. The City conducted the records search that same day.

14. On September 5, 2018, City Public Records Coordinator Donah Baribeau provided plaintiff a cost estimate for review and screening of the records. On September 11, 2018, Baribeau provided plaintiff a revised cost estimate due to the volume of emails, adding 2.5 hours of work to the original estimate or $106.06. Baribeau told plaintiff she would continue working on the request once the revised estimate was paid. Ex. 101, pp.5-6 Plaintiff paid the revised estimate that same day. Ex. 101, pp.7-8. No testimony or evidence was offered regarding Baribeau's rates other than the estimates.
15. Baribeau's work on the request included reviewing the emails and redacting confidential and privileged information. Baribeau described "being interrupted a lot" during the review. In addition, between August 30, 2018, and September 28, 2018, Baribeau suffered an illness, attended a funeral, covered receptionist duties during that employee's vacation, and spent six days covering for the appeals secretary.
16. On September 24, 2018, 16 business days after the issuance of the District Attorney's order, Baribeau informed plaintiff that she hoped to complete the review and produce the records no later than the end of the week. Ex. 101, p. 5.
17. On September 25, 2018, the plaintiff filed this lawsuit alleging that the City violated the Oregon Public Records Act.
18. On September 28, 2018, the records were produced to plaintiff. Ex. 101, p. 3-4.
19. Plaintiff paid a total of $311.67 to the City for the records. Ex. 101, p.1.
20. The City has never conducted a study on the fees charged by the Bureau of Technical Services for responding to public records requests. The 39% surcharge bears little relationship to the City's actual labor costs and in some circumstances can be lower than the actual cost. The Bureau spends less than 5% of its time on public records requests.

21. When estimates are prepared for requesters, Rothi prepares a "worst case" estimate. Sometimes the work takes less time than Rothi's estimate, sometimes it takes more time. Either way, the requester must pay the estimate to receive the records. If the estimate is low, the City sends a revised estimate with the increased costs, as Baribeau did in this case. The City does not have a mechanism in place to refund overcharging that results from high estimates.
22. Nichols and Rothi are both highly paid employees. The City is currently posting to hire someone to handle responses to records requests with the aim being to reduce the cost to both the City and to requesters.
23. In this case, it appears that plaintiff was overcharged by approximately $35.00 for the time Nichols spent on the request and his hourly rate. It also appears that plaintiff was undercharged for Rothi's time by approximately $10.72.
24. On October 26, 2018, plaintiff claimed that the City excluded documents from its production, giving as an example one email in which the email addresses (the "metadata") were not visible and an attachment mentioned in the email appeared to be missing. In response, Johnston reviewed all of the documents produced to plaintiff. Johnston noted that the missing attachment in fact had been provided with the original response, provided the missing attachment again in February 2019, and informed plaintiff that she could not produce the rest of the email in native format due to the redactions. These were the only two documents Johnston determined were "missing" from the production. Plaintiff was unable to point to any other indicator of any other missing documents. The City's production to plaintiff was complete on September 28, 2018, 20 business days after the issuance of the DA's order.

25. On October 31, 2019, the City proffered a check to plaintiff in the amount of $52.00 "in satisfaction of the amount the City believes" plaintiff claims to have been overcharged. Ex. 124.

LEGAL DISCUSSION

I. Timing of the City's Response to Plaintiff's August 7, 2018 Public Records Request

ORS Chapter 192 governs the timing and production of public records requests, beginning for our purposes with ORS 192.329(1):

> A public body shall complete its response to a written public records request that is received by an individual identified in the public body's procedure as described in ORS 192.324 (Copies or inspection of public records) *as soon as practicable and without reasonable delay* (emphasis added).

The public body must acknowledge a public records request within 5 business days of receipt. ORS 192.324. As soon as reasonably possible but no later than 10 business days from the date acknowledgement must be made, the public body must either complete its response to the request or provide a written statement that they are still processing the request along with a reasonable estimated date of completion based on the information currently available. ORS 192.329(5).

If the public body denies the records request, the requester can petition the District Attorney to review the request and issue a ruling as to whether the public body inappropriately denied the request. ORS 192.407(1). If the District Attorney grants the requester's petition, the order may require disclosure of the records within seven days, or within any other period that the district attorney deems appropriate to comply with ORS 192.329. ORS 192.407(3).

Here, the District Attorney granted Plaintiff's petition in part, ordering that the City provide the requested records in the format in which the City maintained the records, not in the format requested by Plaintiff. The District Attorney's order stated that the City must provide the

requested records to the Plaintiff "*as soon as practicable and without unreasonable delay* pursuant to ORS 192.407(3) and ORS 192.329" (emphasis added). Although the District Attorney could have ordered production of the records within seven days pursuant to ORS 192.407(3), they did not.

Plaintiff argues that the fact the order tolled the time period during which plaintiff's petition was under review, that necessarily meant the order at a bare minimum imposed the time periods of ORS 192.324 and 192.329(5). The Court disagrees. ORS 192.407(3) specifically allows a district attorney to prescribe any other time period that they conclude is appropriate to comply with ORS 192.329. In addition, ORS 192.329(1) provides that the public body shall complete its response to a public records request "as soon as practicable and without unreasonable delay. That is what the District Attorney ordered in this case.[1]

The District Attorney did not specify what constitutes "as soon as practicable and without unreasonable delay." However, an exception to the time periods prescribed in ORS 192.324 and 192.329(5) exists and those time periods "do not apply to a public body if compliance would be impracticable because:

(a) The staff or volunteers necessary to complete a response to the public records request are unavailable;
(b) Compliance would demonstrably impede the public body's ability to perform other necessary services; or
(c) Of the volume of public records requests being simultaneously processed by the public body."

ORS 192.329(6).

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[1] Plaintiff also argues that the separate notice to public body provided after the signature line warning the City that it could be liable for plaintiff's attorney fees if it did not comply with the DA's order or within seven days express an intent to appeal the order or actually file an appeal of the order, means that the DA ordered the City to produce documents within seven days of the order. The Court disagrees with plaintiff's interpretation of the notice. The notice is not inconsistent with the DA's order to produce the documents as soon as practicable and without unreasonable delay. The warning requires the City to express their intent to object to the order or to file their objections to the order within seven days.

These exceptions apply to the statutory provisions referenced by the District Attorney and the specific language used in their order. As a result, if one of the circumstances listed in ORS 192.329(6) is present and the timing of the production reasonable, then the strict time periods advocated by plaintiff do not apply.

Here, the City was able to search for and download the records relatively quickly, within two days of the issuance of the DA's order. Once the records went to the public records officer for review, however, the public records officer was unavailable for a period of time, was covering necessary departmental tasks for other unavailable employees for a period of time, and experienced multiple and extended interruptions in her ability to complete the records review due to conducting other necessary business of her department. Baribeau provided two cost estimates to plaintiff during the time between August 30, 2018 and September 24, 2018, and informed plaintiff that her review was going to take longer than anticipated due to the volume of documents. Ultimately, Baribeau was able to provide the documents to plaintiff on September 28, 2018.

The Court finds that the provisions of ORS 192.329(6) apply, therefore the City complied with the District Attorney's order to produce the documents as soon as practicable and without unreasonable delay. Further, the Court finds that the District Attorney's order requiring the City to produce records in an available format, albeit not the format request by Plaintiff, was not erroneous.

II. Fees Charged by the City

"A public body may establish fees reasonably calculated to reimburse the public body for the public body's actual cost of making public records available, including costs for summarizing, compiling or tailoring the public records, either in organization or media, to meet

the request." ORS 192.324(a). The burden is on the City to show that the fees charged are reasonably related to the cost of producing the records.

In *Davis*, 108 Or App at 132-133, the court found that the public body did not meet its burden because no study had been conducted to determine the actual cost of providing public records and the public body could not show that the fees set by ordinance were reasonable calculated to reimburse it for its actual costs. The court came to this conclusion even though the public body had a fee schedule authorized by ordinance and used by all Bureau divisions.

Here, the City presented testimony and evidence of the hourly rates (including the 39% mark-up for benefits) for two employees involved in responding to plaintiff's public records request along with the City's fee schedule established by City ordinance. The City also presented testimony that no study had been done relating to the fees charged by the Bureau of Technology Services, rather the City occasionally brought in consultants to review rates and overhead costs. Rothi testified that when preparing an estimate for a public records requester, he prepared a "worst case" estimate. Rothi and Nichols are two highly paid members of the BTS department. The City presented no evidence of the rates charged for other members of the department who may have been available to conduct the records search. The City presented no evidence of the rates charged for Baribeau's records review.

In an apparent recognition that the City sometimes charges excessive fees, Rothi testified that requesters like Plaintiff must pay the full "worst case" estimate before the records are turned over. Rothi also testified that the City currently has no mechanism for refunding requesters who overpay when the actual labor is less than estimated, although the City is "working on" such a mechanism. In addition, the City is posting for a position within the BTS that would be

responsible for conducting email searches and gathering records responsive to public records requests with the goal of lowering department costs.

Based on the evidence presented by the City, the Court finds that the City has not met its burden to show that the fees charged to Plaintiff were reasonably calculated to reimburse the City for the actual costs of responding to Plaintiff's request. The Court finds that the fees charged to Plaintiff were excessive by $24.28 based on the actual time spent on the request by Nichols and Rothi. The Court also finds that hourly rates in the amount of $91.92 for Rothi's time and $66.09 for Nichols' time is excessive given the nature of the tasks performed by each.

III. Attorney Fees

If the requestor prevails in the suit, they shall be awarded costs and disbursements and reasonable attorney fees. ORS 192.431(3). If the requestor prevails only in part, the court has the discretion to award costs, disbursements and reasonable attorney fees, "or an appropriate portion thereof."[2] Regardless of the outcome, the requestor shall recover attorney fees and costs if the public body fails to fully comply with the disclosure order, and fails to either issue a notice of intention to institute proceedings to contest the order, or actually institute the proceedings within seven days.

Here, the Court finds that the City failed in part to comply with the District Attorney's order by failing to reasonably calculate the fees necessary to reimburse the City for its work responding to the records request and charging the petitioner excessive fees. Therefore, Plaintiff

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[2] Plaintiff argues pursuant to *Davis v. Walker*, 108 Or App 128 (1991), that ORS 192.431(3) requires public bodies to comply with a district attorney's orders to disclose public records within 7 days of the date of the order. *Davis* provides no guidance in the circumstances of this case where the district attorney ordered the City to disclose the records as soon as practicable and without unreasonable delay. On its face, the district attorney's order in this case did not require disclosure within 7 days.

prevailed only in part and the Court has discretion to award an appropriate portion of Plaintiff's reasonable attorney fees, costs and disbursements.

ORDERS

NOW THEREFORE, it is HEREBY ORDERED that:

1. The City DID NOT violate the District Attorney's order to produce the requested records as soon as practicable and without unreasonable delay.
2. The City DID NOT violate the District Attorney's order to produce the requested records in an available format.
3. The District Attorney's order to produce the records in an available format rather than the requested format WAS NOT erroneous.
4. The City DID violate the District Attorney's order in part by charging Plaintiff more than what was necessary to recover the City's actual costs of retrieval and production.
5. The City's current method for determining fees for routine email and document search, including providing a "worst case estimate" IS NOT reasonably calculated to reimburse it for its actual cost of making the records available and results in overcharging the public records requester without providing a method to refund of any overcharges.
6. The City is hereby enjoined from charging excessive fees for routine email and document searches.
7. The City must recalculate the time spent responding to Plaintiff's public records request at the lowest hourly rate charged by any department personnel who could be responsible for responding to public records requests, plus any overhead factor, and refund Plaintiff the difference, if any, over and above the $52.00 already refunded to Plaintiff.

8. Because the City violated the District Attorney's order in part, pursuant to ORS 192.431(3) Plaintiff is entitled to petition the Court for recovery of his attorney fees and costs incurred in pursuit of this matter. The Court will determine whether and what portion of fees upon consideration of Plaintiff's petition and Defendant's objections thereto.

DATED this 18th day of November, 2019.

SHELLEY D. RUSSELL
Circuit Court Judge