Nathan Vasquez, Multnomah County District Attorney

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May 8, 2025

via email only

Thomas Jones
American Accountability Foundation
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D. Raghav Shan
Legal Counsel – OHSU
shanmuga@ohsu.edu

Re: Petition of the American Accountability Foundation challenging Oregon Health & Science University's fee estimate on a public records request

Dear Mr. Jones and Mr. Shan:

On November 25, 2024, petitioner, on behalf of the American Accountability Foundation, submitted a public records request to Oregon Health & Science University (OHSU) for, in relevant part, "text messages sent by Dr. Blair Peters that contain any of the following keywords: top surgery, mastectomy, bottom surgery, hysterectomy, penectomy, orchiectomy, GAC, gender affirming, pediatric, adolescent."[1] The request sought roughly two years of data. On January 27, 2025, OHSU issued a fee estimate of $1,994.85 pursuant to ORS 192.324(4). On March 31, 2025, having not received payment on this estimate, OHSU communicated that it had closed the request. ORS 192.329(3)(b) ("If the requester fails to pay the fee within 60 days of the date on which the public body informed the requester of the fee […] the public body shall close the request.") On April 30, 2025 the American Accountability Foundation submitted this petition challenging the fee estimate and attendant closure of the request.

DISCUSSION

A public body in receipt of a public records request is entitled charge fees "reasonably calculated to reimburse the public body for the public body's actual cost of making public records available[.]" ORS 192.324(4)(a). Petitioner does not directly contest the amount of time OHSU estimates it will take to gather and review the text messages, nor the cost of Dr. Peters' time. Rather petitioner argues that using a surgeon's hourly rate to calculate the fees in this case is impermissible due to the nature of the work required to produce the records.

Petitioner is correct that a public body may only charge fees under ORS 192.324(4) at the rate of the least expensive staff who are capable of performing the work. See, e.g., *Kessler v. City of Portland*, Mult. Co. Cir. Ct. 18CV43134 (2019) (requiring public body to charge only "the lowest hourly rate charged by any department personnel who *could be* responsible for responding

[1] The request also sought emails. OHSU indicates that petitioner paid the fees for those records and it provided them to him. That portion of the request is not at issue in this petition.

to public records requests, plus any overhead") (emphasis added); *Petition of Bial*, MCDA PRO 24-33 (2024) ("a public body may only assess fees commensurate with the least expensive person capable of doing the work, whether or not it actually elects to assign that work to that person.")

OHSU does not dispute this rule, but argues that its fee estimate survives this standard of scrutiny. According to OHSU, only Dr. Peters possesses the knowledge necessary to sort through his own text messages and determine which are personal and which relate to the conduct of the public's business and are, therefore, public records. ORS 192.311(5). Put differently, because Dr. Peters is the only one capable of doing the work, the *nature* of the work he is required to perform (clerical or surgical) is irrelevant to assessing the burden on OHSU because, whatever the nature of the work, Dr. Peters' time must be spent to perform it. This, in OHSU's view, distinguishes the present case from *Kessler* or *Bial* where a public body elected to have a more expensive employee do work others were capable of doing. Petitioner's position is that it is the nature of the work being done that should set the rate, not the person doing it. Moreover, petitioner argues that it is unfair to impose this cost his organization for Dr. Peters' elective decision to comingle personal and professional records on his device.

The public records law acknowledges that, whatever the requirements of agency policy, public records may be contained on personal devices. ORS 192.311(5)(b) ("'Public record' does not include any writing that does not relate to the conduct of the public's business and that is contained on a privately owned computer.") And we have previously approved processes wherein public officials could search their own personal devices for public records. *Petition of Kessler*, MCDA PRO 18-28 (2018) (canvassing authority and concluding that public body may not compel employee to provide access to personal device to confirm non-existence of additional responsive records.)

It may be that a more cost-efficient process than what OHSU intends to do here is possible. It may also be that any savings in dividing labor between work only Dr. Peters can do (identifying which messages contain "information relating to the conduct of the public's business") and work clerical staff can do (determining which public records contain the responsive keywords) would be negligible. The public records law does not afford the district attorney the authority to review a challenge to the factual accuracy or reasonableness of a public body's fee estimate. *Petition of Kessler*, MCDA PRO 23-156 (2023) (citing *Petition of Mayes*, Att'y Gen. PRO (March 29, 2000)); see also, *Petition of Beckham*, MCDA PRO 24-63 (2024) ("[P]etitioner asserts that the fee estimate itself was unreasonable because of the particular personnel whose salaries were used to estimate the costs. This is not a claim that is justiciable in this forum.")

This office lacks statutory authorization conduct such a review, and may not fill in any gaps in express authorization with "inherent authority" as may a court of law. Likewise, the informal litigation process in this forum does not permit development of a record sufficient to examine contested issues of fact. *Petition of A. Kessler*, MCDA PRO 22-46 (2022) (Evaluating claim that a public body could employ a more efficient, and cheaper, process to produce records "would necessitate a thorough factual record developed through depositions, requests for production, and sworn trial testimony.") *Petition of In Defense of Animals*, MCDA PRO 13-18 (2013) ("Unlike a court of law my office is not in the position to take evidence, review depositions and subpoenaed records, or conduct a fact finding trial as to the actual expenses [in]curred by the public body in accumulating and disclosing the requested records.")

When confronted with a challenge to the amount of fees, "our only inquiry is whether a fee is so grossly disproportionate to the tasks involved as to announce that the true purpose of the fee estimate is to deny access to records. *Petition of Kessler*, MCDA PRO 22-46 (2022). OHSU articulated the reasonable basis of its fee estimate sufficient to clear this low threshold. This office lacks the jurisdiction to decide anything else.

If petitioner wishes to challenge the factual merits of OHSU's fee estimate for the text messages, its recourse is in the circuit court. *In Defense of Animals v. OHSU*, 199 Or App 160, 183 (2005) ("Although ORS chapter 192 does not expressly provide for circuit court review of the reasonableness of a public body's fees, it was within the trial court's jurisdiction to decide that question.") *Petition of Babcock*, MCDA PRO 15-22 (2015) ("The proper forum for challenging the reasonableness or necessity of a public agency's fees is the court.")

ORDER

Accordingly, the petition is denied.

Regards,

NATHAN VASQUEZ
District Attorney
Multnomah County, Oregon

By: _____
Adam Gibbs
General Counsel

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