



John Hummel District Attorney

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January 26, 2021

Mary Winters
City Attorney
City of Bend
mwinters@bendoregon.gov

Jasmine Barnett
Central Oregon Peacekeepers
jasmine.barnett541@gmail.com

Dear Ms. Winters and Ms. Barnett:

Thank you for your prompt and thorough briefing of the issues. This letter constitutes my ruling in the matter of Ms. Barnett's appeal of the City of Bend's (City) denial of her request for a waiver of the fee the City quoted her to process her public records request.

Background

- On January 12, 2021 Ms. Barnett submitted a public records request to the City¹ requesting: "text messages, emails and contracts spanning from Jan 1, 2020-present with Adam Sutterfield or Adam Sutterfield INC with the City of Bend or Bend Police Department."
- On January 15, 2021, the City replied to Ms. Barnett that the fee to process her request was \$30.00, per the City fee schedule.
- On the same day, Ms. Barnett responded and requested a fee waiver, indicating that the request was in the public interest.
- On January 19, 2021 the City informed Ms. Barnett that there were no emails or contracts with Mr. Sutterfield, and that her fee waiver request had been denied. The City further informed Ms. Barnett that the cost to complete a search for responsive text messages remained \$30.00.

¹ Ms. Barnett says she first submitted her public records request on December 19, 2020. The City say they did not receive it. Both parties agree that Ms. Barnett filed a public records request on January 12, 2021. Whether Ms. Barnett submitted a request on December 19, 2020 is not decided by me as it is not a fact material to my analysis and conclusion. For the record, I have no reason to doubt either of the parties on this issue.

- On January 19, 2021, via email to me, and pursuant to ORS 192.324(6), Ms. Barnett filed an appeal of the City of Bend’s denial of her request for a fee waiver of the charge the City quoted her to process her public records request.
- On January 19, 2021, I notified the City of Bend of this appeal via email to Mary Winters and I invited the City to provide me with their legal argument in support of their purported denial of Ms. Barnett’s fee waiver request.
- On January 22, 2021, the City of Bend filed with me their legal argument. (Exhibit A).
- On January 22, 2021, I provided Ms. Barnett with the City of Bend’s legal argument and I invited her to file a response.
- On January 23, 2021, Ms. Barnett filed with me her legal argument. (Exhibit B).

Legal Standards

A public body may waive or reduce its fee for a particular request if doing so “is in the public interest because making the record available primarily benefits the general public.” ORS 192.324(5).

- **Public Interest Test:**
 - “Waiving or reducing fees is in the public interest “when the furnishing of the record has utility—indeed, its greatest utility—to the community or society as a whole.” State of Oregon Department of Justice Attorney General’s Public Records and Meetings Manual, June 2019, p. 23 (citing: *In Defense of Animals v. OHSU*, 199 Or App 160, at 189 (2005)).
 - In determining whether the requester has established a sufficient public interest, relevant factors include the requester’s identity, the purpose for which the requester intends to use the information, the character of the information, whether the requested information is already in the public domain, and whether the requester can demonstrate the ability to disseminate the information to the public. DOJ Manual, at p. 24
- **Fee Waiver Denial Test:**
 - “If disclosure is in the public interest, the public body’s decision to deny a request for a fee waiver or reduction must be reasonable under the totality of the circumstances.” State of Oregon Department of Justice Attorney General’s Public Records and Meetings Manual, June 2019, p. 22 (citing: *In Defense of Animals v. OHSU*, 199 Or App 160, at 188–90 (2005)).
 - 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. DOJ Manual at p. 24 (citing DOJ Public Records Order, Sept 10, 2009, Rogers, at 3.)

- Facts typically relevant to a fee-waiver decision include how narrowly tailored the request is to a matter of public interest; the time and expense needed to fulfill the request; the volume of the records requested; the need to segregate exempt from nonexempt materials; whether the fee was avoidable; and the ability of the requester to pay the fee. DOJ Manual at p. 25 (citing DOJ Public Records Order, Apr 24, 2009, Harbaugh, at 3.))

Legal Arguments

The City makes three interrelated arguments:

1. Ms. Barnett's request does not serve a public interest.
2. If Ms. Barnett's request is found by me to serve a public interest, the City's denial of the fee waiver request was nonetheless proper because if the City waived the fee in this case they would run the risk of receiving, and thus having to grant, a burdensome amount of fee waiver requests.
3. If Ms. Barnett's request is found by me to serve a public interest merely because she expressed an intention to post the records she received from the City on social media, this would lower the "public interest" fee waiver standard in Oregon law.

Ms. Barnett argues:

1. The subject of her request is in the public interest.
2. The denial of her fee waiver request was unreasonable because of the importance of the subject matter of the records she sought, and because the fee "is a burden to working class people looking for answers to an important question."

Legal Analysis

I. Public Interest

Ms. Barnett argues that her request is in the public interest, because she is requesting records that will help answer the question of whether the City entered into a contractual relationship with a person that Ms. Barnett, and the Central Oregon Peacekeepers², describe as "one of the most well-known and recognizable agitators³ who spent the summer counter protesting racial justice movement events." Ms.

² The Central Oregon Peacekeepers are a racial justice advocacy group based in Deschutes County. Ms. Barnett states that she seeks these records on behalf of herself and the Peacekeepers.

³ Throughout the remainder of this opinion I will use the word "right-wing agitator" to describe this person, because this is term that is used by Ms. Barnett in her briefing. I do not take a position on whether I consider this person to in fact be a "right-wing agitator."

Barnett states in her pleadings that the person in question claimed to have entered into a contractual relationship with the City in front of a member of the Peacekeepers and other witnesses.

The City argues that the request is not in the public interest, because even if it was initially in the public interest, the public interest “diminished to near zero” after the City completed a search for contracts or emails between the City and alleged racial agitator. In essence, the City argues there would only be a public interest if the City’s records confirmed the assertion by the alleged right-wing agitator that he entered into a contract with the City, so once the City confirmed that no records exist of such a contractual relationship, there is no public interest in a further search of text messages.

Ms. Barnett argues that when a right-wing agitator states publicly that he entered into a contractual relationship with the City of Bend Police Department, a search for public records to either confirm or refute the assertion is in the public interest. In other words, Ms. Barnett argues that it is irrelevant to the public interest test what the potential results are of the search. Ms. Barnett argues it is equally as relevant and beneficial to the public to know that a right-wing agitator is lying about having entered into a contractual relationship with the City of Bend Police Department as it would be to know that he was telling the truth.

As set out above, we start our public interest analysis with an understanding that: waiving or reducing fees is in the public interest “when the furnishing of the record has utility—indeed, its greatest utility—to the community or society as a whole.” State of Oregon Department of Justice Attorney General’s Public Records and Meetings Manual, June 2019, p. 23 (citing: *In Defense of Animals v. OHSU*, 199 Or App 160, at 189 (2005)).

The question thus becomes: Is the greatest utility of the information requested by Ms. Barnett and the Central Oregon Peacekeepers to the community or society as a whole?

In answering this question, we consider these factors:

a. The requester's identity:

Ms. Barnett requests these documents on behalf of herself and the Central Oregon Peacekeepers. The Peacekeepers are a well-known and active local group with a large following on social media that works on behalf of racial justice in our community. The fact the Peacekeepers is the requestor of this information is supportive of a community interest finding.

b. The purpose for which the requester intends to use the information:

Ms. Barnett says the Peacekeepers will use the information to inform the public whether the City is engaged in a contractual relationship with a right-wing agitator. Ms. Barnett takes great pains to say that regardless of whether the City is, or is not, engaged in a contractual relationship with this person, the Peacekeepers will inform the public. This purpose is supportive of a community interest finding.

c. The character of the information:

The information sought seeks to answer the question of whether the City is engaged in a contractual relationship with a right-wing agitator. This purpose is supportive of a community interest finding.

d. Whether the requested information is already in the public domain:

The requested information is not already in the public domain. This is supportive of a community interest finding.

e. Whether the requester can demonstrate the ability to disseminate the information to the public.

The parties agree that the Peacekeepers maintain social media accounts that reach tens of thousands of people. Ms. Barnett said she will disseminate on these social media platforms the results from her public records request. This is supportive of a community interest finding.

I find that the information sought by Ms. Barnett and the Peacekeepers is in the public interest. The request must be viewed in the context of the moment in time it is made. After George Floyd was

killed by police in Minneapolis in May of last year, hundreds of thousands of Americans took to our streets to demand equality in policing, and to ask for recognition of something simple in concept: that Black Lives Matter in the United States America. In response, hundreds of thousands of Americans told black, brown, indigenous, and other people of color, in no uncertain terms, that their lives do not matter and that the police can do no wrong.

And on January 6, 2021, thousands of primarily white Americans stormed the United States Capitol, many spewing vial, racist, and demonstrably false rants about majority black cities rigging the Presidential election. These insurrectionists attempted to stop, by force, the certification of the election of President Biden, and install as our next President their preferred candidate, former President Donald Trump. In the process of doing so, they murdered a Capitol Police Officer who gave his life defending our country.

I could write much here, but suffice it to say that at this moment in time, if answering the question of whether the City of Bend Police Department is engaged in a contractual relationship with a right-wing agitator is not in the public interest, then nothing is. It is of no consequence that partial results from a search of the requested records do not show such a connection. The full search will either show a connection, or refute the assertion made by the person who claimed a connection. As Ms. Barnett argues, both are equally important.

II. Fee Waiver Denial

As the City correctly points out, even when a public interest exists, governments are authorized to deny fee waiver requests, as long as their denial is “reasonable.” State of Oregon Department of Justice Attorney General’s Public Records and Meetings Manual, June 2019, p. 22 (citing: *In Defense of Animals v. OHSU*, 199 Or App 160, at 188–90 (2005)).

When assessing whether the City's denial of Ms. Barnett's fee waiver request was reasonable, Oregon law instructs me to consider the following three factors:

a. The character of the public interest in the particular disclosure:

The character of the public interest is determining whether the City of Bend Police Department is engaged in a contractual relationship with a right-wing agitator. Because the request at issue seeks records of this type of character, it is supportive of a finding that the fee waiver was unreasonable.

b. The extent to which the fee impedes that public interest:

Regardless of whether a fee waiver should have been granted in this case, I commend the City for quoting a relatively inexpensive fee of \$30.00 for the labor intensive project of searching multiple cell phones for responsive text messages. That having been said, Ms. Barnett argues that a fee of \$30.00 "is a burden to working class people looking for answers to an important question." Ms. Barnett is correct that while \$30.00 might be a reasonable estimated cost for the amount of time required to process this work, it is nonetheless a burden for many people in our community.

I find that the fee quoted for this search was reasonable and not set so high as to impede the public interest.

c. The extent to which a waiver would burden the public body:

The City argues that if they grant this fee waiver request, more people will be emboldened to request fee waivers and the City would have to grant these requests. The City then asks me to "consider the impact to the City in the aggregate" if this were to happen.

I wish the City would have explicitly stated their feared "impact to the City in the aggregate" if they were to grant Ms. Barnett's request, rather than asking me to speculate. Is the City suggesting that the revenue from fee waiver requests is what pays for the staff to process public records requests, and without this revenue, they would be unable to employ someone to process these requests? Is the City

suggesting that the fees are necessary to deter people from requesting documents, and without these deterrence fees, the public will submit more public records requests than they do now? I don't know if either of these outcomes are what they fear, but both are too speculative to inform my analysis, and would not sway me even if these outcomes were certain.

The City's arguments on the public body burden prong of the analysis are not persuasive in the aggregate (noting again that the fee amount of \$30.00 was reasonable and appropriate). Granting Ms. Barnett's fee waiver request would not bind the hands of the City in subsequent fee waiver requests. Going forward, the City should be guided by the public interest test in Oregon law when deciding whether to grant a fee waiver request, just like always.

CONCLUSION

Ms. Barnett's public records request was in the public interest, and the City's denial of her request for a waiver of their processing fee was not reasonable. For these reasons, I rule in favor of Ms. Barnett. The City of Bend shall waive the fee to process this request, or in the alternative, seek review of my decision in Deschutes County Circuit Court.

Thank you again for your timely and thoughtful briefing of this matter.

Sincerely,



John Hummel
District Attorney



CITY OF BEND

710 NW WALL STREET
PO BOX 431
BEND, OR 97709
541-693-2100 Tel
541-385-6676 Fax
www.bendoregon.gov

MAYOR
Sally Russell

MAYOR PRO TEM
Gena Goodman-Campbell

CITY COUNCILOR
Barb Campbell
Anthony Broadman
Melanie Kebler
Megan Perkins
Rita Schenkelberg

CITY MANAGER
Eric King

CITY ATTORNEY
Mary A. Winters

January 22, 2021

Via email and first class mail

John Hummel
Deschutes County District Attorney
1164 NW Bond Street
Bend, OR 97703

Re: Jasmine Barnett fee waiver appeal

Dear John:

This responds to your request for information and legal argument regarding Ms. Barnett's appeal of the City's decision to deny her request for a public records request fee waiver. We hope you will find the following background and statement of the City's position useful.

Background

Ms. Barnett submitted the request on January 12, 2021.¹ (Attachment A). City Recorder Robyn Christie acknowledged the request the same day, stating the City would provide the records or an estimate of the time and fees for disclosure of the public records within fifteen days. (Attachment A). Ms. Barnett sought the following records: text messages, emails, and contracts from January 1, 2020 to the present with Adam Sutterfield or "Adam Sutterfield INC" and the City of Bend or Bend Police Department.

Brandie Swindle of the Bend Police Department wrote to Ms. Barnett on January 15, 2021, informing her that she had received the request from the

¹ Although Ms. Barnett indicated in her appeal to you that she submitted a request through the City's online portal on December 19, 2020, the City system has no record of that request.

EXHIBIT A

City Recorder, was searching for responsive records, and that the request should be completed by the following week and would require payment of a \$30 research fee per the City's Fee Schedule. Ms. Barnett responded on the same day, requesting a fee waiver pursuant to ORS 192.324. (Attachment B). Ms. Barnett indicated that the request was in the public interest, that she did not stand to gain financially from the request, and that she had the capacity to make them available to the public.

On January 19, 2021, Ms. Swindle informed Ms. Barnett there were no records of emails or contracts with Mr. Sutterfield. She also informed Ms. Barnett that the fee waiver had been denied, but offered to continue the search for the text message aspect of the request if Ms. Barnett would pay the \$30 fee. (Attachment B). She did so after consulting with the City Recorder. This appeal followed.

Response

The City's adopted Public Records Administrative Policy provides that after the first 15 minutes of staff time, the City will estimate the cost for the City staff time of locating the requested records. (Attachment C). The \$30 charge for conducting the remaining work of searching for responsive text messages is based on Section 6.1.05 of the City's Fee Resolution. Requests for fee waivers are made in the discretion of the custodian of public records. Consistent with the statute, the public interest test is directed at "the public", or the interests of the community or society as a whole. Further, "Requests for a fee waiver should identify the reason for the request and the public interest served in waiving or reducing fees." The decision is within the reasonable discretion of the City. (Attachment C, 6 and 7).

ORS 192.324(5) governs public records fee waivers, providing the following:

The custodian of a 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.

Similar to the City's policy, the plain language of the statute affords the public body substantial discretion in responding to a request for a fee waiver. The Attorney General's Public Records and Meetings Manual (2019) outlines several considerations for evaluating fee waiver requests. Broken down, the statute provides a two-step test: 1) whether access to the requested records would primarily benefit the general public; and 2) if so, whether the character of the public interest in the particular disclosure, the extent to which the fee impedes the public interest, and the extent to which a waiver would burden the public body, favor granting the waiver request.

Importantly, there can be no fee waiver if making the records available does not primarily benefit the public interest. Put another way, there must be some public interest present in order for a fee waiver to be considered.

Here, some background relevant to the request may be helpful in the analysis. Mr. Sutterfield has been alleged by some to have "a long and well known history of

collaboration” with right-wing extremist groups.² In an October 20, 2020 post to Facebook, the Central Oregon Peacekeepers group reported they had been working on a story about how the Bend Chief of Police “hired” Mr. Sutterfield to perform repairs to the parking lot of the Bend Police Department. *Id.* The post drew links between the Bend Chief of Police and Mr. Sutterfield based on the group’s allegations that both were involved with or sympathetic to violent white supremacist extremism.

Of course, the City understands that any such links would be the subject of great public interest. However, the City already conducted some of the work to fulfill Ms. Barnett’s request, which showed there are no emails in City systems to or from Mr. Sutterfield. Further, there are no City contracts with Mr. Sutterfield or his business. This proves that there is no business relationship between the City and Mr. Sutterfield.

To the extent there may have been a public interest element to this request, it is diminished to near zero by the fact that there is no business relationship between the City and/or the Chief of Police and Mr. Sutterfield. The discretion to grant Ms. Barnett’s fee waiver request only arises when there is a public interest. We understand that had the research on the emails or contracting aspects of the request unearthed evidence of a relationship between the City and Mr. Sutterfield, the analysis could be different. As it stands, based on research City staff performed without charge to Ms. Barnett, the public interest element is negligible or non-existent. Without a public interest, the City is not in a position to consider waiving the fee.

Nevertheless, if you determine that access to any responsive text messages might primarily benefit the general public, the City maintains it is not required to grant the fee waiver in this instance. Even if access to the records would primarily benefit the general public, there is more to the analysis: the character of the public interest in the particular disclosure, the extent to which the fee impedes the public interest, and the extent to which a waiver would burden the public body, favor granting the waiver request.

Here, although Ms. Barnett asserts a public interest, the interest at play appears to stem in large part from an unfounded social media assertion about business links between the City and Mr. Sutterfield that have been proven not to exist. The City submits that there is not a public interest component to something that is untrue.

Although Ms. Barnett indicated she could make the records public, that alone does not create a public interest, much less a substantial one. There is no indication of any underlying reasons the public interest supports a waiver. Asking for additional free staff time to search records is not a benefit to the public where it has been established that the alleged business links between the public body and Mr. Sutterfield do not exist.

The fee waiver analysis also includes two similar but contrasting factors: the extent to which the fee impedes the public interest, and the extent to which the waiver would burden the

² <https://www.facebook.com/106204461146894/posts/breakingthe-bend-police-chief-mike-krantz-has-just-announced-his-plan-to-arrest-/160069252427081/>

public body. To be sure, the City would not suffer financially from foregoing the \$30 fee to fulfill the remainder of Ms. Barnett's request, as it is a small amount.

However, the fees exist and are charged for a reason. Responding to public records requests is an important responsibility of a public entity, but it can also disrupt other work by taking staff away from their other critical tasks. Consider the impact to the City in the aggregate were it to begin waiving fees upon every request, especially when the public interest element was questionable or minimal. Or if stating that an intention to post results on social media was sufficient, on its own, to establish public benefit. On balance, these factors do not weigh in favor of granting a waiver, and certainly are not compelling enough to overcome the discretion afforded the City under the statute. The City's decision not to grant the fee waiver was not unreasonable under the circumstances.

Please let us know if we can offer any additional information or answer any questions.

Sincerely,

DocuSigned by:
Mary Winters

F0C398BD345A438...
Mary Winters, City Attorney
mwinters@bendoregon.gov

Enclosures

From: [Robyn Christie](#)
To: ["jasmine.barnett541@gmail.com"](mailto:jasmine.barnett541@gmail.com)
Subject: FW: Public Records Request
Date: Tuesday, January 12, 2021 5:26:00 PM
Attachments: [image001.png](#)
[image002.png](#)
[image003.png](#)
[image004.png](#)
[image005.png](#)
[image006.png](#)

In accordance with ORS 192.324, this is to acknowledge our receipt of your request for records.

We will provide the records or provide an estimate of the time and fees for disclosure of the public records within fifteen days.

Regards,
Robyn



From: rchristie@bendoregon.gov <rchristie@bendoregon.gov>
Sent: Tuesday, January 12, 2021 3:37 PM
To: Robyn Christie <rchristie@bendoregon.gov>
Subject: Public Records Request

CAUTION: External Email. Use caution when opening attachments, clicking links, or responding to this email.

A new entry to a form/survey has been submitted.

Form Name: Public Records Request
Date & Time: 01/12/2021 3:37 PM
Response #: 671
Submitter ID: 33741

IP address: 212.102.47.57

Time to complete: 3 min. , 18 sec.

Survey Details

Page 1

Contact Information:

Name	Jasmine Barnett
Phone Number	5416479133
Email Address	jasmine.barnett541@gmail.com
Street Address	1918 NE Diablo Way
City	Bend
State	Oregon
ZIP Code	97701

Pursuant to the Oregon open records law, ORS 192.001 to 192.607, I'm requesting a copy of:

I am requesting text messages, emails and contracts spanning from Jan 1, 2020-present with Adam Sutterfield or Adam Sutterfield INC with the City of Bend or Bend Police Department

I agree to pay any reasonable copying and postage fees associated with this request. If my request results in the need for additional research, the City will provide an estimated cost and require a deposit prior to preparing the public record documents.

Check here to agree

If your request for the above public records is denied, a written explanation for the denial including a reference to the specific statutory exemption(s) will be supplied to you upon request.

Thank you,
City of Bend

This is an automated message generated by the Vision Content Management System™. Please do not reply directly to this email.

From: [Brandie Swindle](#)
To: [Robyn Christie](#)
Subject: FW: Public Records Request
Date: Tuesday, January 19, 2021 4:31:52 PM
Attachments: [image001.png](#)
[image002.png](#)
[image003.png](#)
[image004.png](#)
[image005.png](#)



Brandie Swindle
Records and Evidence Program Manager
City of Bend Police Department
O: 541-322-2966 | [Join BPD – Learn More](#)



From: Brandie Swindle
Sent: Tuesday, January 19, 2021 12:07 PM
To: Jasmine Barnett <jasmine.barnett541@gmail.com>
Subject: RE: Public Records Request

Hi Jasmine,

We did start working on your request. We have checked for emails in regards to Adam Sutterfield or Adam Sutterfield INC and we did check for contracts with the City and Bend Police Department under those same names. Both searches produced no records.

I received a response from the City on the request for waiver of fees, it was denied. The fees in regards to this request are due to the staff time in searching for text messages. If you would like to proceed with the \$30.00 fee for searching for text messages with Adam Sutterfield please let me know.

Thank you,



Brandie Swindle
Records and Evidence Program Manager
City of Bend Police Department
O: 541-322-2966 | [Join BPD – Learn More](#)



From: Jasmine Barnett <jasmine.barnett541@gmail.com>

Sent: Friday, January 15, 2021 6:21 PM

To: Brandie Swindle <bswindle@bendoregon.gov>

Subject: Re: Public Records Request

CAUTION: External Email. Use caution when opening attachments, clicking links, or responding to this email.

Hi Brandie,

Thank you for your response

I would like to request a fee waiver in Pursuant of Oregon Law ORS 192.324

The request is in the public interest, I do not stand to financially gain from the records, and I have the capacity to make them available to the public.

Thank you

Jasmine Helsley-Barnett

She/her

On Jan 15, 2021, at 4:45 PM, Brandie Swindle <bswindle@bendoregon.gov> wrote:

Hello Jasmine,

I hope your week has gone well. I am emailing you to let you know that I have received your records request from the City Recorder and I am working on searching for responsive records. I expect to be able to respond to you by next week. There is a \$30.00 research fee associated with this request per the City Fee Schedule, you can call our main office during business hours to pay over the phone (541-322-2960) with a card. Currently other forms of payment aren't accepted due to COVID. Please just let the person that helps you know to email me proof of payment, or if you prefer you can.

Thank You,

<image001.png>

Brandie Swindle
Records and Evidence Program Manager
City of Bend Police Department

O: 541-322-2966 | [Join BPD – Learn More](#)
<image002.png>

<image003.png>

<image004.png>

<image005.png>

PUBLIC RECORDS LAW DISCLOSURE: Emails are generally public records and therefore subject to public disclosure unless exempt from disclosure under Oregon Public Records Law. Emails can be sent inadvertently to unintended recipients and contain confidential or privileged information. If you are not the intended recipient (or authorized to receive for the recipient), please advise by return email and delete immediately without reading or forwarding to others. Thank you.

City of Bend City Manager Administrative Policy	
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TITLE: Public Records Requests
POLICY NO.: ADM 2019-12



CITY OF BEND

Public Records Requests Policy No. ADM 2019-12

Bend Code Chapter 1.30.005 provides for 'City Manager Authority to Adopt Administrative Regulations, Policies and Guidelines.' All regulations, policies and guidelines adopted by the City Manager shall be consistent with the City of Bend Charter, the Bend Code, and Council ordinances.

The following policy conforms to the above stated standards.

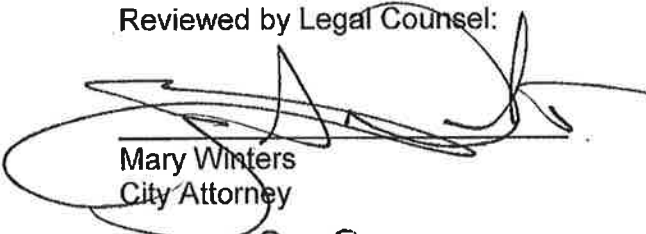
Authorized by City Manager:



Eric King
City Manager

Dated: 9-10-19

Reviewed by Legal Counsel:



Mary Winters
City Attorney

Dated: 9-9-2019

City of Bend
City Manager Administrative Policy



PURPOSE: It is the policy of the City of Bend (City) to make non-exempt public records easily accessible to interested parties. The City recognizes that the Oregon Public Records Law (ORS 192.410-505) gives the public the right to inspect and copy certain public records maintained by the City.¹ The City also recognizes that certain records are exempt from public disclosure, or that disclosure may require balancing the right of the public to access the records against individual privacy rights, governmental interests, confidentiality issues and attorney/client privilege. Additionally, when the City receives a request to inspect or copy public records, it incurs costs and it is in the public interest that costs be recovered by the City.

It is the purpose of this Policy to: Establish an orderly and consistent procedure for responding to public records requests; (b) Establish the basis for a fee schedule intended to reimburse the City for the actual costs incurred in responding to public records requests; and (c) Inform citizens and all City Departments of the procedures and guidelines that apply to public records requests.

Section 1 – Making a Public Records Request

A request for public records that are in the custody of the City of Bend may be made by submitting a written request to the City Recorder, who is the Custodian of Records (or his or her designee). The City is required to allow inspection or copying of all non-exempt public records. Public record requests may be submitted in person, by mail, by fax or by e-mail. The City may request additional information or clarification from the requester for the purpose of expediting its response to the request.

The request must include the name and address of the person requesting the public record; the telephone number or other contact information for the person requesting the public record; and a sufficiently detailed description of the record(s) requested to allow the City of Bend to search for and identify responsive records. The City may require that the request be dated and signed by the person requesting the public record.

Section 2 – Processing a Public Records Request.

1. **Acknowledgment.** Within five business days of receipt of a written public records request the City Recorder shall send a written acknowledgement to the requestor, containing the following:

¹ The City is required to respond to Public Records requests by the Oregon Public Records Law. The Federal "Freedom of Information Act" (FOIA) does not apply to requests for the City's public records. This law only applies to requests for public records maintained by the federal government.

**City of Bend
City Manager Administrative Policy**



- A. Confirmation of whether or not the City is the custodian of the requested record, if known: or
 - B. A statement that no such records exist, or
 - C. If the request is unclear, a request to clarify the records sought, and
 - D. A cost estimate with a notice that a deposit for costs must be paid before the request will be processed.
2. The City will respond to written public records requests as soon as practicable and without unreasonable delay.
3. The City may request additional information or clarification from a requestor for the purpose of expediting the City's response to the request. If the City has requested additional information or clarification in good faith, its obligation to further complete its response to the request is suspended until the requester provides the requested information or clarification or affirmatively declines to provide that information or clarification. If the requestor fails to respond within 60 days to a good faith request from the City for information or clarification, the City shall close the request.
4. As soon as reasonably possible but not later than 10 business days after the date the City is required to acknowledge receipt of the request, the City will:
- A. Complete the public records request; or
 - B. Provide a written statement to the requestor that the City is still processing the request and a reasonable estimated date by which the City expects to complete its response based on the information current available.

(Except that the time periods in this Section 2 do not apply if compliance by the City would be impracticable because the staff necessary to complete the response to the request are unavailable (on leave or not scheduled to work), compliance will demonstrably impede the City's ability to perform other necessary services, or because of the volume of public records requests simultaneously being processed by the City. ORS 192.329(6).)

5. If the City Recorder believes a request should be denied in whole or in part, the Recorder will prepare a written explanation of the basis for the denial, which shall identify all applicable exemptions from disclosure for each part of the record being withheld. The Recorder will work with the City Attorney's office as necessary to identify applicable exemptions.
6. Inspection. If a physical inspection of public records is to occur, City staff shall be present at all times to supervise the inspection and to ensure that no documents are removed, destroyed, or otherwise tampered with.

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Section 3 - Calculation of Fees and Response

Based upon an evaluation of actual costs in making public records available for inspection or copying, the City calculates fees for respond records requests in the following manner:

1. \$1.50 for the first page of a photocopied record and \$.15 per page for each page thereafter.
2. The cost of records transmitted by fax is \$1.50 for the first page and \$0.15 for each additional page if the record is to be sent to a FAX number that will result in a long distance charge.
3. There is no per page fee for records transmitted by e-mail. The determination that a file is too large to send via e-mail is at the sole discretion of the City.
4. Actual cost for use of material and equipment for producing copies of non-standard records will be charged.
5. Upon request, copies of public records may also be provided on a USB drive if the document(s) are stored in the City's computer system. Drives will be provided at a cost consistent with the City's fee resolution for each drive and may contain as much information as the drive will hold. Due to the threat of computer viruses, the City will not permit requesters to provide drives for electronic reproduction of computer records.
6. Labor charges that include researching, locating, compiling, editing or otherwise processing information and records:
 - A. There will be no charge for the first 15 minutes of staff time.
 - B. Beginning with the 16th minute, the charge for the request is equal to the salary of the employee(s) gathering the information. The City will determine which staff member is able to gather the material in the most efficient manner.
 - C. The actual cost for delivery of records such as postage and courier fees.
 - D. Cost for City staff time locating the requested records, reviewing the records in order to delete exempt material, supervising a person's inspection of original documents in order to protect the records, or certifying documents as true copies.
 - E. Cost of time spent by the attorney(s) for the City in reviewing the public records, redacting material from the public records or segregating the public records into exempt and nonexempt records.

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- F. **Prepayment Required.** The City may require pre-payment of estimated fees before taking further action on a request, and having the requestor confirm that he or she wants the City to proceed. If the City has informed the requestor of the estimated fee the City's obligation to complete the request is suspended until the fee has been paid or the fee is waived under Section 7 below. If the requestor fails to pay the fee within 60 days of the date the City informs the requestor of the fee or denies a fee waiver, the City shall close the request.

- G. If the actual charges are less than the prepayment, any overpayment will be refunded in a timely manner.

- 7. **Fee Waivers.** Under the Act, the custodian of a public record may reduce or waive fees if the custodian determines that doing so is in "the public interest because making the record available primarily benefits the general public." Application of the public interest test requires analysis of whether disclosure of a record will benefit the interests of the community or society as a whole, i.e., "the public." A personal benefit to be derived by the requester alone is insufficient to permit a fee waiver. Requests for a fee waiver should identify the reason for the request and the public interest served in waiving or reducing fees. The decision to waive or reduce fees is within the reasonable discretion of the City. Requests for a fee waiver or reduction must be evaluated on a case-by-case basis by the City Recorder.

- 8. **Media Requests.** Requests made by media representatives will be charged as follows:
 - A. Requests for a limited number of easily available documents will not be charged.

 - B. Requests for broad, staff intensive requests will be charged the same as all other requests unless, on a case by case basis, the City Recorder determines that making a fee waiver or reduction is warranted due to (1) the character of the public interest in the particular disclosure, (2) the extent to which the fee impedes the public interests, and (3) the extent to which a waiver would burden the City's resources.

- 9. **ADA Format.** No additional fees will be charged for providing a record in an alternate format in accordance with the Americans with Disabilities Act of 1991.

- 10. **Easily accessible or routinely requested records.** In the case of a records that are easily accessible by City staff or are publicly available (such as on the City's website), and that contain no materials that are exempt from disclosure, the City Recorder may inform the requestor how to access the records or may provide a copy of the records at no cost.

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Section 4 - General Concepts

What is a Public Record?

ORS 192.311 (5) defines a "public record" as *including*:

(a) "Public record" includes any writing that contains information relating to the conduct of the public's business, including but not limited to court records, mortgages, and deed records, prepared, owned, used or retained by a public body regardless of physical form or characteristics.

(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.

This definition includes information stored on virtually any medium. A record may be handwritten, typed, photocopied, printed, microfilmed, or existing in an electronic form such as e-mail or a word processing document or other types of machine readable or electronic recordings. Telephone messages left on a voicemail system are writings and therefore subject to inspection to the extent that they exist. However, public bodies are not required to retain their telephone messages.

Records need not have been prepared originally by the public body to qualify as public records. If records prepared outside government contain "information relating to the conduct of the public's business," and are "owned, used or retained" by the public body. For example, the Oregon Attorney General has concluded that a contract giving an agency ownership of everything created by the contractor meant that a record never in the agency's possession was a public record subject to disclosure. However, a document prepared by a private entity does not become a public record merely because a public official reviews the document in the course of official business so long as the official neither uses nor retains the document. Not all documents in the possession of a public officer or agency employee necessarily constitute public records.

Public Records vs. Requests for Information.

It is important that employees distinguish between a request for information and a public records request. Many public records requests are requests for information that would actually require the creation of a new public record. Public bodies are not obligated under Oregon's Public Records law to create new public records where none exists in order to respond to requests for information. The public body only has the duty to allow inspection and copying of existing public records. Public bodies are not required to create a record to disclose the "reasoning" behind their actions; or other "knowledge" their staff might have. Nor does the Act require public bodies to explain or to answer questions or provide legal research or analysis about their public records.

Although computer data and printouts generated for use by the public body are public records, the City is not required to create new information using its computer programs

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or to create a new program to extract the data in its computer in a manner requested by the public. The Act requires public bodies to retrieve and make available nonexempt computer or electronically stored data and information, when requested, through the computer software or programs in use by the public body. This does not mean that public bodies must develop or acquire new or additional software or programs in order to retrieve the requested information. Nor does it mean that public bodies must use existing programs to develop entirely new information. When the City uses computer software or programs to retrieve information for its own purposes, it must, upon request, use that same software or program to retrieve and make available existing data or information stored by the public body in computer or electronic form.

Appeals.

If a public records request or a fee waiver request is denied, the requestor may appeal the denial to the Deschutes County District Attorney, pursuant to ORS 192.460.

District Attorney Hummel,

1/23/2020

I've read the City Attorney's argument for denying my request, and for convenience I'll respond in a similar format to the one she used. First, I will briefly discuss the background of my request (and correct the inaccurate background she attempted to establish). Then I will address her arguments point by point, paying particular attention to the parts of the public interest test (as described in the The Attorney General's Public Records and Meetings Manual, 2019) that she neglected.

I will base my entire argument on the precedent established in "Eudey v. Central Intelligence Agency" (1) that the appropriate standard of review in determining applicability of a public interest fee waiver for a public records request is whether the public body's action was arbitrary and capricious or an abuse of discretion. From the day I made this request, every action by the City has been both arbitrary and capricious.

Background

In her background section, Ms. Winters asserted to you that my request was filed on January 12, 2021 and that the City responded on the same day. Neither of these assertions are correct, and the continued insistence by the City that these are the dates is an important piece in the consideration for a fee waiver.

In reality, I first submitted this request on December 19, 2020. (Attachment A) I received no response of any kind to that request. The City failed entirely to meet it's legal obligations under ORS 192.329 (1), ORS 192.324 (2) and ORS 192.329 (5) to respond in a timely manner to my request for records.

On Monday, January 11, 2021, the Central Oregon Peacekeepers sent an email to the Bend City Council with a long list of concerns. One of the concerns in that letter was the failure to respond to this December 19 public records request. City Councilor Barbara Campbell (Attachment B) reached out and offered assistance in expediting the request, so it was submitted for a SECOND time on January 12, 2021.

On January 19, the City informed me that there were no emails or contracts matching my request, and that my fee waiver request had been denied. No justification for the denial was given at that time.

The City Recorder and City Attorney continue to behave as if that first request never happened, and that they did not fail their legal obligation to respond to it. By neglecting to disclose this more complete timeline to you, they are attempting to withhold important context for our request for a fee waiver.

These failures, and the City's continued refusal to acknowledge them, demonstrate a baseline attitude by the City that their decisions are both arbitrary and capricious in completing this request.

EXHIBIT B

The Public Interest Test

Ms. Winters asserted that the public interest test (as described in the Attorney General's Public Records and Meetings Manual, 2019) can be broken down to two steps. This assertion on her part is strange and concerning, given the fact that the Manual quite explicitly states a THREE step test. In fact, the Manual could not be more clear on this point. Ms. Winters has chosen to combine the second and third steps of the "public interest test." There are only two possible interpretations of this misrepresentation of the public interest test, as it's described in the Manual.

First, this may be an innocent oversight on the part of Ms. Winters. I prefer to think the best of people, so I'm inclined to believe this is the case. Ms. Winters may simply be unaware of the steps the law requires her to take in deciding whether or not to waive a fee. If this is the case, then the decision to deny the fee was arbitrary and capricious because it was made in ignorance of the City's actual obligations.

The second possibility is that Ms. Winters does understand that the test is more complex than she represented, and is willfully attempting to avoid the more complete and nuanced test described in the Manual and by law. I hope this is not the case, but it would also demonstrate that the City's decisions have been arbitrary and capricious because a decision was made to willfully obfuscate the City's obligations.

Regardless of why Ms. Winters misrepresented the considerations the Manual guides public bodies to consider, by examining the entirety of the language (and those parts of the test that Ms. Winters chose not to address) it becomes clear that I qualify for this waiver.

I will address each step of the test, and the nuance of each as described in the Manual, with case law examples as appropriate.

The Manual requires public bodies in Oregon to consider:

1) "The character of the public interest in the particular disclosure."

The argument Ms. Winters is making to deny my request revolves entirely around the OUTCOME of the records request. She is asserting that because the search did not find contracts between the City and Adam Sutterfield, then there is no public interest. The City is beginning with the false assumption that my motivation, and the motivation of the Central Oregon Peacekeepers, is in uncovering onerous behavior by the City. In reality, our motivation is to simply answer the question. We are arguing that asking the QUESTION is in the public interest, regardless of what the answer to that question is.

In October, Adam Sutterfield claimed to have received a contract from the City of Bend to make repairs to the Bend Police Department parking lot. This claim was made in person to Luke Richter of the Central Oregon Peacekeepers, and in front of other witnesses. This claim by Sutterfield immediately sparked interest from the public.

Sutterfield is one of the most well known and recognizable agitators who spent the summer counter protesting racial justice movement events. In response to his assertion, The Central Oregon Peacekeepers immediately started asking questions of the City and the Police Department as to the reality of Sutterfield's claim.

Ms. Winters is correct that the first step in deciding if a fee waiver is appropriate is to establish whether or not a public interest exists. That public interest is not only obvious, Ms. Winters herself does an excellent job of demonstrating just how obvious it is.

She spells it right out. She says in no uncertain terms that a business relationship between Adam Sutterfield and the City of Bend would be "of great public interest." She also goes on to acknowledge that she is aware of the fact that the Central Oregon Peacekeepers have posted on our various platforms about this question. In just the single article Ms. Winters referenced on October 30, our content reached 30,728 readers on just one of our platforms. It seems strange that the City is acknowledging that the question was of interest to tens of thousands of people, but still denies that answering this question is in the public interest.

If discovering the existence of a business link between the City and Adam Sutterfield is in the public interest, then it logically follows that disproving Sutterfield's assertion of the link is likewise in the public interest. If the City of Bend is NOT engaging a well known right wing agitator to do repairs to City Property, then the public will benefit from knowing that he lied about it. Once the City finally fulfills its legal obligation to complete this request, the Central Oregon Peacekeepers will be publishing what we find. If what we find is that there is no relationship between the City of Bend and Adam Sutterfield (or his businesses) then we will publish that. This information will benefit the general public, and in fact will benefit City institutions by rebuilding trust.

I am arguing that the PURSUIT of this information is in the public interest, and in "Badhwar v. United States Dept. of Air Force" (2) the plaintiffs successfully argued that it was the PURSUIT of the information they sought that the Department of the Air Force had arbitrarily and capriciously inhibited. The City would have us consulting Schrodinger's cat for the existence of public interest. If the answer to the question is "Yes", then Ms. Winters agrees this records request primarily benefits the public. If the answer is "No", then Ms. Winters would have us believe that the public never asked this question to begin with.

My motivation, and that of the Central Oregon Peacekeepers, has always been the pursuit of the question. Asking the question, independent of it's answer, is in the public interest.

For these reasons, I believe I have demonstrated that I have satisfied the first requirement of the "public interest test." The disclosure of the results of this request primarily benefits the general public.

2) "The extent to which the fee impedes that public interest."

In Ms. Winters' argument, she attempts to combine this second step with the third (below) and make them inseparable. They are separate in the text of the Manual for a reason, which I will demonstrate.

In "In Defense of Animals vs. OHSU" (3) the plaintiff in that case successfully argued to the Oregon Court of Appeals that "the fee waiver provision in ORS 192.440 should be interpreted particularly to facilitate access to public records by citizen 'watchdog' and nonprofit public interest organizations that challenge agency actions and policies." In this matter, the Central Oregon Peacekeepers have been acting in exactly that capacity. As discussed above, the existence of a public interest in a question is not dependent on it's answer. The general public either does or does not have an interest in the disclosure of the information. The City is arguing that citizen watchdog groups are only eligible for a fee waiver when they find that the public body has done something onerous. This attitude attaches a punitive element to the fee, and appears to be an attempt to discourage requests for records. If the consequence of finding that the City DID NOT engage in onerous behavior is that citizen watchdog groups will be fined, then citizen watchdog groups will be less likely to ask for public records.

The Central Oregon Peacekeepers are a group of private, unpaid volunteers. We do the work that we do because we believe in more transparency from our elected officials. While Ms. Winters acknowledges that a \$30.00 fee means nothing to the City, it is a burden to working class people looking for answers to an important question.

Again, In "Badhwar v. United States Dept. of Air Force" (2) the plaintiffs demonstrated "without contradiction that their means are limited and that the fee requirement has inhibited their requests for and use of documents that they might otherwise seek in pursuit of their investigation." The imposition of a fee in that case inhibited the plaintiff's ability to pursue a matter of public interest, as the fee in this case is inhibiting ours. We are still very much interested in whether or not text messages exist between City of Bend employees and Adam Sutterfield. The fee is preventing us from finalizing our pursuit of this question, and answering it once and for all.

I want to emphasize again that, regardless of the answer to the question, the Peacekeepers intend to publish the results. If Adam Sutterfield lied on October 5th about his relationship with the City...then we intend to say so to the thousands of people we reach. It's worth noting that both private citizens and elected officials in Central Oregon utilize our platform to send and receive information. As recently as this week, Mayor Sally Russel of Bend used her official Facebook account as Mayor to interact with Bend residents in the comments section of a video we posted. County Commissioners, City Councilors, Bend police officers, and every local news agency have all communicated with or on our various platforms. Ms. Winters herself acknowledged in her argument that she is aware of our work, and that alone demonstrates our capacity to distribute information.

The only thing preventing the public finally getting an answer to the question of Adam Sutterfield's relationship with the City (or lack thereof) is the fee that the City insists on charging which is preventing us from completing our investigation.

For these reasons, I believe I have demonstrated that I have satisfied the second requirement of the "public interest test". Denial of the fee waiver inhibits the public interest by further delaying the completion of this records request, and the ability of myself and the Central Oregon Peacekeepers to publish the results.

3) "The extent to which a waiver would burden the public body."

As mentioned above, Ms. Winters tried to conflate this third step with the second. It is separated for a reason, and that is because a fee that is a significant burden to the requester may not be a burden to the public body. Ms. Winters explicitly states, "To be sure, the City would not suffer financially from foregoing the \$30 fee to fulfill the remainder of Ms. Barnett's request, as it is a small amount." She admitted in plain language that the \$30 dollar fee is not a burden to the City.

Instead, she tries to make the argument that waiving the fee will create a FUTURE burden to the City in public records requests that may or may not be made by others. In her argument, she asked you to "Consider the impact to the City in the aggregate were it to begin waiving fees upon every request." This is nearly exactly the argument made by the defendant in "Diamond v. FBI." (4) The United States District Court, S. D. New York, concluded that "An agency may not decline to waive fees because of a perceived obligation to the public to collect them." Ms. Winters' argument that my fee waiver should be denied because of her fears around future requests is irrelevant and has already been defeated in court. It demonstrates that the City's objection to waiving the fee has nothing to do with the merits of my specific request, and are based instead on attempting to disincentivize requests for records in general and in the future.

It's slightly disturbing that the City Attorney would make this argument about a future burden, when it is one that the Manual she cited explicitly highlights as one of the arguments a public body should NOT make. This lack of care in crafting her argument for the denial further demonstrates the arbitrary and capricious nature of the denial, and of the City's handling of this records request from the beginning.

For these reasons, I believe I have demonstrated that I have satisfied the third requirement of the "public interest test. Affording me this fee waiver is not a burden to the City.

Summary and Conclusion

In both the manner in which this public records request has been processed, as well as the denial of the fee waiver, the behavior of the City has been arbitrary and capricious.

- The City started this process by ignoring my first lawful request for records and by failing in their legal obligations to respond in a timely manner.
- When the City finally responded to my second request (with the assistance of pressure from a City Councilor) they denied my request for a fee waiver without explanation.
- When I filed an appeal to you, the City crafted a post hoc explanation for the denial that misrepresented the obligations of a public body in considering a fee waiver, and that made several arguments that have already been defeated in courts of law. The lack of care demonstrated in how the City crafted their argument shows the capricious nature of their denial.
- This public records request (though it was originally ignored, in violation of Oregon statute) has already revealed information that is of interest and value to the general public. The City itself demonstrated the existence of a public interest in their arguments for why they denied the waiver.
- Imposition of the fee significantly inhibits the public interest by preventing the Central Oregon Peacekeepers from the pursuit of our investigation, and the publication of its results.
- The City admits that granting this fee waiver is not a burden to them.

All of the above demonstrates that the City's decision to deny the waiver was arbitrary and capricious, and for those reasons I believe my appeal should be granted and the fees waived.

Thank you for your time, and let me know if there is any further information you require,

- Jasmine Barnett



References:

- (1) Eudey v. Central Intelligence Agency, 478 F. Supp. 1175 - Dist. Court, Dist. of Columbia 1979
- (2) Badhwar v. United States Dept. of Air Force, 615 F. Supp. 698 - Dist. Court, Dist. of Columbia 1985
- (3) In Defense of Animals v. Ohsu, 112 P.3d 336 (Or. Ct. App. 2005)
- (4) Diamond v. FBI, 548 F. Supp. 1158 - Dist. Court, SD New York 1982

Attachments:

Robyn Christie Inbox - Google December 19, 2020 at 7:30 PM RC
Public Records Request
To: Jasmine

A new entry to a form/survey has been submitted.

Form Name: Public Records Request
Date & Time: 12/19/2020 7:30 PM
Response #: 652
Submitter ID: 33709
IP address: 67.204.161.147
Time to complete: 6 min. , 0 sec.

Survey Details

Page 1

Contact Information:

Name Jasmine Barnett
Phone Number 5416479133
Email Address jasmine.barnett541@gmail.com
Street Address 1918 NE Diablo Way
City Bend
State Oregon
ZIP Code 97701

Pursuant to the Oregon open records law, ORS 192.001 to 192.607, I'm requesting a copy of:
All emails and text messages to and from Adam Sutterfield or Sutterfield Roofing with the City of Bend and The Bend Police Department. As well as any contracts for hire to Adam Sutterfield from the city and from Bend Police Department between Jan. 2019 and December 2020.

I agree to pay any reasonable copying and postage fees associated with this request. If my request results in the need for additional research, the City will provide an estimated cost and require a deposit prior to preparing the public record documents.

Check here to agree

If your request for the above public records is denied, a written explanation for the denial including a reference to the specific statutory exemption(s) will be supplied to you upon request.

Thank you,
City of Bend

Attachment A

Barbara Campbell
to me ▾

Mon, Jan 11, 2:23 PM (12 days ago) ☆ ↩ ⋮

Hello Peacekeepers,

I have followed up on your public records request. Hopefully we'll hear about that soon.

I've also written to the DA to find out the procedure for apprehending those guys who have warrants out for their arrest from the Pilot Butte incidents.

Thanks for writing,
Barb

Get [Outlook for iOS](#)

Attachment B