

John Hummel District Attorney

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November 4, 2021

Dr. Steven Cook
Superintendent, Bend LaPine Schools
janet.bojanowski@bend.k12.or.us

Nicole Bales
Bend Bulletin
nbales@bendbulletin.com

Dear Ms. Bales and Dr. Cook:

Thank you for your prompt and courteous presentation of the issues. This letter constitutes my ruling in the matter of the Bulletin's appeal of the Bend LaPine School District's (BLP) denial of their request for a waiver of the fee BLP quoted them to process their public records request.

Background

- On October 11, 2021, the Bulletin submitted a public records request via email to BLP in which they sought the following:
 - “Public records that involve Bend High School and include and involve COVID-19, quarantine, isolation, exposure, Bend High School football team and the football team's coaches since Sept. 24, 2021.”
- In their October 11th email, the Bulletin also requested a fee waiver, as follows:
 - “I would like to request a waiver of all fees in that the disclosure of the requested information is in the public interest and will contribute significantly to the public's understanding of the coronavirus, its effect on students, staff and school and how schools respond. Our request is related to news gathering purposes and we intend to write a story.”
- BLP promptly acknowledged the Bulletin's request, and the parties engaged in correspondence that resulted in the Bulletin agreeing to BLP's suggestion that they narrow and focus their request by limiting it to emails.
- BLP provided the Bulletin with a time and cost estimate to comply with their narrowed request. The cost estimate was \$656.44 to process and copy an estimated 166 emails with a total page

estimate of 332 pages. The processing piece of the estimate included reviewing, redacting, and legal review.

- BLP denied the Bulletin’s request for a fee waiver, informing them that: “Due to the wide scope of the request, we are unable to waive the fees for this request.”
- On October 29, 2021, The Bulletin filed with me their appeal of BLP’s decision to deny the fee waiver they requested. (Exhibit A)
- On November 2, 2021, BLP filed with me their legal argument. (Exhibit B)

Legal Standards

Reasonableness of Fees:

Public bodies are authorized to establish fees reasonably calculated to reimburse the public body for its actual cost of making public records available. ORS 192.324(4)(a)

Fee Waiver:

A public body may waive or reduce its fee for the processing of a public records 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

BLP concedes that the subject matter of the Bulletin’s public records request, COVID-19 and its impact on our community and its schools, is a matter of public interest. BLP argues that in spite of this public interest, their decision to deny the Bulletin’s fee waiver request was reasonable, as follows:

1. **Impact of Fee on Public Interest:** There is no evidence that the fee would impede the Bulletin from obtaining the records they seek. Furthermore, BLP argued that the Bulletin rejected BLP’s suggestion to narrow the scope of their request, and that if they had accepted BLP’s suggestion, it is possible that far less time, and thus cost, would have been required to process the request.
2. **Burden on Public Body (and Actual Cost) -**The request requires the District's technology staff to formulate search terms for an electronic query into the District's email accounts. It then requires District staff to print and review the responsive documents for duplications, which is especially time-consuming for a request that includes multiple emails between Bend High Staff. Further, [the Bulletin] seeks information between any staff and school board members including emails, text messages, memos, letters and other communication between September 24, 2021, to October 11, 2021, involving COVID-19, quarantines, isolations, and exposures of the Bend High football team and its coaches. There is a high likelihood that the records sought contain confidential medical or educational information that is exempt from disclosure. The district has an obligation and responsibility to segregate exempt from nonexempt materials and its failure to do so would expose the district to liability.

Legal Analysis

Above, I set forth the legal factors established by the courts, the Oregon Legislature, and the Oregon Attorney General for the assessment of whether a denial of a fee waiver request is reasonable. I’ll address each of these factors now.

I. The character of the public interest in the particular disclosure.

The parties agree that Covid-19, and its impact on our schools, is in the public interest.

II. The extent to which the fee impedes the public interest

BLP argues there is no evidence the fee they quoted the Bulletin would impede them from obtaining the records they seek. However, this argument is insufficient, standing alone, to support granting not even a partial fee waiver. An analogous case was decided in 2016 by the Oregon Attorney General who determined that a 50 percent fee reduction granted to the Oregonian was reasonable (as opposed to the 100 percent reduction they sought) because they sought over 200 files, and at least some of these files did not contain information in the public interest. *State of Oregon Department of Justice Attorney General's Public Records and Meetings Manual, June 2019, p. 25 (citing: Public Records Order, May 26, 2017, Brosseau)*.

I take judicial notice of the fact the Bulletin is a smaller news organization than the Oregonian. Also, the Bulletin's request in our case is for fewer documents than was requested by the Oregonian, and the Bulletin's request was focused on documents in the public interest.

Another helpful case was decided in 2017 by the Oregon Attorney General who determined that a 20 percent fee reduction for a media requestor was reasonable to fulfill a broad request not tailored to specific files (unlike the Bulletin's request in our case). *DOJ Manual at p. 25 (citing Public Records Order, Sept. 5, 2017, Woodworth)*.

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

BLP set forth in their legal argument how the processing of the Bulletin's request would burden their operations (compiling documents, redacting documents, legal review of documents, etc.), but they did not state how the waiver of the quoted fee would burden their operations. In other words, if the Bulletin paid the quoted fee, BLP would have to do the same amount of work to process the request as they would have to do if they waived the fee. Fee waiver burdens occur when, for example, a public body would use fee revenue to hire a temporary employee to process a public records request, and if the

fee was waived, the public body would have insufficient money to hire the temporary employee, thus requiring the work to be completed by permanent staff who would have to forgo performing other important work to process the public records request.

IV. How narrowly tailored the request is to a matter of public interest

The Bulletin's request was narrowly tailored to obtain records in the public interest.

V. The time and expense needed to fulfill the request

The time estimate provided by BLP (8 hours) to process the Bulletin's request is not particularly long when considering the importance of the topic and the size of BLP's staff.

VI. The volume of the records requested.

BLP estimated that their search would produce 332 pages of responsive records. This is not a volume of records that is typically found to be so large as to support the denial of a fee waiver request. For example, in 2010 the Oregon Attorney General determined that the denial of even a partial fee waiver was reasonable where the responsive records totaled 14,266 pages. *DOJ Manual at p. 25 (citing Public Records Order, May 17, 2010, Dimitre).*

VII. The need to segregate exempt from nonexempt materials.

The Bulletin's request no doubt will produce exempt materials, due to the fact COVID-19 searches will return some documents that contain protected health information. The time required to segregate protected health information was included in the time and cost estimate created by BLP.

VIII. Whether the fee was avoidable

The briefing on this issue is perplexing. In their legal argument, BLP asserted that the Bulletin rejected BLP's suggestion to narrow the scope of their request, and if they had agreed to their suggestion to narrow the scope of their request then it's possible that far less time and cost would have been required to process the request. BLP apparently overlooked the fact that the Bulletin actually agreed to

BLP's suggestion to narrow the scope of their request. BLP suggested to the Bulletin that rather than asking for all responsive documents (which would include text messages, emails, memos, etc.) they first ask for emails only. The Bulletin responded by narrowing their request to emails only, and it is this request for emails only that formed the basis for the time and cost estimate prepared by BLP.

In light of the fact the Bulletin modified their initial request to limit the amount of time and cost to process their request, the fee that was eventually quoted to process the request could not have been avoided (other than by abandoning their request in toto).

IX. The ability of the requester to pay the fee.

In the context of the facts of this case, this factor is duplicative of factor II (the extent to which the fee impedes the public interest) discussed above,¹ so I won't address it again here.

CONCLUSION

The parties are in agreement that the subject matter of the Bulletin's public records request is in the public interest, and I concur. The question then becomes whether BLP's denial of the Bulletin's request for a fee waiver was reasonable.

Even though the Bulletin requested a 100 percent fee waiver, BLP had the authority to grant a partial fee waiver. "When assessing a request for a fee waiver of 100%, public bodies should also determine whether a more modest fee reduction is appropriate. There may be circumstances in which denying a total fee waiver is reasonable, but where refusing a 25% or 50% reduction is unreasonable." *DOJ Manual at p. 26*. BLP did not grant a partial fee waiver, and there is no evidence presented that

¹ In some cases, the facts result in these two factors requiring distinct analysis. One example would be a situation where numerous parties requested similar documents, all the parties requested a fee waiver, all the fee waiver requests were denied, and one of the parties then paid the fee, obtained the documents, and disseminated the relevant information gleaned from the documents to the public. If one of the requestors who did not pay the fee then appealed the denial of their fee waiver request, finding the denial to be reasonable would not "impede the public interest" because the information sought in the request would have already been disseminated to the public. This however is not the situation in the case-at-bar.

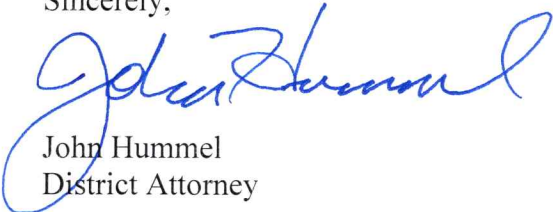
they considered this. Instead, a large portion of their legal argument was focused on informing me that the Bulletin declined BLP's suggestion to narrow the scope of their request, when in-fact the Bulletin accepted the suggestion and significantly narrowed the scope of their request by limiting it to responsive emails. This fact, when considered with the factors discussed above (particularly the relatively few responsive documents estimated to be discovered and the relatively short amount of estimated time required to process the documents) results in a finding that BLP's decision to deny the Bulletin's fee waiver request was unreasonable.²

BLP is Ordered to waive the fees to process the Bulletin's request and provide the Bulletin with nonexempt records that are responsive to their request. The default length of time to comply per ORS 192.407(3)(a) is seven days, but the statute grants me authority to extend the deadline to a date I "conclude is appropriate." In light of the fact the requested records in this case require legal review to segregate protected health information, and in light of the fact next week contains the Veteran's Day holiday, I will extend the deadline to November 18, 2021.

By 5:00 PM on November 18, 2021, BLP must either provide the Bulletin with nonexempt records responsive to their request, or seek review of my decision in Deschutes County Circuit Court.

Thank you again for your timely and professional interactions during this process.

Sincerely,



John Hummel
District Attorney

² It is likely that if BLP had granted a partial fee waiver I would have found their decision to not grant a 100 percent waiver to be reasonable.

John Hummel

From: Nicole Bales <nbales@bendbulletin.com>
Sent: Friday, October 29, 2021 12:53 PM
To: John Hummel; Jessica Chandler
Subject: Fee appeal
Attachments: Records request_Bend High (1) (2).pdf; EO Media Group Mail - Bend High virus cases.pdf; EO Media Group Mail - Outbreak report.pdf; EO Media Group Mail - Public records request.pdf; Bales Oct 2021 Estimate (1).pdf

You don't often get email from nbales@bendbulletin.com. [Learn why this is important](#)

[EXTERNAL EMAIL]

Good Afternoon,

We would like to appeal a fee Bend-La Pine Schools is requesting from The Bulletin to obtain records related to coronavirus cases at Bend High School.

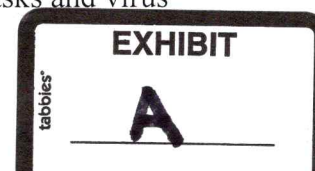
On Oct. 11 we requested emails from all staff and school board members between September 24, 2021 to October 11, 2021 that involve Bend High School and include and involve COVID-19, quarantine, isolation, exposure, Bend High School football team and the football team's coaches.

The request followed communication (which is attached) with the district's director of safety and communication. We emailed the director on Oct. 10 to ask about virus cases tied to the high school football team. We had received a reliable tip that day that the football game was cancelled because of cases tied to the team and in-school spread. We also were told that the football coach would not wear a mask in the weight gym and told students they didn't need to either.

The director of safety and communications provided little information. When we realized we were not going to receive adequate information from the district, we filed the attached public records request. The director of safety and communications called us minutes after the request was sent and recommended we edit it so it wasn't as broad to keep costs lower. She also said she would speak with the district's attorney about what she could share about the cases. We updated our request as she recommended, but we never heard back from her regarding the cases.

As of Wednesday, the Oregon Health Authority in its weekly outbreak report has reported 38 virus cases at Bend High School with the most recent onset date of 10/18/2021. The health authority on Wednesday reported an outbreak of 12 virus cases at Bend High School with the most recent onset date of 10/12/21. It is also the largest K-12 active outbreak reported in Central Oregon. We contacted the director of safety and communication on Wednesday about the report asking for more information. We followed up again today and have yet to receive any information.

The school district is requesting \$656.44 for the records we requested. We believe these records are of public interest and we expect to use them to write a news story. We believe the school district should waive the fees. People in the public have reached out to us with concerns about the outbreak and how masking is handled on the football team. We would like to inspect these records to better understand the situation and how it was addressed. As you know, there has been significant debate regionally and nationally over masks and virus



precautions in schools. We believe this information should be accessible and available to the public. Please let us know if you need any other information.

Thank you for your time.

Nicole Bales

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Nicole Bales

Reporter

The Bulletin

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OFFICE OF THE SUPERINTENDENT
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November 2, 2021

Via Email Only at John.Hummel@dca.us
John Hummel
District Attorney
The Office of the District Attorney
1164 NW Bond St.
Bend, OR 97703

Via Email Only at nbales@bendbulletin.com
Nicole Bales
320 SW Upper Terrace Dr.
Suite #200
Bend OR 97702

Re: Bulletin's appeal of fee waiver denial

District Attorney Hummel and Ms. Bale:

This letter serves as the Bend-La Pine Schools ("District") response to The Bulletin's ("Bulletin") appeal of its fee waiver request for a public records request.

The District desires to supplement the record with respect to the communications between the District and the Bulletin and has attached the email exchanges between Ms. Bales and Janet Bojanowski, who is the District employee responsible for processing public records request. The records requested by Ms. Bales sought records between any staff and school board members including emails, text messages, memos, letters and other communication between September 24, 2021, to October 11, 2021, involving COVID-19, quarantines, isolations, and exposures of the Bend High football team and its coaches. Ms. Bojanowski advised Ms. Bales that her request was likely to produce a large number of records and that the request was broad and that some of the records she sought contained exempt records concerning student information and private medical information. Ms. Bojanowski suggested that starting with emails may provide the information she sought and then if Ms. Bales wished she could seek specific types of records from specific individuals. Ms. Bales agreed with that approach.



The District understands that as a public body it may waive or reduce its fees for responding to a records request. The District further believes COVID-19 and its impact on our community and its schools is a matter of public interest. However, even if a request meets the public interest test, a public body still retains the discretion to waive or reduce its fee, provided its decision is reasonable under the totality of the circumstances. *In Defense of Animals v. OHSU*, 199 Or. App. 160, 189-190 (2005).

The District understands that it may 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 a public body. Public Records Order, Sept. 10, 2009, Rogers, at 3.

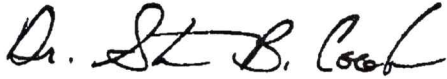
Character of Public Interest - Again, the District acknowledges COVID-19 and its impact on our community and its schools as a matter of public interest.

Impact of Fee on Public Interest – Ms. Bales makes the argument that the District should waive its fee in its entirety. The District is not aware that the fee impedes the Bulletin from obtaining the records from any communication with Ms. Bales including the communication in her appeal. Ms. Bales was made aware that the format of her request was broad. Ms. Bales elected to retain the scope of her request and Ms. Bojanowski suggested ways to minimize the breadth of the request without knowing exactly what Ms. Bales was seeking. It is possible that Ms. Bales could narrow her request but she, as is her right, elected not to. If Ms. Bales had elected to narrow her request, it is possible that it would have required far less time and effort to fulfill the request. Additionally, the fee estimate is based upon the projected number of pages returned in the search. Oregon's Public Records Act requires a public body to refund any overpayment in the event the actual costs are less than the estimated fees.

Burden on Public Body (and Actual Cost) –The request requires the District's technology staff to formulate search terms for an electronic query into the District's email accounts. It then requires District staff to print and review the responsive documents for duplications, which is especially time-consuming for a request that includes multiple emails between Bend High Staff. Further, Ms. Bales requests seeks information between any staff and school board members including emails, text messages, memos, letters and other communication between September 24, 2021, to October 11, 2021, involving COVID-19, quarantines, isolations, and exposures of the Bend High football team and its coaches. There is a high likelihood that the records sought contain confidential medical or educational information that is exempt from disclosure. The district has an obligation and responsibility to segregate exempt from nonexempt materials and its failure to do so would exposes the district to liability.

For the reasons described above, the District believes its estimated fees of \$656.44 is reasonable under the totality of the circumstances. The District respectfully asks that Mr. Hummel deny the Bulletin's request for relief.

Sincerely,

A handwritten signature in black ink, appearing to read "Dr. Steven Cook". The signature is fluid and cursive, with the first letters of each word being capitalized and prominent.

Dr. Steven Cook
Superintendent

Attachment: Bales/Bojanowski email correspondence