



## John Hummel District Attorney

1164 NW Bond Street • Bend, Oregon 97701  
(541) 388-6520 • Fax: (541) 330-4691  
Grand Jury Fax: (541) 330-4698  
[www.ddda.us](http://www.ddda.us)

December 15, 2016

Ian M. Leitheiser  
Associate City Attorney  
City of Bend  
Sent Via email only: [ileitheiser@bend.oregon.gov](mailto:ileitheiser@bend.oregon.gov)

Joseph Yazbeck, Jr.  
Attorney for Camp Creek Electric  
Jordan Ramis PC  
Sent Via email only: [Joseph.yazbeck@jordanramis.com](mailto:Joseph.yazbeck@jordanramis.com)

Gentlemen:

On December 9, 2016, Camp Creek Electric (Camp Creek) filed with me what they refer to as an appeal of the City of Bend's (Bend) denial of some of their recent public records requests. But a close look at their request indicates it is more accurately described as a request for clarification of the November 14, 2016 Order I issued in this matter.

Camp Creek indicates that Bend has not provided them with all of the documents I ordered produced in the November 14<sup>th</sup> Order, and that the records that have been provided are not in the format I ordered them to be provided in. Camp Creek argues that Bend has withheld some of the documents based on privilege claims. Camp Creek asks me to clarify whether the intent of my November 14<sup>th</sup> order was for all documents to be provided, regardless of any potential claim by Bend of public record exemption, or, conversely, whether my order contemplated Bend being able to make future exemption claims.

Camp Creek asks that if my intent was the former, an explicit statement to this effect is desired, and if my intent was the latter, that they now appeal Bend's withholding of the documents that Bend claims exemptions for.

My intent was the former. Remember, in the proceedings that resulted in my order of November 14, 2016, Bend did not appear. Prior to issuing my ruling I contacted Bend and asked them to submit legal arguments in support of their position, but they failed to do so. Consequently, I accepted Camp Creek's statement of facts and proceeded to conduct my legal analysis.

Bend's lack of appearance hampered their ability to carry their burden of persuasion to convince me that their decision to withhold records was proper, but it did not result in an "automatic" win for Camp Creek – Oregon's public records law was reviewed and applied to each step of the analysis.

There were two questions to answer in the appeal:

1. Did Bend Constructively Deny Camp Creek's Request for the Documents?
2. Was Bend required to provide the documents in PST format as opposed to PDF format?

I answered "Yes" to both of these questions.

I found a delay of 10.5 months for two of the requests and 5.5 months for the other, in the absence of legal argument and evidence from Bend justifying the delay, constituted an unreasonable delay under Oregon's Public Records Law and thus constituted a constructive denial of Camp Creek's request.

And I ruled that because Bend maintains their emails in PST format, and that Oregon's public records law requires a public body to provide requested documents in the format in which the public body stores the documents if this format is requested by the requestor, Bend had to provide the documents in PST format.

As a result, I ordered that Bend must either provide the documents to Camp Creek no later than November 21, 2016 or, no later than November 21, 2016, issue a notice of their intention to institute proceedings for injunctive or declaratory relief in Deschutes County Circuit Court.

Apparently Bend did not provide all of the records to Camp Creek nor did they issue a notice of intent to institute proceedings for injunctive or declaratory relief. Instead, Bend provided some of the records and withheld others based on claims of exemptions to Oregon's public records law. This was in direct violation of the November 14, 2016 order.


Bend had the opportunity to argue whether one or more exemptions applied to one or more of the documents in question – this opportunity was during the appeal proceedings I held that led up to the November 14<sup>th</sup> order. Bend chose not to appear and make those arguments. They had another opportunity to make their exemption arguments – by filing a notice no later than November 21<sup>st</sup> in Deschutes County Circuit Court.

Instead, Bend chose to not provide all of the records that were ordered to be produced and to not initiate proceedings in Circuit Court. This was in direct violation of the November 14<sup>th</sup> Order.

Oregon's public records law does not grant district attorneys enforcement powers over public records appeal orders they issue. Consequently, Camp Creek will have to decide how or if to seek redress for my ruling today that Bend is in violation of the November 14<sup>th</sup> order.

As an aside, I encourage the parties to consider a more collaborative approach to resolve their outstanding public records matters than the contentious, time consuming, and unproductive path that is currently being pursued. Perhaps an agreement to have an arbitrator spend a day or two with each party and then issue a binding ruling that addresses all outstanding public records requests? Then moving forward the discovery process could control? I of course will continue to rule on any appeals that come my way – I share my thoughts here because how this is being handled now does not seem to be working for either party.

Sincerely,



John Hummel  
District Attorney