



John Hummel District Attorney

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November 14, 2016

Ian M. Leitheiser
Associate City Attorney
City of Bend
Bend, Oregon
Sent Via email only: ileitheiser@bend.oregon.gov

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

Gentlemen:

Pursuant to ORS 192.470, Camp Creek Electric (Camp Creek) filed an appeal with me requesting that I review the City of Bend's (Bend) denial of one of their recent public records requests.

Pursuant to ORS 192.470(2) I immediately contacted the City of Bend (Bend) and provided them this notice:

Pursuant to ORS 192.470, Camp Creek Electric filed an appeal with me requesting that I review what they claim to be the City of Bend's denial of one of their recent public records request. The details of the request are contained in the attached appeal letter dated November 7, 2016.

Please let me know if the City of Bend intends to provide the records in question to Camp Creek. If you intend to deny Camp Creek's request, please tell me the basis for this denial and I will then begin my review of the appeal. If the City denies Camp Creek's request, Pursuant to ORS 192.470(2), please: "[T]ransmit the public record disclosure of which is sought, or a copy, to [me], together with a statement of [the City of Bend's] reasons for believing that the public records should not be disclosed."

Based on the claim in the appeal, it appears Bend might argue that Bend has not denied Camp Creek's request as Bend is still processing the request. If this is Bend's position please present you argument as to why the amount of time Bend has taken to process this request is reasonable. Also, if this is Bend's

argument, the documents sought by Camp Creek are irrelevant to my decision (since my decision will not be based on whether an exemption exists – my decision will be limited to whether the length of time Bend has taken to comply is reasonable), so I will consent to Bend not providing the records in question (see: 192.470(2)).

Pursuant to ORS 192.465 I will issue my decision by 5:00 PM on November 14th.

Bend did not respond. This letter constitutes my Order in this case.

FINDINGS

Because Bend did not submit a legal argument, or present evidence, I adopt the facts as presented in Camp Creek's appeal letter dated November 7, 2016 (attached).

LEGAL ANALYSIS

Burden of Persuasion:

Bend has the burden of persuasion to convince me that their decision in this matter was proper. *ORS 192.450(1)*.

Standard of Proof:

In order for Bend to carry their burden of persuasion I must affirmatively conclude that the records request was not denied, or, that the request was denied but the requested records are exempt. If I do not so conclude, I must order them to be disclosed. *Attorney General's Public Records and Meetings Manual 2014, section I.G.1.b. (citing Oregon Attorney General Public Records Order, March 4, 2008, Brent Walth)*.

Application of Law:

There are two issues to address in this appeal:

- Has Bend constructively denied Camp Creek's request for the documents they have not yet provided?
- Is Bend required to provide the documents in question in PST format as opposed to PDF format?

1. Has Bend Constructively Denied Camp Creek's Request For the Documents they Have Not Yet Provided?

Bend provided some of the requested emails and has not provided others. Camp Creek argues the refusal to provide all of the requested emails constitutes a constructive denial of their request.

a. Actual Denial?

A District Attorney does not have jurisdiction to rule on a public records appeal until a public body has denied a request for disclosure. *Oregon Attorney General Public Records Order, August 13, 1987, Bennett Hall and Chris Bristol, Attorney General's Public Records and Meetings Manual 2014, Appendix F p.9.*

As previously mentioned, Bend has not appeared in this case and has presented no evidence. However, because the subject of this particular appeal has been litigated previously between these parties I assume, based on arguments presented in previous cases, that Bend's position is that they have not denied Camp Creek's public records' request; they are processing the request and have not completed this work.

Based on this argument I find Bend has not explicitly denied Camp Creek's public records request.

b. Constructive Denial?

A determination that Bend has not explicitly denied Camp Creek's request is not be the end of the analysis. At some point, in spite of the lack of an explicit denial by a public body, and even with a consideration of the fact the public body continues to work on processing a request, a failure to complete processing of the request can constitute a constructive denial. (*For the proposition that public records request denials can be actual or constructive, See: Oregon Attorney General's Public Records Order, May 9, 1989, Paul R. Hribernick, Attorney General's Public Records and Meetings Manual 2014, Appendix F p.19.*)

Has Bend constructively denied Camp Creek's request?

The relevant law is ORS 192.430(1) which says that custodians of public records: "shall furnish proper and reasonable opportunities for inspection and examination."

Is the amount of time that has transpired since Camp Creek requested the records, reasonable?

There are three requests at issue in this appeal:

- December 24, 2015: Camp Creek requested from Bend all emails between Bend and Jeff England from the 2013 to the request date.
- December 24, 2015: Camp Creek requested from Bend all emails between Bend and Scott Thompson from 2013 to the request date.
- June 4, 2016: Camp Creek requested from Bend all emails sent to and from Bend employee Peggy Spencer from June 2013 to the request date.

Bend has the burden of persuasion to convince me that their decision to process Camp Creek's public records request in the manner they have chosen is authorized by Oregon law. In order to carry this burden they must cause me to affirmatively conclude that their response to date has been "proper and reasonable." ORS 192.430(1)

Bend fails to carry their burden. 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, constitutes an unreasonable delay under Oregon's Public Records Law and thus constitutes a constructive denial of Camp Creek's request. Therefore, I Order Bend to produce these records to Camp Creek.

2. Is Bend required to provide the documents in question in PST format as opposed to PDF format?

Camp Creek argues that Bend maintains their email in PST format, that Camp Creek requested the emails be provided in PST format, and that Bend provided them in PDF format. Camp Creek argues 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 in, if this is the format requested by the requestor.

Camp Creek is correct.

If the public record is maintained in a machine readable or electronic form, the custodian shall provide a copy of the public record in the form requested, if available. If the public record is not available in the form requested, the custodian shall make the public record available in the form in which the custodian maintains the public record.

ORS 192.440(3)

Bend is ordered to produce the requested documents in PST format.

CONCLUSION

Bend constructively denied Camp Creek's request the emails they have not yet provided to Camp Creek. Therefore, I Order Bend to produce these records to Camp Creek.

When Bend provides these documents to Camp Creek they must be provided in PST format. In regard to the documents that Bend previously provided to Camp Creek in PDF format, Bend must provide new copies of these documents to Camp Creek in PST format.

Bend must either provide these documents to Camp Creek no later than November 21, 2016 (see: ORS 192.450(2) and 174.120(1)) or, no later than November 21, 2016, "issue a notice of their intention to institute proceedings for injunctive or declaratory relief in the Circuit Court for [Deschutes] County." ORS 192.450(2) and 192.460(1)(b).

Sincerely,

John Hummel
District Attorney