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VIA E-MAIL ONLY: misha.isaak@stoel.com and amber.nabors@biz.oregon.gov

Misha Isaak
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760 SW Ninth Ave, Ste 3000
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Amber Nabors
Oregon Business Development Department
775 Summer St., NE
Salem, OR 97301

Re: Petition for Public Records Disclosure Order
Oregon Business Development Department
DOJ File No.: 123660-GA0098-23

Dear Mr. Isaak and Ms. Nabors:

This letter is the Attorney General's response to Mr. Isaak's petition, on behalf of a client, for disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478. His petition, which we received June 5, 2023,[1] asks the Attorney General to find that the Oregon Business Development Department ("Business Oregon") has failed to respond to a public records request within prescribed timeframes, and grant the following relief:

> (1) an order that the records be provided under ORS 192.411;
>
> (2) an order under ORS 192.407 that the agency has failed to respond to the request as required by ORS 192.329; and
>
> (3) all of the remedies available under ORS 192.407(3).

Mr. Isaak also seeks any other remedies that may be available. As explained below, we dismiss the petition with respect to records that Business Oregon has now disclosed. We otherwise grant the petition with respect to Mr. Isaak's first and second requests. However, we decline to order the remedies allowed by ORS 192.407(3) because, on this record, we ultimately do not find that Business Oregon responded to his request with undue delay, despite some missteps in its communications with Mr. Isaak.

[1] We thank Mr. Isaak for granting an extension of time in which to respond.

The Public Records Law confers the right to inspect public records in Oregon, unless such records are exempt under ORS 192.338, 192.345, or 192.355. ORS 192.314(1). The law is a disclosure law, and agencies are obligated to respond to records requests "as soon as practicable and without unreasonable delay." ORS 192.329(1). An agency that is unable to complete its response within fifteen business days of receiving a written request is required to provide the requester with a reasonable estimated completion date. ORS 192.329(5). A requester may petition the Attorney General if they believe an agency has failed to comply with the processing timelines or other provisions contained in ORS 192.329. ORS 192.407(1). The Attorney General must treat an agency's failure to provide a timely response as a denial of the request, unless the agency can demonstrate that compliance was not required under ORS 192.329. ORS 192.407(1)(a). The agency carries the burden to sustain its actions. ORS 192.411(1). If the Attorney General grants a petition and finds that the agency responded to the request with undue delay or otherwise failed to respond to the request, the order granting the petition may require the agency to waive or reduce its processing fees, and to pay a penalty of $200 to the requester. ORS 192.407(3).

Mr. Isaak's petition stems from an April 26, 2023, request for all records referencing "Moonshadow" or "Boesjes." We understand that Business Oregon timely acknowledged that request the next day. ORS 192.324(2). On May 16, fourteen business days after receiving the request, Business Oregon informed Mr. Isaak that its initial search revealed potentially hundreds of thousands of responsive records and requested that he narrow the scope and timeframe of his request. Later that day, he responded that he would like the actual search result numbers, the cost estimate for processing his original request, and a separate cost estimate for a subset of records that also contains the search term "Hegle." Thereafter, he requested a status update from Business Oregon on May 19 and again on May 25. Business Oregon responded on May 26 and informed Mr. Isaak that there were nearly 12,000 records responsive to his original request, of which 354 records also contained the term "Hegle." The response did not include either of the fee estimates he requested. Mr. Isaak responded that day requesting that Business Oregon disclose the subset of records containing "Hegle," provide an estimated completion date for those records, and provide the fee estimate for his original request. As of the date of his petition, Business Oregon had not furnished Mr. Isaak with any records, provided him with an estimated completion date, or provided its fee estimate for his original request.

As an initial matter, we understand that Business Oregon has now completed its response to Mr. Isaak's request for the subset of records at no charge and also provided him with the fee estimate to process his initial request. Because Business Oregon has completed its response to those parts of Mr. Isaak's request, we respectfully dismiss those aspects of his petition as moot.

The remainder of Mr. Isaak's petition relates to his original request. The record demonstrates that Business Oregon did not respond to that request as required by ORS 192.329 within the prescribed timeframe; specifically, Business Oregon failed to provide him with a reasonable estimated completion date within fifteen business days. And because Business Oregon has not explained why compliance was impracticable for one of the reasons listed in

ORS 192.329(6), we are required to treat this failure to timely respond as a denial of Mr. Isaak's initial request. ORS 192.329(1)(a). We therefore grant Mr. Isaak's petition as it relates to his original request.

When an agency fails to comply with ORS 192.329, we have discretion to order the disclosure of nonexempt material within any timeframe we deem appropriate to bring the agency into compliance with ORS 192.329. ORS 192.407(3). In determining an appropriate timeframe for disclosure in this instance, we note that Business Oregon currently estimates that it will take about 230 hours to gather, duplicate, and review the approximately 12,000 responsive records it has identified. The department also informs us that it is currently able to commit an average of ten hours per week to processing the request and estimates that it will complete its response within 23 weeks of receipt of payment of its estimated processing fees. Business Oregon also reports that it will produce nonexempt records on a rolling basis as they become available.

On this record, we decline to exercise our discretion to order disclosure within a particular timeframe. Given the large volume of records at issue, the considerable amount of time it will take to process them, and the fact that a subset of records has already been disclosed, we do not believe that Business Oregon's failure to timely respond will unduly delay the production of records. We also find Business Oregon's proffered commitments of ten hours per week to processing the request and to furnishing nonexempt records on a rolling basis to be reasonable. *See* Public Records Order, Nov 24, 2021, Anderson (a commitment of eight to ten hours per week was reasonable given the size and scope of the request). Under the circumstances, we find that the timeframe proposed by Business Oregon substantially complies with the law based on the information currently available, and therefore respectfully decline to order disclosure within a particular timeframe. *See* ORS 192.329(5)(b).

We also decline to grant Mr. Isaak's request that we order Business Oregon to pay a $200 penalty, or to waive or reduce its processing fees because we cannot conclude that the department's untimely response constituted undue delay. *See* ORS 192.407(3). Business Oregon made a timely request that Mr. Isaak narrow the scope of his original request, and he responded by requesting a fee estimate. Although it took Business Oregon approximately fourteen business days to provide its estimate, there was no actual delay in the processing of Mr. Isaak's initial request because the department was actively processing a subset of that request throughout that time period. Business Oregon has now completed its response to that portion of his request at no charge. Because Business Oregon has now provided its fee estimate for Mr. Isaak's original request and has not otherwise denied any aspect of that request, we respectfully decline to order any additional sanctions.

In conclusion, we grant Mr. Isaak's petition with respect to his initial request but decline to order disclosure within a particular timeframe. We therefore order Business Oregon to complete its response to Mr. Isaak as soon as practicable and without unreasonable delay, with disclosures of nonexempt records on a rolling basis, and subject to his payment of Business Oregon's estimated processing fees. *See* ORS 192.329(1) and (3). If Business Oregon elects not

to comply with this order, it has seven days to announce its intention to seek judicial review. ORS 192.411(2). We also decline to grant Mr. Isaak's request that we order additional sanctions because we cannot conclude that the department's untimely response constituted undue delay in this instance.

Sincerely,

LISA M. UDLAND
Deputy Attorney General

ACF/pjn