

## RESOLUTION No. 37479 ~~As Amended~~

Authorize City Attorney to appeal final judgment in *Alan Lloyd Kessler v. City of Portland*, Multnomah County Circuit Court Case No. 18CV43134 (Resolution)

WHEREAS, on August 7, 2018, Plaintiff Alan Kessler submitted a public records request to the City seeking the production of metadata contained in emails between certain email accounts of Bureau of Development Services employees and an Historic Landmarks Commissioner; and,

WHEREAS, because the City does not maintain records in the metadata format requested by Plaintiff, and thus the Bureau of Technology Services was unable to provide the records in that format, the City Attorney's Office and the Bureau of Technology Services attempted to fulfill the records request by providing the emails to Plaintiff in their native format, which Plaintiff rejected and appealed to the District Attorney; and,

WHEREAS, on August 28, 2018, the District Attorney granted Plaintiff's request in part, ordering the City to produce the records in the form in which they are maintained by the records custodian; and,

WHEREAS, on September 28, 2018, the City provided approximately 3500 pages of documents to Plaintiff in native format containing all of the information requested by Plaintiff in his public records request in accordance with the District Attorney's order; and,

WHEREAS, the City billed Plaintiff \$311.67 to fulfill his records request, in part to recover the Bureau of Technology Services' costs in conducting an electronic records search, and in other part to recoup Bureau of Development Services' staff time to fulfill the request, which Plaintiff paid; and

WHEREAS, on October 9, 2018, Plaintiff served the City with a lawsuit filed in Multnomah County Circuit Court, alleging that the City had violated the Oregon Public Records Act by: (a) failing to provide him with all of the records he requested; (b) failing to timely comply with the District Attorney's order; (c) charging him fees that exceeded the time that the Bureau of Technology Services spent in its records search and an amount that he alleged was "excessive" for the work performed; and (d) failing to provide him with the records in metadata format; and,

WHEREAS, prior to trial, the City refunded Plaintiff \$52.00 to reimburse him for an overcharge of 15 minutes in conducting the Bureau of Technology Services' records search and an adjustment in the hourly rate of the bureau employee who had conducted the search; and

WHEREAS, on November 4, 2019, the matter went to trial in the Multnomah County Circuit Court, after which the court issued an opinion and order, and then a judgment, finding that the City did not violate the District Attorney's order to timely produce the records, nor did the City violate the District Attorney's order to produce the records in an available format; and,

WHEREAS, the court further found that the City charged Plaintiff \$24.28 more than the Bureau of Technology Services' costs of conducting the email search, which costs the City had already reimbursed Plaintiff prior to trial, and that the Bureau of Technology Services charges hourly rates that the court believes are "excessive" for nature of the tasks being performed in an email search; and,

WHEREAS, the court thus enjoined the City from "charging excessive fees for routine email and document searches" and ordered the City to recalculate the time the Bureau of Technology Services spent conducting the email search for Plaintiff using "the lowest hourly rate charged by any department personnel who could be responsible for responding to public records requests, plus any overhead factor..."; and

WHEREAS, the Bureau of Technology Services thus recalculated its email search fee for Plaintiff's request at the lowest hourly rate charged by a bureau employee who is qualified to conduct the search and has determined that fee to be \$51.51, which was fully covered by the \$52.00 refund the City issued to Plaintiff prior to the trial; and

WHEREAS, the Bureau of Technology Services has changed its billing practices so that it bills for public records searches at a standard public records rate based on the lowest hourly rate charged by a bureau employee who is qualified to conduct the search plus overhead, and City bureaus requesting Bureau of Technology Services' assistance in conducting public records searches are credited for estimated charges that exceed the actual time expended by bureau employees on each request, which credit can be passed back onto the requestor; and

WHEREAS, the City Attorney's Office most respectfully believes that the court's judgment exceeds the scope of its authority; and

WHEREAS, the City Attorney's Office most respectfully finds the court's judgment enjoining the City from "charging excessive fees" to be vague because the public records law allows governments to charge fees that are "reasonably calculated to reimburse" their actual costs, which the City's fees are designed to achieve, and because the judgment is not clear as to what the court considers to be "excessive," and also because the judgment is unclear as to whether it applies to future public records requests or to Plaintiff only; and

WHEREAS, having prevailed on the issue of the City overcharging him by \$51.51, which the City fully refunded prior to trial, Plaintiff is seeking attorney's fees and costs in excess of \$120,000; and

WHEREAS, if the Multnomah County Circuit Court decision is left in state, it will prevent the City from using its expertise and discretion in using the Bureau of Technology Services' employees it feels are qualified from conducting public records searches and from recouping its actual costs; and

WHEREAS, it is of paramount importance to the City to ensure full transparency in its public records and to comply with the court's judgment, but the judgment lacks sufficient clarity to ensure that the City can comply with its mandate; and

WHEREAS, the City is committed to continuing to improve its public records process to ensure transparency and accessibility of its public records to all who seek them.

NOW, THEREFORE, BE IT RESOLVED, the City Attorney is authorized to take the steps necessary to appeal the Multnomah County Circuit Court's final judgment entered January 9, 2020, in *Alan Lloyd Kessler v. City of Portland*, Multnomah County Circuit Court Case No. 18CV43134, to the Oregon Court of Appeals and any other higher court and, in furtherance of such appeal, to make any stipulation, agreement, or admission as in her judgment may be in the interest of the City.

BE IT FURTHER RESOLVED, the City is already taking steps to have a records-fee policy that ensures transparency, and thus the City should enter into settlement discussions during the pendency of the appeal to resolve the case.

Adopted by the Council: FEB 05 2020

Mayor Ted Wheeler  
Prepared by: Karen L. Moynahan  
Date Prepared: January 27, 2020

**Mary Hull Caballero**  
Auditor of the City of Portland

By 

Deputy

Agenda No.  
**RESOLUTION NO. 37479 As Amended**  
 Title

Authorize City Attorney to appeal judgment in Alan Lloyd Kessler v. City of Portland, Multnomah County Circuit Court No. 18CV43134 (Resolution)

<p><b>INTRODUCED BY</b>                  Commissioner/Auditor:  <b>Mayor Wheeler</b></p>	<p>CLERK USE: DATE FILED <u>JAN 28 2020</u></p>
<p><b>COMMISSIONER APPROVAL</b></p> <p>Mayor—Finance &amp; Administration - Wheeler <i>W</i></p> <p>Position 1/Utilities - Fritz</p> <p>Position 2/Works - <del>Fritz</del> <i>Vacant</i></p> <p>Position 3/Affairs - Hardesty</p> <p>Position 4/Safety - Eudaly</p>	<p>Mary Hull Caballero                  Auditor of the City of Portland</p> <p>By: <i>[Signature]</i>                  Deputy</p>
<p><b>BUREAU APPROVAL</b></p> <p>Bureau: Office of the City Attorney                  Bureau Head: Tracy Reeve <i>TR</i></p>	<p><b>ACTION TAKEN:</b></p>
<p>Prepared by: K. Moynahan                  Date Prepared: January 27, 2020</p>	
<p><b>Impact Statement</b></p> <p>Completed <input checked="" type="checkbox"/> Amends Budget <input type="checkbox"/></p>	
<p><b>Portland Policy Document</b>                  If "Yes" requires City Policy paragraph stated in document.</p> <p>Yes <input type="checkbox"/> No <input checked="" type="checkbox"/></p>	
<p><b>City Auditor Office Approval:</b>                  required for Code Ordinances</p>	
<p><b>City Attorney Approval:</b> <i>SPR</i>                  required for contract, code, easement, franchise, comp plan, charter</p>	
<p>Council Meeting Date <b>February 5, 2020</b></p>	

AGENDA	FOUR-FIFTHS AGENDA	COMMISSIONERS VOTED AS FOLLOWS:	
		YEAS	NAYS
<p><b>TIME CERTAIN</b> <input type="checkbox"/></p> <p>Start time: _____</p> <p>Total amount of time needed: _____                      (for presentation, testimony and discussion)</p>	1. Fritz	1. Fritz ✓	
<p><b>CONSENT</b> <input type="checkbox"/></p>	2. <del>Fritz</del> <i>Vacant</i>	2. <del>Fritz</del> <i>Vacant</i>	
<p><b>REGULAR</b> <input checked="" type="checkbox"/></p> <p>Total amount of time needed: <u>15</u>                      (for presentation, testimony and discussion)</p>	3. Hardesty	3. Hardesty ✓	
	4. Eudaly	4. Eudaly ✓	
	Wheeler	Wheeler ✓	