



November 3, 2022

SENT VIA E-MAIL

Robert Taylor, City Attorney
Ted Wheeler, Mayor
Jo Ann Hardesty, Commissioner
Mingus Mapps, Commissioner
Carmen Rubio, Commissioner
Dan Ryan, Commissioner
City of Portland
1221 SW 4th Avenue
Portland, OR 97204

RE: Demand to Halt Vote on Proposed Camping Ban / Notice of Claim / Preservation and Request for Records

Dear Portland City Attorney Taylor, Mayor Wheeler, and Commissioners Hardesty, Mapps, Rubio, and Ryan:

I write to preserve the rights of my client, [Street Roots](#), a non-profit news organization in Portland, Oregon that produces an award-winning weekly street newspaper sold by people experiencing homelessness and poverty to earn an income.

Street Roots sends notice of potential claims and the attendant duty to preserve relevant evidence. Street Roots also seeks recent public records of communications between the offices of Dan Ryan, Ted Wheeler and Sam Adams, the City Clerk and individuals prioritized for public comment (or their supporters) at the October 26, 2022 hearing on the Dan Ryan, Mayor Wheeler, and Sam Adams' proposal to ban camping and place people in large camp compounds ("the Proposed Ban").¹ *See, e.g.*, Alex Zielinski, "Wheeler, Ryan Unveil Unfunded Proposal to

¹ www.portland.gov/council/documents/resolution/mental-health-and-substance-abuse-recovery-resolution

Criminalize Homelessness,” The Portland Mercury (October 21, 2022)²; Nicole Hayden, “Portlanders Offer Mixed Reviews on mayor’s camping ban proposal” OregonLive (October 26, 2022) (describing the “prioritization of the business community” that Mayor Wheeler’s staff confirmed was requested by Dan Ryan’s office).³

Additionally, Street Roots and the ACLU of Oregon jointly admonish the City leadership controlling the timing and form of this so-called proposal. The Proposed Ban was made public by Mayor Ted Wheeler and Commissioner Dan Ryan at a press conference on October 21, 2022, a press conference to which Street Roots journalists were not invited, despite the paper’s longtime coverage of homelessness issues. The press conference was less than three weeks before an election in which homelessness is a top and exceptionally divisive issue for Portland voters. And, today’s vote on the Proposed Ban – which is just a resolution and does not accomplish anything concrete except to invite litigation – comes a mere five days before election day. The rushed and suspect timing of Mayor Wheeler and Dan Ryan’s actions, coupled with the prioritization of opinions in line with those seeking to unseat a current council member, is extremely concerning. Moving forward with this symbolic vote, especially with the current rushed and problematic timeline, is unnecessary and reckless and appears to be designed to score political points at the expense of the vulnerable people Street Roots serves.

We demand that the City Council delay voting on the Proposed Ban until all council members and the public can hear an unbiased presentation of viewpoints, and to stop using taxpayer money for political theater. The council should pause until it can create an unbiased forum that intentionally considers accommodating those who were harmed by last week’s deprioritization. Given the impacts of last week’s discrimination, that day is not today.

Background and Notice of Claims

Portland has a long history of failed attempts to use criminal punishment as a means to control where and when unhoused Oregonians can and cannot sleep. *See, e.g.*, Matt Davis, “Kick ‘Em to the Curb,” The Portland Mercury (April 22, 2010) (describing then-mayor Sam Adams’ attempt to refashion a sit-lie ordinance that was deemed unconstitutional); *accord* Ramona Cowles, “Landmark decision by Multnomah County Judge Stephen Gallagher overturns Portland’s nineteen-year-old anti-camping ordinance” Street Roots (October 2000).⁴

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www.portlandmercury.com/Housing/2022/10/21/46147935/wheeler-ryan-unveil-unfunded-proposal-to-criminalize-homelessness

³ www.oregonlive.com/portland/2022/10/portlanders-offer-mixed-reviews-on-mayors-camping-ban-proposal.html

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<https://twitter.com/StreetRoots/status/1587928178919899136?s=20&t=7UdlV5KrvxFQMwyJkMcF1g>

The Ninth Circuit Court of Appeals, whose decisions bind the City’s actions, has repeatedly, and as recently as a month ago, flatly rejected criminally-enforced camping bans as unconstitutional cruel and unusual punishments. *See, e.g., Johnson v. Grants Pass*, 50 F.4th 787 (9th Cir. 2022).

Such plainly problematic policies fuel campaigns that demonize our unhoused neighbors, sow division, and embolden the false belief that criminal punishment for sleeping outside is legal. *See, e.g.* Rebecca Ellis, “Portland City Council candidate Rene Gonzalez pledges ‘tough love’ in bet voters are moving to the center,” Oregon Public Broadcasting (October 20, 2022) (wherein a political candidate calls it merely “tough love” in taking the position that unsheltered people should be ticketed or potentially face jail time).⁵

Indeed, there is also evidence suggesting that Wheeler, Adams, and Ryan may be working with divisive advocacy campaigns to move City policies forward in violation of the civil rights of unhoused Portlanders, creating potential liability for more than just the electeds. For example, Adams has relied on political polls funded by People for Portland and the Portland Business Alliance. *See* Rebecca Ellis, “People for Portland is spending big to change the city’s approach to homelessness. Is it working?” Oregon Public Broadcasting (Feb. 28, 2022) (“People for Portland has been divisive since day one.”).⁶ It does not seem coincidental, then, that a new poll from the Portland Business Alliance that surveyed only 400 people and posited there was widespread support for the Proposed Ban surfaced yesterday, just a day before the Council’s vote on the Proposed Ban.

No matter how popular criminalizing homelessness might become, it does not render it lawful. Criminalization has been Portland’s go-to solution for the decades preceding our ongoing crisis. It is clearly not working.

Some Oregon government bodies have been successful in getting people into homes and motel-based shelters without long wait times. For example, since its launch this spring, the Move-In Multnomah program housed people in weeks – rather than months or years. Metro’s regional long-term rent assistance moves people into housing and prevents evictions while providing long-term stability. Project Turnkey, funded by the Oregon Legislature and administered by the Oregon Community Foundation, transformed 19 motel shelters in 13 counties, and is now engaged in a second round of motel purchases.

Yet just last week, Commissioner Dan Ryan selected and positioned certain testimonies of numerous realtors, business-owners and certain paid lobbyists, including those from the Oregon Restaurant and Lodging Association, Portland Business Alliance, Portland Metropolitan

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<https://www.opb.org/article/2022/10/20/rene-gonzalez-portland-oregon-city-council-jo-ann-hardesty/?outputType=amp>

⁶ <https://www.opb.org/article/2022/02/28/people-for-portland-approach-homelessness>

Association of Realtors, and Oregon Business & Industry, at the head of the public testimony queue before the City Council hearing on October 26 based on their supportive viewpoints in favor of the Proposed Ban.⁷ At the hearing, Commissioner Jo Ann Hardesty inquired into the prioritization of these voices over others, and journalists followed up to shed light on how Ryan's office may be discriminating against certain viewpoints. **Money and political opinion should not determine your place in line to talk to elected officials.**

When a government body opens its meetings to public testimony, it creates a limited public forum in which government actions must remain viewpoint neutral. *See, e.g., White v. City of Norwalk*, 900 F. 2d 1421, 1425 (9th Cir. 1990) (“Citizens have an enormous first amendment interest in directing speech about public issues to those who govern their city.”). Additionally, a policy or practice that permits viewpoint amplification that misleads public perception is like a book ban's sneaky cousin as it similarly limits access to information. *See, e.g., Board of Education, Island Trees Union Free School Dist. v. Pico*, 457 U.S. 853, 866-67 (1982) (holding a book ban violated the First Amendment right of access to information supported by its free speech and free press guarantees, and recognizing that the First Amendment prohibits government actors from “contract[ing] the spectrum of available knowledge.”). Dominating public forums with a single narrative restricts the information available to the public just as if the non-dominant viewpoint were expressly excluded.

Street Roots' members and vendors, many of whom are unhoused and face significant barriers to giving public testimony, waited hours to testify from the Street Roots office. This required Street Roots staff to work extra time. The organization also had to expend additional resources for its own forum to ensure unhoused people had the opportunity to be heard.

Not only have Street Roots' rights been violated during the public process for the Proposed Ban, but the Proposed Ban itself threatens to violate their rights as well. The Ninth Circuit Court of Appeals has twice affirmed the right to rest for people who have no shelter to sleep in. *See Johnson v. Grants Pass*, 50 F. 4th 787 (9th Cir. 2022); *accord Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2018). The rulings prohibit using criminal enforcement mechanisms to prohibit camping in public when a person has nowhere else to go. *Id.* “A local government cannot avoid this ruling by issuing civil citations that, later, become criminal offenses.” *Johnson*, 50 F. 4th at 807. Furthermore, Street Roots and its members and supporters need not wait for the city to enforce its camping ban in violation of their Eighth Amendment rights in order to seek court intervention. *Id.* at 800-01.

Based on the above facts, Street Roots notifies the City of Portland, Dan Ryan, Ted Wheeler, Sam Adams, and any potential co-conspirators in implementing the above policies and practices

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<https://www.oregonlive.com/portland/2022/10/portlanders-offer-mixed-reviews-on-mayors-camping-ban-proposal.html>; <https://www.opb.org/article/2022/10/27/portland-homeless-camping-ban-affordable-housing/>

of its impending right to bring claims including, but not limited to, violations of the First and Eighth Amendments to the U.S. Constitution, 42 U.S.C. §§ 1983 and 1985, and Article I, sections 8, 16 and 13 of the Oregon Constitution. Some of these claims can include claims for damages (including punitive damages), as well as attorney fees.

Duty to Preserve Records

Given the potential litigation discussed above, the City and its employees have a duty to actively preserve and protect from spoliation all relevant documents, tangible things, and electronically stored information (ESI) (collectively, “records”), on both City-issued and personal devices, including but not limited to:

1. Records created or accessed by people in the office of Ted Wheeler, including, but not limited to, Ted Wheeler, Sam Adams, Cody Bowman, and Bobby Lee.
2. Records created or accessed by people in the office of Dan Ryan, including, but not limited to, Dan Ryan and Kellie Torres.
3. Records created or accessed by the people in the Portland Housing Bureau.
4. Records created or accessed by the people in the Portland Office of Management & Finance.
5. Records created or accessed by the people in the Portland City Attorney’s Office.
6. Records containing relevant terms, including but not limited to, “houseless,” “homeless,” “unhoused,” “homeless,” “camp,” “encampment,” “camping,” “unsanctioned,” “clean-up,” “sanitation,” “testimony,” “October 26,” “constitution,” “Wapato,” “Martin,” “Boise,” “Johnson,” “Blake,” “Grants Pass,” “viewpoint,” “First Amendment,” “Street Roots.”
7. Records of communications involving (1) Dan Ryan or any of his staff (past or present) and (2) any staff in the Clerk’s office about public testimony.
8. Records of communications involving (1) Dan Ryan or any of his staff (past or present) and (2) Ted Wheeler or any of his staff (past or present).
9. Records of communications involving (1) Dan Ryan or any of his staff (past or present) and (2) any person or organizational representative who testified to City Council on October 26, 2022.
10. Records of communications involving (1) Ted Wheeler or any of his staff (past or present) and (2) any person that testified to City Council on October 26, 2022.
11. ESI from or relating to the October 26, 2022 hearing.

Adequate preservation of ESI requires more than simply refraining from efforts to delete, destroy or dispose of such evidence. You must intervene to prevent loss due to routine operations or active deletion by employing proper techniques and protocols to preserve ESI. ESI should be interpreted broadly to include, but not be limited to, digital communications on all manner of transmission (e.g., email, text, messaging apps, social media networking, etc.). These, of course, are examples and not an exhaustive list.

In addition to preserving ESI on City-owned workstations and servers, the City should also determine if any individual's home or portable systems, including those of Ted Wheeler, Dan Ryan, or Sam Adams, may contain potentially relevant data. To the extent that City employees have potentially relevant calendar information, phone or messaging history, e-mail communications, or documents away from City offices or on personal devices, that evidence must be preserved. This is especially important given the City's remote work during and after the COVID-19 pandemic.

Potential parties, including the City, should also anticipate the need to disclose and produce metadata and act to preserve it. System metadata provides additional information about other ESI, including history of any modifications, that may not be directly apparent from looking at the ESI itself.

Request for Public Records

As you work to preserve relevant records and in order to continue investigating its potential claims, Street Roots requests the following records of communication⁸ under ORS 192.311 *et seq.*:

1. Communications from the past 90 days between or including (1) Dan Ryan or any of his staff (past or present) and (2) any staff in the Clerk's office about testimony for October 31, 2022.
2. Communications from the past 90 days between or including (1) Dan Ryan or any of his staff (past or present) and (2) Mayor Wheeler or any of his staff (past or present) regarding houselessness in Portland.
3. Communications in the past 2 years between Sam Adams and Tom Miller.
4. Communications in the past 2 years between Sam Adams and Skyler Bocker-Knapp.
5. Communications in the past 2 years between Sam Adams and Cody Bowman.
6. Communications in the past 2 years between Sam Adams and Shuly Wasserstrom.
7. The calendars of Mayor Ted Wheeler, Commissioner Dan Ryan, and Mayor's Office staff member Sam Adams for the past 2 years.
8. Communications from the past 2 years between or including (1) any city employee and (2) any person employed by, paid by, or otherwise representing Wheelhouse Northwest.
9. Communications from the past 2 years between or including (1) any city employee and (2) any person employed by, paid by, or otherwise representing Gallatin Public Affairs.
10. Communications from the past 2 years between or including (1) any city employee and (2) any person employed by, paid by, or otherwise representing People for Portland.
11. Communications from the past 90 days between or including (1) any city employee and (2) any person employed by, paid by, or otherwise representing Portland Business Alliance.

⁸ Communication is intended broadly, including, but not limited to e-mails, text messages, WhatsApp, Signal messages, Social media site/app messaging, Slack, intra-office messaging tools, phone call records, and calendar invites.

12. Communications from the past 90 days between or including (1) any city employee and (2) any person employed by, paid by, or otherwise representing Portland Accountability PAC.
13. Communications from the past 90 days between or including (1) any city employee and (2) any person employed by, paid by, or otherwise representing Oregon Restaurant and Lodging Association
14. Communications from the past 90 days between or including (1) any city employee and (2) any person employed by, paid by, or otherwise representing Portland Metropolitan Association of Realtors.
15. Communications from the past 90 days between or including (1) any city employee and (2) any person employed by, paid by, or otherwise representing Oregon Business & Industry.
16. Communications from the past 2 years between or including (1) any city employee and (2) Kevin Looper or a person representing or communicating on behalf of Kevin Looper.
17. Communications from the past 2 years between or including (1) any city employee and (2) Dan Lavey or a person representing or communicating on behalf of Dan Lavey.
18. Communications from the past 2 years between or including (1) any city employee and (2) Vadim Mozyrsky or a person representing or communicating on behalf of Vadim Mozyrsky.
19. Communications from the past 2 years between or including (1) any city employee and (2) Andrew Hoan or a person representing or communicating on behalf of Andrew Hoan.
20. Communications from the past 2 years between or including (1) any city employee and (2) Jon Issacs or a person representing or communicating on behalf of Jon Issacs.
21. Communications from the past 2 years between or including (1) any city employee and (2) Jordan Schnitzer or a person representing or communicating on behalf of Jordan Schnitzer.
22. Communications from the past 2 years between or including (1) any city employee and (2) Greg Goodman or a person representing or communicating on behalf of Greg Goodman.
23. Communications from the past 2 years between or including (1) any city employee and (2) John DiLorenzo or a person representing or communicating on behalf of John DiLorenzo.
24. Communications from the past 90 days between or including any city employee about the October 26, 2022 hearing or the Proposed Ban.

These requests for communications may include communications on the personal devices of public employees. Oregon public records law defines public records relative to the content of such communications, not the location. *Compare* ORS 192.311(5)(a) (defining public records to be writings about public business) *with* ORS 192.311(5)(b) (excluding from the definition of public record writings on privately-owned computers only when they do not pertain to public business).

In accordance with Oregon public records laws, please respond as soon as practicable and without unreasonable delay. You must acknowledge receipt of this request within five (5) business days of receiving the request, and you must complete your response to this request within ten (10) business days after providing us with acknowledgement of receipt (i.e., within 15 business days after receiving this request). See ORS 192.329.

As a non-profit news gathering organization, Street Roots requests a waiver of all fees, including fees for records, clerical, managerial, and professional staff time, copies, media, postage and miscellaneous costs, on the grounds that disclosure of the requested records is in the public interest. Under ORS 192.324(5), a fee waiver or reduction is available where record disclosure “primarily benefits the general public.” This occurs “when the furnishing of the record has utility—indeed, its greatest utility—to the community or society as a whole, in contrast to a concern or interest of a private individual or entity.” *In Defense of Animals v. Oregon Health Sciences University*, 199 Or. App. 160, 189 (2005). That is the case here, where the public has a strong interest in transparency about the City’s treatment of political opinions close to a major City election, as well as the constitutionality of the City’s actions that stand to harm some of its most vulnerable residents. Indeed, these records regard an issue of utmost public concern as homelessness has repeatedly been identified as a top issue for people living in Portland.

Should you find any records exempt from disclosure, the ACLU of Oregon notes that a public body bears the burden of demonstrating that an exemption applies and that the presumption of conditional exemptions is in favor of disclosure. *See, e.g., ACLU of Oregon v. City of Eugene*, 360 Or. 269 (2016). We therefore respectfully request a written communication explaining the legal authority relied upon to deny disclosure of any requested records, or to release said records with redactions or deletions. We also respectfully request that the explanation include the government interests relied upon to find that the public interest is outweighed in the context of any conditional exemption.

If I can provide any clarification that may expedite your attention to our request, please contact me at the email address or number listed below. Thank you for your prompt attention to this matter.

Thank you,



Kelly Simon
Legal Director
American Civil Liberties Union of Oregon
[REDACTED]