

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-046-08

(UNFAIR LABOR PRACTICE)

AMERICAN FEDERATION OF STATE,)
COUNTY AND MUNICIPAL EMPLOYEES)
COUNCIL 75, LOCAL 189,)
))
Complainant,)
))
v.)
))
CITY OF PORTLAND,)
))
Respondent.)

ORDER ON REMAND

This matter is before the Board on remand from the Court of Appeals. *AFSCME Council 75 v. City of Portland*, 276 Or App 174 (2016). The court reversed and remanded that portion of the Board’s prior order that dismissed the allegation that the City of Portland (City) violated ORS 243.672(1)(e) by allegedly making a unilateral change in responding to an information request from the American Federation of State, County and Municipal Employees Council 75, Local 189 (AFSCME). *See* 24 PECBR 1008 (2012), *recons*, 25 PECBR 85 (2013). We allowed the parties to submit additional briefing on the matter, and also allowed several entities to submit *amicus curiae* briefs.¹ The Board held oral argument on June 14, 2016.

We begin with a brief overview of the case. AFSCME filed a complaint alleging, among other things, that the City violated ORS 243.672(1)(e) by charging for staff time to respond to AFSCME’s information request regarding two grievances, and for withholding that information until AFSCME paid the requested amount. Relevant to the issue before us on remand, the Board’s

¹The Board received such briefs from the following entities: (1) Oregon Education Association; (2) Oregon School Boards Association; (3) Oregon School Employees Association; (4) Seaside Employees’ Association; and (5) Tri-County Metropolitan Transportation District of Oregon. The City moved to strike various portions of two briefs (Oregon Education Association and Seaside Employees’ Association), on the ground that the briefs included “evidence” not offered at hearing. The objected-to information consists primarily of background information of the *amici* and their interest in the dispute in this matter. All of the *amici* submitted similar information, and such information is commonly included in an *amicus* brief. Moreover, we do not consider that information to be “evidence” offered as part of our resolution of this case and we have not considered it as such. Consequently, we deny the City’s motion to strike.

initial order identified two different ways in which the City's actions potentially violated its obligation to bargain in good faith, as required by (1)(e): (1) by unilaterally changing the *status quo* when it charged "for the cost of staff time needed to produced [the requested] information"; and (2) by failing to adequately "provide information requested by AFSCME related to the Mersereau and Oswalt grievances."

The Board's initial order concluded that the City violated (1)(e) by failing to respond in a timely manner to AFSCME's requests for information relevant to the Mersereau and Oswalt grievances. The order also, however, dismissed the "unilateral change" charge, concluding that the subject of the change concerned only a permissive, rather than mandatory, subject of bargaining.²

Regarding those two (1)(e) decisions, AFSCME assigned error to the portion of the Board's order that concluded that the subject of the change was permissive for bargaining. The City did not assign error to any portion of the order. The Court of Appeals reversed and remanded to this Board "to reconsider that part of [the Board's] order addressing whether the [C]ity's decision on charges to the union for the production of information related to pending grievances involved a permissive or mandatory subject of bargaining." 276 Or App at 189-90. The court otherwise affirmed the Board's prior order.³

The Board's Case Law on Information Requests

To properly frame our resolution of this matter, we begin with an overview of our case law regarding information requests. In *Oregon State Employes Association v. Children's Services Division, Department of Human Resources, State of Oregon*, Case No. C-32-76, 2 PECBR 900 (1976), this Board adopted the National Labor Relations Board's (NLRB's) construction on Sections 8(a)(5) and (8)(d) of the National Labor Relations Act (NLRA), as applied to the Public Employee Collective Bargaining Act's (PECBA's) corollary ORS 243.672(1)(e)—namely, an employer's duty to bargain in good faith includes the duty to furnish information necessary to allow a labor organization to intelligently evaluate and pursue a pending grievance (citing *NLRB v. Truitt Manufacturing*, 351 US 149 (1956)). In *Washington County School District No. 48 v. Beaverton Education Association & Nelson*, Case No. C-169-79, 5 PECBR 4398 (1981), the Board followed NLRB precedent to conclude that the duty to furnish information also applied to labor organizations (rather than just employers). The Board further clarified that that a "discovery-type standard" (*i.e.*, information of possible or potential relevance) applied to information requests regarding enforcing or policing a contract, but that a higher standard applied to such requests "in the negotiations setting." 5 PECBR at 4403.

²Thus, the Board's prior order did not address whether the City's actions amounted to a change in the *status quo*.

³AFSCME raised an alternative assignment of error that the court did not reach—*i.e.*, that the Board failed to give the parties a full evidentiary hearing on the issue of the impacts of the City's decision. Because of how we resolve the matter on remand (discussed below), we conclude that a further evidentiary hearing on those impacts is unnecessary. The court also did not address AFSCME's assignment of error regarding the amount of the civil penalty levied against the City. As noted below, we adhere to the amount of the penalty awarded in our prior order.

Building on these cases, the Board, in *Oregon School Employees Association, Chapter 68 v. Colton School District 53*, Case No. C-124-81, 6 PECBR 5027, 5031 (1982) (*Colton*), fleshed out the scope of the duty to provide requested information:

“The extent to which a party must supply the information requested and the length of time the party may take to do so are dependent upon the totality of circumstances present in the case; just as good or bad faith bargaining at the negotiations table must be determined by consideration of all circumstances.”

The Board went on to explain that when a party alleges a violation of (1)(e) or (2)(b) based on a response to an information request, the Board would generally consider the following factors: (1) the reason given for the request; (2) the ease or difficulty in producing the information; (3) the kind of information requested; and (4) the parties’ history regarding information requests. *Id.* at 5031-32. For decades, this “totality-of-circumstances” paradigm continued to provide the framework for whether a response to an information request violated the PECBA. *See, e.g., Service Employees International Union Local 503, Oregon Public Employees Union v. State of Oregon, Department of Forestry*, Case No. UP-19-05, 22 PECBR 33, 41-42 (2007), *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-39-03, 20 PECBR 664 (2004), *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-7-98, 18 PECBR 64 (1999), and *Oregon School Employees Association v. Salem-Keizer School District 24J*, Case No. UP-50-86, 10 PECBR 252 (1987).

Then came *Lebanon Education Association/OEA v Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323 (2008). There, in one section of the order, the Board employed the longstanding totality approach, and found that the employer’s response to the information request violated (1)(e). Specifically, in finding the response to the information request “both unsatisfactory and untimely,” the Board explained:

“Other than complaining about the costs of providing the [requested materials], the [employer] did not specifically answer [the union’s] request until January 18, 2006 [almost two months after the request]. On that date, [the employer] told [the union] that some of the [requested material] did not exist, that the [employer] was willing to ‘create’ an estimate of the costs involved in obtaining the [requested documents], and that [the union] would need to assure payment for these costs before the [employer] took any further action.

“* * * * *

“The [employer] first responded two months after the [union] made its request. In its response, the [employer] provided none of the documents sought by the [union]; insisted that the [union] pay the costs of producing the information it wanted without specifying what those costs would be; and told the [union], for the first time, that some of the requested materials did not exist.” 22 PECBR at 368-69.

The Board added:

“A public employer, under certain circumstances, may be justified in charging a labor organization for expenses incurred in providing requested information and in requiring that a union representative inspect raw data to decide what materials are needed. These circumstances are not present here. The [employer] offered no evidence regarding either the difficulty in, or expense of, producing the materials sought by the [union]. Having no information in the record regarding these matters, we cannot conclude that the obligation to produce the requested documents was so costly and onerous that the [employer] was justified in asking [the union] to inspect the data and select the materials [it] wanted.” *Id.* at 369.

In short, that section of the *Lebanon* order applied the Board’s longstanding totality test to conclude that the employer violated ORS 243.672(1)(e). In doing so, it treated the employer’s “cost-related” actions as one of the factors considered in determining whether the overall response to the information request satisfied the employer’s obligation to bargain in good faith. This is consistent with how this Board had long analyzed whether a response to an information request violated the obligation to bargain in good faith.

Another section of *Lebanon*, however, extracted the “costs” from the general category of providing information and analyzed it as a separate issue under a (1)(e) “unilateral change” theory. 22 PECBR at 359-67. Like the NLRB, this Board has long held that a public employer violates its obligation to bargain in good faith if it makes a unilateral change (*i.e.*, without bargaining with the exclusive representative) regarding a mandatory subject of bargaining. Employing that doctrine in *Lebanon*, the Board concluded that the employer had made a unilateral change by refusing to provide the requested information unless the union gave advance written assurance to reimburse the employer for the staff time, attorney fees, and copying costs incurred in compiling and producing the information. That demand, the Board concluded, exceeded the past practice “of charging at most a nominal amount to cover copy costs” and never before collecting “reimbursement for staff time or attorney fees.” *Id.* at 360. As a necessary element of finding an unlawful unilateral change, the Board “conclude[d] that providing information to a labor organization at little or no charge concerns a mandatory subject for bargaining.” *Id.* at 362.

Lebanon and this Case

After *Lebanon*, the Board issued its initial order in this case. Again, the Board used the “totality” framework and concluded that the City violated (1)(e) by failing to timely respond to the information requests. *See* 24 PECBR at 1032-34, *recons*, 25 PECBR at 88-89. In doing so, the Board noted that: (1) “the City took an unreasonably long time to question AFSCME about its requests for materials relevant to the * * * grievances”; and (2) “the City failed to give AFSCME a reasonable estimate of the staff costs involved in responding to its requests concerning the Oswalt grievance.” 24 PECBR at 1034.

Unlike *Lebanon*, the Board separately concluded that there was no unlawful unilateral change with regard to “charging AFSCME for the cost of staff time needed to respond to AFSCME’s requests for information.” *Id.* at 1029. The Board reached that conclusion by determining that “[c]harging for information is a permissive subject of bargaining,” and that the Board had erred in *Lebanon* when it concluded that such charging was mandatory for bargaining. *Id.* at 1032. As noted above, the Court of Appeals has reversed and remanded this portion of the Board’s order.

On remand, we now conclude that our earlier order should not have followed *Lebanon*’s approach by addressing the mandatory or permissive nature of those charges. Rather, it is our longstanding totality-of-the-circumstances framework that provides the better approach for resolving whether a response to an information request violates (1)(e).⁴ At oral argument on remand, both parties agreed that employing the totality framework, rather than a unilateral-change approach, made sense and was the better analytical model to use in resolving whether an information response violates (1)(e). We disavow those portions of both *Lebanon* and our prior order in this case that employed a unilateral-change analysis to an information request response, including those portions that reached conflicting conclusions on the mandatory/permissive nature of the subjects at issue in those orders. We reserve for another day whether, in the context of contract negotiation, the subject of a proposal on information requests (including costs or charges) is mandatory or permissive for bargaining. Because resolution of that question is not necessary or apt in this case, we proceed to using the totality of the circumstances to determine whether the City violated (1)(e) in how it responded to AFSCME’s information requests.⁵

⁴It is worth noting that, by its terms, ORS 243.672(1)(e) proscribes “refus[ing] to bargain collectively in good faith”—it does not expressly mention “providing relevant information upon request in a timely manner” or “unilateral changes in employment relations.” Rather, our totality approach regarding information requests and our prohibition against unilateral changes are tools that we use to assess whether a party has refused to bargain in good faith (as prohibited by (1)(e)). Thus, they are different means to the same end (*i.e.*, whether a (1)(e) violation occurred). As explained throughout this order, we believe that our longstanding totality approach will generally be the best means by which to determine whether an information response violates (1)(e).

⁵As noted above, on remand, the Board received and considered numerous *amicus* briefs. Because of how the case had been previously presented and argued, we asked *amici* to focus on several questions, including (most prominently) the true “subject” of the purported change, and whether that subject was mandatory or permissive for bargaining. Although we are, on remand, ultimately not addressing those issues, the submission of those briefs, which contained compelling legal analyses and arguments, was not in vain. Rather, those briefs assisted in solidifying the approach that we have taken today. Indeed, some of the *amicus* briefs, as well as the parties’ briefs, echoed and reinforced the key principles that we employ in this order.

Application of the “Colton” Factors

As set forth above, when determining whether a public employer’s response to a labor organization’s information request violates (1)(e), this Board generally looks to: (1) the reason given for the request; (2) the ease or difficulty in producing the data; (3) the kind of information requested; and (4) the history of labor-management relations regarding information requests. *See Colton*, 6 PECBR at 5031. We address each factor, in turn, regarding the facts of this case.⁶

Reason for the Request

Here, the requested information related to pending grievances, thereby requiring a quicker and specific response by the City. *See id.* (a “request for information relating to a pending grievance ordinarily will require a quicker and more specific response than a request * * * that concerns the administration of a collective bargaining agreement generally”). As set forth in our prior order, we have already concluded that the City’s response was so untimely as to establish a (1)(e) violation.⁷

Ease or Difficulty in Responding and Kind of Information Requested

We discuss the next two factors together: the ease or difficulty in producing the information, and the type of information requested. We discuss the factors in combination because the City’s defense to AFSCME’s (1)(e) claim rests primarily on these two factors, which dovetail in this case (and often in others where there is a cost dispute arising out of the ease or difficulty in providing responsive documents). In short, the City asserts that the requested information was both difficult and costly to provide.

Despite using the totality framework for decades, the Board has not fully articulated or consistently applied a framework for analyzing the issue of “costs” within the totality framework. *Compare Colton*, 6 PECBR at 5032 (an employer could ask for reimbursement of reasonable costs, and, if the labor organization refused to reimburse, the employer may be permitted to refuse to provide the information), with *Department of Forestry*, 22 PECBR at 44, leaving open the questions of: (1) whether a public employer could “exact prepayment” as a condition of responding to an information request; (2) whether the employer could “select[] certain employees to respond to the Union’s request for information” and then charge the union for that time; and (3) whether the employer had charged an unreasonable amount to comply with the information request), and *Lebanon*, 23 PECBR at 369 (“[a] public employer, under certain circumstances, may be justified in charging a labor organization for expenses incurred in providing requested information”).

⁶Neither party has contested the factual findings of the Board’s prior order, and we continue to use those findings (as supplemented) for purposes of this order on remand.

⁷Arguably, because one portion of our prior order already found a (1)(e) violation based on the City’s delinquent response, our inquiry could be at an end. However, because of the time and attention devoted to the “costs” dispute, and to clarify our general ongoing approach to information-request disputes, we will proceed to assess the remainder of the City’s response under our totality test.

Under the NLRA, on which our “totality test” is based, a large body of case law has established certain principles for analyzing the issue of “costs” as part of that totality test. Those principles include the following:

- “The cost and burden of compliance ordinarily will not justify an initial, categorical refusal to supply relevant data.” *Tower Books*, 273 NLRB 671, 671 (1984).
- The objecting party bears the burden of establishing an unduly burdensome financial impact so as to put the requesting party on notice of a need to bargain about the allocation of costs associated with compiling the information. *Id.*; *Martin Marietta Energy Systems*, 316 NLRB 868, 868 (1995).
- To avoid an inference that the cost of compiling the information would be negligible, an objecting party must justify its assertion of a burdensome financial impact if the requesting party maintains that the cost of compliance would be “*de minimis*.” *Tower Books*, 273 NLRB at 671.
- An unconditional demand that the requesting party pay all costs is inconsistent with the obligation to bargain in good faith. *Martin Marietta Energy Systems*, 316 NLRB at 868.
- If the parties dispute whether the costs to comply with the information request are unduly burdensome, “the parties must bargain in good faith as to who shall bear such costs.”⁸ *Tower Books*, 273 NLRB at 671 (quoting *Food Employer Council*, 197 NLRB 651, 651 (1972)).

We find that these principles provide a commonsense framework for analyzing similar disputes under the PECBA. We now apply that framework to this case.

The City’s Response to AFSCME’s Information Request – Mersereau Grievance

As noted above, the City contends that AFSCME’s document request included potentially confidential and privileged information, such that the City was required to have an attorney perform a document review at substantial costs. With respect to the Mersereau grievance, on October 7, 2008, the City informed AFSCME that a payment of \$622.08 was required to receive documents that the City was prepared to provide.⁹ AFSCME objected to this amount and asked the City to provide the requested information “at no charge or at a nominal charge * * * as done in the past.” The record does not establish that the City subsequently sought to pursue a good-faith accommodation with AFSCME or provided the documents.¹⁰

⁸ This should not be read to foreclose that the parties may bargain to split the costs.

⁹The City had previously charged (and AFSCME had paid) \$41.25 and \$57.31 for documents provided on August 27 and September 11, 2008. We do not understand AFSCME to have objected to those charges, and we do not, therefore, address them. See *Department of Forestry*, 22 PECBR at 44.

¹⁰Approximately two months after lodging its objection to the City’s cost demand, AFSCME withdrew the Mersereau grievance.

We conclude that the City's response to the Mersereau grievance documents was inconsistent with its (1)(e) obligation to bargain in good faith. To begin, the City's first response to AFSCME's August 22 document request was to unconditionally demand that AFSCME pay \$622.08 as a prerequisite to receiving the documents. Such an unconditional demand is inconsistent with the obligation to bargain in good faith. *Martin Marietta Energy Systems*, 316 NLRB at 868. Moreover, "[t]he cost and burden of compliance ordinarily will not justify an initial, categorical refusal to supply relevant data." *Tower Books*, 273 NLRB at 671. Here, the City used the cost and burden of complying with the August 22 document request as a justification for not providing the information until it received payment from AFSCME. Finally, when AFSCME objected to the amount of the payment and requested a reduced amount, the City did not commence bargaining with AFSCME over that amount; rather, the City failed to respond at all. Those actions do not comport with the (1)(e) obligation to bargain in good faith. See *Tower Books*, 273 NLRB at 671 (if the costs of compliance creates an unduly burdensome financial impact, the parties must bargain in good faith as to those costs).

The City's Response to AFSCME's Information Request – Oswalt Grievance

We now address the City's response to the Oswalt grievance documents. The City's first response (on September 17, 2008) informed AFSCME that an estimate would be forthcoming and that "AFSCME [would] be charged for production of information as allowed by [the] PECBA." The City's next response (on September 30, 2008) informed AFSCME that a full response would "require research and be quite time consuming." To that end, the City also informed AFSCME that it would prepare a cost estimate so that AFSCME could "decide whether AFSCME [would] pay for the associated costs." On October 24, 2008, the City followed up with a calculation and demand that AFSCME pay \$200 before beginning to work on the document request.

On October 29, 2008, AFSCME objected to paying "hundreds of dollars" to the City for information that AFSCME believed that it could get "for free through arbitral subpoena." On November 12, 2008, AFSCME offered to pay copying costs, but not the "research" costs that the City was also seeking.

On November 25, the City informed AFSCME that it would be sending some documents with copying costs of \$63.25, based on AFSCME's representation that it would pay the copying costs. With respect to the remaining documents (*i.e.*, those that the City estimated would require a "hand search" or legal review at substantial costs), the City requested a phone call to "discuss ways to make the information request more time and cost effective." AFSCME responded with a request that the City provide documentation that would substantiate that AFSCME had previously paid for attorney and paralegal costs incurred by the City as part of an information request. AFSCME stated that this information was necessary to determine whether it would file an unfair labor practice complaint with the Board.

That same day, the City responded that it would "check into what AFSCME [had] paid for" in the past. The City (via counsel) added:

"But, in the meantime, I want to be clear that we would like to engage in some constructive dialog and problem solving on this topic of information requests from AFSCME. AFSCME makes information requests that are extremely broad, very

difficult to manage and very time consuming. It is a workload problem for our office * * *.

“The tactic of threatening to run to [the Board] and file a ULP is counterproductive to efforts to work cooperatively. I would prefer to try and problem solve first and if we reach a stalemate then let’s confer about taking it to [the Board].”

On November 26, AFSCME (via counsel) responded that it needed the “past practice” information to properly assess its legal options. AFSCME further stated that

“the place to resolve larger issues * * *, such as who ‘should’ bear the cost burden of producing information [that] both sides may find relevant to resolving grievance, is at the bargaining table. That is the place where * * * the parties work cooperatively to resolve cost/benefit issues. It’s not by unilateral action of the City to impose huge costs on the union when the costs have been absorbed by the [C]ity and its phalanx of resources in the past.”

The City responded that same day, reiterating that

“there is a problem that needs to be solved. If there needs to be discussion and/or bargaining to resolve, then that is what needs to happen. Sometimes the problem solving and open discussion up front can set the stage for any sort of bargaining discussion.”

The City added that it wanted to first complete the information request “before moving on to the larger issue * * *.” The City concluded by asking AFSCME to have a telephone conference later in the week or early in the following week.

Also on November 26, AFSCME responded that “a resolution” could not be discussed until the “past practice” was assessed, and that, if the City provided that “past practice” information by the end of the week, then AFSCME would have a telephone conversation the following week.

By letter dated November 26 (and received by counsel for AFSCME on December 1), the City provided responsive documents to several of the requested items. Regarding those documents, the City asked AFSCME to pay the copying costs (consistent with AFSCME’s offer to pay those costs). With respect to four items, the City asked AFSCME counsel to call to discuss. Elsewhere in the letter, the City indicated that it was confused about some of the requested information, and that some of the information would be time consuming and costly to produce. With respect to those items, the City requested that the parties discuss how to potentially manage the costs. The record does not contain a further response by AFSCME, other than the December 12 filing of this unfair labor practice complaint.

Although we concluded in our prior order that the City’s delayed response and failure to provide a reasonable estimate of the staff costs to respond to the information request was sufficient to establish that the City violated (1)(e), we provide the following commentary on the City’s handling of the “costs” of the information request related to the ease or difficulty in producing the information.

Initially, the City demanded that AFSCME pay \$200 before beginning to work on the document request. That initial response is not in accordance with good-faith bargaining. *See Martin Marietta Energy Systems*, 316 NLRB at 868 (an unconditional demand that the requesting party pay all costs is inconsistent with the obligation to bargain in good faith); *Tower Books*, 273 NLRB at 671 (the “cost and burden of compliance ordinarily will not justify an initial, categorical refusal to supply relevant data”).

When AFSCME objected to that initial demand, however, the City responded more appropriately. Specifically, the City indicated that, with at least respect to some of the documents, producing the information in the precise form requested by AFSCME would create a burdensome financial impact. AFSCME did not refute that assertion or object that the costs associated with the requests was *de minimis*. Had AFSCME done so, the City would have been required to justify its assertion of a burdensome financial impact to avoid an inference that the information could be produced at a negligible cost. *Tower Books*, 273 NLRB at 671.

Moreover, the City certainly put AFSCME “on notice of a need to bargain about the allocation of costs associated with compiling the information.” *Martin Marietta Energy Systems*, 316 NLRB at 868. The City also made multiple overtures to discuss and bargain about the costs or alternative ways to provide AFSCME with the information that it sought. Such efforts are more in line with good-faith bargaining.

Parties’ History Regarding Information Requests

Finally, we turn to the parties’ history regarding information requests. The record does not establish that AFSCME has engaged in “a pattern of numerous requests or fish-and-grieve’ expeditions,” such that “the time to provide the information can be lengthened or * * * excused altogether.” *See Colton*, 6 PECBR at 5032. On the other hand, the record also does not establish “a pattern of unreasonable delays” by the City “in responding to legitimate information requests,” such that the “reasonable time to provide [the] information [should] be shortened.” *See id.* Thus, this factor would not weigh one or the other in our conclusion.

Totality of the City’s Response

We adhere to our prior conclusion that the totality of the City’s response to AFSCME’s information requests did not satisfy the City’s obligations under ORS 243.672(1)(e).¹¹ Our further examination of the “costs” dispute, within the totality framework, reinforces that conclusion. Specifically, with respect to some of the documents, the City conditioned its PECBA obligation on AFSCME prepaying those costs, which were greater than costs previously charged, and failed to adequately explain the bases of those costs. Moreover, with respect to some documents, the City did not bargain in good-faith with AFSCME over the allocation of costs or otherwise pursue a good-faith accommodation regarding its costs/unduly burdensome concerns.

¹¹Accordingly, for the reasons set forth above, we do not address AFSCME’s alternative theory (unilateral change) for why the City’s information response violated (1)(e).

Because the City's response to AFSCME's information request violated ORS 243.672(1)(e), we order the City to cease and desist from that unlawful conduct. *See* ORS 243.676(2)(b). At this stage, there is no additional remedial relief identified by AFSCME that is necessary to effectuate the purposes of the PECBA.¹² *See* ORS 243.676(2)(c).

Summary

In sum, we disavow the conclusion in the Board's prior order that "charging for information is a permissive subject of bargaining."¹³ More fundamentally, we conclude that we should not have employed a "unilateral-change analysis" in assessing whether the City's response to AFSCME's information requests violated ORS 243.672(1)(e). Such an analysis is an ill fit where, as here, a party is alleging that a response to a valid and relevant information request under the PECBA violated ORS 243.672(1)(e). Rather, as explained above, the Board has a long-established analytical paradigm (modeled on NLRB case law) that it has used in such circumstances. With this order, we return to the path laid out by *Colton* and its progeny—*i.e.*, assessing the totality of the circumstances to see whether a response to an information request violates (1)(e) or (2)(d). In doing so, we set forth guiding principles to be applied when a cost dispute arises out of that totality analysis. We reiterate the belief articulated in *Colton* that following this "common-sense approach * * * will, in most cases, obviate recourse to PECBA procedures." 6 PECBR at 5033.

ORDER

1. The City shall cease and desist from violating ORS 243.672(1)(e) in responding to information requests from AFSCME.

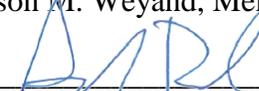
2. If the City has not previously done so, it shall pay AFSCME a civil penalty of \$200, within 30 days of the date of this Order.

DATED August 4, 2016.



Kathryn A. Logan, Chair

*Jason M. Weyand, Member



Adam L. Rhynard, Member

*Member Weyand did not participate in the deliberation and decision of this case.

This Order may be appealed pursuant to ORS 183.482.

¹²We adhere to our prior determination regarding the amount of the civil penalty that the City must pay AFSCME.

¹³As noted above, we also disavow the conclusion in *Lebanon* that charging for information is a mandatory subject of bargaining.