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1001 SW Fifth Avenue, Suite 1650
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Re: Petition of Scott Niebling on behalf of the Oregon Center for Environmental Health received May 24, 2006 to disclose certain records of the Port of Portland

Dear Mr. Niebling and Mr. Mountain:

On this public records petition, ORS 192.410 et. seq., petitioner Scott Niebling requests the District Attorney to order the Port of Portland (POP) and its employees to make available for inspection or copying the following records:

Documents pertaining to agreements concerning the joint defense of claims between or among members of the Lower Willamette Group concerning the allocation of liability or fault for clean up costs for the last six years.

On March 10, 2006, Jane Harris, Executive Director of the Oregon Center for Environmental Health (OCEH), submitted a request to the Port of Portland for a variety of documents related to the Lower Willamette Group (LWG). In a May 4, 2006 letter response, POP General Counsel Carla L. Kelley denied the request in its entirety. Ms. Kelley claimed exemption under the attorney-client privilege (ORS 40.225), Confidential Submissions (ORS 192.502(4)), and the Pending Litigation Records Exemption (ORS 192.501(1)).

Petitioner asserted that the records requested were the same as those that were the subject of a disclosure order to the POP from a November 2005 request of The Oregonian. However, the OECH requested the disclosure not only of the LWG joint defense agreement but any documents "concerning the allocation of liability or fault for clean up costs of environmental contamination along the Willamette River for the past six years." This apparently has led the POP to estimate its costs of searching for and screening relevant documents to be approximately \$12,000. Not unexpectedly, petitioner has requested there be a waiver of costs.

This office discussed the intended scope of this order with petitioner and James Mountain, counsel for the Port. It has been agreed that the request for disclosure of any documents other than the LWG joint defense agreement as well as the request for waiver of costs will be suspended pending further discussions between the parties. It is hoped that the unresolved aspect of the records request and the estimate of costs can be amicably narrowed without the intervention of this office.

DISCUSSION


On February 23, 2006, this office rejected four claimed exemptions (including Trade Secrets) and ordered the POP to disclose to The Oregonian the joint defense and confidentiality agreements of the LWG. PR 05-25. In response to the new petition of the OECH, the POP has submitted or our *in camera* review a seventeen page letter argument from Mr. Mountain, the various versions of the Harbor PRP Group Participation Agreement, affidavits, letters, and case law. The Port has claimed three of the same exemptions as those asserted in response to The Oregonian petition. Mr. Mountain has made further arguments justifying all three exemptions and has specifically asked this office to reconsider its analysis of the attorney-client privilege and the litigation exemption.

We have reviewed the extensive submission of the Port as well as our seven page Oregonian order. With due respect, we have found no basis to reconsider our opinion that the attorney-client privilege does not extend to the joint defense agreement itself or that the public interest is best served by disclosure of the secret compact between certain potential public and private polluters of the Willamette River. This office reaffirms our previous order in The Oregonian petition (attached) and applies its reasoning to this petition.

ORDER

Accordingly, it is ordered that the Port of Portland promptly disclose the records sought in the above petition. Disclosure of the documents ordered is subject to payment of the Port of Portland's fee, if any, not exceeding the actual cost in making the information available, consistent with ORS 192.440.

Very truly yours,


MICHAEL D. SCHRUNK
District Attorney
Multnomah County

NOTICE TO PUBLIC AGENCY

Pursuant to ORS 192.450(2), 192.460 and 192.490(3) your agency may become liable to pay petitioner's attorney fees in any court action arising from this public records petition (regardless whether petitioner prevails on the merits of disclosure in court) if you do not comply with this order and also fail to issue within 7 days formal notice of your intent to initiate court action to contest this order, or fail to file such court action within 7 additional days thereafter.