MICHAEL D. SCHRUNK, District Attorney for Multnomah County
600 County Courthouse • Portland, Oregon 97204 • (503) 988-3162 • FAX (503) 988-3643

February 23, 2006

Alex Pulaski
Staff Writer
The Oregonian
1320 SW Broadway
Portland, OR 97201-3499

James E. Mountain, Jr.
Attorney at Law
Harrang Long Gary Rudnick P.C.
1001 SW Fifth Avenue, Suite 1650
Portland, OR 97204

Re: Petition of Alex Pulaski on behalf of The Oregonian received November 29, 2005 to disclose certain records of the Port of Portland

Dear Mr. Pulaski and Mr. Mountain:

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

> **The joint defense and confidentiality agreements the Port has entered into with the other parties to the LWG [Lower Willamette Group].**

On July 27, 2005, The Oregonian initially made an informal request for certain public records of the POP relating to the Lower Willamette Group. In an October 19, 2005 email, Eliza Dozono of the POP characterized the information as confidential and declined to disclose it on several grounds. Ms. Dozano stated that in the late 1990's, the Environmental Protection Agency (EPA) "sent liability notices to approximately 70 potentially responsible parties ('PRP's') regarding the investigation and cleanup of the harbor. In response, the Port and other LWG members entered into a joint defense agreement." An agreement was negotiated with EPA to investigate the contamination. Ms. Dozano noted that over 50 PRP's chose not to participate.

The Oregonian then submitted a formal request under the Public Records Law that was denied in a November 8, 2005 letter by POP General Counsel, Carla Kelley. Ms. Kelley asserted attorney–client privilege, and the conditional exemptions of litigation, confidential submissions, and the protection of trade secrets. Petitioner argues the attorney-client privilege is intended to protect

legal advice, conclusions or strategy, not the documents sought in his request. Petitioner maintains that the public interest outweighs the other claimed exemptions and requires disclosure.

The POP responded to the petition in a December 5, 2005 fourteen-page letter from James Mountain together with the declarations of David Ashton, Assistant General Counsel for the Port, Max Miller, Jr., legal counsel for Gunderson, LLC, a member of the LWG, and Doug Loutzenhiser, Director Environment & Sustainable Development for Arkema Inc., also a member of the LWG. Mr. Mountain spent considerable time citing legal authority in support of the Port's contention that the LWG agreement is protected under the joint defense privilege, as attorney work product, and as legal strategy and advice. In a January 19, 2006 letter, Mr. Mountain provided this office with supplemental authority and an extensive discussion of the "joint defense" or "common interest" privilege that he argued is a corollary to the attorney-client or work product privilege.

In 1980, the Lower Willamette River was identified as a superfund site. In 2000, the EPA sent liability notices to 69 property owners. The Lower Willamette Group was created including the Port of Portland and the City of Portland. The document sought by petitioner represents a complex interim relationship among fifteen potentially responsible property owners along the Willamette River. The initial phase of LWG activity is the remedial investigation and feasibility study. The goal is to identify the nature and extent of the contamination problems and what options are available to deal with them. This phase is nearly complete. After Phase I, the group dissolves. Phase 2 is remedial action. Certainly some members of the LWG will band together in potential defense against the action of the EPA and/or the nine natural resource trustees including six Native American tribes. Many of the fifty potentially responsible parties who chose not to join the group for Phase 1 could be the subjects of interpleader action. Any dropouts from the LWG would also be subject to litigation.

The POP provided the original participation agreement and three amended agreements for our review. Each agreement is over 30 pages long plus signature pages and exhibits. Apparently the identity of all but one of the current private members is already public knowledge. According to Mr. Mountain, the agreement sets out "the framework within which the LWG members cooperatively will respond to their designation by the EPA as parties potentially responsible for pollution in the Harbor."

DISCUSSION

I. ATTORNEY-CLIENT PRIVILEGE.

ORS 192.502(9) incorporates the lawyer-client privilege of ORS 40.225 into an unconditional exemption under the Public Records Law. In its July 6, 1982 Public Records Order (Zaitz), the Attorney General determined that a review of such a claimed exemption is very limited:

> If the purpose is not waived [by the client], the exemption is absolute; neither the preliminary language of ORS 192.500(2) nor paragraph (h) itself contains any language providing for a balancing

> test. If the lawyer-client privilege is applicable, the Attorney General cannot consider whether or not the information should be disclosed in the public interest, but must deny your petition. Attorney General's Public Records Manual, 2005, page F-4.

The centuries old common law doctrine has maintained the rule that "communications between an attorney and his client during and by reason of their relations as such...are deemed privileged." Sitton v. Peyree, 117 Or 107, 114 (1925). This doctrine has been codified in Oregon Evidence Code OEC 503 (ORS 40.225). The Oregon Supreme Court has made the availability of the privilege dependent on two conditions:

> (1) the communications must be confidential within the meaning of OEC 503(1)(b)[1], and
> (2) the communication must be made for the purpose of facilitating the rendition of professional legal services to the client. State v. Jancsek, 302 Or 270, 275 (1986).

The attorney-client privilege extends not only to the client but also to those individuals who constitute representatives of the client. ORS 40.225(1)(d) provides: "'Representative of the client' means a principal, an employee, an officer or a director of the client." The central issue explored in State ex rel OHSU v. Haas, 325 Or 492 (1997) was the extent of protected communication between a lawyer and his client. "[T]he legal advice must originate with the lawyer but may be communicated by other individuals who are themselves covered by the privilege." 325 Or at 505. The Supreme Court noted that the attorney-client privilege is not limited to a "control group" but includes other individuals that "need to communicate on behalf of the client with the attorney for the purpose of receiving legal advice." State ex rel OHSU v. Haas, 325 Or at 508.

The scope of the privilege is set out with specificity in ORS 40.225(2):

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
> (a) Between the client or the client's representative and the client's lawyer or a representative of the lawyer;
> (b) Between the client's lawyer and the lawyer's representative;
> (c) By the client or the client's lawyer to a lawyer representing another in a matter of common interest;

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[1] OEC 503(1)(b) provides:

"Confidential communication" means a communication not intended to be disclosed to third persons other than to those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(d) Between representatives of the client or between the client and a representative of the client; or
(e) Between lawyers representing the client.

After extended conversations with Cheryl Koshuta, POP Director, Environmental Affairs, Assistant General Counsel David Ashton, and James Mountain, this office is much more knowledgeable about the importance of the agreement and the need to protect its contents from public scrutiny. The question is whether Oregon Law has extended the attorney-client privilege to cover such an arrangement. We conclude that it does not.

The commentary to OEC 503 recognizes the concepts of common interest and joint defense:

> In a case in which lawyers represent different clients who have a common interest, Rule 503 allows each client a privilege as to the client's own statements. Thus, in 'joint defense' or 'pooled information' situations, if all clients resist disclosure, none will occur. However, if for some reason one client wishes to disclose the client's own statements made at a joint conference, the person is permitted to do so. No privilege applies where there is no common interest to be promoted by joint consultation, and the parties, therefore, meet on a purely adversary basis.

Mr. Mountain admits, "no Oregon court has yet decided the precise question of whether a joint defense agreement is itself a privileged communication under ORS 40.225(2)(c)..." Several federal courts and circuits, including the Ninth Circuit, have recognized the joint defense privilege. Mr. Mountain points out that both state and federal courts in several jurisdictions "have held that documents or information protected by the joint defense or common interest privilege are not subject to being produced under public records laws."

In Black v. Southwestern Water Conservation Dist., 74 P3d 462, 469 (2003), cited by Mr., Mountain, the Colorado Court of Appeals made the following observations about the attorney-client privilege:

> The common interest privilege is not an independent basis for privilege, but an exception to the general rule that the attorney-client privilege is waived when privileged information is disclosed to third parties [citation omitted].
>
> It is well established that not every disclosure of attorney-client communications constitutes a waiver of privilege. Communications shared with third persons who have a common legal interest with respect to the subject matter thereof will be deemed neither a breach nor a waiver of the confidentiality surrounding the attorney-client relationship [citation omitted].

> The common interest doctrine does not require existing or impending litigation. [citation omitted]. It includes pre-existing confidential communications and documents that are shared during a common enterprise. [citation omitted]. Accordingly, when a party invokes the common interest privilege, the court must focus on the circumstances surrounding the disclosure of the communications or documents rather than on when the communications were generated [citation omitted].
>
> The privilege applies only to communications given in confidence [citation omitted], and intended and reasonably believed to be a part of an on-going and joint effort to set up a common legal strategy.

In the 2002 Boston Public Interest Law Journal, an exhaustive survey noted that Congress did not adopt a Proposed Rule 503(b) that would have recognized the common interest privilege. Ten of the thirteen federal circuits recognize the privilege, but only thirteen states courts have done so. Oregon has adopted the rule but no court cases have interpreted its parameters. The question is not whether the attorney-client privilege might apply to certain activities, information, or legal advice shared by the Lower Willamette Group. The question is whether the agreement itself is privileged.

We have searched the participation agreement for evidence of communications, strategies, work product, or legal advice that would fit within the concept of the "common interest privilege." This office has repeatedly asked the POP to point out the passages that were specifically of concern. The answer has consistently been to stress that the agreement itself must be protected in its entirety. We believe the absence of any Oregon case law (or support in the Oregon Evidence Code Commentary) precludes such an expansive umbrella of absolute privilege.

II. LITIGATION EXEMPTION.

ORS 192.501(1) conditionally exempts:

> Records of a public body pertaining to litigation to which the public body is a party if the complaint has been filed, or if the complaint has not been filed, if the public body shows that such litigation is reasonably likely to occur. This exemption does not apply to litigation that has been concluded...

The Court of Appeals has construed this exemption very narrowly and it is subject to a public interest analysis. "The purpose of this exemption is to place governmental bodies on an even footing with private parties before and during *court* litigation." Attorney General's Public Records Manual, 2005, p. 29. The exemption does not extend to records collected in the ordinary course of

business but is limited to "...information compiled or acquired by the public body for use in ongoing litigation..." Lane County School District v. Parks, 55 Or App 416, 420 (1981).

Admittedly, the potential for litigation in the contamination cleanup of the lower Willamette River is great. Mr. Mountain states that the "LWG agreement describes defense and prosecution strategies to which the Port subscribes in cooperation with other LWG members based on mutual interests." We have been provided with no specific examples of these strategies. In fact, Mr. Mountain notes that the "LWG agreement says nothing about how any cleanup will be accomplished or how it will be financed."

In any case, the public interest in knowing the nature of the "agreement" between the Port of Portland, the City of Portland, and 13 potentially responsible private businesses clearly outweighs any speculative harm that might befall the LWG. As stated by petitioner: "There is a strong public interest in knowing whether the agreement is constructed in such a way as to give control to private companies over what the Port, a public agency, does." The need for transparency outweighs the litigation concerns expressed by the Port.

Petitioner notes that the cleanup is of "intense public interest because of the implications for wildlife and human health and because tens of millions of dollars entrusted to public agencies will be spent. Generations of Oregonians will live with the decisions made within the LWG."

The Willamette River is a vital resource for the citizens of Oregon. A clean river will be an enduring legacy for our children. The federal government has designated the lower Willamette as a superfund site. The EPA has identified at least 70 entities, public and private, as potential responsible parties. The contamination of our principal waterway must be cleaned up. It is a long process requiring the involvement and cooperation of numerous governments, businesses and resource and environmental trustees. It is best done in the open.

III. CONFIDENTIAL SUBMISSIONS EXEMPTION.

ORS 192.502(4) exempts:

> Information submitted to a public body in confidence and not otherwise required by law to be submitted, where such information should reasonably be considered confidential, the public body has obliged itself in good faith not to disclose the information, and when the public interest would suffer by its disclosure.

"The purpose of this exemption is to encourage voluntary submissions of relevant information to public bodies, with some reasonable assurance that the information will be kept confidential." Attorney General's Public Records Manual, 2005, p. 69.

POP maintains that the entire joint defense agreement is confidential. "The LWG members entered into discussions with the understanding that the terms of the resulting LWG agreement

would be kept confidential." We understand that the essential nature of the agreement is secret, intentionally so. We agree that the requirements of the exemption are satisfied. However, the question is whether the public interest would suffer by disclosure of the agreement. This office concludes that it is inappropriate for a public body such as POP to participate with certain private enterprises in an investigation and evaluation of the pollution of the public waterways under circumstances hidden from public view. The public interest is not served by such secret arrangements.

IV. TRADE SECRETS.

ORS 192.501(2) conditionally exempts:

> Trade Secrets. "Trade secrets," as used in this section, may include, but are not limited to, any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within an organization and which is used in a business it conducts, having actual or potential commercial value, and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it[.]

The POP argues that the "LWG agreement contains the plans, procedures, and other information regarding how the LWG members will deal with Portland Harbor Superfund Site issues in order to best position themselves for the remedial investigation and expected litigation." Mr. Mountain has provided no specific sections of the agreement that meet the definition of "trade secrets." We have reviewed the joint defense agreement at length and can find no evidence of trade secrets subject to the exemption. It simply does not apply.

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.