



MICHAEL D. SCHRUNK, District Attorney for Multnomah County

600 County Courthouse • Portland, Oregon 97204 • 503 988-3162 • FAX 503 988-3643

www.co.multnomah.or.us/da/

December 13, 2002

Paul Phillips
PAC/WEST COMMUNICATIONS
8600 SW St. Helens Road
Suite 100
Wilsonville, OR 97070

Benjamin Walters
Deputy City Attorney
City of Portland
Office of the City Attorney
City Hall, Suite 430
1221 SW 4th Avenue
Portland, OR 97204

Re: Petition of Paul Phillips on behalf of Oregonians for Jobs and Power received
December 5, 2002 to disclose certain records of the City of Portland

Dear Mr. Phillips and Mr. Walters:

On this public records petition, ORS 192.410 et. seq., petitioner Paul Philips requests the District Attorney to order the City of Portland to provide the following records:

**an unredacted version of their Municipalization Overview
Study from June 2002.**

On September 12, 2002, Matt Wingard, then Executive Director of Oregonians for Jobs and Power (OJP), requested a copy of the City of Portland's Municipalization Overview Study from Tim Grewe, Chief Administrative Officer. In response, Mr. Wingard received a twenty-four-page document with eight spaces stamped "REDACTED." There was no cover letter. Mr. Wingard again wrote to Mr. Grewe on November 13 and pointed out that there was no explanation supplied by his office "as to why certain parts of the study were exempt from public inspection." Mr. Wingard then requested an unredacted copy of the study.

Linda Meng, Chief Deputy City Attorney, responded to Mr. Wingard's second letter on November 29 and provided the following explanation for the redactions:

The materials that were redacted from the document you requested were removed at my direction because they were prepared by or in conjunction with the City Attorney's office or our outside legal counsel, Preston Gates & Ellis. They are materials that reflect our legal thinking and analysis regarding certain issues and are protected by attorney client privilege. These materials have been redacted from all copies of the document that were provided to outside parties.

Petitioner then submitted his petition to this office and noted "[r]epeated requests by OJP and state lawmakers for unredacted copies of this report have been reluctantly answered with vague and unjustified legal reasoning." The City responded to the petition in a letter to this office dated December 11, 2002. Senior Deputy City Attorney Benjamin Walters indicated that the City's agent, Regional Financial Advisors, Inc. prepared the report. The redacted passages were, according to Mr. Walters, advice "provided to the consultant in researching and preparing its report to the City." This legal advice was for the purpose of "facilitating the rendition of professional legal services to the City, and was not intended to be disclosed to third parties."

DISCUSSION

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, 2001, page F-5.

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).

We have carefully examined the unredacted Municipalization Overview document provided by the City and reviewed the deleted passages with Senior Deputy City Attorney Walters. The non-disclosed sections include advice about financing, legislation, and acquisition strategies. With one noted exception, the contents are clearly confidential communications made for the purpose of facilitating the rendition of legal services to the City. As such, the redacted sections are unconditionally privileged and cannot be ordered disclosed to petitioner.

ORDER

Accordingly, it is ordered that the City of Portland promptly disclose the records sought in the above petition as follows: the second and third sentences of the one-paragraph redaction found on the first page of the "Briefing Points" under "Goals Rate reduction." Otherwise, the petition of Paul Phillips for Oregonians for Jobs and Power to disclose certain records of the City of Portland is denied.

Very truly yours,


MICHAEL D. SCHRUNK
District Attorney
Multnomah County, Oregon

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.

Page 4
December 13, 2002
Re: Petition of Paul Phillips

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.

02-18