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September 10, 2002

David Austin
The Oregonian
Northeast Portland Bureau
4606 NE Martin Luther King Jr. Blvd
Portland, OR 97211

Harry Auerbach
Office of City Attorney
City Hall, Suite 430
1221 SW 4th Avenue
Portland, OR 97204

Re: Petition of David Austin for The Oregonian received August 28, 2002 to disclose certain records of the City of Portland

Dear Mr. Austin and Mr. Auerbach:

On this public records petition, ORS 192.410 et. seq., petitioner David Austin for The Oregonian requests the District Attorney to order the City of Portland and its employees to make available for inspection a copy of the following records:

> **1. Any and all documents, records, reports or videotapes regarding the near drowning of Justin Metschan at Wilson pool o July 11, 2002.**
>
> **2. Any and all written or videotaped reports conducted by any and all contractors hired by the city to investigate what happened.**
>
> **3. All documents that were produced by city staff, including Wilson's lifeguards, their managers and other city personnel as a matter of routine when such an incident occurs.**

Petitioner also requests the District Attorney to order the waiver of fees charged for the production of the following records:

> **[A]ny and all information regarding the contractor status of Jeff Ellis and Jeff Ellis and Associates, the company conducting the investigation. Specifically, I want to know how long Ellis has been a contractor with the city, under what capacity has he been hired and how much he has been paid for city work.**[1]

On August 13, 2002, petitioner requested the above-listed documents from Mr. Auerbach as well as Commissioner Jim Francesconi and Parks and Recreation Director Charles Jordan. Mr. Auerbach responded to petitioner in a letter dated August 26 declining to provide most of the records. The City was willing to disclose non-privileged records relating to Jeff Ellis upon payment of the estimated cost of $50.

Mr. Auerbach submitted a letter response to the petition on August 29. He summarized the records as falling into six categories: written statements of employees made immediately following the event, exposure incident reports, written summaries of interviews with witnesses, videotapes of witness interviews, a Portland Fire Bureau Pre-Hospital Care Report, and e-mails among Mr. Auerbach and representatives of his clients. He claimed exemption for the notes, summaries, videotapes and e-mails as protected by attorney-client privilege and records pertaining to litigation. Exemptions were asserted for the exposure reports as confidential medical reports and personal information and the Fire Bureau report as a confidential medical report.

The City has estimated its fees based upon its cost in gathering the invoices and payment records that constitute the Ellis records. Mr. Auerbach contends that waiver of the fees is not justified in the public interest since there is nothing in the particular records in question that will "add measurably to the public's understanding of the events of July 11."

On September 6, this office received a "confidential" letter from Mr. Auerbach further explaining the nature of the various materials and the circumstances of their creation. Attached to the letter were documents from the Aquatic Supervisor Manual outlining procedures and protocols for staff of the Portland Parks and Reaction in the event of a catastrophic aquatic incident. Mr. Auerbach also provided examples of the records reflecting the contractor status of Jeff Ellis.

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[1] Petitioner has also asked this office to order the City to produce "copies of incident reports for all Portland public swimming pools during the Summer 2002 swimming season." Such a petition is premature as the City has not yet processed or denied this request.

DISCUSSION

I. Attorney-Client Privileged Documents

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)[2], 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).

Waiver under OEC 503 is addressed in Kirkpatrick in Oregon Evidence, Third Edition, 1996, at page 229: "The attorney-client privilege can be waived by the client expressly or impliedly. Waiver occurs under Rule 511 when the client voluntarily discloses, or consents to disclosure of, any significant part of the matter or communication." Kirkpatrick points out that under Rule 511, "[w]aiver by disclosure of part or all of a privileged communication can occur in any situation, within or without the context of a lawsuit." Oregon Evidence, Third Edition, 1996, at page 278.

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[2] 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.

In State ex rel OHSU v. Haas, 325 Or 492, 498 (1997), the Supreme Court considered the question of the waiver of a claim of attorney-client privilege in a report by an OHSU attorney regarding sexual harassment and gender discrimination. The court noted that "two considerations arise in determining whether a waiver has occurred: (1) whether the disclosure was 'itself a privileged communication' and, if not, (2) whether the disclosure was a 'significant part of the matter or communication.'"

The court in Haas concluded that discussion of the report at a faculty meeting was a privileged communication not intended to be disclosed to third persons. The court found it unnecessary to "consider whether the disclosure was a "significant part of the matter or communication" within the meaning of OEC 511." State ex rel OHSU v. Haas, 325 Or at 511.

Two Court of Appeals decisions provide the necessary guidance. In Oregon Publishing Company v. Portland School District No. IJ, 152 Or App 135, 138 (1998), the trial court concluded that the district had waived its right to withhold an investigative report as a confidential personnel record because the district had disclosed the contents of the report at an unemployment compensation hearing for one of the affected district employees. The Court of Appeals held that "waiver applies to exempt records under the Oregon Law" and rejected the district's contention that it could not waive the applicable exemption, because the privilege against disclosure belonged to the affected individuals.

The court went on to acknowledge the restrictive versus expansive application of waiver in various federal FOIA decisions:

> We also conclude that there is no blanket principle that applies to waiver under the Oregon public records inspection law. We recognize, however, that the Oregon law reflects a "'strong and enduring policy that public records and governmental activities be open to the public.'" *Guard Publishing*, 310 Or at 39, 791 P2d 854(quoting *Jordan*, 308 Or at 438, 781 P2d 1203). Application of waiver to a claimed exemption of a public record from disclosure should be consistent with that policy (emphasis added).

Oregon Publishing Company v. Portland School District No. IJ, 152 Or App at 142.

The court then applied waiver to the case and the district's position that "the disclosure at the unemployment compensation hearing of information *from* the report did not waive the exemption in ORS 342.850(8) against disclosure *of* the report." Oregon Publishing Company, 152 Or App at 141. The court noted that testimony disclosed substantially all of the information in the investigation report and concluded that the exemption was waived.

In Springfield School District # 19 v. Guard Publishing Company, 156 Or App 176, 182 (1998), the court again considered the waiver of an exemption for personnel records of three high school staff members. The court reaffirmed the principle that the "document itself need not have been disclosed to give rise to waiver, if the information contained in the report is equivalent to the disclosed information."

Among other various documents, the district disclosed the charging letters against two of the employees. "Those letters described in detail the circumstances of the district's investigations and the finding of misconduct against Weiseth and Hill. The documents now sought are of a different nature but are, for the most part, based on the same factual circumstances." *Ibid.*

Guard Publishing Company argued that release of the documents waived any exemption the district might have had from disclosure of documents relating to Hill and the third district staff member. The Court of Appeals agreed.

> A comparison of Document 43 [the investigative report of the school district' s attorney related to Hill' s conduct] with the letter charging Hill reveals that the letter made reference to the incidents described in Document 43 and also described the circumstances outlined in Document 43 that gave rise to the discipline. The district has therefore waived its exemption from disclosure with regard to Document 43 (emphasis added).

Springfield School District # 19 v. Guard Publishing Company, 156 Or App at 182.

a. Written statements of employees

City employees made written statements immediately following the Wilson pool event consistent with the dictates of the Parks and Recreation protocols for managing a catastrophic incident. According to Mr. Auerbach, the reports were "ordered and collected by City supervisory personnel and transmitted to me for the purpose of facilitating the rendition of professional legal services to my client." The statements were not provided to Jeff Ellis for use in his investigation.

Petitioner argues that he is entitled to "routine" documents produced as part of the city's regular practice. "For example, it is the city's practice to have lifeguards write out incident reports – not because of anticipated legal action, but for safety review purposes – whenever someone gets help at a pool."

Mr. Auerbach has advised this office that the pool staff members understood at the time they gave the statements to their supervisors that they were doing so in anticipation of litigation. As such, the statements are confidential communications of a client and absolutely privileged.

b. Written summaries of interviews with witnesses

City employees were specifically directed by Mr. Auerbach to take notes during interviews of both City employees and third parties conducted as part of the investigation of the incident. As such, the notes are absolutely privileged from disclosure under the attorney-client privilege.

c. Videotape interviews with witnesses

According to the four-page investigative report submitted to Mr. Auerbach, Jeff Ellis conducted videotape interviews with City employees and third parties. Mr. Ellis reached his opinions based upon his "on-site visit to the Wilson swimming pool, interviews with fact witnesses associated with this accident and review of relevant operational procedures practiced by Portland Parks department personnel." The report was distributed to the media (including petitioner) together with a two-page statement from the City.

Also distributed to the media was a memorandum from Mr. Auerbach, which advised Commissioner Francesconi that the report was protected by the attorney-client privilege. Mr. Auerbach advised the Commissioner to "make it clear that you are waiving the privilege only as to the report itself, and that all other privileged materials remain privileged." There is no indication that Commissioner Francesconi acted on this advice other than to distribute the letter with the report.

Mr. Auerbach continues to assert the attorney-client privilege. He argues that Commissioner Francesconi did not waive the privilege with respect to the videotape interviews when he provided the Ellis & Associates report and the accompanying position statement of the City. The question under the Public Records law is whether the City has disclosed a "significant part of the matter or communication." A careful reading of the report and statement discloses a detailed rendition of the factual circumstances of the events at the Wilson pool. Although the names of the witnesses are left out, it is evident that a substantial part of the underlying interviews have been disclosed. It is a close question but this office concludes that the attorney-client privilege has been waived for the videotapes.

Mr. Auerbach correctly points out that employees engaged in their performance of duty are clients as much as the City of Portland. The persons interviewed by Mr. Ellis, including the juvenile lifeguards, are entitled to the City's protection. We agree to the extent that this order will provide an alternative to disclosure of the videotapes. The City (at its own expense) can prepare a transcript of the videotape interviews and redact the identifiers of the individuals being interviewed. The cost to petitioner should be no more than the cost for preparing a copy of the videotapes themselves.

d. E-mails between Mr. Auerbach and representatives of the City

We reviewed a representative sample of the approximately sixty e-mails generated to and by Mr. Auerbach after the Wilson pool incident. According to Mr. Auerbach, three or four of the e-mails will be voluntarily disclosed as not exempt under the attorney-client privilege. The rest are absolutely privileged as confidential communications made for the purpose of facilitating the rendition of professional services and as records relating to litigation.

II. Medical Reports

a. Exposure incident reports

According to Mr. Auerbach, several city employees filled out reports as a result of exposure to potentially infectious materials in the course of the incident. The City claims exemption of these records under ORS 192.525, which provides in part:

> (8) For purposes of this section, "medical records" includes chart notes, reports, laboratory reports, correspondence, transcribed records, patient questionnaires and any other record concerning the patient's care, diagnosis or treatment. "Medical records" does include personal office notes of the health care provider that do not concern the patient's care, diagnosis or treatment.

A review of one of the reports leads us to the conclusion that the purpose and substance of the information is not to create a medical record but to memorialize the circumstances of a possible exposure of a city employee to a health hazard. As such, the reports are not exempt "medical records" under ORS 192.525.

The City also claims exemption for the reports under ORS 192.502(2), Personal Privacy:

> Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if the public disclosure thereof would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance. The party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy.

The City claims, on behalf of its employees, that disclosure of the exposure incident reports would constitute an unreasonable invasion of privacy. Mr. Auerbach states, "[t]here is nothing in the reports that it would be in the public interest to disclose." We conclude that the reports

themselves should be disclosed in the public interest but that the particular identifiers of the city employees should be redacted.

b. Pre-Hospital Care Report

The first responders to the incident at the Wilson pool were Fire Bureau personnel. They filled out a standard Portland Fire Bureau Pre-Hospital Care Report. We have reviewed this document and it is consistent with the work of a paramedic in assessing and treating a patient as a first responder. Mr. Auerbach again claims exemption of the report under ORS 192.525.

The report clearly falls within the definition of a "medical record." The question is whether the Fire Bureau personnel are health care providers. ORS 192.525(10) provides:

> For purposes of this section, "health care provider" includes a health care facility defined in ORS 442.015 and emergency medical technicians certified by the Department of Human Services.

Mr. Auerbach advised us in his confidential letter of September 6 that it is a job requirement that all Portland firefighters be emergency medical technicians certified by the Department of Human Services. We conclude that the pre-hospital care report is exempt as a medical record.

III. Fee Waiver

The Public Records Law expressly authorizes a public body to establish fees "reasonably calculated to reimburse it for its actual cost in making such records available." ORS 192.440(3). The public body is permitted to include in its fees "costs for summarizing, compiling or tailoring [a] record, either in organization or media, to meet the person's request." ORS 192.440(3).

"Actual cost" may include a charge for the time spent by the public body's staff in locating the requested records and "a public body may preliminarily estimate charges for responding to a records request and require prepayment of the estimated charges before acting on the request." Attorney General's Public Records Manual, 2001, page 13.

The public agency may provide the records without charge or at a reduced fee "if the custodian determines that the waiver or reduction is in the public interest because making the record available primarily benefits the general public." ORS 192.440(4). The Attorney General has recognized that even if making the record available is in the public interest, a public body may still deny a fee waiver or reduction if warranted by certain factors.

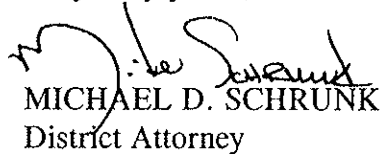
A distinction must be drawn between a request for records readily available for inspection or copying and those records that must be compiled (or created) in a special production. The city does not accept petitioner's argument that the "invoices and payment records" involving Jeff Ellis &

Associates are of sufficient public interest to justify a fee waiver. This office agrees with Mr. Auerbach that the decade of invoices and payment records will not be "particularly edifying." Petitioner has been (or will be) provided with e-mails identified by Mr. Auerbach as not exempt and responsive to the request. This has been accomplished at modest cost to the city and at no cost to petitioner. The City is entitled to be reimbursed for its extraordinary research costs together with any copying fees.

ORDER

Accordingly, it is ordered that the City of Portland promptly disclose the records sought in the above petition as follows: videotape interviews conducted by Jeff Ellis (or redacted transcripts) and the exposure incident reports (redacted). Disclosure of the documents ordered is subject to payment of the City of Portland's fee, if any, not exceeding the actual cost in making the information available, consistent with ORS 192.440 and this order.

Very truly yours,



MICHAEL D. SCHRUNK
District Attorney

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.