



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/

July 31, 2002

Brent Huntsberger
Business News Reporter
The Oregonian
1320 SW Broadway
Portland, OR 97201

James Kirk
Assistant General Counsel
Port of Portland
121 NW Everett
Portland, Or 97209

Re: Petition of Brent Huntsberger on behalf of The Oregonian received July 22, 2002 to disclose certain records of the Port of Portland.

Dear Mr. Huntsberger and Mr. Kirk:

This public records petition is the latest in a series of requests made by reporters from The Oregonian to the Port of Portland to release documents pertaining to the Columbia River channel deepening project.

The current Columbia River navigation channel, maintained by the Army Corps of Engineers, is forty feet in depth. To accommodate modern cargo vessels it has been proposed that this channel depth be increased to forty-three feet, an improvement which would benefit all Columbia River ports from Astoria to Portland. The proposed project has generated a great deal of controversy and public interest on a number of fronts, primarily economic and environmental.

The channel deepening issue has been the topic of substantial press coverage and to facilitate its reporting Oregonian reporters have sought access under the public records laws, ORS 192.410 et. seq., to public records maintained by the Port of Portland, a public agency. On February 14, 2002 this office issued an opinion in an earlier, similar public records petition by

The Oregonian. That opinion is attached because it discusses the legal position taken by this office on identical issues presented by the same parties.

On July 19, 2002 the newspaper filed the current petition for this office to review actions taken by the Port in declining to release certain documents in a new series of requests for public records. In general, it should be noted, the Port has complied with these requests of The Oregonian to voluntarily release information.¹ For certain documents in both series of requests, however, the Port has claimed exemptions, under the public records laws, and has declined to release the documents to Oregonian reporters who have requested them. In the current case the Port has claimed exemptions which it contends cover all or part of 34 of the 458 documents requested. The public records law requires the District Attorney's Office to review these claimed exemptions and issue a determination about their legal validity.

To facilitate the task of reviewing these claimed exemptions, the Port of Portland has provided this office with copies of the documents which it claims to be exempt. In addition, a 20-page letter has been submitted to our office from Port of Portland General Counsel James Kirk explaining the rationale behind the claimed exemptions, including the withdrawal of claimed exemptions in certain portions of several documents. Extensive conversations with Chief Counsel Kirk and five supplementary e-mails explaining the Port's position have provided assistance in understanding the issues behind many of the exemptions.

1. Attorney-client privilege.

Thirty-two of the exemptions claimed by the Port involve the claim of attorney-client privilege under ORS 40.225 (Rule 503 of the Oregon Evidence Code). To understand this claimed exemption it is necessary to also understand the background of litigation surrounding the channel deepening project. On February 14, 2000 a lawsuit was filed in federal court in Seattle by certain environmental groups challenging the biological impact assessments of the Army Corps of Engineers and National Marines Fisheries Service (NMFS). The Port and other Columbia River ports intervened in the lawsuit. NMFS subsequently withdrew its biological assessment and the lawsuit was suspended in part and dismissed without prejudice in part.

Working on the assumption that litigation would recommence when a new biological assessment was issued and when the Corps of Engineers issued a record of decision, the Port, in collaboration with other Columbia River ports, hired a scientific consulting firm, Parametrix, Inc., and private counsel. A complex communication structure was established to facilitate the conveyance of information between the attorneys, the representatives of each port and Parametrix, which was hired, essentially, to develop independent scientific data designed to influence the ultimate Corps and NMFS biological assessments and to assist in the litigation described above, all presumably with the objective of obtaining a legal result leading to the approval of the channel deepening project. This decision reflects our understanding of that legal climate and the structure developed to deal with it.

¹ In a similar petition filed September 15, 2001 the Port agreed to release 566 of the 617 requested documents and in this petition the Port has agreed to release 424 of the 458 requested documents.

Our assessment of the exemptions claimed is that the attorney-client privilege protects most of the documents requested from disclosure. It should be noted that the Port, in examining these documents, has itself concluded that certain portions should be disclosed. The following is a list of documents for which the attorney-client privilege is claimed by the Port, in all or in part of the document. Where the privilege applies only partly we will indicate what portions are subject to disclosure. Most of the documents listed are fully protected by the privilege, although we have determined that in two cases the privilege does not apply and the documents should be released in their entirety.

Document 26. E-mail from attorney Eric Laschever Dianne Perry, coordinator of the channel deepening project, with attached biological assessment, marked with comments and proposals. Privileged.

Document 30. E-mail from Eric Laschever to Alan Willis and Dianne Perry with attached draft revision proposals. Privileged.

Document 31. E-mail from Alan Willis to Eric Laschever. Privileged.

Document 43. E-mail from Rick Cardwell to Rick Mishaga with copies Brad Hermanson, John Marsh, Jeff Wirtz and Dianne Perry, with attached memorandum expressing opinions on NMFS assessment. It should be noted that this same document was the subject of the February 14 opinion of this office (No. 146 in that petition). Privileged to the extent that it was not ordered released to The Oregonian at that time.

Document 66. E-mail from Alan Willis to Kevin Halsey pointing out a typographical error in an earlier advisory draft. Privileged.

Document 83. Legal memo from Preston, Gates and Ellis to Dianne Perry and Alan Willis pertaining to legal aspects of channel deepening project. Privileged.

Document 91. Two e-mails between Sebastian Degens and Alan Willis, with copies to Dianne Perry, attorney Jeff Ring and Robert Moulton. Privileged, although the Port reports that these documents were in fact inadvertently disclosed to the petitioner.

Document 92. Identical e-mails to those in Document 91. Privileged.

Document 111. Approximately sixty-five pages of various memoranda. The first four pages consisting of a memo from Kevin Halsey to attorney Jeff Ring is privileged. The remainder of the document, released outside of the attorney-client structure, to officials from other ports, is not privileged and is subject to release.

Document 138. Multiple e-mail records consisting of communications between Parametrix employees and Dianne Perry and Eric Laschever. Privileged.

Document 153. Three e-mails and a four-page report. Only the e-mail from Rick Mishaga to John Marsh and Kevin Halsey is claimed to be exempt by the Port. It is privileged and the remainder is subject to release.

Document 170. E-mail memo from Rick Mishaga to Dianne Perry with copy to attorney Dave Bartz. Privileged.

Document 172. Three e-mails between Rick Mishaga, Dianne Perry, attorney Jeff Ring and attorney Dave Bartz. Privileged.

Document 174. This document, according to the Port, has been disclosed as part of Document 51.

Document 304. This is the same memorandum from Rick Cardwell referred to in Document 43.

Document 328. E-mail from John Marsh to attorneys Jeff Ring and Dave Bartz with accompanying outline. Privileged.

Document 329. E-mail from attorney Dave Bartz to Dianne Perry pertaining to comments on draft from attorney Jeff Ring. Privileged.

Document 330. Memorandum from attorney Jeff Ring to Dianne Perry and Rick Mishaga with attached working draft of cutthroat salmon impact report, replete with handwritten notes from Ring. The handwritten notes by attorney Ring are privileged. The draft is not privileged and the Port should release a clean copy of this document without the handwritten opinions of the attorney involved. This determination is based upon information found in other documents submitted by the Port. Specifically, document 420, discussed later, includes an e-mail from Dianne Perry to Jeff Ring in which she states that "the draft cutthroat document (this document) is being done collaboratively with USFWS—Rick did not order that work under the privilege protection."

Document 379. E-mail from Sebastian Degens to Alan Willis. Two e-mails between Sebastian Degens and Alan Willis with copies to Robert Moulton, Dianne Perry and attorney Jeff Ring. Privileged.

Document 383. Two e-mails between Sebastian Degens and attorney Jeff Ring. Privileged.

Document 420. Two e-mails between attorney Jeff Ring and Dianne Perry. Privileged.

Document 421. Multiple records. Only an e-mail from Megan Grant to numerous attorneys and representatives of the various ports and an e-mail from attorney Jeff Ring to Pamela Morgan are claimed to be exempt. These are privileged and the other documents, consisting of thirty-five pages of Corps and NMFS documents should be released.

Document 424. Memorandum from attorney Jeff Ring to John Marsh. Privileged.

Document 425. This document consists of numerous handwritten notes on the back page of an e-mail hardcopy. The e-mail is not claimed to be exempt. The handwritten notes were made by

Rick Mishaga while in a conference with Port attorneys. These notes are privileged and the e-mails are not. They have been disclosed to the petitioner, according to the Port.

Document 427. An e-mail from Rick Cardwell of Parametrix to Brad Hermanson and Rick Mishaga, with an accompanying four-page memorandum. The Port claims an attorney-client privilege for this document. Under OEC 503(1)(b) communications between attorneys and clients must be confidential to be privileged. We believe that this document was not submitted confidentially in a manner which would justify the protection of the privilege.

In his e-mail Mr. Cardwell suggests that his accompanying memorandum, which he stresses was prepared on his own time, be shared with working groups outside of the structure of the channel deepening project. Specifically, the Port of Portland is currently working on a harbor improvement project with a completely different structure of attorneys and representatives. In his memorandum itself he alludes to the fact that he has summarized this information to the harbor improvement project and to the Sustainable Ecosystem Institute, both outside of the structure of attorney confidentiality in the channel deepening project.

Because it is evident that Mr. Cardwell, in preparing this memorandum, envisioned a wider distribution for it than within the strict confines of the channel deepening project, it cannot be considered to have been developed as a confidential document. As such the claimed privilege does not apply.

Document 431. An e-mail from attorney Jeff Ring to Rick Mishaga, Dianne Perry and Dave Lohman. Privileged.

Document 436. A two-page document with handwritten notes by Dianne Perry taken during meetings with Port attorneys. Privileged.

Document 439. Memorandum From attorney Rick Laschever to Dianne Perry. Privileged.

Document 440. A memorandum from Dianne Perry to various port directors with an accompanying legal memorandum from law firm Preston, Gates and Ellis. Privileged.

Document 441. Memorandum from attorney Eric Laschever to Dianne Perry. Privileged.

Document 442. Pre-decisional document draft from law firm of Preston, Gates and Ellis to Dianne Perry. Privileged.

2. Documents where other exemptions are claimed.

Document 204. This document consists of thirty-five pages of Army Corps of Engineers "predecisional documents." The documents appear in the records of the Port although they are stamped "For Internal Use Only." The Port claims, through Mr. Kirk, that these documents were submitted to the Port in confidence and that furthermore under ORS 192.502(10) the federal government is the proper custodian of these records. Consequently, it is claimed, the request for release should be made through the Federal Freedom of Information Act to the Army Corps of

Engineers. This exemption for transferred records requires that the records be submitted from the transferring agency to the transferee in confidence.

The confidential nature of these documents is not well established by the Port in claiming this exemption. It would have been preferable to submit documentation from the Corps on this point. We believe, however, that we can reasonably infer, from the history of this project and from the designation "For Internal Use Only" that the Corps would not have released the documents to the Port unless they believed that they would be kept confidential. As a consequence, we conclude that ORS 191.502(10) does apply.

Document 392. This is an e-mail and attached memorandum from Keith Leavitt to then Port executive director Mike Thorne. A substantial portion of the e-mail and memorandum has been released to the petitioner. The Port has redacted a portion of the documents and claim that these portions are exempt as internal advisory opinions under ORS 192.502(1).

To qualify for an exemption as an internal advisory opinion the document must be a communication within a public body, it must be advisory in nature preliminary to any final agency action, it must cover other than purely factual matters and the public interest in maintaining frank communication within a public agency must outweigh the public interest in disclosure. The portions of Document 392 which the Port has redacted meet those criteria. They concern advice from a Port employee to the highest level of Port management concerning how to best present the channel deepening project to the Governor of the State of Oregon in a scheduled meeting. According to the Attorney General's Public Records and Meetings Manual, p. 40, the "test of whether there are grounds for asserting the exemption is whether disclosure would inhibit the employee so as to interfere with the free flow of information and ideas that the agency needs for its efficient operation,..."

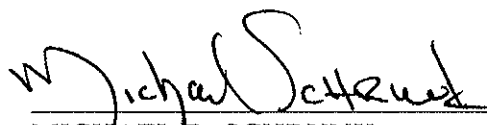
We conclude that the exemption in ORS 192.502(10) applies. The redacted portion of the documents consists of precisely the type of sensitive, preliminary opinions that are sought to be protected by this exemption.

Document 429. This is a two-page document prepared by the Army Corps of Engineers and submitted to the Port to facilitate work on the biological assessment in progress. It is marked "Privileged and Confidential (DO NOT DISTRIBUTE)." Dianne Perry asserts that it was intended to be confidential and that was the understanding of both the Corps and the Port. For the same rationale expressed in Document 204 we conclude that it is privileged.

ORDER

Accordingly, it is ordered that the Port of Portland promptly disclose the records sought in the above petition as follows: Document 111—release all but the first four pages. Document 153—release everything but the 7/10/01 e-mail from Rick Mishaga to John Marsh. Document 330—release a clean copy of the memorandum attached to the cover memorandum. Document 421—release all but the Megan Grant and Jeff Ring e-mails of 2/28/01. Document 427—release in its entirety. 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, Oregon

Enclosure

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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.

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MICHAEL D. SCHRUNK, District Attorney for Multnomah County

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

February 14, 2002

Brent Hunsberger
Business News Reporter
The Oregonian
1320 SW Broadway
Portland, OR 97201-3499

James J. Kirk
Assistant General Counsel
Port of Portland
121 NW Everett
Portland, OR 97209

Re: Petition of Brent Hunsberger on behalf of The Oregonian received January 14, 2002 to disclose certain records of the Port of Portland

Dear Mr. Hunsberger and Mr. Kirk:

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

Correspondence and communications related to deepening the Columbia River navigation channel that were withheld from The Oregonian's inspection under ORS 192.501(1), which exempts records pertaining to litigation.

On September 15, 2001, petitioner submitted his extensive request to Ms. Eliza Dozono, Corporate Media Manager for the POP. In response, the Port provided approximately 216 documents under the heading "e-mails," 395 documents titled "Executive Department," 98 documents titled "Bob Hrdlicka's Documents," and 73 documents titled "Planning & Policy Development." All or parts of 51 documents were not disclosed as privileged attorney-client communications.

In the petition, Mr. Hunsberger highlighted thirteen of the withheld documents that "did not appear to authored by or directed to the Port's Attorney." Petitioner argued that the POP is not a party to a lawsuit dealing with the deepening project and that the POP has not shown that it expects to be a party of future litigation involving the largely federal project.

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On January 18, 2002, POP Assistant General Counsel James Kirk responded to the petition. We received a follow-up letter dated January 30, 2002. Counsel Kirk claimed all (or parts of all) documents were unconditionally privileged under ORS 40.225, attorney-client, and conditionally privileged under ORS 192.501(1), records pertaining to litigation. Two documents were asserted to be conditionally exempt under ORS 192.502 (4) as confidential submissions. This office was also provided with two affidavits of Ms. Dianne Perry, the Columbia River Channel Deepening Project Manager, together with a copy of the intergovernmental agreement between the POP and the Port of Vancouver, and an extensive chart listing most (if not all) of the attorneys for the six ports and all the representatives of the various ports.

Mr. Kirk subsequently submitted an e-mail and a February 4 letter to this office further explaining the relationship of the six Columbia River ports under the Channel Deepening Project, the role of the numerous attorneys involved in the litigation, and the public interest concerns of the Port of Portland. Petitioner provided a detailed letter on January 31 discussing certain documents and amplifying arguments that the public interest required disclosure of the documents sought in his petition. Mr. Kirk submitted a final six-page letter on February 8.

DISCUSSION

I. ATTORNEY-CLIENT PRIVILEGE.

The lawyer-client privilege of ORS 40.225 is incorporated by ORS 192.502(9) 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:

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- (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 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;
- (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 POP Assistant General Counsel Kirk, we feel much more knowledgeable about the roles of various attorneys (both POP counsel and outside counsel) and the numerous representatives of the six Columbia River ports. Of primary importance to the POP is the concept of "common interest" which would arguably protect communications between

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.

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the six port representatives. We are unable to agree with the Port's position. The privilege, in unambiguous language, only applies to communications "[b]y the client or the client's lawyer to a lawyer representing another in a matter of common interest." ORS 40.225(2)(c). The only exception to that bright line would be the few instances where a port representative, such as Dianne Perry, served as the conduit for a privileged communication between an attorney and another port representative.

The process of evaluating each document in this petition requires consideration of three basic questions: 1) was the communication of a confidential legal nature or more correctly commentary of a policy nature², 2) was the communication either directly or indirectly to or from a representative of a client and an attorney, and 3) was the communication confidential in nature? In the interest of time and space, this order does not provide an explanation of the rationale for our decision on each document.

A. E-MAILS

No. 125 - One-page e-mail from POP Assistant General Counsel Jeffery Ring to other counsel and representatives of the Ports - privileged. (POP has disclosed the 17-page draft Cooperation Agreement).

No. 126 - One-page memorandum from POP General Counsel Streisinger to representatives of the POP - privileged.

No. 127 - One-page e-mail from POP Assistant General Counsel Ring to POP representative David Lohman - privileged.

No. 146 - Two-page memorandum and comments contained in the 32-page Toxic Contaminants Impact report prepared by consultant Rick Cardwell at the direction of POP Assistant General Counsel Ring - privileged. (POP has disclosed the cover e-mail from Columbia River Channel Coalition Executive Director Dianne Perry and a redacted version of the other documents).

No. 155 - Three-page memorandum from POP General Counsel Ring to POP representatives - privileged.

No. 156 - One-page e-mail and 13-page memorandum from POP Assistant General Counsel Ring to Diane Perry and Alan Willis - privileged.

² "All these communications [of ORS 40.225(2)] must be specifically for the purpose of obtaining legal services for the client; otherwise the privilege does not attach." Kirkpatrick, Oregon Evidence, 3rd. ed. p. 210. "If the client consults with the lawyer as a friend, counselor, business advisor, executor, investigator, tax preparer, attesting witness, or scrivener, the privilege will not arise." *Ibid.*, p. 213.

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No. 222 – One-page of four e-mails and a one page memorandum attachment to the original e-mail. The first three e-mails to or from POP Assistant General Counsel Ring – privileged. The e-mail from POP representative Richard Finn to Dianne Perry and POP representatives David Lohman, Keith Leavitt and Bernie Bills and the attached memorandum - not privileged.

No. 224 – Three-page memorandum from POP Assistant General Counsel Ring to POP representatives – privileged.

B. EXECUTIVE DEPARTMENT

No. 137 – Three-page memorandum from outside counsel Peter Friedman to Dave Lohman – privileged.

No. 142 – Two-page memorandum from POP General Counsel Cory Streisinger to POP Executive Director Mike Thorne - privileged.

No. 145 – One-page memorandum from POP General Counsel Streisinger to POP Executive Director Thorne – privileged. (POP has disclosed the attached minutes and partial transcript).

No. 188 – One-page memorandum from Assistant General Counsel Brian Playfair to POP representatives – privileged.

C. BOB HRDLICKA' S DOCUMENTS

No. 8 – One-page memorandum from Senior Project Manager Dianne Perry to the six port managers or executive directors – not privileged. One-page briefing paper will be discussed (Section III below) under the claimed exemption as a confidential communication.

No. 9 – Two-pages of slides, one-page document entitled “Reconsultation Goals,” and three-pages of charts. The information on the two slides and charts below the words “Ports Legal Team” in the Reconsultation Approaches Option 1 box and the information below the words “Legal Counsel” in the Reconsultation Approaches Option 2 box are privileged. The rest of the documents are not privileged. (POP has already disclosed one page of the slides and one page of the charts).

No. 10 and 11 – One-page document titled Channel Deepening Project. The line starting “Outside Counsel” and the two lines titled “Future Litigation Costs” are privileged. The rest of the document is not privileged.

No. 13 - Two-page memorandum from Senior Project Manager Dianne Perry to the six port managers or executive directors – not privileged except the fifth paragraph beginning “Our respective legal counsel” is privileged.

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No. 17 – Four-page Confidential Draft from POP representative Dave Lohman to POP Executive Director Thorne (edited from an initial draft by counselor Ring) – not privileged except for the first full paragraph of page three.

No. 23 – Three-page e-mail from POP Assistant General Counsel Ring to Dianne Perry and POP Counsel and representatives – privileged.

No. 26 – Two-page memo from Dianne Perry to the Washington and Oregon port directors and representatives, POP counsel, and outside counsel – privileged.

No. 29 – Two-page pre-meeting notes for March 6, 2000 channel brainstorming meeting and one-page list of attendees – not privileged.

No. 35 – One-page of slides relating to September 10, 1999 Project Engineering & Design Agreement – not privileged (POP has already disclosed the attached one-page document and one-page of slides).

No. 37 – One-Page of e-Mails to and from POP representative Alan Willis, POP Assistant General Counsel Ring, and POP outside attorneys Gail Achterman and Michael O'Connell – privileged.

No. 107 – Three-page document outline of major issues on channel deepening – not privileged.

D. PLANNING & POLICY DEVELOPMENT

No. 26 – Three pages of e-mails to and from POP outside attorney Achterman to POP Assistant General Counsel Ring and POP representatives Willis and Hrdlicka, forwarded to POP representatives Sebastian Degens and David Lohman – privileged.

No. 39 – One-page of e-mails to and from POP outside counsel Michael Campbell, POP Assistant General Counsel Ring, POP General Counsel Streisinger, POP outside counsel Achterman, and POP representatives Willis and Lohman – privileged.

No. 54 – One-page e-mail and four pages of slides from Amber Quinn, POP Legal Department Administrative Coordinator, to POP representatives Richard Finn, Keith Leavitt, David Lohman, and General Counsel Streisinger – not privileged.

No. 55 – Seven-page Litigation Summary sent as an e-mail attachment by POP Assistant General Counsel Ring to POP representatives Lohman, Finn, and Leavitt – privileged.

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No. 56 – Three-pages of e-mails to and from outside counsel O' Connell and Bartz, from Mr. Bartz to POP Assistant General Counsel Ring and outside counsel Achterman and then forwarded to POP General Counsel Streisinger and POP representatives Lohman, Willis, Finn, and Leavitt – privileged.

No. 57 – Four-pages of e-mails to and from outside counsel O' Connell and Bartz, from Mr. Bartz to POP Assistant General Counsel Ring and outside counsel Achterman and then forwarded to POP General Counsel Streisinger and POP representatives Lohman, Willis, Finn, and Leavitt – privileged.

No. 58 – One-page e-mail from outside counsel Beth Ginsberg to POP Assistant General counsel Ring and outside counsel Achterman – privileged.

No. 59 – One-page of e-mails from POP representative Willis to numerous attorneys and POP representatives and response from POP representative Finn – not privileged.

No. 60 – E-mail from POP Assistant General Counsel Ring to POP representatives Lohman and Willis and attached two-page Proposed Washington law firm budget – privileged.

No. 61 – [same as Hrdlicka No. 8].

No. 63 – Two-pages of e-mails to and from POP Assistant General Counsel Ring and outside counsel Ginsberg, and then forwarded by counsel Ring to POP representatives Willis and Lohman, and POP General Counsel Streisinger – privileged.

No. 65 – One-page of e-mails to and from POP Assistant General Counsel Ring and POP representative Lohman and attached three-page memorandum from Counsel Ring to Executive Director Thorne – privileged.

No. 66 – One-page e-mail from POP Assistant General Counsel Ring to POP representatives Lohman, Hrdlicka, and POP General Counsel Streisinger with attached one-page exhibit – privileged.

No.68 – One-page e-mail from POP Assistant General Counsel Ring to POP Assistant General Counsel Kirk, outside counsel Lynch, Achterman, Bartz, Stephenson, Ginsberg, and POP representatives Willis, Perry, Lohman, and Leavitt with attached three-page memorandum from counsel Ring to POP representatives Perry, Willis, and Bills and outside counsel Bartz – privileged.

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No. 69 – One-page of e-mails from outside counsel Ginsberg to POP Assistant General Counsel Ring and outside counsel Stephenson, Bartz, and Achterman, forwarded from counsel Ring to POP representatives Willis and Perry, e-mail replies to and from Alan Willis and Jeff Ring, and forwarded from Dianne Perry to POP representatives Lohman, Leavitt, and Hrdlicka – privileged.

No. 72 – Two-pages of e-mails from Diane Perry to outside counsel Bartz, POP representatives Bills and Willis, and counsel Ring, response from David Bartz with copy to outside counsel Stephenson (and others), and response from counsel Stephenson – privileged.

No. 73 – One-e-mail from POP Assistant General Counsel Ring to POP representatives Lohman, Hrdlicka, Perry, Willis, Bills, outside counsel Bartz, Stephenson, and Ginsberg, and POP General Counsel Streisinger with attached three-page memorandum from counsel Ring to POP representatives Lohman, Hrdlicka, Perry, and Willis – privileged.

No. 75 - One-page response to e-mail from outside counsel Achterman to David Lohman – not privileged except the sentence following “(2) West Hayden Island” and the three sentences following “(3) Terminal 1/Urban Redevelopment.” (POP has already disclosed the one-page e-mail from Darla Swensen, Executive Director Thorne’s Administrative Coordinator to David Lohman, forwarded by Lohman to Dianne Perry, Gail Achterman, Keith Leavitt, Cheryl Koshuta, Trey Harbert, and Richard Finn).

No. 77 – Two-page e-mail from outside counsel James Lynch to POP Assistant General Counsel Ring forwarded to POP representatives Dianne Perry, David Lohman, Keith Leavitt, Richard Finn, and Alan Willis, and response from Alan Willis – privileged.

No. 79 - One-page e-mail from POP Assistant General Counsel Ring to David Lohman and Dianne Perry with attached twenty four-page edited document titled “Attorney Client Privilege DO NOT RELEASE”³ – privileged.

No. 80 – One-page e-mail from Dianne Perry to POP Assistant General Counsel Ring and outside counsel David Bartz, Walt Evans, Beth Ginsberg, and Guy Stephenson, and POP representative Bernie Bills (copy to various POP representatives) – privileged.

No. 83 – Three pages of e-mails from outside counsel Jim Lynch to POP Assistant General Counsel Ring and forwarded to outside counsel David Bartz and POP representatives Bernie Bills, Alan Willis, and Dianne Perry, with a response from Alan Willis, a reply to Alan Willis from David Bartz and a response to David Bartz from counsel Ring – privileged.

³ Counsel Kirk has advised this office that the edited document was a privileged Corps document provided in confidence to the Port’s lawyers for comments. The Port is attempting to find the “final version” of the document for possible disclosure to The Oregonian.

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No. 86 - One page of e-mails from outside counsel Beth Ginsberg to Dianne Perry, Assistant General Counsel Ring, and outside counsel Bartz and Stephenson, forwarded with a two-paragraph comment from Dianne Perry to numerous POP representatives and Director and General Counsel Streisinger - all privileged except the second paragraph of Dianne Perry's comment.

No. 93 - One-page e-mail from Cathy Tortorici, NMSF, to Dianne Perry with attached two-page agenda for Columbia River Channel Improvement Project meeting, forwarded to outside counsel David Bartz, POP Assistant General Counsel Ring, and POP representative David Lohman, with response from counsel Ring - not privileged except the e-mail from counsel Ring.

No. 95 - E-mail from Dianne Perry to numerous POP representatives, outside counsel Bartz, and POP counsel Streisinger and Ring with attached two-page document (identical to No. 13), and response from counsel Ring - not privileged except the response from counsel Ring and the fifth paragraph of the two-page document beginning "Our respective legal counsel."

No. 98 - E-mail from Dianne Perry to numerous POP representatives and outside counsel Bartz with attached one-page draft document, one-page e-mail from POP Assistant General Counsel James Kirk to POP representative David Lohman, and one-page memorandum from counsel Kirk to counsel Ring - not privileged except the first sentence in the fourth paragraph of Dianne Perry's e-mail and the e-mail and memorandum from counsel Kirk.

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, 2001, p. 27. 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).

The Port of Portland has claimed the litigation exemption for all withheld records. The litigation in which the Port of Portland intervened was apparently filed on February 14, 2000

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against the National Marine Fisheries Service. POP Assistant General Counsel Kirk stated in his January 30 letter to this office that POP Assistant General Counsel Jeff Ring "concluded that litigation was reasonably likely when he first saw a draft of the Corps' eight-page biological assessment in January or February of 1999." We will accept that date for purposes of our evaluation of the withheld documents. The analysis is necessarily limited to those documents not determined to be exempt under the attorney-client privilege.

With respect to the documents below found to be exempt, it was also determined that the public interest did not require disclosure. With respect to the documents below found not to be exempt, it was determined that the litigation exemption simply did not apply.

A. E-MAILS

No. 222 - July 2000 e-mail (except noted privileged material) from POP representative Richard Finn to Dianne Perry and POP representatives David Lohman, Keith Leavitt and Bernie Bills and the attached memorandum - not exempt.

B. BOB HRDLICKA' S DOCUMENTS

No. 8 - October 2000 one-page memorandum from Senior Project Manager Dianne Perry to the six port managers or executive directors - not exempt.

No. 9 - October 2000 six-pages of materials (except noted privileged material) concerning the Channel Deepening Project - not exempt.

No. 10 and 11 - October 2000 one-page document (except noted privileged material) titled Channel Deepening Project - not exempt.

No. 13 - October 2000 two-page memorandum (except noted privileged material) from Senior Project Manager Dianne Perry to the six port managers or executive directors - not exempt.

No. 17 - October 2000 four-page Confidential Draft (except noted privileged material) from POP representative Dave Lohman to POP Executive Director Thorne - not exempt.

No. 29 - March 2000 two-page pre-meeting notes for March 6, 2000 channel brainstorming meeting and one-page list of attendees - exempt.

No. 35 - One-page of slides relating to September 10, 1999 Project Engineering & Design Agreement - exempt.

No. 107 - Undated three-page document outline of major issues on channel deepening - exempt.

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C. PLANNING & POLICY DEVELOPMENT

No. 54 – February 2000 one-page e-mail and four pages of slides from Amber Quinn, POP Legal Department Administrative Coordinator, to POP representatives Richard Finn, Keith Leavitt, David Lohman, and General Counsel Streisinger – exempt.

No. 59 – February 2000 one-page of e-mails from POP representative Willis to numerous attorneys and POP representatives and response from POP representative Finn – not exempt.

No. 75 One-page response to e-mail (except noted privileged material) from outside counsel Achterman to David Lohman – not exempt.

No. 86 – September 2000 e-mail comment (except noted privileged material) from Dianne Perry to numerous POP representatives and Director and General Counsel Streisinger- exempt.

No. 93 - October 2000 one-page e-mail from Cathy Tortorici, NMSF, to Dianne Perry with attached two-page agenda for Columbia River Channel Improvement Project meeting, forwarded to outside counsel David Bartz, POP Assistant General Counsel Ring, and POP representative David Lohman (Counsel Ring's response is privileged) - not exempt.

No. 95 – October 2000 e-mail from Dianne Perry to numerous POP representatives, outside counsel Bartz, and POP counsel Streisinger and Ring with attached two-page document (except noted privileged material)- not exempt.

No. 98 – October 2000 e-mail (except noted privileged material) from Dianne Perry to numerous POP representatives and outside counsel Bartz with attached one-page draft document – not exempt.

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.

According to the February 4, 2002 affidavit of Dianne Perry, the Corps of Engineers “white paper” (Bob Hrdlicka Document No. 8) was submitted in confidence. It was a voluntary submission by the Corps and Ms. Perry agreed to keep the document confidential. The white

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paper was to be "shared only with other ports serving as non-federal sponsors for the Columbia River navigation channel deepening project."

"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, 2001, p. 64. POP Assistant General Counsel Kirk noted in his January 18 letter to this office that the white paper was "not subject to disclosure under the federal Freedom of Information Act." The Corps has recently reiterated the continued confidential nature of the white paper and advised Ms. Perry "the Port was not authorized to release it." The federal government is the proper custodian of the document and a request for its disclosure can and should be made under the Freedom of Information Act. See ORS 192.502(10).

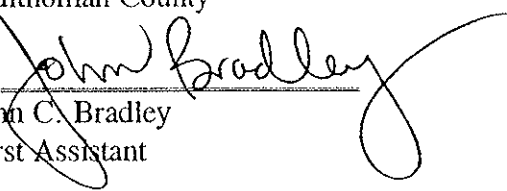
The first four requirements of the exemption have been met. A thorough review of the document itself reveals factual information, commentary, opinions, and recommendations of an interim nature. We have evaluated the white paper in light of the petitioner's concerns and explanation of the public interest. There is, however, nothing embarrassing, controversial, or particularly significant in the document. Its disclosure, however, would affect the sensitive relationship between the Port of Portland and the Corps. Disclosure must be denied.

ORDER

Accordingly, it is ordered that the Port of Portland promptly disclose the records sought in the above petition as follows: No. 8 (except exempt confidential communication), No. 9 (except privileged material), No. 10 and 11 (except privileged lines), No. 13 (except privileged paragraph), No. 17 (except privileged paragraph), No. 59, No. 75 (except privileged sentences), No. 93 (except privileged e-mail), No. 95 (except privileged response and paragraph), No. 98 (except privileged sentence, e-mail and memorandum), and No. 222 (except three privileged e-mails). 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

By 
John C. Bradley
First Assistant

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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.

02-02