



MICHAEL D. SCHRUNK, District Attorney for Multnomah County

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January 10, 2002

Darrell Cornelius
22243 NE Park Lane
Fairview, OR 97024

Paul Elsner
Beery & Elsner LLP
1750 SW Harbor Way Suite 380
Portland, OR 97201-5164

Re: Petition of Darrell Cornelius received December 5, 2002 to disclose certain records of the City of Fairview

Dear Mr. Cornelius and Mr. Elsner:

On this public records petition, ORS 192.410 et. seq., petitioner Darrell Cornelius requests the District Attorney to order the City of Fairview and its employees to make available for inspection a copy of the following records:

1. All records and writings of statements made by any person relevant to the investigation of Jeff Sarvis.
2. All records and writings used or reviewed in investigating complaints and/or charges made against Jeff Sarvis.
3. The city's file copy of the letter written by Mayor Vonderharr which was published in the *Gresham Outlook* in its November 3, 2001, edition.
4. All records used in the preparation of the mayor's letter referred to in the preceding paragraph. All records supporting facts contained therein. All records of any nature in any person's files in any person's possession which contain the information referred to in the mayor's letter. In this latter regard, I specially include City Attorney Elsner's files.

Darrell Cornelius, a citizen of the City of Fairview, made a request for numerous records "related to the investigation and employment termination of former City of Fairview employee Jeff Sarvis" in a letter to Mayor Vonderharr dated October 22, 2001. Paul Elsner, Fairview City Attorney, responded in a letter dated October 31. First, Mr. Elsner indicated

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that there were two documents responsive to the request and that they would be provided. Second, Mr. Sarvis' personnel file would be made available to petitioner (with necessary redactions). Third, the investigative records and writings "consisting of six or seven investigative summaries of interviews with various persons" were protected by attorney-client privilege and would not be disclosed. In response, petitioner noted that the mayor and city council had caused a letter to be published in the November 3, 2001, edition of The Gresham Outlook. Petitioner enlarged his request to include any documents relating to the preparation of that letter. Petitioner rejected the city's claim of attorney-client privilege and argued that, in any case, the privilege had been waived.

The City responded to the petition in a letter dated December 7. Mr. Elsner asserted that the City is the "client" and that he is the "client's lawyer" under ORS 40.225(2). The employees interviewed are "representatives of the Client" and the interviews conducted by his investigator were communications protected under the lawyer-client privilege. Mr. Elsner rejected the waiver contention on the ground that public discussion of matters does not waive the underlying privilege as it applies to each of the documents covered.

On December 5, we reviewed the contents of the "investigative file" located in Mr. Elsner's offices. Generally, the file consists of the fragmentary notes of the investigator, reports of the interview of eight people, and tape recordings of five of the interviews. The interviews all center around seven allegations made against Jeff Sarvis, then Public Works Director.

Petitioner has raised the question of the sanitization of records provided to him and has expressed concern about the absence of any "handwritten notes, memos to file, or similar such records" possibly in the possession of various city officials or employees. At the request of this office and Mr. Elsner, petitioner granted additional time for the City to conduct a final search for additional documents responsive to his request. On January 3, this office was advised that no additional documents were uncovered. This office is satisfied that the documents reviewed on December 5 in Mr. Elsner's offices are the only records not disclosed by the city.

On September 28, 2001 this office issued Public Record Orders 01-14 and 01-15 requiring disclosure of the Sarvis investigation to The Oregonian and The Gresham Outlook. We assumed for purposes of the orders that "the Fairview City Administrator, Marilyn Holstrom, voluntarily disclosed a significant part of the investigative report to an employee, Jeff Sarvis." Mr. Elsner has questioned the accuracy of this statement although no further affidavits have been provided to this office contradicting the factual assumption we made. We will, in any case, consider the alternative contention of petitioner that there was a waiver of the attorney-client privilege when the Fairview Mayor and City Council submitted its letter to The Gresham Outlook on October 31. The letter to the editor was published on November 3. The copy of this letter provided to petitioner is attached to this order.

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, 1999, 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).

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.

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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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.

Here, it cannot be argued by the City of Fairview that the October 31 letter to the editor of The Gresham Outlook was a privileged communication. It was necessarily intended to be published by the media and distributed to the public. The remaining question under Haas is whether the disclosure was a “significant part of the matter or communication.”

Two Court of Appeals decisions provide the necessary guidance. In Oregon Publishing Company v. Portland School District No. II, 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. II, 152 Or App at 142.

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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.

Here, the only documents that have been identified by the City of Fairview as investigatory material are the interviews of Brenda Tam, for the City Attorney. The mayor and the council stated in its October 31 letter to the editor:

The City Attorney's Office immediately began interviewing City staff while the City Administrator began an internal investigation which has just been completed. This letter will list the findings of the Administrator's internal investigation and actions taken by the City to foster better internal administration.

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This office has thoroughly reviewed twenty-five pages of investigator work product generated by Brenda Tam under the direction of Fairview City Attorney Paul Elsner. The interviews are representative of the "investigative file" that constitutes the public records sought by petitioner. The focus of her investigation were the seven allegations raised by Ms. Debbie Curtis and outlined by the City in its October 31 letter. It appears that the City Administrator sustained allegations against Mr. Sarvis involving gasoline credit card use, personal use of a City cellular telephone, and the receipt of two Blazer tickets. The other four allegations were either unfounded or not sustained due to conflicting evidence.

The interviews admittedly include some extraneous material about the relationship between certain employees in the Public Works Department and those employees work ethic. The mayor and the council noted this circumstance in its reluctance to disclose the interview material itself:

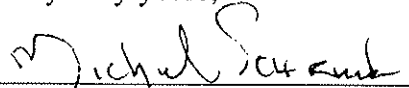
The interviews performed by the City Attorney's Office have not been released for a variety of reasons, not the least of which is because they contain statements and opinions expressed by Fairview employees who were promised confidentiality during the interviews. We believe there is nothing to be gained by airing personal views and information about personal matters that have no bearing on the operating of the City.

The City of Fairview has not accepted the invitation of this office to undertake the redaction of certain interview material as confidential submissions under the Public Records Law. See ORS 192.502(4). Consequently, the limited question to be decided is whether the City's letter to the editor of The Gresham Outlook was a disclosure of a "significant part of the matter or communication." Clearly it was. The attorney-client privilege has been waived.

ORDER

Accordingly, it is ordered that the City of Fairview promptly disclose the records sought in the above petition. Disclosure of the documents ordered is subject to payment of the City of Fairview'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

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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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