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September 28, 2001

Dean Rhodes  
Managing Editor  
The Gresham Outlook  
1190 NE Division St  
Gresham, OR 97030

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

Re: Petition of Dean Rhodes on behalf of The Gresham Outlook received September 18, 2001 to disclose certain records of the City of Fairview

Dear Mr. Rhodes and Mr. Elsner:

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

- I. The report of an investigation compiled on allegations against former Fairview public works director Jeff Sarvis.**

Kim Wetzel, reporter for The Gresham Outlook, made a request for "a copy of the investigation done on Jeff Sarvis" in an email to Marilyn Holstrom on August 22, 2001. Paul Elsner, Fairview City Attorney, responded to Ms. Wetzel by email on the same date. Mr. Elsner argued that the material sought was not a "public record" under the terms of ORS 192.410(4) and was exempt as "attorney-client communication and/or attorney work product," ORS 192.502(9). In response, Ms. Wetzel took the position that the public interest in disclosure outweighed the public interest in confidentiality, "despite the imposition of a disciplinary sanction."

On September 18th, we reviewed a confidential summary of the contested document, allowed under ORS 192.470(2). We have also had telephonic discussions with Mr. Elsner concerning the nature and purpose of the investigative report. Mr. Elsner responded to the petition in a letter to this office dated September 24. The City has not pursued the contention that the investigative report is not a public record. The City continues to assert that the report is a confidential communication "unconditionally exempt" under the "Lawyer-Client Privilege."

## DISCUSSION

### **I. Public Record.**

The first question to be addressed is whether investigative report prepared under the direction of and retained by the City Attorney for the City of Fairview is a public record as defined in ORS 192.410 (4):

"Public record" includes any writing containing information relating to the conduct of the public's business, including but not limited to court records, mortgages, and deed records, prepared, owned, used or retained by a public body regardless of physical form or characteristics.

The term "writing" is defined by ORS 192.410 (6) to include:

handwriting, typewriting, printing, photographing and every means of recording, including letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, files, facsimiles or electronic recordings.

The Attorney General's Public Records Manual, 1999, page 6, provides some guidance in evaluating the City's position:

Records need not have been prepared originally by the public agency to qualify as public records. If records prepared outside government contain "information relating to the conduct of the public's business," and are "owned, used or retained" by the public body, the records are within the scope of the Public Records Law.

The investigative report prepared by a private investigator was generated at the specific direction of the City Attorney of Fairview concerning "allegations of sexual harassment/workplace misconduct raised by a former City employee, Ms. Debbie Curtis about then Public Works director, Jeff Sarvis." The report was used and retained by the City Attorney as a basis for his legal advice to the City of Fairview. There can be no question but that the investigative report is a "public record" subject to disclosure under the Public Records Law.

### **II. 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, 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)<sup>1</sup>, 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).

There is no indication that the investigative report was ever used in a disciplinary proceeding<sup>2</sup> or found its way into the personnel file of either Mr. Sarvis or Debbie Curtis. Indeed, Mr. Sarvis resigned from his position as Fairview Public Works Director. Mr. Elsner maintains in no uncertain terms that the report was generated for the specific purpose of assisting the City Attorney in analyzing claims of misconduct and providing advice to his client, the City of Fairview.

In State ex rel OHSU v. Haas, 325 Or 492 (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 parties did not dispute that the "Billips report" was confidential and protected by the lawyer-client privilege when Billips provided copies of it to the dean of the medical school and the chair of the Anesthesiology Department. State ex rel OHSU v. Haas, 325 Or at 498.

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<sup>1</sup> 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.

<sup>2</sup> The City of Fairview has not claimed an exemption for personnel discipline action. The Attorney general has taken the position that the exemption under ORS 192.501(12) "does not apply when an employee of a public body resigns during an employer investigation or in lieu of disciplinary action." Attorney General's Public Records Manual, 1999, page 35.

The Dean of Anesthesiology presented the "Billips report" at a faculty meeting. The Supreme Court had no difficulty finding there was no waiver of the lawyer-client privilege by "telling the faculty that the Department had a problem with discrimination, that OHSU would not indemnify the staff in the event of litigation, and that gender sensitivity training was necessary." State ex rel OHSU v. Haas, 325 Or at 508.

The Supreme Court concluded that the "Billips report" was a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client. In a comment germane to the resolution of this public records petition, the court held:

A lawyer who conducts an internal investigation concerning a client's potential legal liability, provides the client with a written report on the results of that investigation, and advises the client on ways to resolve problems uncovered in the investigation renders professional legal services to the client. State ex rel OHSU v. Haas, 325 Or at 501-502.

The materials sought in this public records petition were generated as a result of issues raised about employment conditions and attitudes in the Fairview Public Works Department. Although there was no pending litigation or contested matter, it is clear that the investigative report was designed as a tool for the City Attorney to use in formulating legal advice to his client, the City of Fairview, about potential legal liability for the conduct of its employees. As such, the report was unconditionally exempt from disclosure under ORS 40.225.

The attorney-client privilege extends not only to the client but 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.

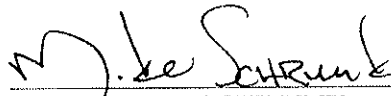
This office will assume for purposes of this order that the Fairview City Administrator, Marilyn Holstrom, voluntarily disclosed a significant part of the investigative report to an employee, Jeff Sarvis. It does not appear, however, that the intent of the communication was consistent with the purpose of the attorney-client privilege. At the time of the disclosure, Mr. Sarvis was in an adversarial position with his employer and the communication was in the context of an employment action. Mr. Sarvis cannot be considered a representative of the client. We must conclude that the use of the investigative report by the City Administrator constituted a waiver of the attorney-client privilege. See ORS 40.280 (OEC 511).

Page 5  
September 28, 2001  
Re: Petition of Dean Rhodes

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

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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