



MICHAEL D. SCHRUNK, District Attorney for Multnomah County

600 County Courthouse • Portland, Oregon 97204 • (503) 248-3162 • FAX (503) 248-3643

August 30, 2001

Philip Dawdy
Staff Writer
Willamette Week
822 SW 10th Ave
Portland, OR 97205

Janet Noelle Billups
Legal Counsel
Oregon Health Sciences University
3181 SW Sam Jackson Park Road
L-585
Portland, OR 97201-3098

Re: Petition of Philip Dawdy for Willamette Week received August 21, 2001 to disclose certain records of Oregon Health Sciences University (OHSU)

Dear Mr. Dawdy and Ms. Billups:

On this public records petition, ORS 192.410 et. seq., petitioner Philip Dawdy, on behalf of Willamette Week, requests the District Attorney to order OHSU and its employees to produce a copy of the following:

- 1. all letters, memoranda, e-mails, reports and similar communications from Gary Chiodo to Gerald Schatten, as well as from Gerald Schatten to Gary Chiodo.**
- 2. all letters, memoranda, e-mails, reports and similar communications written by Gary Chiodo, which concern the work of Gerald Schatten.**

Petitioner originally requested the records on March 13, 2001. Ms. Janet Billups, legal counsel for OHSU, responded by e-mail on July 17, 2001. She noted that four documents had been identified as responsive to petitioner's request. Her preliminary legal opinion was that the documents were exempt as personnel records, as internal advisory communications preliminary to a final agency action, and as attorney-client privileged communications. Ms. Billups sought a second opinion by outside counsel, Jerome Lidz. Ms. Elaine McCall, interim FOIA officer, ultimately denied the request on August 1, 2001. On August 21, this office sent a letter to Ms. Billups with a faxed copy to outside counsel, requesting a response to the petition as well as confidential copies of the withheld documents.

Page 2

August 30, 2001

Re: Petition of Philip Dawdy

Mr. Lidz responded to the petition in a letter to this office dated August 27. Three exemptions are offered by OHSU: attorney-client privilege under ORS 40.225(2), internal advisory communications under ORS 192.502(1), and personnel records under ORS 353.260(1). Under separate cover, Mr. Lidz provided in confidence the three documents ultimately identified by OHSU as responsive to the request of petitioner.¹

OHSU argues that the second and third documents, a February 15, 2001 letter from Gary Chiodo to Gerald Schatten, are protected from disclosure as confidential communications between client and attorney. All three documents, with the exemption of the last four sentences of the November 29, 2000 e-mail from Dr. Chiodo to Dr. Schatten,² are viewed as conditionally exempt as communications within a public body preliminary to final agency determination of policy or action. Finally, Mr. Lidz contends all three documents are unconditionally exempt as restricted personnel records of OHSU employees less than 25 years old.

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, 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 We accept Mr. Lidz' explanation that only three of the four documents initially identified by Ms. Billups are, in fact, those sought by petitioner in his request of March 13, 2001.

² This office assumes that OHSU will provide to petitioner a redacted version of the November 29, 2000 e-mail.

- (1) the communications must be confidential within the meaning of OEC 503(1)(b)³, and
- (2) the communication must be made for the purpose of facilitating the rendition of professional legal services to the client. State v. Jancsek, 302 Or 270, 275 (1986).

We have carefully reviewed the two letters provided by OHSU. There is no indication that the contents are confidential communications made for the purpose of facilitating the rendition of legal services to employees of OHSU. Rather, the letters are addressed to Dr. Schatten and relate to his performance as an employee of OHSU. The letters may be of some interest to the legal department of OHSU but copying counsel does not invoke the privilege. The attorney-client privilege simply does not apply.

II. Internal Advisory Communications.

ORS 192.502(1) exempts:

Communications within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to any final agency determination of policy or action. This exemption shall not apply unless the public body shows that in the particular instance the public interest in encouraging frank communications between officials and employees of public bodies clearly outweighs the public interest in disclosure.

OHSU has not taken the position that these documents are part of a disciplinary investigation in which the "evaluations and recommendations of supervisors and investigators are the types of communications protected by this exemption." Attorney General's Public Records Manual, 1999, page 48. Rather, Mr. Lidz refers to the "tentative, advisory nature of the communications" and the concerns expressed by Dr. Chiodo.

The three communications from Dr. Chiodo to Dr. Schatten can fairly be characterized as those of a supervisor, monitor or fellow employee with oversight responsibilities. Arguably, the three documents could relate to a form of discipline, performance evaluation, or directive from management. However, none of the documents appear to be the type of communication protected by the exemption. "The central thrust of this exemption is to protect the confidentiality of frank and

³ 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.

uninhibited advice and observations a public employee gives to a superior or associate." Attorney General's Public Records Manual, 1999, page 45. We cannot agree with OHSU that these documents are exempt as the "confusions and preliminary impressions of public officials."

III. Personnel Records.

ORS 192.502(9) incorporates the unconditional exemption of ORS 353.260, which provides in part:

(1) Oregon Health Sciences University may adopt policies governing access to university personnel records that are less than 25 years old.

(2) Policies adopted under subsection (1) of this section shall require that personnel records be subjected to restrictions on access unless the president of the university finds that the public interest in maintaining individual rights to privacy in an adequate educational environment would not suffer by disclosure of such records.

(7) As used in this section, "personnel records" means records containing information kept by the university concerning a faculty member and furnished by the faculty member or by others about the faculty member at the member's or at the university's request, including but not limited to information concerning discipline, membership activity, employment performance or other personal records of individual persons.

OHSU has adopted such personnel records policies including one restricting the release of confidential records:

Personnel records designated as subject to restricted access shall be available only to University personnel, such as faculty, administrators, students, and others serving on official institutional committees or in other official capacities, who have a demonstrably legitimate need to review them in order to fulfill their official, administrative or professional responsibilities and to the employee who is the subject of the records. These records shall not be released to any other person or agency without the person's written consent, unless upon receipt of a valid subpoena or other court order or process or as required or authorized by state statute, federal law, or valid federal or state regulations, or orders.

Page 5

August 30, 2001

Re: Petition of Philip Dawdy

In Oregonian Pub. Co. v. Portland School Dist. No. II, 329 Or 393, 402 (1969), the Supreme Court rejected an attempt to restrict access to a public record by placing the record in a personnel file or using a label such as "Personnel Investigation" for those records:

ORS 342.850(8) [public school teacher evaluations and personnel files] does not, however, authorize the district to exempt a public record from disclosure by placing it in a district personnel file and claiming an exemption based on the report's title or location, rather than its content.

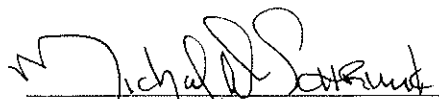
It cannot be disputed that the documents in question (at least initially) were not part of Dr. Schatten's personnel file. The November 29, 2000 e-mail was sent from Dr. Chiodo to Dr. Schatten in the ordinary course of communication between OHSU employees. The February 15, 2001 confidential letter was copied to Ms. Billups and four other doctors (OHSU faculty members with supervisory authority over Dr. Schatten or his project). The April 16, 2001 letter was again copied to Ms. Billups. There is nothing in the three documents to indicate they were part of a personnel action or employee evaluation.

The question is whether the documents have legitimately been placed in Dr. Schatten's personnel file under ORS 353.260 based upon their content and not as a matter of convenience or to hide them from public scrutiny. Otherwise, Oregonian Pub. Co. v. Portland School Dist. No. II precludes the application of the exemption. The answer lies in the fact that Dr. Chiodo, in his role as the Corporate Compliance Officer for OHSU, was writing to Dr. Schatten on a subject that directly dealt with Dr. Schatten's job performance. As such, the documents were appropriately deposited in Dr. Schatten's personnel file as information relating to "employment performance." The exemption is valid.

ORDER

Accordingly, it is ordered that the petition of Philip Dawdy to disclose certain records of OHSU is denied.

Very truly yours,



MICHAEL D. SCHRUNK

District Attorney

Multnomah County