



MICHAEL D. SCHRUNK, District Attorney for Multnomah County

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July 17, 2001

Laurence A. Tuttle
610 SW Alder. #1021
Portland, OR 97205

Benjamin Walters
Deputy City attorney
City of Portland
Office of the City Attorney
City Hall, Suite 430
1221 SW 4th Avenue
Portland, OR 97204

Re: Petition of Laurence Tuttle received July 6, 2001 to disclose certain records of the City of Portland

Dear Mr. Tuttle and Mr. Walters:

On this public records petition, ORS 192.410 et. seq., petitioner Laurence Tuttle requests the District Attorney to order the City of Portland to "comply fully with Petitioner's public records request of June 18, 2001, including all records omitted and withheld." Petitioner's letter to City Attorney Jeffrey Rogers requested the disclosure of:

Correspondence, memoranda, electronic mail, meeting notes, meeting minutes, notes or summaries of telephone calls, telephone logs, and other records of the City of Portland, including the records of the Office of the City Attorney, related to the transfer or assignment of the franchise of PacifiCorp arising from the merger of PacifiCorp and Scottish Power. Records are requested for the period January 1, 1999, through the time this letter is received on June 18, 2001.

Benjamin Walters, Deputy City Attorney, responded to petitioner by letter on July 3, 2001. Mr. Walters provided five documents consisting of correspondence to and from PacifiCorp counsel and correspondence between Alan Richardson of Scottish Power and City Commissioner Eric Sten. The City claimed exemptions from disclosure of seventeen other documents identified as within the scope of petitioner's request. Mr. Walters cited the attorney-client privilege of ORS 40.225 (and its corollary work product privilege) and the conditional exemption of ORS 192.502(1), confidential communications within a public body.

Mr. Walters responded to the petition in a letter to this office dated July 3, 2001. The City continues to assert the attorney-client privilege as well as the confidential advisory communications exemption. The City provided seventeen documents for our review. Mr. Walters declined to recognize the attorney-client waiver asserted by petitioner to have been "volunteered" by Portland City Mayor Vera Katz at a meeting on June 5, 2001.

On July 12, we reviewed the contested documents with Mr. Walters. All the documents involve communications to or from employees of City Bureaus or City Commissioners. We concluded that two documents were, in fact, substantially unrelated to this public records request (although the attorney-client privilege is asserted) and a third document was determined to be subject only to the confidential advisory communications exemption. Mr. Walters provided an additional document (similar to and related to the above described documents) and again claimed the attorney-client privilege for nondisclosure.

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) the communications must be confidential within the meaning of OEC 503(1)(b)¹, and

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.

- (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 eighteen documents provided by the City. With the one noted exception, the contents are clearly confidential communications made for the purpose of facilitating the rendition of legal services to the City Energy Bureau, the Cable Office, the Office of Transportation, the City Economist, and at least one City Commissioner. As such, seventeen of the documents are unconditionally privileged and cannot be ordered disclosed to petitioner. We agree with Mr. Walters that the "attorney-client privilege belongs to the City, not to individual elected officials."²

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.

The two-page document in question is a communication within the City and is of an advisory nature preliminary to final city action. The entire document covers other than purely factual materials. Mr. Walters points out that "the discussion involved consideration of options that have implications going out for several years." The sensitive nature of the document has not been diminished by the passage of time or any decisions made by the City's elected officials.

The remaining question is whether the public interest in protecting the confidentiality of frank and uninhibited advice and observations a public employee gives to a superior or associate outweighs the public interest in disclosure. "The test...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, as distinguished from mere embarrassment of the employee or agency. See Attorney General's Public Records Manual, 1999, page 45.

² The City maintains that Mayor Katz does not have the authority to waive the attorney-client privilege. We have been provided with no information to dispute the City's contention that it is the City Council that is "vested with the power and authority given to the municipal corporation of the City of Portland."

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Deputy City Attorney Walters has taken the position that "staff's frank analysis and evaluation of the various available choices of action clearly fall within the statutory exemption. If public scrutiny of such communications were available to Mr. Tuttle as well as others, such discussions would be cut short if they occurred at all." Petitioner has not provided this office with arguments that persuade us that the public interest would be served by disclosure. We are satisfied that the document should be protected in the interest of the public.

ORDER

Accordingly, it is ordered that the petition of Laurence A. Tuttle to disclose certain records of the City of Portland is denied.

Very truly yours,


MICHAEL D. SCHRUNK
District Attorney
Multnomah County

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