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June 28, 2005

Ryan Frank
The Oregonian
1320 SW Broadway
Portland, OR 97201

Melvin Oden-Orr
Portland Development Commission
222 NW Fifth Avenue
Portland, OR 97209-3859

Re: Petition of Ryan Frank for The Oregonian received June 21, 2005 to disclose certain records of the Portland Development Commission (PDC)

Dear Mr. Frank and Mr. Oden-Orr:

On this public records petition, ORS 192.410 et. seq., petitioner Ryan Frank for The Oregonian requests the District Attorney to order the PDC to “produce copies of documents disclosed to and reviewed by the Oregonian, but subsequently withheld by PDC’s executive director Donald F. Mazziotti.” The Oregonian inspected the documents as a result of a public records request to the PDC seeking “any and all documents produced at the request of the Beam Development Team regarding the Burnside Bridgehead project.”

PDC declined to provide the documents as unrelated to the Beam protest and exempt from disclosure under ORS 192.502(1), Internal Advisory Communications, and 192.501(6), Real Estate Appraisal Information. In response to the petition, PDC has produced six email documents and asserts the additional exemption of attorney-client privilege. In the interest of time, the documents will be identified and discussed briefly together with the relevant exemption.

THE EXEMPTIONS

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 communication between officials and employees of public bodies clearly outweighs the public interest in disclosure.

The Attorney General's Public Records Manual, 2004, page 56, contains a discussion of the need for a strong showing of the "chilling effect" to overcome the presumption favoring disclosure. The Manual cited the decision of Coos County v. Dept. of Fish & Wildlife, 86 Or App 168, 173 (1987):

Any "chilling effect" that disclosure may have on future communications within the agency, because of potential embarrassment to the agency or its employees, is not sufficient, in and of itself, to overcome the presumption favoring disclosure. *See, e.g., Turner v. Reed*, [22 Or App 177]. To hold otherwise would effectively exempt from disclosure all interagency communications that are advisory in nature and cover other than purely factual matters.

Attorney-Client Privileged Documents

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, 2004, 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:

- (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).

Real Estate Appraisal Information

ORS 192.501(6) conditionally exempts:

Information relating to the appraisal of real estate prior to its acquisition[.]

DISCUSSION

1. Email string ending as from Tim Liszt to Martha Richmond, dated May 11, 2005.

PDC argues that this set of emails is exempt as internal advisory communications. Although the communications are between employees and management of PDC, they are not advisory or preliminary to any final agency policy or action. In addition, the public interest in disclosure outweighs any chilling effect on the frank communications contained in the emails. The exemption does not apply. One paragraph mentions General Counsel Matt Baines and is a request for legal advice. It is exempt as an attorney-client communication.

2. Email string ending as from Tim Liszt to Matt Hennessee, dated May 11, 2005.

This is a continuation of the string email above. It is not exempt except for the attorney-client communication.

3. Email string ending from Julie Rawls to Christina Cain, Kristy Branson, and Martha Richmond, dated May 11, 2005.

PDC claims this set of emails is exempt as internal advisory communications. Again, the emails can best be characterized as employee discussions and not advice preliminary to final agency policy or action. The public interest requires disclosure.

4. Email string ending as from Cheryl Twete to Christine Egan, Donald Mazziotti, and Martha Richmond, dated February 10, 2005.

PDC notes that this set of emails is unrelated to the Burnside Bridgehead Project. It was inadvertently disclosed with the Bridgehead documents. This is not a basis for exemption.

"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."

5. Email string ending as from Don Mazziotti to Estee Segal, dated April 14, 2005(page 561).

PDC notes this set of emails is unrelated to the Burnside Bridgehead Project and is exempt as internal advisory communications. The emails are advisory discussions at a management level and are arguably preliminary to final agency policy or action. However, it is not clear that disclosure would have a chilling effect on frank communications at PDC. The public interest requires disclosure. PDC also claims part of the document as privileged. We could find no attorney-client communications to support the exemption claim.

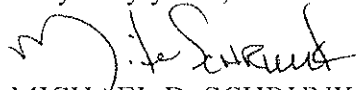
6. Email string ending as from Peter Englander to Michael O'Connell.

PDC claims this set of emails as exempt real estate appraisal information. The content of the emails deals with a project unrelated to the Burnside Bridgehead and includes financial information that may relate to real estate. It does appear to be very sensitive in nature and can best be viewed as internal advisory communications. The first line does discuss the Bridgehead Project and should be disclosed. Otherwise, this document is exempt.

ORDER

Accordingly, it is ordered that the Portland Development Commission promptly disclose the records sought in the above petition as follows: Email 1 (redacted), email 2 (redacted), emails 3, 4, and 5, and email 6 (redacted). Disclosure of the documents ordered is subject to payment of Portland Development Commission's fee, if any, not exceeding the actual cost in making the information available, consistent with ORS 192.440 and this order.

Very truly yours,


MICHAEL D. SCHRUNK
District Attorney

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.