



MICHAEL D. SCHRUNK, District Attorney for Multnomah County  
600 County Courthouse • Portland, Oregon 97204 • (503) 248-3162

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November 5, 1998

FRANCES HYSON  
16507 SE MILL STREET  
PORTLAND OR 97233

CLARK I. BALFOUR  
CABLE HUSTON BENEDICT  
HAAGENSEN & LLOYD LLP  
ATTORNEYS AT LAW  
SUITE 2000  
1001 SW FIFTH AVENUE  
PORTLAND OR 97204-1136

Re: Petition of Frances Hyson, October 27, 1998 to  
disclose certain records of the Rockwood Water PUD

Dear Ms. Hyson and Mr. Balfour:

BACKGROUND

On this public records petition, ORS 192.410 et. seq., petitioner Frances Hyson requests the District Attorney to order the Rockwood Water PUD to produce a copy of the following records:

R.W.P.U.D. response October 9, 1998 to  
Secretary of State Phil Keisling

According to documents supplied by petitioner, the Secretary of State received a complaint from petitioner alleging possible violations of law by members of the Rockwood Water People's Utility District, the Manager and the Board of Directors. Harvey Barnes, Manager of the District, received a letter from Nancy Buckno, Program Representative in the Elections Division, on or about September 23, 1998. Six questions were directed to Mr. Barnes with a request to respond by October 2, 1998. Ms. Buckno stated the Elections Office would then issue a determination as soon as possible.

Petitioner also received a letter from Ms. Buckno acknowledging the complaint and asking two questions regarding documents petitioner had submitted to the Secretary of State.

On October 9, petitioner requested in writing the District response to the inquiry of the Secretary of State. An oral request for the same information was made at the October 20 District Board meeting. According to petitioner, Mr. Barnes declined to provide the documents on advice of counsel. Petitioner made a final request for the District response on October 23, 1998.

Clark Balfour, attorney for the Rockwood Water District (the District), responded to this public records petition in a letter dated November 3, 1998 (attached). The District claims conditional exemptions from disclosure under ORS 192.502(1), Internal Advisory Communications, ORS 192.501(3), Criminal Investigatory Material, and ORS 192.501(1), Public Records Pertaining to Litigation. Mr. Balfour included a copy of the October 9 four-page response to Ms. Buckno by Mr. Barnes for our review.

#### Discussion

1. The Internal Advisory Communication exemption is available when the communication is of an "advisory nature to the extent that they cover other than purely factual materials" and the public agency demonstrates the interest in frank communications between public bodies "clearly outweighs the public interest in disclosure."

A review of the questions asked by Ms. Buckno and the response from Mr. Barnes are factual in nature. Further, there has been no attempt by the District to segregate any "advisory" portions of the response. Additionally, there has been no attempt to satisfy the District's burden that disclosure would have a "chilling affect" sufficient to overcome the presumption in favor of disclosure. See Attorney General's Public Records Manual, 1997, pages 41-45.

2. The Criminal Investigatory Material exemption applies to information "compiled for criminal law purposes." This exemption would be available to the Secretary of State which is the public agency conducting the elections law violation complaint. The retention of a copy of that letter by the District is for purposes beyond the scope of the exemption.

3. ORS 192.501(1) conditionally exempts:

Records of a public body pertaining to litigation to which the public body is a party if the complaint had been filed, or if the complaint has not been filed, if the public body shows that such litigation is reasonably likely to occur. This exemption does not

apply to litigation which has been concluded, and nothing in this subsection shall limit any right or opportunity granted by discovery or deposition statutes to a party to litigation or potential litigation.

In asserting the first two exemptions, the District has strongly expressed a concern over both criminal and civil litigation arising out of petitioner's complaint of violation of elections laws. Nonetheless, the District felt it necessary and appropriate to respond with full candor and frankness to the questions posed by Ms. Buckno. Mr. Balfour notes that this spirit of cooperation was intended to assist the Secretary of State and "settle or head off litigation matters at the earliest possible stage."

The purpose of the litigation exemption is to place governmental bodies "on an even footing with private parties before and during court litigation." Attorney General's Public Records Manual, 1997, p. 23. It is necessary for the public body to objectively show that court litigation is "reasonably likely to occur." The public body must also determine if the "public interest requires disclosure in the particular instance."

Mr. Balfour candidly admits that the District has shared its factual defenses with the Secretary of State - the very agency that will determine if it will seek a criminal sanction or a civil penalty. If no action occurs, the document will be available for public scrutiny. Until then, the District maintains it has no duty to provide a nonparty with their litigation document.

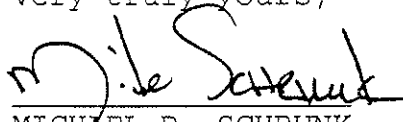
The District has made a satisfactory case that the response letter is a record pertaining to litigation. The petitioner has demonstrated no public interest in the disclosure of the District response. It would be inappropriate to require disclosure until the Secretary of State has completed his investigation. Mr. Balfour reported in his letter that Mr. Barnes advised him that he told petitioner that she was free to request the letter from the Secretary of State.

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ORDER

Accordingly, it is ordered that the petition of Frances Hyson, to disclose certain records of the Rockwood Water PUD is denied without prejudice to renewal when any litigation (or potential for litigation) is concluded, ORS 192.501 (1).

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael D. Schrunk". The signature is written in a cursive style with a large initial "M".

MICHAEL D. SCHRUNK  
District Attorney  
Multnomah County

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