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Gary P. Shepherd
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Lory J. Kraut
Deputy City Attorney
Office of City Attorney
City Hall, Suite 430
1221 SW 4th Avenue
Portland, OR 97204

Re: Petition of Gary Shepherd for Mike McGee received November 10, 2006, to disclose certain records of the City of Portland

Dear Ms. Kraut and Mr. Shepherd:

On this public records petition, ORS 192.410 et. seq., petitioner Gary Shepherd requests the District Attorney to order the City of Portland and its employees to produce the following records:

1. All notes, correspondence, papers, documents, and/or other information that were produced and/or used in reviewing and scoring Mr. McGee by all oral examination givers in the Internal Interview Panel pertaining to Mr. McGee and Fire Battalion Chief Examination No. 05-148.
2. All notes, correspondence, papers, documents, and/or other information that relate to or concern the City's act and/or decision to employ an Internal Interview Panel for promotional examinations. The decision to use an Internal Interview Panel for promotional examinations drastically changed the testing format in place for decades and permitted bias and prejudices to permeate the testing process and candidate evaluation. Mr. McGee is personally aware that a decision was made, as he was informed as much by Union and City representatives. If no written decision was made, we request the minutes of the meeting at which the oral decision was made (we know a meeting took place) as well as all emails exchanged by and between Human Resources and the Chief's office concerning the testing format change prior to and after the decision.

BACKGROUND

Petitioner made several requests for the production of documents regarding Fire Chief Examination No. 05-148 in a letter to Deputy City Attorney Stephanie Harper on March 3, 2006. The City responded in letters dated June 6 and June 8, 2006 agreeing to release 148 pages of redacted materials. Deputy City Attorney Lory Kraut indicated that she was "advised by the Bureau of Human Resources" that with respect to the employment of an interview panel, "no such documents exist." Petitioner objected to the City's position, particularly the fact that no documents had been produced regarding the review and scoring of Mr. McGee's examination. Additionally, petitioner maintained that it was "not plausible to assert that no documents exist that relate to or concern the City's act and/or decision to employ an Internal Interview Panel for promotional examinations."

On August 17, 2006 Deputy City Attorney Kraut agreed to provide the assessment sheets with the redaction of "virtually all of the comments made by the assessors." In a September 8, 2006 letter response to a July 31, 2006 email, petitioner thanked the City for providing the comment sheets but noted that "since they were entirely redacted, they are of no value." Petitioner again questioned the City's position that no records existed "on a major decision to change the testing procedure that had been in place for decades, a decision that brought a subjective element to the objective "fitness and merit" promotional system."

Deputy City Attorney Kraut responded in a September 29, 2006 letter. She stated that the Portland Fire & Rescue's core leadership team" reviewed their files for any relevant notes or documents." Minutes from the "core weekly meetings and the labor management committee meetings" were also reviewed. Ms. Kraut related that the Bureau of Human Resources analyst "informed me that she did not have any documents relating to the decision to employ an internal interview panel." This petition followed.

The City submitted a November 29, 2006 answer to the petition. Ms. Kraut noted that the Internal Interview Scoring Records were redacted to exclude "all substantive information, which compromised the integrity of the assessment process." The City claimed the redacted materials were exempt as Test and Examination Material under ORS 192.501(4). Since the questions in the oral interviews are used to "identify the critical attributes it desires in battalion chiefs," the public interest is best served by maintaining the confidentiality of the questions, suggested responses, and much of the score sheets themselves. This is especially true, according to Ms. Kraut, because the "pool" of interview questions may be reused or modified slightly or be mixed in with new questions. Three Attorney General's Opinions were cited by the City in support of its position.

Ms. Kraut continued to maintain that there are no "written records memorializing an internal interview panel." She asserted that employees of the Bureau of Human Resources searched unsuccessfully for notes and electronic files "discussing the decision to use an internal

interview panel.” Portland Fire and Rescue reviewed its weekly core meeting minutes as well as the minutes from its labor/management committee. Ms. Kraut was advised that the results were negative.

On December 11, 2006, petitioner submitted a five-page response to the City’s arguments. Two days later, petitioner submitted follow-up arguments. With respect to the first request, petitioner correctly noted that Attorney General Opinions were not binding precedent. He argued that the opinions relied upon by the City “represent a misinterpretation and misapplication of the public records law and statutory exemption set forth in ORS 197.501(4) (sic).” Petitioner pointed out that the phrase “examination information” used by the Attorney General in the cited opinions does not appear in the plain language of the statutory exemption. Further, petitioner was not seeking information to aid him in future examinations, “but rather seeks information that will aid him in his appeal to establish that the current system and his evaluation in particular was not based on fitness and merit as required.”

Petitioner raised a Constitutional claim in support of an argument that the public interest requires disclosure even if the exemption applies to the records in question. Petitioner maintained that there is a “constitutionally significant property interest” in a fair evaluation and pointed out that the City Charter “requires promotions to ‘be made on the basis of qualifications and merit.’” The existence of a fair and competitive examination can only be insured by the verification of the results. “If no manipulation or biases is uncovered, then the system works as designed.”

Finally, petitioner contends that the City’s refusal to provide the examination papers is a violation of the civil service requirements of ORS 242.722. Under that provision, a person who takes a civil service promotional examination “shall have access to the examination papers of the person.” Ms. Kraut advised this office that ORS 242.722 does not apply to cities such as Portland which have a charter and a civil service system of its own.

DISCUSSION

I. Notes, etc. on reviewing and scoring by the Internal Interview Panel

The City has claimed exemption of the test questions and answers pursuant to ORS 192.501(4) which conditionally exempts:

Test questions, scoring keys, and other data used to administer a licensing examination, employment, academic or other examination or testing procedure before the examination is given and if the examination is to be used again. Records establishing procedures for and instructing persons administering, grading or evaluating an examination or testing procedure are included in this exemption, to the extent that disclosure would create a risk that the result might be affected[.]

The opinions of the Attorney General have consistently upheld the exemption for particular parts of any examination that “will be used again to grade or evaluate applicants.” Attorney General’s Public Records Manual, 2005, p. 37. The position of the Attorney General is well reasoned and responsive to the spirit of the Public Records Law.

The obvious purpose of this exemption is to protect the integrity of examinations administered by various public bodies for licensing, employment and other purposes. Information used to administer the test is confidential until the test has been given. Examination information remains confidential if the test will be reused. We have concluded that records of the oral answers to test questions must be released if the answers do not indirectly reveal the questions. Likewise, a completed answer sheet is not exempt if disclosure would not compromise the integrity of the examination. However, we have also concluded that the scoring sheet for a practical examination that lists the items on which a licensing applicant is being evaluated is the equivalent of written test questions and exempt when disclosure would jeopardize the integrity of subsequent examinations.

Attorney General’s Public Records Manual, 2005, p. 37.

The 1997 opinion in Chastain dealt with a practical examination for electrolysis licensing, not unlike the oral interview for Fire Battalion Chief undertaken by Lieutenant McGee. The questions, score sheets, and comments of the proctors in Chastain were all found to be exempt under ORS 192.501(4). Petitioner rejects the reasoning in Chastain and the position of the Attorney General’s Public Records Manual. After much consideration, we cannot find sufficient reasons to embark on a separate statutory analysis of the outer limits of this exemption. The issues raised and the conclusions reached in Chastain at least serve as a useful method to evaluate the materials provided by the City in response to this petition.

A review of the unredacted evaluation forms of the three examiners discloses an extensive set of suggested responses to the five questions for the evaluators to use to make check marks for correct answers. Additionally, there were appropriate handwritten comments made to support the rating on each question. The redacted material is either the “test questions,” the “scoring keys” or “other data used to administer” the oral examination. The exemption applies unless there is some public interest that outweighs maintaining the integrity of the examination.

Petitioner has provided no information to call into question the fairness of the Fire Battalion Chief oral interview process or the specific evaluation of Lieutenant McGee. Whatever constitutionally protected property interest exists, exposing the entire examination materials to scrutiny is not necessarily the appropriate remedy.

II. Notes, etc on the decision to employ an Internal Interview Panel

Petitioner has demanded the disclosure of materials that the City, in good faith and with due diligence, has asserted do not exist. It is perhaps surprising that no documentation was ever generated or retained by any of the committees responsible for creating the new internal evaluation system. However, this office is not in a position to order the disclosure of presumptively nonexistent records.

ORDER

Accordingly, it is ordered that the petition of Gary Shepherd for Mike McGee to disclose certain records of the City of Portland is denied.

Very truly yours,


MICHAEL D. SCHRUNK
District Attorney
Multnomah County