

MICHAEL D. SCHRUNK, District Attorney for Multnomah County  
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October 28, 1998

MARY L. STRAYHAND  
SR. HUMAN RESOURCES ANALYST  
OFFICE OF FINANCE AND ADMINISTRATION  
BUREAU OF HUMAN RESOURCES  
1120 SW 5TH AVENUE, RM. 404  
PORTLAND OR 97204

GARY P. SHEPHERD  
ATTORNEY AT LAW  
3115 SE SALMON STREET  
PORTLAND OR 97214

Re: Petition of Gary Shepherd, for Gordon Hovies,  
October 19, 1998 to disclose certain records of the City  
of Portland

Dear Ms. Strayhand and Mr. Shepherd:

BACKGROUND

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

1. Mr. Hovies' Personal Rating/Comment Sheet from each evaluator from the Oral Assessment Center portion of Fire Lieutenant's Promotional Examination No. 98-010.
2. A copy of test items #30, #84, and #116 from Fire Lieutenant's Promotional Examination No. 98-010 appealed by Mr. Hovies.
3. A copy of the test items/questions from Fire Lieutenant's Promotional Examination No. 98-010 that were re-keyed, double keyed, and/or eliminated as a result of test item appeals by other examination participants, as well as the a City's stated reasons for re-keying, double keying, and/or eliminating test items/questions.

According to correspondence provided with this petition, Portland firefighter Gordon Hovies met on at least two occasions with City personnel to discuss the Lieutenant's Promotional examination No. 98-010 taken by Mr. Hovies. Mr. Hovies has made verbal and written requests to be provided with the test items he had appealed, the test items other candidates had appealed, and the individual rating sheets of the oral assessment examiners. The City declined to comply with Mr. Hovies' requests.

The City has provided Mr. Hovies with a written copy of the summary and scoring sheets relating to the oral assessment portion of the examination. Petitioner, however, is seeking the "individual" personal rating/comment sheets of Mr. Hovies which apparently are used to create the summary documents.

In response to this public records petition, the City first took the position that the requested documents were confidential and referred to an August 24, 1998 letter to Mr. Hovies. See attached letter from Mary Strayhand dated October 26, 1998. Ms. Strayhand had advised Mr. Hovies that Donnoe & Associates, the consultant who administered the examination, "do not allow a review of the rating sheets nor the raters' comments because that is confidential information."

The City recontacted Bill Donnoe and was advised that the "rating sheets are considered property of the consultant and not the City." Mr. Donnoe expressed a willingness to release the "rating forms" to the City but not the notes from the assessors, recommended feedback, or the actual questions from the assessment center." See attached letter dated October 28, 1998.

The City has claimed exemption of the test questions 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[.]

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The City has identified three test questions appealed by Mr. Hovies and ten questions (one of which was appealed by Mr. Hovies) that were re-keyed, double-keyed, and/or eliminated. The City has provided the reasons for alterations to the ten questions but has declined to provide copies of the questions themselves. The City has noted that petitioner has been given the opportunity to review the three test questions in the three days following the test administration.

The City initially maintained that all the test questions were confidential for the reason that the items "may be used in future Fire Lieutenant examinations. Disclosure of these test items could compromise future Fire Lieutenant examinations." In response to our telephone inquiry, Ms. Strayhand has provided additional rationale for the claimed exemption in her October 28 letter:

Part of the process of developing a written multiple choice exam is to review the previous examination and the statistics from that examination. Based on the study material given to Fire Lieutenant candidates, we make determinations on what questions from the previous exam we will use, which ones we will not and what new questions need to be added. Some of the questions from this Fire Lieutenant Exam No. 98-010 will be used on the next Fire Lieutenant exam.

Mr. Hovies filed a public records petition (96-8) with the District Attorney's Office for records of the 1995 Fire Lieutenant Examination. His petition was denied and he instituted court proceedings. Petitioner has provided the District Attorney's Office with a fax of the attached 19-page opinion and order of Judge Marcus in Case No. 9703-02222.

#### Discussion

##### 1. Mr. Hovies' Personal Rating/Comment Sheets.

The City does not claim any exemption with respect to these documents. The only question is whether the items are, in fact, public records. Judge Marcus considered a similar request of Mr. Hovies and concluded that:

To the extent that they exist and are subject to the actual or constructive control of the City, plaintiff is entitled to inspect and copy, subject to reasonable restriction on the time and manner of inspection and the cost of

copying, the...records he has requested[.]  
Opinion and Order, p. 15.

The Attorney General's Public Records Manual, 1997, p. 6, recognize that "records need not have been prepared originally by the public body to qualify as public records." If such records contain "information relating to the conduct of the public business," and are "owned, used or retained" by the public body, the records are within the scope of the Public Records Law. ORS 192.410(4).

On the other hand, the Manual points out on p. 6 that "a document prepared by a private entity does not become a public record merely because a public official reviews the document in the course of official business so long as the official neither uses nor retains the document."

Judge Marcus recognized this limitation on the reach of the public records law:

The qualification that the materials be subject to the actual or constructive control of the City is intended to recognize that there may be propriety materials employed by the contractor which conducted the Assessment Center for the City to which the City itself has no access under its arrangement with the contractor. **If the City has no access to such materials, the Public Records Act gives the plaintiff no access to such materials** (emphasis added). Opinion and Order, p. 16.

The City has made it clear that the personal rating/comment sheets are the private property of Donnoe & Associates. Mr. Donnoe has expressed a willingness to release the "rating sheets" to the City. Those items, together with the materials already provided to Mr. Hovies, constitute the public records accessible to the City and subject to disclosure.

## 2. A copy of the test items/questions.

The City has claimed the conditional exemption of ORS 192.501(4) which exempts information from disclosure "unless the public interest requires disclosure in the particular instance." ORS 192.501. Petitioner has made no assertion of public interest in the disclosure of the eleven test questions. To the contrary, it is clear petitioner, on behalf of Mr. Hovies, is gathering information in contemplation of action challenging Mr. Hovies' performance on the Fire Lieutenant's Promotional Examination.

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The Attorney General's Public Records Manual, 1997, p. 30 sets out a clear standard of analysis:

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** (emphasis added).

In the 1997 proceeding before Judge Marcus, the City was ordered to disclose the 1995 written examination. The opinion pointed out on page 14 that the "problem for the City is that it has not bothered to show that the test will be given again or that disclosure would create a risk of affecting future test results."

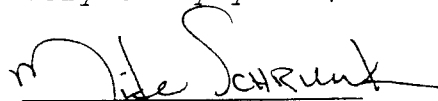
Here, the City has satisfied its burden by explaining that some of the questions on the 1998 written examination will be used on the next Fire Lieutenant Promotional examination. It can make no difference whether one, eleven, or 127 questions are, in fact, chosen to be administered to the next class of Lieutenant candidates.

ORDER

Accordingly, it is ordered that the petition of Gary Shepherd, for Gordon Hovies, is denied with respect to the personal rating/comment sheets except to the extent those documents are provided to the city by Donnoe & Associates. Disclosure of the documents ordered is subject to payment of the City of Gresham's fee, if any, not exceeding the actual cost in making the information available, consistent with ORS 192.440.

It is further ordered that the petition of Gary Shepherd, for Gordon Hovies, is denied with respect to test items on Fire Lieutenant Examination No. 98-010. ORS 192.501(4).

Very truly yours,



MICHAEL D. SCHRUNK  
District Attorney  
Multnomah County

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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.

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