



**ROD UNDERHILL**, District Attorney for Multnomah County

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Lee van der Voo, Reporter  
InvestigateWest  
909 N. Beech St., Ste 209B  
Portland, Oregon 97227

Beverly Pearman, Esq.  
Assistant General Counsel  
Port of Portland  
7200 NE Airport Way  
Portland, Oregon 97208

Re: Petition of Lee van der Voo of InvestigateWest for the disclosure of documents concerning an internal investigation of an alleged sexual assault by a Port of Portland employee

Dear Ms. van der Voo and Ms. Pearman:

In response to a Public Records request submitted by Ms. Lee van der Voo of InvestigateWest concerning an alleged sexual assault by a Port of Portland employee, the Port of Portland has made a determination to produce the majority of the documents that are the subject of the petition to this office. After due consideration, and for the reasons expressed in this letter, my office has decided to deny Ms. van der Voo's request to the extent it seeks documents beyond what the Port of Portland has agreed voluntarily to produce, because we agree that those documents are subject to exemptions.

### **Background**

On October 10, 2014, while attending a work-related training program in the Dallas/Fort Worth area, a Port of Portland Airport Fire and Rescue employee (the "accused") allegedly sexually assaulted a co-worker (the "victim"). A complaint was filed with the local police department and a report was forwarded to the Tarrant County District Attorney. As of the date of this letter, charges have not been presented to the grand jury.

Following the incident, the Port of Portland launched a personnel investigation into the alleged sexual misconduct. As part of that investigation, members of the Port of Portland's human resources staff interviewed the victim and other employees. Citing the possibility of

criminal charges in Texas, the accused refused to be interviewed, asserting his Fifth Amendment rights at the advice of counsel. The Port of Portland disciplined the accused for insubordination, putting him on unpaid administrative leave, but has not concluded its investigation or imposed discipline for the underlying incident. The victim executed a settlement and release and, as of April 21, 2015, is no longer employed by the Port of Portland.

In February 2015, Lee van der Voo of InvestigateWest submitted a public records request to the Port of Portland seeking the disclosure of documents relating to the alleged sexual assault. The Port of Portland disclosed relevant documents, but withheld the human resources investigation file as exempt from disclosure under public records law:

The specific exemptions that we are relying on are ORS 192.501(12) and 192.502(2). OPR 192.501(12) exempts a ‘personnel discipline action, or materials or documents supporting that action.’ As we previously disclosed, the Port is conducting an internal investigation of alleged sexual misconduct, and the information contained within this file is exempt from disclosure under ORS 192.501(12). Additionally, ORS 192.502(2) exempts the disclosure of ‘information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if public disclosure would constitute an unreasonable invasion of privacy....’ We believe that information contained in the investigation file is subject to this exemption as well.

By letter to this office, Ms. van der Voo appealed from the denial, asserting that the investigation was complete and therefore no longer exempted, and that, in any event, a compelling public interest outweighed any stated exemptions.<sup>1</sup> After receipt of Ms. van der Voo’s letter, the Port of Portland reviewed its file and determined that a limited number of records are also exempted under the catchall provision in 192.502(9) as privileged attorney-client communication. This office reviewed the documents at issue and will address the three alleged exemptions in turn.

### **The Asserted Exemptions**

#### **ORS 192.501 (12) Personnel Disciplinary Action**

ORS 192.501(12) exempts from disclosure a “personnel discipline action, or materials or documents supporting that action.” All of the exemptions described in ORS 192.501 are conditional; they exempt certain types of information from disclosure “unless the public interest requires disclosure in the particular instance.” (*Attorney General’s Public Records and Meetings Manual* (2014) at 25.) “Disclosure decisions should be based on balancing those public interests that favor disclosure of governmental records against those public interests that favor governmental confidentiality, *with the presumption always being in favor of disclosure. Id.* The

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<sup>1</sup> Ms. van der Voo also argues that a “final administrative determination” has been made, eliminating the protection in ORS 192.501(17), which conditionally exempts reports to the Oregon Occupational Safety and Health Division only until a determination is made or a citation is issued. The Port, however, does not assert or rely upon that exemption as there has been no report to the Occupational Safety and Health Division in this matter.

conditional exemptions, therefore, require public bodies to conduct a careful balancing of confidentiality interests against public disclosure interests. *See e.g., City of Portland v. David Anderson*, 163 Or App 550, 988 P.2d 402 (1999) (finding public interest required disclosure of records pertaining to an investigation and disciplinary action where a police captain's integrity and ability to enforce the law evenhandedly was at issue).

During the pendency of this appeal, the Port of Portland reversed its position and concluded that the public has a compelling interest in disclosure. It has performed the requisite balancing, and made its own determination that the majority of the human resources investigation file should be made available:

[T]he Port has concluded that the public interest in disclosure weighs in favor of releasing all interview notes and related background information contained in the investigation file. However, it does not tip in favor of releasing notes made by the human resources specialist describing her impressions or conclusions from the interviews as well as future questions she expects to ask.... If this information is released now, the Port's investigation will be prejudiced because the employee under investigation will have advance warning and insight as to areas of interest or concern by the Port.

Ms. van der Voo indicated by email to this office that she has "no objection to the Port's suggested withholdings for pending investigative materials," and therefore declines to seek disclosure of the human resource specialist's notes at this time. Moreover, this office declines to compel the disclosure of the identities of the interviewed witnesses. Redacting witness names, and any other identifying information, preserves the cooperation of the witnesses as the investigation continues and therefore serves the public interest.

#### ORS 192.502(2) Personal Privacy Exemption

ORS 192.502(2) exempts:

Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if public disclosure would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance. The party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy.

The purpose of this exemption is to protect the privacy of individuals from unreasonable invasion. An invasion of privacy will be unreasonable where an "ordinary reasonable person would deem [it] highly offensive." *AG Manual* at 75.

Given that the identity of an alleged sexual assault victim is not often publicly disclosed without the victim's consent, and as of this writing, the victim has not consented to disclosure, this office finds the exemption should be employed to protect the victim's privacy. Ms. van der Voo has not met her burden of showing that public interest requires a different result. Therefore, the Port of Portland is hereby ordered to redact any disclosed documents to protect the victim's name and other identifying information.

ORS 192.502(9) Attorney-Client Privilege

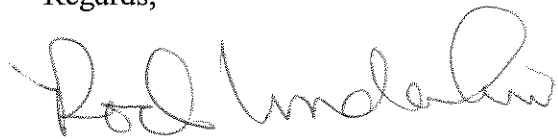
It is well-settled that "communications between an attorney and his client during and by reason of their relations as such, made in confidence and to enable the attorney to perform his professional duty in regard to the subject matter of the communication are deemed privileged." See *Sitton v. Peyree*, 117 Or 107, 114 (1926). This privilege has been upheld by the Oregon Supreme Court, see *State v. Jancsek*, 302 Or 270, 275 (1986), and codified in Oregon statutory law, see ORS 40.225. Moreover, it has been incorporated into Public Records law as an unconditional exemption to disclosure. See ORS 192.502(9); *AG Manual* at 95.

This office has reviewed the very limited number of documents exempted by the attorney-client communication and concurs with the Port of Portland's assessment that these documents contain privileged communication. The documents do not contain factual information, which by law cannot be exempted merely because an attorney is included on the communication, but rather reflect the very strategic analysis and advice intended to be protected by law.

Conclusion

In accordance with the Port of Portland's own conclusion that public interest compels the disclosure of its investigation, this office takes only the limited role of denying Ms. van der Voo's petition to the extent it seeks documents beyond what the Port of Portland has agreed to produce that are protected, or required to be redacted, by ORS 192.501(12), ORS 192.502(2), and/or ORS 192.502(9), as detailed above.

Regards,



ROD UNDERHILL  
District Attorney  
Multnomah County, Oregon