



ROD UNDERHILL, District Attorney for Multnomah County

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August 10, 2015

Captain Todd Wyatt
Portland Police Bureau
1111 S.W. 2nd Ave., #1250
Portland, OR 97204

Mark Amberg
Chief Deputy City Attorney
1221 S.W. 4th Ave., Suite 430
Portland, OR 97204

Re: Petition of Todd Wyatt requesting a report prepared by Robert Jordan.

Dear Captain Wyatt and Mr. Amberg:

In his public records petition under ORS 192.410 et seq., petitioner Todd Wyatt requested the district attorney to order the City of Portland to release the following records:

An unredacted copy of a report written by Robert J. Jordan regarding an investigation conducted by Mr. Jordan into claims of alleged misconduct by certain Portland Police Bureau employees.

As background, the police chief had disciplined petitioner, a captain with the Portland Police Bureau, and reduced his rank to lieutenant. The circumstances that led to the discipline are not relevant to resolution of this petition. Petitioner appealed the imposition of discipline and, after an arbitration in which multiple police bureau employees testified, the arbitrator reinstated petitioner to his previous rank. Petitioner then submitted a detailed and lengthy list of allegations regarding factual inaccuracies and inconsistencies in the witnesses' statements. Against this background the city attorney's office requested the services of an outside expert, Robert J. Jordan, to assist them in evaluating petitioner's allegations and to advise as to what further action, if any, would constitute best practice in the context of a law enforcement internal affairs investigation.

Mr. Jordan is an expert in the field of law enforcement internal affairs. Mr. Jordan served as director of the Office of Professional Responsibility for the FBI before being assigned as special agent in charge for the FBI's Portland office. The request for Mr. Jordan's services originated from the city attorney's office and Mr. Jordan provided his work product, in the form of a report summarizing his advice and conclusions, to the city attorney when complete. In his report, Mr. Jordan concluded that none of the allegations advanced by petitioner merited further investigation.

Petitioner then sought a copy of Mr. Jordan's report and, after the city denied his request, this appeal ensued.

DISCUSSION

A. Attorney-Client Privilege

Mr. Amberg informs us that in the course of the city attorney's representation of the Portland Police Bureau in this ongoing dispute, the city attorney retained Mr. Jordan as an expert and agent of the city attorney. Accordingly, the city asserts that Mr. Jordan's report is exempt as an attorney-client privileged document. In response petitioner makes public policy arguments that the spirit of the public records law requires transparency and that the public has an interest in knowing how and why its officials conduct investigations of the sort at issue here.

The attorney-client privilege of ORS 40.225 is incorporated into the Public Records Law by ORS 192.502(9) as an unconditional exemption. Where an exemption is unconditional, we may not consider the public interest as part of our analysis. If the document is privileged we may not order it disclosed regardless of the public's interest in its contents. See, for example, *In re petition of Bernstein for The Oregonian*, MCDA PRO 13-04 (2013); *In re petition of Allen Van Dyke*, Att'y General PRO (11/21/2007).

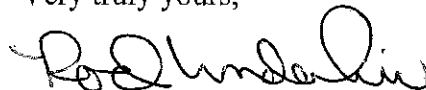
The *Van Dyke* opinion, cited above, squarely addresses the situation presented here. In *Van Dyke* the petitioner sought an investigative report commissioned by the Department of Justice. The report sought to evaluate complaints that the petitioner had made against Department of Fish and Wildlife employees. The petitioner alleged that these employees had made misstatements about him and he wanted to review the resulting report. The attorney general held the report was subject to attorney-client privilege and exempt from disclosure.

Certainly, a public body may not draw the veil of attorney-client privilege over an investigation merely by selecting an attorney to perform an otherwise factual investigation. Depending on the circumstances, purely factual information might not be covered by privilege for purposes of the Public Records Law regardless of who gathers it. *In re petition of Frank for The Oregonian*, MCDA PRO 05-19 (2005); ORS 192.502(9)(b). However, a document conveying the confidential opinion or advice of an attorney or his agent in the rendition of professional legal services is privileged. *State v. Riddle*, 330 Or 471 (2000). Having reviewed Mr. Jordan's report it is not a close call to conclude that it is advisory rather than independently factual. Attorney-client privilege applies to this document and it is not subject to disclosure under the Public Records Law.

ORDER

Accordingly, the petition is denied.

Very truly yours,



ROD UNDERHILL
District Attorney
Multnomah County, Oregon