



ROD UNDERHILL, District Attorney for Multnomah County

1021 SW 4th Ave., 600 County Courthouse • Portland, Oregon 97204 • 503 988-3162 • FAX 503 988-3643
www.mcda.us

August 24, 2015

Nick Budnick
The Oregonian
1500 S.W. First Ave.
Portland, OR 97201

Jeff Condit
Miller Nash Graham & Dunn LLP
111 S.W. 5th Ave., Suite 3400
Portland, OR 97204

Re: Petition of Nick Budnick for The Oregonian requesting tort claim notices by Timothy Donahue against Portland Community College.

Dear Mr. Budnick and Mr. Condit:

In his public records petition under ORS 192.410 et seq., petitioner Nick Budnick, on behalf of The Oregonian, requests the district attorney to order Portland Community College (PCC) to provide the following records:

Any tort notices, threats of litigation or lawsuit, draft lawsuits or lawsuits from Timothy Donahue since 2010, along with any accompanying or supporting documents or exhibits.

Timothy Donahue served as the director of PCC's Facilities Management Services department until 2013. According to petitioner, in July 2012 Mr. Donahue submitted an audit request relating to construction work on a new PCC facility. Mr. Donahue subsequently filed a notice of tort claim against PCC alleging violation of whistleblower laws, discrimination, and harassment.

PCC declined to produce the requested records, citing ORS 192.502(2), the personal privacy exemption and, as to one particular portion of one document, attorney-client privilege.

Mr. Condit, on behalf of PCC, has submitted a confidential letter response describing the applicability of these exemptions to the facts contained in the documents as well as the records themselves. The documents at issue consist of a two-page letter along with six exhibits totaling 34 additional pages.

DISCUSSION

A. Personal Privacy

ORS 192.502(2) exempts from disclosure:

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.

Of primary concern to PCC is that the exhibits to Mr. Donahue's letter contain inflammatory allegations against current and former PCC employees. PCC asserts that disclosure of these allegations would unreasonably invade the privacy of the named employees.¹ The information at issue—spread across all six exhibits—falls into three general categories: Mr. Donahue's allegations against other employees, his defense of his own performance, and PCC's investigation and resolution of those allegations.

i. Allegations made by Mr. Donahue against other PCC employees

The courts, the attorney general, and this office have at various times recognized that "information of a personal nature" as used in this section could include a person's: home address, age, weight, residential telephone number, medical information, psychological evaluation, personal financial information, autopsy photos, social security number, and personal family photos.

After careful consideration of the categories of information previously found exempt, we do not believe that a person's account of an event, or the motives he or she ascribe to others, constitutes information of a personal nature.² See, *In re petition of Bernstein for The Oregonian*, MCDA PRO 15-14 (2015) (account of a non-traumatic event is not personal information). The decision is made easier in this particular case because the allegations of misconduct are accompanied by a lengthy rebuttal in the form of an investigation report that deems them unsubstantiated.

ii. Self-promotional statements made by Mr. Donahue

The self-promotional statements given by Mr. Donahue to PCC executives investigating the matters explored in the documents are not "information of a personal nature" and, thereby, not exempt.

iii. Investigation of Mr. Donahue's allegations and recommended action

PCC has rightly concluded that the personnel discipline exemption, ORS 192.501(12), does not apply to its official investigation into Mr. Donahue's allegations. This exemption is unavailable because PCC did not discipline anyone as a result of the investigation. See, e.g. *In re petition of Bernstein for The Oregonian*, MCDA PRO 15-14 (2015). With respect to internal investigations that do not result in discipline the legislature has created an express exemption to the Public Records Law for unfounded allegations against law enforcement officers. ORS

¹ PCC has only asserted a privacy exemption as to allegations against current and former PCC employees and not as to any information relating to Mr. Donahue. A public body makes the final decision as to what exemptions to claim and we will not assess exemptions not raised by the body.

² Of course, the extreme case proves the exception. See, *In re petition of Franzen for The Oregonian*, MCDA PRO 04-02 (2004) (account of a violent sexual assault not subject to disclosure).

August 24, 2015

Petition of Nick Budnick

181.854(3). We must interpret the lack of a similar exemption for other public employees as an intentional omission. The report is not exempt.

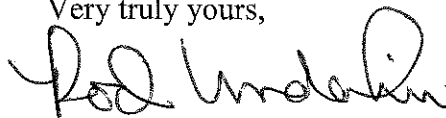
B. Attorney-client privilege

The disclosure of attorney advice in a document sent to third parties would ordinarily breach any attorney-client privilege. The maintenance of privilege depends on continued confidentiality. However, in this case, both Mr. Donahue and high-ranking officials of PCC to whom he sent the document at issue were holders of the same attorney-client privilege. On the specific facts of this case that privilege is not waived and we agree with PCC that paragraph three on page three of exhibit one may be redacted.

ORDER

Accordingly, the petition is granted subject to the single redaction described above. Portland Community College is ordered to promptly disclose all records responsive to this request except for paragraph three on page three of exhibit one. This disclosure is subject to payment of fees to PCC, if any, not exceeding the actual cost in making the information available.

Very truly yours,



ROD UNDERHILL

District Attorney

Multnomah County, Oregon

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's 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 seven days formal notice of your intent to initiate court action to contest this order, or fail to file such court action within seven additional days thereafter.