



ROD UNDERHILL, District Attorney for Multnomah County

600 County Courthouse • Portland, Oregon 97204 • 503 988-3162 • FAX 503 988-3643
www.mcda.us

January 30, 2017

Bethany Barnes
The Oregonian
1500 S.W. First Avenue, Suite 400
Portland, Oregon 97201

Stephanie Harper
Portland Public Schools
General Counsel's Office
501 N. Dixon Street
Portland, Oregon 97227

Re: Petition of Bethany Barnes for The Oregonian requesting an unredacted copy of an email log.

Dear Ms. Barnes and Ms. Harper:

In her public records petition, dated January 18, 2017, petitioner Bethany Barnes, on behalf of The Oregonian, requests that this office order the Portland Public School District (PPS) to disclose unredacted copies of the following records:

the log of emails (including deletes and drafts) between Amanda Whalen and Anna Richter Taylor from June 1, 2016 to present.

At the times relevant to this petition Amanda Whalen was the Chief of Staff for PPS and Anna Richter Taylor was a consultant in the public relations field doing business as ART Public Affairs. Ms. Richter Taylor was hired on an emergency, and then ongoing, basis to provide advice and direction to the PPS communications department after multiple resignations in the department and other recent high profile events in the district.

Petitioner filed her request with PPS on November 9, 2016. On December 12, 2016 PPS provided petitioner with a list of 880 emails responsive to the request including, as to each email, the fields "To," "From," "Subject," and "Date." Of these 880 logged emails, 15 contain partial redactions to their subject lines. Each of the redacted subject lines includes unredacted text that caused PPS to believe the email was attorney-client privileged. For example:

	From	To	Subject	Date
649	Anna Richter Taylor	Amanda Whalen and 1 other	[REDACTED]/Attorney Client Privilege	7/6/2016 14:17

After receiving the log, Ms. Barnes requested that this office review the redactions and order PPS to produce any deleted or draft emails, which do not appear to be contained in this log.

PPS asserts that the redacted material is subject to attorney-client privilege and exempt from disclosure. With one exception, as to which PPS concedes that a subject line was

erroneously redacted, we agree with PPS and deny the petition. The erroneously redacted subject line is numbered 779 and PPS' concession is well taken. Because they have indicated they intend to produce that information, the petition is moot as to this record.

DISCUSSION

A. Attorney-client privilege – ORS 192.502(9) / ORS 40.225

ORS 192.502(9) exempts from disclosure under the public records law:

Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law.

It has long been recognized that Oregon's public agencies may receive confidential advice from their attorneys just as any private organization might. The public records law incorporates the attorney-client privilege by way of ORS 192.502(9). *Port of Portland v. Or. Ctr. for Env'tl. Health*, 238 Or App 404, 409 (2010) (so noting).

Except in one instance, the emails at issue here are not between attorneys and employees, but rather are amongst high level employees or contractors. Although the attorney-client privilege protects communications between the lawyer and the client, the distribution within an organization of legal advice received from counsel does not, by itself, waive the privilege. See, e.g., *Strougo v. BEA Assocs.*, 199 F.R.D. 515, 520 (S.D.N.Y 2001) (citing *Upjohn Co. v. United States*, 449 U.S. 383 (1981)).

Ms. Richter Taylor is not a PPS employee, but this does not mean she may not be covered by the privilege. PPS has provided, and we have reviewed, the contract defining the scope of her work. Based on the nature of the work expected to be done by Ms. Richter Taylor under the contract we do not believe that discussion of attorney-client privileged matters with her constitutes a waiver of the privilege. An organization is entitled to hire contractors to perform work on its behalf and, if substantive discussions with its lawyers are necessary to that work, then the privilege can likewise extend to that contractor.

Our decision here is made without knowledge of the contents of the actual emails at issue. Petitioner, limited the scope (and attendant expense) of her request, by asking only for a log rather than the full contents of all emails. The scope of the request likewise limits the scope of our review. PPS has provided this office, and we have reviewed, an unredacted version of the log provided to petitioner.

With that qualification we are satisfied that it is more likely than not that the redactions contain information subject to the attorney-client privilege. If petitioner wishes to request the contents of the emails themselves as part of a more expansive records request, and is willing to pay the costs associated with that request, then a determination can be made on a new record. We do not feel it in keeping with the fee provisions of ORS 192.440 to require PPS to conduct that review at its own expense for the purpose of a public records appeal when those underlying emails have not themselves been requested.

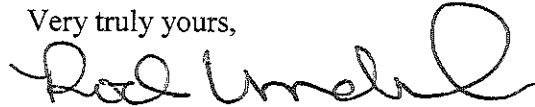
Petitioner also requested that we order PPS to provide the log of draft and deleted emails, none of which were among the provided records. PPS has confirmed with this office that no draft or deleted emails responsive to this request are contained in Ms. Whalen's email account.

Page 3
January 30, 2017
Petition of Bethany Barnes

ORDER

As to entry 779 in the email log, the petition is moot based on PPS' representation that it will provide the unredacted record. As to the remaining redactions, the petition is denied.

Very truly yours,

A handwritten signature in black ink, appearing to read "Rod Underhill". The signature is fluid and cursive, with a large loop at the end.

ROD UNDERHILL
District Attorney
Multnomah County, Oregon

17-03