



ROD UNDERHILL, District Attorney for Multnomah County

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June 7, 2017

Joshua W. Jeffery, MTS
Department of History
915 Volunteer Boulevard
Sixth Floor, Dunford Hall
Knoxville, Tennessee 37996

Karen L. Moynahan
Portland Office of City Attorney
1221 S.W. Fourth Avenue, Suite 430
Portland, Oregon 97204

Re: Petition of Joshua Jeffery, requesting records relating to the Bull Run Watershed.

Dear Mr. Jeffery and Ms. Moynahan:

Petitioner made a public records request to the City of Portland on May 22, 2017, for, “The following GIS data on the Bull Run Watershed: All shapefiles, metadata, GBD databases, and other map layers showing the locations and conditions of roads within the BRWMU, the locations of gates, infrastructure, and natural features. I am NOT requesting: LIDAR data, aerial photography, or other imagery of this kind.” On May 25, 2017, the City of Portland replied to the request, providing petitioner with access to a GBD database that contained five shapefiles that provided road and maintenance conditions, a link to the Portland Water Bureau’s (Bureau) report to the Oregon Health Authority that indicates general locations of gates, and the location of a fire tower. However, the City of Portland did not provide shapefiles with the locations of gates, the conditions of roads within the Bull Run Watershed Management Unit (BRWMU), nor the locations of all of the roads within the BRWMU. After petitioner again requested these specific items on May 26, 2017, the City of Portland denied the request based upon ORS 192.502(33). On May 30, 2017, petitioner appealed. After appealing, the City of Portland released additional road data maintenance information, which the petitioner believes is still inadequate to fulfill his request.

Petitioner is a historian and a doctoral student at the University of Tennessee. The information that he has requested is for an historical and current study of the protections implemented by the City of Portland as to the Bull Run Watershed, a principle source of water for the City of Portland. Petitioner formerly worked as a ranger in the BRWMU.

The Bull Run Watershed, which is 147 square miles of forest land, has been the primary water source for the City of Portland since 1895. 950,000 residents in the Portland metropolitan

region are served by this Watershed.¹ 95 percent of the land is owned by the United States Forest Service. The reservoirs can contain about 17 billion gallons of water. Within the BRWMU is Bull Run Lake, Bull Run Dams One and Two, a diversion and headworks structure, a system of roads, telecommunication towers, and a water quality laboratory building. There is also a hydroelectric project at the dam, which is owned by the City of Portland. The watershed has been closed to general public access since 1904, due in part to federal land management restrictions. The City of Portland has also restricted access in order to protect this critical water supply from human-caused contamination or destruction. Public access is only permitted through the Bureau.

The City of Portland has implemented a number of security measures to protect the watershed, which include a full-time caretaker; law enforcement patrols; law enforcement overflights; locked and keyed gates at critical access points; and additional measures which the Bureau cannot reveal without compromising their efficacy. Security measures have been increased due to the Public Health Security and Bioterrorism Preparedness and Response Act of 2002. The Bureau does not release information regarding minor roads, exact gate locations, or communication tower locations, as a security measure for the watershed.

The City of Portland has submitted a response to the petitioner's arguments, which include an analysis of the exemptions to Public Records under ORS 192.502(8), ORS 192.502(33), ORS 192.501(22), and ORS 192.501(23).

DISCUSSION

A. Federal Law Exemption - ORS 192.502(8)

ORS 192.502(8) exempts from disclosure, "[a]ny public records or information the disclosure of which is prohibited by federal law or regulations." The Public Health Security and Bioterrorism Preparedness and Response Act of 2002, which has been codified, in part, as the Safety of Public Water Systems Act, requires all community water systems in the United States that serve more than 3,300 people to make a Vulnerability Assessments and an Emergency Response Plan. 42 USC 300i-(a) describes the Vulnerability Assessment:

Each community water system serving a population of greater than 3,300 persons shall conduct an assessment of the vulnerability of its system to a terrorist attack or other intentional acts intended to substantially disrupt the ability of the system to provide a safe and reliable supply of drinking water. The vulnerability assessment shall include, but not be limited to, a review of pipes and constructed conveyances, physical barriers, water collection, pretreatment, treatment, storage and distribution facilities, electronic, computer or other automated systems which are utilized by the public water system, the use, storage, or handling of various chemicals, and the operation and maintenance of such system...

¹ See, <https://www.portlandoregon.gov/water/29784>

42 USC 300i-(a)(3) further provides:

Except for information contained in a certification under this subsection identifying the system submitting the certification and the date of the certification, all information provided to the Administrator under this subsection and all information derived therefrom shall be exempt from disclosure under section 552 of title 5.

A particularized map of critical gates and roads leading to telecommunication towers, a hydroelectric project, and various points of a critical drinking water reservoir that services 950,000 people would be a part of any Vulnerability Assessment. Roger Hediger, in his Declaration, indicated that “Delay tactics are a critical part of the City’s security plan because every second exposes an intruder to security forces.” The Bureau has stated that it does not release exact gate locations or minor roads because it is a delay tactic in order create uncertainty for any would-be trespasser. This is a part of a system-wide approach to ensure the safety of the water supply.

Besides the Vulnerability Assessment, a community water system must also prepare an Emergency Response Plan. 42 USC 300i-(b) states:

Each community water system serving a population greater than 3,300 shall prepare or revise, where necessary, an emergency response plan that incorporates the results of vulnerability assessments that have been completed...The emergency response plan shall include, but not be limited to, plans, procedures, and identification of equipment that can be implemented or utilized in the event of a terrorist or other intentional attack on the public water system. The emergency response plan shall also include actions, procedures, and identification of equipment which can obviate or significantly lessen the impact of terrorist attacks or other intentional actions on the public health and the safety and supply of drinking water provided to communities and individuals...

The petitioner has not asked for a copy of either the Vulnerability Assessment or the Emergency Response Plan. However, the particular parts of the watershed infrastructure that he has requested certainly do fall within the parameters of these two documents. The petitioner disputes whether the locations of gates have been revealed through other documents issued by the Bureau.

This office has not viewed any of the materials that are exempt under 42 USC 300i-(1), including the exact locations of any gates, roads or communication towers within the BRWMU. We cannot assess petitioner’s claim that the precise locations of infrastructure within the BRWMU have been revealed through other documents produced by the City of Portland. We conclude that the Safety of Public Water Systems Act does apply and we are satisfied that the BRWMU is subject to these federal rules without reviewing the requested record.

Oregon law provides that, “Every person has a right to inspect any public record of a public body in the state, except as otherwise expressly provided.” ORS 192.420(1). However, Oregon Public Records law exempts any public record or information from disclosure which is prohibited by federal law. Given that a federal law applies, ORS 192.502(8) exempts the information which is requested by petitioner. There is no public interest consideration for records under this exemption.

The City of Portland has made three further arguments for exemption under ORS 192.502(33), ORS 192.501(22), and ORS 192.501(23). Since the records are exempt under ORS 192.502(8), we do not need to decide whether the other exemptions apply.

ORDER

Accordingly, the petition is denied.

Very truly yours,

A handwritten signature in black ink that reads "Rod Underhill". The signature is written in a cursive style with a large, looped "R" and "U".

ROD UNDERHILL
District Attorney
Multnomah County, Oregon