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November 15, 2017

Uri Henig
uri.henig@gmail.com (via email only)

Randy Geller
Attorney at Law
360 E. 10th Avenue, Suite 300
Eugene, Oregon 97401

Re: Petition of Uri Henig seeking records of internal PPS discussions relating to a part-time student schedule

Dear Mr. Henig and Mr. Geller:

In his public records petition, dated November 6, 2017, petitioner Uri Henig, requests that this office order the Portland Public School District (PPS) to disclose records withheld on the basis of attorney-client privilege.

Petitioner initially requested records in November of 2016 relating to a dispute with the district about the ability of his child to maintain a part-time enrollment at the da Vinci Arts Middle School. PPS provided him with certain records, but withheld in their entirety about 70 pages on the basis of attorney-client privilege.

PPS now agrees that the blanket redaction of the privileged emails is not appropriate and intends to release email header information showing the participants in each conversation as well as the date, time, and subject (to the extent it does not disclose privileged information) of the emails at issue. PPS maintains that portions of the contents of these emails remain protected by attorney-client privilege. We write only to address the redactions still asserted by PPS and, as discussed below, find most of them supported by law.

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.

The confidentiality of communications between an attorney and his or her client is a foundational principle of our system of laws. *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (“The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.”) This privilege extends to public organizations that employ or retain lawyers to give them legal advice and shields those communications from disclosure under the public records law. *Port of Portland v. Or. Ctr. for Env'tl. Health*, 238 Or App 404, 409 (2010) (noting incorporation of attorney-client privilege into the public records law by way of ORS

192.502(9)). Any communication between an attorney and her agency client that make it easier for the agency to make use of legal advice or services are subject to privilege and unconditionally exempt from disclosure under the public records law. *Petition of Barnes*, MCDA PRO 17-48 (2017).

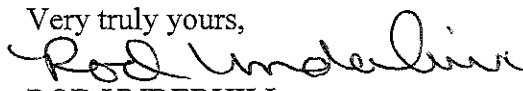
Petitioner argues that the privilege should not apply because the documents were not part of litigation and because there is a public interest in determining the reasons behind PPS' policy positions on student enrolment. Litigation need not be pending, or even contemplated, in order for an agency to seek the advice and input of its legal counsel. The contents of privileged communications do not need to expressly contain legal advice, merely be to or from an attorney and "make it easier for an entity to make use of legal advice or services." *Port of Portland*, 238 Or App at 411. This could include background information provided to a lawyer, policy ideas that are sent to a lawyer for the purpose of legal input, or directions from the client to the lawyer as to a desired course of action, in addition to actual legal analysis or specific requests for legal advice. At the same time, an organization cannot render a document confidential by gratuitously copying its lawyer.

Having reviewed the more limited redactions now proposed by PPS it is apparent that there were indeed legal issues involved in the circumstances giving rise to these emails. These issues reasonably caused the district to involve its attorney. We agree that the redactions are supported by law, except as expressly listed below:

- 23-140.126 0274, 11/9/16 10:02 email from Meera Kreitzer to Fred Locke. This applies only to the top email, and not the 11/9/16 8:35 email duplicated below.
- 23-140.126 0275, 11/9/16 11:02 email from Meera Kreitzer to Fred Locke.¹ This applies only to the top email, and not the 11/9/16 8:35 email duplicated below.
- 23-140.126 0279, 11/13/16 10:03 email from Fred Locke to Antonio Lopez, Stephanie Harper, and Judy Brennan. This does not apply to the 11/12/16 email from Antonio Lopez also appearing on this page.

ORDER

Accordingly, the petition is denied in part, and granted in part. PPS shall promptly provide petitioner with the contents of the emails expressly identified in this order. This disclosure is subject to payment of fees to PPS, if any, not exceeding the actual cost in making the information available.

Very truly yours,

ROD UNDERHILL
District Attorney
Multnomah County, Oregon

¹ The first redaction on this page is not subject to attorney-client privilege, but relates to a completely different matter and is thus non-responsive to petitioner's request.

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.

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