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November 10, 2011

Brad Schmidt
The Oregonian
1320 SW Broadway
Portland, Oregon 97212

Jed Tomkins
Assistant County Attorney
Office of Multnomah County Attorney
501 SE Hawthorne Blvd., Suite 500
Portland, OR 97214

Re: Petition of Brad Schmidt for The Oregonian received October 28, 2011 to disclose certain unredacted records of Multnomah County

Dear Mr. Schmidt and Mr. Tomkins:

On this public records petition, ORS 192.410 et. Seq., petitioner Brad Schmidt asks the District Attorney to order Multnomah County and it employees or agents to produce a copy or copies of the following records:

All documentation regarding the tax status of the Headwaters Apartments at 8833 SW 30th Ave.

Petitioner made his request in an October 4, 2011 email to David Austin, Communications Director for Multnomah County. 174 pages of email documents were provided with a "substantial waiver of the fees" but with "exemption for a few documents as attorney-client privilege and/or internal advisory communications."

Petitioner noted that one of the redacted set of email documents were between Assistant County Attorney John Thomas, and Jack Orchard, private counsel working for the City. In another, emails were between a state attorney and Mr. Thomas. A third email appeared to be "between a state tax employee and a county tax employee." Petitioner argued in his petition that "the county improperly asserts that communication between opposing attorneys and other outside agencies – not an attorney and client – is covered under attorney-client privilege." Petitioner pointed out that "the county released related correspondence between the same attorneys representing the city and county." Petitioner asked that "this office review the redacted documents to determine whether the exemption applies, as we believe it does not."

County Communications Director Austin did not provide an explanation to petitioner either verbally or in writing justifying the redactions as internal advisory communications. With respect to the public interest in disclosure, petitioner explained that the Headwaters Apartments initially received a tax exemption at the request of the City of Portland. The County later attempted to tax the property on the basis that the exemption was made in error. The City then warned of an estoppel claim and the County determined it could not successfully defend its position. Petitioner made a strong case that the Headwaters Apartments in fact should not have received the exemption.

Jed Tomkins, assistant county attorney, responded to the petition in an email dated November 3, 2011. He provided the unredacted emails together with a confidential explanation of the contents and the parties to the emails. Mr. Tomkins made additional arguments in a November 9, 2011 email.

Mr. Tomkins explained that most of the emails "occurred solely between John Thomas, senior Multnomah county attorney, and employees in the County's Division of Assessment and Taxation – Randy Walruff, Assessor; Richard Sanderman, chief supervisor; and Sally Brown, special programs supervisor." He noted that the files named DOJ were communications solely between Mr. Thomas "and Doug Adair, Oregon Department of Justice, general Counsel, Tax and Finance Division, who represented the Oregon Department of Revenue (DOR).

Attorney-Client Privilege

For centuries, the common law doctrine has maintained the rule that "communications between an attorney and his client during and by reason of their relations as such, made in confidence and to enable the attorney to perform his professional duty in regard to the subject matter of the communication, are deemed privileged." Sitton v. Peyree, 117 Or 107, 114 (1926). This doctrine has been codified in Oregon Evidence Code (OEC) 503 (ORS 40.225).

The Oregon Supreme Court has made the availability of the privilege dependent on two conditions:

(1) the communications must be confidential within the meaning of OEC 503(1)(b)[1], and
(2) the communications must be made for the purpose of facilitating the rendition of professional legal services to the client.

State v. Jancsek, 302 Or 270, 275 (1986).

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[1] OEC 503(1)(b) provides:

"Confidential communication" means a communication not intended to be disclosed to third persons other than to those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

The lawyer-client privilege of ORS 40.225 is incorporated by ORS 192.502(9) into an unconditional exemption under the Public Records Law. In its July 6, 1982 Public Records Order (Zaitz), the Attorney General determined that a review of such a claimed exemption is very limited:

> If the lawyer-client privilege is applicable, the Attorney General cannot consider whether or not the information should be disclosed in the public interest, but must deny your petition.

Attorney General's Public Records Manual, 2008, page F-5.

We have reviewed seven sets of emails (some with attachments) and all relate to communications between Senior Multnomah County Attorney Thomas and county supervisory personnel involved in the City appeal of the Headwaters Apartments tax assessment. The emails range from a request for legal services, work product concerning "Agreed Facts" in the civil action, questions from the county personnel, and advise from Mr. Thomas.

The communications in the seven sets of emails are confidential and clearly made for the purpose of providing legal services to the client. As such, the redacted materials are exempt from disclosure.

In addition to communications between a client, his representative and his lawyer or his representative is the following General Rule of Privilege, OEC 503(2)(c):

> By the client or the client's lawyer to a lawyer representing another in a matter of common interest.

According to Laird Kilpatrick in his commentary to Oregon Evidence, Fifth Edition 2007, this provision of OEC 503:

> ...allows each client a privilege as to the client's own statements. Thus, in "joint defense" or "pooled information" situations, if all clients resist disclosure, none will occur...No privilege applies where there is no common interest to be promoted by joint consultation, and the parties, therefore, meet on a purely adversary basis.

We have reviewed three sets of email communications between Mr. Thomas and Mr. Adair. The communications to Mr. Adair from Mr. Thomas are confidential communications made for the purpose of providing legal services to the county assessor. There is, of necessity, a close working relationship between the two legal departments when dealing with issues of tax assessment.

Mr. Tomkins explained that the DOR "supervises all county assessors and has the power to order corrections to county tax rolls and to take other action necessary to ensure proper implementation of the tax code." The county assessor on occasion "seeks guidance in the defense of tax appeals from his supervisor, the DOR." Senior County Attorney Thomas conferred with DOJ General Counsel Adair on the subject of defense of the tax appeal. The common interest provision constitutes a complete exemption of the emails to Mr. Adair.

This office has received no correspondence from Mr. Adair asserting the attorney-client privilege on behalf of his client. Consequently, the brief statements of Mr. Adair to Mr. Thomas are not exempt under ORS 40.225.

Internal Advisory Communications

ORS 192.502(1) exempts:

> Communications within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to any final agency determination of policy or action. This exemption shall not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between official and employees of public bodies clearly outweighs the public interest in disclosure.

It is unnecessary to evaluate the applicability of this exemption to the redacted materials subject to the attorney-client exemption. We have reviewed the four brief responses of Mr. Adair to the email communications from Mr. Thomas. The County has asserted the need to avoid the "chilling effect" from disclosure. "The communications reflect that Thomas and Adair discussed the strengths and weaknesses of the opposing party's position, their concerns with opposing counsel's approach to the law, and alternative options for resolution."

The statements from Mr. Adair are fairly innocuous and it is perhaps an overabundance of caution for the County to apply the exemption to the communications here. However, that is the judgment of the County and not for this office to second guess. In any case, the disclosure of the substance of the statements will not serve the public interest. The exemption must be upheld with respect to Mr. Adair's email correspondence.

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Accordingly, it is ordered that the petition of Brad Schmidt to disclose the unredacted records of Multnomah County is denied.

Very truly yours,

MICHAEL D. SCHRUNK
District Attorney
Multnomah County, Oregon