



MICHAEL D. SCHRUNK, District Attorney for Multnomah County

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April 18, 2001

Fran Hyson
16507 SE Mill Street
Portland, OR 97233

Clark I. Balfour
Cable Huston Benedict
Haagensen & Lloyd LLP
Attorneys at Law
Suite 2000
1001 SW fifth Avenue
Portland, Or 97204-1136

Re: Petition of Fran Hyson received April 16, 2001 to disclose certain records of the Rockwood Water PUD

Dear Ms. Hyson and Mr. Balfour:

On this public records petition, ORS 192.410 et. seq., petitioner Fran Hyson requests the District Attorney to order the Rockwood Water PUD to produce the following records:

Requested "opinion" of Clark Balfour, attorney for Rockwood Water.

- 1. - copy, to increase board meeting fee from \$50.00 to \$100.00.**
- 2. - copy, Notifying Public of Public Meetings Law.**
- 3. - itemized copy of attorney fee charged to the District for service of these two (2) items requested.**
- 4. - copy from my file on Written Notice to be Notified of all meetings.**

On March 19, 2001, petitioner requested the above-listed documents from Harvey Barnes, Manager of Rockwood Water PUD. Mr. Barnes responded to petitioner in a letter dated March 27. He declined to provide the first two documents, which he identified as "two memos from our attorney to the Board." Mr. Barnes did not decline to provide the "itemized copy of attorney fee", as it was not yet in existence. Mr. Barnes did deliver to petitioner a copy of the note she sent to the District in 1995 regarding notification of the delivery of "packets" to the Board members. Unfortunately, this was not the document sought by petitioner in her fourth request in the March 20 letter.

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Clark Balfour, attorney for the Rockwood PUD, responded to the petition in a letter to this office dated April 13, 2001. With respect to the first two requests, Mr. Balfour took the position that "[w]e consider these documents to be exempt from public disclosure under ORS 192.502(9) as attorney-client privileged communications."

Mr. Balfour affirmed the manager's statement that Mr. Balfour's bill had not yet been generated and, consequently, asserted that "item 3 does not exist." Finally, Mr. Balfour took the position in his letter that "the District provided item 4 to the Petitioner." In a subsequent telephone conversation with this office, Mr. Balfour indicated that the document requested in item 4 could not be found. Mr. Balfour did represent to us that petitioner has been offered the opportunity to look for the document herself. It does appear that the Rockwood PUD has not denied petitioner's request for the notification letter.

DISCUSSION

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 purpose is not waived [by the client], the exemption is absolute; neither the preliminary language of ORS 192.500(2) nor paragraph (h) itself contains any language providing for a balancing test. 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, 1999, page F-4.

The centuries old common law doctrine has maintained the rule that "communications between an attorney and his client during and by reason of their relations as such...are deemed privileged." Sitton v. Peyree, 117 Or 107, 114 (1925). 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

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.

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(2) the communication 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).

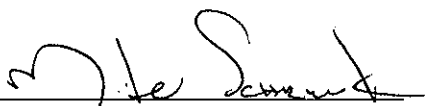
Mr. Balfour has provided this office (in confidence) with the one-page memorandum regarding board compensation and the three-page memorandum regarding public notification of meetings. A review of the documents reveals the customary work of a lawyer giving relevant legal advice to the manager and board of the Rockwood Water PUD on questions of board interest. The contents are confidential communications made for the purpose of facilitating the rendition of legal services to the Rockwood Water PUD. As such, the memoranda are unconditionally privileged and cannot be ordered disclosed to petitioner.

Petitioner has not been denied access to the remaining documents listed in the petition. The bill for attorney services has not yet been generated. According to Mr. Barnes, the bill "will be provided as it becomes available." We understand that the missing "Written Notice to be Notified of all Meetings" will be provided to petitioner if and when it is found.

ORDER

Accordingly, it is ordered that the petition of Fran Hyson to disclose certain records of the Rockwood Water PUD is denied.

Very truly yours,


MICHAEL D. SCHRUNK
District Attorney
Multnomah County

01-06