MICHAEL D. SCHRUNK, District Attorney for Multnomah County
600 County Courthouse • Portland, Oregon 97204-1193 • (503) 248-3162

April 14, 1998

CANDACE HAINES
GRESHAM CITY HALL
1333 NW EASTMAN PARKWAY
GRESHAM OR 97030

LISA GRACE LEDNICER
METRO EAST NEWS BUREAU
295 NE SECOND STREET
PORTLAND OR 97030

Re: Petition of Lisa Grace Lednicer, for The Oregonian, dated April 3, 1998, to disclose certain records of the City of Gresham

Dear Ms. Haines and Ms. Lednicer:

On this public records petition, ORS 192.410 et. seq., petitioner Lisa Grace Lednicer, Metro East New Bureau reporter for The Oregonian, requests the District Attorney to order the City of Gresham to produce the following records:

> **any and all information gathered by Gresham police and other officials regarding an investigation of City Council member Jack Gallagher.**

BACKGROUND

Petitioner made her request in writing to the City of Gresham on March 30, 1998 after an oral request for the records was denied by City Attorney Candace Haines on March 26, 1998.[1] According to petitioner, the City Council met in executive session on March 24,

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[1] Petitioner was initially told by Ms. Haines that the records were "privileged." Upon petitioner's written request to Greg Parker, public information officer, petitioner was referred to Senior Assistant City Attorney Susan Bischoff. On April 2, petitioner received an e-mail from Ms. Bischoff stating that they hoped to have a written response by Friday, April 10.

1998 to discuss the "non-criminal investigation" of councilman Gallagher. In the following open session, the City Council voted not to send the findings of the investigation to the state Government Standards and Practices. Petitioner believes the investigation is closed and that the records should be made available.

On April 10, 1998, Gresham City Attorney Candace Haines responded to the public records petition. The City of Gresham has claimed exemption from disclosure of the requested records pursuant to the conditional exemption for internal advisory communications, ORS 192.502(1). The city also claims exemption under the attorney-client privilege of ORS 40.225 which is recognized in ORS 192.502(8).

Enclosed with the city's response was a one-page summary of the records sought by petitioner.[2] Memo 1 is identified as a statement from Ms. Haines to the Gresham City Council of the action the Council might take after the City Attorney's briefing in executive session. Sections of the State Ethics Code and Gresham City Rules are included in the memo. Memo 2 is again from Ms. Haines to the City Council setting out the various options available to the City Council after hearing briefing in executive session.

The third document is identified as an investigative report of the Gresham Police Department consisting of nineteen interviews, documents relating to the City Community Development Department, and six other documents or reports. One of the six documents is a portion of a memorandum from City Manager Bonnie Kraft to the City Attorney concerning potential litigation.

DISCUSSION

I. MEMO 1 AND MEMO 2.

The City argues that the introductory paragraph of Memo 1 and all of Memo 2 are confidential communications protected by the attorney-client privilege. ORS 40.225(1)(b) provides:

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[2] ORS 192.470(2) allows the substitution of a summary of the public records with the consent of the District attorney. In light of the bar disciplinary concerns expressed by Ms. Haines, this office will not require disclosure of the actual records. It should be noted, however, that the failure to provide the requested documents for review makes it more difficult to favorably evaluate any claimed exemption.

> 'Confidential communication' means a communication not intended to be disclosed to third persons other than 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 City also claims that the memos are internal advisory communications under ORS 192.502(1), which 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 officials and employees of public bodies clearly outweighs the public interest in disclosure.

The Attorney General's Public Records Manual, p. 53 (1995), cites two public records orders which upheld the attorney-client privilege. Public Records Order, March 30, 1989, Howser, involved documents compiled in the course of a pending Oregon State Bar disciplinary proceeding. Public Records Order, October 21, 1988, Best, involved documents prepared by the Public Utility Commission staff for a pending contested case proceeding.

In both Howser and Best, the Attorney General discussed the need for "frank communication" and denied disclosure of documents as internal advisory communications. The attorney-client privilege was only mentioned in passing.

The nature and substance of Memo 1 and 2 appear to fit more closely in the category of internal advisory communications between one agency (the City Attorney) and another (the City Council). The communications (with the exception of the admittedly non-exempt portions of Memo 1) are of an advisory nature preliminary to any final agency action and cover other than purely actual materials. Any public interest in disclosure is outweighed by the need for council members to have legal advice concerning the type of action and options available to the City Council.

II. INVESTIGATIVE REPORT

The City argues that the Gresham Police Department is a "Representative of the lawyer" under ORS 40.225(1)(e). As such, the

investigative report is a confidential communication exempt under the attorney-client privilege. We think that with this argument, the City paints with too broad a brush. The Gresham Police Department was asked to conduct an investigation of Gresham City Councilman Jack Gallagher. A report was produced. The report is clearly a public record. The City Attorney has reviewed that investigation and made a verbal report to the City Council presumably containing her recommendations. There was, however, no pending litigation or contested matter.[3] The investigative report falls outside the bounds of attorney-client privilege.

The City maintains that the investigative report does not contain factual matters and is advisory in nature. As such, it is exempt as an internal advisory communication. Ms. Haines argues that the release of the report would have a "chilling effect on the willingness of other governing bodies to conduct investigations when necessary." There is nothing to support this position other than speculation that no governing body would dare to investigate one of its members unless the allegations were clear cut.

The City further argues that there would be a chilling effect on the willingness of employees to speak frankly if they knew their communications were not protected from disclosure. There is no indication that any of the nineteen current and former City employees spoke to the Gresham Police Department in confidence or that the nature and substance of their information must somehow be protected.

As stated in The Attorney General's Public Records Manual, p. 37-38 (1995):

> The central thrust of this exemption [Internal Advisory Communications] is to protect the confidentiality of frank and uninhibited advice and observations a public employee gives to a superior or associate. The test of whether there are grounds for asserting the exemption is whether disclosure would inhibit the employee so as to interfere with the free flow of information and ideas that the agency needs for its efficient operation, as distinguished from mere embarrassment of the employee or agency.

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[3] We will accept Ms. Haines representation that a portion of one memorandum from City Manager Bonnie Kraft concerns potential litigation and is a privileged communication. It can be redacted pursuant to ORS 192.505.

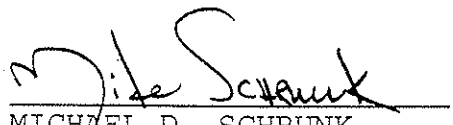
The description of the nature and substance of the investigative report and its supporting documents does not support the position of the City. Presumably the Gresham Police Department was asked to conduct an investigation into allegations of criminal behavior. Nothing in the City's summary suggests that the Gresham Police Department was used to conduct a survey of employees regarding their observations or views concerning the conduct of the City's business. The resulting investigative document is a police report just like any other police report and it is subject to the public records law. The investigation is complete, the City Attorney has made her verbal report, and the City Council has concluded its business. The investigative report of the Gresham Police Department should be made available to petitioner.

ORDER

Accordingly, it is ordered that the petition of Lisa Grace Lednicer, for The Oregonian, is denied with respect to the introductory paragraph of Memo 1 and all of Memo 2 as exempt Internal Advisory Communications, ORS 192.502(1).

It is further ordered that the City of Gresham promptly disclose all documents contained in the investigative report of the Gresham Police Department with the exception of the portion of the Bonnie Kraft memorandum to the City Attorney concerning potential litigation, exempt as confidential communications, ORS 40.225(1)(b). Disclosure of the documents ordered is subject to payment of the City of Gresham's fee, if any, not exceeding the actual cost in making the information available, consistent with ORS 192.440.

Very truly yours,



MICHAEL D. SCHRUNK
District Attorney
Multnomah County

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 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 7 days formal notice of your intent to initiate court action to contest this order, or fail to file such court action within 7 additional days thereafter.

JKH:JKH

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