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July 15, 1999

Leslie N. Moore
2506 NE 205th Avenue
Fairview, OR 97024

Paul C. Elsner
Beery & Elsner
Attorneys at Law
Suite 250
1750 SW Harbor Way
Portland, OR 97201-5164

Re: Public Record Request of July 5, 1999 to disclose certain records
of the City of Fairview

Dear Mr. Moore and Mr. Elsner:

BACKGROUND

On this public records petition, ORS 192.410 et. seq., petitioner Leslie N. Moore requests the District Attorney to order the City of Fairview to produce a copy of the following records:

- 1) The itemized billings and reports of the City Attorney's for the past two years.
- 2) The activities, agreements and authorization of Attorney S. Marks with the City of Fairview.
- 3) All files pertaining to the original inception, determination and establishment of the Silent Creek Reimbursement District[.]
- 4) All memos, communiqués, records and etc., in the City of Fairview dealings with Nordic Construction or their Attorney Matthew Kehoe from August 1998 through May 1999.

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5) All memos, communiqués or records referring to Leslie Moore or the Moore Development on 205th avenue in Fairview and the Legal Authority by which the City Administrator of Fairview ordered the City Council of Fairview to not speak with nor have any dealings with Leslie Moore and all memos and etc. associated with that, or similar orders or directives.

Petitioner has made various letter requests of the Fairview City Council for public information which he submitted with his public records petition. The May 18th letter includes (with some modifications) a request for documents 1, 2, and 3 of this petition. Marilyn Holstrom, Fairview City Administrator, responded to petitioner in a May 25th letter. She agreed to provide an expurgated version of the attorney billings (citing attorney-client privilege) as well as the reports to the City Council. Ms. Holstrom agreed to provide the documents relating to Attorney S. Marks as well as the Silent Creek Reimbursement District (subject to payment of a deposit for the actual costs of reviewing and providing those materials).

Petitioner sent a follow-up letter to the Fairview City Council on May 28. Petitioner objected to the assertion of an attorney-client privilege and the payment of a deposit. Ms. Holstrom responded in a letter dated June 3 that the privileged attorney-client communications would include the description of services in the billings provided by the law firm that contracts to do legal work for the City of Fairview. Ms. Holstrom also explained the nature of the costs associated with complying with petitioner's public records request.

In addition to the three requests addressed by Ms. Holstrom, the petition continues with two requests dealing with Nordic Construction and Moore Development. Petitioner concludes with a request for a waiver of the fees and asserts that his request is in the public interest.

Paul Elsner, representing the City of Fairview, responded to the petition in a letter dated July 9 and in two telephone conversations with this office. With respect to the first request, Mr. Elsner stated that the City has made the reports available but claimed an unconditional exemption for attorney-client communications in the billing statements under ORS 40.225(2). Mr. Elsner agreed to provide any documents in

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existence referenced in the second request. Mr. Elsner reserved the right to review the Silent Creek Reimbursement District documents sought in the third request (no exempt materials have been identified by Mr. Elsner at this time) but otherwise agreed to make any non-privileged information available to petitioner.

Mr. Elsner initially took the position that the fourth and fifth requests have not been requested of the City of Fairview either orally or in writing by petitioner. In a July 14 letter response to Mr. Elsner's letter, petitioner asserted that "these matters were addressed verbally and were denied publicly in the Council meeting of July 7, 1999." Mr. Elsner subsequently advised this office that the City of Fairview would provide these documents "to the extent they exist" subject to the payment of the costs of review and production noted previously.

DISCUSSION

The City of Fairview has agreed to provide the requested documents subject to an assertion of the attorney-client privilege and payment of a deposit by petitioner. There are, therefore, two issues in dispute: the validity of the claimed exemption and whether the public interest requires a fee reduction or fee waiver.

I. Attorney-Client privilege

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, 1997, page F-4.

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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(2)). 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 communication must be made for the purpose of facilitating the rendition of professional legal services to the client. State v. Jancsek, 302 Or 270 (1986).

Mr. Elsner has provided this office with several pages of the billing statements in question. The statement is a standard explanation of service and includes the date of service, which attorney provided the service, a brief narrative description of the service, the hours spent and the charge for the service. The City of Fairview has claimed the privilege with respect to the narrative description of service and proposes to expurgate or redact that part of each statement of services.

A review of the sample statements reveals fairly innocuous explanations of the subject of the legal services and the legal work provided. The descriptions, however, are confidential communications made for the purpose of facilitating the rendition of legal services to the City of Fairview. As such, the narrative descriptions are unconditionally privileged and cannot be ordered disclosed to petitioner.

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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II. Fee Waiver

The Public Records Law expressly authorizes a public body to establish fees "reasonably calculated to reimburse it for its actual cost in making such records available." ORS 192.440(3). The public body is permitted to include in its fees "costs for summarizing, compiling or tailoring [a] record, either in organization or media, to meet the person's request." ORS 192.440(3).

"Actual cost" may include a charge for the time spent by the public body's staff in locating the requested records and "a public body may preliminarily estimate charges for responding to a records request and require prepayment of the estimated charges before acting on the request." Attorney General's Public Records Manual, 1997, page 11.

The public agency may provide the records without charge or at a reduced fee "if the custodian determines that the waiver or reduction is in the public interest because making the record available primarily benefits the general public." ORS 192.440(4).

Mr. Elsner notes in his response to the petition that compliance with the records request would necessarily involve the use of a small city staff and substantially interfere with the normal business of the City of Fairview. He notes that petitioner is currently engaged in litigation with the City and speculates that the request is "driven in part by the current adversarial relationship Mr. Moore has with the City." Mr. Elsner acknowledges petitioner's position on the City's budget committee but notes that the committee's work is done for this year and that petitioner had access as a member of the Committee to all City financial records.

The motives of petitioner in seeking the records are irrelevant except as a factor in determining the public interest. Petitioner maintains that his concerns over the operation of his City are legitimate and that his questions about spending and funds have never been genuinely responded to. The petition states that

I believe that it is in the public interest to search out these matters and attempt to access the agenda behind this pattern of disingenuous activities and the misrepresentations

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repeatedly provided to the City Council to direct their decision making process.

Petitioner has made his extensive request for records as a private citizen and not as a member of the City Budget Committee. His efforts may be laudable but there has been no showing that disclosure of the records will primarily benefit the general public. The City of Fairview has exercised its discretion not to expend its limited financial resources by granting petitioner a fee waiver or reduction. We are not in a position to second guess that decision.

ORDER

Accordingly, it is ordered that the City of Fairview promptly disclose the records sought in the above petition, with the proviso that it provide a redacted version of the attorney billing records. Disclosure of the documents ordered is subject to payment of the City of Fairview'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

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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

cc: Mary Holstrom, Fairview City Administrator

99-14