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January 9, 2007

Gary P. Shepherd  
Oregon Land Law Legal Services  
3115 SE Salmon Street  
Portland, OR 97214

Lory J. Kraut  
Deputy City Attorney  
Office of City Attorney  
City Hall, Suite 430  
1221 SW 4<sup>th</sup> Avenue  
Portland, OR 97204

Re: Petition of Gary Shepherd for Gordon Hovies received October 3, 2006, to disclose certain records of the City of Portland

Dear Ms. Kraut and Mr. Shepherd:

#### BACKGROUND

On this public records petition, ORS 192.410 et. seq., petitioner Gary Shepherd requests the District Attorney to order the City of Portland and its employees to produce the following records:

1. **The complete email exchange between Allen Messer, Jim Forquer, and Cliff Collins (all City employees) dated on or about March 3, 2005.**
2. **Any and all documents relating to or concerning how many were and who checked out the study books/aids available to Fire Captain Examination No. 05-026 test candidates.**
3. **The questions, answers, and any and all documents identifying the reference or location to the answer with respect to the question in "The Company Officer."**

On March 3, 2006 petitioner requested six sets of records from the City in support of his client's pending Civil Service Board Appeal. The City responded in a June 6, 2006 letter agreeing to provide certain documents, claiming various exemptions on some requests, and representing that no documents had been found responsive to other requests. Petitioner answered in a June 14, 2006

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letter that certain documents (request 1 and 2 here) did in fact exist and should be provided and expressed disagreement with the City's claimed exemption on a third request. The City responded by email and petitioner made his final arguments in a September 8, 2006 letter. This petition followed.

Petitioner represents a Portland Fire Bureau Lieutenant who took and failed the written examination for Fire Captain. The first request relates to email exchanges between another firefighter, a Fire Captain, and a Human Resources employee regarding study materials for the promotional examination. The second request is for any check out logs for the study materials. The third request is for the question, answer and other documents relating to a question taken from the book the Company Officer.

The City provided to this office the following materials: a memorandum listing the 2005 Captain's Promotional Exam Study Material, inter-office correspondence regarding the return of books checked out for the promotional examination, and a sealed set of two documents consisting of questions 60 through 77 and the answers from the source material the Company Officer. Deputy City Attorney Lory Kraut also included an unsent "draft" response to petitioner's September 8, 2006 letter.

The City has repeatedly contended that it has no documents consistent with either the first or second request. No emails (deleted or otherwise) were found and no documentation of any check out of study aids was located. The City has continued to claim exemption from disclosure of the test questions and answers under ORS 192.501(4), Test and Examination Material.

In an effort to clarify the email retrieval issue, this office asked Ms. Kraut to ascertain whether or not back up tapes existed from which a search for erased emails could be undertaken. (Petitioner has offered to have his own expert analyze the computer hard drive.) She contacted a supervisor in the Bureau of Information Technology who advised Ms. Kraut that back up tapes "would likely have only been kept for about two weeks" from the dates Mr. Messer and Captain Forquer would have last checked their computers. Mr. Messer last checked his computer on June 23, 2006 and Captain Forquer was contacted on August 2, 2006. Ms. Kraut concluded that "no relevant backup tapes would have existed as of the date Mr. Shepherd filed Hovies' Public Records Petition."

The City has taken an arguably expansive approach to the Test and Examination Material exemption. The Fire Bureau has discontinued use of the Company Officer book as source material for the Captain examination and replaced it with Fire Department Company Officer Third Edition. According to Ms. Kraut, the questions with a few exemptions "address subject matter covered in both books." More significantly, the questions "remain relevant and might be used again because it is information contained in other PF&R's reference material, i.e., operational guidelines, rules and regulations, etc, which were identified as study material." Additionally, Ms. Kraut characterizes certain questions as "style" questions the disclosure of which would give Mr. Hovies "an unfair advantage the next time he took the Captain's examination."

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Petitioner argues that since the Company Officer book will no longer be used as a source of questions and answers on future examinations, “the questions, answers, and documents identifying the location of the questions and answers in the source book” and used in the completed examination could not “implicate or impact future examinations.”

## DISCUSSION

### Request No. 1 - Email exchanges

Public records include documents retained by a public body “regardless of physical form or characteristics.” ORS 192.410(4)(a). Email is such a public record. Deleted email messages are also public records if the messages “continue to exist on computer back-up tapes.” Attorney General’s Public Records Manual, 2005, p. 5. A public body has no duty to “create” public records or “develop or acquire new or additional software or programs in order to retrieve the requested information.” Attorney General’s Public Records Manual, 2005, p. 6. It follows that if back up tapes exist and if the public body has access to those tapes with its own software or programs, then the public body must conduct a search of the back up tapes and locate any documents consistent with a particular request. The City does not appear to disagree with this analysis.

Email exchanges between Allen Messer, Jim Forquer, and Cliff Collins were not located on any of their personal work computers. Attempts were made to determine if back up tapes were in existence that could be searched for deleted messages concerning study materials on the Captain’s promotional examination. The City has concluded that no back up tapes are in existence for the time period in question. Consequently, no public records, in whatever form, have been retained by the City. No evidence to the contrary has been presented by petitioner. This office is not in a position to order the City to disclose nonexistent documents and there is no precedent for this office to order the City to make its computer system available to a requester in order for him to make its own search.

### Request No. 2 -- Check out documents

Ms. Kraut was advised by Portland Fire & Rescue (PF &R) that “study materials were available on a first-come, first-served basis. Candidates signed a checkout sheet.” The check out sheet was discarded after the examination ended. If the candidates did not return study material, a reminder was sent out. The City provided a one-page template of this reminder document which was reused by the Training Division each time it was sent out. Apparently, no hard copies of these reminders were retained by the Training Division.

The failure to retain hard copies of the check out sheets and the reminder memos may reflect adversely on the retention policies of the Fire Bureau. Nonetheless, the Training Division must be taken at its word that no records exist. No evidence to the contrary has been presented by petitioner.

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Request No. 3 – Test materials

The City has claimed exemption of the test questions and answers pursuant to ORS 192.501(4) which conditionally exempts:

Test questions, scoring keys, and other data used to administer a licensing examination, employment, academic or other examination or testing procedure before the examination is given and if the examination is to be used again. Records establishing procedures for and instructing persons administering, grading or evaluating an examination or testing procedure are included in this exemption, to the extent that disclosure would create a risk that the result might be affected[.]

The 2005 Captain's Promotional Exam study material included ten categories of "Open Book" material, and nine categories of "Closed Book" material including the now defunct Company Officer book. Some of the materials were only available on a check out basis. Petitioner is seeking the questions and answers specifically found only in the abandoned source book. This would appear to be a reasonable request if the relevant questions and answers were unique to the Company Officer. They are not.

Deputy City Attorney Kraut spent considerable time setting out the particular questions and making reference to various sources for the answers other than the Company Officer including the replacement book, Fire Department Company Officer Third Edition. She provided a detailed analysis and explanation of how the questions and answers may be used in future tests. Ms. Kraut emphasized that the type of question would likely be used again "although the exact wording of the question may change in the future." The City has satisfied its burden under the exemption of demonstrating that the test questions are "to be used again" and that "disclosure would create a risk that the result might be affected."

On December 13, 2006, this office received further correspondence from petitioner replying to the City of Portland's position. Petitioner makes two new arguments. First, in order for there to be an effective promotional examination appeal, there must be an opportunity to be heard, including the opportunity to present and rebut evidence to a tribunal. Petitioner has an interest in disclosure "to check or verify the results he obtained, which may have come into question after a limited review of examination material." Second, petitioner has a "constitutionally significant property interest to be fairly evaluated for promotion." A failure to disclose the test materials "brings into question the fairness and equality of the examination process." This would be a violation of the Fourteenth Amendment.

Petitioner has essentially couched a public interest argument in constitutional language. Petitioner may be right that the Fourteenth Amendment rights of Lieutenant Hovies to a fair hearing under the City Charter can only occur if he gains access to the test materials. However, this order

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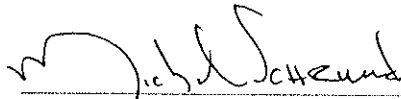
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must of necessity be limited to the question of the validity of the exemption asserted by the City. The vindication of Lieutenant Hovies' Constitutional Rights is best left to the province of the courts.

ORDER

Accordingly, it is ordered that the petition of Gary Shepherd for Gordon Hovies to disclose certain records of the City of Portland is denied.

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael D. Schrunk". The signature is written in a cursive style with a large initial "M".

MICHAEL D. SCHRUNK  
District Attorney  
Multnomah County