



**ROD UNDERHILL**, District Attorney for Multnomah County

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June 5, 2013

Brad Schmidt  
The Oregonian  
1320 S.W. Broadway  
Portland, Oregon 97201

James Van Dyke  
City Attorney  
1221 S.W. 4<sup>th</sup> Ave., Suite 430  
Portland, Oregon 97204

Re: Petition of Brad Schmidt on behalf of *The Oregonian* to disclose investigative reports or findings tied to any investigation by Yael Livny, or anyone else, of allegations that Jack Graham attempted to divert utility funds to the City's general fund.

Dear Mr. Schmidt and Mr. Van Dyke:

### **BACKGROUND**

On May 22, 2013 Mr. Schmidt requested that the District Attorney of Multnomah County order the City of Portland, and its employees or agents to produce a copy or copies of the following records:

- (1) Investigative reports or findings tied to any investigation by Yael Livny, or anyone else, of allegations that Jack Graham attempted to divert utility funds to the City's general fund. This includes investigative reports or findings outlining claims of retaliation or threats.
- (2) Documents acknowledging whistleblower status for city employees tied to this topic.

The City acknowledges that they hired Ms. Livny, an attorney in private practice, to provide "Expert services and advice to the City regarding [a] personnel investigation." The contracts specifically stated that the "Communications between the City and the consultant are privileged and confidential." The City's position as to documents regarding employees with whistleblower status is that they would be protected by the attorney-client privilege.

Mr. Schmidt initially asked to inspect these records on May 1, 2013, citing Oregon's public records law. ORS 192.420-505. The request was denied May 17, 2013 by City Attorney, James Van Dyke. In his denial Mr. Van Dyke cited the attorney-client privilege as the basis for not

releasing the requested documentation. ORS 40.225. The City accurately claims that the attorney-client privilege exemption is incorporated into the public records law by ORS 192.502(9)(a), which exempts “Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law.”

## DISCUSSION

### I. ATTORNEY-CLIENT PRIVILEGE

The City argues that the requested documents are exempt under ORS 192.502(9) as attorney-client privileged material. 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) 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).

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.

This exemption, however, has been legislatively narrowed and does not apply if all the factors in ORS 192.502(9)(b) are present. In 2007 the Oregon legislature enacted ORS 192.502(9)(b) and ORS 192.423 partly in response to the decision in Klamath School District v. Teamy, 207 Or App 250 (2006). Under Klamath, public agencies or officials could essentially circumvent the public records laws by hiring an attorney to conduct the investigation and claim blanket attorney-client privilege for the entire investigation. Before the enactment of ORS 192.502(9)(b) and ORS 192.423, the City would not have been required to disclose any of the requested materials without further inquiry as they could claim the attorney-client privilege.

The Oregonian is correct, however, in that even if the attorney-client relationship exists, the exemption does not now allow for a blanket denial and instead requires the disclosure of factual information when all of the following factors are present:

- (A) The basis for the claim of exemption is ORS 40.225;

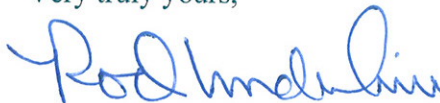
- (B) The factual information is not prohibited from disclosure under any applicable state or federal law, regulation or court order and is not otherwise exempt from disclosure under ORS 192.410 to 192.505;
- (C) The factual information was compiled by or at the direction of an attorney as part of an investigation on behalf of the public body in response to information of possible wrongdoing by the public body;
- (D) The factual information was not compiled in preparation for litigation, arbitration or an administrative proceeding that was reasonably likely to be initiated or that has been initiated by or against the public body; and
- (E) The holder of the privilege under ORS 40.225 has made or authorized a public statement characterizing or partially disclosing the factual information compiled by or at the attorney's direction.

In analyzing the above criteria, we conclude that factor (E) is not present. At this point in time the City has not made or authorized a public statement regarding Ms. Livny's investigation. We agree with the City that the communications made by the mayor's chief of staff regarding the substance of the requested materials were advisory internal communications. We also agree with the City that the documents provided to our office regarding whistle blowing are protected by the attorney client-privilege since they were prepared by Mr. Van Dyke and conveyed his legal opinions and advice to city employees who sought that advice. The communications made by the mayor's chief of staff are similarly protected.

**ORDER**

Accordingly, at this time, it is ordered that the petition of Brad Schmidt on behalf of *The Oregonian* is hereby denied.

Very truly yours,



ROD UNDERHILL  
District Attorney  
Multnomah County