



ROD UNDERHILL, District Attorney for Multnomah County

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March 5, 2015

Matthew Ryan
Assistant County Attorney
Office of Multnomah County Attorney
501 S.E. Hawthorne Blvd., Suite 500
Portland, Oregon 97214

Tony Hernandez
Reporter, The Oregonian
1500 SW First Ave. Ste. 400
Portland, Oregon 97201

Re: Petition dated January 29, 2015 of Tony Hernandez for Multnomah County to disclose an un-redacted version of the "March 2014 Cost Range Projection Chart."

Dear Mr. Ryan and Mr. Hernandez:

On this public records petition, ORS 192.410 et. seq., petitioner Tony Hernandez asks the Multnomah County District Attorney to order the Multnomah County Communications Office to produce a copy of the above-mentioned record regarding potential cost overruns related to the replacement of the Sellwood Bridge.

BACKGROUND

According to the Oregonian, Mike Pullen of the Multnomah County Communications Office provided the requested document on December 23, 2014, in response to a public records request dated November 25, 2014. In his response, Mr. Pullen said the county was providing the document with "three entries redacted as they were specific to matters in or likely to be in litigation." By email on January 27, 2015, David Austin of the Communications Office amplified the basis for the redaction, citing ORS 192.501 (1), 192.502 (1) and 192.502 (9). On February 26, 2015 Assistant County Counsel Matthew Ryan responded to the petition and provided my office with an un-redacted version of the cost range projection chart and asserted the redacted provisions were exempt under the attorney-client privilege and work product doctrine. ORS 40.225.

DISCUSSION

ATTORNEY-CLIENT PRIVILEGE

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)¹, 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, 2011, page F-5.

Mr. Hernandez makes several credible public interest arguments. He justifiably asserts that in Portland, street and road construction costs are of significant public interest and that residents take a keen interest in how public money is being used on major projects. Petitioner’s arguments, however, would only be relevant if my office had to engage in a public interest balancing test mandated by the conditional exemptions asserted by the county (Public Records Pertaining to Litigation. ORS 192.501 (1), Internal Advisory. ORS 192.502 (1)).

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¹ OEC 503(1)(b) provides:

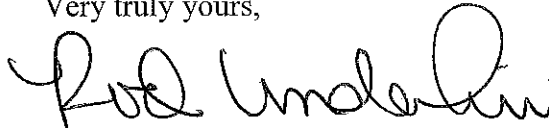
“Confidential communication” means a communication not intended to be disclosed to third persons other than to those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

Mr. Ryan has assured my office that the redacted portions of the requested document are summaries of materials prepared by and discussed with the county attorney in anticipation of litigation. After a review of the un-redacted requested record, we find that the redacted portion is unconditionally exempt under the work product doctrine of the attorney-client privilege. OEC 503 (ORS 40.225), ORS 192.502(9).

ORDER

Accordingly, the petition is denied.

Very truly yours,

A handwritten signature in black ink, appearing to read "Rod Underhill". The signature is fluid and cursive, with a large initial "R" and "U".

ROD UNDERHILL
District Attorney
Multnomah County, Oregon