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November 8, 2017

Bethany Barnes
The Oregonian
1500 S.W. First Avenue, Suite 400
Portland, Oregon 97201

Randy Geller
Attorney at Law
360 E. 10th Avenue, Suite 300
Eugene, Oregon 97401

Re: Petition of Bethany Barnes for The Oregonian requesting Portland Public School District emails mentioning the word "Whitehurst"

Dear Ms. Barnes and Mr. Geller:

In her public records petition, dated October 17, 2017, petitioner Bethany Barnes, on behalf of The Oregonian, requests that this office order the Portland Public School District (PPS) to disclose:

any PPS emails from 6/29/2017–8/24/2017 with the keyword "Whitehurst."

Petitioner requested these records from PPS on August 24, 2017. PPS denied her request, stating that any responsive records related to an ongoing investigation and were exempt from disclosure as records potentially supporting a personnel disciplinary action (ORS 192.501(12)). This appeal ensued.

We have discussed the background involving former PPS Coach Mitch Whitehurst at length in our consideration of a previous public records appeal from petitioner. *Petition of Barnes for The Oregonian*, MCDA PRO 17-08 (2017). In very brief summary, Coach Whitehurst retired from PPS in 2015 after over 30 years in various roles with the district. Over the years multiple allegations of inappropriate behavior with students or coworkers were made against him. Recently the district agreed to settle a lawsuit relating to Coach Whitehurst's conduct with a coworker for $250,000. On August 17, 2017 petitioner published an article that illuminated the failings of PPS personnel practices as they concerned Coach Whitehurst.[1] PPS has subsequently approved funding for an outside team of investigators to review the Whitehurst case and make recommendations on how avoid a similar situation in the future.

In response to this appeal, PPS has provided this office with 5,625 pages of records responsive to petitioner's request, and has indicated it now intends to disclose the substantial majority of them to petitioner voluntarily. We have spoken with PPS' lawyer and petitioner and all are agreed at this point that any records that relate to any "Whitehurst" other than "Mitch

[1] B. Barnes, "How Portland Public Schools helped educator evade allegations of sexual misconduct," THE OREGONIAN (Aug. 17, 2017) (oregonlive.com)

Whitehurst" need not be produced.[2] PPS still claims a subset of those records are exempt due to attorney-client privilege.[3] PPS no longer asserts that any of the emails are exempt as supporting a personnel disciplinary action.

As discussed below, we find the majority of the proposed redactions supported by law, however a handful of additional emails still must be disclosed.

DISCUSSION

A. Attorney-client privilege – ORS 192.502(9), ORS 40.225

ORS 192.502(9) exempts from disclosure under the public records law:

> Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law.

i. Legal principles

The confidentiality of communications between an attorney and his or her client is a foundational principle of our system of laws. *Upjohn Co. v. United States*, 449 U.S. 383 (1981) ("The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.") This privilege extends to public organizations that employ or retain lawyers to give them legal advice and shields those communications from disclosure under the public records law. *Port of Portland v. Or. Ctr. for Envtl. Health*, 238 Or App 404, 409 (2010) (noting incorporation of attorney-client privilege into the public records law by way of ORS 192.502(9)).

It is equally true, however, that not all communications involving a lawyer are privileged. The privilege only attaches to those that are "made for the purpose of facilitating the rendition of professional legal services." *Id.* at 412. Communications of little legal significance cannot be rendered confidential merely by looping in a lawyer. See, *United States Postal Service v. Phelps Dodge Refining Corp.*, 852 F. Supp. 156, 163-64 (E.D.N.Y. 1994) (noting that "[a] corporation cannot be permitted to insulate its files from discovery simply by sending a 'cc' to in-house counsel"). The more difficult question, and the key to the present case, is determining when a communication with a lawyer is made as a part of providing legal services, and when it is not.

Some courts look to whether the "primary purpose" of the conversation was to provide legal services or some other purpose. But this does not help to put a bright line around what is and what is not a "legal service," particularly where an organization finds itself mired in a multifaceted crisis. An alternative definition, more useful in a blended-advice situation is that communications with a lawyer are not privileged only if the lawyer would have been included in the discussion "with or without reference to his knowledge and discretion in the law to give the advice." *United States v. Chen*, 99 F.3d 1495 (1996).

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[2] This eliminates from consideration a large quantity of records that either include the name of a student, the name of a job applicant, or the name of an apparent guest at a social function none of whom have any known connection to former PPS coach Mitch Whitehurst.

[3] PPS additionally asserts various exemptions as to parent and staff personal contact information that appear sporadically throughout the records. Under the circumstances these redactions are fine and we do not discuss them further.

Many courts have recognized that where a lawyer is retained to perform media relations or lobbying work his or her communications are not privileged.[4] This is an easy line to draw where outside counsel has been retained with a specific, and easily definable, mission. This line is fuzzier as to in-house counsel with the general job of protecting the client's legal interests. In particular, media statements regarding former employees can have "important legal implications" requiring legal advice from counsel. *Alomari v. Ohio Dep't of Pub. Safety*, 626 Fed. Appx. 558 (6th Cir 2015) (unpublished) (advice on how to respond to media inquiries privileged because there are important legal implications when that client agency will issue a public statement about an employee).

ii. Application of the attorney-client privilege to these emails

PPS and petitioner each raises legitimate concerns regarding the resolution of this petition, and we have attempted to delicately balance the competing interests within the framework of the public records law and Oregon's law of attorney-client privilege. Distinguishing between attorney-client discussion with legal implications and generalized public relations work in this case involved many close calls.

The allegations against Mitch Whitehurst, and PPS' handling of those allegations, have already spawned litigation against the district. *Rory Thompson v. Portland Public Schools*, Multnomah County Cir. Ct. 15CV22875. Counsel for PPS holds the reasonable belief that more lawsuits may be forthcoming. Public statements made to the media by PPS officials could constitute admissions with potential legal implications for PPS' position in any litigation relating to the matter. Discussion between the general counsel's office and the communications department, the board, or the superintendent about the appropriate response to an inquiry can be subject to privilege under these circumstances.

Our ability to discuss the contents of individual emails in this order is severely limited but, applying the standard from *Chen* (was the lawyer involved without reference to his knowledge and discretion in the law) and the recognition from our Court of Appeals in *Port of Portland* that a privileged communication need not directly contain or solicit a legal opinion, we find PPS' proposed redactions supported by law except as expressly listed below:

- Email from David Northfield sent 8/4/17 5:25 PM as it appears on pages 2414-15.
- Email from James Harris sent 8/1/17 3:18 PM as it appears on page 3118, 3126, and 3347. The other redacted emails on these pages are exempt.
- Email from David Northfield sent 6/29/17 5:19 PM as it appears on pages 5501, and 5613-25.

[4] See, for example, *Harrington v. Freedom of Info. Comm'n*, 323 Conn. 1 (2016) ("some of the e-mails exclusively addressed nonlegal matters, such as [...] burnishing the defendant's public image, that could not reasonably be found to have been inextricably connected to legal advice"); *In re Chevron Corp.*, 749 F.Supp.2d 141, 165 (S.D.N.Y. 2010) (attorney-client privilege does not apply to communications on "media and public relations, lobbying, and political activism[,] . . . at least in the absence of very unusual circumstances"); *NXIVM Corp. v. O'Hara*, 241 F.R.D. 109, 130 (N.D.N.Y. 2007) (no privilege where attorney was advising on business, media, public relations, or lobbying matters).

The following emails marked for redaction in our copy of the records are not exempt and must be disclosed either due to erroneous redaction now acknowledged as such by PPS or because none of the involved parties are legal staff:

- all emails that appear on pages 2002-03,
- the email that appears on page 2021, and
- the document appearing on page 2093.

PPS has, correctly, chosen only to redact the contents of privileged communications and not the participants in or date of the communication. As a result, petitioner will see that some of the redactions we have approved include emails to or from former PPS employees. Emails sent by former employees to an organization's lawyers seeking advice and direction relating to their former employment can be withheld as privileged.[5]

We do not mean to suggest by this order that a public agency involving its attorney in discussions about the proper way to respond to a reporter will always be subject to attorney-client privilege. Rather, in the specific context and climate surrounding PPS' handling of the Whitehurst matter, these communications related to ongoing attempts by the general counsel's office to mitigate the district's legal exposure and thus were "made for the purpose of facilitating the rendition of professional legal services." *Port of Portland v. Or. Ctr. for Envtl. Health*, 238 Or App 404, 412 (2010).

ORDER

Accordingly, the petition is denied in part and granted in part. PPS is ordered to promptly provide petitioner with the emails itemized above. Because PPS now intends to provide the thousands of pages of records not marked for redaction, the petition is moot as to those pages. This disclosure is subject to payment of fees to PPS, if any, not exceeding the actual cost in making the information available.

Very truly yours,

Rod Underhill

ROD UNDERHILL
District Attorney
Multnomah County, Oregon

[5] Oregon law is silent on whether or not privilege extends to former employees. However, most jurisdictions to have considered the question agree that the attorney-client privilege extends to communications between former employees and an organization's legal counsel about matters relating to their employment. See, for example, *Better Gov't Bureau v. McGraw*, 106 F.3d 582, 605 (4th Cir. 1997) ("Most lower courts have [...] granted the privilege to communications between a client's counsel and the client's former employees").

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

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