



ROD UNDERHILL, District Attorney for Multnomah County

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February 21, 2019

Aubrey Perry
aubrey.perry@gmail.com [by email only]

Heidi Brown
Senior Deputy City Attorney
1221 S.W. Fourth Avenue, Suite 430
Portland, Oregon 97204

Re: Petition of Aubrey Perry seeking information relating to the City of Portland's pay equity study

Dear Ms. Perry and Ms. Brown:

In her public records petition, dated February 10, 2019, petitioner Aubrey Perry asks this office to order the City of Portland to disclose:

1. Final Pay Equity Study Report
2. The statistical records, including any and all formulas, methodologies, and de-identified data used to generate the final report of the study.

On January 1, 2019 certain amendments to Oregon's Equal Pay Act became operative. One of these provisions was intended to ensure that members of different protected classes were not compensated differently for equivalent work. The new amendments substantially expanded the protected classes from what had previously just been sex, to add ten additional classes including race, marital status, veteran status, among others. As a result, the city asserts, it is safest to assume that, now, any two individuals performing comparable work will be in at least one differing class.

An Oregonian article on the new amendments summarized their effect as follows: "Oregon's far-reaching new pay equity law [...] open[s] the door to a raft of pay increases for employees or a clutch of complaints — and potential lawsuits — against employers."¹ The law does, however, describe one way that an employer can avoid compensatory and punitive damages in litigation under this law: it can perform an equal pay analysis every three years and make reasonable and substantial progress to reduce any inequities the analysis reveals. ORS 652.235.

¹ "Oregon's new pay equity law raises prospects, worries." Oregonian/OregonLive.com (Dec. 23, 2018) (<https://www.oregonlive.com/politics/2018/12/oregons-new-pay-equity-law-raises-prospects-worries.html>)

Ahead of the January 1, 2019 effective date, the Portland city attorney's office commissioned a statistician to perform pay equity study in order to be prepared to avail itself of the safe harbor provision in the expected event that it was sued for pay disparities. As a result, the city asserts that the pay equity study and any data and methodology are exempt as records prepared in anticipation of litigation (ORS 192.345(1)) and under the attorney work product doctrine (ORS 192.355(9) / 40.225).

Because we agree with the city that this study was prepared in anticipation of litigation, we do not reach its alternative assertion of attorney-client privilege.

DISCUSSION

A. Litigation Records – ORS 192.345(1)

ORS 192.345(1) exempts from disclosure,

Records of a public body pertaining to litigation to which the public body is a party if the complaint has been filed, or if the complaint has not been filed, if the public body shows that such litigation is reasonably likely to occur.

The application of this section is not a particularly close call. ORS 652.235 sets out a precise road map for any public or private employer to follow in order to shield itself in pay equity litigation. The documents at issue here are the City of Portland's effort to follow that map. That no lawsuits have been filed in the seven weeks since the law took effect does remove the protections of this section. Based on the media coverage of this law as well as the representations of the city attorney's office we are convinced that pay equity litigation is "reasonably likely to occur."

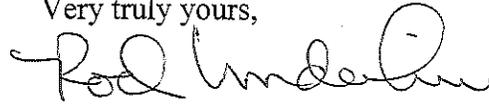
ORS 192.345(1) creates a conditional exemption, however petitioner has not made a compelling case that the public interest in this case nonetheless requires a different result. The salary of any particular City of Portland employee is a public record that is routinely disclosed. The city has also published a list of individuals whose pay was increased as a result of the findings of the pay equity study and the amount by which it was increased. This serves to adequately inform the public as to the previous disparities in pay in its local government, and the efforts undertaken to fix them, without simultaneously disclosing the technical minutia of its process such that a potential litigant could pick apart its method and determine if the city were vulnerable to enhanced damages or penalties.

As the Attorney General has stated "[t]he purpose of this exemption is to place governmental bodies, as parties or potential parties to litigation, on an even footing with private parties." PUBLIC RECORDS AND MEETINGS MANUAL (2014) at 37. The Equal Pay Act applies to both private and public bodies in Oregon and it follows that it would unfairly disadvantage a public employer were the nuances of its attempt to prospectively avail itself of a safe harbor provision known in advance of litigation.

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 loop at the end.

ROD UNDERHILL
District Attorney
Multnomah County, Oregon