

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

600 County Courthouse • Portland, Oregon 97204 • 503 988-3162 • FAX 503 988-3643  
www.mcda.us

May 28, 2019

Jeff Manning  
The Oregonian  
1500 S.W. First Avenue, Suite 400  
Portland, Oregon 97201

Liani Reeves  
Bullard Law  
200 S.W. Market Street, Suite 1900  
Portland, Oregon 97201

Re: Petition of Jeff Manning, on behalf of The Oregonian, requesting reports of Portland State University's investigation of former President Rahmat Shoureshi

Dear Mr. Manning and Ms. Reeves:

In his public records petition, dated May 15, 2019, Jeff Manning, a reporter for The Oregonian, asks this office to order Portland State University (PSU) to provide him with copies of two reports prepared by outside investigators concerning the conduct of PSU's recently-resigned president, Rahmat Shoureshi.

The allegations against President Shoureshi have been published by multiple news outlets. OPB summarized the situation as follows: "[Shoureshi] spent the last few [months] under intense scrutiny, sparked by stories from The Oregonian/OregonLive that questioned Shoureshi's treatment of staff, his spending habits and his overall approach to the job of running one of Oregon's largest universities."<sup>1</sup> As part of the severance agreement with President Shoureshi, which has been released by PSU, he will remain on administrative leave until December 2019, during which time PSU will pay him approximately \$880,000.

The reports at issue here were commissioned by attorney Amy Pederson, with Stoel Rives LLP, who represents PSU in employment-related matters. In February of 2018 Ms. Pederson advised PSU's board that further investigation of matters involving President Shoureshi was necessary for her to provide informed advice about a number of impending legal matters. The board authorized her to pursue an investigation, which resulted in the generation of an auditor's report and an investigator's report. The board then convened in executive session on April 26, 2019 at which Ms. Pederson provided legal advice based on the two reports.

On May 10, 2019 PSU announced President Shoureshi's resignation with the following summary of President Shoureshi's 21 months in office:

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<sup>1</sup> "PSU President Rahmat Shoureshi Forced Out," Rob Manning, Oregon Public Broadcasting (May 10, 2019) (<https://www.opb.org/news/article/rahmat-shoureshi-portland-state-resign/>)

“We are grateful for Dr. Shoureshi’s service to PSU the past 21 months,” Board of Trustees Chair Gale Castillo said. “We wish him the best and look forward to continuing the work that he started.”

Under Dr. Shoureshi’s leadership, the university has made significant strides. During his tenure, PSU launched a \$300 million fund-raising campaign and raised more than \$66 million to support students, faculty and programs. PSU also expanded its global reach by promoting new partnerships with universities in China and Saudi Arabia, launched the Harold Schnitzer Visiting Scholar Program and developed vision and goals for PSU to attain by 2025.

PSU has provided this office with copies of the two reports at issue, which we have reviewed, and has asserted that they are exempt from disclosure as a result of the attorney-client privilege. Because the Oregon Court of Appeals has previously resolved a substantially identical case, and we are bound by its holding, we must deny the petition.

## DISCUSSION

### A. Attorney-client privilege – ORS 192.355(9), ORS 40.225

ORS 192.355(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. Applicability of privilege – ORS 40.225*

It is clear that the attorney-client privilege extends to public agencies, except as expressly provided otherwise by the legislature. As to factual investigations done at the behest of legal counsel, such as those at issue here, we do not write on a blank slate; the Court of Appeals has previously considered and decided a case of sufficient similarity to these facts as to control our decision. *Klamath County School District v. Teamey*, 207 Or App 250 (2006)

In *Teamey* the Klamath County School Board was presented with allegations of mismanagement and misconduct by certain district employees, specifically failing to enforce district policies, using district property for personal gain, failing to follow appropriate cost containment policies, making inappropriate expenditures, and entering into transactions with administrative insiders. *Id.* at 254. The board contacted its outside counsel for advice and he indicated that a factual investigation was necessary for him to advise the board on its options. At the board’s direction, the attorney commissioned an auditor and a private investigator to look into the matter. Upon the conclusion of that investigation the resulting reports were presented to the board in executive session and the attorney used the reports as the basis of providing legal advice to the board.

Residents of the county then sought, by way of the public records law, copies of the investigative reports from the school board. The board refused to provide them, asserting privilege. This decision was upheld by the Court of Appeals, which explained its reasoning as follows:

The testimony of Zagar [the lawyer] and Stevens [a board member] demonstrates that (1) the district's purpose in contacting Zagar was to seek legal advice, (2) the auditor and investigator who wrote the reports were employed to assist Zagar in the rendition of professional legal services, (3) the investigation was carried out to facilitate his rendition of legal advice, and (4) Zagar relied upon the reports of the investigation in giving legal advice to the board. Cf. *State ex rel. OHSU v. Haas*, 325 Ore. 492, 501-02, 942 P.2d 261 (1997) ('A lawyer who conducts an internal investigation concerning a client's potential legal liability, provides the client with a written report on the results of that investigation, and advises the client on ways to resolve problems uncovered in the investigation renders professional legal services to the client.'). We conclude that, under those circumstances, the reports of the auditor and private investigator were confidential communications within the meaning of OEC 503 and were therefore exempt from disclosure under ORS 192.502(9) [now 192.355(9)].

*Id.* at 261–62

This office previously reached a contrary conclusion in *Petition of Frank*, MCDA PRO 05-19 (2005). In *Frank* we concluded that purely factual materials, as distinct from legal analysis, conclusions, or recommendations, contained in an attorney-investigator's report and notes were disclosable under the public records law. This opinion pre-dated *Teamey* and pre-dated the enactment of ORS 192.355(9)(b) (see below). In light of these subsequent developments, it is clear that *Frank* no longer represents good authority on the intersection of attorney-client privilege and the public records law.

ii. *Waiver of privilege – ORS 192.355(9)(b)*

Notwithstanding the existence of privilege, the legislature has nonetheless provided that certain factual investigations that would otherwise be privileged must be released if all of the following are true:

- (A) The basis for the claim of exemption is ORS 40.225 [attorney-client privilege];
- (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 192.311 to 192.478;
- (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.

We do not find that PSU has waived its privilege as provided in this section.<sup>2</sup> Even assuming all the other elements are met, PSU has not made or authorized a public statement characterizing these investigations. Petitioner urges us to find that the board's statement about President Shoureshi's departure constitutes such a public statement, but we respectfully decline to do so. The statement appears carefully worded to make no reference whatsoever to the investigations that were conducted or their conclusions. Rather it thanks President Shoureshi for a handful of acts and wishes him well.

There is certainly some dissonance between the public reporting of the allegations against President Shoureshi, an executive session of the board followed in short order by the president's departure, and the blandly positive public statement agreed to in the separation agreement. However, that the board failed to mention the allegations or the resulting investigation cannot be construed to "characterize" or "partially disclose" the factual information turned up by the investigation.

*iii. Public interest in disclosure*

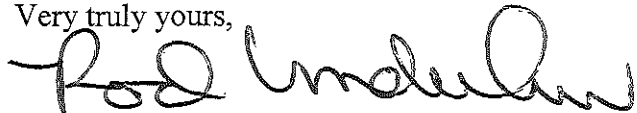
Petitioner makes a compelling public interest argument as to why an investigation such as this should be made public. It is not difficult to see a public interest in the circumstances surrounding the abrupt departure of a highly compensated leader of one of the region's major universities. However, it is clear that the legislature has not permitted us to consider the public's interest when evaluating an assertion of attorney-client privilege. *Petition of Wyatt*, MCDA PRO 15-21 ("[w]here an exemption is unconditional, we may not consider the public interest as part of our analysis. If the document is privileged we may not order it disclosed regardless of the public interest in its contents.")

The end result of applying *Teamey* in this situation is that a public body may shield an investigation of its leader by appropriately framing its mandate to outside counsel and careful control of any public statement regarding the results of its investigation. As discussed above, PSU has conformed its conduct to these requirements and, as such, we cannot find *Teamey* distinguishable in any meaningful fashion from the present facts.

**ORDER**

Accordingly, the petition is denied.

Very truly yours,



ROD UNDERHILL

District Attorney

Multnomah County, Oregon

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<sup>2</sup> In *Teamey* the school board made exactly the type of statement characterizing the investigation that would, now, support a waiver under this section. ORS 192.355(9)(b) was enacted the year after *Teamey* and thus limits its holding, but in a way that is not factually relevant to the case at issue here.