



ROD UNDERHILL, District Attorney for Multnomah County

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June 11, 2019

Jon Bial
Assistant General Counsel
Oregon Public Broadcasting
7140 S.W. Macadam Avenue
Portland, Oregon 97219

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

Re: Petition of Jon Bial, on behalf of Oregon Public Broadcasting, requesting records relating to Portland State University's investigation of former President Rahmat Shoureshi

Dear Mr. Bial and Ms. Reeves:

In his public records petition, dated May 30, 2019, Jon Bial, counsel for Oregon Public Broadcasting (OPB), asks this office to order Portland State University (PSU) to provide him with copies of records relating to an investigation into the conduct of PSU's recently-resigned president, Rahmat Shoureshi.

We have recently addressed, and denied, a petition seeking substantially the same information. *Petition of Manning*, MCDA PRO 19-18 (May 28, 2019). To the extent petitioner raises the same arguments previously addressed, we rely on our discussion and holding in *Manning*. However, petitioner additionally argues that, by disclosing the reports at issue to President Shoureshi and to his legal counsel, PSU has waived privilege as to those documents.¹

As discussed below, we conclude that PSU did not waive privilege because, at the time of the release, PSU and President Shoureshi's attorneys were expressly operating under a common interest agreement that permitted the sharing of otherwise privileged material without breaching or waiving the privilege as to a subsequent re-disclosure.

¹ Petitioner also asks for document beyond the two reports at issue in *Manning*, specifically *any* records that relate to the audit or investigation. PSU responds that it had offered to provide over 7,500 pages of documents that had previously been released to other requestors to OPB, and sought clarification from OPB as to whether this would satisfy the request or, in the alternative, if there were specific additional search terms that OPB wished to have run. Pursuant to ORS 192.329(4)(a) this constitutes a good faith request for clarification and, as such, we cannot say that PSU has denied the request at this time as to these records. As such, we address here only the new arguments raised as to the two reports at issue in *Manning*.

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.

As we discussed at length in *Manning*, Oregon Court of Appeals precedent compels the conclusion that the investigation at issue here is covered by privilege given the totality of the facts involved. *Petition of Manning*, MCDA PRO 19-18 (May 28, 2019); *Klamath County School District v. Teamey*, 207 Or App 250 (2006).

Petitioner in this case, unlike in *Manning*, raises the additional argument that because PSU released the report to President Shoureshi and also to his personal lawyer, Steve Berman, that action waived any otherwise existing privilege. Petitioner is correct that a release of a privileged document to a person not holding the privilege effects a waiver of the attorney-client privilege. See, e.g. *State v. Langley*, 314 Or 247, 264 (1992).

First, as to President Shoureshi, he was the head of the university, and thereby a holder of privilege with PSU's counsel, at all relevant times here. We are unaware of, and petitioner has cited, authority suggesting differential treatment of a holder of privilege depending on the subjective intent of the person providing him with information. Since President Shoureshi was a holder of PSU's attorney-client privilege, release of the records to him did not waive that privilege.

Second, as to Mr. Berman, PSU has established to this office's satisfaction that there was, in fact, a common interest agreement in place between Amy Pederson, representing PSU, and Mr. Berman, representing President Shoureshi at the time the materials were provided to him.

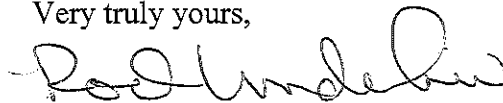
A privilege is not breached when lawyers representing two different clients have established a "common interest agreement." *Port of Portland v. Oregon Ctr. For Envtl. Health*, 238 Or App 404 (2010) ("[T]he attorney-client privilege applies if there is a confidential communication made for the purpose of facilitating the rendition of professional legal services between a client or client's lawyer and the lawyer of another in a matter of common interest.") This doctrine can apply to ostensible adversaries where there is a shared area of interest. The Court of Appeals has stated that parties need not have identical legal interests to invoke the common interest doctrine. *Id.* at 413-16.

PSU asserts that the reasons for, and terms of, the common interest agreement between Ms. Pederson and Mr. Berman are likewise privileged. A release of privileged material to this office does not constitute a waiver of that privilege per ORS 192.415(2) and, as such, we have received and reviewed a declaration from Ms. Pederson outlining the nature, terms, and duration of the agreement between her and Mr. Berman. It is clear from that declaration that this matter was carefully lawyered with a nuanced awareness of the intersection between Oregon's laws of privilege and public records. On the record before us, there is no basis to find a waiver of privilege.

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