ROD UNDERHILL, District Attorney for Multnomah County
600 County Courthouse • Portland, Oregon 97204 • 503 988-3162 • FAX 503 988-3643
www.mcda.us

December 12, 2019

Alan Kessler
2725 S.E. 36th Ave.
Portland, Oregon 97202

Jenifer Johnston
Sr. Deputy City Attorney
Portland City Attorney's Office
1221 S.W. Fourth Avenue, Suite 430
Portland, Oregon 97204

Re: Petition of Alan Kessler seeking access to an unredacted copy of an email thread involving communications between the Portland City Attorney's Office and employees of the Bureaus of Development Services and Technology Services

Dear Mr. Kessler and Ms. Johnston:

On August 7, 2018, petitioner made a public records request to the City of Portland for the metadata of emails sent or received from any one of six identified email accounts. The City investigated and determined it did not possess a responsive record. Petitioner appealed to this office. We disagreed with the City's position that, as a matter of law, it did not possess a responsive record and ordered certain materials produced. *Petition of Kessler*, MCDA PRO 18-35 (2018). Petitioner subsequently filed a lawsuit in the circuit court alleging multiple violations of the public records law in this matter. *Kessler v. City of Portland*, Mult. Co. Cir. Ct 18CV43134. The case went to trial on November 4, 2019.

Subsequent to the trial, petitioner filed multiple public records requests relating to documents that were introduced, in redacted form, as exhibits during the trial or documents that were referenced in testimony. We have been called on to resolve one petition wherein the City agreed to release an unredacted email after evaluating petitioner's arguments in favor of waiver of privilege as to that particular communication. *Petition of Kessler*, MCDA PRO 19-56 (2019).

The petition currently before us arises out of a November 5, 2019 request for "all email sent or received by Paul Rothi between August 7, 2018 and August 28, 2018 related to [petitioner's] prior request." The City provided petitioner with an email thread that involved six emails, all between the same four individuals: Jenifer Johnston, Carrie Wilton, Paul Rothi, Donah Baribeau. Ms. Johnston is a lawyer with the City Attorney's Office responsible for public records matters. Ms. Wilton is a paralegal with the City Attorney's Office who primarily assists Ms. Johnston. Mr. Rothi works for the Bureau of Technology Services. Ms. Baribeau works for the Bureau of Development Services and was the person assigned to initially respond to petitioner's November 5, 2019 request.

All the emails, as provided to petitioner, had the metadata visible (i.e. the To, From, Subject, Date, and Subject fields) but the substance of each communication was redacted.

As part of the litigation of the civil matter referenced above two portions of sworn testimony are potentially relevant to this petition. First, Mr. Rothi testified in a deposition as follows:

> **Q:** So who was it that you told that those fields could be provided?
>
> **[City's attorney]:** With the exception of anyone in the attorney-client – or in the City Attorney's Office.
>
> **A:** I reviewed – I sent an e-mail. I don't recall exactly who was on the e-mail. I would have to go look at the e-mail to see exactly who I sent that to. I believe Donah Baribeau was one of the people that was – which is the PIO for development services. I believe she was one of the people on that email.

The second is trial testimony given by Ms. Johnston on behalf of the City under questioning from the City's trial attorney, Karen Moynahan:

> **Ms. Moynahan:** And how did you know that the city didn't have the records in the format he requested?
>
> **Ms. Johnston:** Um, I can't remember who all I communicated with. But I also so I know I had never seen such a printout despite working, you know, on emails in — in Digital Discovery Pro. And I believe I also communicated with Mr. Rothi and possibly some other people about whether we had a document with all of the metadata Mr. Kessler was requesting and based on the information, I gathered, we did not have in existence, a document with all of the metadata that Mr. Kessler was requesting.

Petitioner argues that, assuming that the emails at issue here were at one point privileged, the two exchanges above served to waive that privilege. For the reasons discussed below, we disagree and 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.

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 192.355(9)). Any communication "between the client or the client's representative and the lawyer or a representative of a lawyer" that makes it easier for the agency to make use of legal advice or services is subject to privilege and unconditionally exempt from disclosure under the public records law. ORS 40.225. See also, *Petition of Barnes*, MCDA PRO 17-48 (2017). Petitioner does not contest any of these general premises, but rather focuses his argument on waiver of that privilege by the testimony of Mr. Rothi and Ms. Johnston.

As a threshold matter, we have reviewed the email string at issue and readily conclude that under the circumstances of this case they meet the initial requirements for privilege. At a very high level, a City employee is seeking the advice of the City Attorney's Office in how to respond to a public records request. The City Attorney's Office then conducts an inquiry to determine the facts necessary to render a legal opinion as to whether or not, as a matter of law, it is in possession of responsive documents. Such communications are privileged.

Facts that are communicated to a lawyer are not privileged, only the actual transmission to the lawyer is. *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981). Likewise, privilege does not extend to the fact of a communication, but only to its contents.

Petitioner is correct that, under Oregon law, an existing privilege may be waived if a holder of the privilege voluntarily discloses a "significant portion" of the communication. OEC 511.[1] The City's argument against waiver in this case is 1) only the City Council can waive privilege, so the precise contours of Ms. Johnston's testimony are irrelevant and 2) the testimony did not disclose a "significant portion" of the privileged communication as required to effect a waiver under ORE 511.

We reject the City's suggestion that only the City Council, acting as a body, may waive privilege. We have previously held that individual commissioners and certain high-ranking bureau officials are "holders of the privilege" for purposes of ORS 192.355(9)(b), and we see no basis to define that term differently in this context. *Petition of Bernstein*, MCDA PRO 15-14 (2015) (fire commissioner); *Petitions of Schmidt and Jaquiss*, MDCA PRO 13-10 (2013) (human resources director).

Moreover, in this case the City examined, as a fact witness, one of its own lawyers. As the lawyer for the City, the City Attorney's Office is presumed to act with the authority of its client. If Ms. Johnston's testimony, made in response to questioning by the City, constitutes the

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[1] OEC 511 provides, in relevant part:

> "A person upon whom [OEC 503 to 514] confer a privilege against disclosure of the confidential matter or communication waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. [...]"

disclosure of a "significant portion" of the communication under ORE 511, then this will serve to waive the privilege as to that communication.

It is clear to us that Mr. Rothi's deposition testimony does not constitute a waiver of privilege. His testimony is carefully cabined by counsel to exclude any reference to communications with lawyers. Assuming that the emails at issue here are what he refers to in his testimony, they do not disclose a significant portion of the communication. Although we do find this a closer call than the City suggests in its briefing, we also agree that Ms. Johnston's trial testimony did not disclose a significant portion of the privileged contents of the relevant communications.

Ms. Johnston's testimony above discloses that communications occurred and that as a result of those communications she reached the conclusion that the City did not possess the requested record. This discloses the fact of a communication, which as previously noted is not privileged, and a fact that, presumably, she learned by synthesizing the referenced communications. The underlying fact, that the City did not possess a metadata-only document, is also not privileged.

So, Ms. Johnston's testimony discloses two non-privileged pieces of information but does not disclose a significant portion of the actual communication, which is the only part that is privileged. Indeed her testimony appears carefully worded to avoid just this conclusion. Rather than say: "In his August 9 email to me, Mr. Rothi told me that ....", she testifies: "I communicated with Mr. Rothi and possibly some other people about whether we had a document [...] based on the information, I gathered, we did not have in existence, a [responsive] document."

This case is unusual for attorney-client privilege waiver analysis in that here Ms. Johnston, the lawyer, was the witness on the stand whose testimony is alleged by petitioner to constitute a waiver of privilege. We have been unable to locate any published precedent, from any jurisdiction, involving this inversion of the traditional posture. That said, the Louisiana Supreme Court provided an extended example that aptly illustrates the nuance of what is privileged and what is not surrounding these types of discussions:

> If, for example, Mrs. Smith chooses to testify that she was unaware that the defendants had committed legal malpractice causing damage to decedent's succession prior to August 10, 1984, that on that date she visited her attorney and received communications from him and that she then had knowledge for the first time that the defendants had committed malpractice damaging the succession, these statements would not constitute a waiver of her attorney-client privilege because she would not have offered her testimony as to all or part of a specific communication to or from her attorney. On the other hand, for example, if Mrs. Smith elects to testify at the trial of the exception, as she did at her deposition, that her attorney Mr. White told her on August 10, 1984 that in his legal opinion the defendants maladministered the succession causing her a loss, this statement would constitute a waiver because it is an offer of her testimony as to a part of a specific communication between her and her attorney.

Smith v. Kavanaugh, Pierson & Talley, 513 So. 2d 1138 (La. 1987). As in *Smith*, Ms. Johnston testified to the fact of a communication and to knowledge that she now had after, and presumably as a result of, that communication and other related communications. Although we recognize that there is no on point Oregon precedent in this matter, applying the reasoning of courts in other jurisdictions, we do not believe Ms. Johnston's quoted testimony constitutes the disclosure of a significant portion of the privileged communications between her, her paralegal, and employees of her client.

ORDER

Accordingly, the petition is denied.

Very truly yours,

ROD UNDERHILL
District Attorney
Multnomah County, Oregon

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