



MIKE SCHMIDT, District Attorney for Multnomah County

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

February 16, 2021

Nigel Jaquiss
Willamette Week
2220 NW Quimby Street
Portland, Oregon 97210

Michelle A. Bellia
Office of the Metro Attorney
600 N.E. Grand Avenue
Portland, Oregon 97232

Re: Petition of Nigel Jaquiss seeking a joint defense agreement between Metro and the Port of Portland

Dear Mr. Jaquiss and Ms. Bellia:

Petitioner Nigel Jaquiss, a reporter for Willamette Week, has petitioned this office seeking an order compelling Metro to release to him “any agreement between Metro and the Port regarding the clean-up of the [Willamette Cove] property.” Metro had previously indicated that it possessed responsive documents, and released some, but it declined to provide a “Joint Defense Agreement” citing attorney-client privilege.

In 1996, Metro purchased the Willamette Cove property as part of the Willamette River Greenway Project. However, after the purchase the State Department of Environmental Quality (DEQ) and the U.S. Environmental Protection Agency (EPA) determined the site contained hazardous materials as part of their oversight and remediation of the greater Portland Harbor. Metro and the Port of Portland entered into the above-referenced Joint Defense Agreement to facilitate and coordinate their responses to the regulatory processes and allocate responsibility for costs associated with that process. Citing recent public statements made by Metro referencing this agreement as its justification for certain expenditure decisions, petitioner argues that the public interest requires disclosure.

Because the Oregon Court of Appeals has issued an opinion resolving a materially indistinguishable public records claim, we must deny the petition despite any potential public interest in this information.

DISCUSSION

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

Our analysis of this matter begins and ends with the Oregon Court of Appeals’ decision in *Port of Portland v. Or. Ctr. Env’tl Health*, 238 Or App 404 (2010). In this case, the EPA listed a portion of the lower Willamette River as a “Superfund” clean-up site and identified numerous

private and public entities as potentially responsible parties (PRPs) who might have legal obligations to finance the clean-up. Many of these PRPs negotiated and entered into a joint defense agreement amongst themselves to pool resources in responding to the EPA's investigation.

The Oregon Center for Environmental Health then sought a copy of that joint defense agreement from the Port of Portland. The Port refused to provide it and plaintiff then petitioned this office for review. We ordered the joint defense agreement released. The Port appealed. The Court of Appeals upheld the Port's claim that the agreement was privileged and exempt from disclosure. The Court found that the agreement in its entirety was a confidential communication within the scope of privilege, including any cost-allocation information contained in it.

Having reviewed the agreement between Metro and the Port as part of the present petition, we do not see any material that would distinguish it from what is described in *Port of Portland*. Petitioner acknowledges the decision in *Port of Portland* but argues that the result here should differ because, unlike in *Port of Portland*, all of the involved parties are public bodies. We agree with petitioner that it is somewhat incongruous that two bodies (the Port and Metro) who are subject of legal process by a third public body (DEQ), all of which are publicly funded and subject to the public records law, should be able to shield their processes and allocation of responsibility from public scrutiny. However, the Court has made clear that for purposes of attorney-client privilege public bodies stand in the same position as private entities. The Court has already concluded that a joint defense agreement in an environmental remediation matter is subject to privilege under the common interest doctrine. Because the attorney-client privilege is an unconditional exemption, we therefore may not consider the public's interest in the information contained in it.

ORDER

Accordingly, the petition is denied.

Very truly yours,



MIKE SCHMIDT

District Attorney

Multnomah County, Oregon