



MIKE SCHMIDT, District Attorney for Multnomah County

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April 15, 2022

VIA EMAIL ONLY

Jon Bial
Oregon Public Broadcasting
7140 S. Macadam Avenue
Portland, Oregon 97219

Fallon Niedrist
Portland City Attorney's Office
1221 S.W. Fourth Avenue, Suite 430
Portland, Oregon 97204

Re: Petition of Jon Bial seeking records relating to the ASCETA report

Dear Mr. Bial and Ms. Niedrist:

In May, 2021, this office granted a public records petition from Mr. Bial, on behalf of Oregon Public Broadcasting (OPB), and ordered the City of Portland to produce a report regarding the functioning and culture of the Office of Community & Civic Life (Civic Life). *Petition of Bial*, MCDA PRR 21-24 (2021) (*Bial I*). An outside contractor, ASCETA, had prepared this report under contract with the City Attorney's office. The City had asserted the report was covered by attorney-client privilege, but for the reasons discussed at length in *Bial*, we reached a different conclusion.

After receiving the ASCETA report, OPB made a follow-up records request for records in the possession of Lory Kraut or Civic Life that relate to the business and employment practices of Civic Life during a 15 month period.¹ Ms. Kraut is an attorney with the City Attorney's Office responsible for, among other things, advising Civic Life. The City produced responsive records, but withheld over 1,200 pages citing, as to most, attorney-client privilege. Petitioner asks us to review the withheld documents, evaluate the propriety of the City's assertion of privilege, and order released any documents that were improperly withheld.

¹ The full text of the request is "All records held by: (1) Lory Kraut that were sent to, or received from, the Civic Life [bureau] that relate to the business practices and employment practices of the Civic Life bureau, including but not limited to, any email, letter, or report that mention ASCETA, audit of Civic Life, or "Oregon Public Broadcasting" (including any public records requests other than the one by Rebecca Ellis) and (2) the Civic Life bureau that were sent to, or received from, Lory Kraut that relate to the business practices and employment practices of the Civic Life bureau, including but not limited, to any email, letter, or report that mention ASCETA, audit of Civic Life, or "Oregon Public Broadcasting" (including any public records requests other than the one by Rebecca Ellis). To the extent the documents are in both places, only one set need be produced. Please limit your search from January 1, 2020 to March 29, 2021."

The City also withheld some documents, and redacted a small handful of others, on the grounds of ORS 192.345(12) (the personnel discipline exemption) and ORS 192.355(2) (the information of a personal nature exemption) respectively. We have reviewed those claims and readily find them proper. The involved legal and factual issues tread no new ground and neither parties nor the public will benefit from an extended discussion. The petition is denied as to these items.

As to the attorney-client privilege assertions, for the reasons discussed below, we grant the petition in part.

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 attorney-client privilege extends to public agencies, except as expressly provided otherwise by the legislature. *Port of Portland v. Or. Ctr. For Env'tl. Health*, 238 Or App 404, 409 (2010). As applied to the public records law by ORS 192.355(9), this creates an unconditional exemption from disclosure. This means that, if we find the requirements to establish privilege are met, we may not weigh the public's interest in the records. *Petition of Manning*, MCDA PRO 19-18 (2019)

i. Legal standard – ORS 40.225

Oregon's version of the attorney-client privilege is broad in its reach, yet it is not without limit. Establishing the existence of privilege requires more than the presence of a lawyer in the chain of procurement, or on the cc line of an email, without reference to the nature or contents of the record. *Petition of Barnes*, MCDA PRO 17-48 (2017). In *Barnes*, we wrote:

[N]ot all communications involving a lawyer are privileged. The privilege only attaches to those that are “made for the purpose of facilitating the rendition of professional legal services.” Communications of little legal significance cannot be rendered confidential merely by looping in a lawyer. See, *United States Postal Service v. Phelps Dodge Refining Corp.*, 852 F. Supp. 156, 163-64 (E.D.N.Y. 1994) (noting that “[a] corporation cannot be permitted to insulate its files from discovery simply by sending a ‘cc’ to in-house counsel”). The more difficult question, and the key to the present case, is determining when a communication with a lawyer is made as a part of providing legal services, and when it is not.

We went on to note that Oregon courts have not laid down a definitive test for what constitutes the “provision of legal services” under ORS 40.225. In *Barnes*, which involved the confidentiality of emails between an array of individuals including a public body's lawyer about how to respond to a brewing crisis, we settled on the standard articulated by the Ninth Circuit:

was the lawyer consulted “with or without reference to his knowledge and discretion in the law to give the advice.” *United States v. Chen*, 99 F.3d 1495 (1996).

We have continued to apply that standard to communications involving legal staff. See, *Petition of Kessler*, MCDA PRO 20-45 (2020) (emails to city paralegal not privileged where client was seeking technical advice on a computer system and not legal advice). This formulation is less useful in a situation such as this where an assessment is commissioned based on various concerns raised by various parties. In the absence of specific guidance from Oregon courts, we turn to the “primary purpose” formulation alternatively discussed in *Barnes*. That is, was the primary purpose of the communication/investigation/report/etc. to facilitate the provision of legal services or was it in furtherance of a different goal?²

ii. Our previous decision in Bial I

In *Bial I*, after considering the content and surrounding circumstances of the ASCETA contract and report, we held that,

[t]he City has not met its burden of showing that the primary purpose, or even a substantial purpose, of [the ASCETA report] is the facilitation of legal services. All indicators show it to be business, management, personnel, and public relations advice intended to guide the transformation of a struggling office. Such advice, and the fact finding underlying it, is not exempt from disclosure regardless of what label is placed on it.

Id. at 5-6. This prior holding immediately resolves a number of the issues presented in this petition. If the primary purpose of ASCETA’s work was not to facilitate the provision of legal services, then communications between the city’s attorneys, who managed ASCETA’s contract, and ASCETA are not privileged. This does not mean, however, that internal discussions *about* ASCETA’s work and the underlying ongoing issues at Civic Life, either before, during, or after it was completed cannot be privileged. As we noted in *Bial I*,

[a]ny legal advice from the city’s lawyers to the commissioner-in-charge about the legal merits or potential legal pitfalls of implementing [ASCETA’s] recommendations would be quintessential privileged material; so too any questions from the commissioner-in-charge to counsel on any of those topics.

Id. at 4.

iii. Lawyer as messenger

Communications to or from lawyers are only privileged if the primary purpose of the communication is the rendition of professional legal services. Lawyers are not the equivalent of a

² This section restates, verbatim, the legal standard section from *Bial I*. There have been no relevant changes to the law in the interim.

“diplomatic pouch” rendering anything they convey unquestionably exempt from subsequent disclosure.

Contained in the withheld records in this case are communications made by a lawyer at the behest of one City actor to a second City actor relating factual matters. In a public facing order we cannot recount the specific context behind these communications. However, that context makes clear that the lawyer was used as a conduit because of the belief that the communication would be confidential and not because of their “knowledge and discretion in the law.” *United States v. Chen*, 99 F.3d 1495 (1996). Neither such communications, nor the direction to make such communications, are privileged.

iv. Email threads

As stated above, the entire “communication” is exempt if the primary purpose of the communication was the provision of legal services. When dealing with a lengthy thread of emails, defining what precisely constitutes the “communication” is non-obvious. By way of illustration, privilege would clearly attach to an entire email thread if two non-lawyer employees were talking together about a personnel discipline matter over the course of a few emails, and then added their lawyer to the “Cc” line for the purpose of getting the lawyer’s legal assessment or advice based on the facts and conclusions documented in their discussion. The fact of transmission of non-privileged material to a lawyer is, itself, privileged even if the underlying facts would independently be subject to release if asked for directly.

On the other hand, if a public body’s lawyer and a non-lawyer employee discuss their children’s sports teams in an email exchange, and then change the topic in the same email thread to discuss legal matters, the “down thread” emails are not privileged. They have no relevance to the privileged “communication” that is the most recent email.

Lastly, an otherwise unprivileged discussion between holders of the privilege might include privileged material. That is, an email between high-ranking members of a city bureau might say “Lawyer A told us to conduct further due diligence before confronting Employee B with Issue C.” *State ex rel. OHSU v. Haas*, 325 Or 492 (1997). This would be privileged advice that would remain exempt and redactable from the email. However, the inclusion of this line in an email would not render the entire email subject to privilege.

Unfortunately, most real-world applications of these principles, including those presented in this document production, are less clear-cut than these hypothetical extremes.

v. Burden of proof

Petitioner rightly observes that in any public records action the burden is on the public body to sustain its claim of exemption. ORS 192.411. In a case involving privilege, that means the City must establish the necessary context to show that any particular record is privileged, just as it would have to do in a court of law. However, the compressed timelines and informal nature of proceedings before this office do not permit the laborious preparation of a formal privilege log as is found in the well-funded civil litigation that generates most judicial decisions in this area.

We expect public bodies to provide us sufficient background information to assess the nature and purpose of the communications as well as the identities and roles of relevant involved parties. This information is sometimes provided or supplemented orally, which is permitted as a “statement of [] reasons for believing that the public record should not be disclosed.” ORS 192.411(2). The burden, however, remains with the public body. Where we cannot determine with certainty the purpose of a communication the result will be a disclosure order.

vi. Application to the documents at issue

In conducting this document review, we have applied the following rules, based on the legal analysis above, to determine whether or not an email, document, or portion thereof, is privileged:

- 1) Communications between the city’s lawyers and ASCETA providing direction and input on its evaluation of Civic Life are not privileged based on the conclusions in *Bial I*. So too emails from city employees to city lawyers directing the lawyer(s) to provide specific information to ASCETA.
- 2) Communications between the city’s lawyers and other City actors are not privileged if the context shows that the lawyer simply acted as a conduit for non-privileged information.
- 3) Internal emails among holders of the privilege that repeat legal advice attributed to a City lawyer may have that legal advice redacted.
- 4) Non-privileged emails or documents forwarded to a lawyer for the purpose of legal review or analysis are privileged as part of the communication.
- 5) Email threads that copy a lawyer without expressly asking for legal advice or opinion, or where context does not clearly show the lawyer asked to be included for the purpose of giving legal advice or opinion, are not privileged.
- 6) However, if a lawyer does respond to such a conversation as described in (5) with legal advice, the specific email conveying that advice is privileged.
- 7) Emails to a lawyer that by their content announce a non-legal purpose to the request.

In the attachment to this order, which sets out the specific conclusions from our review of the documents, these rules are referenced by number to explain the decision as to each record.

B. Sanctions – ORS 192.407

Petitioner has additionally requested that we impose sanctions against the City for improperly withholding materials in contravention of our determinations in *Bial I*. We decline to do so because, even assuming for purposes of argument that this is what the City did, our authority to impose sanctions only extends to undue delay. ORS 192.407. Where a public body is

working with a records requestor in an attempt to resolve disputed points, we do not consider this undue delay, even if we ultimately disagree with some of the City's legal determinations.

ORDER

Accordingly, the petition is granted in part. The City is ordered to release to petitioner copies of the documents as described in attached Exhibit A. This release is subject to the payment of fees, if any, as authorized by ORS 192.324(4).

Very truly yours,

A handwritten signature in black ink, appearing to read "Mike Schmidt", written over a horizontal line.

MIKE SCHMIDT
District Attorney
Multnomah County, Oregon

Notice to Public Agency

Pursuant to ORS 192.411(2), 192.415, and 192.431(3) your agency may become liable to pay petitioner's attorney's fees in any court action arising from this public records petition (regardless whether petitioner prevails on the merits of disclosure in court) if you do not comply with this order and also fail to issue within seven days formal notice of your intent to initiate court action to contest this order, or fail to file such court action within seven additional days thereafter.

Exhibit A

Document: 172486 privileged.pdf

| Page(s) | Rule | Notes |
|---------|-------|--|
| 118-119 | 2 | |
| 120-126 | 6, 1 | The top, draft, email on this page may be redacted. The remaining emails in this thread fall under Rule 1. |
| 211-223 | * | See 224-227 below. |
| 224-227 | 5,6,7 | This is an email thread with interwoven privilege and non-privilege. The second and third emails on p.224 are privileged. On p. 225-227, the emails sent at 9:53 am, 9:51 am, and 8:25 am are privileged, the remainder are not. Shorter forms of this email thread are contained in pages 211-223, the individual emails are identical in those shorter threads and may be redacted consistent with the redactions approved here. |
| 248-265 | * | See 265-270 below. |
| 265-270 | 1,7 | The last email on p.268 (sent 9:16 am) and all emails on p.269-70 are privileged. The remaining emails in this page range are not privileged. This email thread is reproduced multiple times as it grew from p. 248-264, the individual emails are identical (or substantially identical in the case of the drafts preserved) and may be redacted consistent with the redactions approved here. |
| 289-290 | 1,2 | |
| 293-304 | 7 | (Attachments to email at p.289), not independently privileged and parent email not privileged per above. |
| 305-309 | | (Attachment to email at p.289), not privileged. However, may be withheld pursuant to ORS 192.345(12) IF the referenced employee was disciplined or the disciplinary process is ongoing. Otherwise it is not exempt. |
| 310-311 | 7 | (Attachments to email at p.289), not independently privileged and parent email not privileged per above. |
| 321-367 | * | Redact consistent with 368-373 below. |

Exhibit A

| | | |
|---------------------------|----------------|--|
| <p>368-373</p> | <p>various</p> | <p>Blended thread of privileged legal requests and non-privileged factual requests from non-lawyer to non-lawyer. Permissible redactions: p.372 email sent 10:55 am, last sentence of first paragraph may be redacted starting after the word "responses" to the end of the paragraph; email sent 12:31 pm first sentence may be redacted from the ellipsis through the end of the email. p.371-373 email sent 1:10 pm may be redacted; p.371 email sent 10:43 am may be redacted in the second sentence starting after "below" through the end of the sentence. p. 369 email sent 12:35 pm may be withheld; p.368 email sent 4:11 pm may be withheld.</p> <p>[DA Note: this thread presents a close call and highlights the most difficult issues presented in this case. However, the contents of the thread fairly clearly indicate that the primary purpose is addressing appropriate PR amongst people with intimate factual knowledge of the situation and defers requests for legal advice to a later date; where the lawyers do chime in with advice, on the contents of an appropriate response as opposed to providing facts to go into the response, an admittedly fine distinction, we have approved those as privileged.]</p> |
| <p>1006 - 1009</p> | <p>7</p> | <p>Expressly not seeking legal advice/review, not privileged. However, the contents of the emails starting with the one on p.1007 sent at 11:05 am through the end of the thread on p.1008 are exempt under ORS 192.345(12) and may be redacted.</p> |

Documents not expressly mentioned in the log above are exempt and not subject to release by the terms of the order in this case.