



MIKE SCHMIDT, District Attorney for Multnomah County

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

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

Re: Petition of Jon Bial, on behalf of OPB, requesting review of redactions made to records released by the City of Portland

Dear Mr. Bial and Ms. Johnston:

Jon Bial, on behalf of Oregon Public Broadcasting (OPB), has petitioned this office for an order requiring the City of Portland to produce records under the public records law. An OPB reporter had made a public records request for emails during a period of time that mentioned variants on the keyword "iMessage." The City provided responsive records, but redacted portions on the basis of, as relevant here, attorney-client privilege. Petitioner now challenges the redactions in three of the email threads that were produced.

For the reasons discussed below, we conclude that the City has adequately established that the redacted communications related to the provision of legal services, were between parties covered by attorney-client privilege, and are therefore exempt from disclosure under the public records law.

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.

Communications with a lawyer are privileged when the primary purpose of that communication was the provision of, or facilitation of, legal services. *Petition of Barnes*, MCDA PRO 17-48 (2017). It can be difficult to dissect email threads that include a lawyer, such as those

at issue here, to identify precisely what is and what is not covered under this section. See, *Petition of Bial*, MCDA PRO 22-11 (2022) (discussing many of the factual permutations that can present in an email thread). As we instructed in *Bial*, the burden is on a public body to provide this office with sufficient contextual background information to assess the purpose of the redacted communications if it is not facially apparent. In this case the City has done so.

As the City rightly observes, we have previously held that consultation with legal staff on the technical mechanics of how to use a computer system is not privileged. *Petition of Kessler*, MCDA PRO 20-45 (2020). However, the City argues the present case is distinct in that it involves advice and direction, not technical assistance. Put another way, “how do I...?” is a technical question. “Do I need to...” or “you need to...” is a request for, or rendition of, legal advice, if made in the context of the provision of legal services. We agree with the City that recommendations and direction from a lawyer to a client for the purpose of ensuring compliance with the requirements of law are communications in furtherance of the provision of legal services.

Having reviewed the email threads at issue, we conclude that the redacted portions relate to legal compliance, are between an attorney and client, and are thus exempt from disclosure.

ORDER

Accordingly, the petition is denied.

Regards,

A handwritten signature in black ink, appearing to read 'Mike Schmidt', with a large, stylized flourish at the end.

MIKE SCHMIDT
District Attorney
Multnomah County, Oregon