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January 30, 2023

VIA EMAIL ONLY

Patrick Cashman
pcashman20@gmail.com

Trevor Byrd
trevor.byrd@portlandoregon.gov

Re: Petition of Patrick Cashman seeking records from the City of Portland

Dear Mr. Cashman and Mr. Byrd:

On December 23, 2022, petitioner, Patrick Cashman, asked the City of Portland to provide him: "Provide all SENT and bcc sent copies of communications on personal systems used for public business and public systems of Carrie Belding containing the term "Sears" from 6/1/2022 to date first action is taken on this demand." The City produced responsive records, but redacted sections of certain pages, and withheld other documents in their entirety, citing the attorney-client privilege. This petition ensued.

The City provided this office unredacted versions of the disputed records and a legal summary of its reasons for believing the records were exempt as required by ORS 192.422. The City additionally and separately provided this office certain privileged material describing the specific legal context for the assertion of privilege as to the disputed records. Having reviewed those materials, we find that two withheld emails are not privileged, and must be released, but that the remainder are properly exempt from disclosure.

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 Envtl. 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. ORS 40.225 exempts from disclosure, "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client." The section goes on to describe the different parties between whom confidential communications may be privileged. As relevant here those are those between 1) a lawyer and a representative of the client; and 2) between representatives of the client.

The City's response to this petition describes the responsive emails for which it has asserted privilege as follows:

> The Entirely Privileged Records:
>
> The email written on June 30, 2022 at 11:19 a.m. is clearly the rendition of legal advice from an attorney to her clients. That advice discusses facts—found in the emails predating the advice—upon which the legal advice was contemplated and rendered. That is properly privileged. Emails subsequent to the advice discuss how to implement that advice. See *Petition of Cashman*, MCDA PRO 23-01 p. 2 ("Internal emails among holders of the privilege that repeat legal advice attributed to a lawyer may have that legal advice redacted."). Disclosing any portion of that email chain would reveal the substance and topic of the advice rendered.
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> The Partially Redacted Records:
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> The emails on June 29, 2022 at 2:20 p.m. and 3:08 p.m. are a textbook example of attorney-client privilege: a client requesting legal advice and the lawyer then rendering that advice. The next redacted email, June 29, 2022 at 3:38 p.m. renders legal advice on an unrelated topic. The confidential statement will explain more context in that regard.

As indicated, the City provided this office with the unredacted versions of the emails at issue as well as a privileged statement of the legal issues. As that later statement remains confidential pursuant to ORS 192.415(2) and ORS 192.355(10), we cannot describe the details of its contents in a published order. *Turner v. Reed*, 22 Or App 177, 180 at n.3 (1975). Having reviewed the emails and the confidential submission, the City's summary is an accurate factual characterization of the emails. However, we disagree with the City's legal analysis in one respect.

The City asserts privilege as to "[e]mails subsequent to the advice discuss how to implement that advice," citing our order from earlier this month, *Petition of Cashman*, MCDA PRO 23-01 (2023). The City accurately quotes the relevant statement from *Cashman*, where we wrote, "[i]nternal emails among holders of the privilege *that repeat legal advice attributed to a lawyer* may have that legal advice redacted." *Id.* (emphasis added). The emails dated June 30, 2022 6:41 p.m. and June 30, 2022, 11:38 a.m. do not repeat advice attributed to a lawyer; they involve word-level grammatical suggestions between non-lawyer staff and are not privileged. The first six words of the 11:38 a.m. email may, however, be redacted.

ORDER

Accordingly, the petition is granted as to the two emails consistent with the discussion above and otherwise denied. The City of Portland shall provide petitioner with records redacted consistent with this opinion or, within seven days of this order, provide notice of intent to initiate further proceedings as provided in ORS 192.411 and 192.415. This production is subject to the payment of fees, if any, not to exceed those authorized by ORS 192.324(4).

Very truly yours,

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.

23-07