



MIKE SCHMIDT, District Attorney for Multnomah County

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March 6, 2023

VIA EMAIL ONLY

Patrick Cashman
pcashman20@gmail.com

Trevor Byrd
Deputy City Attorney
trevor.byrd@portlandoregon.gov

Re: Petition of Patrick Cashman seeking a public records petition submission from MCDA PRO 23-07

Dear Mr. Cashman and Mr. Byrd:

On January 26, 2023, petitioner, Patrick Cashman, made a public records request to the City of Portland for, “all supporting documents, statements, texts, morse code, pillow talk, or other communication provided by the City Attorney to the Multnomah DDA regarding public records appeal DA Appeal 23-7. The response was by some ‘Byrd’ person and revealed the existence of such secret ex parte communications between the City and DDA[.]”

Petition of Cashman, MCDA PRO 23-07 (2023), the case referenced in the request, involved an assertion by the City of Portland that certain materials responsive to a public records request were exempt from disclosure due to attorney-client privilege. Petitioner challenged this assertion with a public records petition to this office pursuant to ORS 192.415. As part of this proceeding the City made available to MCDA: argument as to the law applicable to the exemption, which was also provided to petitioner; unredacted versions of the emails at issue, which were not provided to petitioner; and a two-page document providing legal context to the statements contained in the emails; which was not provided to petitioner. After reviewing all of these items, we ordered certain of the emails released and found others to be privileged.

The January 26, 2023, public records request relates to the submissions in the 23-07 litigation that were not provided to petitioner. In response to his request for these documents, the City provided him with a heavily redacted version of the two-page confidential statement previously made available to this office. This petition, challenging those redactions, followed.

In our order in 23-07, we noted the existence of the confidential submission, and stated that it would remain confidential. *Id.* at 1-2 (“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.” We further stated that this material “remains confidential pursuant to ORS 192.415(2) and ORS 192.355(10).”) Consistent with this previous determination, and as elaborated below, we find this information is exempt from disclosure and deny the petition.

DISCUSSION

ORS 192.422(2) provides that, upon receipt of a public records petition:

The public body shall thereupon transmit the public record disclosure of which is sought, or a copy, to the [district attorney], together with a statement of its reasons for believing that the public record should not be disclosed.

It is axiomatic that the disputed record transmitted to the district attorney cannot be subject to release, except as subsequently ordered by the district attorney or a court in the course of that proceeding. To find otherwise would subvert the entire purpose of the public records review framework in the public records law. Petitioner's request for "all documents" submitted by the City to the district attorney in 23-07 is broad enough to reach the disputed record itself, and as to that record the petition is denied without further discussion. The primary object of the request, however, seems to be contextual statement that was submitted in confidence by the City alongside the challenged email chain.

The material in the confidential submission, which this office reviewed as part of the initial petition in 23-07 and has reviewed again as the substantive record at issue in this case, is a quintessential privileged compilation of attorney work product. It describes the nature and bounds of a particular on-going legal issue facing the City. And, as the City correctly notes, disclosure of a record to the district attorney as part of the public records appellate process does not serve as a waiver of any privilege. ORS 192.415(2). This point is essential to the proper function of the public records system enacted by the legislature.

Because the Attorney General handles sub-judicial review of State agency public records matters, state agencies maintain an end-to-end attorney-client privilege throughout review of a public records matter. ORS 192.411. ORS 192.415(2) places local governmental bodies on approximately the same footing as State agencies during the same process. Although the district attorney does not have an attorney-client relationship with local government bodies, this section permits local government bodies to share the otherwise confidential information that is necessary to meet their burden of proof.

As this office has repeatedly noted, a public body must do more than simply assert that a communication is privileged or show that a lawyer was copied on an email to sustain a claim of exemption. *Petition of Bial*, MCDA PRO 22-11 (2022) ("[T]he City must establish the necessary context to show that any particular record is privileged[.]"); *Petition of Bial*, MCDA PRO 22-24 (2022) ("the burden is on a public body to provide [the District Attorney] with sufficient contextual background information to assess the purpose of the redacted communications if it is not facial apparent").

Given this undeniable burden the public records law places on public bodies to sustain their actions, it would be nonsensical to also conclude that they are prohibited from meeting that burden without breaching privilege to do so. Were we to so conclude, a public body's lawyers would have to choose between breaching privilege and failing to defend a legal action against their client. This is a choice without a permissible answer under the Oregon Rules of

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Professional Conduct and not one we believe that the legislature intended to force on governmental attorneys.

Because we conclude that the redacted information remains subject to attorney-client privilege, we do not reach the City's alternative arguments in support of its position.

ORDER

Accordingly, the petition is denied.

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

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