



MIKE SCHMIDT, District Attorney for Multnomah County

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May 2, 2023

via email only

Sophie Peel
speel@wweek.com

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

Re: Petition of Sophie Peel's request for records relating to Parks Bureau light poles.

Dear Ms. Peel and Mr. Byrd:

Ms. Peel has petitioned this office, as authorized by ORS 192.415, requesting that we order the City of Portland to provide a copy of a light pole study that was commissioned by the City of Portland Bureau of Parks and Recreation.

Petitioner learned of the light pole study on February 22, 2023, when Portland Parks and Recreation announced that it would remove 243 light poles from 12 city parks, based upon a "system-wide review" of 1,000 park light poles, which "identified 243 light poles that include structurally unsound anchoring systems that may pose a life and safety hazard to the public and must be removed." Petitioner further learned from Tim Collier, a Parks and Recreation spokesperson, that on June 26, 2022, "a woman laying in a hammock attached to a light pole was partially crushed by that same light pole." Petitioner submitted a public records request for the light pole study on February 24, 2023.

Petitioner's request was denied by the City on March 16, 2023. The City asserted that the records were exempt because the study was both prepared in anticipation of litigation and as an internal advisory record.

We reviewed the 52-page report titled "Irving Park Light Pole Failure; Structural Assessment," dated November 18, 2022. We also reviewed two tort claim notices that were served upon the City, dated July 14, 2022, and November 21, 2022, respectively. Lastly, we reviewed a confidential submission by the City pertaining to the timeline of its legal analysis of the June 23, 2022, incident.

For the reasons discussed below, we conclude that portions of the Structural Assessment must be disclosed to the petitioner.

DISCUSSION

A. Litigation records - ORS 192.345(1)

ORS 192.345(1) conditional exempts from disclosure under the public records law:

Records of a public body pertaining to litigation to which the public body is a party if the complaint has been filed, or if the complaint has not been filed, if the public body shows that such litigation is reasonably likely to occur. This exemption does not apply to litigation which has been concluded, and nothing in this subsection shall limit any right or opportunity granted by discovery or deposition statutes to a party to litigation or potential litigation.

The purpose of the conditional exemption for litigation records is to place governmental bodies “on an even footing with private parties.” ATTORNEY GENERAL’S PUBLIC RECORDS MANUAL (2019) at 52. As pointed out in *Petition of Noren*, Att’t Gen. PRO (05/23/1994):

In the absence of such protection, public bodies would be unfairly disadvantaged in litigation by having the legal analysis and strategies of their attorneys available to any person who requests such records, including the opposing party. Alternatively, the public bodies and public attorneys would be required to communicate orally and keep no written attorney work product. Such practices would be risky, inefficient and ultimately injurious to the public.

The exemption has been very narrowly construed. “[R]ecords are exempt only when the records contain information compiled or acquired by the public body for use in ongoing litigation or, if a complaint has not been filed, if the public body shows that such litigation is ‘reasonably likely to occur.’” *Lane County School Dist. No. 4J v. Parks*, 55 Or App 416, 420 (1981).

Based upon the fact that the City has received two tort notices, it is clear that the Structural Assessment was prepared due to litigation reasonably likely to occur. A tort notice is the beginning of civil litigation with regard to public body.

However, this does not end the analysis. ORS 192.345(1) creates a conditional exemption, whereby the need to keep information confidential by a public body must be weighed against the public interest in disclosure. “The public’s interest in disclosure encompasses the public’s interest in information about the manner in which public business is conducted and the right of the public to monitor what * * * officials are doing on the job.” MANUAL at 32, quoting, *In Defense of Animals v. OHSU*, 199 Or App 160, 175-76 (2005).

There must be more than “an interest in private litigation.” *Petition of Riddell*, Att’y Gen. PRO (01/28/2015); See, e.g., *Petition of Hyson*, MCDA PRO 98-27 (1998) (“The petitioner has demonstrated no public interest in the disclosure”). Petitioner is a member of the media and has the ability to disseminate these records to the public.

There is a two-step process to determine whether the public interest requires the disclosure of a record. First, the exemption at issue must be evaluated in light of any case-

specific facts. “Second, the public body should weigh those interests and determine which one predominates, with the presumption in favor of disclosure.” MANUAL at 32.

Petitioner makes a compelling case that release of the report is in the public interest. The parks are vital to the livability within the City of Portland and are used heavily by the community. A brief review of the hours of operation for the parks indicates that many of the parks are open from 5 am to midnight¹ every day of the week. Many of the operational hours of the parks are at night, when illumination is essential for public safety when entering and passing through the City’s parks. There are a total of 12 parks that have been identified as containing lights that are to be removed. The City began the process of removing 243 lights, but then halted the process, calling into question the safety of the remaining lights within the parks.

We find that some of the information within the report should be released to the public at this time.

In reviewing the 52-page Structural Assessment, there appear to be three types of information: historical records, narrative of the investigation, and analysis with recommendations by the writer of the report. To the extent that records contained in the report are historical records, such as the contents of Appendix A of the report, the litigation exemption does not apply, as those records were available as public records prior to preparation of the report.

To the extent that the report contains narrative information of the investigation, such as the information appearing on pages 1 through 14, 16, and 18-19, we find that the public interest in the information outweighs the City’s need for confidentiality. The public should have information about the condition of the lights within the parks, as it is a safety concern for the community.

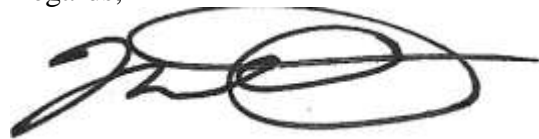
However, to the extent that the remaining pages of the report are analysis and conclusions pertaining to the lights within the parks, we find that the public interest in disclosure at this time does not outweigh the interest in litigation parity. The preparer of the report, who works for an engineering firm, will likely be called as an expert witness during the course of litigation. Their work will likely be subject to the scrutiny of experts on behalf of other litigants that are party to the case. This class of information will go to the heart of any defenses that the City may claim during litigation. To release that information through the public records process would put the City at a disadvantage in the litigation process, which we believe outweighs disclosure to the public at this time. At the conclusion of litigation, the conditional exemption will likely no longer apply to the remainder of information contained within the report.

The City also has argued that ORS 192.355(1), advisory communications, applies to the report. We need not determine whether or not this report does, in fact, qualify as an internal advisory communication because, even if it does, the public interest balancing is the same as articulated above.

ORDER

Accordingly, the petition is granted in part. The City of Portland is ordered to promptly provide petitioner with a version of the Structural Assessment consistent with this order. The petition is otherwise denied.

Regards,

A handwritten signature in black ink, appearing to read "MIKE SCHMIDT", with a large, stylized flourish extending to the right.

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.

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