



Nathan Vasquez, Multnomah County District Attorney

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via email only

Jon Bial
Deputy General Counsel
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Trevor Byrd
Deputy City Attorney
trevor.byrd@portlandoregon.gov

Re: Petition of Oregon Public Broadcasting seeking a list of programs and policies subject to change as a result of an executive order from the City of Portland Mayor Keith Wilson

Dear Mr. Bial and Mr. Byrd:

On September 5, 2025, Alex Zielinski, a reporter for Oregon Public Broadcasting, submitted a public records request to the City of Portland for, in relevant part:

On July 31, Mayor Wilson issued an executive order announcing changes to city policy and program language around race and gender to improve the likeness of the city receiving federal grant funding. In the new release announcing this decision, Wilson's office noted that this order could lead to changes in "approximately 75 programs and policies."

I am requesting a list of all programs and policies that the city has determined necessary to change to meet Wilson's executive order

The City denied the request, citing the attorney-client privilege. Petitioner then sought review by this office pursuant to ORS 192.422.

The City has made the records responsive to this request available for my review and, for the reasons set out below, I deny the petition.

DISCUSSION

A. Attorney Client Privilege – ORS 40.225 / ORS 192.355(9)

i. Existence of privilege

The confidentiality of communications between an attorney and their client is a foundational principle of our system of laws. *Upjohn Co. v. United States*, 449 U.S. 383 (1981) ("The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.") This privilege extends to public organizations that employ or retain lawyers to give them legal advice and shields those communications from disclosure under the

public records law. *Port of Portland v. Or. Ctr. for Env'tl. Health*, 238 Or App 404, 409 (2010) (noting incorporation of attorney-client privilege into the public records law by way of ORS 192.502(9)).

In a public facing order it is not possible to describe the contents or context of the responsive documents in useful detail. *Turner v. Reed*, 22 Or App 177 (1975) (“Since our decision is subject to review [...], it would be inappropriate for us to disclose the contents of the disputed records.”) However, the documents I have reviewed contain the compiled work of the City’s attorneys in reviewing and assessing various programs across the City.

ORS 192.355(9)(b), by creating a waiver of exemption from public records disclosure for certain subsets of attorney-client privileged investigative records, acknowledges that such a compilation of communications is itself privileged. It would be inconsistent with the purposes of privilege for a telephone call with a client to be privileged, but the attorney’s notes about the contents and implications of that conversation not to be. Confidential communications to the City’s attorneys in furtherance of their work to provide legal services to their client, or recorded by the City’s attorneys as a result of such communications, are privileged.

OPB argues that the scope of privilege between a public body’s attorney and their client is less than that between a private client and their attorney. A public body, like any client, may electively choose to waive privilege and release information. A public body might choose to do so for any number of reasons, including the public policy reasons advanced by OPB. But, as a matter of law, evaluation of whether the privilege exists, or has been waived, is not informed by the distinction between public and private clients.

ORS 192.355(9)(b) is not to the contrary. This section does not limit privilege; rather it limits the incorporation of privilege into the public records law in a particular situation. Records disclosed in response to a public records request may nonetheless retain their privileged status. ORS 192.335(2).

While I agree with petitioner that privilege does not attach simply because a communication involves a lawyer, that is not the situation here. Compare, *Petition of Bial*, MCDA PRO 22-11 (2022) (“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 ‘diplomatic pouch’ rendering anything they convey unquestionably exempt from subsequent disclosure.”) Due to the nature of this litigation, OPB is arguing in the dark. A public records petitioner can only speculate as to the specific form, context, and contents of the contested records. The responsive records submitted to me for review meet the criteria to establish the existence of attorney-client privilege.

ii. Waiver

Petitioner further argues that even if a privilege did exist at one point, the City’s subsequent actions have waived its ability to assert it. On July 31, 2025, Mayor Wilson issued an executive order stating that the City is required to comply with “all applicable federal civil-rights and

nondiscrimination laws.”¹ Along with that order, Mayor Wilson’s office issued a statement describing the impact of the order as requiring “changes to a relatively small sub-set of programs and policies – approximately 75, according to preliminary analysis.”² In petitioner’s view this statement prevents the City from now claiming privilege as to any supporting records.

OPB cites *Oregonian Publishing Co. v. Portland School District 1J*, 152 Or App 135 (1998), for the proposition that a public body can waive its ability to assert a public records exemption. *Oregonian* stands for the proposition that, where a public statement “disclosed substantially all of the information in [the record]” the public body waives its ability to subsequently assert an exemption to its disclosure. *Id.* at 142. Such is not the case here. The Mayor issued a statement that disclosed the existence of a record and the number of programs implicated. This is not “equivalent to” the full contents of the record, as the Court found in *Oregonian. Id.*

The result is the same under the default waiver of evidentiary privilege rules in OEC 511. That section provides that privilege is waived if a “holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication.” Mayor Wilson is a holder of the privilege for these purposes and his statement was “voluntary.” However, it did not disclose a “significant part” of the matter.

Lastly, attorney-client privilege may not exempt the factual portion of a privileged record from disclosure if the four elements in ORS 192.355(9)(b)(B)-(E) are present:

(B) The factual information is not prohibited from disclosure under any applicable state or federal law, regulation or court order and is not otherwise exempt from disclosure under ORS 192.311 to 192.478;

(C) The factual information was compiled by or at the direction of an attorney as part of an investigation on behalf of the public body in response to information of possible wrongdoing by the public body;

(D) The factual information was not compiled in preparation for litigation, arbitration or an administrative proceeding that was reasonably likely to be initiated or that has been initiated by or against the public body; and

(E) The holder of the privilege under ORS 40.225 has made or authorized a public statement characterizing or partially disclosing the factual information compiled by or at the attorney's direction.

Assuming for purposes of argument the existence of the other three elements, (D) is not satisfied on this record. The United States Department of Justice has initiated broad civil rights enforcement investigations of other state and local governments regarding comparable issues and has directly given notice to the City of a specific investigation involving the Portland Police

¹ Office of Mayor Keith Wilson, *Executive Order to City Employees to Comply with Federal Law “EO-2025-01”*. (July 31, 2025). <https://www.portland.gov/mayor/keith-wilson/documents/eo-compliance-nondiscrimination-laws/download>

² City of Portland, “Portland executive order preserves federal funding, maintains commitment to diversity, equity and inclusion.” (July 31, 2025). <https://www.portland.gov/mayor/keith-wilson/news/2025/7/31/portland-executiveorder-preserves-federal-funding-maintains>

Bureau’s conduct within the context of an existing federal consent decree.³ Against this backdrop, the City has met its burden of establishing that the factual information that could be within the scope of ORS 192.355(9)(b) was “compiled in preparation for litigation [...] that was reasonably likely to be initiated [...] against the public body.”

In sum, there are three different potentially relevant waiver provisions, with three different levels of disclosure necessary to activate them:

- Disclosure of “substantially all of the information” in a record serves as a waiver of the right to assert a public records exemption as per *Oregonian*.
- Disclosure of “any significant part” of the matter constitutes waiver of the underlying privilege as provided in OEC 511.
- A statement “partially disclosing the factual information” is one element of the exception to the exemption in ORS 192.355(9)(b).

I find that the Mayor’s press release did not constitute an *Oregonian* or OEC 511 waiver. I do not reach whether it satisfied ORS 192.355(9)(b)(E) because of my finding under ORS 192.355(9)(b)(D) that the City compiled the material in preparation for litigation that was reasonably likely to be initiated.

ORDER

Accordingly, the petition is denied.

Regards,

NATHAN VASQUEZ
District Attorney
Multnomah County, Oregon

By: 

Adam Gibbs
General Counsel

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³ See, “Justice Department Investigates Austin, Texas for Racially Discriminatory Employment Practices,” Office of Public Affairs, U.S. Department of Justice, Sept. 18, 2025 (<https://www.justice.gov/opa/pr/justice-department-investigates-austin-texas-racially-discriminatory-employment-practices>); “Justice Department Launches Investigation into Rhode Island for Race-Based Employment Preferences in Violation of Title VII of the Civil Rights Act,” Office of Public Affairs, U.S. Department of Justice, June 5, 2025 (<https://www.justice.gov/opa/pr/justice-department-launches-investigation-rhode-island-race-based-employment-preferences>); S. Tenenbaum, “Justice Department opens discrimination investigation into Chicago city hiring practices,” CBS News, May 19, 2025 (<https://www.cbsnews.com/chicago/news/justice-department-discrimination-investigation-chicago-city-hiring-practices/>); S. Schachet, “DOJ investigates Portland police after PPB arrests conservative influence at ICE building,” KPTV 12, Oc. 3, 2025 (<https://www.kptv.com/2025/10/04/doj-investigates-portland-police-after-ppb-arrests-conservative-influencer-ice-building/>);