



Nathan Vasquez, Multnomah County District Attorney

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via email only

Alan Kessler
Attorney for Barbara Spears
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Veronica R. Rodriguez
Assistant County Attorney
Multnomah County Attorney's Office
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Re: Petition of Barbara Spears seeking the records underlying statements made by
Multnomah County in Public Records Petition 26-49

Dear Mr. Kessler and Ms. Rodriguez:

In *Petition of Spears*, MCDA PRO 26-49 (2026), this office determined that Multnomah County Animal Services (MCAS) had not met its burden to establish that job applications for its shelter director position were exempt from disclosure under the public records law. During that proceeding the County stated that it was preparing a declaration in support of its response and was awaiting the signed declaration from the relevant MCAS employee. The order in 26-49 issued before any such declaration was submitted for consideration.

On July 19, 2026, Ms. Spears submitted a new request to MCAS for the records behind the County's statements while litigating 26-49:

Please provide all records referring to or relating to any instance in which Barbara Spears is alleged to have "contact[ed a] named individual unsolicited" based on a public records request. Additionally, please provide any and all records referring or relating to any complaints MCAS has had regarding any such alleged contacts. Finally, please provide any records relating or referring to MCAS's expressed belief that Ms. Spears is likely to "use identifying information found in [public records] to contact and harry" any individual.

MCAS responded that it did not possess any responsive records.

Counsel for Ms. Spears petitioned this office on August 6 under ORS 192.415, arguing that the draft declaration is a responsive record "whether finalized or not," that the complaints County counsel referenced are likewise responsive, and that the County must produce these records or withhold them under a claim of exemption. The County's response amends MCAS' original response by acknowledging that a draft of the declaration exists, but the County asserts it is exempt under ORS 192.355(9). The County provided the draft declaration for my review pursuant to ORS

192.422(2). For the reasons discussed below, I conclude that the draft declaration is exempt from disclosure and deny the petition.

DISCUSSION

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

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. This means that, if I find the requirements to establish privilege are met, I may not weigh the public's interest in the records. *Petition of Manning*, MCDA PRO 19-18 (2019).

No Oregon appellate decision addresses whether an attorney's unsigned draft of a witness declaration is work product, but the federal courts applying similar rules do.

Draft affidavits reflect not so much what the witness has said but rather the drafting lawyer's impression of what the witness had said. The content of unexecuted drafts thus cannot fairly be characterized as facts, and the changes such drafts undergo before being signed by the witness may well reveal the drafting lawyer's mental impressions and strategy. Accordingly, unexecuted drafts of affidavits are protected by the work product privilege.

Burlington v. News Corp., 2010 WL 11474545 at *1 n 1 (E.D. Pa. June 7, 2010). See also, *Randleman v. Fidelity Nat. Title Ins. Co.*, 251 F.R.D. 281, 285, 287 (N.D. Ohio 2008) (“the trend is to consider draft affidavits and communications with counsel relating to affidavits as covered by the attorney work product doctrine”; drafts penned by counsel are opinion work product, which “receives near absolute protection”); *Judicial Watch v. Dep't of Commerce*, 201 F.R.D. 265, 269 (D.D.C. 2001) (“A draft of a declaration to be executed by a party or witness denotes what a lawyer thinks that party or witness should say and thereby exposes that lawyer's mental processes.”); *Mitura v. Finco Services, Inc.*, 347 F.R.D. 299, 301 (S.D.N.Y. 2024) (an attorney's drafts of a declaration are “classic work product.”)

The draft declaration before me is exactly this document. It was composed by counsel, it was never signed, and it carries the highlighting and interstitial notation making clear it is a draft document. In a public-facing order I will not describe its contents further. *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.”)

B. Waiver of Privilege

Petitioner's counsel argues that even if the draft could be privileged, any privilege was waived when the substance of the declaration was described in the course of 26-49. The disclosures at issue are these: in litigating 26-49, the County described conduct it attributed to Ms. Spears, stated that MCAS had received complaints regarding that conduct, and disclosed that a declaration in support of its response was being prepared and awaited the declarant's signature.

A privilege holder waives the underlying privilege by voluntarily disclosing “any significant part of the matter or communication.” OEC 511.¹ The underlying facts are not privileged; facts can’t be privileged. What is privileged is the particular draft expression of those facts as prepared by the County’s attorney and communicated to the representative of their client. While the County has characterized the underlying facts in its communications in the previous petition, it has disclosed nothing about the specific factual instances it was intended to address than that the declaration exists in draft form. Indeed, the declaration’s *raison d’être* was that the generalities and beliefs asserted in the initial response did not contain sufficient factual information to serve the needed purpose. The County’s statement that it was working on a declaration to fill that void did not constitute a waiver of privilege as to the draft declaration transmitted from counsel to a County employee.

C. Other Records

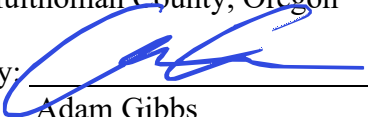
As to the other categories of records identified in the request, MCAS’ response that it does not possess any remains. Petitioner’s questioning of this response is understandable: MCAS’ defense of its position in 26-49 asserted such reports existed and it now states it does not have any written record of them. Whether these reports were never reduced to writing, upon closer examination were determined to have never existed, or something else is beyond the scope of this proceeding. *Petition of Cashman*, MCDA PRO 22-47 (2022) (the District Attorney “has consistently held that where a public body asserts that it does not possess any public records responsive to a request we are not equipped or empowered to evaluate that determination”); *Petition of PRADA*, MCDA PRO 23-134 (2023) (“our role under Chapter 192 is adjudicative, not investigative.”)

ORDER

Accordingly, the petition is denied.

Regards,

NATHAN VASQUEZ
District Attorney
Multnomah County, Oregon

By: 
Adam Gibbs
General Counsel

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¹ Other waiver standards apply in related contexts. See *Petition of Bial*, MCDA PRO 25-60 (2025). I do not find any of them met here.