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November 1, 2005

Ryan Frank
The Oregonian
1320 SW Broadway
Portland, OR 97201

Matt Baines
General Counsel
Portland Development Commission
222 NW Fifth Avenue
Portland, OR 97209-3859

Re: Petition of Ryan Frank for The Oregonian to disclose certain records of the
Portland Development Commission (PDC)

Dear Mr. Frank and Mr. Baines:

On this public records petition, ORS 192.410 et. seq., petitioner Ryan Frank for The Oregonian requests the District Attorney to order the PDC to provide access to the following documents:

**[D]ocuments produced by Barran Liebman LLP and/or
Brad Tellam under its contract with the PDC and documents
related to any investigations of Tracy Smith, Wyman Winston
and/or the Walking on Cotton contract.**

According to PDC, a confidential memorandum was submitted to the Board of Commissioners in May 2005 alleging misconduct on the part of Board Chair Matt Hennessee and Deputy Executive Director Wyman Winston. An investigation of these allegations led to misconduct allegations against a third person, PDC Organizational Development Manager Tracy Smith. PDC contracted with attorney Brad Tellam to conduct an independent confidential investigation.

Mr. Tellam provided this office with an approximately five-inch high set of documents for our review. PDC submitted eight sets of emails together with numerous affidavits and arguments to justify the non-disclosure of all the materials. This petition has been the subject of much discussion and negotiation between the parties. Petitioner eventually rejected a PDC offer of a compromise resolution of the petition.

In its written response to the petition, PDC stated that it referred the matter to independent outside counsel to “provide legal and investigative services for the Commission’s Audit Committee.” This is consistent with the terms of the PDC Contract we were provided with by petitioner. At the conclusion of the investigation, “Mr. Tellam briefed the Audit Committee and Interim General Counsel Matt Baines at his office on the results of each investigation and the legal implications with respect to GSPC and employment law issues involving Mr. Winston. The products of the investigation, three confidential memoranda, were provided to the Audit Committee.

PDC contends that the law firm of Baran Liebman is not a public body. Therefore, the materials in the possession of Brad Tellam are not public records. PDC also asserts the attorney-client privilege both for the Tellam investigation and the emails to and from PDC counsel. PDC next argues that certain of the Tellam documents are exempt from disclosure as a confidential submission. Finally, PDC maintains that the Wyman Winston related documents are exempt as a personnel discipline action.

Petitioner points out that “Mr. Tellam’s work products, whether delivered to the PDC or not, are clearly in the custody of the PDC. His contract states: ‘All work products of the Contractor which result from this contract are the exclusive property of the Commission.’” The Oregonian contends that Mr. Tellam acted as much as an independent investigator as he did as an attorney providing legal advice to a client.” Petitioner concedes that Mr. Tellam’s legal advice is exempt from disclosure. Petitioner is only seeking the disclosure of “any and all documents Mr. Tellam created or obtained in this fact-finding investigation.”

Petitioner has made no written response to the claimed exemptions for confidential submissions and personnel discipline action. However, this office discussed the applicability of the exemptions with petitioner on numerous occasions. The confidential submission exemption is dependent on the satisfaction of certain criteria, especially the understanding of the parties and the representations of the public agency. The personnel discipline action exemption again rests on the satisfaction of certain elements, particularly the status or position of the employee, the nature of the misconduct, and the extent of the discipline.

DISCUSSION

Brad Tellam was hired as both an attorney and an investigator. In either case, the records in his possession are presumptively the property of the client, PDC. The only reference in his employment contract with PDC supports this conclusion: Mr. Tellam’s work products are the “exclusive property if the Commission.” We agree with petitioner that the materials are public records subject to the public records law.

I. Attorney-Client Privilege

ORS 192.502(9) incorporates the lawyer-client privilege of ORS 40.225 into an unconditional exemption under the Public Records Law. In its July 6, 1982 Public Records Order (Zaitz), the Attorney General determined that a review of such a claimed exemption is very limited:

If the purpose is not waived [by the client], the exemption is absolute; neither the preliminary language of ORS 192.500(2) nor paragraph (h) itself contains any language providing for a balancing test. If the lawyer-client privilege is applicable, the Attorney General cannot consider whether or not the information should be disclosed in the public interest, but must deny your petition. Attorney General's Public Records Manual, 2004, page F-4.

The centuries old common law doctrine has maintained the rule that "communications between an attorney and his client during and by reason of their relations as such...are deemed privileged." Sitton v. Peyree, 117 Or 107, 114 (1925). This doctrine has been codified in Oregon Evidence Code (OEC) 503 (ORS 40.225). The Oregon Supreme Court has made the availability of the privilege dependent on two conditions:

- (1) the communications must be confidential within the meaning of OEC 503(1)(b)¹, and
- (2) the communication must be made for the purpose of facilitating the rendition of professional legal services to the client. State v. Jancsek, 302 Or 270, 275 (1986).

The work product doctrine is a necessary corollary of the attorney-client privilege. The difficulty presented in this petition is to discern exactly what work is related to legal advice and what work is related to the independent investigation.

First, the eight sets of emails are essentially electronic communications between the attorneys for PDC and PDC employees seeking or giving advice or communicating information. The emails are exempt.

¹ OEC 503(1)(b) provides:

"Confidential communication" means a communication not intended to be disclosed to third persons other than to those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

Second, the three confidential memoranda (with some variation) consist of sections including an introduction, the factual background, the substance of the interviews with relevant witnesses, and a concluding discussion. Each report is limited to factual information; no legal advice or legal conclusions could be identified. The three reports are not exempt as attorney-client work product or communications.

Third, there are hand written notes (largely illegible) made by Mr. Tellam during his numerous witness interviews. Theoretically, the notes could contain the work product of an attorney analyzing the ethical or employment law implications of the witnesses' statements. Or, the notes could simply be a short hand version of the factual information gathered by an investigator as part of his assignment. A thorough review of the notes leads to the latter conclusion. We could not identify any legal notations. The notes are not exempt as attorney-client work product.

II. Confidential Submissions

ORS 192.502 (4) exempts:

Information submitted to a public body in confidence and not otherwise required by law to be submitted, where such information should reasonably be considered confidential, the public body has obliged itself in good faith not to disclose the information, and when the public interest would suffer by the disclosure.

As stated in the Attorney General's Public Records and Meetings Manual, 2004, p. 68, there are "no less than five conditions that must be met" for the Confidential Submissions exemption to apply:

1. The informant must have submitted the information on the condition that the information would be kept confidential.
2. The informant must not have been required by law to provide the information.
3. The information itself must be of a nature that reasonably should be kept confidential.
4. The public body must show that it has obligated itself in *good faith* not to disclose the information.
5. Disclosure of the information must cause harm to the public interest.

This office received affidavits from Brad Tellam and two of the persons interviewed as part of the investigation. We have reviewed Mr. Tellam's interview notes, documents gathered by Mr. Tellam containing the names of the two interviewees, and the three confidential memoranda.

The affidavits clearly establish that the two employees submitted to the interviews with the understanding that their conversations would be held in confidence. The information was not required by law to be provided and the information itself reasonably should be kept confidential. Mr. Tellam obligated himself and PDC to maintain the employees' anonymity to the extent possible. Disclosure of the identity and comments of the two individuals would be disruptive in the PDC work place and would set a bad precedent for future internal investigations of any public agency. The exemption applies to all references of the two employees.

There are necessary redactions in four documents in addition to the interview notes of the two employees: the name on a June 23, 2005 cover memorandum to Brad Tellam, the name on an email dated August 4, 2004 from Wyman Winston, the name in the June 29, 2005 confidential memorandum of Brad Tellam regarding the Wyman Winston investigation, and the name and interview references in the June 29, 2005 confidential memorandum of Brad Tellam regarding the Matt Hennessee investigation. The completed redactions will be included with the copy of this order to PDC.

III. Personnel Discipline Action

In 1985, the Oregon legislature passed ORS 192.501(12), which exempts: "A personnel discipline action, or materials or documents supporting that action[.]" This is a conditional exemption that may be overcome if it is shown that "...the public interest requires disclosure in the particular instance [.] The exemption applies when discipline has been imposed.

The appellate courts have spoken with respect to cases involving sustained discipline complaints. "The policy intended by the legislature, which we enforce, protects the public employee from ridicule for having been disciplined but does not shield the government from public efforts to obtain knowledge about its processes." City of Portland v. Rice, 308 Or 118, 124, n 5 (1989). (PPB Internal Affairs investigation ordered disclosed over claim of personnel discipline exemption). Accord, Oregonian Publishing Company v. Portland School District No II, 144 Or App 180 (1996) (Public interest required disclosure of discipline investigation and sanction of school employees for misuse and theft of school property).

The Attorney General's Public Records Manual, 2004, page 40, provides some guidance in the application of the traditional Personnel Discipline Action exemption:

Consistent with this policy, there are situations when the public interest in disclosure outweighs the public interest in confidentiality, despite the imposition of a disciplinary sanction. For example, the public interest typically favors disclosure if the conduct potentially constitutes a criminal offense or if the records relate to alleged misuse and theft of public property by public employees. Other factors to consider in weighing the public interest in disclosure

against the employee's interest in confidentiality include the employee's position, the basis for the disciplinary action, and the extent to which the information has already been made public.

The general rule in Oregon with respect to public records favors disclosure. City of Portland v. David Anderson and The Oregonian, 163 Or App 550, 552 (1999). With respect to sustained discipline, this office continues to be guided by the principles enunciated in our Public Records Order, February 6, 1997, *Foster*, involving the disciplinary records of Gresham police Sergeant James Kalbasky.

FOSTER CRITERIA

1. Serious misconduct by a government employee should be disclosed in the public interest; relatively minor misconduct need not be disclosed if the public interest would not be significantly promoted by doing so.
2. Generally, termination from employment or other discipline for cause is serious misconduct if it is based upon corruption in the discharge of the public's business (including theft of the public's property), abuse of official power by employing such power for a purpose not related to any lawful government objective or by use of illegal or impermissible means in the pursuit of a governmental objective, misconduct which impairs or imperils the mission of the government agency, or criminal behavior (particularly when job-related) which constitutes proper ground for discharge from employment or other discipline.
3. Discipline for acts or faults of government employees falling short of the preceding kinds of serious misconduct may also be determined to require disclosure if the cumulation of repeated disciplinary violations fairly raises the issue whether continued employment of the particular employee in itself constitutes an imprudent or improper management decision not to impose more severe sanctions or termination of employment.
4. Discipline cases that evidence systematic misconduct, i.e., misconduct affecting multiple employees and involving similar improper acts or omissions may require disclosure even when the acts or faults in question do not individually rise to the level of the serious misconduct described in points 1 and 2, where the overall pattern of disciplinary violations indicates there may be a concentrated personnel problem in a particular agency or part of any agency, or sheds light on the effectiveness of management's efforts to properly control the behavior in question.

5. Other cases of disciplinary records may merit disclosure in the public interest even though the conduct of the disciplined employee is not serious misconduct as previously described, where circumstances raise an issue of unduly harsh (or unduly lenient), arbitrary, irrational administration of discipline by management and thus illuminate management's conduct of the public business.
6. Finally, public employees should not be subjected to public disclosure of disciplinary violations not of the kind specified in the preceding guiding principles, when such disclosure would merely subject the employee to added humiliation and would not significantly promote the public's understanding of the manner in which the programs and services of government are being carried out. Part of the purpose of employee discipline is to encourage the employee's morale while correcting undesirable conduct, which goal is not promoted, as we think, by a process of indiscriminate public pillory -- and which consideration presumably was part of the Legislative Assembly's motivation for the enactment of the "discipline action" exemption in the first place.

The Oregon Court of Appeals decision of City of Portland v. David Anderson and The Oregonian, 163 Or App 550 (1999) discusses allegations of misconduct of supervisory personnel of a law enforcement agency. In that case, the Court upheld the disclosure of the personnel discipline action materials regarding the sustained discipline of Portland Police Bureau Captain John Michael Garvey. In Anderson, the Court of Appeals identified the presence of a public interest even when dealing with allegations of off-duty, non-criminal and not *per se* illegal conduct of a high-ranking law enforcement manager:

The public has a legitimate interest in confirming his integrity and his ability to enforce the law evenhandedly. The police investigation that resulted in discipline concluded that Garvey had engaged in sexual conduct through an escort service that may serve as a front for prostitution. That information bears materially on his integrity and on the risk that its compromise could affect the administration of his duties. Portland v. Anderson, 163 Or App at 554.

Wyman Winston was then Deputy Executive Director of the Portland Development Commission. Serious allegations of misconduct were made against Mr. Winston involving an outside contract with Anthony Harris to provide coaching skills as part of Mr. Winston's leadership development plan. Tracy Smith, also the subject of investigation, recommended Mr. Harris for the coaching position. The contract was for \$100,000.

Although Mr. Winston was largely exonerated in the Tellam investigation, he acknowledged that he made an error that resulted in a violation of PDC contract policy. Mr. Winston agreed to a two-week suspension without pay, a significant sanction. We are satisfied that the *Foster* criteria have been met, particularly since we are dealing with a high ranking public employee responsible for the expenditure of the public's money. The documents related to the Wyman Winston investigation should be disclosed in the public interest.

ORDER

Accordingly, it is ordered that the Portland Development Commission promptly disclose the records sought in the above petition with the exception of the eight sets of PDC attorney emails, Brad Tellam's notes from the two confidential interviews, together with the redactions in four documents noted in the discussion on confidential submissions. Disclosure of the documents ordered is subject to payment of Portland Development Commission's fee, if any, not exceeding the actual cost in making the information available, consistent with ORS 192.440 and this order.

Very truly yours,

MICHAEL D. SCHRUNK
District Attorney

NOTICE TO PUBLIC AGENCY

Pursuant to ORS 192.450(2), 192.460 and 192.490(3) your agency may become liable to pay petitioner's attorney 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 7 days formal notice of your intent to initiate court action to contest this order, or fail to file such court action within 7 additional days thereafter.