



John S. Foote, District Attorney for Clackamas County

807 Main Street, Room 7, Oregon City, Oregon 97045
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October 9, 2020

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Raymond Rendleman
Clackamas Review/Oregon City News
rendleman@pamplinmedia.com

RE: Petition of Raymond Rendleman, requesting records relating to City of Oregon City's investigation.
File # 005-324288

Dear Mr. Rendleman and Mr. Kabeiseman,

In his public records petition, dated October 2, 2020, Petitioner asked this office for an order to provide him copies of the City of Oregon's City's (hereinafter "the City") Draft Report regarding the actions of Mayor Holladay. In their denial, the City has claimed the records are 1) exempted from disclosure as attorney-client privilege under ORS 40.225 and ORS 192.355(9)(a), and 2) exempted as an internal advisory communication under ORS 192.355(1).

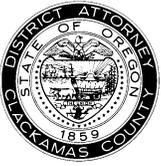
As background, the City hired attorney Lori Watson on July 8, 2020 to examine the actions of the Mayor of Oregon City in April and May of 2020 and provide an analysis of whether those actions violated any law, regulation, rule, policy, or procedure. On September 27, 2020, Ms. Watson submitted the Draft Report and the City Commission reviewed it at an executive session on Friday October 2, 2020. After the meeting, the City posted an Executive Session Update online stating the following:

On Friday, October 2, 2020, the Oregon City Commissioners held an Executive Session continuing the investigation of Mayor Dan Holladay's actions to violate Executive Order No. 20-12 "Stay Home, Save Lives."

The Commissioners requested further investigation prior to finalizing the report. Once the report is finalized, the City Commission will hold a public meeting to release the report and review the findings.

The City Commissioners including the Mayor are committed to a full, impartial, and transparent review of the allegations.

As additional context, the actions of the Mayor were the subject of significant public concern and has resulted in the Mayor being the subject of a recall campaign over the summer of 2020. The proponents of the recall submitted sufficient signatures for a recall, and unless the



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Mayor resigns, that election will take place on Tuesday November 10, 2020. Petitioner now requests the Draft Report on behalf of Pamplin Media Group, citing the upcoming election as a compelling public interest to require disclosure.

The City has provided this office with copies of the Draft Report, supporting documentation, and the Engagement Agreement with Lori Watson. Because the City did not waive attorney-client privilege as to the Draft Report, and because the court has previously addressed a case of substantially identical similarity, we must deny the petition. As such, we do not reach the question of whether the material is exempted under ORS 192.355(1).

DISCUSSION

A. *Attorney Client Privilege*

ORS 192.355(9) exempts from disclosure under the public law:

Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law.

a. ORS 192.355(9)(a) – Privileged Documents

An attorney-client claim of privilege may be asserted when three requirements are met. “First, the communication must have been between a ‘client’ and the client’s ‘lawyer,’ as those terms have been defined in OEC 503(1)(a) and (c). Second, the communication must have been a ‘confidential communication,’ as that term is defined in OEC 503(1)(b). Finally, the communication must be ‘made for the purpose facilitating the rendition of professional legal services to the client.’ OEC 503(2).”¹

The requirements are met in this case. First, the City and the attorney Lori Watson meet the definitions of ‘client’ and ‘lawyer’ laid out in OEC 503 (also ORS 40.255(1)(a) and (c)). The City is a “... organization or entity, either public or private...”² and Ms. Watson is a practicing attorney in the state of Oregon. Second, despite what may have been initially discussed, the information gathered by Ms. Watson and report was intended to be confidential and covered by the attorney client privilege, as specifically expressed in the Engagement Agreement between the City and her. Finally, the investigation was done for the specific purpose of providing legal services in the form of an impartial investigation, again as specifically detailed in the Engagement Agreement between the City and attorney Lori Watson.

The appellate court has also addressed a similar situation and concluded that an investigation into potential wrongdoing by a member of a public body conducted by an outside

¹ *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 355 Or 476 (2014) (citing *State v. Jancsek*, 302 Or 270, 275 (1986)).

² ORS 40.255(1)(a)



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investigator was a confidential communication. The decision, *Klamath County School District v. Teamey*, is a case of sufficient similarity to the present facts as to control our decision.³

In *Teamey* the Klamath County School Board was presented with allegations of mismanagement and misconduct by certain district employees, specifically failing to enforce district policies, using district property for personal gain, failing to follow appropriate cost containment policies, making inappropriate expenditures, and entering into transactions with administrative insiders.⁴ The board contacted its outside counsel for advice and he indicated that a factual investigation was necessary for him to advise the board on its options. At the board's direction, the attorney commissioned an auditor and a private investigator to look into the matter. Upon the conclusion of that investigation the resulting reports were presented to the board in executive session and the attorney used the reports as the basis of providing legal advice to the board. Those records were then subject to a public records request. The court ultimately held the attorney-client privilege exempted those materials:

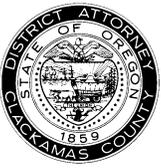
The testimony of Zagar [the lawyer] and Stevens [a board member] demonstrates that (1) the district's purpose in contacting Zagar was to seek legal advice, (2) the auditor and investigator who wrote the reports were employed to assist Zagar in the rendition of professional legal services, (3) the investigation was carried out to facilitate his rendition of legal advice, and (4) Zagar relied upon the reports of the investigation in giving legal advice to the board. *Cf. State ex rel. OHSU v. Haas*, 325 Ore. 492, 501-02, 942 P.2d 261 (1997) ('A lawyer who conducts an internal investigation concerning a client's potential legal liability, provides the client with a written report on the results of that investigation, and advises the client on ways to resolve problems uncovered in the investigation renders professional legal services to the client.'). We conclude that, under those circumstances, the reports of the auditor and private investigator were confidential communications within the meaning of OEC 503 and were therefore exempt from disclosure under ORS 192.502(9) [now 192.355(9)].⁵

The circumstances presented in the present appeal are analogous to those in *Teamey*. (1) The City retained Ms. Watson for legal services. (2) Ms. Watson, or any others, were employed to assist in the rendering legal services. (3) The investigation was carried out to facilitate Ms. Watson rendering legal services, again in the form of an impartial investigation to determine if any policy or other rule or regulation violations occurred. (4) Ms. Watson relied on the report of the investigation and material therein to provide legal services. Regardless of whether Ms. Watson handled the investigation personally, or hired outside services to help, it is clear she relied upon any such services in rendering her services. Given the similarities with *Teamey*, it is clear that the Draft Report of Ms. Watson are attorney-client privilege.

³ *Klamath County School District v. Teamey*, 207 Or App 250 (2006).

⁴ *Id.* at 254.

⁵ *Id.* at 261-62.



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b. ORS 192.355(9)(b) – Privilege exemption

The legislature has specifically considered whether the attorney-client privilege exemption applies where potential wrongdoing by a public body is being investigated on behalf of that public body. ORS 192.355(9)(b) states that the protections of ORS 192.355(9)(a) don't apply if all of the following are true:

- (A) The basis for the claim of exemption is ORS 40.225 [attorney-client privilege];
- (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.

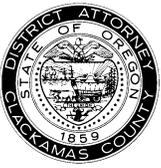
Sections (A) and (C) are met in this case. The basis for the exemption claimed by the City is attorney-client privilege, and the information was compiled at the direction of an attorney (Lori Wilson) on behalf of the public body (the City), in response to possible wrong doing (by that of Mayor Holladay).

However, sections (B), (D), and (E) are not as clear. However, we do not reach these questions as to (B) and (D) as it is clear that section (E) has not occurred in this case, as explained below.

c. Public Disclosure

The city posted an update online regarding the October 2, 2020 executive session, as mentioned previously in this document. The question is: did the online post constitute “a public statement characterizing or partially disclosing the factual information compiled by or at the attorney’s direction?” The answer is no.

While the online post by the City stated that the investigation report will be released at some point, the posting did not actually comment on any of the factual information. Further, while the City has expressed an intention to waive the attorney-client privilege at some point in the future, by not releasing a copy of the report, they have not manifested the intent to waive the attorney-client privilege at this time, evidence by the invocation of the exemption in response to Petitioner’s public record request. Thus, while the intent of the City may be to eventually release the report, they have not yet disclosed any details of the report or actually waived the privilege at



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this time and section (E) has not been met. Due to every element of ORS 192.355(9)(b) not being met, the Draft Report does not meet the exception.

B. Public Interest

The petitioner makes a compelling public interest argument for the disclosure of the report. A public body's investigation into wrongdoing by an officer of the body can be of no greater interest to the public when that very officer's conduct is the basis for a recall election.

However, the attorney-client privilege cited by respondent is within ORS 192.355. ORS 192.355, as opposed to 192.345,⁶ does not include a general provision requiring disclosure if the public interest so requires. Instead, ORS 192.355 only requires disclosure in favor of the public interest if that language is included in a particular subsections. ORS 192.355(9)(a), the attorney-client privilege, does not contain any language allowing for the release of information if the public interest demands. As such, we cannot consider the public interest in our analysis.⁷ Instead, the legislature has limited any exception to the exemption through the provision of ORS 192.355(9)(b). As previously stated, all 5 elements of ORS 192.355(9)(b) have not been met in this case.

Ultimately, the end result of *Teamey*⁸ means that a public body may claim attorney-client privilege to exempt from disclosure an investigation of its leader by asking for an investigation as legal services, and controlling a public statement regarding the investigation, and we are bound by that decision. Until the City decides to disclose some or all of the facts or report, they have not waived their privilege.

ORDER

The material requested by petitioner are exempted from public records disclosure under ORS 192.355(9)(a). Accordingly, the petition is denied.

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District Attorney

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Deputy District Attorney

⁶ "The following public records are exempt from disclosure.... Unless the public interest requires disclosure in the particular instance".

⁷ Multnomah County District Attorney's Office in, *Petition of Wyatt*, MCDA PRO 15-21, similarly concluded that the legislature has not permitted us to consider the public interest in assessing whether attorney-client privilege exempts material from disclosure

⁸ We would note that Multnomah County District Attorney's Office has similarly reviewed a PSU investigation into misconduct by PSU President Shoureshi and concluded that such investigation was a rendering of legal services and exempted under public records law. *Petition of Jeff Manning*, MCDA PRO 19-19.