



CITY OF  
**PORTLAND, OREGON**  
OFFICE OF THE CITY ATTORNEY

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**CONFIDENTIAL SUBMISSION**

**VIA EMAIL ONLY**

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Adam W. Gibbs  
Multnomah County District Attorney's Office  
Multnomah County Central Courthouse  
1200 SW First Ave. Suite 5200  
Portland, OR 97204

Re: Petition of Jon Bial (OPB) appealing the denial of records from the City of Portland for a copy of the [ASCETA] review into workplace culture within the Civic Life office.  
Case No. 21-24

Dear Mr. Gibbs:

**I. INTRODUCTION**

Rebecca Ellis, a reporter from OPB, made a public records request for the final report of ASCETA, a consulting firm retained by the Portland City Attorney's Office to conduct an assessment of the Office of Community and Civic Life (Civic Life). The City denied the request on the basis that the final report is confidential under the Attorney-Client Privilege. The only issues for the DA to decide in the instant petition are: 1. Did the City Attorney's Office retain ASCETA to facilitate the rendition of legal services; or 2. Did Commissioner Mapps waive the attorney-client privilege? Neither argument has merit and the District Attorney's Office should deny the petition.

**II. THE CITY ATTORNEY'S OFFICE RETAINED ASCETA TO FACILITATE RENDITION OF PROFESSIONAL LEGAL SERVICES**

The Attorney-Client Privilege is codified in ORS 40.225(2):

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client.

The elements required to invoke the attorney-client privilege under Oregon law are:

1. The communications were made between an attorney and a client;
2. The communications were confidential; and
3. The communications were made for the purpose of facilitating the rendition of legal services.

*State ex rel Oregon Health Sciences University v. Haas*, 325 Or 492, 501 (1997). OPB concedes the existence of the first two elements of the privilege. Accordingly, the only remaining issue is whether the City Attorney's Office retained ASCETA to facilitate its ability to provide legal services.

A. Genesis of the ASCETA contract

It is necessary to provide background information on how it was that the City hired ASCETA for your office to understand that ASCETA was retained to facilitate legal services. Let me start by introducing myself and describing the work that I do. I am an attorney who specializes in public-sector labor and employment law. I do not advise bureaus on policy or business matters. My practice includes a wide variety of legal advice on a broad array of labor and employment issues, including, but not limited to: family medical leave, disability law, harassment, discrimination, retaliation, negative work environment, discipline, traditional labor law, etc. I routinely advise the Bureau of Human Resources (BHR) and bureau directors, managers and supervisors on the myriad of personnel issues that arise in the workplace. A paradigm is when a bureau has an employee who is either not performing the job well or who has engaged in some kind of misconduct. I help the bureau identify the nature of the rule violation(s), analyze whether the bureau has sufficient grounds to impose corrective action, strategize on various options to correct the behavior, advise on the risks and benefits of taking a particular approach, including exposing the City to liability, evaluate the likelihood of sustaining whatever course of action the bureau decides to take, and defend the City in the event the employee grieves or otherwise challenges the personnel action. Civic Life is one of the bureaus to which I provide labor and employment advice.<sup>1</sup>

In or around December 2019, the City Ombudsman received numerous complaints from current and former Civic Life employees. The complainants defied categorization. They included Caucasians and people of color, employees with long seniority as well as relatively new employees, line employees and supervisory employees. The nature of the complaints was broad and included:

- Poor leadership by the Civic Life Director, lack of regard for people;
- Problematic and unqualified managers/supervisors;

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<sup>1</sup> Another lawyer in our office advises Civic Life on operational issues.

- Lack of effective change management, constant turmoil;
- High rate of employee turnover, including employees voluntarily leaving Civic Life;
- Unethical hiring and contracting processes;
- Lack of internal communication and guidance;
- Bullying, harassing and retaliatory behaviors;
- Inability of HR investigations and grievances to resolve problems; and
- Inability or unwillingness of leadership to address problems.

At or around the same time of the complaints to the Ombudsman, [REDACTED]

[REDACTED]

and my office proceeded to retain ASCETA to conduct the assessment. The assessment was the necessary, foundational precursor for me to provide informed legal advice. I viewed the complaints as symptoms, but I needed to understand the underlying issues before I could identify potential options and evaluate the risk and potential liability associated with those strategies.

B. The ASCETA Final Report Facilitates the Rendition of Legal Advice

OPB contends that ASCETA’s report contains business or policy advice and is therefore outside of the attorney-client privilege. OPB’s argument is ill informed. It is based on a redacted copy of the ASCETA contract, which provides an incomplete understanding of the nature of the work ASCETA performed. OPB relies solely on the general “purpose” clause, while, understandably, completely ignoring the more specific “scope of work” in Exhibit A (because it was redacted).

Exhibit A reflects that the City retained ASCETA to undertake the following work:

[REDACTED]

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<sup>2</sup> [REDACTED]

[REDACTED]

[REDACTED]

Even the most cursory evaluation of the ASCETA final report undermines OPB's contention that it is a business or policy document.

[REDACTED]

The final report facilitates my ability to provide informed legal advice to the City.

In *Haas, supra*, the Oregon Supreme Court recognized that a communication is made for the purpose of facilitating the rendition of legal services if it makes it easier for an entity to make use of legal advice or services. 325 Or. at 502. In that case, an attorney for OHSU conducted an internal investigation regarding a complaint of sex discrimination. In addressing the question of whether the investigation facilitated the rendition of legal advice, the court determined that “[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.” *Id.* at 501–02.

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3 [REDACTED]

In this case, I was asked to provide legal advice about the myriad of employment problems at Civic Life. [REDACTED]

[REDACTED] My office retained ASCETA to facilitate the rendition of legal services. ASCETA produced a written report, which I am currently using to provide legal advice to BHR and to the current Commissioner-in-Charge of Civic Life. Under *Hass*, since the ASCETA report provides the basis for my rendition of legal services, it falls within the attorney-client privilege.

### **III. THE CITY DID NOT WAIVE THE ATTORNEY-CLIENT PRIVILEGE**

OPB contends that the City waived the attorney-client privilege when Commissioner Mapps referred to the ASCETA assessment during a City Council meeting. ORS 192.355(9)(b) governs waiver of attorney-client privilege under the public records law. OPB must establish the following five elements to prove a partial waiver of the factual information underlying the report:

Subject to ORS 192.360, paragraph (a) of this subsection does not apply to factual information compiled in a public record when:

(A) The basis for the claim of exemption is ORS 40.225;

(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.<sup>4</sup>

ORS 192.355(9)(b).

A. Waiver Requires a Significant Disclosure of the Substance of the Privileged Report

Several court of appeals decisions and Multnomah County District Attorney opinions illustrate the extent of the disclosure required to constitute a waiver. For example, in *Oregon Publishing Company v. Portland School District 1J*, 152 Or App 135 (1998), the school district had disclosed substantially all of the information from a privileged investigation report at an unemployment hearing. The court of appeals concluded that the district had waived the privilege.

The court of appeals reaffirmed the principle that the document itself does not have to be disclosed to waive the privilege in *Springfield School District #19 v. Guard Publishing Company*, 156 Or App 176 (1988). It is sufficient if the information contained in the privileged report is equivalent to the information disclosed. 156 Or App at 182. In that case, the school district had disclosed the discipline letters for two employees. Those letters described in detail the results of the district's investigation. The court held that release of the discipline letters waived the privilege with respect to the investigation report.

In Petition of Darrell Cornelius, January 10, 2002, the City of Fairview's outside lawyer hired an investigator to investigate a city employee. The city ultimately discharged the employee. The petitioner sought a copy of the investigation report, which the city denied on the basis of attorney-client privilege. The petitioner claimed that the city waived the privilege when the mayor and the city council submitted a letter to the editor of the Gresham Outlook. The letter revealed the factual findings of the investigation and the corrective actions taken by the City. Your office concluded that the letter to the editor waived the privilege because it included the investigator's factual findings.

Petition of The Oregonian (Manning), No. 19-19, reflects a turning point in how the District Attorney's Office analyzed the issue of waiver. In that case, Portland State University's (PSU) outside counsel retained an auditor and an investigator to investigate allegations against

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<sup>4</sup> OEC 511 explains when the lawyer-client privilege is waived and provides in part: "A person upon whom [OEC 503 to 514] confer a privilege against disclosure of the confidential matter or communication waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of **any significant part of the matter or communication**. This section does not apply if the disclosure is itself a privileged communication. Voluntary disclosure does not occur with the mere commencement of litigation or, in the case of a deposition taken for the purpose of perpetuating testimony, until the offering of the deposition as evidence." (Emphasis added.)

PSU's president. The attorney relied on both reports to advise PSU's Board. Shortly thereafter PSU announced the president's resignation. The public announcement thanked the president for his service and touted his two significant accomplishments during his relatively short tenure. The Oregonian requested, but was denied, copies of an auditor's report and an investigation report. PSU claimed both reports were privileged; the petitioner asserted that PSU had waived the privilege.

The District Attorney concluded that the court of appeal's decision in *Klamath County School District v. Teamey*, 207 Or App 250 (2006) controlled and that both reports, in their entirety, were privileged. In so doing, the District Attorney overruled *Petition of Frank, MCDA PRO, 05-19 (2005)*, in which the District Attorney had concluded that purely factual matter, as opposed to legal conclusion and analysis, contained in investigation reports was disclosable. Because *Petition of Frank* predated *Teamey* and the enactment of ORS 192.355(9)(b), your office concluded that *Petition of Frank* was no longer good authority and analyzed the waiver issue under ORS 192.355(9)(b). The District Attorney concluded that PSU's carefully worded public statement did not constitute a waiver.

Joint *Petition of The Oregonian (Schmidt) and the Willamette Week (Jacquiss)*, No. 13-10, in contrast, illustrates a disclosure that satisfies the statutory element of ORS 192.355(9)(b)(E). In that case, the petitioners sought the investigation report into allegations that the City's Chief Administrative Officer had diverted funds. The City withheld the investigation report claiming that it was privileged. The petitioners argued that the City waived the privilege because both the BHR Director and the Mayor had made public statements about the investigation.

Your office concluded that the Mayor's statements were highly generalized and hypothetical and, therefore did not constitute a waiver. But the BHR Director's statement that the "employee would not be disciplined because the investigation found no wrongdoing" did constitute a partial disclosure of the factual information from the investigation. The District Attorney concluded that, under ORS 192.355(9)(b), the public was entitled to a summary of unprivileged factual information compiled through the investigation.<sup>5</sup>

B. Commissioner Mapps' Statements Merely Referring to the ASCETA Assessment do not Constitute Waiver

OPB's waiver argument is based solely on two statements made by Commissioner Mingus Mapps during a City Council meeting. See article by Danny Peterson, [City Council votes yes to Civic Life supporting SW neighborhoods](#), KOIN, Mar. 10, 2021. The article was about the Portland City Council approving Commissioner Jo Ann Hardesty's proposal to have the Civic

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<sup>5</sup> It's worth noting that, even a partial disclosure of factual information, does not waive the privilege as to the entire report. It simply entitled the petitioners to obtain a summary of the factual information compiled in the investigation.

Life take over support duties for Southwest Portland Neighborhood Association. The author noted:

Commissioner Mingus Mapps, a former employee of the civic life bureau, was the lone “no” vote among City Council. He said he did not want to vote in favor of the ordinance until an independent audit of the civic life bureau was completed. ...

Mapps said an audit of civic life, conducted by ASCETA, is expected to reach City Council’s desk in a matter of a few days. He proposed tabling the decision before Council until after the audit comes out.

Neither of the above statements by Commissioner Mapps disclosed anything of substance about the content of the report, much less any significant part of the ASCETA report. For those reasons, OPB cannot establish that Commissioner Mapps waived the attorney-client privilege.<sup>6</sup>

#### **IV. THE ENTIRE REPORT IS PRIVILEGE**

Without any substantive discussion, OPB includes a throw-away line in the last paragraph of its petition that “[a]t a minimum, those parts of the report that are not subject to privilege must be disclosed.” The City assumes OPB is trying to invoke ORS 192.338, the provision of the public records law that requires a public employer to segregate exempt from non-exempt material and to make the latter public. OPB’s request is misguided.

Your office rejected a similar request in Petition of The Oregonian (Friedman), No. 19-35. In that case, the petitioner contended that the City of Portland was required to segregate non-exempt material from a legal memorandum that was clearly privileged. Your office concluded that the entire memorandum was privileged and exempt from disclosure. The decision explains that:

The rule of ORS 192.338 is that exempt and non-exempt material must be segregated and as much released as possible. The rule of ORS 40.225 is that communications related to the provision of legal services are privileged. The exemption applies to the entire communication to the extent that it fairly relates to the provision of

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<sup>6</sup> For the same reason, OPB’s argument that Civic Life’s request for \$70,000 in the budget adjustment process for follow up strategic planning does not constitute waiver. OPB’s public interest argument similarly is unavailing. If the requirements of the privilege are met, the attorney-client privilege applies and the exemption is not subject to a balancing test. *Teamey*, 207 Or App at 261 (“the statute is clear on its face: if the requirements of OEC 503 are satisfied, the attorney-client privilege applies”).

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legal services.

*See also* Manning Petition, *supra* (district attorney overruled previous opinion in Petition of Frank in which it held that facts discovered by the investigation (as opposed to legal analysis and recommendations) were not privileged). As we have already established above, the City procured the ASCETA final report to facilitate the rendition of legal services. I am relying on the report currently to provide legal advice to resolve the employment issues at Civic Life. Since OPB failed to establish waiver, the entire report is privileged and exempt from disclosure.

## V. CONCLUSION

My office procured the ASCETA final report to help me provide informed legal advice to BHR and Commissioner Hardesty. Commissioner Mapps did not waive the attorney-client privilege merely by referring to the timing of when the City expected to receive the final report. Because the ASCETA report is protected by the attorney-client privilege, the entire report is confidential and exempt from disclosure. For those and all the other reasons stated above, the District Attorney should dismiss OPB's petition.

Sincerely,



Lory J. Kraut  
Senior Deputy City Attorney

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Encls.