



MIKE SCHMIDT, District Attorney for Multnomah County

1200 SW First Ave, Suite 5200 • Portland, Oregon 97204 • 503 988-3162 • FAX 503 988-3643
www.mcda.us

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Jon Bial
Oregon Public Broadcasting
7140 S. Macadam Avenue
Portland, Oregon 97219

Rachel Monahan
Willamette Week
2220 N.W. Quimby Street
Portland, Oregon 97210

Allan Classen
NW Examiner
2825 N.W. Upshur Street, Suite C
Portland, Oregon 97210

Paul Leistner, Ph.D.
2350 S.E. 57th Avenue
Portland, Oregon 97215

Lory Kraut
Portland City Attorney's Office
1221 S.W. Fourth Avenue, Suite 430
Portland, Oregon 97204

Re: Petitions of Jon Bial, Rachel Monahan, Allan Classen, and Paul Leistner seeking access to the ASCETA report from the City of Portland

Dear Mr. Bial, Ms. Monahan, Mr. Classen, Dr. Leistner, and Ms. Kraut:

This office has received four separate public records appeals all seeking access to the same report from the City of Portland. These petitions, in the order received, were from Jon Bial, on behalf of Oregon Public Broadcasting (OPB); Rachel Monahan, on behalf of Willamette Week; Allan Classen, on behalf of the NW Examiner; and Paul Leistner, a former employee of the Office of Community & Civic Life (Civic Life).

In mid-March a workplace consultant, ASCETA, delivered to the City of Portland a report detailing the findings from its assessment of Civic Life as well as recommendations for improving the culture and function of that bureau. This report is the subject of the present appeals. The City claims the report is attorney-client privileged and not subject to release. Petitioners assert that the report is not privileged and, even if parts of it are, the City has waived that privilege.

All parties agree that the background that led the City to commission ASCETA to assess Civic Life is a critical component of assessing the applicability of privilege in this case. The City's ombudsman, Margie Sollinger, received an unusual number of complaints from current and former Civic Life employees. In December 2019, after looking into it herself, Ms. Solinger's office authored a memo in which she wrote:

the sheer breadth and scope [of complaints] would seem to create an obligation on the part of the City to address the workplace environment at Civic Life. Internal mechanisms and solutions involving the buy-in of the Director do not appear to be viable. We therefore recommend the City enter into a contract with an experienced third-party workplace consultant to conduct an environmental scan, evaluate the propriety of hires and procurements, engage in neutral fact-finding, provide management coaching, etc. The consultant should also be empowered to make recommendations to the City about any actions it needs to take to restore Civic Life to a safe and productive work environment.

The City tells us that around this same time the Bureau of Human Resources (BHR) sought the advice of the city attorney on responding to the mass of complaints coming from Civic Life. It is unclear if this was independent of the Ombudsman's efforts, or responsive to her concerns. The City's lawyers indicated that they would need a factual investigation to assess the situation at Civic Life in order to properly advise their client.

The City Attorney's Office then contracted with ASCETA, a workplace consultancy, to do this work. As this contract was being put in place, the ombudsman emailed all the complainants who had come to her and informed them that contrary to her hopes, the proposed investigation was no longer "employee centered" and instead "appears to be intended as a tool to help management achieve the organization's goals." Email from Ms. Solinger, Aug. 31, 2020.

The contract with ASCETA was finalized October 7, 2020. A redacted version of that contract has been publicly released, and what follows is taken from that version. The contract specifies that the City "seeks an independent and holistic assessment of the bureau's operations to identify barriers to success, evaluate bureau culture, and review employment practices." Further, "after completing the assessment, the consultant will advise on strategies, implementation and process to ensure transformative growth, while maintaining a healthy, respectful and productive work environment."

ASCETA proceeded with a first round of employee interviews and, on January 6, 2021, provided Civic Life employees with brief summary of its findings to date.

In mid-March ASCETA delivered its final report to the City. The report, consistent with the scope of work, contains two substantive sections. The first, "Findings" mostly presents quotes from the employee interviews. The second, "Recommendations" provides the advice the City had requested.

Petitioners all made public records requests for the report. The City denied each request, citing the attorney-client privilege. Petitioners each then asked this office to order the City to release the report.

Because we do not find the City has established that the ASCETA report is privileged, we grant the petitions and order the report released.

DISCUSSION

A. Attorney-client privilege – ORS 192.355(9), ORS 40.225

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

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

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

i. Legal standard – ORS 40.225

Oregon's version of the attorney-client privilege is broad in its reach, yet it is not without limit. Establishing the existence of privilege requires more than the presence of a lawyer in the chain of procurement, or on the cc line of an email, without reference to the nature or contents of the record. *Petition of Barnes*, MCDA PRO 17-48 (2017). In *Barnes*, we wrote:

[N]ot all communications involving a lawyer are privileged. The privilege only attaches to those that are “made for the purpose of facilitating the rendition of professional legal services.” Communications of little legal significance cannot be rendered confidential merely by looping in a lawyer. See, *United States Postal Service v. Phelps Dodge Refining Corp.*, 852 F. Supp. 156, 163-64 (E.D.N.Y. 1994) (noting that “[a] corporation cannot be permitted to insulate its files from discovery simply by sending a ‘cc’ to in-house counsel”). The more difficult question, and the key to the present case, is determining when a communication with a lawyer is made as a part of providing legal services, and when it is not.

We went on to note that Oregon courts have not laid down a definitive test for what constitutes the “provision of legal services” under ORS 40.225. In *Barnes*, which involved the confidentiality of emails between an array of individuals including a public body's lawyer about how to respond to a brewing crisis, we settled on the standard articulated by the Ninth Circuit: was the lawyer consulted “with or without reference to his knowledge and discretion in the law to give the advice.” *United States v. Chen*, 99 F.3d 1495 (1996).

We have continued to apply that standard to communications involving legal staff. See, *Petition of Kessler*, MCDA PRO MCDA PRO 20-45 (2020) (emails to city paralegal not privileged where client was seeking technical advice on a computer system and not legal advice). This formulation is less useful in a situation such as this where an assessment is commissioned based on various concerns raised by various parties. In the absence of specific guidance from Oregon courts, we turn to the “primary purpose” formulation alternatively discussed in *Barnes*. That is, was the primary purpose of the communication/investigation/report/etc. to facilitate the provision of legal services or was it in furtherance of a different goal?

ii. Application to Recommendations

Broadly, the City asked ASCETA to conduct fact finding and give advice based on that fact finding. With regard to the “Recommendations” section of the report, we have carefully reviewed it and it contains no legal analysis, no legal recommendations, no discussion of how to limit liability, and does not reference any legal principles.

The recommendations section provides management, personnel, and public relations advice. Apart from including a label that the report is “attorney-client privileged” there is nothing in the report itself that would lead any reasonable reviewer to believe it related to the facilitation of professional legal services.

While it is certainly true that implementation of the ASCETA recommendations could raise any number of potential legal issues, this is true of almost any action taken by the City in any of its bureaus. Any legal advice from the city’s lawyers to the commissioner-in-charge about the legal merits or potential legal pitfalls of implementing such recommendations would be quintessential privileged material; so too any questions from the commissioner-in-charge to counsel on any of those topics. That, however, is not what is presented to us. ASCETA was asked to advise on “strategies, implementation and process to ensure transformative growth, while maintaining a healthy, respectful and productive work environment.” It did that. There is no basis under the public records law to withhold those recommendations from public inspection.

iii. Application to Findings

The City argues that this case is controlled by *Klamath County School District v. Teamey*, 207 Or App 250 (2006), in which the Court of Appeals concluded that a factual investigation of wrong-doing by a public body performed by the agent of a lawyer for the purpose of allowing the lawyer to provide legal advice to the public body is privileged and exempt from disclosure.

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. *Id.* at 254. 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.

Counsel for OPB argues that *Teamey* is distinguishable because ASCETA was contracted to provide business advice, not to facilitate legal advice. The City argues that, although the redacted scope of work does not readily convey that the purpose of the contract was to facilitate legal advice, the redacted portion of the document clears up that point. Having reviewed the redacted portion, we do not believe it materially alters the nature of what ASCETA believed it was doing for the City.

This project was contracted as a holistic evaluation to improve Civic Life. That is what the scope of work called for, that is what ASCETA told Civic Life employees it was doing, and that is what the final report looks like. In the various facets of this office's work, we have reviewed many legal investigator's reports in contexts ranging from criminal cases, to regulatory actions, to civil litigation, to employee discipline. The findings section of the ASCETA report is not comparable to other reports we have seen. It does not present facts in a way that could be used to verify or validate any particular act or action. Indeed, the identifiers that would be needed to assess particular conduct are often expressly redacted. Rather, unattributed excerpts from interviews are interspersed with motivational quotes and very high-level summaries in a way that illustrates the mood and concerns at Civic Life in support of the recommendations that follow.

OPB points to a January 6, 2021 email from Sophia Tzeng, ASCETA's principal, to Civic Life employees as evidence of waiver of privilege. In this email Ms. Tzeng sets out six paragraphs summarizing what she's heard so far from employees. She concludes her email by writing "[i]n late January to February, we will conclude our work with collective, collaborative approaches to build solutions and generate recommendations for a more satisfying work environment for all."

We see this email less as evidence of waiver than probative of ASCETA's understanding of its assignment from the City.¹ A legal investigator, contracted to conduct a confidential fact finding mission, would not broadcast a progress summary of the results of her investigation to the subjects of her investigation. However, such an encouraging status-update appears completely consistent with a management and culture audit.

When faced with "apparent internal dysfunction" at Civic Life, in the words of Ms. Solinger, the City sought outside help to fix it. The City has not met its burden of showing that the primary purpose, or even a substantial purpose, of this document is the facilitation of legal services. All indicators show it to be business, management, personnel, and public relations

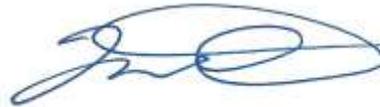
¹ As the City rightly observes, even assuming this email constituted a "substantial disclosure," an unauthorized release by an anonymous employee cannot be said to constitute an intentional disclosure by the holder of the privilege as required by OEC 511. While, contrary to the City's argument, we have held that waiver can occur by someone below the rank of commissioner, that does not extend much, if at all, past bureau director. *Petition of Schmidt for The Oregonian and Jaquiss for Willamette Week*, MCDA PRO 13-10 (2013) (finding statement by director of Bureau of Human Resources supported waiver.)

advice intended to guide the transformation of a struggling office. Such advice, and the fact finding underlying it, is not exempt from disclosure regardless of what label is placed on it.

ORDER

Accordingly, the petition is granted. The City is ordered to promptly release a copy of the ASCETA report to petitioners. This release is subject to the payment of fees, if any, as authorized by ORS 192.324(4).

Very truly yours,



MIKE SCHMIDT
District Attorney
Multnomah County, Oregon

Notice to Public Agency

Pursuant to ORS 192.411(2), 192.415, and 192.431(3) your agency may become liable to pay petitioner's attorney's 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 seven days formal notice of your intent to initiate court action to contest this order, or fail to file such court action within seven additional days thereafter.

21-24, 21-29, 21-31, 21-33