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Gentlemen:

Pursuant to ORS 192.470, Mike Brye (Petitioner) filed an appeal with me requesting that I review the City of Bend's denial of his recent public records requests.

Pursuant to ORS 192.470(2) I immediately contacted the City of Bend (Bend) and asked them to:

[T]ransmit the public record disclosure of which is sought, or a copy, to the [District Attorney], together with a statement of its reasons for believing that the public records should not be disclosed.

On May 24, 2016 I received Bend's response which fully complied with my request. I thus began my review of this matter. This letter constitutes my Order in this case.

FINDINGS

Based on my review of the documents in question, and my communication with the parties, I make the following findings of fact:

1. On December 24, 2015, pursuant to Oregon's public records law, Petitioner requested from Bend the following records:
 - All emails sent to and from Jim Wodrich during years 2013, 2014, and 2015.

2. On March 18, 2016, Bend made many emails available to Petitioner and also withheld 149. The basis for Bend withholding these emails was Oregon Revised Statute 192.502(9)(a) which incorporates Oregon's attorney/client privilege law (ORS 40.225) into Oregon's public records law.
3. Petitioner filed an appeal with me requesting a review of two issues:
 - o Did Bend lawfully withhold the 149 emails?
 - o Is Bend unlawfully withholding responsive emails other than the 149 emails they claim to be covered by attorney/client privilege?
4. Subsequent to the filing of this appeal, Bend indicated that in addition to the 149 emails withheld based on a claim of attorney/client privilege, they also withhold numerous other responsive emails. Bend states these emails were inadvertently withheld because Bend staff ran a records search for Jim Wodrich's email address of jwodrich@bendoregon.gov but did not run a search for other email addresses used by Wodrich (Bend's attorney was unaware Wodrich was using other email addresses). Bend says a preliminary search of these other emails reveals approximately 17,000 responsive emails.

I find Bend's withholding of these additional emails was inadvertent. Bend is communicating with Petitioner regarding how to process his request about these newly discovered emails.

LEGAL ANALYSIS

Burden of Persuasion:

Bend has the burden of persuasion to convince me that their decision to deny the Petitioner's request was proper. *ORS 192.450(1)*.

Standard of Proof:

In order for Bend to carry their burden of persuasion I must affirmatively conclude the requested records are exempt. If I do not so conclude, I must order them to be disclosed. *Attorney General's Public Records and Meetings Manual 2014, section I.G.1.b. (citing Oregon Attorney General Public Records Order, March 4, 2008, Brent Walth)*.

Application of Law:

There are two issues to address in this appeal. First, does Oregon's public records law authorize the City of Bend to withhold the 149 emails they withheld? And, second, did Bend withhold emails other than these 149, and if they did, do they have a legal basis to do so? I'll address the 149 emails first.

1. Attorney/Client Exemption

Bend argues they lawfully declined to provide Petitioner with the 149 emails in question pursuant to the attorney/client exemption to Oregon's public records law. This exemption involves a review of two statutes: Oregon's public records law section that incorporates Oregon's attorney/client privilege and Oregon's attorney/client privilege itself.

The relevant section of Oregon's public records law states:

The following public records are exempt from disclosure under ORS 192.410 to 192.505:

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

ORS 192.502(9)(a)

On its face this exemption to Oregon's public records law states that matters that are privileged under Oregon law are exempt from disclosure under the public records law. The relevant portion of Oregon's attorney/client privilege law states:

(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:

- (a) Between the client or the client's representative and the client's lawyer or a representative of the lawyer;
- (b) Between the client's lawyer and the lawyer's representative;
- (c) By the client or the client's lawyer to a lawyer representing another in a matter of common interest;
- (d) Between representatives of the client or between the client and a representative of the client; or
- (e) Between lawyers representing the client.

ORS 40.225(2)

I reviewed each of the 149 emails Bend claims to be exempt from discovery based on the attorney/client privilege. I find that 144 are covered by the privilege and thus were properly withheld pursuant to Oregon's public records exemption for privileged communications (ORS 192.502(9)(a)).

Since this particular exemption to Oregon's public records law is a "non-conditional" exemption no further analysis is required for these emails.¹

Additionally, five emails claimed by Bend to be covered by the attorney/client privilege do not fall under the ambit of the protection offered by the attorney/client privilege and thus must be disclosed. Bend has the burden of persuasion to convince me that their decisions to deny Petitioner's request is authorized by Oregon law. In order to carry this burden they must cause me to affirmatively conclude the requested records are exempt. In regard to these five emails, Bend failed to carry their burden, therefore, I order Bend to provide them to Petitioner.

The five emails were not between Bend and Bend's attorney. It appears these emails were inadvertently included in the batch of emails Bend claims to be covered by the attorney/client privilege. These emails are:

- January 15, 2014, 4:42 PM, From: Tom Hickmann, To: Brady Fuller, CC: Jim Wodrich
- January 17, 2014, 10:17 AM, From: Tom Hickmann, To: Jim Wodrich, CC: Brady Fuller, Craig Massie, Peggy Spencer
- May 19, 2014, 9:59 AM, From Teresa Ristoff, To: Jim Wodrich
- May 19, 2014, 10:08 AM, From: Jim Wodrich, To: Teresa Ristoff
- May 19, 2014, 7:35 AM, From: Teresa Ristoff, To: Jim Wodrich

In regard to the 144 emails that are protected from disclosure by the attorney/client privilege, within these emails are some email "threads" not covered by the attorney/client privilege. I inquired of Bend whether these emails within emails had been provided to the Petitioner. Bend replied, indicating that these emails within emails fall into three categories:

- Emails that are not covered by any exemption to Oregon's public records law and have not been provided to the Petitioner.
- Emails that Bend is unable to locate.
- One email that Bend claims is covered by the litigation exemption to Oregon's public records law.

I'll address each of these three categories separately.

¹ Certain Oregon public records law exemptions are conditional, meaning, if the exemption applies an analysis has to be conducted to determine if, in spite of the existence of the exemption, the documents should nonetheless be disclosed if disclosure is in the public interest. Such an analysis is not permitted for non-conditional exemption.

a. Emails Not Covered by a Public Records Exemption

The emails within the attorney/client privilege emails that are not covered by any exemption to Oregon's public records law, and which have not been provided to the Petitioner, should have been provided to Petitioner and Bend conceded this to me. Bend stated they would provide these emails to Petitioner and I order them to do so. These emails are:

- Tuesday, June 3, 2014 @ 11:53 AM
To: Jim Wodrich
From: Jonathan.McGrew@CH2M.com
Cc: Craig.Massie@CH2M.com
Subject: FW: Schedule Submittal
- Tuesday, June 3, 2014 @ 2:38 PM
To: Jim Wodrich
From: Jonathan.McGrew@CH2M.com
Subject: FW: Time Impacts related to Change Orders
- Monday, May 19, 2014 @ 11:38 AM
To: Jim Wodrich
From: Jim Redfield
Subject: CO Response #6 – Apollo Response to Change Order #2
- Tuesday, February 26, 2013 @ 4:20
To: Jim Wodrich
From: Brady Fuller
Cc: narnis@ci.bend.or.us, Dave.Simmons@CH2M.com, PSpencer@ci.bend.or.us,
Debby.Sheldon@CH2M.com, 240191@sites.CH2M.com
Subject: Final Ward Legal Descriptions and Exhibits Signed
- Tuesday, February 26, 2013 @ 12:53 PM
To: Brady Fuller
From: Jim Wodrich
Subject: FW Updated legal description and exhibits – FW: Ward Property Exchange
- Monday February 25, 20123 @ 10:42 AM
To: Jim Wodrich
From: Brady Fuller
Subject: Updated Legal Descriptions and Exhibits – FW Ward Property Exchange
- Thursday, February 21, 2013, 11:37 AM
To: Brady Fuller
From: Jim Wodrich
Subject: FW: Ward Property Exchange

- The attachment to the email from the June 4, 2014 10:49 AM email from Jim Wodrich to John Parness

b. Emails that Bend is Unable to Locate

In regard to the emails within attorney/client privilege emails that Bend is unable to locate, Bend makes no argument that any of these emails are exempt from disclosure by any provision of Oregon's public records law. The emails in question are:

- Thursday, May 15, 2014 @ 4:00 PM
To: Jim Wodrich
From: Jonathan.McGrew@CH2M.com
Cc: Craig.Massie@CH2M.com; Brady.Fuller@CH2M.com
Subject: Emailing: Cover ltr CO 03, Item costs tall-est, CO No 3
- Tuesday, April 29, 2014 @ 3:38 PM
To: Jim Wodrich
From: Brady.Fuller@CH2M.com
Cc: Craig.Massie@Ch2M.com; Jeff England
Subject: Bend WRF – Owner Claim – review
- Tuesday, February 26, 2013 @ 12:53 PM
To: Brady Fuller
From: Jim Wodrich
Subject: FW Updated legal description and exhibits – FW: Ward Property Exchange
- Monday February 25, 2012 @ 10:42 AM
To: Jim Wodrich
From: Brady Fuller
Subject: Updated Legal Descriptions and Exhibits – FW Ward Property Exchange
- Thursday, February 21, 2013, 11:37 AM
To: Brady Fuller
From: Jim Wodrich
Subject: FW: Ward Property Exchange

Bend has the burden of persuasion to convince me that their decision to deny Petitioner's request is authorized by Oregon law. In order to carry this burden they must cause me to affirmatively conclude the requested records are exempt. Bend fails to carry their burden, and to their credit, they do not attempt to. These emails should have been provided and were not provided. I find Bend's failure to disclose these emails was not intentional, but the fact remains that the emails were not disclosed.

The District Attorney does not have the legal authority to assess damages in a public records appeal case. Therefore, if Petitioner desires a legal remedy and/or the award of damages for Bend's failure to provide these records, he must make such a request to the Deschutes County Circuit Court.

c. Litigation Exemption

Bend argues that one email within the attorney/client privilege emails is exempt from production based on the litigation exemption to Oregon's public records law. The email in question was sent on March 5, 2014 at 4:54 PM from Chris Anderson to Jim Wodrich (with an attachment).

The litigation exemption states:

The following public records are exempt from disclosure under ORS 192.410 to 192.505 unless the public interest requires disclosure in the particular instance:

Records of a public body pertaining to litigation to which the public body is a party if the complaint has been filed, or if the complaint has not been filed, if the public body shows that such litigation is reasonably likely to occur. This exemption does not apply to litigation which has been concluded, and nothing in this subsection shall limit any right or opportunity granted by discovery or deposition statutes to a party to litigation or potential litigation.

ORS 192.501(1)

I reviewed the email and attachment in question and find that they both fall within the ambit of the litigation exemption.

“The Court of Appeals has construed the litigation exemption very narrowly, in order ‘to further the statutory policy that government records be open to the public.’ The court held that the litigation exemption applies only to records ‘compiled or acquired by the public body for use in ongoing litigation or * * * litigation [that] is reasonably likely to occur.’” *Attorney General's Public Records and Meetings Manual 2014, section I.E.4.d.(1). (Citing Lane County School Dist. V. Parks, 55 Or App 416, 419-20 (1981)).*

Bend has the burden of persuasion to convince me that their decision to deny Petitioner's request is authorized by Oregon law. In order to carry this burden they must cause me to affirmatively conclude the requested records are exempt. Bend met their burden. The records in question were compiled by Bend for use in anticipated litigation that was likely to occur.

When the elements of the litigation exemption are satisfied in a particular case the records must nonetheless be disclosed if “the public interest requires disclosure in the particular instance.” *ORS 192.501* Bend has the burden of persuasion to convince me that the public interest does not require disclosure in this particular instance. They carried their burden. While the subject matter writ large of

the documents in question is in the public interest, the documents themselves are not. The documents address the particulars of a contract between Bend, and an outside attorney and consultant they retained for the anticipated litigation. Details of the dispute in question are not addressed.

2. “Other Emails”

Petitioner asks me to review whether, in addition to the 149 emails withheld based on a claim of attorney/client privilege, Bend unlawfully withheld other emails. As stated in my findings, Bend agrees they did withhold other emails and I found that this action was inadvertent. Bend and the Petitioner are discussing how to proceed in regard to these other emails.

Therefore, Petitioner’s claim is not “ripe.” In other words, Bend has not denied Petitioner’s request to provide him with these emails, therefore, there is no denial to appeal. Bend will review the other emails in question and will no doubt provide some and withhold others based on various claims under the public records law.

If Petitioner agrees with Bend’s handling of his public records request in regard to these other emails, that will be the end of the matter. If Petitioner disagrees with how Bend responds to his request for these other emails he has the right to again file an appeal with my office.

3. Conclusion:

Bend properly withheld 144 emails pursuant to ORS 192.502(9) which incorporates Oregon’s attorney/client privilege into a non-conditional exemption to Oregon’s public records law.

Bend improperly withheld five emails, therefore I grant Petitioner’s appeal in regard to these emails and Order Bend to disclose these emails (listed above in section 1).

Bend conceded they failed to provide Petitioner with seven emails and/or documents that were responsive to his public records request and which were not covered by an exemption to the public records law. Bend committed to providing Petitioner with these records and I order them to do so. These records are listed above in section 1(a).

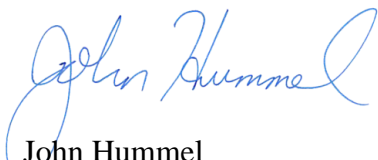
Bend conceded they failed to provide Petitioner with five emails that were responsive to his request, but indicates they are unable to locate the documents. Bend is ordered to disclose these documents, but the District Attorney is without legal authority to issue sanctions or remedial measures in the event Bend is unable to comply.

Bend properly withheld the March 5, 2014, 4:54 PM email from Chris Anderson to Jim Wodrich (with attachment) pursuant to the litigation exemption to Oregon’s public records law and the public interest exception to the litigation exemption does not require production in this case.

Petitioner’s claim regarding the “other” emails is not ripe, therefore, I deny his appeal but grant him leave to resubmit his appeal at a later date.

In regard to the records I ordered Bend to produce, Bend must either provide them to Petitioner no later than June 3, 2016 (see: ORS 192.450(2) and 174.120(1)) or, no later than June 3, 2016, “issue a notice of their intention to institute proceedings for injunctive or declaratory relief in the Circuit Court for [Deschutes] County.” ORS 192.450(2) and 192.460(1)(b)

Sincerely,



John Hummel
District Attorney