



## John Hummel District Attorney

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Gentlemen:

Pursuant to ORS 192.470, Camp Creek Electric (Camp Creek) filed an appeal with me requesting that I review the City of Bend's (Bend) denial of one of their 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 September 23, 2016 I received Bend's response which included their legal argument in this matter. but which did not include the public records sought by Camp Creek.

In a subsequent correspondence with Bend I consented, pursuant to ORS 192.470(2), to Bend not providing me the public records sought by Camp Creek that they have not yet reviewed<sup>1</sup>, however, I informed Bend I wanted to review the records that Bend reviewed and withheld based on their assertion of the attorney/client privilege. On September 27, 2016 I received these records, which comprised 40 pages.

In the cover letter accompanying the transmittal of the purported attorney/client documents, Bend asserted that the documents: "are covered by the attorney-client privilege, work product privilege, or

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<sup>1</sup> Because Bend's defense in this matter is that they have not denied Camp Creek's request, and considering the volume of document pages (approximately 3,000), production of the documents would be burdensome and unhelpful to my decision.

both. They reflect communications between City employees and attorneys in the course of obtaining legal advice, and some of the documents reflect tasks and strategies undertaken at the direction of attorneys with potential litigation in mind. I believe most of these handwritten notes were taken by Jeff England, the Assistant Director of the City's Engineering and Infrastructure Planning Department, the department responsible for most of the WRF project management."

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. In April of 2016, Camp Creek submitted a public records request to Bend titled: "Records Request 12 – Project Documents Not in EADOC."
2. This request included a request for agendas, minutes, notes and recommendations to the Bend City Council by the City of Bend WRF Risk Management Team.
3. In July of 2016, Bend agreed to provide Camp Creek with agendas, minutes, notes and recommendations to the Bend City Council by the City of Bend WRF Risk Management Team, subject to what they describe as "the application of any appropriate exemptions, such as for attorney-client privilege or work product."
4. Bend asserts that they do not anticipate denying Camp Creek's public records request for the documents listed in point 3, *supra*.
5. Approximately 3,000 pages of documents are responsive to Camp Creek's records request.
6. Bend has provided some of the documents listed in point 3, *supra*, (most recently on September 7, 2016) and is continuing their review of the remaining documents to ascertain whether any public record exemptions apply to them.
7. Bend has declined to provide some of the documents listed in point 3, *supra*, based on their assertion of the attorney/client, litigation, and work product exemptions.
8. Bend has not provided Camp Creek an estimate of when Bend will complete their processing of this public records request.
9. Bend has not provided Camp Creek an estimate of the cost Bend will charge Camp Creek to process their public records request, instead, Bend charges Camp Creek for work as it is completed and Camp Creek to date has paid these costs.

10. Camp Creek has offered to pay “overtime or premium rates” to expedite Bend’s processing of their request. Bend has rejected this offer.
11. Camp Creek filed an appeal with me seeking an Order that: “Compel[s] the City of Bend to provide all WRF Risk Management Team Meeting agenda, notes, minutes and recommendations to Bend City Council.”

## LEGAL ANALYSIS

### **Burden of Persuasion:**

Bend has the burden of persuasion to convince me that their decision in this matter was proper. *ORS 192.450(1)*.

### **Standard of Proof:**

In order for Bend to carry their burden of persuasion I must affirmatively conclude that the records request was not denied, or, that the request was denied but the requested records were 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 three issues to address in this appeal:

- Is Camp Creek’s claim that the WRF Risk Management Team constitutes a public body relevant to this appeal?
- Was Bend’s assertion of the attorney/client, work product, and/or litigation exemptions supported by the law?
- Has Bend denied Camp Creek’s records request for the documents they have not yet reviewed?

#### **1. Is the Question of Whether the WRF Risk Management Team is a Public Body Relevant to this Appeal?**

The short answer is “no.”

Camp Creek argues that the WRF Risk Management Team is a public body, thus meetings of the group constitute “public meetings,” therefore, Bend is unable to lawfully claim any public record exemptions (such as attorney/client privilege) as a basis for withholding documents reviewed by the group.

In other words, Camp Creek says Bend violated Oregon’s public meetings laws by conducting meetings of a public body in secret. If the public body had held their meetings in public, the argument goes, then

the public would have seen the documents of the body during the public meetings. If the body had legal documents that they did not want the public to see, the public body would have called an executive session pursuant to Oregon's public meetings laws. Since no executive session was called during these meetings, and since these meetings should have been held in public, the documents discussed at these meetings are public and not eligible for protection from disclosure via the application of the attorney/client exemption.

I will not address Camp Creek's Public Meetings Law argument because claims that a public body has violated Oregon's Public Meetings Law must be addressed through the exclusive remedy contained in that law. ORS 192.680(6). A District Attorney sitting in review of a public records appeal does not possess jurisdiction to review alleged violations of Oregon's Public Meetings Law.

## **2. Attorney/Client Exemption; Work Product; Litigation Exemptions**

Bend argues they lawfully declined to provide Camp Creek with 40 documents based on the attorney/client, work product, and/or litigation exemptions. I'll address each exemption individually.

### **a. Attorney/Client Exemption**

The attorney/client 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 40 pages of documents Bend claims to be exempt from discovery based on the attorney/client privilege. I find that five 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.<sup>2</sup>

These five pages of documents were letters from either Bend employees to Bend's legal counsel, or from Bend's legal counsel to Bend. The letters contained confidential communications made for the purpose of facilitating the rendition of professional legal services to Bend. These documents clearly fall within the protection of Oregon's attorney/client privilege.

The remaining 35 pages of documents claimed by Bend to be covered by the attorney/client privilege do not fall under the ambit of the privilege. These pages are handwritten notes made by Bend staff members regarding anticipated litigation, and typed task lists regarding anticipated litigation, but do not constitute communication between client and attorney, thus do not fall within the ambit of Oregon's attorney/client privilege.

I will now review whether these 35 pages of documents were properly withheld pursuant to other public record exemptions

#### **b. Litigation Exemption**

In addition to the attorney/client exemption, Bend argues that the 40 pages of documents they reviewed and withheld from Camp Creek were exempted from disclosure due to the existence of the litigation and work product exemption.

The litigation exemption to Oregon's public records law 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

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<sup>2</sup> 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.

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)

Bend does not assert there is current litigation pending that is related to the records sought by Camp Creek. Their basis for asserting the litigation exemption is that litigation is “reasonably likely to occur.”

Bend has the burden of persuasion to convince me that their decision to deny Camp Creek’s request pursuant to the litigation exemption was authorized by Oregon law. In order to carry this burden they must cause me to affirmatively conclude the requested records are exempt. The first step in carrying their burden is to convince me that litigation is reasonably likely to occur. Bend carries their burden: The parties have retained counsel; experts have been consulted; the respective adverse positions of the parties are well know; communication between the parties and their legal counsels about the areas of the dispute are on-going and extensive; the potential damages are over a million dollars; and the parties are currently engaged in formal mediation proceedings.

But this is not the end of the analysis. In order for the litigation exemption to apply, I must be convinced the records in question were compiled by Bend for use in the anticipated litigation.

The Court of Appeals has construed this 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.” In the court’s view the exemption does not apply to records collected in the ordinary course of business, even if those records subsequently become relevant to litigation. *Attorney General's Public Records and Meetings Manual 2014, section I.E.4.d.(1) (citing Lane County School District v. Parks, 55 Or App 416, 419-20, 637 P2d 1383 (1981))*.

All 35 pages of the documents I deemed not protected from disclosure by Oregon’s attorney/client exemption were clearly compiled or acquired by Bend for use in the anticipated litigation. Because of this, Bend has satisfied their burden of persuasion to prove that they 35 pages of documents are exempt from disclosure based on the litigation exemption.

However, this is still not the end of the analysis. The litigation exemption is a conditional exemption, thus, another level of review is required. For conditional exemptions 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.

What does “Public Interest” mean in the context of Oregon’s Public Records Law?

The Public Records Law does not define the term. However, the Oregon Court of Appeals has stated that ‘the Public Records Law

expresses the legislature's view that members of the public are entitled to information that will facilitate their understanding of how public business is conducted.' Similarly, the Court of Appeals previously characterized the public interest in disclosure as 'the right of the citizens to monitor what elected and appointed officials are doing on the job.' This might include, for example, the right to inspect records of alleged misuse and theft of public property by public employees or to inspect records that bear directly on the integrity of a high ranking police officer to enforce the law evenhandedly.

*Attorney General's Public Records and Meetings Manual 2014, section I.E.3 p.30 (internal citations omitted).*

Bend satisfies their burden of persuasion to convince me that the public interest does not require disclosure of these records. The documents in questions are complex and technical and do not involve allegations of theft, ethical violations, or other types of government integrity allegations. The documents were prepared to aid Bend in anticipated litigation and if this matter goes to trial, the information in the documents will be aired in a public courtroom. If the matter does not proceed to trial the documents will be available to the public at the conclusion of the case.

### **c. Work Product Exemption**

Because I find Bend lawfully withheld the 40 pages of documents, an analysis of the work product exemption is unnecessary to my final ruling in this matter. Because of this, and because of the time constraints in public record appeal cases, I will dispense with an analysis of the applicability of the work product exemption.

### **3. Did Bend Deny Camp Creek's Records Request?**

With the exception of the documents Bend declined to provide to Camp Creek based on Bend's assertion of the attorney/client, work product, and litigation privileges, Bend argues they have not denied Camp Creek's records request. Bend argues that they are complying with Camp Creek's request by providing Camp Creek with responsive documents on a rolling basis as soon as Bend's legal counsel completes his review of documents and that they intend to continue doing so as record reviews are completed. Bend's position is that the documents are voluminous, proper legal vetting takes time, and the amount of time that they are taking to complete their review is reasonable in light of the volume and complexity of the documents.

In support of this argument Bend points out that they provided Camp Creek with responsive documents as recently as September 7, 2016. Bend also argues in support of their position that they agree that the documents sought by Camp Creek are public records (with the caveat that they reserve the right to assert attorney client, work product, and other applicable exemptions that might be revealed during their legal review of each of the responsive documents).

**a. Actual Denial?**

A District Attorney does not have jurisdiction to rule on a public records appeal until a public body has denied a request for disclosure. *Oregon Attorney General Public Records Order, August 13, 1987, Bennett Hall and Chris Bristol, Attorney General's Public Records and Meetings Manual 2014, Appendix F p.9.*

Bend asserts they have not denied Camp Creek's request, that they consider the documents requested by Camp Creek to be public records, and that their review of the documents in question is ongoing and as they complete their review of documents they either provide them to Camp Creek or they withhold them based on the existence of an exemption to Oregon's public records law.

Because of Bend's explicit statement that they have not denied Camp Creek's request, and because they continue to process Camp Creek's request and they have provided responsive documents to Camp Creek during their review, I find Bend has not explicitly denied Camp Creek's public records request.

**b. Constructive Denial?**

A determination that Bend has not explicitly denied Camp Creek's request is not be the end of the analysis. At some point, in spite of the lack of an explicit denial by a public body, and even with a consideration of the fact the public body continues to work on processing a request, the failure to complete processing of the request can constitute a constructive denial. *(For the proposition that public records request denials can be actual or constructive, See: Oregon Attorney General's Public Records Order, May 9, 1989, Paul R. Hribernick, Attorney General's Public Records and Meetings Manual 2014, Appendix F p.19.)*

Has Bend constructively denied Camp Creek's request?

The relevant law is ORS 192.430(1) which says that custodians of public records: "shall furnish proper and reasonable opportunities for inspection and examination."

Is the amount of time that has transpired since Camp Creek requested the records, reasonable? In assessing this it is appropriate to consider the time Bend requires to conduct a legal review of the responsive documents. ("The agency's reasonable time to respond to the request also includes the time needed to consult with legal counsel about the disclosure of records that appear to be exempt in whole or in part." *Oregon Attorney General Public Records Order, April 3, 1995, Lars Larson, Attorney General's Public Records and Meetings Manual 2014, Appendix F p.30.*)

But the need to conduct a legal review of responsive documents cannot serve as a carte blanche grant to Bend to provide the documents at a time of their choosing. The documents must be provided in a "reasonable" amount of time, considering the amount of pages and the need to conduct a legal review.

Camp Creek submitted their request to Bend in April of 2016, five months ago. Approximately 3,000 pages of documents are responsive to Camp Creek's request. Bend has not provided an estimate as to



when they will complete the processing of this request. Camp Creek has offered to pay enhanced fees to Bend to assist them in the processing of the request. Bend has rejected this offer.

There are obviously countless ways Bend could have processed Camp Creeks records request. Here are but three possibilities:

**I. In-House / Slow**

- Bend reviews 30 document pages per day<sup>3</sup>;
- This would have resulted in the review being complete now (assuming 20 work days a month over 5 months for a total of 100 days to review 3,000 documents).

**II. In-House / Expedited**

- A law clerk or paralegal reviews 500 pages per day and places each page into one of two piles: a pile of pages that have no possibility whatsoever of being covered by the attorney/client, litigation, and or work/product exemptions and a pile that might be covered by one or both of these exemptions;
- After two weeks, all the documents would have undergone an initial review;
- The pile of documents that contained no indicia of being covered by an exemption would be provided to Camp Creek;
- The pile of documents that potentially are covered by an exemption would be reviewed by Bend's legal counsel. This review is something that could reasonably be completed in two additional weeks.

**III. Outsource**

- Bend retains a litigation support company to review the documents.
- Oregon has companies that provide attorneys to handle major document review projects (Special Counsel and Legal Northwest being two of them).
- Outsourcing this project would likely have resulted in the document review being completed in two weeks or less.
- This option is viable because Camp Creek agreed to pay enhanced fees for the processing of their request.

Bend has the burden of persuasion to convince me that their decision to process Camp Creek's public records request in the manner they have chosen is authorized by Oregon law. In order to carry this burden they must cause me to affirmatively conclude that their response to date has been "proper and reasonable." ORS 192.430(1)

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<sup>3</sup> I had the opportunity today to review the 40 pages of documents discussed in this Order and to conduct an assessment of the potential existence of the litigation and attorney/client exemptions. This required one hour of my time.

Bend fails to carry their burden. Bend's failure to pursue either of the above three options, or similar options, is unreasonable under Oregon's Public Records Law and constitutes a constructive denial of Camp Creek's request. Therefore, I Order Bend to produce these records to Camp Creek.

### CONCLUSION

I am without jurisdiction to determine whether the WRF Risk Management Team is a public body, therefore I issue no ruling on this topic.

Bend properly withheld five pages of documents pursuant to the attorney/client exemption to Oregon's Public Records Law.

Bend properly withheld 35 pages of documents pursuant to the litigation exemption to Oregon's Public Records Law.

Bend constructively denied Camp Creek's request for the thousands of other pages of responsive records as a result of their processing of this request being less than "proper and reasonable." Therefore, I Order Bend to produce these records to Camp Creek.

In regard to the records I ordered Bend to produce, Bend must either provide them to Camp Creek no later than October 4, 2016 (see: ORS 192.450(2) and 174.120(1)) or, no later than October 4, 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).

To be clear, Bend cannot lawfully comply with this Order by reviewing the records in question and providing some and withholding the others based on a claim of the existence of the attorney/client, litigation, or some other exemption. The time to review the documents and claim an exemption has passed. Bend can comply with this Order in one of two ways: provide Camp Creek with all of the outstanding documents (all responsive documents other than the 40 pages of documents I ruled are exempted from disclosure); or, file a notice in Deschutes County Circuit Court by October 4, 2016.

Thank you to both parties for your cooperation during this process.

Sincerely,



John Hummel  
District Attorney