



John Hummel District Attorney

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April 14, 2017

Paul Taylor
Counsel for Bend Park and Recreation District
Attorney and Share Holder, Bryant Lovlien & Jarvis
Bend, Oregon
Sent Via email only: taylor@bljlawyers.com

MacGregor Ehlen
Owyee Research LLC
Portland, Oregon
Sent Via email only: mac@owyhee-research.com

Gentlemen:

Pursuant to ORS 192.470, MacGregor Ehlen (Ehlen) filed an appeal requesting that I review the Bend Park and Recreation District's (BPRD) denial of his recent public records request.

Full details of Ehlen's request to BPRD and his legal argument for why he should prevail on appeal are contained in his attached appeal pleading. In summary:

- Ehlen claims that on January 25, 2017 he submitted a public records request to BPRD for documents regarding the South UGB Deschutes River Trail project and the Upper Deschutes Advisory Group.
- Ehlen says that in response to his request BPRD provided him 134 emails and an environmental study.
- Ehlen says that BPRD did not provide him some responsive documents. Ehlen concludes this because he states he received documents from the Oregon Parks and Recreation Department (based on a public records request he submitted to that agency) that included email communication with BPRD about the subject of Ehlen's public records request to BPRD but which were not provided to him by BPRD.
- Based on this, Ehlen argues BPRD did not fully comply with his public records request and he seeks an Order from the District Attorney compelling BPRD to fully comply with his request.

Pursuant to ORS 192.470(2) I immediately contacted BPRD and provided them this notice:

Pursuant to ORS 192.470, Ehlen MacGregor (sic) filed an appeal with me requesting that I review what Mr. MacGregor (sic) claims to be Bend Park and Recreation District's (BPRD) denial of his recent public records request. The details of the request are contained in the attached appeal letter dated April 7, 2017.

The gravamen of Mr. MacGregor's (sic) claim is that BPRD stated to Mr. MacGregor (sic) that they approved his request in full, but their actions revealed they failed to provide him

documents that were responsive to his request and they failed to cite one or more exemptions to Oregon's public records law that would have authorized the documents to be withheld.

Please let me know if you agree that BPRD withheld records from Mr. MacGregor (sic) that are responsive to his request.

If BPRD did withhold responsive records, please let me know if BPRD intends to provide the records in question to Mr. MacGregor (sic). If BPRD did withhold responsive records and intends to continue to withhold them, pursuant to ORS 192.470(2), please: "[T]ransmit the public record disclosure of which is sought, or a copy, to [me], together with a statement of [BPRD's] reasons for believing that the public records should not be disclosed."

Pursuant to ORS 192.465 and 174.120 I will issue my decision by 5:00 PM on April 14th.

On April 12, 2017, BPRD submitted what can be characterized as an informal, informational response with the caveat that after they completed additional research their formal response would follow (due to the tight statutory timeline for District Attorneys to issue decisions in public records appeals this preliminary response was appreciated).

On April 14, 2017, BPRD submitted their formal and final response.

BPRD makes three arguments in their response:

- Ehlen's public records request to BPRD transposed two letters in the acronym for the Oregon Parks and Recreation Department (i.e., he wrote "ORPD" instead of "OPRD"). BPRD did not notice this mistake so BPRD IT staff searched for "ORPD," not knowing that it was incorrect. As a result, a large number of emails never made it into the initial review process. BPRD has now conducted a search of their records using the correct acronym (OPRD) and discovered additional documents responsive to Ehlen's request. BPRD committed to provide these documents to Ehlen (subject to their review for the existence of any applicable exemptions to Oregon's public records law).
- BPRD withheld some responsive documents from Ehlen based on BPRD's determination that these documents were subject to an exemption to Oregon's public records law, but their re-review of these documents as a result of Ehlen's appeal resulted in them concluding that they should not have been classified as exempt. Per BPRD, these documents will be provided to Ehlen.
- BPRD withheld other responsive documents from Ehlen based on BPRD's determination that they were subject to an exemption to Oregon's public records law and their re-review of these documents as a result of Ehlen's appeal resulted in them re-affirming their conclusion. The exemption cited is the attorney client privilege (ORS 192.502(9)). BPRD provided these documents to the District Attorney for his review in this appeal. The documents consisted of four emails.

This letter constitutes my Order in this case.

FINDINGS

BPRD did not deny Ehlen's public records request for documents they are not now claiming to be exempt from disclosure.

Regarding the documents BPRD did not initially provide and did not initially claim to be exempt: these documents were not provided due to Ehlen's scrivener's error. BPRD detected this error, re-ran a search, and will provide any responsive documents to Ehlen (subject to their review for the existence of exemptions).

Regarding BPRD's assertion of exemptions that they now withdraw: agencies are encouraged to re-look at their public records exemption determinations whenever a member of the public asks them to do so. As a result of Ehlen's appeal BPRD re-looked at their exemption claims and concluded they incorrectly asserted the claim for some of the records in question and then committed to quickly make these records available to Ehlen. This does not constitute a violation of Oregon's public records law and is an example of a responsive and open-minded government.

LEGAL ANALYSIS

Burden of Persuasion:

BPRD 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 BPRD to carry their burden of persuasion I must affirmatively conclude that Ehlen's request was not denied, or, that the request was denied but 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 is one issue to address in this appeal:

- Does the Attorney/Client exemption to Oregon's public records authorize BPRD to withhold the four emails they are withholding?

1. Attorney/Client Exemption

BPRD argues they lawfully declined to provide Ehlen with four emails 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 four emails BPRD claims to be exempt from discovery based on the attorney/client privilege. I find that all four 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

CONCLUSION

BPRD did not deny Ehlen's public records request. Some of the responsive documents they withheld were withheld based on a scrivener's error on Ehlen's part; others were withheld based on an incorrect application of an exemption to Oregon's public records law that they have since revised; and the others were withheld based on a correct application of Oregon's attorney/client privilege law.

Sincerely,

John Hummel
District Attorney

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.