



John Hummel District Attorney

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Liam Hughes
Executive Director
Sisters Park and Recreation District
SENT VIA EMAIL: Liam@sistersrecreation.com

Mike Morgan
SENT VIA EMAIL: morgan@bendcable.com

Dear Mr. Hughes and Mr. Morgan:

Greetings. On August 10, 2015, I received from Mr. Morgan a petition pursuant to ORS 192.460 requesting that I order the Sisters Park and Recreation District (SPRD) to disclose records he requested from them on July 21, 2015. The records sought by Mr. Morgan were: "Any and all complaints regarding Lacrosse that SPRD has received in the past six months and a copy of any document(s) detailing the results of any investigation into the matters alleged in these complaints."

Pursuant to ORS 192.470(2) I immediately contacted Mr. Hughes and asked him 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.

By the end of the day on August 10, 2015, Mr. Hughes had fully complied with my request and I began my consideration of Mr. Morgan's petition. This letter constitutes my Order in this case.

Burden of Persuasion:

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

Standard of Proof:

In order for SPRD 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)*.

Findings

1. On July 21, 2015, Mike Morgan requested from SPRD “Any and all complaints regarding Lacrosse that SPRD has received in the past six months and a copy of any document(s) detailing the results of any investigation into the matters alleged in these complaints.”
2. On August 4, 2015, SPRD denied Mr. Morgan’s request for two reasons:
 - a. They asserted the records “pertain[ed] to issues on which litigation may be filed,” thus ORS 192.501(1) authorized their non-disclosure.
 - b. They asserted the records “related to or involved a personnel disciplinary action,” thus ORS 192.501(12) authorized their non-disclosure.
3. SPRD is in possession of records responsive to Mr. Morgan’s request. These records relate to complaints submitted by the public to SPRD and the Sisters School District in regard to the actions of a person who served as lacrosse coach, SPRD board member, and Sisters School District board member.
4. SPRD did not conduct an investigation into the validity of the complaints Mr. Morgan referenced in his public records request because they claim the coach in question “stepped down” from his/her coaching duties. However, the Sisters School District did, and records of the School District’s investigation are in the possession of SPRD and were provided to me (in addition to numerous other responsive documents) in response to my ORS 192.470(2) request.
5. The subject of the complaints is a prominent person in the Sisters community: currently employed in a senior administrative position in local government and serving as an elected official on the SPRD board of directors. When the complaints in question were submitted to SPRD the person in question was serving as lacrosse coach, SPRD board member and Sisters School District board member. Today, the person in question no longer serves as coach or school district board member.

Legal Analysis:

a. Litigation Exemption Generally

SPRD’s first basis for denying Mr. Morgan’s request is the litigation exemption to Oregon’s public records law. This 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)

SPRD does not assert there is current litigation pending that is related to the records sought by Mr. Morgan. Their basis for asserting the litigation exemption seems to be that litigation is “reasonably likely to occur.” But, other than their assertion of the litigation exemption, they make no argument as to why they believe litigation is “reasonably likely to occur.”

However, in reviewing the documents presented to me in response to my ORS 192.470(2) request to SPRD, I see one document that mentions potential litigation: A June 7, 2015 letter addressed to SPRD and Sisters High School in which the authors of the letter discuss their concerns with the Sisters’ Lacrosse program and allege these concerns “create[s] serious liability issues for both SPRD and the Sisters School District.” The authors of this letter also state: “If a legal action were to be taken, both SPRD and the Sisters School District would be involved in the action.” And the authors say: “[The coach in question] must either resign from or be removed from his positions as Lacrosse coach and sole member of the lacrosse committee directing the program.”

In assessing whether litigation is “reasonably likely to occur” it’s particularly relevant that the remedy sought by the authors of the letter is removal of the coach, and the coach is no longer coaching.

Additionally, even if SPRD convinced me that litigation was “reasonably likely to occur” the litigation exemption would not apply in this case because the records in question were not compiled by SPRD for use in 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)).

In light of the fact that the remedy sought by the authors of the letter has been achieved, that SPRD made no argument as to why they believe litigation is “reasonably likely to occur,” that the records in question were not compiled by SPRD for use in anticipated litigation, and that SPRD has the burden of persuasion in this matter to convince me that the requested records are exempt, I do not affirmatively conclude that litigation is “reasonably likely to occur.” Because of this, the litigation exemption does not apply.

b. Litigation Exemption Public Interest Condition

Alternatively, if I found litigation were “reasonably likely to occur” and the records in question were compiled by SPRD for use in anticipated litigation I would not affirmatively find that the records are exempt under the litigation exemption because this exemption is conditional and SPRD did not meet their burden of persuasion to overcome the conditional nature of the exemption.

When the elements of the litigation exemption are satisfied in a particular case (to reiterate, I find that these elements are not satisfied in this case), the records must nonetheless be disclosed if “the public interest requires disclosure in the particular instance.” *ORS 192.501* SPRD has the burden of persuasion to convince me that the public interest does not require disclosure in this particular instance. They failed to carry their burden. These records relate to a person who formerly held two local elected positions (and currently holds one of these), was and is employed in a prominent senior administrative position for a local government, and was a youth coach for a sports team affiliated with a local public school district and local parks and recreation district. And the allegations contained in the requested records are serious in that they related to allegations of mistreatment of minors.

c. Personnel Exemption Generally

SPRD’s second basis for denying Mr. Morgan’s request is the personnel exemption to Oregon’s public records law. This 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:

A personnel discipline action, or materials or documents supporting that action.

ORS 192.501(12)

SPRD did not make an argument to me as to why this exemption should apply to the records sought by Mr. Morgan. They did however tell me that they: “[D]id not conduct any investigation into the validity of these claims [the claims documented in the records sought by Mr. Morgan] due to the coach stepping down and closing the issue.”

Only completed disciplinary actions when a sanction is imposed, and materials or documents that support that particular disciplinary action, fall within the scope of this exemption. The exemption does not apply when an employee of a public body resigns during an employer investigation or in lieu of disciplinary action. The policy underlying this narrowly construed exemption is to “protect[] the public employee from ridicule for having been disciplined but does not shield the government from public efforts to obtain knowledge about its processes.

Attorney General's Public Records and Meetings Manual 2014, section I.E.4.d.(12) (citing City of Portland v. Rice, 308 Or 118, 775 P2d 1371 (1989)).

Since the coach “stepped down,” and in the absence of any evidence or argument to the contrary, and considering it’s SPRD’s burden to convince me that their assertion of the personnel exemption was proper, I conclude that no “discipline action” was taken against the coach, therefore, the personnel exemption does not apply.

d. Personnel Exemption Public Interest Condition


Alternatively, if I found the personnel exemption did apply, for the reasons stated previously in regard to the litigation exemption public interest condition, I would not affirmatively find that the records are exempt because this exemption is conditional and SPRD did not meet their burden of persuasion to convince me that the public interest does not require disclosure in this particular instance.

Order:

The litigation and personnel exemptions to Oregon’s public records law do not apply to the records sought by Mr. Morgan. Therefore, I grant Mr. Morgan’s petition and order SPRD to disclose the records that are responsive to Mr. Morgan’s July 21, 2015 request.

SPRD must either provide these records to Mr. Morgan no later than August 21, 2015 (ORS 192.450(2) and 174.120) or, no later than August 21, 2015, “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