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Aaron West
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The Nugget
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Gentlemen:

Pursuant to ORS 192.470, Mike Morgan, The Nugget newspaper, and The Bulletin newspaper (“Petitioners”) filed appeals with me requesting that I review the City of Sisters (“Sisters”) denial of their recent public records requests.

Pursuant to ORS 192.470(2) I immediately contacted Sisters 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 7, 2016 I received Sisters’ response (see attached letter from Steven Bryant) which fully complied with my request. I thus began my review of this matter. This letter constitutes my Order in this case.

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FINDINGS

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

1. The records in question relate to Andrew Gorayeb (Gorayeb) who is the former City Manager of Sisters.
2. Previously, Gorayeb was an elected official on the Sisters Park and Recreation District board of directors and an elected Sisters School District board member. He also was previously a youth lacrosse coach with the Sisters Park and Recreation District.
3. On April 29, 2016, pursuant to Oregon's public records law, Mike Morgan requested from Sisters the following records:
 - a. A copy of all written employee complaints against Gorayeb with all other names redacted.
 - b. A copy of the CIS Report summarizing the results of its investigation with all names redacted except Gorayeb.
 - c. A copy of Gorayeb's resignation letter.
 - d. A copy of the severance agreement between Gorayeb and Sisters approved by council on April 29, 2016.
4. In his request Mr. Morgan stated he believed the public was entitled to this information to evaluate the propriety of giving the city manager a severance far greater than called for in his employment contract given the fact that his conduct was recently investigated as the result of complaints from city employees.
5. Via an April 29, 2015 email from City Recorder Kathy Nelson, Sisters provided Morgan with copies of Gorayeb's letter of resignation and severance agreement. Sisters did not provide the investigation report or any written complaints. The stated basis for this denial was that the records that were not provided were a part of Gorayeb's personnel file and as such were not public records. Via a May 2, 2016 email from Kathy Nelson to Morgan, she clarified that her earlier denial was based on ORS 192.501(12).
6. On April 30, 2016, Morgan appealed the partial denial of his request by filing a petition with my office.
7. On April 1, 2016, pursuant to Oregon's public records law, the Nugget newspaper requested from Sisters the following records:
 - a. The report and ancillary documents (executive summary) from the investigation commissioned by Sisters into the conduct of Gorayeb.
8. The Nugget was not provided the documents and was not provided a reason for this.

9. In April 29, 2016, pursuant to Oregon's public records law, the Nugget wrote to Sisters to request a response but again did not receive a response. This silence constituted a constructive denial of The Nugget's public records request
10. On May 1, 2016, The Nugget appealed the denial of their request by filing a petition with my office.
11. In their appeal The Nugget states they are aware that Sisters has declined at least two other public records requests for the report and has publicly asserted that the report is a personnel record and therefore exempt from public records disclosure (implicitly citing ORS 192.501(12)). The Nugget contends that the report is not exempt because Gorayeb resigned in lieu of discipline.
12. Further, The Nugget states that the public interest in disclosure outweighs Gorayeb's interest in confidentiality. Specifically, the Nugget argues that release of the records is important because it will help the public understand these issues:
 - a. The nature of the alleged conduct of Gorayeb and what allegations were sustained.
 - b. Why Sisters and Gorayeb were unable to come to terms;
 - c. Why Sisters chose to provide Gorayeb with a substantial severance package — far beyond the severance to which he was contractually entitled — when he chose to resign in lieu of discipline.
13. The Nugget further argued in their appeal that given Gorayeb's former position as the chief executive of Sisters, and the fact that some information has been made public, but not enough to truly inform the citizenry, this is a situation in which the public interest in disclosure outweighs the public employee's interest in confidentiality.
14. On April 21, 2016, pursuant to Oregon's public records law, The Bulletin requested from Sisters the following records:
 - a. All records and documents related to reports and/or investigations concerning employee complaints made about Gorayeb between January 1, 2016 and April 21, 2016.
15. Sisters denied The Bulletin's request, citing as their basis the personnel discipline action conditional exemption cited in ORS 192.501(12).
16. On May 3, 2016, The Bulletin appealed the denial of their request by filing a petition with my office.
17. In their appeal The Bulletin argues the records should be released because they are in the public's interest. As support for this claim they cite that Sisters provided Gorayeb with a severance package worth more than \$120,000 after spending \$16,000 for an investigation and report into the allegations against Gorayeb.
18. Another basis for The Bulletin's "public interest argument" is that Gorayeb was recently previously investigated (due to allegations when he was employed as a lacrosse coach in the Sisters

community), subsequently resigned, and the public body involved (Sisters Park and Recreation District) attempted to keep the records sealed.

19. The Bulletin says it is in the public's interest to know what is in the report/investigation that was not bad enough to terminate Gorayeb but still resulted in a generous severance package.
20. In addition to the records that were previously provided by Sisters (Gorayeb's letter of resignation and severance agreement), Sisters is in possession of documents responsive to the Petitioners' requests. Specifically, Sisters is in possession of:
 - a. A draft of the investigation report prepared by Beery, Elsner & Hammond, LLP (March 22, 2016);
 - b. A final report of the investigation prepared by Beery, Elsner & Hammond, LLP (March 28, 2016);
 - c. Executive summary of the investigation prepared by Beery, Elsner & Hammond, LLP (March 28, 2016);
21. Sisters is not in possession or control of any written complaints made by any employee concerning Gorayeb.

LEGAL ANALYSIS

Burden of Persuasion:

Sisters has the burden of persuasion to convince me that their decisions to deny Petitioners' requests were proper. *ORS 192.450(1)*.

Standard of Proof:

In order for Sisters 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 Findings, Burden of Persuasion, Standard of Proof, and Public Records Law:

As a threshold matter, the portion of Mr. Morgan's request that asked for a copy of written employee complaints made by Sisters' employees against Gorayeb was properly denied as such records do not exist.

In regard to Sisters' decision to forgo providing documents to Petitioners that *do* exist, Sisters cites three exemptions in Oregon's public records law as support for their decisions: The personnel discipline conditional exemption, the litigation conditional exemption, and the confidential submittal exemption. Because the confidential submittal exemption is not conditional, meaning, if I find it applies, no further analysis is required, I'll address this first.

1. Confidential Submittal Exemption

Sisters argues they lawfully declined to provide Petitioners with the draft investigation report, final investigation report, and executive summary of the investigation report pursuant to the confidential submittal 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:

Information submitted to a public body in confidence and not otherwise required by law to be submitted, where such information should reasonably be considered confidential, the public body has obliged itself in good faith not to disclose the information, and when the public interest would suffer by the disclosure.

ORS 192.502(4)

Sisters argues to me that: "As the reports and draft report show, the investigator conducted lengthy interviews with numerous employees. Those employees participated based on the investigator's representation that the City would do its best to keep the information they were sharing confidential. The information provided is not information that the employees would otherwise share (about Mr. Gorayeb or about their peers)." *Steven Bryant Letter, p. 5, May 7, 2016.*

The investigator's report indicates that at the start of her interview of each employee and former employee she: "advised the interviewee that I would keep the interview as confidential as possible, but could not guarantee complete confidentiality." (Final Report, p.1, March 28, 2016).

What is the legal import of an investigator informing an interviewee that she would try to keep the contents of an interview confidential, but could not guarantee confidentiality? We don't have a case directly on point, but a case with similar facts is *In the Matter of Oregon Attorney General Public Record Order, November 17, 1988, Rae*. This case involved an Oregon Department of Transportation investigator assuring confidentiality at the start of each interview. In that case the Attorney General ordered disclosure of the records in question, ruling that the confidential submittal exemption did not apply, because the Attorney General "could not determine that the employees actually submitted the information in reliance on that assurance." *Id.*

The case-at-bar is distinguished from *Rae* because in our case the investigator merely expressed that she would attempt to keep the records confidential, but could not guarantee confidentiality, while in *Rae* the investigator assured confidentiality. This difference makes the *Rae* facts more supportive of the application of the confidential submittal exemption. In spite of this, the Attorney General in *Rae* found the exemption did not apply. And the reason for this decision in *Rae* is present in our case: that there is no evidence presented to permit me to find that the employees who were interviewed "actually submitted the information in reliance on that assurance."

A final consideration in the analysis of the confidential submittal exemption is whether the public interest would be harmed by releasing the documents in question.

The final condition is whether disclosure of the information would harm the public interest. Even if all the other conditions are met, if the public interest would not suffer by disclosure, the exemption does not apply. This condition requires consideration not only of the impact of the disclosure on the particular informant providing the information but also of the likelihood that disclosure would discourage other informants from providing information in confidence in the future.

Attorney General's Public Records and Meetings Manual 2014, section I.E.4.e.(4)

Sisters' claim that the public interest would suffer by disclosure of these records is less than clear, but from what I glean, their position is that because the investigator found some of the complaints against Gorayeb to be sustained but found some to be unfounded, the public interest would not be served by releasing the documents because the unfounded allegations amount to office gossip. *Steven Bryant Letter, p.4, May 7, 2016*. Sisters also argues that release of the documents would harm and embarrass Gorayeb and that this somehow supports the legal argument that releasing the documents would not be in the public interest. *Id.* To the extent I correctly understand these arguments, I find them unpersuasive.

Sisters has the burden of persuasion to convince me that their decisions to deny Petitioners' requests pursuant to the confidential submittal exemption were authorized by Oregon law. In order to carry this burden they must cause me to affirmatively conclude the requested records are exempt. Sisters fails to carry their burden.

The investigator did not promise confidentiality to the employees who were interviewed – she merely indicated she would attempt to keep the records confidential but could not guarantee confidentiality. This fact is dispositive of my inquiry. In addition to this fact, Sisters failed to present evidence that the employees actually submitted answers to the investigator's questions in reliance on the investigator's tepid commitment to them¹. And finally, disclosure of the documents in question would not harm the public - quite the contrary is true. For all three of these reasons, I find the confidential submittal exemption does not apply.

2. Litigation Exemption Generally

Sisters also argues they lawfully declined to provide the documents in question pursuant to 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:

¹ Sisters' legal counsel asserts in his argument to me that the "employees participated based on the investigator's representation" (*Steven Bryant Letter, p. 5, May 7, 2016*) but this argument is not supported by evidence in the record. Therefore, I did not consider this argument in my legal analysis.

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)

Sisters does not assert there is current litigation pending that is related to the records sought by the Petitioners. Their basis for asserting the litigation exemption is that litigation is “reasonably likely to occur.” Sisters argues to me that litigation is reasonably likely to occur because when the Mayor of Sisters spoke with the employees who complained about Gorayeb, at least one of them “clearly threatened litigation against the city based on the conduct of Mr. Gorayeb.” *Steven Bryan Letter, p.4 May 7, 2016*. Sisters does not provide details of this “threat,” does not state whether this employee(s) has retained an attorney, does not indicate whether a tort claim notice has been filed, and does not say whether the fact Gorayeb no longer works for Sisters has mollified this employee(s). A bare assertion that someone “clearly threatened litigation” against a city is insufficient to establish that litigation is “reasonably likely to occur.”

Sisters has the burden of persuasion to convince me that their decisions to deny Petitioners’ requests pursuant to the litigation exemption were authorized by Oregon law. In order to carry this burden they must cause me to affirmatively conclude the requested records are exempt. Sisters fails to carry their burden because they presented insufficient evidence to establish that litigation is reasonably likely to occur.

Additionally, even if Sisters 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 Sisters 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)).

Sisters’ administration received complaints from City employees alleging misconduct by Gorayeb. Sisters decided to hire an outside investigator to investigate the matter to determine if the complaints had merit. Is Sisters arguing that if they were certain they would not be sued by the employees in question they would not have investigated the serious allegations they made? Of course this cannot be true. Any reasonable and rational mayor or city councilor would want to investigate complaints of this character to ensure that city

employees work in a safe and healthy environment. I find this was the reason the investigation and subsequent report were created and that the reports in question were not “compiled or acquired for use in ongoing litigation or litigation that was reasonably likely to occur.”

Because Sisters is unable to establish that litigation was reasonably likely to occur, and is unable to establish that the documents in question were compiled in anticipation of litigation, I find the litigation exemption does not apply.

3. Personnel Exemption Generally

Sisters also argues they lawfully declined to provide the documents in question pursuant to 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)

What is a personnel discipline action? Case law and the Attorney General provide guidance:

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)).

The potential application of the personnel exemption in our case depends on whether Gorayeb resigned in lieu of discipline. If he did, the exemption does not apply. If he did not, it does apply.

I am aided by Gorayeb’s resignation letter (previously disclosed to the public). In this April 28, 2016 letter addressed to Sisters’ Mayor and City Councilors, Gorayeb expressed displeasure with the discipline he says he was “subjected” to: “a six month probationary period, weekly meetings, constant evaluations, management training, and unnecessary second guessing of my work.” Gorayeb said in his letter that this discipline “frankly, [was] not a workable solution.” He then closed his letter by saying he would not return to work on May 1, 2016.

Was Gorayeb's discipline completed when he resigned? This question is important because only completed discipline actions fail under the protection of the personnel exemption. Prior to his resignation Gorayeb was informed of what his discipline would be if he remained employed by Sisters. A plain reading of his resignation letter reveals that Gorayeb chose to avoid this proposed discipline by resigning in lieu of receiving the discipline. Consequently, the disciplinary action proposed by Sisters was not completed.

Like the other exemptions, Sisters has the burden of persuasion to convince me that their decisions to deny Petitioners' requests pursuant to the personnel exemption were authorized by Oregon law. In order to carry this burden they must cause me to affirmatively conclude the requested records are exempt. Because the only evidence presented by Sisters on this issue is Gorayeb's resignation letter, and because in this letter Gorayeb states he is resigning because he disagrees with the proposed discipline, no reasonable conclusion other than that Gorayeb resigned in lieu of discipline can be reached on this record. Therefore, I find that the personnel exemption does not apply.

4. Public Interest Exception

Alternatively, if I found that the litigation or personnel exemptions did apply I would find the records were not exempt from disclosure because these exemptions are conditional and Sisters did not meet their burden of persuasion to overcome the conditional nature of the exemption.

When the elements of the litigation and/or personnel exemptions are satisfied in a particular case (to reiterate, I find 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* Sisters has the burden of persuasion to convince me that the public interest does not require disclosure in this particular instance. They fail to carry their burden.

These records relate to a person who formerly held two local elected positions, was employed as the City Manager for the City of Sisters, and previously was a youth coach for a sports team affiliated with a local public school district and local parks and recreation district. The allegations contained in the requested records relate to alleged mistreatment of Sisters' city employees. And one of the results of the investigation was Gorayeb resigning in lieu of accepting the discipline proposed by Sisters and then Sisters providing him a severance package for a substantial sum of money.

Another important factor in my analysis is the fact that the general nature of the allegations against Gorayeb (current Sisters' employees alleged workplace "harassment" type conduct) have already been publically disseminated (through media accounts, city council meetings, and Gorayeb's resignation letter).

The Oregon Court of Appeals provides guidance in how to interpret the public interest exemption in a case involving a personnel investigation of a public employee:

We have stated that 'the Public Records [inspection 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.' We also have said that 'disclosure decisions should be based on balancing those public interests that favor disclosure of governmental

records against those public interests that favor governmental confidentiality, with the presumption always being in favor of disclosure.

The public interest in this case is significant and requires disclosure. The records at issue involve alleged misuse and theft of public property by public employees. That is a matter of legitimate public interest. Furthermore, considering the publicity that this matter already has received, it is not clear that disclosure of the documents will intrude into any privacy that Parr or Williams enjoy with respect to it. Therefore, the documents are not exempt under ORS 192.501(12).

Oregonian Pub. Co. v. Portland School District, 144 Or. App. 180, 187 (1996)(citations omitted).

While our case does not allege theft of public property by a public employee, it does allege harassment of public employees by the chief administrator of Sisters. This is a matter of public concern. And like in *The Oregonian* case just cited, this matter has already received much publicity so the addition of more and detailed facts to the facts and innuendo that are already in the public realm will serve the public, Sisters, and Gorayeb.

Conclusion:

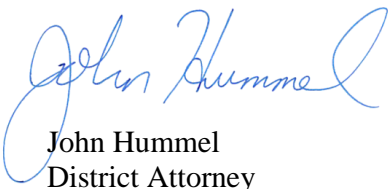
The confidential submittal, litigation and personnel exemptions to Oregon's public records law do not apply to the records sought by Petitioners.

Because I found the litigation and personnel exemptions do not apply, my analysis of the public interest exception is not required to resolve this matter. However, I find that the public interest exception does apply.

Therefore, I grant the Petitioners' petition and Order Sisters to disclose the records they requested.

Sisters must either provide these records to Petitioners no later than May 17, 2016 (see: ORS 192.450(2) and 174.120) or, no later than May 17, 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