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November 3, 2010

Erin Mills
333 E. Main
Hermiston, OR 97838

Gary Luisi, Hermiston City Attorney
230 Southeast 4th Street
Hermiston, OR 97838-2410

Re: Public Records Disclosure Order:
City of Hermiston Records

Dear Ms. Mills and Mr. Luisi:

On October 27, 2010, our office received Ms. Mills' petition seeking an order directing the City of Hermiston ("City") to disclose certain records under the Oregon Public Records Law.[1] Specifically, Ms. Mills seeks a copy of a tort claim notice submitted by Officer Douglas Smith of the Hermiston Police Department. For the reasons explained below, we grant Ms. Mills' petition, and order the City to disclose the requested tort claim notice.

The Oregon Public Records Law, ORS 192.410 to 192.505, confers upon any person the right to inspect public records of any public body in this state, subject to express exemptions and limitations. ORS 192.420. The Public Records Law is a disclosure law, not a confidentiality law; exemptions from disclosure are narrowly construed. ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2010) § I.e.1., http://www.doj.state.or.us/public_records/manual/ public_records.shtml#e.

The City states that it does not generally assert any exemption with respect to tort claim notices. However, the City also asserts that the particular tort claim notice requested by Ms. Mills is exempt from disclosure under three provisions: ORS 192.501(1), applicable to documents pertaining to litigation; ORS 192.501(3), applicable to information compiled in conjunction with criminal investigations; and ORS 192.501(12), applicable to employee

[1] The Attorney General is currently Acting District Attorney in Umatilla County, and this order is issued in that capacity under the authority of ORS 192.460.

discipline actions and supporting materials. Each of these exemptions is conditional, applying "unless the public interest requires disclosure in the particular instance." ORS 192.501. In applying conditional exemptions under ORS 192.501, the presumption favors disclosure of public records. *Turner v. Reed*, 22 Or App177, 187 (1975) ("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*") (emphasis added).

ORS 192.501(1)

The City first asserts that the notice is exempt under ORS 192.501(1), which applies to "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." In *Lane County School Dist. 4J v. Parks*, 55 Or App 416 (1981), the Oregon Court of Appeals construed ORS 192.501. The Court noted a California Court of Appeals decision, *State Div. of Indus. Safety v. Superior Court, County of Los Angeles*, 43 Cal.App.3d 778, 117 Cal.Rptr. 726, 729 (1975). In that decision, the California court had "construed the 'pertaining to' language in the statute as essentially providing '* * * public agencies with the protection of the attorney-client privilege, including work product, for a limited period while there is ongoing litigation.'" (Ellipses by the Oregon Court of Appeals.) The Oregon Court of Appeals declined to "hold that the Oregon exemption specifically follows every contour of the attorney-client privilege," but stated that "the California approach represents a sound analysis of the litigation exemption." 55 Or App at 420.

A tort claim notice is provided to a public entity by a potential adversary in litigation. It is not remotely analogous to work product or to a privileged communication between attorney and client. We cannot conclude that a tort claim notice is exempt from disclosure under ORS 192.501(1) as that exemption has been construed.

ORS 192.501(3)

The City next asserts that the notice is exempt from disclosure under ORS 192.501(3) as "[i]nvestigatory information compiled for criminal law purposes." Specifically, the City states that it "is conducting an independent investigation into the allegations set out in the tort claim headed by [the] city attorney [who is also] city prosecutor." The City notes that, under ORS 221.339(5), "the city attorney has authority to prosecute a violation of any offense created by statute that is subject to the jurisdiction of a municipal court * * * if the offense is committed or triable in the city" under most circumstances. The City describes its investigation:

> An independent investigator has been hired by the City's insurance carrier and will assist [the City Attorney] in the investigation, but the investigator's first duty is to report his findings and conclusions to the City's insurance carrier to ensure the investigator's independence. That report will be turned over to the district attorney's office for its consideration.

Frankly, the investigator's "first duty" to the City's insurance carrier is difficult to reconcile with the City's characterization of this as a criminal investigation. The City's insurance carrier does not have authority to prosecute criminal matters and is not a law enforcement agency that would typically investigate a criminal matter on behalf of a government prosecutor. The City's description seems more consistent with a description of an investigation that would be conducted in a civil matter.

Even if we were persuaded that the City's investigation should be regarded as a criminal investigation, and the tort claim notice regarded as information compiled for purposes of that investigation, ORS 192.501(2) is a conditional exemption. It applies "unless the public interest requires disclosure in the particular circumstance." ORS 192.501. The doubtful nature of the investigation is one reason to think that the usually strong public interest in nondisclosure of criminal investigatory materials is significantly diminished here. In addition, one of the central interests typically served by ORS 192.501(3) is that nondisclosure prevents parties other than law enforcement from contacting witnesses, handling evidence, and otherwise conducting themselves in a manner that would potentially impede the ability of law enforcement to obtain reliable information. Providing information to a third party with the explicit expectation that the third party conduct an independent investigation for the third party's primary benefit is inconsistent with that purpose and further diminishes the typically strong public interest in nondisclosure.

The City asserts that the public interest does not require disclosure because "release of unsubstantiated claims of public corruption would disparage the very government institution that is to protect and serve the public." But the Public Records Law is not intended to protect the public from reaching its own conclusions – even incorrect conclusions that disparage government – based on information contained in public records.

Because we are skeptical of the City's assertion that the investigation should be regarded as a criminal investigation, because the disclosure of information to a third party seems inconsistent with one of the primary purposes of ORS 192.501(2), and because the City's arguments regarding the public interest misunderstand the purpose of the Public Records Law, we conclude that the tort claim notice is not exempt under ORS 192.501(2).

ORS 192.501(12)

Finally, the City asserts that ORS 192.501(12) exempts the tort claim notice, or some information contained in it. Specifically, the City notes that the notice discusses a disciplinary action completed against the individual who filed the notice. The City takes the position that "[i]f the claimant wishes to disclose to the public that he was disciplined, that is up to him not the City."

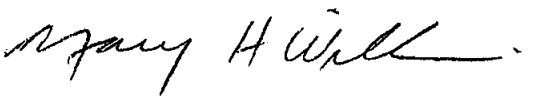
A fatal flaw in the City's argument is that the employee *has* made the decision to publicize the discipline, by filing a tort claim notice relating to it. A tort claim notice seeks

redress for harms allegedly inflicted by a public body. A person filing such a notice cannot reasonably expect anything to come of the notice and also expect the notice itself to remain confidential. There may also be other problems with the City's attempt to rely on ORS 192.501(12),[2] but further analysis of the application of the exemption in these circumstances is unnecessary.

Conclusion

For the reasons given above, we conclude that the requested tort claim notice is not exempt from disclosure, and order the City to disclose it. In complying with this order, the City may redact information that is exempt from disclosure under ORS 192.502(3) and information the disclosure of which would violate the Oregon Consumer Identity Theft Protection Act, ORS 646A.600 to 646A.628. The City has seven days within which to comply with this order or announce its intention to institute judicial proceedings. ORS 192.450(2).

Sincerely,



MARY H. WILLIAMS
Deputy Attorney General

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[2] The exemption does not give disciplined employees unfettered discretion to require nondisclosure of records. In fact, the exemption only applies if the interests in nondisclosure outweigh the public interest in disclosure. And even when the exemption applies, the Public Records Law does not require a public body to assert the exemption.