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November 29, 2016

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Re: Petition for Public Records Disclosure Order
Deschutes County
DOJ File No.: 137001-GA0085-16

Dear Ms. Coughlin and Mr. Doyle:

This letter is the Attorney General's order responding to Ms. Coughlin's November 22, 2016, petition for disclosure under the Oregon Public Records Law, ORS 192.410 to 192.505. That petition asks the Attorney General to order Deschutes County to produce records showing the County's accounting for its SIR insurance policy in the case *Mays v. Deschutes County*.

As discussed below, we conclude that the requested records are not exempt from disclosure, and that therefore the County must produce them to Ms. Coughlin within seven days: while ORS 192.501(1) does exempt from disclosure records pertaining to litigation, the Court of Appeals has narrowly construed this exemption to apply only to information prepared for use in litigation, not to any information that is somehow related to the litigation. Of course, the County may redact any information that reveals the substance of confidential attorney-client communications or that reveals work product (including a lawyer's mental impressions or opinions). But the County may not redact the information that Ms. Coughlin is primarily interested in, such as the amount of fees and expenses the County has expended on this litigation.

The Public Records Law confers a right to inspect any public record of a public body in Oregon, subject to certain exemptions contained in ORS 192.501 to 192.505. *See* ORS 192.420(1). Any person denied the right to inspect or to receive a copy of a public record of a public body other than a state agency may petition the appropriate District Attorney to review the record and determine if it may be withheld.[1] ORS 192.460(1)(a). The agency carries the burden to sustain any such denial. *Id.*

We spoke with Ms. Coughlin, who clarified that she is seeking only records showing how much the County has spent on litigation, and how much of those costs will be covered by the County's self-insured retention policy; that is, she is not seeking info that would reveal the specifics of how the County is preparing for the litigation. Because these records relate to the pending litigation, the County asserts that they are exempt from disclosure as work product and under ORS 192.501(1), which applies to records pertaining to litigation unless the public interest requires disclosure. The Court of Appeals has held that ORS 192.501(1) applies only to "information compiled or acquired by the public body for use in . . . litigation." *Lane County School District No. 4J v. Parks*, 55 Or App 416, 420 (1981). The *Lane County* court also favorably cited California case law interpreting a similar exemption to mirror the protections for attorney-client privileged communications and for work product.[2] *Id.*

Although the County asserts that knowing how much it has spent on litigation would reveal its legal strategies and which experts or consultants it plans to use, that assertion is insufficient for the County to meet its burden to show that ORS 192.501(1) applies here. The County compiles its fees and submits them to its insurer for business purposes, not for use in litigation. It is unclear how revealing these amounts would show the substance of the County's preparations for litigation. Of course, to the extent the County's communications with its insurer reflect legal opinions or theories, or other types of information considered work product, that information is appropriately redacted. *See* ORS 192.505 (If a record contains both nonexempt and exempt material, the public body must produce the nonexempt material.).

The County also asserts that it cannot provide an SIR balance because it has not settled with its insurer on the amount of fees and expenses that will count towards that balance. However, Ms. Coughlin's request can properly be interpreted to include any records showing how much the County has spent on this litigation: even if no agreed-upon balance has been arrived at yet with the insurer, there are likely records (either shared with the insurer or internal to the County) showing the amount the County has spent.

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[1] Due to a conflict of interest, the Attorney General is acting for the Deschutes County District Attorney in issuing this order. *See* ORS 180.240 (Attorney General has same powers as the district attorneys).

[2] Our discussion of ORS 192.501(1) applies to the County's claim of work product as well because the protection for work product is incorporated by that exemption.

Because the requested information is not exempt from disclosure under ORS 192.501(1), we grant Ms. Coughlin's petition for records showing the amount spent by the County on litigation, and for communications with the insurer showing the amount being claimed by the County towards its SIR balance or showing the amount the insurer is applying towards the SIR balance. The county has seven days to produce the requested information or to give notice of intent to institute proceedings for injunctive or declaratory relief. ORS 192.450(2); 192.460(1).

Sincerely,

Frederick M. Boss
Deputy Attorney General

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