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Public Records Order

This order arises from a Petition for Public Records Order which was submitted to my office on April 30, 2023, by the petitioner Matthew Osborn-Grosso.

Background

On May 4, 2022, the petitioner submitted a public records request to the University of Oregon for certain records pertaining to demonstrations or protests on certain dates in 2017 and 2018. The University's Office of Public Records subsequently provided 296 pages of documents in response to the request. The University partially redacted some of the documents. Along with the partially redacted documents, the University produced a privilege log. Notably, five email chains were redacted under a claim of attorney-client privilege and attorney work product.

On April 30, 2023, the petitioner submitted a Petition for Public Records Order asking this office to review the University's claim of attorney-client privilege. I reached out to the parties to establish a timeline for submissions and my order, to which the parties agreed. I also requested unredacted records from the University to facilitate my review.

The University submitted a written response on May 8 in which it confirmed that it was invoking the attorney-client privilege in relation to the five email chains at issue. The response contained a lengthy discussion of the relevant factual background and law. The University also supplied me with partially unredacted records by email, but the five email chains at issue remained redacted.

On May 9, I sent an email to both parties which contained the following:

I will note at this point that I do not have a basis to evaluate the appropriateness of the University's invocation of the attorney-client privilege. The University's partially unredacted records maintain the redactions on the claimed privileged materials. Disclosure of those materials to my office would not waive any such privilege and would constitute a compelled disclosure. ORS 192.415(2) & (3). Without being able to view and evaluate those unredacted communications, and without any other evidence (e.g., affidavits) to support the assertion that those communications are privileged, it seems unlikely that the University will be able to meet its burden in this appeal.

I make these statements in an effort to assist both parties in avoiding the potential costs of litigation in the courts down the road.

The petitioner submitted a reply on May 11, stating in pertinent part: "The requester believes the Attorney Client Privilege exemption is being used as a shield to exclude the correspondence of university

employees concerning surveillance of student political activities from public scrutiny. It would be of relevant public interest for the contents of these correspondences to be revealed.”

Also on May 11, the University supplemented its written response with a sworn declaration from Kevin S. Reed, Vice President and General Counsel at the University. Vice President Reed asserts that the five redacted email chains contain communications protected by the attorney-client privilege. Specifically, Vice President Reed states that the emails were intended to be confidential and involve “seeking, providing, and discussing legal advice” relating to “my and my colleagues’ interpretation of state and federal law protecting the rights of individuals to engage in expressive activities at the University.” Vice President Reed also asserts that the University “has not waived and does not intend to waive the attorney-client privilege with respect to the records.”

The sworn declaration from Vice President Reed was attached to an email from the University’s Office of Public Records. The email concludes with the following statement: “If, after the DDA reviews the declaration, additional information is needed, the University would be happy to extend an invitation to visit our office to review hard copies of the attorney-client privileged pages from the release.”

Relevant Law

Oregon law provides that “[e]very person has a right to inspect any public record of a public body in this state” subject to certain exemptions. ORS 192.314(1). Exemptions are interpreted narrowly. *Guard Publ’g Co. v. Lane County Sch. Dist. No. 4J*, 310 Or. 32, 37 (1990). Exemptions listed in ORS 192.345 are conditional insofar as they exempt certain types of information from disclosure “unless the public interest requires disclosure in the particular instance.” Other exemptions listed in ORS 192.355 are unconditional or have specific conditions that differ from the public interest balancing test contained in ORS 192.345.

The attorney-client privilege limits disclosure of confidential communications between a client and their lawyer. ORS 40.225(2). “ ‘Confidential communication’ means a communication not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” ORS 40.225(1)(b).

The public records law captures the attorney-client privilege in a catch-all provision which exempts from disclosure “[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law.” ORS 192.355(9)(a). This catch-all provision is followed by a narrow condition under which the attorney-client privilege, and only the attorney-client privilege, does not prevent disclosure of certain records. ORS 192.455(9)(b).

When a public body denies a public records request, a requestor may seek review from the district attorney of the county in which the public body is located. ORS 192.415(1)(a). The requestor files a petition with the district attorney, who—acting in a quasi-judicial role—then issues an order denying or granting the petition, either in whole or in part. ORS 192.411(1). The burden is on the public body to sustain its denial of the public records request. *Id.* “Disclosure of a record to the district attorney . . . does not waive any privilege or claim of privilege regarding the record or its contents,” ORS 192.415(2), and constitutes a compelled disclosure. ORS 192.415(3).

After the district attorney issues the order, the public body or requester can institute court proceedings challenging that order. ORS 192.411(2); 192.415(1)(b). “The court, on its own motion, may view the documents in controversy in camera before reaching a decision. Any noncompliance with the order of the court may be punished as contempt of court.” ORS 192.431(1).

Discussion

The University has met its burden, but barely.

This case is made difficult by the University’s failure to provide the unredacted emails for my review. The University bears the burden of demonstrating that its denial of the public records request is lawful. The principal mechanism for doing so is providing the public records at issue to the quasi-judicial officer reviewing the case. I appreciate that the University’s Office of Public Records invited me to come to their office to review hard copies of the unredacted emails, but offering is not the same as producing. Again, the University bears the burden. While the district attorney does not have the power of a court to compel production of a record for in camera review, “[d]isclosure of a record to the district attorney . . . does not waive any privilege or claim of privilege regarding the record or its contents,” ORS 192.415(2), and constitutes a compelled disclosure. ORS 192.415(3). While there may be some understandable unease with providing claimed privileged materials over email, there should be no legal concern.

That said, Vice President Reed’s sworn declaration is sufficient to sustain the invocation of the attorney-client privilege over the five email chains at issue. Vice President Reed identifies the participants of the email chains. The participants are easily identifiable as high-level employees and officers of the University, people who likely would be seeking legal advice. Vice President Reed avers that the communications relate to “interpretation of state and federal law protecting the rights of individuals to engage in expressive activity at the University.” Taking into account the nature of the public records request and the contents of the records the University produced, Vice President Reed’s declaration “sufficiently describe[s] the particular content of the document[s],” *Brown v. Guard Publishing Company*, 267 Or. App. 552, 570 (2014), in a way that allows me to conclude that the five email chains are protected by the attorney-client privilege and not subject to public disclosure.

Conclusion and Order

The five email chains at issue are exempt from disclosure. The petition is ordered denied.

s/ Spencer Gwartney
Spencer Gwartney
Deputy District Attorney