

DISTRICT ATTORNEY
LINN COUNTY, OREGON

In the Matter of the Review of a Public
Records Request by

THOMAS CORDIER,

Petitioner,

v.

CITY OF ALBANY, OREGON,

Respondent.

OPINION AND ORDER

I. BACKGROUND

The City of Albany (City) publishes a monthly newsletter called *City Bridges*. *James V. B. Delapoer*, Statement of the City of Albany, p1. The City maintains a list of about 33,800 e-mails that it uses to electronically distribute *City Bridges*. *Id.* Mr. Thomas Cordier (Petitioner) made a public records request asking the City to provide him with the above mentioned e-mail list. *Letter from Thomas E. Cordier*, to Doug Marteeny, Linn County D.A. (Sept. 23, 2013).

The City's e-mail list was created by pulling e-mails from three sources. (Salinas Aff.). Those sources and the approximate number of e-mails obtained from them are as follows:

<u>Source</u>	<u>Number of e-mails</u>
Library Patrons	22,000
Utility Billings	7,200
Parks and Recreation	4,600. (<i>Id.</i>)

The library e-mails were gathered from library patrons. *Delapoer* at 3. The Utility Billing e-mails were obtained from utility billing records. *Id.* The Parks and Recreation e-mails are generally from patrons of the Parks and Recreation Department. Parks and Recreation staff

“collects e-mail addresses of citizens and patrons who utilize Parks and Recreation Department services.” (Ewing Aff.). In all cases, those “e-mail addresses are voluntarily submitted.” *Id.* “In some cases” the City provides specific written promises in their sign up forms assuring that their e-mail addresses will be kept confidential. *Id.* However, that is not universally done.

The City denied Petitioner’s request relying upon the following statutory exemptions described briefly as follows:

- Library Records Exemption, ORS 192.502 (23); and
- Utility Customer Exemption, ORS 192.502 (28).
- Information Submitted in Confidence Exemption, ORS 192.502(4); Delapoer at 2.

Petitioner now requests the District Attorney to order the City to provide Petitioner with the e-mail addresses described above.

II. LAW

“Oregon’s Inspection of Public Records laws, ORS 192.410 et seq, operate under a strong presumption of disclosure.” *Gray v. Salem-Keizer School Dist.*, 139 Or App. 556, 912 P.2d 938 (1996). “Every person has a right to inspect any public record of a public body in this state, except as otherwise expressly provided by ORS 192.501 to 192.550.” ORS 192.420.

“[D]isclosure is the rule. Exemptions from disclosure are to be narrowly construed.” *Guard Pub. Co. v. Lane County School Dist. No. 4J*, 310 Or 32, 791 P.2d 854 (1990). A public body may not exempt itself from its responsibilities under the Inspection of Public Records law simply by promising the contributor confidentiality. *Id.* at 39.

The burden of proof is on the public body to sustain its action by a preponderance of the evidence. ORS 192490(1). *See also, Guard Pub. Co.*, 310 Or 32, 38, 791 P.2d 854 (1990).

A. Specific Exemptions

1. Library Records Exemption

ORS 192.502(23)(c) exempts from disclosure “[t]he records of a library, including: [t]he electronic mail address of a patron.”

2. Utility Customer Exemption

ORS 192.502(28) exempts from disclosure “... electronic mail addresses ... of customers who receive water, sewer or storm drain services from a public body”

3. Information Submitted in Confidence Exemption

ORS 192.502(4) exempts from disclosure “[i]nformation 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 obligated itself in good faith not to disclose the information, and when the public interest would suffer by the disclosure.” In determining whether this exemption applies, a five part test is used:

“1. The exemption applies only to information which is submitted voluntarily when the informant is under no legal obligation, by statute, rule, contract, or otherwise, to provide the information.

“2. The agency must be in a position to show that the information was of a nature which reasonably should be kept confidential.

“3. The agency must show that it has obliged itself in good faith not to disclose the information.

“4. Disclosure must cause harm to the public interest.

“5. The person must have, in fact, submitted the information in confidence.” *Gray*, 139 Or. App. 556, 912 P.2d 938 (1996) (quoting Attorney General’s Public Records and Meetings Manual, 41 (1993).

Public bodies invoking ORS 192.502[(4)] must satisfy each requirement above to justify non-disclosure.” *Id.*

The Court in *Gray* gave a more detailed explanation of the fifth prong listed above. *Id.* There, plaintiff applied for a job with Salem-Keizer School District, respondent. *Id.* at 558. Despite his 20 years of teaching experience, plaintiff was not interviewed for the job. Thereafter, school district personnel told plaintiff there were negative reports or references in his application file. *Id.* Plaintiff requested access to his application file. The school district granted access to the file but denied access to two reports provided by persons who had previously worked with plaintiff. *Id.* at 559. The School District invoked the Information Provided in Confidence exemption. *Id.* at 559. The School District submitted an affidavit from the School District's director of human resources. That affidavit provided in part that "there was a clear understanding between the district and those individuals that the information being provided would be treated as confidential." *Id.* at 564. No contradictory evidence was provided. *Id.* The court held that the uncontradicted affidavit statement was sufficient to establish that the information was submitted in confidence. *Id.*

Hood Technology Corp. v. Oregon Occupational Safety & Health Div., also explains the fifth prong listed above. 168 Or App 293, 7 P.3d 564 (2000). There, plaintiff owned and operated a business. The Oregon Occupational Safety & Health Division (OR-OSHA) received a complaint alleging that plaintiff violated the Oregon Safe Employment Act by failing to provide employees with restroom facilities. That complaint was received by phone. As per office policy the OR-OSHA employee who received the complainant's call "elicited information regarding the nature of the complaint, as well as the caller's name, address and telephone number." *Id.* at 295. "[T]he complainant provided the information regarding the alleged violation and his or

her identity before being informed that he or she could request confidentiality.” *Id.* (Emphasis added.) After being informed of such option, the complainant requested confidentiality. *Id.* at 296. The Court identified that those circumstances reasonably support two competing inferences as to the complainant’s subjective understanding at the time he or she submitted the information: (1) The complainant initially provided the information, without regards for confidentiality – and requested confidentiality only in response to the OR-OSHA employee broaching the subject; or (2) The complainant intended and believed from the outset that his or her identity would be kept confidential. *Id.* at 303. The Court pointed out that the information provided in the first instance immediately above would not be information “submitted in confidence” under ORS 192.502(4). *Id.*

B. Requirement To Show Individualized Basis For Exemptions

To satisfy its burden that an exemption applies, a public body must establish exemptions from disclosure not on a categorical basis, but “on an individualized basis.” *Guard Pub Co.*, 310 Or 32, 39, 792 P.2d 854 (1990). In *Guard Pub. Co.*, a school district adopted a general policy that it would not disclose the names and addresses of replacement coaches during a strike. The school district sought to use its non-disclosure policy and the Information of a Personal Nature Exemption found in 192.502(2) as a blanket bar to disclosure of the replacement coach names and addresses. The Court held that such a policy could not be used to invoke an exemption and instead the district had to consider each source of information individually to see whether an exemption from disclosure would apply. *Id.* at 39-40.

This same doctrine was followed in *Mail Tribune, Inc. v. Winters*, 236 Or. App. 91, 237 P.3d 831 (2010). There, the Jackson County Sheriff sought to prevent disclosure of a list of all

concealed handgun licenses issued in the county in 2006 and 2007. *Id.* at 93. In an attempt to prevent disclosure of this information, the Sheriff relied on two exemptions: (1) ORS 192.502(2) (exempting information of a personal nature); and (2) ORS 192.501(23) (exempting records that identify security measures). To support use of those exemptions, the Sheriff testified that he had received e-mails from folks all over the State of Oregon and all but one wanted the records exempted from disclosure and not released. *Id.* at 94. He also testified that “[r]eleasing a list of concealed handgun licensees would create a risk of public safety by allowing individuals to target concealed handgun licensees.” *Id.* The Court rejected the Sheriff’s arguments and required him to disclose the addresses. The Court explained that the Sheriff needed to make an “individualized showing” sufficient to justify the use of either exemption. *Id.* at 95. Although the Sheriff had shown that some applicants had applied for the handgun license as a security measure, he had failed to show that all applicants had done so. *Id.* at 97. Consequently, he had failed to provide sufficient proof that the exemptions applied. *Id.* The determination of whether a risk of public safety was created had to be determined on a case-by-case basis by evaluating individual licensees. *Id.* at 95.

The Court has applied this same “individualized showing” rule to the Information Submitted in Confidence Exemption found in ORS 192.502(4). *Hood Technology Corp. v. Oregon Occupational Safety & Health Div.*, 168 Or App 293, 305, 7 P.3d 564 (2000).

C. Transferring Records

Where a public record is found to be exempt, it does not automatically lose its exempt status when it is transferred to another public officer or public body. As long as the considerations giving rise to confidential or exempt nature of the public records remain

applicable, records exempt under ORS 192.502 maintain their exemption status even when they are transferred from one public agency to another. ORS 192.502(10).

IV. ANALYSIS

A. Library Patron E-Mails

The 22,000 library patron e-mails addresses fall squarely within the exemption found in ORS 192.502(23). The legislature categorically exempted such records and e-mail addresses from disclosure.

These e-mails do not lose their exempt status when another agency uses the e-mails for a non-library purpose. ORS 192.502(10). Because I find that these e-mails are exempt under ORS 192.502(23), an analysis of their exempt status under other provisions is unnecessary.

Petitioner's request to have these library patron e-mails released is denied.

B. Utility Customer E-Mails

The 7,200 utility customer e-mails fall squarely within the exemption found in ORS 192.502(28). All of these e-mail addresses are obtained from customers in connection with utility services provided by the City. I find that the City has met its burden of showing that these e-mails are all utility customer e-mails and are therefore exempt from disclosure.

These e-mails do not lose their exempt status when another agency uses the e-mails for a non-utility billing purpose. ORS 192.502(10). Because I find that these e-mails are exempt under ORS 192.502(28), an analysis of their exempt status under other provisions is unnecessary.

Petitioner's request to have the utility e-mails released is denied.

C. Parks and Recreation E-Mails

E-mails obtained by the City's Parks and Recreation Department do not fall within ORS 192.502(23) or (28) exemptions discussed above. For these e-mails, the City relies upon the Information Submitted in Confidence Exemption of ORS 192.502(4). As described above, a five pronged test must be satisfied before the City can rely on this exemption. *Gray*, 139 Or. App. 556, 912 P.2d 938 (1996). I find that the City provided evidence sufficient to satisfy the first, second and fourth prongs of the test for these e-mails. However, I do not find that the City has shown that the third and fifth prongs have been satisfied for all e-mails provided to the Parks and Recreation Department.

Parks and Recreation employee Beth Ewing indicated that “[i]n some cases” the City will provide written promises which assure patrons that submitted e-mails will be kept confidential. (Ewing Aff.). It is axiomatic that “some” is not “all.” Ms. Ewing candidly revealed that a confidentiality statement is not universally contained in forms that solicit e-mail addresses. *Id.* In order to establish an exemption from disclosure, a public body must establish exemption on an individualized, case-by-case basis. *Hood Technology Corp. v. Oregon Occupational Safety & Health Div.*, 168 Or App 293, 305, 7 P.3d 564 (2000) (case-by-case rule applied to ORS 192.502(4)); *See also, Mail Tribune, Inc. v. Winters*, 236 Or. App. 91, 237 P.3d 831 (2010); *Guard Pub. Co. v. Lane County School Dist. No. 4J*, 310 Or 32, 791 P.2d 854 (1990).

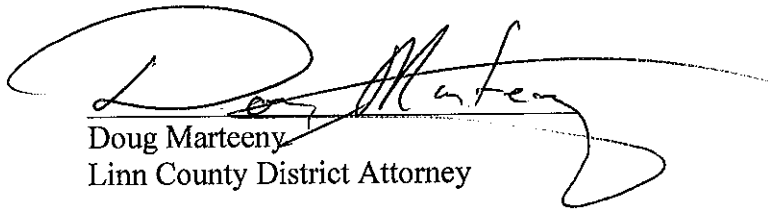
Even though it appears that *some* patrons provided e-mails in confidence, that does not mean *all* patron e-mails were submitted in confidence. The record does not establish which e-mails were provided in confidence. The record supports the inference that some patrons did not provide their e-mail in confidence. Consequently, there can be no blanket exemption for all e-mails submitted to the Parks and Recreation Department.

I find that the City has not met the burden of prong numbers three and five of the test described above. Therefore, Petitioner's request to obtain e-mails gathered by the Parks and Recreation Department is granted.

If any party disagrees with this opinion, then it may be appealed to the Circuit Court pursuant to ORS 192.450 or 192.460.

V. **ORDER**

It is so ordered that Petitioner's request is denied in part and granted in part.



Doug Marteeny
Linn County District Attorney

September 30, 2013
Date