

Public Statement

Re: H. Bartholomew Public Records Appeal.

On Wednesday, August 28, 2019, the Clackamas County District Attorney's office confirmed the Oregon Attorney General's position that city councils may meet with their attorneys in executive session to discuss and receive legal advice subject to the same lawyer-client privilege enjoyed by any other party seeking confidential legal advice. As the representatives of the City and its taxpayers, the Council has the duty to zealously protect the City in any litigation. This necessarily includes the right and duty not to divulge its strategies to the opposing party in ongoing litigation. The decision of the District Attorney rejects the effort of a newspaper reporter to obtain confidential information from a City Council meeting with its legal counsel.

On April 1st of this year, the West Linn City Council met in executive session with its attorney to discuss the City's response to a lawsuit filed by Rory Bialostosky against Councilor Teri Cummings with the Clackamas County Circuit Court. It bears noting that Councilor Cummings was not sued in her individual capacity, but rather expressly "in her official capacity as a West Linn City Councilor." On August 16, 2019, the Clackamas County Circuit Court entered a *General Judgment* dismissing Mr. Bialostosky's lawsuit. Mr. Bialostosky has indicated that he plans to appeal the *General Judgment*, and, as of today, this proceeding is still pending before the Oregon courts.

On July 25, 2019, reporter Holly Bartholomew, made a public records request to the City, seeking a copy of the audio-recording of the April 1, 2019, executive session meeting. On July 30, 2019, the City denied Ms. Bartholomew's request, advising her that the recording was protected by the City Council's lawyer-client privilege. On August 15, 2019, Ms. Bartholomew sought review by the Clackamas County District Attorney. Ms. Bartholomew argued that the true nature of the executive session was to "approve the expenditure of public funds" for the defense of Mr. Bialostosky's lawsuit against Councilor Cummings. Ms. Bartholomew further argued that the Council had made a "final decision" or "final action" on the issue of defending the Bialostosky lawsuit, contrary rules providing that such decisions or actions are impermissible in executive session.

The Oregon Attorney General has provided advice, in the form of a published Public Records and Meetings Manual, on the ability of governing bodies to consult with legal counsel in executive session when litigation is involved: ". . . this provision is intended to put public bodies on an equal footing with private litigants. This means that the governing body shall be able to engage in private and candid discussion with counsel about the legal issues raised by the litigation." The Attorney General also has advised that executive session discussion with counsel regarding a pending case, "may proceed even to the point at which the governing body has reached an informal consensus as to its course of action."

Based on the Attorney General's Manual, the District Attorney has now rejected Ms. Bartholomew's claims, determining that each of them is unfounded. The decision confirmed that the April 1st executive session is protected communication and that the City is not required to disclose the recording. The District Attorney also found that all discussions between the City Council and its legal counsel fell squarely within the allowed subjects of a valid executive session. In addition, the decision ruled that because the matter involved a case naming a City Council member in her official capacity, the litigation was appropriately the business of the City, and not a private matter.