



John S. Foote, District Attorney for Clackamas County

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August 28, 2019

Holly Bartholomew
West Linn Tidings
P.O. Box 548
Lake Oswego, OR 97034

Tim Ramis
Jordan Ramis, P.C.
2 Centerpointe Dr. #600
Lake Oswego, OR 97035

RE: Petition by Holly Bartholomew for the City of West Linn to disclose the audio recording of the executive session of the West Linn City Council on April 1, 2019.

Dear Ms. Bartholomew and Mr. Ramis,

After a review of the audio recording of the April 1, 2019 West Linn City Council executive session and a consideration of the arguments presented by both the City and Ms. Bartholomew as well as other relevant law, Ms. Bartholomew's petition for disclosure of that recording is denied.

Background

On July 25, 2019, Ms. Bartholomew made a public records request of the City of West Linn for a copy of the recording (or a transcript) of the April 1, 2019 executive session of the West Linn City Council. On August 7, 2019, Tim Ramis, acting as the City Attorney for West Linn, addressed a memorandum to Ms. Bartholomew denying her public records request on the basis of lawyer-client privilege per ORS 40.225 and ORS 192.660(2)(h). On August 15, 2019, Ms. Bartholomew petitioned the Clackamas County District Attorney's Office to review the City of West Linn's denial of her public records request.

Ms. Bartholomew contends that, in relevant part, the recording contains a final decision of the West Linn City Council to use public funds to pay for the legal services of Mr. Ramis in relation to specific litigation. Ms. Bartholomew further contends that the matter was improper for executive session because it considered the use of City legal services and therefore public funds for an individual councilor; Ms. Bartholomew considered such discussion improper because in her opinion such a use of legal services would confer upon that councilor a private pecuniary benefit.



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The City contends that the entirety of the matters discussed in executive session on April 1, 2019, were appropriate for executive session and therefore should not be disclosed. Specifically, the City contends that the communications put at issue by Ms. Bartholomew are subject to the protections of lawyer-client privilege per ORS 40.225 and ORS 192.660(2)(h). The City further argues that the litigation discussed in the executive session is still pending as the time period for an appeal has not elapsed and the other party to the litigation has indicated he plans to appeal the trial court's decision. Finally, the City finds legal significance in the fact the councilor named in the litigation at issue was named in her official capacity as a West Linn City Councilor.

Discussion

A.

The disclosure of recordings of executive sessions is governed by ORS 192.650(2).¹ At issue is whether the recording contains discussions that are inconsistent with the purpose executive sessions. As illustrated by ORS 192.660, the purpose of executive sessions is to allow for discussion of sensitive matters by a public body. However, the protections of executive sessions do not extend to a “final action” or “final decision” made by a public body during an executive session. ORS 192.660(6).²

As is relevant here, an executive session may be held for the purpose of “* * * consult[ing] with counsel concerning the legal rights and duties of a public body with regard to current litigation or litigation likely to be filed.” ORS 192.660(2)(h). There is a lack of judicial opinions interpreting this statute. However, the *Attorney General's Manual* provides some helpful analysis suggesting that the purpose of this provision is to “* * * put public bodies on an equal footing with private litigants,” which means the ability to “* * * engage in a private and candid discussion with counsel about the legal issues raised by the litigation,” including, “not only procedural options, but also substantive analysis of the legal merits, risks, and ramifications of the litigation.” *Attorney General's Manual* at 166. The guidance from the Attorney General also places a limit on the scope of ORS 192.660(2)(h), “The discussion in executive session may proceed even to the point at which the governing body has reached an informal consensus as to its course of action. However, any final decision must be made in open session.” *Id.* at 167.

¹ “* * * If the disclosure of certain material is inconsistent with the purpose for which a meeting under ORS 192.660 is authorized to be held, that material may be excluded from disclosure. However, excluded materials are authorized to be examined privately by a court in any legal action and the court shall determine their admissibility.”

² Neither “final decision,” nor “final action” are defined in statute or by the courts. However, “decision” is defined as, “* * * any determination, action, vote or final disposition upon a motion, proposal, resolution, order, ordinance or measure on which a vote of a governing body is required, at any meeting at which a quorum is present.” ORS 192.610(1). Additionally, the *Attorney General's Public Records and Meetings Manual* provides some guidance: “(t)he relevant criteria are the nature of the decision or action, and whether publicly announcing the decision would frustrate the purpose behind the statutory authorization for the particular executive session.” State of Oregon, Department of Justice, *Atty. Gen. Public Records and Meetings Manual*, 173 (2019) (hereinafter, *Attorney General's Manual*).



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Finally, in the event that the protections of the executive session do not extend to the material at issue, it is still subject to the exemptions to disclosure of public records found in ORS 192.345, 192.355, and elsewhere in law. Relevant exemptions may include the exemption for public records pertaining to litigation, internal advisory communications, and lawyer-client privileged communication.

B.

The first question to be addressed is whether a “final action” or “final decision” was improperly made in the executive session at issue. Here, no “final action” or “final decision” was improperly made.

A “‘Decision’ means any determination, action, vote or final disposition upon a motion, proposal, resolution, order, ordinance or measure on which a vote of a governing body is required, at any meeting at which a quorum is present.” ORS 192.610(1). Importantly, a “decision” is only made if the “decision” is on an issue that requires a vote of the public body. No such “decision” was made during the executive session at issue. There is no guidance beyond that in the *Attorney General’s Manual* about the meaning of a “final action.” Applying the criteria from the *Attorney General’s Manual* (discussed in footnote two above) and considering the statutory definition of “decision,” no such action or decision was made on the recording at issue. Choices made by the council, if any, during the April 1, 2019 executive session do not constitute a “decision” under the statutory definition; to announce those choices, if any, would frustrate the purpose of the executive session for the reasons explained below.

The second question to be addressed is whether the material on the requested recording is consistent with the purpose for which the executive session was authorized. ORS 192.650(2). If so, then the recording may be disclosed only with the consent of the City; but, if not, then the recording may be disclosed, subject to any applicable exemptions under 192.345, 192.355, and elsewhere in law. Here, the material on the requested recording is consistent with the purpose for which the executive session was authorized and therefore may not be disclosed without consent of the City.

Here, the purpose of the executive session was to discuss pending litigation. The named defendant in that litigation was a West Linn City Councilor; the caption on the complaint specifically named that councilor in her official capacity as a West Linn City Councilor. Therefore, the litigation is appropriately business of the City and not a private matter. The discussion in the executive session between councilors and the City Attorney falls squarely into the categories of permissible discussion provided in the *Attorney General’s Manual* of “* * * procedural options * * * [and] substantive analysis of the legal merits, risks, and ramifications of the litigation.” *Attorney General’s Manual* at 166. Therefore, the disclosure of any such



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communication without the consent of the City would frustrate the purpose of executive session to allow for frank communication between a public body and its attorney about pending litigation. Disclosure of such communication would put a public body at a disadvantage to private litigants, which is precisely the harm that ORS 192.660(2)(h) seeks to prevent.

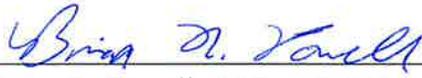
Finally, because the recording at issue is protected by ORS 192.650(2) in conjunction with ORS 192.660(2)(h), this decision need not and does not consider the merits of exemptions under public records law, such as exemptions for public records pertaining to litigation, internal advisory communications, and lawyer-client privilege. Those exemptions would need to be considered only if the protection of ORS 192.650(2) did not extend to the recording.

Order

Accordingly, it is ordered that the petition of Holly Bartholomew to disclose the audio recording of the April 1, 2019 executive session of the West Linn City Council is denied.

Dated this 28th day of August, 2019.

JOHN S. FOOTE
District Attorney



Brian R. Powell, OSB #174392
Deputy District Attorney
Clackamas County District Attorney's Office