

Douglas C. Blomgren
Commissioner

August 18, 2005

Bertha Ferrán
Commissioner

VIA FACSIMILE

Sal Kadri
Commissioner

Attn: John K. Hoover, for
Michael D. Schruck
District Attorney, Multnomah County
1021 SW Fourth Avenue, Room 600
Portland, Oregon 97204-1193

Eric Parsons
Commissioner

Re: Petition of Christopher Frankonis – Portland Communiqué, August 8, 2005, to disclose certain records of the Portland Development Commission

Mark Rosenbaum
Commissioner

Dear Mr. Hoover:

Tom Potter
Mayor

As a preliminary matter, the documents requested by Mr. Frankonis were not reviewed prior to receipt of your August 8th letter because of the agency's position that they are not in fact public records. Moreover, they are attorney work product and subject to attorney-client privilege protections. Without waiving this position, counsel has reviewed the documents solely for the purpose of responding to this petition. You should receive documents responsive to the petition from the Barran Liebman LLP law firm today. As explained below, many of the documents are not public records, others are exempt from disclosure, if they are in fact found to be public records, and can be produced, but not from the files of the Commission's attorneys.

Bruce Warner
Executive Director

Wyman Winston
Deputy Executive Director

As a general matter, documents in the possession of Brad Tellam and Barran Liebman consist of: (1) documents provided to him by Commission in-house counsel and staff; (2) notes from interviews with Commissioner Hennessee, the contractors, and staff, many of whom spoke based on grounds of anonymity; and (3) documents prepared by Mr. Tellam to aid in tracking the facts and briefing the Audit Committee and the Commission regarding the results of his investigation. Again, aside from PDC documents provided to him and reports provided to the Commission by him, nothing generated by Mr. Tellam or his firm as part of the process of his investigation is in the possession of Commission staff or its Commissioners.

www.pdc.us

222 Northwest
Fifth Avenue
Portland, OR
97209-3859

tel: 503.823.3200
fax: 503.823.3368
TTY: 503.823.3366

Background

On or about May 9, 2005, the Board of Commissioners received a confidential memorandum from the Internal Auditor Manager, David Nemo, containing a number of anonymous allegations implicating two situations likely involving conduct he characterized as "improper and unethical". First he details an allegation that the Board Chair, Matt Hennessee, had "directly or indirectly unduly influenced the expenditure of public funds" to 3, The Communications Company ("3 Communications") and its principal, Nathaniel "Thane" Clevenger. Second, he explained that the Deputy



Executive Director, Wyman Winston, had violated internal policies in approving a consultant contract, and payments for work not performed, or of little value. This involved the contractor "Walking On Cotton", which was an organization owned and operated by Anthony Harris.

During the course of the investigation that ensued, published reports by *The Oregonian* suggested that Mr. Harris and PDC Organizational Development Manager, Tracy Smith, had conversations wherein Ms. Smith requested Mr. Harris to discuss her salary and pay grade with her immediate supervisor, Mr. Winston, as Mr. Harris was serving as Mr. Winston's executive coach under the terms of his contract with the Commission. She was placed on administrative leave on or about June 13 pending the results of the investigation.

Recognizing that these allegations raised complex employment, public contracting and ethics issues, on or about May 17, 2005, the Commission retained the services of the prominent Portland law firm of Barran Liebman LLP and Brad Tellam, a renowned ethics attorney with the firm, to provide legal advice and investigative services for the Commission's Audit Committee. *Affidavit of Matthew Baines, enclosed; Affidavit of Bradley F. Tellam, enclosed.* The legal advice involved determining any implications for the Government Standards and Practices Commission ("GSPC") for any conduct of the Board Chair, and any employment issues for the allegations against the Deputy Executive Director. *Id.* He provided this advice. *Id.*

The decision was made to refer the matter to independent, outside counsel in order to (1) ensure an unbiased review of the facts; and (2) better protect the anonymity of the involved staff, as well as to obtain advice regarding any agency exposure arising from the allegations. It was also recommended by the Internal Audit Manager. As a result of the allegations, Tracy Smith and Anthony Harris both retained their own respective counsel to protect their rights and interests.

At the conclusion of his investigation, Mr. Tellam briefed the Audit Committee and Interim General Counsel Matt Baines at his office on the results of each investigation and the legal implications with respect to GSPC and employment law issues involving Mr. Winston. *Aff. of Matthew Baines; Aff. of Bradley F. Tellam.* The Audit Committee consisted of Commissioners Parsons and Blomgren. Mr. Tellam explained the results of each investigation, which he had reduced to three confidential memoranda dated June 29, 2005. *Aff. of Bradley F. Tellam.* The memoranda were reviewed by Commissioners Parson and Blomgren, and Mr. Baines and they discussed the final form of his work product. *Id.*

Mr. Tellam's contract required the preparation of appropriate reports on the results of his investigation. He prepared summary memoranda to the Board explaining the results of his investigation; the results of the Hennessee investigation were presented in a public meeting. *Aff. of Matthew Baines.* The results of the Winston and Smith

investigations were reported to Interim Executive Director Judith Tuttle, who met with Mr. Tellam. *Aff. of Bradley F. Tellam*. Ms. Tuttle reviewed the reports and discussed them with Mr. Winton and Ms. Smith's legal counsel. *Aff. of Matthew Baines*.

Ultimately he concluded that Matt Hennessee had not directly or indirectly unduly influenced the expenditure of public funds. He also concluded that Tracy Smith had formed a personal relationship with Mr. Harris and Ms. Smith had, among other things, loaned him money. He also noted that it could be construed that she attempted to influence decisions relating to her employment and Mr. Harris' contract because of that relationship. As a result of Mr. Tellam's investigation, Mr. Winston was determined to have made contracting errors that resulted in a violation of the Commission's contracting policy, for which he was suspended for two weeks without pay.

As part of his investigation, Mr. Tellam reviewed the following: (1) Commission documents materials relating to contracting procedures, including Board resolutions, policies and procedures; (2) the 3 Communications and Walking On Cotton contract files; and (3) documents obtained by him from third parties. He also interviewed several witnesses, including several Commission employees involved with the contracts in question, Chair Hennessee, Nathaniel Clevenger, and Anthony Harris, as well as the anonymous employees.

The Request.

Mr. Frankonis has requested the following:

"All documents *generated* by Bradley E. Tellam, or his staff, in the production of his memorandum dated July 5, 2005 (and presented before the PDC Board of Commissioners on Wednesday, July 13, 2005), regarding PDC Chair Matt Hennessee and contracts awarded to Nathaniel Clevenger and 3 Public Relations."

Argument

Documents generated by Brad Tellam as part of his "process" of investigating the allegations are not "public records" subject to disclosure because Barran Liebman is not a "public body" as defined by the statute. Moreover, even if they were, many of the documents are exempt from disclosure as attorney work product and attorney-client privilege, as well as being protected as confidential submissions. Except as noted herein, the documents in question have not been seen, used or retained by the Commission staff or Commissioners, except to the extent they have been made public records by being provided to the Commission, namely in the three July 5th memos.

The documents provided to Mr. Tellam regarding the Commission's contracting policies and procedures, as well as the 3 Communication and Walking On Cotton contract files are clearly public records: they were generated by the Commission, were provided to Mr. Tellam by the Commission, and are retained by the Commission. This information can be made available to Petitioner if he requests it. Such is not the case for the other records created as part of Mr. Tellam's investigative process.

Barran Liebman Is Not A Public Body

All documents of interest to the public are not public records. Barran Liebman LLP is not a public body subject to the public records laws. ORS 192.410 provides that, subject to certain exceptions, "[e]very person has a right to inspect any public record of a *public body* in this state." Under ORS 192.410(3), public records are defined as:

". . . any writing containing information relating to the conduct of the public's business, including but not limited to court records, mortgages, and deed records, *prepared, owned, used or retained by a public body* regardless of physical form or characteristics. (Emphasis added.).

Accordingly, unless Barran Liebman is considered a *public body*, petitioner has no right to documents in their possession. The Oregon Supreme Court in *Marks v. McKenzie High School Fact-Finding Team*, 319 Or 451 (1994), on facts similar to ours, considered what constitutes a public body.

Marks v. McKenzie High School Fact-Finding Team involved an action brought by a group of parents against a fact-finding team commissioned by the McKenzie School Board and appointed by the Confederation of Oregon School Administrators (COSA) to investigate concerns regarding the high school. *Id.* at 453. The team consisted of three members, 2 retired school administrators and 1 on leave. *Id.* The plaintiff's sought to inspect the records in the possession of the fact-finding team *only*; there was no dispute that the report prepared by the defendant and provided to the School District was a public record. *Id.* at 456.¹ Specifically, the complaint alleged that the team was charged to "investigate certain aspects of the high school's operation, to prepare a report regarding that investigation, and to make any recommendations that the team deemed appropriate." *Id.* The court determined that the right to inspect the records turned on whether the fact-finding group was a public body. *Id.* at 454-456.

In concluding that the fact-finding team was not a public body and that their records were not subject to inspection, the court applied a "functional equivalent" analysis. They write:

¹ In a footnote the Oregon Supreme Court noted that there was no allegation that the public body "prepared, owned, used or retained" the records of the team sought by the plaintiff. They noted that that was plainly a public record. Our situation is the same: the report provided by Brad Tellam has been released to the Commission and the public; it is a public record.

[W]e hold that the determination of whether a particular entity is a "public body" within the meaning of ORS 192.410(3) will depend on the character of that entity and the nature and attributes of that entity's relationship with government and governmental decision-making. *Id.* at 463.

They noted the following relevant factors:

1. The entity's origin;
2. the nature of the function assigned to and performed by the entity;
3. the scope of the authority granted to and exercised by the entity;
4. the nature and level of governmental financial involvement with the entity;
5. the nature and scope of governmental control over the entity's operation; and
6. the status of the entity's officers and employees. *Id.* at 463-464.

Considering these factors, the court found that the fact-finding team was not a public body. *Id.* They noted that the school board exercised *no* control or supervision over the team's operations; and the team had *no* decision-making authority other than the conduct of the investigation. *Id.* at 466. Both of these were factors weighing against them being a public body. *Id.* at 465-466. Ultimately, eventhough the Court recognized that the investigation itself was related to the operation of the high school, this and the fact that the team was created at the behest of the school board, were not sufficient to make it a public body. *Id.*

Barran Liebman is not a public body. It is a private, for-profit law firm serving both local and national clients, private, public and governmental. It has substantial revenues that make the \$25,000 contract with the Commission not even one-half of 1% of their annual receipts. *Aff. Of Bradley F. Tellam.* However, the fact that the Commission will pay Barran Liebman is not dispositive on the issue. *See Marks, supra.* at 463 (explaining that no single factor is either indispensable or dispositive).

The firm functions completely as an independent contractor for its clients. It's responsible for its own supplies and materials, insurance, and required to exercise its independent judgment in completing its work. *Aff. Of Bradley F. Tellam.* Aside from the contract and the scope of work, the Commission has no control over how the firm operates. Finally, no employee, attorney, officer, or director of the firm is also an employee, attorney, officer or commissioner of the Commission. They are simply an independent consultant. All these factors establish that they in no way act as the "functional equivalent" of a public body under the analysis provided in *Marks*.

Petitioner notes that the records relate to a matter of public concern. It is simply not enough that the subject matter of the documents bear on matters of public concern; that's not the test. The court in *Marks* noted that without decision-making authority, the

only affect the fact-finding team could have on matters of public concern was through their report, which the public did have a right to see. *Id.* at 466. Thus the argument that information generated as part of Mr. Tellam's process is subject to public scrutiny has already been rejected by Oregon's highest court and should not be persuasive in this forum. The Commission released the reports prepared by Brad Tellam. There is no public interest sufficient to overcome the fact that the public disclosure laws do not apply to Barran Liebman as a private, for-profit law firm.

If documents in Brad Tellam's possession are found to be public records, i.e., records of a *public body*, then they are exempt from disclosure as attorney-client privileged communications, attorney work product, confidential submissions and personnel discipline actions.

Attorney Client Privilege

ORS 192.502(9) makes absolutely exempt "public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged" under Oregon law. Attorney-client communications are exempt from disclosure through ORS 192.502(9) and ORS 40.225. ORS 40.225(2) provides that:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendering of professional legal services to the client.

The Commission has two types of attorneys: in-house counsel and outside counsel. Outside counsel communications are protected to the same extent as in-house counsel. It is clear that Mr. Tellam provided professional legal services as part of his investigation. Both Matt Baines and Brad Tellam confirm that. Again, they indicated that he was asked to, and in fact did, provide advice regarding the relevance of the allegations against the Chair to the jurisdiction of the GSPC, as well as employment law issues related to the allegations against Wyman Winston. *Aff. of Bradley F. Tellam; Aff. of Matthew Baines*. Thus any communications in his files between Mr. Tellam and Commission staff and Board are absolutely exempted from disclosure as privileged.

Attorney Work Product

Brad Tellam's files are attorney work product. ORS 192.501(1) protects from disclosure records that contain information *compiled or acquired* by the public body for use in litigation that is reasonably likely to occur. *See Lane County School District No. 4J v. Parks*, 55 Or App 416, 420 (1981)(interpreting earlier version of statute). It provides in relevant part:

Records of a public body *pertaining* to litigation to which the public body is a party if the complaint has been filed, or if the complaint has not been

filed, if the public body shows that such litigation is reasonably likely to occur. . . . ORS 192.501(1) (Emphasis added.).

Thus, whether or not the documents in question include legal advice or were for the purpose of rendering legal advice becomes irrelevant. Moreover, the rule does not even require that it be prepared by an attorney. In fact the content of the document becomes irrelevant, so long as it was *compiled or acquired* in preparation for litigation. *Id.* at 420. The policy behind this exemption is to place governmental bodies on an even footing with private parties before and during litigation. *Attorney General's Public Records and Meeting Manual* at 28.

At the time the Commission received the memo from David Nemo, it understood that potential liability and litigation existed. *Aff. of Matthew Baines*. Mr. Tellam's investigation was of course geared toward providing the agency a factual basis for its actions.

Investigator files are among the type of information subject to work product protection. *See United Pacific Insurance Company, v. Trachsel*, 83 Or App 401, 404 (1986) ("Investigation reports prepared by or for an insurer may fall into either category depending on the purpose of the investigation disclosed by the evidence."). The documents prepared by Brad Tellam to assist him in processing the information he gathered, such as a timeline, memoranda or notes are all protected as work product.

Anonymous Reporters Information Exempt As Confidential Submissions.

Under ORS 192.502(3), a public record is exempt from disclosure as a confidential submission if the following criteria are met:

1. the informant must have submitted the information on the condition that the information would be kept confidential;
2. the informant must not have been required by law to provide the information;
3. the information itself must be of a nature that reasonably should be kept confidential;
4. the public body must show that it has obligated itself in good faith not to disclose the information;
5. disclosure of the information must cause harm to the public interest.

Attorney General's Public Records and Meetings Manual, January 2004, page53; *see also Gray v. Salem-Keizer School District*, 139 Or App 556 (1995)([W]e find persuasive, and, thus, refer to , the cogent five-part test for exemptions set out in the Attorney General's Public Records and Meetings Manual.)

Many of the documents in the possession of Barran Liebman and Brad Tellam clearly qualify as confidential submissions under ORS 192.502(4). As indicated in the memo from David Nemo to the Commission Board of Director's dated May 9, 2005, the reporting employees made it clear to Mr. Nemo that they wished to remain anonymous. He writes: "Understandably, the employees are concerned about their anonymity, but are willing to cooperate with any investigation undertaken by the Board." In response, Audit Committee member Commissioner Eric Parsons recommended retaining an outside investigator in an effort to protect the employee's request for confidentiality. See E-mail string printed by Matthew Baines, dated May 10, 2005.

In addition to the Commission's willingness to protect the employee's request for anonymity, Brad Tellam explained at the beginning of his interviews that he would endeavor to maintain their anonymity as well. *Aff. of Bradley F. Tellam*. Moreover, anonymous reports of possible wrongdoing by superiors is the type of information that should be kept confidential when so requested. Disclosure of such information would harm the public interest by discouraging reports by employees who fear retaliation for filing the report. Thus, all communications with the anonymous employees and notes from their interviews should be exempted from disclosure as confidential submissions.

In summary, Barran Liebman LLP is not a public body subject to the public records laws. The records in their possession related to the investigations of Mr. Hennessee, Mr. Winston and Ms. Smith are not public records. If they are found to be so based on a determination that Barran Liebman is a *public body*, then they are exempt from disclosure based on attorney-client privilege, attorney work product, and based on their status as confidential submissions. If petitioner wants the records that are clearly public, they need only modify their request so as not to seek them from the possession of the Commission's attorneys. If you have any additional questions, feel free to give me a call at (503) 823-3225.

Sincerely,



Melvin Oden-Orr

Enclosures

cc: Christopher Frankonis, Portland Communiqué
Martha Richmond
Matt Baines, Esq.

IN RE PETITION OF CHRISTOPHER FRANKONIS – PORTLAND
COMMUNIQUÉ, AUGUST 8, 2005, TO DISCLOSE CERTAIN RECORDS OF
THE PORTLAND DEVELOPMENT COMMISSION

AFFIDAVIT OF BRADLEY F. TELLAM, ESQ.:

State of Oregon)

)

County of Multnomah)


I, Bradley F. Tellam, being of lawful age, upon oath state:

1. I am a member of the Oregon and Washington State Bar Associations. I am a partner at the law firm of Barran Liebman LLP. The firm focuses in the general areas of labor and employment. It represents local and national employers, private, public and governmental.
2. I practice primarily in the areas of employment law, complex civil litigation, and appeals. In addition, I devote significant time to legal ethics and professional responsibility issues, including representation of attorneys.
3. On or about May 17, 2005, Barran Liebman LLP entered a contract with the Portland Development Commission to provide investigative services and legal advice to the Audit Committee of the Board. The anticipated work product consisted of a report to the Audit Committee and legal advice addressing issues related to the Government Standards and Practices Act for allegations against Chair Matt Hennessee, and employment law issues related to Deputy Executive Director Wyman Winston.
4. The fee provided in the contract was not to exceed \$25,000. This amount represents less than one-half of one percent of Barran Liebman's gross revenues last year.
5. The investigation initially involved allegations against the Chair of the Board, Matt Hennessee and the Deputy Executive Director, Wyman Winston generally relating to alleged contracting improprieties. During the course of the investigation, published reports implicated Organizational Development Manager Tracy Smith, and the investigation was expanded to include her.
6. During my investigation I interviewed several individuals, including Commission staff involved with the contracts at issue, some of whom expressed an interest in maintaining their anonymity and feared reprisals from their superiors and fellow

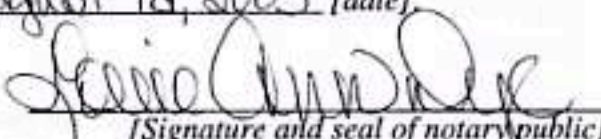
employees. David Nemo, the Commission's Internal Audit Manager, was the conduit to those employees.

7. At the beginning of my interviews I explained to all witnesses that I represented the Commission and that I was not acting as their lawyer. I also explained that the information I received from them likely would be shared with the Audit Committee, that it was the Commission's decision what would be done with the information, and that they should consider whatever they told me to be available to the Commission. I also told those who were concerned about anonymity that I would keep their names confidential to the extent possible consistent with my obligations to the Commission.
8. At the conclusion of my investigation, I briefed the Audit Committee and Interim General Counsel Matt Baines at my office on the results of each investigation and the legal implications with respect to GSPC and employment law issues involving Mr. Winston. I explained the results of each investigation, which I had reduced to three confidential memoranda dated June 29, 2005. The memoranda were reviewed by Commissioners Parson and Blomgren, and Mr. Baines and we discussed the final form of my work product.
9. Ultimately, it was determined that I would prepare summary memoranda explaining the results of my investigation. The results of the Hennessee investigation were presented to the Board in a public meeting. The results of the Winston and Smith investigations were reported to Interim Executive Director Judith Tuttle during a meeting with me.

Dated: August 18, 2005

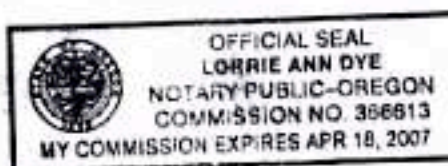


Bradley F. Tellam

Subscribed and sworn to before me August 18, 2005 [date].

[Signature and seal of notary public]

Notary Public

My commission expires: 4-18-07 [date].



**IN RE PETITION OF CHRISTOPHER FRANKONIS – PORTLAND
COMMUNIQUÉ, AUGUST 8, 2005, TO DISCLOSE CERTAIN RECORDS OF
THE PORTLAND DEVELOPMENT COMMISSION**

AFFIDAVIT OF MATTHEW R. BAINES, ESQ.:

State of Oregon)
)
County of Multnomah)

I, Matthew R. Baines, being of lawful age, upon oath states:

1. I am a member of the Oregon Bar Association and serve as the Interim General Counsel for the Portland Development Commission.
2. On or about May 9, 2005, the Board of Commissioners received a confidential memorandum from the Internal Auditor Manager, David Nemo, containing a number of anonymous allegations implicating two situations likely involving conduct he characterized as "improper and unethical". First he reported an allegation that the Board Chair, Matt Hennessee, had "directly or indirectly unduly influenced the expenditure of public funds" to 3, The Communications Company and its principal, Nathaniel "Thane" Clevenger. Second, he reported an allegation that the Deputy Executive Director, Wayman Winston, had violated internal policies in approving a consultant contract, and payments for work not performed, or of little value. This involved the contractor "Walking On Cotton", which was an organization owned and operated by Anthony Harris.
3. Recognizing that the initial allegations raised complex employment, public contracting and ethics issues, I, acting on behalf of the Commission, retained the services of the prominent Portland law firm of Barran Liebman LLP and Brad Tellam, a renowned ethics attorney with the firm, to provide legal advice and investigative services for the Commission's Audit Committee. I believed that the allegations raised in Mr. Nemo's memo could potentially lead to litigation involving the Commission. For these reasons, it was important for me to have an outside lawyer, experienced in employment law and ethics conduct the investigations on behalf of the Commission and provide legal advice to me and the Commission. This involved determining any implications for the Government Standards and Practices Commission for any conduct of the Board Chair, and any employment issues for the allegations against the Deputy Executive Director. Mr. Tellam provided this advice.
4. During the course of the investigation that ensued, published reports by *The Oregonian* suggested that Mr. Harris and PDC Organizational Development

Manager, Tracy Smith, had conversations wherein Ms. Smith requested Mr. Harris to discuss her salary and pay grade with her immediate supervisor, Mr. Winston, as Mr. Harris was serving as Mr. Winston's executive coach under the terms of his contract with the Commission. Based on this information, I requested that Mr. Tellam expand his investigation to include issues relating to Mr. Smith. The Executive Director placed Ms. Smith on administrative leave on or about June 13, 2005 pending the results of the investigation.

5. Under the contract with Barran Liebman LLP, in addition to legal advice, the anticipated work product consisted of three reports to the Audit Committee and the Executive Director. Mr. Tellam briefed the Audit Committee, the Interim Executive Director, Judith Tuttle, and me on the results of his investigation and legal analysis. Mr. Tellam provided one written report regarding the Hennessee investigation to the Board and two written reports to the Interim Executive Director regarding the Winston and Smith investigations. Ms. Tuttle in turn discussed them with Mr. Winston, and Ms. Smith's legal counsel.

Dated: August 18, 2005

Matthew R. Baines
Matthew R. Baines

Subscribed and sworn to before me August 18, 2005 [date].

Juanita A. Swartwood
[Signature and seal of notary public]



Notary Public

My commission expires: February 13, 2009 [date].