

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

PORT OF PORTLAND, a port district,)	
)	
Plaintiff,)	Case No. 0606-06786
v.)	
)	ORDER ON CROSS MOTIONS
OREGON CENTER FOR)	FOR SUMMARY JUDGMENT
ENVIRONMENTAL HEALTH, a domestic)	
Nonprofit Corporation, and JANE H. HARRIS,)	
)	
Defendants.)	

This matter came before the court on November 5, 2007, for hearing on Plaintiff's Motion for Summary Judgment and Defendants' Cross Motion for Summary Judgment. In this action, Plaintiff was represented by its counsel, William F. Gary and James E. Mountain, Jr. Defendants appeared through their counsel, Scott Niebling. Having heard, examined and considered the evidence and arguments, the court rules on the motions as follows.

I. INTRODUCTION

In this lawsuit for declaratory relief, plaintiff Port of Portland seeks *de novo* review of an order issued by the Multnomah County District Attorney, pursuant to the Oregon Public Records Disclosure Act (the Act), ORS 192.410 *et seq*, for the Port to disclose a document entitled "Fifth Amended and Restated Harbor Common Interest and Joint Defense Agreement" (JDA).

The Multnomah County District Attorney initially ordered disclosure of the JDA in response to a request by *The Oregonian* newspaper. The Port declined to disclose the JDA. Defendants here, the Oregon Center for Environmental Health and Jane H. Harris, petitioned the District Attorney on May 22, 2006 for an order directing plaintiff to disclose the JDA.

In response to Defendants' request for an order, and after reviewing the parties' submissions regarding disclosure of the JDA, the District Attorney again ordered plaintiff to disclose the JDA. Plaintiff then sought declaratory relief from this Court.

Plaintiff and defendants have each filed cross-motions for summary judgment, each arguing that the undisputed facts and controlling law support their respective positions regarding whether disclosure of the JDA is required under the Act.

Specifically, plaintiff asserts the JDA is unconditionally exempt from disclosure under ORS 192.502(8), as a record protected by the "lawyer-client privilege" established under federal law, and under ORS 192.502(9), as a record protected by the "lawyer-client privilege" and "work product" doctrine established under state law.

II. FACTS

The following undisputed facts are taken from the briefs and supporting evidence filed in connection with the cross-motions for summary judgment.

In December 2000, the EPA listed the Portland Harbor Superfund Site on the National Priorities List of the most contaminated sites in the United States. Shortly thereafter, the EPA issued "General Liability Notice Letters" to sixty-nine entities, denominated as "potentially responsible parties" (PRPs) under Section 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Upon receiving these letters, the Port of Portland, a public agency, and certain private-party recipients, by and through their respective attorneys, entered into the Lower Willamette Group Agreement, a multilateral contract that Plaintiff contends formed a "joint defense alliance" (JDA). Several PRPs that received an offer to join the JDA declined to do so.

III. STANDARD OF REVIEW

When the pleadings, depositions, affidavits, declarations and admissions on file show that there is no genuine issue of material fact, the moving party is entitled to judgment as a matter of law. The party moving for summary judgment has the burden of demonstrating the absence of a genuine issue of fact.

ORCP 47C provides: "No genuine issue as to a material fact exists if, based upon the

record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment."

If the moving party demonstrates the absence of any genuine issue of material fact, the burden shifts and the party in opposition to the motion for summary judgment must produce evidence sufficient to demonstrate the existence of one or more genuine issues of fact.

IV. ANALYSIS

My analysis begins and, for the reasons set forth below, ends with the claim by plaintiff that the JDA is exempt under ORS 192.502(9), specifically because it is protected from disclosure by the "lawyer-client privilege."

ORS 192.502(9) exempts public records from disclosure if Oregon law prohibits, restricts, or otherwise makes confidential or privileged the information sought. Rule 503 of the Oregon Evidence Code, codified at ORS 40.225, extends the "lawyer-client privilege" to a "confidential communication made for the purpose of facilitating the rendition of legal services...by the... client's lawyer and a lawyer representing another in a matter of common interest." ORE 503(2)(c)

The mere fact the JDA was created in connection with one or more existing lawyer-client relationships is not determinative of the privilege's application, as the privilege is not co-extensive with the relationship. *State v. Riddle* 330 Or 471, 477 (2000). Rather, "the rule [ORE 503] protects communications, not relationships." *Id.*

Conversely, defendants' argument for rejecting plaintiff's claim of protection for the JDA as a whole -- that "it would provide this expansive umbrella of absolute privilege" -- misses the analytical mark, as does the District Attorney's apparent balancing of "lawyer-client" protection for the JDA versus the obvious public interest in the clean-up of the Willamette River. The "lawyer-client privilege" covers what it covers, no more but no less, and the exemption for the privilege under the Act is absolute. *Accord Klamath County School District v. Teamey* 207 Or App 250, 260 (2006)¹

Thus, plaintiff is entitled to summary judgment on its legal assertion that the JDA is totally privileged and, as such, entirely exempt from disclosure, if the undisputed facts and evidence shows the JDA consists exclusively of:

- 1) *communications* that are

1

"Nor does the statute provide for discretion for courts to apply the exemption "sparingly and with restraint" or to apply it only when there is "an overwhelming public interest in maintaining confidentiality." Unlike certain other provisions in ORS 192.501 and ORS 192.502, which expressly require courts to balance confidentiality and public interest, the exemption here applies without regard to such considerations. Thus, the statute does not appear to allow for either a "narrow" or a "broad" reading. Instead, the statute is clear on its face: if the requirements of OEC 503 are satisfied, the attorney-client privilege applies." *Id.*

2) *confidential*, going from

3) *one lawyer to another*, where each represents a client on a matter of *common interest* to the clients and

4) the communications are *made for the purpose of facilitating the rendition of legal services*.

In *Riddle*, the court noted ORE 503 did not define the term "communication," and the court utilized the dictionary meaning: "an 'interchange of thoughts or opinions.'" *Id.* Employing that same definition here, the contents of the JDA do, indeed constitute "communications."

"Confidentiality" is defined in ORE 503(1)(b) as "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." The 1981 Conference Commentary to ORE 503 explains that " 'confidential' is defined in terms of intent." Citing *Bryant v. Dukehart* 106 Or 359 (1922), the Commentary also states that "[u]nless an intent to disclose is apparent, however, the attorney-client communication is confidential."

The undisputed record before this court demonstrates that the attorneys for the Port and the other JDA signatories interchanged the thoughts which came to be written into the JDA with the intent that the thoughts remain confidential. Terms within the JDA's section 9.4, entitled "Maintenance of Confidentiality" clearly express such intent. Indeed, the JDA is replete with provisions expressly intended to preserve the confidential and privileged nature of all matters contained within, and arising out of, the JDA.

There is no dispute that the written thoughts contained within the JDA were

interchanged between one client and that entity's lawyer, and then on to another entity and that entity's lawyer. *See, e.g. Ashton Supp. Decl. Paragraph 5.* There is dispute, however, as to whether the thoughts interchanged were regarding a matter of "common interest."

The term "common interest" is not defined in the statute. Under *PGE v BOLI 317 Or 606* (1993), I consider the dictionary meaning of "common": "belonging to or shared by two or more individuals or by all members of a group." *Webster's New Collegiate Dictionary* (5th ed. 1977.) The dictionary meaning of "interest" is: "right, title or legal share in something; participation in advantage and responsibility." *Id.*

Additionally and significantly, the commentary makes clear inclusion of the term "common interest" within ORE 503(2)(c) was intended to permit protection for lawyer-client privileged communications to survive disclosure within a "joint defense" situation.

Finally, the parties have cited federal case law that discusses the meaning of the legal term "common interest."

Considering these sources, I find no genuine issue of material fact in dispute regarding whether the parties to the JDA had a legally cognizable "common interest" so as to permit Oregon's version of the "lawyer-client privilege" to protect the JDA. All the PRPs, as a consequence of their designation as such, had a common interest in the investigation and clean-up of the Portland Harbor mandated by law, which was the subject of the JDA. Indeed, all the PRPs -- both those that signed the JDA and those choosing not to sign -- acknowledged in writing this common interest, the former in a provision of the JDA, and the latter in the confidentiality agreement that accompanied the JDA.

Next, the *Ashton* affidavits and other evidence make clear and undisputed that the communications leading up to the JDA, and the communications within the JDA itself, were made for the purpose of facilitating the rendition of legal services.

Finally, defendants argue whatever the Port and other JDA signatories' original intent to preserve confidentiality and the attendant lawyer-client privilege, the confidentiality and privilege was waived when the Port circulated the JDA to PRPs that ultimately declined to participate in the joint defense, thereby evidencing a lack of "common interest." I find no waiver occurred under these facts and circumstances for two reasons.

First, the JDA was circulated to PRPs with an accompanying confidentiality agreement, whereby the PRPs agree to keep the JDA confidential even if they did not sign on, and to return or destroy all copies of the JDA. The practical and legal effect of these commitments was to preserve the JDA within the scope of the "lawyer-client privilege," by demonstrating a clear intent that the JDA and its provisions remain confidential.

Second, as noted above, the JDA was circulated only to PRPs that, as a consequence of that designation and of their own assertion of common interest upon signing the confidentiality agreement that accompanied the JDA, undisputedly possessed a "common interest" of the sort sufficient to bring them within the provisions of ORE 503(2)(c).

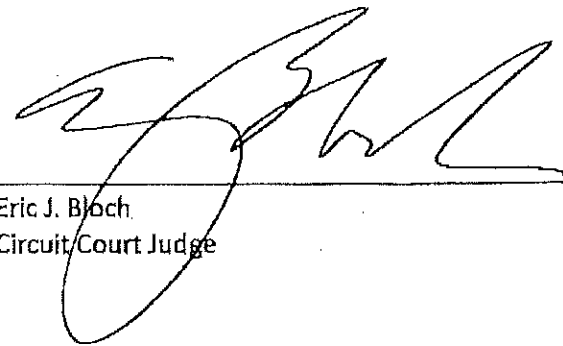
CONCLUSION

For the reasons set forth above, I find no genuine issue of material fact is in dispute and plaintiff is entitled to judgment in its favor as a matter of law regarding the applicability of ORS ORE 503 (ORS 40.225) to the JDA, so as to exempt the JDA from disclosure under the Act.

Defendant's Motion for Summary Judgment is, accordingly, denied.

It is so ruled.

DATED this 13 day of November 2007.



Eric J. Bloch
Circuit/Court Judge