

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-60-03

(UNFAIR LABOR PRACTICE)

BEAVERTON POLICE ASSOCIATION,)	
)	
Complainant,)	
)	RULINGS,
v.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW
CITY OF BEAVERTON,)	AND ORDER
)	
Respondent.)	
_____)	

This Board heard oral argument on January 5, 2005, on Respondent's objections to a proposed order issued on July 2, 2004, by Administrative Law Judge (ALJ) B. Carlton Grew, following a hearing on February 9, 2004, in Beaverton, Oregon. The hearing closed on March 15, 2004, upon receipt of the parties' post-hearing briefs.

Mark J. Makler, Attorney at Law, Garrettson, Goldberg, Fenrich & Makler, 5530 S.W. Kelly Avenue, Portland, Oregon 97201, represented Complainant. Assisting Mr. Makler at hearing was Robert Olsen, a third-year law student at Lewis and Clark Law School.

William B. Kirby, Assistant City Attorney, City of Beaverton, 4755 S.W. Griffith Drive, P.O. Box 4755, Beaverton, Oregon 97076-4755, represented Respondent.

The Beaverton Police Association (Association) filed this complaint on October 16, 2003, alleging that the City of Beaverton (City) violated ORS 243.672(1)(e) and (g) by refusing to provide certain documents in response to the Association's information requests. On December 2, 2003, the City timely filed its answer, in which it admitted and denied certain allegations, and raised affirmative defenses.

The issue is:

Did the City refuse to provide the Association with requested information that was relevant to Detective Weaving's disciplinary proceedings, in violation of ORS 243.672(1)(e) and (g)?

We conclude that the City violated ORS 243.672(1)(e) by failing to provide the requested information, but did not violate ORS 243.672(1)(g).

Having the full record before it, this Board makes the following:

RULINGS

The rulings of the ALJ have been reviewed and are correct

FINDINGS OF FACT

1. The Association is a labor organization and the exclusive representative of a unit of police officers and law enforcement employees employed by the City, a public employer. Bargaining unit members work in the City of Beaverton Police Department (Department).

2. Detective Matt Weaving is a member of the bargaining unit represented by the Association. Weaving's duties include participating in the Washington County Interagency Narcotics Team (WIN Team), which consists of law enforcement officials from the Department and other law enforcement entities in Washington County.

3. On December 12, 2002, Weaving filed a complaint (Weaving Complaint I) with the Department alleging that he was the victim of a hostile work environment and workplace harassment. Weaving's letter named several members of the Department, including Sergeant Richard Preim and Lieutenant Chris Gibson.

4. On May 8, 2003, Weaving filed a complaint (Weaving Complaint II) with Sandra Miller, then the City's Human Resource Director. Weaving alleged that the investigation into the Weaving Complaint I had been inadequate. Weaving also repeated the hostile work environment and workplace harassment allegations he made in the Weaving Complaint I. Miller assigned Human Resources employee Barbara Huson to investigate the complaint.

5. Between May 22 and July 16, 2003, Huson interviewed 18 people regarding the Weaving Complaint II, some more than once. Huson's interviewees included Sergeant Preim, Weaving, Lieutenant Gibson, and most of the individuals on the WIN Team. She also had some discussions with City attorneys.

6. Prior to each interview, Huson told each interviewee that it was City policy to maintain the confidentiality of the interview to the extent permitted by law. Huson believes that the confidentiality of the interviews was important to ensure that the interviewees were candid and forthcoming.

7. On July 8 and 9, 2003, Weaving, Preim, and other members of the WIN Team attended Oregon Narcotics Enforcement Association (ONEA) training in Redmond, Oregon.

8. During breaks in the training, Weaving spoke to Preim. Weaving expressed concerns about personality conflicts within the WIN Team, especially personality conflicts involving him.

9. On July 9, after speaking with Preim, Weaving telephoned Huson. Weaving knew Huson was conducting the investigation of the Weaving Complaint II. Weaving told Huson that he was concerned about retaliation and discipline after hearing statements by others at the ONEA training. Huson took notes of the conversation.

10. On July 11, Sergeant Preim filed an Internal Affairs complaint (IA Complaint) against Weaving. Preim alleged that Weaving had been insubordinate during their conversations at the ONEA training.

11. On July 18, Lieutenant Tim Roberts notified Weaving in writing that Weaving was the subject of an IA Complaint for insubordination. The notice informed Weaving that if the allegations in the IA Complaint were proven, Weaving could be subject to disciplinary action.

12. On August 1, Mayor Rob Drake sent a letter to Weaving regarding the Weaving Complaint II. The Mayor, acting because the human resources director position was then vacant, stated that the allegations of wrongdoing in the Weaving Complaint II were unfounded.

13. During July and August 2003, Sergeant Terry Merritt investigated the IA Complaint. Merritt interviewed Preim; Weaving; Huson; Department Detective Dale Hoskins; Washington County Sheriff's law enforcement officials Detective Bob

Johnson, Deputy Mike Womer, Detective Kari Arguello, Deputy Bill James, and Corporal Steve Schuster; Drug Enforcement Administration (DEA) Agents Mike Gutenson and Jeff Poikey; Hillsboro Police law enforcement officials Detective Pat Lamonica and Sergeant Bob Erickson; and Tigard Police officials Detective Jeff Hering, Mike Ranum, and Detective Bill Napieralski.

14. While investigating the IA Complaint, Merritt learned that many of the people listed in paragraph 13 above had already been interviewed by Huson in the Weaving Complaint II investigation.

15. With Weaving's permission, Merritt interviewed Huson about Weaving's July 9 telephone call. Because Weaving's letter of permission stated that he granted permission to "discuss" the telephone call, Huson did not share her notes of the call with Merritt, but simply talked about it with him.

16. Sergeant Merritt finished his investigation of the IA Complaint and submitted his findings to Captain Stan Newland. On September 16, 2003, Newland sent a written notice to Weaving advising Weaving that the IA Complaint investigation was complete. Newland advised Weaving that he would determine what further action should be taken, and that the discipline being considered included termination.

17. Newland also advised Weaving as follows:

"As part of your due process right, and to assist me in making a fair and impartial evaluation of this matter, I want to afford you an opportunity to present information, documents or other evidence you wish me to consider before deciding what, if any, discipline is warranted. * * *"

The parties refer to this predisciplinary opportunity to present information as a *Loudermill* hearing.¹

18. On September 18, in response to Newland's September 16 notice, Association attorney Mark Makler requested "all information relevant and collected as part of the investigation * * * [s]pecifically * * * an audit performed by Tillamook County Sheriff Todd Anderson * * *." The City provided the audit as requested.

¹*Cleveland Board of Education v. Loudermill*, 470 US 532, 105 S Ct 1487, 84 L Ed 2d 494 (1985) (describing an employee's pre-termination hearing rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution).

19. On September 22, Makler sent a letter to Jim Hough, then Acting Director of the City's Human Resources Department. Makler requested "[a]ny and all written or recorded statements * * * in the possession of the City or any City agent associated with the hostile work environment/harassment complaint made by Detective Weaving" (Weaving Complaint II) in order to prepare for Weaving's upcoming *Loudermill* hearing. Makler stated that the request was made pursuant to ORS 243.672(1)(e) and the collective bargaining agreement.

20. Article 19.2.d of the parties' 2002-2005 collective bargaining agreement provides:

"At least five (5) working days prior to imposing discipline of an economic nature, the City shall:

"I. Notify the employee and employee's Association representative, in writing, of the charges, which will include a copy of the complaint against the employee and which will identify the directives, policies, procedures, work rules and regulations which allegedly have been violated, and provide a copy of the investigation and all documentation upon which the intent to discipline is based, provided that the City need not provide duplicate documentation to both the employee and the employee's Association representative;"

21. Huson responded to Makler on behalf of the City. She provided copies of notes from her interviews and conversations with Weaving. Huson refused to provide her notes from conversations with others she had communicated with during her investigation of the Weaving Complaint II. She explained:

"These notes have not been provided to anyone else, including Captain Newland, and were not considered in any way during the internal investigation which is the subject of the pending pre-disciplinary hearing.

"If you have questions, please do not hesitate to call me."

22. On September 25, Makler e-mailed Huson. Makler stated that the withheld information was:

“* * * necessary and relevant to the BPA and Detective Weaving as we prepare to respond to allegations that may result in discipline, your decision has detrimentally affected the ability of BPA and Detective Weaving to respond with defense and/or mitigating information at a Loudermill hearing.”

Makler also stated that the refusal to provide the requested information violated ORS 243.672(1)(e).

23. On September 26, Hough e-mailed Makler, stating that City officials had reviewed the request and believed the City had provided everything it was required to provide. He explained that the requested materials were beyond the scope of the investigation and that the Association is not entitled to them under existing law.

24. On October 2, Makler informed Captain Newland that he had not received the requested information from the City. The City did not respond.

25. On October 16, 2003, Weaving's predisciplinary hearing took place. During the hearing, Makler told Newland that the City's refusal to provide the information from Huson's Weaving Complaint II investigation prejudiced the ability of Weaving and the Association to prepare for and respond to the allegations against Weaving.

26. On October 22, 2003, Newland and City Chief of Police David G. Bishop notified Weaving that the City had decided not to impose discipline on him regarding the allegations in the IA Complaint.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.

2. The City violated ORS 243.672(1)(e) by failing to provide statements, collected by the City in its investigation of the Weaving II Complaint, to the Association for its use in a disciplinary proceeding involving the same individuals.

Standards for Decision

ORS 243.672(1)(e) makes it an unfair labor practice for a public employer or its designated representative to refuse to bargain collectively in good faith with the exclusive representative. In *Lincoln City Police Employees' Association v. City of Lincoln City*, Case No. UP-32-98, 18 PECBR 203, 210 (1999), this Board stated:

“It is well settled that the duty to bargain in good faith includes the duty to provide certain information. *OSPOA v. State of Oregon*, Case No. UP-24-88, 11 PECBR 718 (1989). We utilize a four-part test to review refusal-to-provide-information complaints. *OSEA, Chapter 68 v. Colton School District 53*, Case No. C-124-81, 6 PECBR 5027 (1982). We consider: (1) the reason given for the request; (2) the ease or difficulty with which the data can be produced; (3) the kind of information requested; and (4) the history of the parties' labor-management relations. In contract administration cases, the duty to supply information exists if the information sought is of probable or potential relevance to a grievance or other contractual matter. *Washington County School District v. Beaverton Education Association and Nelson*, Case No. C-169-79, 5 PECBR 4398, 4405 (1981). * * *

“This Board begins with the premise of full disclosure. *Association of Oregon Corrections Employees v. State of Oregon*, Case No. UP-7-98, 18 PECBR 70 (1999). The Respondent may object to the release of the information for certain reasons. *Id.*” 18 PECBR at 210.

Three of the factors we consider are not at issue here. First, the relevancy, or reasons given for the request, are not in dispute. The information sought was of probable or potential relevance to a grievance or other contractual matter.² Huson took

²In its briefs, and again at oral argument, the City conceded that the requested materials are plausibly relevant. The concession is well taken. The reason the Association gave for the request was to assist Makler in preparing for Weaving's predisciplinary hearing. This Board has held that the Public Employee Collective Bargaining Act (PECBA) right of a labor organization to obtain an employer's investigative material does not mature until the employer has made the decision to take adverse action against an employee, or otherwise creates a situation in which the

and retained notes of her conversations with many of the same individuals who were witnesses in the IA Complaint regarding interactions between Weaving and Preim, the individual who filed the IA Complaint. Second, the ease or difficulty of production is not in dispute. The City concedes it could readily produce the materials. Third, the record does not indicate that the history of labor relations between the parties is an issue of significance in this case.

The primary issue in dispute concerns the kind of information requested. The City asserts that the information sought by the Association is confidential, and therefore exempt from disclosure. This Board balances a labor organization's need for information against any legitimate and substantial confidentiality interests established by the employer. The party asserting confidentiality has the burden of proof. *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-7-98, 18 PECBR 64, 71 (1999) (citing *John Doe Agency v. John Doe Corp.*, 493 US 146, 156, 110 S Ct 471, 107 LE2d 462 (1989)). On balance, we conclude the City has not carried its burden.

All of the requested information concerned the Weaving II Complaint. At the time of the request, that complaint had already been investigated and closed. This Board has previously held that a closed internal investigation report is subject to disclosure under the subsection (1)(e) duty to provide information, although "there may indeed be reason to make some special accommodation regarding confidential investigatory information held by law enforcement employers." *Multnomah County Corrections Officers Association v. Multnomah County Sheriff's Office and Multnomah County*, Case No. UP-21-86, 9 PECBR 9529, 9556 (1987).

The City asserts three grounds for confidentiality which we will consider in turn.

material has "probable or potential relevance to a grievance or other contractual matter." *Washington County School District v. Beaverton Education Association and Nelson*, Case No. C-169-79, 5 PECBR 4398, 4405 (1981). See also *Jackson County Sheriff Employees Association v. Jackson County and Jackson County Sheriff's Office*, Case No. UP-66-92, 14 PECBR 270, 270C, n. 3 (1993); and *Oregon Education Association and Moberg v. Salem Keizer School District #24J*, Case No. UP-55-96, 17 PECBR 188 (1997). Here, however, the labor agreement between these parties makes production of investigatory material prior to a predisciplinary hearing, and the hearing itself, contractual matters. Therefore, at the time of Makler's requests, the material sought had probable or potential relevance to a contractual matter.

A. Confidential Harassment Investigations

The City argues that there is a public policy favoring confidentiality in harassment investigations, in order to encourage frank communication and reduce the risk of retaliation. In support of its argument, the City relies on several sections of Oregon's Public Records Law. It first cites ORS 192.502(8) which exempts from public disclosure "[a]ny public records or information the disclosure of which is prohibited by federal law or regulation." The City points us to *EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, section V(C)(1)(d) (June 18, 1999). It states:

"An employer should make clear to employees that it will protect the confidentiality of harassment allegations to the extent possible. An employer cannot guarantee complete confidentiality, since it cannot conduct an effective investigation without revealing certain information to the alleged harasser and potential witnesses. However, information about the allegation of harassment should be shared only with those who need to know it. Records relating to harassment complaints should be kept confidential on the same basis."

We need not decide whether this type of guidance from an agency constitutes a "federal regulation" for purposes of the statute, because even if we give the City the benefit of the doubt on this question, it still cannot prevail.

First, the *Guidance* does not apply to this case. EEOC specifically noted that its *Guidance* applies only to harassment "on the basis of race, color, sex, religion, national origin, age of 40 or older, disability, or protected activity under the anti-discrimination statutes." *Id.* at sections I and II. The City expressly concluded after its investigation of the Weaving Complaint II that Detective Weaving is "not a protected class under any employment law."

Second, the *Guidance* document does not prohibit access to the notes. It is merely aspirational in that it states what the employer "should" do rather than what it must do. By its terms, the *Guidance* recognizes that an employer cannot guarantee confidentiality, and it suggests the information be limited to those who need to know it. The Association needs this information to perform its duties as exclusive representative. The *EEOC Enforcement Guidance* therefore does not apply, and the City has identified no other applicable federal law or regulation that prohibits disclosure.

The City next relies on ORS 192.502(4) which 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 obliged itself in good faith not to disclose the information, and when the public interest would suffer by the disclosure.”

This Board has held that, where the Public Records Law provides for an exemption from disclosure, as here, and not a prohibition against disclosure, PECBA requirements for disclosure take precedence over the exemption. *Oregon State Police Officers’ Association v. State of Oregon*, Case No. UP-24-88, 11 PECBR 718 (1989); and *In the Matter of OSEA and Pleasant Hill School District*, Case No. DR-5-86, 9 PECBR 9054 (1986). We view the PECBA as one source of the “public interest” identified in the Public Records Law. The legislature expressly found that the public benefits from “the development of harmonious and cooperative relationships between government and its employees.” ORS 243.656(1). The exchange of information between the parties to collective bargaining fosters the type of cooperation the legislature envisioned. On balance, we reject the City’s claim of confidentiality under ORS 192.502(4).

B. Attorney Work Product; Attorney-Client Communications

The City also asserts that the requested documents are protected by the work-product doctrine. According to the City, the doctrine protects documents prepared in anticipation of litigation.

Although Huson testified that she believed litigation was likely to arise out of the harassment claim, the investigation itself was not generated by the threat or likelihood of litigation. The investigation was sparked by Weaving’s complaint that City policies had been violated. The purpose of Huson’s investigation was to evaluate that complaint and recommend appropriate action by the City. Presumably, depending on the evidence, that course of action would be either favorable to Weaving or favorable to Preim, but Huson was not conducting an investigation to defend a potential claim by Weaving or Preim. Indeed, the witness statements would be part of the record justifying the City’s conclusions. There is no evidence that the investigation differed from any other such investigation. There is no evidence suggesting that the investigation would not have included the same steps, and interviews with the same witnesses, regardless of whether Huson expected a lawsuit to result. Accordingly, we conclude that the witness statements are not exempt from disclosure under the work-product doctrine, and that the PECBA requires disclosure of the statements.

The City also asserts attorney-client privilege. At hearing, there was testimony that Huson had substantive discussions with City attorneys in the course of her investigation. Huson's notes of those conversations may be subject to attorney-client privilege and, in that event, would be exempt from disclosure. The City has not identified any specific documents arguably protected by this privilege, and we do not decide the application of that privilege to any specific documents. This blanket assertion of the privilege does not excuse the City from producing the documents.

C. Subjective Information

The City cites *OSEA, Chapter 68 v. Colton School District*, Case No. C-124-81, 6 PECBR 5027 (1982), for the proposition that it need not produce (1) notes made during a grievance investigation or (2) purely subjective information. Neither defense has merit here.

As to the first defense, the Weaving Complaint II was a harassment investigation, not a grievance investigation. The Association did not file a grievance in either the Weaving Complaint II where the subject documents were gathered, or in the IA Complaint which gave rise to the need for the documents.³ The documents at issue were not made during a grievance investigation, so the asserted defense does not apply.

As to the second defense, the City has not identified any specific documents that arguably contain subjective information, and we cannot tell from this record whether any such documents exist. The City has not carried its burden of proof.

Even if the City had proved that some of the requested documents contain subjective information, the defense would still fail. When a union is entitled to information in which an employer can legitimately claim a partial confidentiality interest, the employer must bargain toward an accommodation that addresses the union's information needs and the employer's justified interests. *Association of Oregon Corrections Employees v. State*, 18 PECBR at 71 (citing *Pennsylvania Power & Light Co.*, 301 NLRB 138, 136 LRRM 1225 (1991)). A necessary corollary to the rule is that the party claiming a confidentiality defense must timely notify the requesting party of its position. See *Association of Oregon Corrections Employees v. State of Oregon, Department of*

³The City has taken inconsistent positions. It argued that it was engaged in an harassment investigation for purposes of the EEOC guidelines; and it argued that it should not have to produce documents because no grievance had yet been filed. Here, it argues that the documents are exempt from disclosure because they were gathered in the course of a grievance investigation. The City cannot have it both ways

Corrections, Case No. UP-39-03, 20 PECBR 664 (2004) (a party must make a prompt and definitive statement of its intended disposition of an information request). Otherwise, it is difficult to see how the parties could bargain toward an accommodation.

On this record, it appears the City failed to raise its concerns about disclosing subjective material until after this litigation was commenced. That is too late. The timing did not allow the parties to attempt to find a mutual accommodation of their interests, and the City made no offers of accommodation.⁴ For example, the City could have offered a redacted version of the documents that deleted subjective information; it could have offered *in camera* inspection by a neutral third party; and it could have suggested a nondisclosure agreement. The City did not take these or any other steps aimed at addressing its confidentiality concerns. Instead, it allowed the dispute to fester and did not reveal its position until the matter reached litigation. The City failed to timely raise the defense that the requested material was subjective, and it did not fulfill its duty to bargain toward an accommodation that might have avoided litigation. On these facts, we conclude that the City waived its right to assert the defense.

The Association has established its right to the information it requested, and the City did not prove its defense that the information was confidential. We turn to the remedy.

The City urges that if we find a violation, we should not order it to turn over the documents because no discipline was imposed on Weaving and the matter is complete. We disagree. Even when the underlying grievance has been settled, a duty-to-provide-information complaint is not moot. *Marion County Law Enforcement Association v. Marion County*, Case No. UP-58-92, 14 PECBR 220, 227 (1992). In *Marion County*, even though the grievance was settled, we ordered the employer to cease and desist from failing to provide the requested information. We seek to restore the Association to the position it would have occupied but for the City's violation. Here, that requires the City to provide the information.

⁴The City argues that it offered accommodations in a letter Huson sent the Association. We disagree. The letter stated that the City would not turn over the requested information because no one else has it and because the City did not rely on it in making the decision. Huson then invited the Association to call her if it had questions. This is inadequate. Among other things, it fails to identify a concern that the information sought is subjective. Further, an invitation to call if there are questions does not alone meet the City's burden of negotiating toward an accommodation.

We will order the City to cease and desist from refusing to provide the witness statements requested by the Association, with the exception of documents protected by the attorney-client privilege.

3. The City did not violate ORS 243.672(1)(g) when it refused to provide the information requested by the Association.⁵

The 2002-2005 collective bargaining agreement between the City and Association provides:

“At least five (5) working days prior to imposing discipline of an economic nature, the City shall:

“* * * [P]rovide [the Association with] a copy of the investigation and all documentation upon which the intent to discipline is based * * *.”

This language is peculiar in that it makes the necessity and timing of the disclosure contingent upon the date of an event which may never happen, *i.e.*, the imposition of economic discipline. It is a “no harm, no foul” rule. In this case, the City did not impose economic discipline on Weaving (no harm). Therefore, the City did not fail to “provide a copy of the investigation and all documentation upon which the intent to discipline is based” at least five days before imposing discipline on Weaving (no foul). In addition, the investigation of the IA Complaint did not include material from the Weaving Complaint II which was not provided to Weaving. We will dismiss this claim.⁶

ORDER

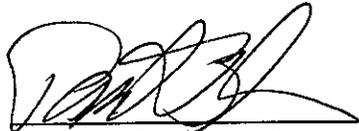
1. The City will cease and desist from violating ORS 243.672(1)(e) by refusing to provide the Association with the witness statements requested by the Association which are not protected by attorney-client privilege.

⁵The City has not raised an affirmative defense that this claim should be resolved through the grievance and arbitration process, and so we address the (1)(g) claim here. *See Joseph Education Association v. Joseph School District No. 6*, Case No. UP-56-95, 16 PECBR 626, 627, n. 2 (1996).

⁶Prior to the predisciplinary hearing, Association representatives did not know whether discipline would be imposed on Weaving. Therefore, at that time, the material sought was of probable or potential relevance to a grievance or other contractual matter.

2. The Association's claim that the City violated ORS 243.672(1)(g) is dismissed.

DATED this 29 day of April 2005.



Paul B. Gamson, Chair

* 

Rita E. Thomas, Board Member



James W. Kasameyer, Board Member

This Order may be appealed pursuant to ORS 183.482.

*Board Member Thomas Concurring in Part and Dissenting in Part:

I concur with the Majority that the City did not violate ORS 243.672(1)(g). I do not agree that the withholding of investigation notes in this case violates ORS 243.672(1)(e).

Employee Harassment and Hostile Work Place Investigations May Be Confidential

The City has argued that ORS 192.502(4), the public interest exemption under the Public Records Law, applies here.¹ I agree.

The Majority notes that we have previously held that PECBA requirements for information disclosure take precedence over this Section (4) exemption. Relying on

¹Section (4) of the Oregon Public Records Law exempts from disclosure "information submitted in confidence and not otherwise required by law to be submitted, when such information should reasonably be considered confidential, the public body has obligated itself in good faith not to disclose the information, and where public interest would suffer by disclosure."

ORS 243.656 (1) which expresses the public benefit of “harmonious and cooperative relationships between government and its employees,” the Majority incorrectly determines that disclosure, without fully applying a balancing test, is in the public interest.

I believe that the application of our precedent regarding what is in the public interest for disclosure, when a Section (4) defense is raised, must be done on a case by case basis. The public interest to exempt must be balanced with the public interest for release of the information. On balance, in cases involving harassment or hostile work environment allegations, it is in the public interest to exempt from release, information gained as part of a good faith confidential investigation. The public policy behind this exemption from disclosure has been exhaustively researched and discussed in the development of federal anti-discrimination laws.

The City argued that *EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, section V(C)(1)(d) (June 19, 1999) should be relied on to prohibit disclosure based on ORS 192.502(8). Correctly, the Majority concluded that the *EEOC* regulations do not apply to Section (8) of the Oregon Public Records Law. However, the Majority failed to balance the public policy interest articulated in the *EEOC* regulations concerning employee harassment and hostile work environment complaints. The generally accepted public policy behind non-disclosure of harassment complaint investigation notes is clear and should be applied here. It is in the public interest for employers to be able to receive candid responses in an investigation of allegations of harassment, regardless of whether the employee making the allegation is in a protected class under federal regulations. If this is not the law that we develop and support for Oregon, I see no reason why public employers in this state would make much effort to help protect an employee from harassment or a hostile work environment. And I do not believe employees will be candid in responding to the employers questions during this type of investigation. Assuming that it is not in the public interest for employees to be harassed in the work place, the public interest is not served by making it difficult to fully investigate allegations brought by an employee seeking protection from harassment in the workplace.

The Notes Are Subjective and a Work Product Involving Potential Litigation

The duty to provide information under PECBA derives from federal law. See *Morrow County Education Assn. V. Morrow County School District*, Case Nos. UP-68/69-89, 11 PECBR 695 (1989). In *Morrow County*, we explained that the duty

“* * * was adopted from federal labor law precedents, and this board generally has followed those precedents, which concern sections 8(a)(5) and generally 8(d) of the National Labor Relations Act, in prescribing a [party’s] responsibilities under the PECBA. *OSEA v. Children’s Services Division, et al.*, Case No. C-32-76, 2 PECBR 900 (1976); see also *Washington County Sch. Dist. No. 48 v. Beaverton Education Assn.*, Case No. C-169-79, 5 PECBR 4398 (1981). We will continue to follow federal precedent, to the extent applicable, in deciding information cases under the PECBA.” 11 PECBR at 712.

An employer does not have to release subjective or work product notes prepared in anticipation of litigation. This exemption is called the “work product doctrine.” The doctrine was first established by the Supreme Court in *Hickman v. Taylor*, 329 U.S. 495 (1947). Federal Regulations later codified the doctrine in Federal Rule of Civil Procedure 26(b)(3). This rule, based on the important public policy of supporting the adversarial process, protects from disclosure, material prepared by an attorney or his representative in anticipation of litigation.²

A December, 2004 decision by the National Labor Relations Board upholds the right of an employer to exempt from disclosure work product notes and also the “mental impressions, conclusions, opinions, ***of an attorney or other representative of a party concerning the litigation.” *Sprint Communications d/b/a Central Telephone Company of Texas and Communication Workers of America, local 6174, AFL-CIO*, 176 L.R.R.M. 1441, 343 NLRB No. 99 (2004).

In *Sprint*, citing *In re Sealed Case*, 146 F. 3d 881, 884 (D.C. Cir. 1998), the Board wrote, “the party representative ‘must at least have had a subjective belief that litigation was a real possibility, and that belief must have been objectively reasonable.’” Citing several other cases the Board concluded that, “The prospect of litigation need not be actual or imminent: it need only be ‘fairly foreseeable.’” *Costal States Gag. Corp. v. Dep’t of Energy*, 617 F. 2d 854, 865 (D.C. Cir. 1980). The privilege, according to the Board, “extends to documents prepared in anticipation of foreseeable litigation, even if no specific claim is contemplated” when the documents are prepared. *Schiller v. NLRB*, 964 F. 2d 1205, 1208 (D. C. Cir. 1992). Finally, noting the public policy behind the work product doctrine, the Board in *Sprint*, again referred to *In re Sealed* writing, “it is often prior to the emergence of specific claims that lawyers are best equipped either to

²Human resource personnel are widely accepted by the courts as representatives of attorneys when conducting an investigation that involves potential litigation.

help clients avoid litigation or to strengthen available defenses should litigation occur.”
Id. at 886.

The notes at issue in this case involved an ongoing employment investigation. The notes contain Huson’s subjective impressions and annotations which are exempt from disclosure. They are also exempt from disclosure because they are Huson’s work product prepared to help avoid litigation, or defend the City in anticipation of potential litigation.

Weaving filed two complaints which involved numerous allegations against his supervisors and the City. With the support and advice of the City attorney, Huson conducted an extensive investigation which included twenty-six interviews regarding Weaving’s claims of:

- Failure by Chief Bishop to investigate his December 12, 2002 complaint;
- Harassment and hostile work environment;
- Unethical conduct, conduct unbecoming and immoral conduct by his supervisors;
- Failure on the part of the Department to properly investigate complaint’s against him;
- Retaliation for filing a grievance against the city;
- Failure to provide him due process; and,
- Failure by the City to process an appeal of his performance appraisal.

These were serious allegations. The City was involved in a volatile employment situation which Huson reasonably thought would result in litigation. Weaving’s supervisor had given him a poor performance appraisal and had removed him summarily from the Westside Interagency Narcotics Team (WIN). Weaving claimed that one of his supervisors had fabricated notes to support another supervisors testimony at an arbitration hearing. And he alleged that the City violated its own general orders in failing to properly investigate and document complaints that had been filed against Weaving. He alleged in his complaint the many examples of harassment and a hostile work environment. After filing a grievance he claimed he had been subject to retaliation by his supervisors. The investigation of Weaving’s complaint was to determine whether his supervisors had engaged in misconduct.

Because of the seriousness of the allegations against the supervisors and the City, Huson worked closely with the City attorney during the harassment investigation.

She reasonably expected a potential lawsuit. It was likely that someone was headed for employment discipline. The reasonableness of her expectations were born out when she received a stressed phone call from Weaving regarding a confrontation with his supervisor at a conference in early July. Weaving called to tell her that "he continued to be 'singled out and treated unfairly.'" Her expectation of litigation was further enunciated when a disciplinary investigation was started against Weaving before her investigation regarding Weaving's harassment and related charges was complete.

The investigation of Weaving's complaint was not conducted in the normal course of business. The City attorney was contacted and became involved in advising Huson on the investigation issues. Interviewing 18 people in 26 interviews and compiling volumes of notes, is not a minor investigation. It was exhaustive, not routine

Huson, with guidance in the investigation from counsel prepared the employer responsibly to avoid or help protect the City from potential litigation. She compiled several notebooks which contained her impressions and annotations. The result of her investigation was the August 1, 2003 memo from Mayor Rob Drake which absolved the supervisors and City of any incorrect actions regarding Weaving. The memo from the Mayor however, did not reduce, it likely increased the potential for litigation against the City. Weaving was given no relief to his complaints and on top of that he was facing a misconduct charge involving some of the people he claimed were harassing him.

I do not agree with the Majority that the Weaving harassment investigation was closed after the Mayor's memo. Weaving's complaints and the misconduct charges against him were part of the same employment dispute involving charges against the City and its supervisors. The City has a right to protect the subjective notes and work product prepared in anticipation of potential litigation.

Timely Notice Was Given For Withholding The Notes

The City notified the Association in a timely manner that the notes taken by Huson in Weaving's complaint were protected because they contained Huson's subjective thoughts and annotations and were also protected as a work product.

In response to the request, Huson indicated that they were solely her notes and that they were not shared with others in the investigation. And Section XII of the City's response to the complaint states that Huson's interview notes for the harassment complaint included "her annotations and comments regarding her impressions and analysis of the issues under investigation." There is no duty to accommodate the

Association's request for subjective notes that are gathered in anticipation of litigation. They are protected as a work product.

In responding to the Association's request the City properly explained why it would not turn over the notes. The City timely explained that they were gathered in the good faith assurance to those interviewed that their answers would be held in confidence. I believe that the law encourages and supports this confidentiality.

Conclusion

We have interpreted the PECBA to broadly provide for disclosure of information when needed by a union to administer a contract or protect employee rights. This interpretation is based on concluding that public policy dictates broad disclosure of information for these purposes. I agree with this.

However, there is also public policy, and well established law that protects other rights and interests regarding disclosure of employer investigation notes. In harassment and hostile work environment complaints, I believe that the facts of each case must be carefully considered in balancing the interests provided for by the PECBA, against the interest of the public for exemption from disclosure. The Majority has not done that here.

I respectfully dissent.

