ROD UNDERHILL, District Attorney for Multnomah County
600 County Courthouse • Portland, Oregon 97204 • (503) 248-3162 • FAX (503) 248-3643

Februrary 5, 2014

Ralph Wiser
Wiser and Associates
One Centerpointe Drive, Suite 570
Lake Oswego, OR 97035

Lory J. Kraut
Senior Deputy City Attorney
Office of City Attorney
City Hall, Suite 430
1221 SW 4th Avenue
Portland, OR 97204

Re: Petition of Ralph Wiser on behalf of Paul Bieker for the production of records related to the Fire Captain Examination.

Dear Ms. Kraut and Mr. Wiser:

On this public records petition, ORS 192.410 et. seq., petitioner Ralph Wiser requests the District Attorney to order the City of Portland and its employees to produce the following records:

1. **The written examination.**
2. **The identity of all the individuals who created the examination.**
3. **The identity of all individuals who submitted exam questions for consideration by the individuals who created the examination.**
4. **Oral questions used in the examination.**
5. **Scoring criteria for each answer.**
6. **The identity of all individuals who scored the examination initially, and those individuals who re-scored the examination, by reference to the initial and each subsequent re-scoring of the examination.**
7. **The methodology used to score the examination initially and in each re-scoring of the examination.**
8. **Un-redacted scantron results for others taking the examination.**
9. **Un-redacted score sheets for other applicants used by each examination assessor at the assessment center.**
10. **All evaluation sheets used by each assessor at the assessment center.**
11. **The qualifications of each assessor.**
12. **The special instructions given to each assessor.**

BACKGROUND

Mr. Bieker is a lieutenant with Portland Fire &Rescue (PF&R). In spring 2013, Lt. Bieker participated in the promotional recruitment for Fire Captain. A Fire Captain is a position within the city's civil service system for which the city required a competitive examination. The examination consisted of two parts: a written, multiple choice test; and an assessment center. Candidates had to pass the written test to move on to the assessment center. The written test was scored by a "Scantron" machine. An error was discovered in the Scantron results. Accordingly, the Bureau of Human Resources (BHR), the city entity that administers promotional examinations, hand-scored the written tests and marked incorrect answers with a red pen. Only those candidates whose scores were affected by the Scantron error were notified. The Scantron error did not affect Mr. Bieker's score on the written test and he was invited to participate in the assessment center. Lt. Bieker did not score high enough on the assessment center to be placed on an eligible list from which the Fire Chief selects the most qualified candidate for promotion. Pursuant to the city's Charter and Human Resources Administrative Rules (HRARs), Lt. Bieker appealed the Fire Captain examination to the Civil Service Board (CSB).

On November 21, 2013 Mr. Wiser submitted a request for production as part of Mr. Bieker's Civil Service Board Examination Appeal. The city treated this request as a public records request since it is their position that the Civil Service Board rules do not authorize a request for production. On December 18, 2013 the city responded to the request and disclosed some documents but claimed additional exemptions for some of the materials requested. On January 10, 2013 Mr. Wiser appealed to this office. After further communication, the city provided certain information regarding Mr. Bieker's evaluations, ratings, and assessments, but not the applicable exam questions, and other requested materials. The city did provide evaluations, ratings and assessments for other firefighters who took the written and oral examination but redacted their identities. The city also disclosed the identities of the individuals who created the examination and submitted test questions (Items 2 and 3).

DISCUSSION

I. Tests and Examination Materials

The city has claimed exemption of the test questions and answers pursuant to ORS 192.501(4) which conditionally exempts:

> Test questions, scoring keys, and other data used to administer a licensing examination, employment, academic or other examination or testing procedure before the examination is given and if the examination is to be used again. Records establishing procedures for and instructing persons administrating, grading or evaluating an examination or testing procedure are included in this exemption, to the extent that disclosure would create a risk that the result might be affected[.]

The opinions of the Attorney General have consistently upheld the exemption for particular parts of any examination that "will be used again to grade or evaluate applicants." Attorney

General's Public Records Manual, 2011, p. 39. The position of the Attorney General is well reasoned and responsive to the spirit of the Public Records Law.

> The obvious purpose of this exemption is to protect the integrity of examinations administered by various public bodies for licensing, employment and other purposes. Information used to administer the test is confidential until the test has been given. Examination information remains confidential if the test will be reused. We have concluded that records of the oral answers to test questions must be released if the answers do not indirectly reveal the questions. Likewise, a completed answer sheet is not exempt if disclosure would not compromise the integrity of the examination. However, we have also concluded that the scoring sheet for a practical examination that lists the items on which a licensing applicant is being evaluated is the equivalent of written test questions and exempt when disclosure would jeopardize the integrity of subsequent examinations.

Attorney General's Public Records Manual, 2011, p. 39.

The 1997 Attorney General opinion in Chastain dealt with a practical examination for electrolysis licensing. The questions, score sheets, and comments of the proctors in Chastain were all found to be exempt under ORS 192.501(4). Id, p.40. My office has before dealt with records petitions brought on behalf of city employees challenging PF&R promotional recruitments. See Petition of Gary Shepard dated October 28, 1998 (Hovies); Petition of Gary Shepard dated January 9, 2007 (Hovies II); Petition of Gary Shepard dated February 14, 2007 (McGee). In Hovies II my office denied the petition because disclosure would jeopardize the integrity of future examinations. We draw the same conclusion in this case. According to the city, BHR maintains the old examination questions, answers, scoring guides and other examination materials in a secure location. PF&R subject matter experts (SMEs), the individuals who create the test questions and assessment center scenarios, review the old examinations and look at format, criteria, and components to help them develop new examinations. Although the city attempts to create new questions for the written test for each recruitment, the reality is that the test questions are eventually recycled and reused because of the limited subject matter on which the candidates are tested. The request for items 1, 4, 5, 7, 10, 12 is therefore denied.

II. Personal Privacy Exemption

ORS 192.502(2) conditionally exempts:

> Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if the public disclosure thereof would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance. The party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy.

"The purpose of this exemption is not to prevent disclosure of personal information, as such, but rather to protect privacy from unreasonable invasion." Jordan v. MVD, 308 Or 433, 441 (1989). Only personal information that would constitute an unreasonable invasion of privacy if publicly disclosed is protected under this exemption. In Jordan, 308 Or at 442, the court noted that the trial court found that the affidavit filed in the trial court ...sufficiently established that disclosure to the requester would more likely than not unreasonably invade her privacy because providing the information would allow Jordan to harry her incessantly to the extent than an ordinary reasonable person would deem highly offensive. The Attorney General has taken the position that "[g]enerally, disclosure of a name itself would not constitute an unreasonable invasion of privacy." Attorney General's Public Records Manual, 2011, p. 68. However, the identities of candidates for university president were not disclosed in a 1988 Letter of Advice. "[A] person's name may be exempt in certain contexts, due to a person's desire for confidentiality to avoid stigmatizing or other undesired effect." Attorney General's Public Records Manual, 2011, E-6.

For items 8, 9, and 10, the petitioner requested the scantron results from the written test and the score sheets and evaluation sheets from the assessment center. The city provided those documents, but redacted the name and social security number for each candidate. The city argues that the unreasonable invasion of privacy in this particular case stems from the disclosure of the person's name in connection with his score. The city argues that candidates have a reasonable expectation that how they scored on promotional examination will not be made public and that disclosure would be highly objectionable and could subject the candidates to ridicule. We agree with the city and find that petitioner has not met his burden in establishing that public disclosure would not constitute an unreasonable invasion of privacy. The petitioner has also not established that there is any public interest served by disclosing the identities of other applicants.

III. Confidential Submissions

ORS 192.502(4) conditionally exempts:

Information 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.

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.

In Item No. 6, Petitioner seeks the identities of the outside assessors who rated

the candidates during the assessment center.[1] According to the city the outside assessors are recruited with the understanding that their identities would not be disclosed. The assessors are assigned numbers to protect their identities. The assessors used their assigned numbers in completing the evaluation sheets. The assessors' names and contact information are kept with the confidential examination material in a locked file cabinet in a secure location.

The city argues that disclosure of the identities of the outside assessors would impair the city's ability to use outside assessors on future examinations. These are volunteer positions and potential assessors may be deterred from participation out of fear of retaliation from an unsuccefull applicant. We agree with the city and conclude that it would be against the public interest to disclose the identities of the outside assessors and find it reasonable that their participation is conditioned on anonymity. The city has satisfied the exemption's 5 part requirement.

The qualifications of the assessors, however, would not be exempt from disclosure (Item #11). The city, however, states that they are not is possession of that information and my office has no authority to order them to acquire such information.

To alleviate the city's concerns regarding disclosure, petitioner suggests that my office issue a protective order or preside over a confidentiality agreement. The Oregon Public Records Law does not give my office the authority to issue such an order. Such orders and remedies are best left to the province of the courts. Petitioner also contends that non-disclosure would prejudice his ability to prosecute his appeal to the Civil Service Board. Although not unsympathetic to his situation, this order must of necessity be limited to the question of the validity of the exemptions asserted by the city.

ORDER

Accordingly, it is ordered that the petition of Ralph Wiser for Paul J. "Jim" Bieker, Jr to disclose certain records of the City of Portland is denied.

Very truly yours,

Rod Underhill

ROD UNDERHILL
District Attorney
Multnomah County

14-01

[1] The City provided the names of city employees who scored the written test initially and who rescored the test by hand after the Scantron error was discovered.