

FORMAL OPINION NO 2005-144

[REVISED 2007]

Communicating with Represented Persons: Obtaining Public Records from a Represented Public Body

Facts:

Lawyer *A* represents a client who opposes certain County action. County is represented in the matter by Lawyer *B*.

Question:

May Lawyer *A* contact a County employee to obtain copies of public records without first obtaining Lawyer *B*'s consent?

Conclusion:

Yes.

Discussion:

Oregon RPC 4.2 provides:

In representing a client or the lawyer's own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless:

- (a) the lawyer has the prior consent of a lawyer representing such other person;
- (b) the lawyer is authorized by law or by court order to do so; or
- (c) a written agreement requires a written notice or demand to be sent to such other person, in which case a copy of such notice or demand shall also be sent to such other person's lawyer.

For purposes of analysis, we will assume that the records sought concern the subject for which the public body has counsel. The question whether a particular entity employee is a "person . . . represented" is discussed in OSB Formal Ethics Op No 2005-80 (rev 2016) and OSB Formal Ethics Op No 2005-152. In general, an employee whose conduct

is at issue or who could bind the entity is a “person represented.” An officer or manager of County would be considered a represented party. OSB Formal Ethics Op No 2005-80 (rev 2016); OSB Formal Ethics Op No 2005-152. Although we recognize that, in many cases, the records clerk to whom a request is presented is not a manager or other “person represented,” we will for this discussion also assume that the person who must be contacted about the records is such a person. The question thus becomes whether communication with that person for purposes of obtaining a public record is authorized by law. *Cf.* ABA Formal Ethics Op No 97-408.¹

Since Oregon became a state, the general rule has been that records of public bodies should be readily available for inspection by members of the public. *Jordan v. Motor Vehicles Div., State of Or.*, 308 Or 433, 436–37, 781 P2d 1203 (1989). That historical policy is presently stated in the Public Records Law: Unless a record is exempt from disclosure, the Public Records Law provides any person the right to inspect or get copies of records for any reason or no reason. ORS 192.410–192.505. An exercise of rights under the Public Records Law requires at least some level of communication with the custodian² of a public record, for example, “May I have a copy of document X?” In this statutory and policy context, Lawyer A’s limited communication with a county employee to accomplish the delivery of a specified public document is a communication authorized by law. If the document requested is, or may be, exempt from disclosure, the public body may seek the advice of counsel whether to assert that the record is exempt from disclosure. ORS 192.450; ORS 192.460. A public body’s claim of exemption from disclosure, at least when made in response to a request for disclosure of a specific document, presupposes some means of prior

¹ If the county employee were a quasi-judicial decision-maker, it would also be necessary to consider Oregon RPC 3.5 regarding *ex parte* communications with judicial decision-makers. *Cf.* OSB Formal Ethics Op No 2005-83 (rev 2016); OSB Formal Ethics Op No 2005-134.

² Under the Public Records Law, the *custodian* is the public body. ORS 192.410(1)(b). As a practical matter, employees of the public body perform the custodial functions for the public body.

identification of the document by the requesting party and communication of that identification to someone who serves, at least functionally, as a custodian of records for the public body. Except as discussed below, nothing in the statutory scheme suggests that the prior identification of the record requested must or should be made to the public body's counsel. If, however, Lawyer A's client is "a party to a civil judicial proceeding" to which the County is a party, or if the client has filed a tort claims notice with the County under ORS 30.275, and if the document relates to that proceeding or notice, ORS 192.420(2)(a) requires Lawyer A to submit the request in writing to the attorney for the public body at the same time as he or she submits it to the custodian of records.³ Thus, Lawyer A may communicate directly with County employee to obtain a public record, but, in situations contemplated by ORS 192.420(2)(a), must make the request, in writing, simultaneously to the public body and its counsel.

The "authorized by law" exception has been narrowly construed. *In re Williams*, 314 Or 530, 538–39, 840 P2d 1280 (1992) (construing that phrase as used in *former* DR 7-104(A)(1)(b), which is essentially identical to Oregon RPC 4.2). Communications that involve substantive content rather than identification of the documents would violate Oregon RPC 4.2 if the communications are directed to a "person represented."⁴ Thus, for example, Lawyer A would violate Oregon RPC 4.2 by asking a person who is deemed to be represented to explain the legal significance of the document. Similarly, questions to such persons

³ ORS 192.420(2)(a) provides:

If a person who is a party to a civil judicial proceeding to which a public body is a party, or who has filed a notice under ORS 30.275(5)(a), asks to inspect or to receive a copy of a public record that the person knows relates to the proceeding or notice, the person must submit the request in writing to the custodian and, at the same time, to the attorney for the public body.

⁴ In some smaller jurisdictions, the person to whom public records requests are addressed may also be an official who will decide the dispute in question. In that event, a lawyer needs to be mindful of the prohibition in Oregon RPC 3.5(b) against *ex parte* communications.

that are intended to elicit statements or admissions against the interest of the public body would be improper.

Approved by Board of Governors, February 2007.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 6.2-4 (duration of duty of confidentiality), § 8.5-1 (communicating with a represented person), § 10.2-1(b) (information-specific former-client conflicts) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 99–101 (2000) (supplemented periodically); and ABA Model RPC 4.2.