

LEGAL MEMORANDUM

TO: Mayor Scholl and City Council of St. Helens

FROM: Peter S. Hicks; Matthew Kahl

DATE: February 14, 2024

RE: Request for News Media Attendance at Executive Sessions

Question Presented

Should Steven Toschi be recognized by the City Council as a representative of the news media and be allowed to attend City Council executive sessions?

Background

The City of St. Helens (the “City”) has received two recent requests from individuals seeking admission to Council executive sessions as representatives of the news media. On December 19, 2023, this office advised that information submitted by Steve Toschi in support of his request, along with information the city obtained from the owner of radio station KOHL, did not appear to qualify Mr. Toschi as a representative of the news media. However, as we have discussed with City Administrator John Walsh, the Attorney General’s Opinion No. 8291 issued on April 18, 2016 (the “Opinion”), and the Attorney General’s Public Records and Meetings Manual 2019 (the “Manual”) document that the definition of “representatives of the news media” is very broad and it is difficult to determine who qualifies as a representative of the news media.

On December 27, 2023, Jennifer Massey also submitted a request to the City seeking admission to Council executive sessions as representatives of the news media for herself and three additional board members of FAFODDS, a non-profit organization whose governing purpose is to obtain information by public records request to disseminate information by various means to the public. At that time, we recommended the request be declined as the request had the appearance of being merely an assertion of qualification as news media without sufficient supporting documentation. The City advised Ms. Massey it would consider any additional documentation provided concerning the request.

Memo to Mayor Scholl and City Council of St. Helens
February 14, 2024
Page 2

On February 5, 2024, the City notified both Mr. Toschi and Ms. Massey that it had not received further documentation for the City to determine whether or not they qualified as a representative of the news media. On February 5, 2024, in response to that communication, Mr. Toschi submitted additional documentation and information to the City. To date, Ms. Massey has not submitted more documentation to support her request.

Analysis

The Opinion attempted to clarify the meaning of “representatives of the news media.” It states that ORS 192.660, the executive session law, permits news gathering representatives of institutional media to attend executive sessions and that “news media” is “broad and flexible enough to encompass subsequent technologies for delivering the news.” The Opinion notes that news media includes the institutional news media – like newspapers, radio, television – but also other types of news gatherers and disseminators such as specialty publications and school newspapers – if they regularly disseminate news such as the “activities of a governing body,” that is local government proceedings and events. The Opinion also notes that in certain instances even bloggers may fall within the definition of a “representative of the news media.” The Opinion gives the impression that as technologies for delivering the news expand so the ways local events are “reported” to the public change over time, the definition of “news media “ can expand.

The decision of who qualifies as a representative of the news media is left to local governments.

Recent Developments

On February 5, 2024, Mr. Toschi sent a letter to John Walsh providing additional information supporting his assertion that he qualifies as a representative of the news media through his radio show, Town Talk Café broadcast on KOHI radio. Within his letter, a copy of which his enclosed, Mr. Toschi noted:

1. He has a contract with KOHI to broadcast his one-hour radio show. The radio show covers local news that is gathered through his efforts. The show is broadcast live one day and then rebroadcast other weekdays during a consistent time slot.
2. The Town Talk Café contract began in October 2023 and has been extended through December 2024. The Town Talk Café also blogs on Facebook regarding council activities.
3. The show is published in a “blog” or “podcast format” that began in January.
4. The Town Talk Café is a Talk Show covering local people, news and events.
5. KOHI does not have control over the content of the show.
6. He intends to comply with all laws.

PRIVILEGED & CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

Memo to Mayor Scholl and City Council of St. Helens
February 14, 2024
Page 3

7. He has read the Attorney General's Opinion, No. 8291, that he asserts qualifies him as "the press".
8. He will perform the "watchdog" function as a member of the press to monitor the council's compliance with Public Meeting Law.

The additional materials submitted by Mr. Toschi enhance his assertion that he is a representative of the news media. While the owner of radio station KOHI has documented that Mr. Toschi is not affiliated with the station as an "employee, contractor, or agency" of the station, it is possible that Mr. Toschi's broadcast contract with KOHI creates an avenue for him to be considered as a news media representative. While an employee, contractor, or agent for a radio station is the traditional way of demonstrating that a person qualifies, should Mr. Toschi be denied recognition as a representative of the news media and a complaint is filed to the OGEC, it is possible that following an investigation the OGEC could find that Mr. Toschi is a "news-gathering" representative who has a "formal affiliation with an institutional news medium." It is conceivable that his radio show could be considered similar to a blog and other evolving social media technologies used to disseminate news.

The question comes to the Council – does Mr. Toschi, through his Town Talk Café show, qualify as a representative of the news media to be allowed into executive sessions? It is up to the Council to make this determination. Based on the information we have reviewed; the City could find that his means of gathering and disseminating news of local events through his radio program might be among the types of technologies for delivering the news that the Opinion anticipated. The Opinion speaks of other technologies among the types of "online publications" that may qualify as a "news medium." Any determination is dependent upon particular facts.

Recommended Action

According to OGEC, a local determination of who qualifies must be made by the City Council, not staff, which would include the City Attorney. Thus, the City Attorney may only advise and provide guidance whether an individual might qualify for admission. An actual decision to exclude someone must be made by the Council and any resulting complaint for an executive session violation could be filed against individual Council members. This places the Council in a somewhat awkward place since the definition of "news media" is certainly broad and OGEC cannot define, by rule and statute, who qualifies as a representative of the news media. OGEC is prohibited by ORS 192.660(11) from establishing which entities are representatives of the news media.

Our advice is that the Council consider making a conditional determination that Mr. Toschi is recognized as a representative of the news media while he continues to conduct the Town Talk Café in its present format on KOHI. If he is allowed to attend executive sessions, his attendance should be contingent upon his continuing to host the radio program discussion of local news. His attendance may be reconsidered if a definition of "representative of the news media" is created by an Oregon state court or the Oregon Legislature that does not include his type of broadcast. The Council should reserve its right to review his conditional approval and if appropriate exclude him from future executive sessions.

Memo to Mayor Scholl and City Council of St. Helens
February 14, 2024
Page 4

Future Considerations

Should Ms. Massey submit additional documentation to support her request, her qualifications and those of FAFODDS as “news media” should be reviewed on the particular facts. In our opinion, as previously stated, her initial submission is closer to a mere assertion that she should be admitted rather than one supported by proof of her consistent activities reporting local news through an institutional news media, specialty publication, or broadcast. The Council must then determine whether Ms. Massey qualifies as a representative of the news media. In addition, as the definition of news media evolves, it is possible that the news medium and credentials sufficient to qualify an individual as a representative of the news media today may differ from the same news medium and credentials in the future, and vice versa – what may not be sufficient today may be sufficient in the future.

Enclosures