**MICHAEL D. SCHRUNK,** District Attorney for Multnomah County
600 County Courthouse • Portland, Oregon 97204 • 503 988-3162 • FAX 503 988-3643
www.co.multnomah.or.us/da/

July 26, 2010

Therese Bottomly
Managing Editor
The Oregonian
1320 SW Broadway
Portland, OR 97201-3499

Ellen Osoinach
Deputy City Attorney
Office of City Attorney
1221 SW 4th Ave, Suite 430
Portland, OR 97204

Re: Petition of Therese Bottomly on behalf of Maxine Bernstein for The Oregonian, received June 30, 2010 to disclose certain records of the Portland Police Bureau.

Dear Ms. Bottomly and Ms. Osoinach:

BACKGROUND

On this public records petition, ORS 192.410 et. seq., petitioner Therese Bottomly requests the District Attorney to order the City of Portland and its employees or agents to produce full and unredacted copies of the following records:

> **Various police documents related to the fatal shooting of Keaton Otis that includes witness names and contact information.**

On June 1, 2010, the City released to petitioner several audio recordings made by the Bureau of Emergency Communications, as well as twelve-hundred pages of written reports prepared by the Portland Police Bureau. Names, home addresses, and phone numbers of all the private citizens that had been interviewed by police were redacted without explanation. The City subsequently provided various exemptions to The Oregonian addressing information throughout the reports.

At the request of this office, the petition was narrowed to include only the City's redaction of the witness information. Deputy City Attorney Ellen Osoinach reviewed the reports and identified 52 individuals whose witness information is in question. On July 15, 2010, Ms. Osoinach submitted a thoughtful and thorough response to the petition. Ms. Bottomly provided equally well-reasoned counter arguments in a letter dated July 21, 2010.

The City has claimed two exemptions: Confidential Submissions for the first 47 individuals, and Personal Privacy for all 52 citizens. Under the first claim, Ms. Osoinach has provided an individualized argument for two of the 47 "confidential submissions" and a generalized position for the remainder. With respect to the second exemption, Ms. Osoinach has provided an argument that includes all 52 individuals. She concludes by framing the question in this case to be "how to balance openness and its costs."

Ms. Bottomly submits that the City "frames the request too narrowly and applies the two exemptions too broadly." She maintains that most of the requirements of the Confidential Submissions exemption[1] have not been met by the City and that the City relies on "assertions, not evidence" in its arguments in support of the Personal Privacy Exemption. Petitioner also makes a substantial public interest argument for disclosure both under the First Amendment to the United Stated Constitution and under the Pubic Records Law.

## DISCUSSION

### I. Confidential Communications

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.

The Attorney General's Public Records Manual, 2008, p. 79 points out that "[i]f the information received is of a law violation... the identity of the informant may be exempt from disclosure under ORS 192.502(9), and ORS 40.275, Rule 510 of the Oregon Evidence Code." But here we are talking about citizen witnesses in a normal (if high-profile) police investigation.

The City submits that 45 of the witnesses implicitly volunteered their personal information in confidence. 35 of these witnesses were eyewitnesses to the events or overheard parts of the event. Ms. Osoinach admits that these individuals shared their observations with the police and "certainly knew that their description of the events would be shared with others." She contends that these 45 witnesses "assumed that their association with the event, and certainly their contact information, would remain confidential."

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[1] Petitioner objects to the presentation of the new claimed exemption of Confidential Submissions. It must be noted that this office has not failed to consider any exemption interposed by a public agency in response to a petition.

Nine other witnesses were simply contacted by police and two were mentioned by other witnesses. Ms. Osoinach states that these citizens "had an even greater expectation that their names and contact information would remain confidential because it was extremely unlikely that they would ever be needed as witnesses." The lack of an expressed request for confidentiality precludes the application of the exemption to the 45 witnesses.

Citizen 34 expressed generalized concerns to Detective Musser about the release of his name and contact information. According to Ms. Osoinach, he was "worried about court appearances as well as possible reprisals by gang members." It does not appear, however, that the detective obliged the City not to disclose the information. In fact, Ms. Osoinach agrees that the City "cannot offer proof that we specifically promised each private citizen to keep his or her personal information confidential." The exemption has not been satisfied for Citizen 34.

Citizen 1 is a closer question. He expressed "strong misgivings" about talking to the police and was fearful that "he and his family would be exposed to unwanted media attention which in turn might lead to some sort of retaliation from unknown persons." According to Ms. Osoinach, this led Detective Dram to "reassure Citizen 1 that the police bureau would only share his name and contact information for law enforcement purposes." The exemption has been established save for the public interest test.

The City makes the argument that "[w]hen citizens agree to share personal information with police, they must have confidence that the City will not broadly disseminate it on a website." Release of the information "would send a message to witnesses in future crimes that cooperation with police means direct exposure to the public and its news cameras, rather than limited and controlled involvement as actors in the judicial process."

The Oregonian contends that the question is whether "information in police incident reports is just the sort of vital public information that the public records law was intended to get out into the public." Ms. Bottomly argues that the utmost transparency is required in this case and that the City's position to "Trust us" does not serve the public. Petitioner notes that its readers "have an abiding interest in how police are dealing with crime in their communities, and, increasingly, with mental illness in their communities."

According to Ms. Bottomly, the "mayor is accountable to the citizens of Portland, who cannot truly assess the job of the three - police force, police chief, police commissioner – without the free flow of information independently gathered and disseminated." The Oregonian has the better argument in stating that "i]ndependent witnesses to police interactions with civilians, and in particular interactions that end with death or serious injury to police officer or suspect, are key to the press' understanding of what occurred." The exemption must be denied with respect to Citizen 1.

This office appreciates the quandary police officers and detectives find themselves in on a daily basis. Witnesses to criminal activity, whether high profile or mundane, must be encouraged to cooperate and volunteer information necessary for a successful investigation. A genuine fear expressed by a witness to a crime should be documented and the need for confidentiality explored at the time of the interview.

The media must be mindful of the legitimate concerns of the police and the need for discretion in pursuing "the story." Transparency in communication between the police and the press would go a long way in resolving the dilemma of disclosure versus protection of witnesses presented in high profile police actions including the death of Keaton Otis.

## 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, 2008, 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, 2008, E-6.

The exemption asserted by the City has a certain threshold requirement. "[T]he information is not exempt absent an individualized justification for exemption." Attorney General's Public Records Manual, 2008, p. 67. This determination must be made on a case-by-case basis. A blanket policy of nondisclosure is not enforceable. Guard Publishing v. Lane County School Dist, 310 Or 32, 38-40 (1990).

The Guard Publishing Co. test was applied in Mail Tribune, Inc. v. Michael S. Winters, 236 Or App 91,96 (2010), where the Court held that the Sheriff of Jackson County had "failed to satisfy his burden of producing evidence that disclosing the list of concealed handgun licenses would constitute an unreasonable invasion of an individual's personal privacy." The Court of Appeals rejected arguments that the very purpose of the license was secrecy, that disclosure would lead to embarrassment, or that the guns would be stolen:

> Those hypothetical purposes do not satisfy the sheriff's burden of proof, because they do not establish individualized bases for nondisclosure. Put another way, the sheriff has failed to satisfy his burden because he has not connected his stated purpose with any particular individual, as required by Guard Publishing Co.

We understand the City's stated privacy concerns that "the release of this personal information would be likely to invite upon the private citizens unsolicited contact or intrusion." Ms. Osoinach asserts that "[s]ome interviewees fear unwanted intrusions by the media, retaliation by associates of the deceased, or unwelcome attention from the general public." The City posits that most citizens "expect that when they give their contact information to police officers, its disclosure will only occur when necessary to fulfill law enforcement purposes." The Oregonian could find "no basis for this sweeping statement of what 'most' citizens think" and concludes that the City lacks the necessary evidence to support its arguments.

Christopher Paille, Office of Accountability and Professional Standards for the Bureau, initially responded to The Oregonian's request. He noted that the Police Bureau was aware of witnesses in previous police shootings, whose names were publicized in the media, had received threats. The Oregonian points out, however, that the June 7, 2010 disclosure of the grand jury proceedings has apparently had no discernable negative effect in the Keaton Otis matter.

Mr. Paille also expressed investigator concerns that "disclosing witness information will deter witnesses in future cases from coming forward, creating a chilling effect on witness participation in criminal investigatory matters." This concern was reiterated by Ms. Osoinach in her response (quoting a police officer): "If word gets out that your information will be released to the media, we'll never solve another gang case."

We must agree with petitioner that "the Bureau has given no evidence – documentary or testimonial – of a chilling effect." Instead, the City has determined that transparency in police shootings must be limited with witnesses in a "controlled involvement as actors in the judicial process." This position is, unfortunately, inconsistent with the "strong and enduring Oregon policy that public records and government activities shall be open to the public." Jordan v. MVD, 308 Or at 438.

The argument for protecting cooperative citizens has undoubted merit and is certainly available in future investigations if the requirements of the exemption are established. The Personal Privacy exemption is simply not available to the City here.

## ORDER

Accordingly, it is ordered that the City of Portland promptly disclose the records sought in the above petition. Disclosure of the documents ordered is subject to payment of the City of Portland's fee, if any, not exceeding the actual cost in making the information available, consistent with ORS 192.440.

Very truly yours,

MICHAEL D. SCHRUNK
District Attorney
Multnomah County, Oregon

## NOTICE TO PUBLIC AGENCY

Pursuant to ORS 192.450(2), 192.460 and 192.490(3) your agency may become liable to pay petitioner's attorney fees in any court action arising from this public records petition (regardless whether petitioner prevails on the merits of disclosure in court) if you do not comply with this order and also fail to issue within 7 days formal notice of your intent to initiate court action to contest this order, or fail to file such a court action within 7 additional days thereafter.

**10-06**