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September 27, 2006

Arthur Sulzberger
The Oregonian
1320 SW Broadway
Portland, OR 97201-3499

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

Re: Petition of Arthur Sulzberger on behalf of The Oregonian received September 11, 2007 to disclose certain records of the City of Portland

Dear Ms. Kraut and Mr. Sulzberger:

BACKGROUND

On this public records petition, ORS 192.410 et. seq., petitioner Arthur Sulzberger requests the District Attorney to order the City of Portland to provide copies of the following records:

[C]omplete transcripts of all testimony given by Multnomah County Sheriff Bernie Guisto during the course of the investigation of former Police Chief Derrick Foxworth for allegations of misconduct. I also request any summaries of his testimony and documentation of any communication, written or otherwise, to or from Mr. Guisto regarding the investigation.

Petitioner requested the materials by email from Yvonne Deckard, City Human Resources Director, on August 27, 2007. Deputy City Attorney Mathew Farley responded in a September 5, 2007 email. Mr. Farley would not even acknowledge that Sheriff Guisto was a confidential source of information but claimed exemption under ORS 192.502(4), Confidential Information.

Petitioner argued in his petition that the city has cited no basis that would prohibit disclosure of the information. The protection of "secret witnesses" is outweighed by the need to probe vital questions involving the person petitioner believes gave confidential testimony to the City in the Foxworth personnel investigation.

In response to the petition, Deputy City Attorney Lory Kraut continued to maintain the information was exempt as confidential information. She noted that "City investigators interviewed 22 witnesses with direct and indirect knowledge of the specific charges." Some of the witnesses requested anonymity. "Charged by the Mayor to 'follow all avenues of discovery,' the investigators in good faith agreed to keep the identity of the witness and the information provided confidential."

Ms. Kraut pointed out that in addition to the context of a personnel investigation, the "particular nature of the Foxworth investigation provides an additional basis to conclude that the information reasonably should be kept confidential." The investigation arose out of a "personal, consensual relationship. It involved sexually explicit emails between two consenting adults." Here, "in attempting to portray the context of the complainant's emotional state, the witness disclosed very sensitive and very private information relating to the complainant."

Ms. Kraut argued that the public interest would be harmed by the need for citizen involvement and the fear of retribution and jeopardy to their lives and the lives of their families. According to the City, a full, fair and impartial investigation required that confidentiality be assured in order to learn what information the witness had to offer. The public interest in the outcome of the investigation has already been served by disclosure of a 38-page investigation report and an audit by an independent attorney.

Petitioner provided this office with additional arguments in a four-page letter. He contended that the Sheriff had a duty to come forward stemming from his oath of office, the moral fitness requirements of state law, and the Law Enforcement Code of Ethics. Petitioner then asserted that the City waived its claim by its public disclosures of the Foxworth investigation.

Petitioner wrote at length about the lack of harm to the public interest: When part of an investigation remains hidden, public trust could be eroded. Was Foxworth treated fairly? Was the testimony exculpatory for Foxworth? Petitioner complained that the "public trust is harmed when police officers are allowed to operate secretly, outside the scope of accountability."

Petitioner rejected the City's arguments on the harm to the public interest as unfounded and unsupported and concluded that the "only plausible reason for the secrecy is to conceal Guisto's role in the investigation." He suspected that the informal police "Code of Silence" was somehow involved and constituted a "danger to the integrity of police officers and their trust in the community."

DISCUSSION

I. Confidential Submissions

ORS 192.504(4) 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.

As stated in the Attorney General's Public Records and Meetings Manual, 2005, p. 69, there are "no less than five conditions that must be met" for the exemption to apply:

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.

The transcript of the interview together with the affidavit of Anna Kanwit, Deputy Director of the City of Portland's Bureau of Human Resources, clearly establishes that the first four conditions have been satisfied. We cannot accept petitioner's argument that an ethical or moral obligation can somehow be interpreted as a legal duty to provide information in a personnel matter. While the nature of the information was "sensitive and very private," it did in fact relate to the personal, consensual relationship of Chief Foxworth and a nonsworn employee of the Police Bureau.

The last condition is more problematical. The question is not whether the public interest favors or requires disclosure of the materials. The test is whether the public interest would be harmed or suffer from disclosure. For purposes of this order, it is not necessary to discuss the name of any witness or his/her position in the community. Further, it is not necessary to reveal the substance of the testimony. The lengthy interview can be characterized as helpful but

indirect. It is corroborative but not significant with respect to the identity of the witness, the information itself, or the outcome of the investigation. In other words, disclosure of the interview would shed little light on the personnel decision of Mayor Potter.

Against this, the City correctly pointed out the need for citizen involvement and that a "critical source of information would be lost but for the statutory assurance of confidentiality." The investigation of the Chief of Police required that the City "conduct a full, fair and impartial investigation." The gathering of information from any and all sources was of paramount concern. Evaluating the truth of similar allegations of misconduct would be jeopardized without the ability to seek and obtain confidential information. Disclosure here would set a standard that would undermine if not nullify such promises of confidentiality.

ORDER

Accordingly, it is ordered that the petition of Arthur Sulzberger on behalf of The Oregonian for the production of records of the City of Portland is denied.

Very truly yours,



MICHAEL D. SCHRUNK
District Attorney
Multnomah County, Oregon