



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/

August 20, 2003

Robert Jay Royer
1766 Fargo St
Klamath Falls, OR 97603

Kathryn A. Short
Assistant County Attorney
Office of Multnomah County Attorney
501 SE Hawthorne Suite 500
Portland, OR 97214

Re: Petition of Robert Jay Royer received August 11, 2003 to disclose certain records of Multnomah County

Dear Mr. Royer and Ms. Short:

BACKGROUND

On this public records petition, ORS 192.410 et. seq., petitioner Robert Royer requests the District Attorney to order Multnomah County to provide the following records:

[T]he background investigation that was performed by ACJ Investigator Turner, conducted on or about Jan 15, 2001.

[D]ocumentation from the Sheriff's Office concerning the background conducted by Deputy Miller [on or about December 27, 2000].

Petitioner was employed as a Temporary Corrections Technician with Multnomah County – Adult Community Justice from January 29, 2001 to March 23, 2001. He applied for the position and was hired after undergoing a criminal background check, pending completion of a full investigation. Petitioner also applied for full time, permanent positions through September 14, 2001. Petitioner was given as a reason for discharge in March as an “end of assignment.” He made his requests for the background documents and applicant files “following discovery of the misconduct by the former County supervisor (Kate Desmond) and the discovery of discrepancies between county discharge documents and claimed background check results.”

On December 18, 2002 and again on June 7, 2003, petitioner requested a copy of the Turner investigation from Adult Community Justice Director Joann Fuller. He received a

response from Assistant County Attorney Jacqueline Weber in a July 11 letter referencing a signed waiver of all rights to review the completed investigation. On August 18, 2002 and again on June 7, 2003, petitioner requested a copy of the Miller investigation from the Human Resources Director, DK Kennedy, who responded in a letter dated June 23, again reciting the written waiver of access to the content of the completed investigation.

Petitioner submitted his petition to this office together with copies of the correspondence as well as copies of the written waivers (submitted with his applications) signed on December 19, 2000, January 5, 2001, March 12, 2001, and September 14, 2001. Multnomah County responded to the petition in an August 20, 2003 letter to this office, claiming the background investigations were exempt as confidential submissions under ORS 192.504(4). Assistant County Attorney Kathryn Short also maintained that petitioner had waived any rights he had to review the documents.

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, 2001, p. 64, 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 first four requirements are clearly established. With respect to the public interest, the County takes the position that there would not only be a “negative impact on individuals who provided information to investigators who assured confidentiality, but future investigations would be hampered because individuals might not provide information to investigators without such an assurance.” Public safety would be compromised without complete information about an applicant’s background.

Petitioner argues that he is entitled to the background check materials on the authority of Grey v. Salem-Keizer Schools District, 139 Or App 556, 565 (1996). In Grey, an applicant for a teaching position contended that “ without such access to their files, individuals can be denied employment because of false accusations or irrational or discriminatory reasons – and that, in turn, harms the public interest in ensuring unbiased, fair and informed hiring decisions by public agencies.” The court applied a balancing test, evaluated the nature of the documents (reference forms), and rejected the District’s anti-“chilling effect” interest. The court limited the disclosure to “non-source-identifying material.”

We have reviewed the summary of the requested documents listed in Ms. Short’s letter response (attached). We have discussed the contents of the background investigations with Ms. Short, specifically with respect to petitioner’s allegations concerning the involvement of his county supervisor, Kate Desmond. We have been advised of the negative information that led to petitioner’s rejection for employment and are satisfied that Ms. Desmond (or any information originating from her supervision of petitioner) was not a part of the background investigation.¹

The background investigation process is extremely sensitive where law enforcement employment applications are concerned. There is an explicit need for confidentiality. Disclosure of background information would, under these circumstances, harm the public interest. Petitioner has not demonstrated a public interest that would override a conclusion that the exemption applies.

II. Waiver of Access

Under ORS 192.420 “every person” has a right to inspect any nonexempt public record of a public body in this state. A necessary limitation on that right must be under circumstances where that person has “waived” this right. Petitioner signed (on four occasions) an employment application document that specifically acknowledged that

I also understand that the contents and findings of the background investigation are confidential[.] I further understand that neither I nor any persons outside of a law enforcement background investigation process will be granted access to all or any part of the results of this investigation. With the above statements in mind I hereby waive any and all rights that I or my representatives may

¹ Petitioner apparently has not asked for his personnel file available for his inspection under ORS 652.750.

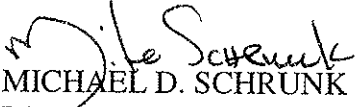
have to read, review, or in any way gain knowledge of the content of the completed investigation.

Petitioner contends that he only signed the waiver "under the conditional understanding that my backgrounds would easily pass...A "reasonable man" does not surrender his right to inspect and challenge the accuracy of information gleaned about him[.]" There is nothing inherently coercive or unreasonable to require such a waiver as a pre-condition of applying for employment. It is particularly necessary for a law enforcement agency to be able to assure confidentiality to sources of information in a background investigation. This office is bound to honor the waivers executed by petitioner.

ORDER

Accordingly, it is ordered that the petition of Robert Royer to disclose certain records of Multnomah County is denied.

Very truly yours,


MICHAEL D. SCHRUNK
District Attorney
Multnomah County, Oregon



OFFICE OF MULTNOMAH COUNTY ATTORNEY

AGNES SOWLE
County Attorney

501 SE. HAWTHORNE, SUITE 500
PORTLAND, OREGON 97214

FAX 503.988.3377
503.988.3138

SCOTT ERIK ASPHAUG
Deputy

MICHELLE A. BELLIA
DAVID N. BLANKFELD
CHRISTOPHER CILIAN
SANDRA N. DUFFY
SUSAN DUNAWAY
PATRICK HENRY
JENNY M. MORF
MATTHEW O. RYAN
KATHRYN A. SHORT
JOHN S. THOMAS
JACQUELINE A. WEBER
Assistants

August 20, 2003

VIA FACSIMILE AND REGULAR MAIL
503/988-3643

John K. Hoover
Deputy District Attorney
600 County Courthouse
1021 SW Fourth Avenue
Portland, OR 97204

Re: *Robert Royer's Request for Records*

Dear Mr. Hoover:

I am writing in response to your August 11, 2003, letter to the Office of the Multnomah County Attorney regarding Mr. Royer's request for records. The records Mr. Royer requests are confidential and exempt from disclosure under ORS 192.502(4). Further, Mr. Royer waived his right to access these documents when he knowingly executed a waiver.

ORS 192.502 provides an exemption to the otherwise expansive public records disclosure laws. ORS 192.502(4) exempts from disclosure:

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 information, and when the public interest would suffer by disclosure[.]

The purpose of this exemption is to encourage citizens to voluntarily provide information to governmental agencies, with some reasonable assurance that the information will be kept confidential.

John Hoover
August 20, 2003
Page 2

When deciding whether the conditional exemption applies in a given situation, the public interest at issue must be weighed against (1) the likelihood that disclosure would discourage others from providing information in confidence in the future, and (2) the impact of the disclosure on the particular individual providing information. Here, there is absolutely no public interest at issue. Disclosure of the MCSO background investigation information serves a private interest only: that of Mr. Royer.

Even if Mr. Royer could somehow establish that the public interest would be served by disclosure of these documents, the resulting harm significantly outweighs any potential benefit. Not only would there be a negative impact on individuals who provided information to investigators who assured confidentiality, but future investigations would be hampered because individuals might not provide information to investigators without such an assurance. Without complete information about an applicant's background, the Sheriff's Office (MCSO) and the Department of Community Justice (DCJ) are seriously disadvantaged in making its hiring decisions, resulting in compromised public safety.

By way of background, when an individual applies for employment with the County in certain public safety positions, they submit a standard Multnomah County application, which is reviewed for meeting minimum qualifications. If an applicant meets the minimum qualifications, the entire application is reviewed (including answers to supplemental questions) to decide which individuals to interview.¹ These individuals are interviewed, ranked and placed on an eligibility list. According to the ranking on the eligibility list, candidates are asked to complete a Statement of Personal History, which requests information about personal references, credit history, criminal history, educational background, employment history, substance abuse, driving record and so on. Once completed, the applicant signs the Statement of Personal History before a notary and submits it to the County.

While most information provided by applicants is complete and accurate, the County cannot rely solely on their statements. Therefore, the background investigation unit of MCSO or DCJ follows up on information provided in the Personal History Forms by contacting personal and professional references. In order to get forthright and honest responses, investigators introduce themselves, assure individuals and organizations that what they say is confidential and will not be shared with anyone outside the background investigation process, including the applicant. This assurance from investigators allows individuals and organizations to speak freely and honestly. Frequently, former employers will not provide any information until they receive a copy of the signed release, which states in part:

¹ Depending on the position, applicants may also be asked to take an examination, e.g. skills test.

John Hoover
August 20, 2003
Page 3

* * * I also understand that the contents and findings of the background investigation are confidential, and will be used for the purpose of background investigations for full time, part time, or volunteer employment with the [Multnomah County Sheriff's Office or Department of Community Justice]. I further understand that neither I nor any persons outside of a law enforcement background investigation process will be granted access to all or any part of the results of this investigation. With the above statements in mind, **I hereby waive any and all rights that I or my representatives may have to read, review, or in any way gain knowledge of the content of the completed investigation.**" (Emphasis added).

Mr. Royer waived any rights that he has or may have to access information about his background investigation and cannot circumvent the full force and effect of that waiver simply by making a public records request. Therefore, based on ORS 192.502(4) and the clear and unambiguous waiver, the County properly denied Mr. Royer's request for background investigation material.

You also requested a summary of the requested documents. The following is a list of documents found in the file for each of the four positions for which Mr. Royer applied:

Corrections Technician 2000

Statement of Personal History (SPH) progress record
Completed SPH, including the following:

- Resume
- Resident history
- Mazama High School Diploma
- Southern OR State College Bachelor of Science degree
- Southern OR University transcripts
- DMV 3 year history
- Small claims court hearing notice
- Separation paperwork for Air Force Reserves (3 pages)
- Employment history index
- Explanation of bankruptcy discharge
- Copies of ODL and concealed handgun licenses issued in Klamath and Jackson County
- City of Medford business license
- Letter of reference from Red's Construction
- Letters of reference from Southern OR State College (2)
- Letter of reference form US Senator Gordon Smith
- Letter of reference from Lt. Col. Richard Houck

John Hoover
August 20, 2003
Page 4

Various records checks standard to MCSO background investigations
Letter of notification to Robert Royer regarding credit report being run 12/27/00
Equifax credit report
Letter of response/clarification from Robert Royer regarding Equifax credit report 01/04/01
Background investigation summary (no interview with applicant) 12/21/00
Letter to Robert Royer notifying him he was no longer being considered for a position 01/05/01
Letter from Robert Royer requesting application and background check materials 06/07/03
Letter to Robert Royer denying above request 06/23/03.

Facility Security Officer 2001

SPH progress record

Completed SPH, including the following:

- Resident history
- Mazama High School Diploma
- Southern OR State College Bachelor of Science degree
- Southern OR University transcripts
- DMV 3 year history
- Small claims court hearing notice
- Separation paperwork for Air Force Reserves (3 pages)
- Employment history index
- Resume
- Explanation of bankruptcy discharge
- Copies of ODL and concealed handgun licenses issued in Klamath and Jackson County
- City of Medford business license
- Letter of reference from Red's Construction
- Letters of reference from Southern OR State College (2)
- Letter of reference from US Senator Gordon Smith
- Letter of reference from Lt. Col. Richard Houck

Copy of 12/21/00 background investigation summary

Memo from background investigator to Personnel detailing reasons to discontinue investigation
02/06/01

Letter to Robert Royer notifying him he was no longer being considered for a position 03/07/01

Letter from Robert Royer requesting application and background check materials 06/07/03

Letter to Robert Royer denying above request 06/23/03.

Corrections Technician 2001

SPH progress record

Completed SPH, including the following:

John Hoover
August 20, 2003
Page 5

- Resident history
- Southern OR State College Bachelor of Science degree
- Southern OR University transcripts
- Separation paperwork for Air Force Reserves (2 pages)

Record of recent NCIC and background checks

Copy of 12/21/00 background investigation summary

Memo from background investigator to Personnel detailing reasons to discontinue investigation
02/06/01

Background investigation summary 06/01/01

Letter from Robert Royer requesting application and background check materials 06/07/03

Letter to Robert Royer denying above request 06/23/03.

Corrections Deputy 2001

SPH progress record

Completed SPH, including the following:

- Current employment attachment
- Resident history
- Mazama High School Diploma
- Southern OR State College Bachelor of Science degree
- Southern OR University transcripts
- Small claims court hearing notice
- Separation paperwork for Air Force Reserves (3 pages)
- Employment history index
- Explanation of bankruptcy discharge
- Copies of ODL and concealed handgun licenses issued in Klamath and Jackson County
- City of Medford business license
- Resume
- Letter of reference from John Bellon
- Letter of reference from Red's Construction
- Letters of reference from Southern OR State College (2)
- Letter of reference from US Senator Gordon Smith
- Letter of reference from Lt. Col. Richard Houck

Various records checks standard to MCSO background investigations

Equifax credit report

Letter of response/clarification from Robert Royer regarding Equifax credit report 01/04/01

Copy of 12/21/00 background investigation summary

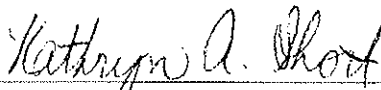
Memo from background investigator to Personnel detailing reasons to discontinue investigation
02/06/01

John Hoover
August 20, 2003
Page 6

Letter of notification to Robert Royer regarding credit report being ran 06/05/01
Copy of 06/01/01 background investigation summary
Original letter of notification to Robert Royer regarding credit report being ran 06/05/01 –
returned
Letter to Robert Royer notifying him he was no longer being considered for a position 06/25/01
Letter from Robert Royer requesting clarification on why he was not selected for a position
07/25/01
Hand written note by Nina Bisson on bottom of letter dated 08/03/01 indicating phone response
to letter
Letter from Robert Royer requesting application and background check materials 06/07/03
Letter to Robert Royer denying above request 06/23/03.

Please contact me if you have any questions or need additional information.

Very truly yours,



Kathryn A. Short
Assistant County Attorney