



MICHAEL D. SCHRUNK, District Attorney for Multnomah County

600 County Courthouse • Portland, Oregon 97204 • (503) 248-3162 • FAX (503) 248-3643

June 28, 2002

James F. Peterson
Custom Woodworking
2502 SW Multnomah Blvd
Portland, OR 97219

Susan Kelly
Office of Planning and Development Review
1900 SW 4th Ave, Suit 5000
Portland, OR 97201

Re: Petition of James F. Peterson, received June 24, 2002, to disclose certain records of the Office of Planning and Development Review (OPDR).

Dear Mr. Peterson and Ms. Kelly:

BACKGROUND

On this public records petition, ORS 192.410 et. seq., petitioner James Peterson requests the District Attorney to order the OPDR and its employees to produce the following records:

A complete copy of the report that my property at 2502-2520 SW Multnomah Blvd. may be in violation of the Portland Zoning Code.

Petitioner made his written request for the above information to Joan Adams, OPDR District Zoning Inspector, on February 12, 2002. Apparently, petitioner was provided with a redacted copy of a 3X5 message card titled "investigation request." Petitioner sent a February 15 follow-up letter asking for a complete copy of the report. Petitioner received no response from OPDR and no explanation for the deletion from the public record.

Susan Kelly, Program Specialist for OPDR, submitted a June 27 letter response to the petition and claimed exemption for the deleted material under ORS 192.502(4), Confidential

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June 28, 2002

Re: Petition of James Peterson

Submissions. (The letter is attached to this order). Ms. Kelly represented that the redacted material in the investigation request form is the name and phone number of the complainant. She indicated that it is the policy of OPDR "to tell people who phone in a code complaint that we will not voluntarily disclose their name or identifying information and that the information will remain confidential." Ms. Kelly also provided a five-page interoffice memorandum from then Deputy City Attorney Paul Elsner to Margaret Mahoney, then Director of Bureau of Buildings. (The opinion is attached to this order). The City Attorney opinion discusses the Bureau's proper response when asked to disclose the identity of a citizen complainant by a third party. Apparently, the same policy considerations enunciated in the opinion continue to be the policy of now OPDR Director Mahoney.

DISCUSSION

ORS 192.502(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.

According to the Attorney General's Public Records Manual, 2001, p. 64, the purpose of this exemption is to "encourage voluntary submission of relevant information to public bodies, with some reasonable assurance that the information will be kept confidential." The letter response of OPDR together with the opinion of the City Attorney clearly establishes that the exemption is appropriate in this case.

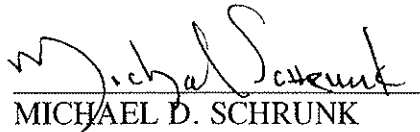
In order to protect the "free flow of information from citizens to the governmental enforcement agencies," there is a need for frankness and a corresponding need for confidentiality. Elsner opinion, p. 2. However, once the confidential information is provided, the investigation report "has no bearing or relevancy on whether a violation actually exists." Elsner opinion, p. 3. Under these circumstances, disclosure of the name and phone number of the complainant would harm the public interest by subjecting citizens to retaliation and make them reluctant to give information about possible code violations. Petitioner has not demonstrated a public interest that would override such a conclusion.

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ORDER

Accordingly, it is ordered that the petition of James F. Peterson to disclose certain records of the Office of Planning and Development Review is denied.

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael Schrunk", written over a horizontal line.

MICHAEL D. SCHRUNK

District Attorney
Multnomah County

02-08



CITY OF

PORTLAND, OREGON

OFFICE OF PLANNING AND DEVELOPMENT REVIEW

1900 S.W. 4th Avenue, Suite 5000

Portland, Oregon 97201

(503) 823-7300

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<http://www.opdr.ci.portland.or.us>

June 27, 2002

John Hoover
Deputy District Attorney
600 County Courthouse
Portland, OR 97204

RE: Petition of James Peterson to disclose certain records City of Portland, Office of Planning and Development Review

Dear Mr. Hoover:

In response to your letter of June 24, 2002, the redacted information on the document titled "Investigation Request" is the name and phone number of the complainant.

It is the policy of the Office of Planning and Development Review to tell people who phone in a code complaint that we will not voluntarily disclose their name or identifying information and that that information will remain confidential. Pursuant to that policy, we have obliged ourselves not to disclose that information.

Please let me know if you require any additional information regarding this matter.

Sincerely,


Susan Kelly
Program Specialist

C: Linda Meng, City Attorney
Paul Scarlett, Code Compliance
Margaret Mahoney, Director



CITY OF
PORTLAND, OREGON

OFFICE OF CITY ATTORNEY

Jeffrey L. Rogers, City Attorney
 1220 S.W. 5th Avenue
 Portland, Oregon 97204
 (503) 248-4047

December 10, 1985

INTEROFFICE MEMORANDUM

TO: Margaret Mahoney
 Director, Bureau of Buildings, B106/R930

FROM: Paul C. Elsner *Paul*
 Deputy City Attorney

RE: Citizen Complaints - Disclosure of Informant's
 Identity

You have asked this office for an opinion concerning the Bureau's proper response when asked to disclose the identity of a citizen complainant by a third party. These requests are usually from persons who allegedly are violating a provision of any of the various building and zoning codes which the Bureau of Buildings enforces. Specifically, you want to know whether the provisions of Oregon's Public Records Law (ORS 192.410 - ORS 192.500) require the disclosure of this information.

Answer: No.

Analysis: Under ORS 192.420 every person has a right to inspect any public document which is not exempted by the provisions of ORS 192.500. The "exemption list" refers to a number of types of documents/information which may or may not be fully exempted, depending on the public interest involved. Of this list, the only provision which is applicable to this opinion is ORS 192.500(2)(c) which states:

"The following public records are exempt from disclosure under ORS 192.410 to 192.500:

* * * * *

(c) 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

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not to disclose the information and when the public interest would suffer by the disclosure."

Under the terms of this provision, four tests must all be met for the information covered thereby to be exempted.

1. The information is voluntarily given, i.e. not required by law to be submitted to the governmental unit;
2. the information is of a nature which should be kept confidential;
3. the public body has obliged itself in good faith not to disclose the information; and
4. the disclosure would harm the public's interest.

Applying these four criteria to the information on a public record regarding the identity of a complainant yields the following analysis.

First, there is no legal requirement for citizens to report violations of the law. Thus, any information relative to the potential code violations given by a citizen is voluntary and within the scope of the exemption.

As for the second criteria - whether the identity of the complainant should reasonably be considered confidential - it is in large part answered by whether the fourth part of the exemption is also met. In other words, if disclosure would harm the public interest then, ipso facto, it is reasonable to assume that the information should be kept confidential.

The public interest to be protected is the free flow of information from citizens to the governmental enforcement agencies. Many citizens would be reluctant to give information if they were capable of being identified as a source of information since then the violator might take retaliatory measures against them. This is especially true in the residential landlord-tenant area, although it also occurs with zoning or nuisance violations (neighbor-to-neighbor, business competitors, etc.) as

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well.¹ Furthermore, the existence of a violation of the code is independent of the identity of the informant - the identity of the informant has no bearing or relevancy on whether a violation actually exists. Also, as I understand it, the actual existence of a violation is ascertained independently by Bureau personnel prior to any official action being taken by the Bureau, thus minimizing, if not eliminating, false allegations being the basis of official enforcement actions.

Finally, the third criteria - the agency's good faith obligation not to disclose the information. As I understand it, the Bureau's policy is to tell complainants that their identities will not be voluntarily disclosed - this constitutes the good faith obligation on our part. The information is then given to Bureau personnel.

Since it appears that each of the four criteria required under ORS 192.500(2)(c) are met, it is appropriate for the Bureau to maintain its policy of nondisclosure relative to

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1. It should be pointed out that in the proper instance, the identity of a complainant might become relevant in which case a court may order disclosure in that particular instance pursuant to ORCP 36(B)(1). This opinion is directed at developing a general policy that would apply in the great majority of cases and is not meant to prohibit access to the City's records in an instance where a court determines that the identity of the informant is appropriate.

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the identity of informants.²

As a final note, it should be noted that ORS 40.270 also provides a basis for nondisclosure of complainant's identity. This statute is also known as Oregon Rule of Evidence (ORE) 510. It states, in relevant part:

"(2) A unit of government has a privilege not to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer.

(3) The privilege created by this section may be claimed by an appropriate representative of the unit of government if the information is furnished to an officer thereof."

The rule goes on to say that the privilege may be lifted by the court in the appropriate instance; but generally it

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2. It should be kept in mind that ORS 192.410 to 192.500 is a public "records" law, not a public "information" law. In other words, it guarantees not the right to obtain information from public bodies but rather the right to independently inspect tangible documents. This statutory right to inspect documents impliedly encompasses a right to examine original records.

As I understand it, the name of the complainant is listed on the intake card, along with other information concerning the violation which would not be exempt from public disclosure. Thus, the Bureau must make available the documents containing this nonexempt information. The proximity of exempt and nonexempt information is somewhat problematic, if inspection of original documents is to be allowed. I believe that in line with ORS 192.430 (which discusses the adoption of reasonable rules necessary for the protection of records) it would be possible to provide a copy of the original document in certain cases with exempted information blanked out.

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can be claimed. Furthermore, the existence and efficacy of this privilege is recognized by the Public Records Law at ORS 192.500(h).

If you have any additional questions, please feel free to contact me.

PCE:cg