



**MICHAEL D. SCHRUNK**, District Attorney for Multnomah County  
600 County Courthouse • Portland, Oregon 97204 • (503) 248-3162 • FAX (503) 248-3643

April 25, 2006

Jacob Quinn Sanders  
Portland Tribune  
6605 E Lake Rd.  
Portland, OR 97222

Stephanie Harper  
Deputy City Attorney  
Office of City Attorney  
City Hall, Suite 430  
1221 SW 4th Avenue  
Portland, OR 97204

Re: Petition of Jacob Sanders for the Portland Tribune received April 17, 2006, to disclose certain records of the City of Portland

Dear Ms. Harper and Mr. Sanders:

#### BACKGROUND

On this public records petition, ORS 192.410 et. seq., petitioner Jacob Sanders requests the District Attorney to order the City of Portland and its employees to produce the following records:

- 1. Portland Police Bureau Internal Affairs Division case No. 1994-C-0699 in re: Dorothy Elmore, DPSTT No. 14162.**

On March 6, 2006, Portland Tribune reporter Jacob Sanders requested any documents in the possession of the Portland Police Bureau Internal Affairs Division regarding its investigations of Dorothy Elmore between 1991-1995. PPB Captain John Tellis identified one sustained complaint closed on April 2, 1997. He claimed exemption as internal discipline, ORS 192.501(12).

Petitioner provided a follow-up letter discussing the “public interest” in disclosure of the disciplinary reports. He argued that it is “to the public’s benefit to know whether police are truthful” especially persons “in prominent positions of authority and responsibility.” Petitioner noted that Assistant Chief Elmore has authority over police records, Internal affairs, and personnel – “all areas that can greatly shape the standards, values, and constitution for the Police Bureau.” Finally, petitioner submitted that it was to the public’s benefit “to see that the Police Bureau is transparent. With transparency comes credibility.”

April 25, 2006

Re: Petition of Jacob Sanders

On April 14, 2006, Deputy City Attorney Stephanie Harper replied to petitioner. She rejected the contention that Ms. Elmore's current assignment as Assistant Chief of the Services Branch of the Portland Police Bureau established sufficient public interest in the disciplinary reports. Ms. Harper noted that the conduct occurred over 12 years ago, that Ms. Elmore did not hold a high-ranking position at the time of her conduct, and that the conduct did not involve corruption or abuse of official power, or criminal behavior. Ms. Harper asserted that there was "no information to suggest that Assistant Chief Elmore is currently facing allegations similar in nature to the 1994 conduct."

Deputy City Attorney Harper submitted a letter response to the petitioner's filing with this office. Ms. Harper provided for our review the 95-page investigation together with the two-page memorandum from then Police Chief Charles Moose. Ms. Harper argued that it is not appropriate to "continue to punish public employees and subject them to ridicule long after the events at issue have been brought to closure." She noted that there is no evidence Ms. Elmore's current conduct is at issue and that at the time of the incident Ms. Elmore was a detective with investigative, not supervisory job responsibilities. Ms. Harper concluded by asserting that making public a 12-year old complaint "would send a discouraging message to bureau members who correct their behavior in response to corrective action and go on to contribute to public service."

#### DISCUSSION

In 1985, the Oregon legislature passed ORS 192.501(12) which exempts "[a] personnel discipline action, or materials or documents supporting that action[.]" This is a conditional exemption that may be overcome if it is shown that "...the public interest requires disclosure in the particular instance [.]" The exemption applies when discipline has been imposed.

The appellate courts have spoken with respect to cases involving sustained discipline complaints. "The policy intended by the legislature, which we enforce, protects the public employee from ridicule for having been disciplined but does not shield the government from public efforts to obtain knowledge about its processes." City of Portland v. Rice, 308 Or 118, 124, n 5 (1989). (PPB Internal Affairs investigation ordered disclosed over claim of personnel discipline exemption). Accord, Oregonian Publishing Company v. Portland School District No II, 144 Or App 180 (1996) (Public interest required disclosure of discipline investigation and sanction of school employees for misuse and theft of school property).

The Attorney General's Public Records Manual, 2005, page 41, provides some guidance in the application of the traditional Personnel Discipline Action exemption:

Consistent with this policy, there are situations when the public interest in disclosure outweighs the public interest in confidentiality, despite the imposition of a disciplinary sanction. For example, the public interest typically favors disclosure if the conduct potentially constitutes a criminal offense or if the records relate to alleged misuse and theft of public property by public employees. Other factors to consider in weighing the public interest in disclosure against the employee's interest

in confidentiality include the employee's position, the basis for the disciplinary action, and the extent to which the information has already been made public.

The general rule in Oregon with respect to public records favors disclosure. Portland v. Anderson, 163 Or App 550, 552 (1999). With respect to sustained discipline, this office continues to be guided by the principles enunciated in our Public Records Order, February 6, 1997, *Foster*, involving the disciplinary records of Gresham police Sergeant James Kalbasky.

### ***FOSTER CRITERIA***

1. Serious misconduct by a government employee should be disclosed in the public interest; relatively minor misconduct need not be disclosed if the public interest would not be significantly promoted by doing so.
2. Generally, termination from employment or other discipline for cause is serious misconduct if it is based upon corruption in the discharge of the public's business (including theft of the public's property), abuse of official power by employing such power for a purpose not related to any lawful government objective or by use of illegal or impermissible means in the pursuit of a governmental objective misconduct which impairs or imperils the mission of the government agency, or criminal behavior (particularly when job-related) which constitutes proper ground for discharge from employment or other discipline.
3. Discipline for acts or faults of government employees falling short of the preceding kinds of serious misconduct may also be determined to require disclosure if the cumulation of repeated disciplinary violations fairly raises the issue whether continued employment of the particular employee in itself constitutes an imprudent or improper management decision not to impose more severe sanctions or termination of employment.
4. Discipline cases that evidence systematic misconduct, i.e., misconduct affecting multiple employees and involving similar improper acts or omissions may require disclosure even when the acts or faults in question do not individually rise to the level of the serious misconduct described in points 1 and 2, where the overall pattern of disciplinary violations indicates there may be a concentrated personnel problem in a particular agency or part of any agency, or sheds light on the effectiveness of management's efforts to properly control the behavior in question.
5. Other cases of disciplinary records may merit disclosure in the public interest even though the conduct of the disciplined employee is not serious misconduct as previously described, where circumstances raise an issue of unduly harsh (or unduly lenient), arbitrary, irrational administration of discipline by management and thus illuminate management's conduct of the public business.

6. Finally, public employees should not be subjected to public disclosure of disciplinary violations not of the kind specified in the preceding guiding principles, when such disclosure would merely subject the employee to added humiliation and would not significantly promote the public's understanding of the manner in which the programs and services of government are being carried out. Part of the purpose of employee discipline is to encourage the employee's morale while correcting undesirable conduct, which goal is not promoted, as we think, by a process of indiscriminate public pillory -- and which consideration presumably was part of the Legislative Assembly's motivation for the enactment of the "discipline action" exemption in the first place.

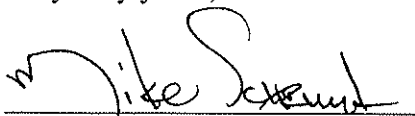
The City correctly points out that the investigation resulted in "low-level disciplinary action taken in response to the rule violation." There is no evidence of systematic misconduct or repeated disciplinary violations. The conduct itself was not criminal in nature, and did not involve corruption in the discharge of the public's business or abuse of power. If this petition had been presented in 1997, there is no question the *Foster* criteria would not support disclosure.

The only public interest implicated in this relatively minor misconduct is the high rank achieved by Assistant Chief Elmore in the nine years since the matter was closed. Disclosure would, in effect, punish Ms. Elmore for the good efforts she has made in her professional career. That makes no sense. In the absence of any public concerns about the current job performance of Ms. Elmore, maintaining the confidentiality of the discipline action is appropriate.

ORDER

Accordingly, it is ordered that the petition of Jacob Sanders for the Portland Tribune to disclose certain records of the City of Portland is denied.

Very truly yours,



MICHAEL D. SCHRUNK

District Attorney  
Multnomah County