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April 9, 2001

Damon Woodcock
6307 NE 8th Ave
Portland, OR 97211

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

Re: Petition of Damon Woodcock received March 22, 2001, to disclose certain records of the City of Portland

Dear Ms. Harper and Mr. Woodcock:

BACKGROUND

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

1. **Public records request for a complete copy of investigative notes, documents, reports and taped interviews concerning EE) #00-001. See attached letter dated 9/26/00 containing request.**

2. **Public records request for copies of IAD Complaint Histories, to include all non-confidential complainant information, for listed Bureau members. See attached letters dated 12/21/00 and 01/04/01 containing requests.**

3. **Public record request for copies of all internal police reports, internal memos, facsimiles, hand written notes, and computerized or digitized information documenting the increasingly violent threatening statements culminating in death threats to the "snitches" made by Officer Kelvin Knudsen during the course of the Central Precinct investigation (#99-047). See attached letter dated 12/21/00 containing request.**

4. Public records request to view original polaroid photos taken of my locker by Lt. Scott Winegar, property receipt #686738. See attached letters dated 12/18/00 and 01/31/01 containing request.

Petitioner argues in his petition that, with respect to the EEO investigation, "ORS 181.854(3) pre-supposes that the 'employee' under investigation is known and/or has been identified. This clearly is not the situation in this case." Petitioner asserts that here is no legal basis to deny his request for IAD complaint histories and cites the IAD SOP of October 15, 1997 which details "the information to be released and the procedures to be followed for filling public records requests such as mine." Petitioner makes reference to the "overtime" investigation and contends that the Knudsen IAD complaint investigation should be disclosed because of the public interest "regarding how the Bureau handled complaints of this magnitude during a serious investigation of the officers assigned to Central Precinct." Petitioner admits having been allowed to view the original photograph held in evidence in PPB Case No. 99-61890 on two separate occasions. Petitioner wants to look at the original photograph again and maintains that there is "no legal basis for the Internal Affairs Division to refuse my access to the original photographs."

On April 2, Deputy City Attorney Harper submitted a letter response to the petitioner's filing with this office. Ms. Harper provided for our review EEO file #00-001, the complaint histories of the police officers listed in petitioner's December 21, 2000 letter to Records Manager Debbie Haugen, .IAD file #99-047, and the reports of Portland Police Bureau Case No. 99-61890.

The Police Bureau invokes the 1999 Personnel Investigation of a Public Safety Employee exemption, ORS 181.854 (unsustained complaints), and the Personnel Discipline Actions exemption, ORS 192.501(12) (sustained complaints), to deny disclosure of the EEO investigation, the complaint histories, and the investigation of Kelvin Knudsen. The Bureau takes the position that it has not denied petitioner access to the poloroid photograph taken by Lt. Winegar.

DISCUSSION

I. EEO #00-001 Investigation.

This office was provided with approximately 90 pages of documents consisting of the investigative summary report and supporting interviews relating to petitioner's ten allegations of discrimination. We have also reviewed the criminal investigation (PPB Case. No. 99-61890) titled "locker in men's locker room defaced with bias implications." The criminal investigation is an available public record. Significantly, the reports do not establish the existence of the prepetrator(s) of the alleged prohibited discrimination or criminal law violations.

The City seeks to deny disclosure of the EEO investigation as a "personnel investigation" under ORS 181.854(3). It is not. Rather, it is an investigation into allegations of bias and discrimination in the workplace centering on gender orientation. As such, it is a public record subject to disclosure. In Oregonian Pub. Co. v. Portland School Dist. No. IJ, 329 Or 393, 402

(1999), an attempt was made to restrict access to a public record by placing the records in a personnel file or using a label such as "Personnel Investigation" for those records. The Supreme Court rejected this approach ad noted:

> Although the title of the investigation report is "Personnel Investigation," the subject noted in the heading of the report is "Misuse and Theft of School District Property," without any reference to any individual school district employee. The focus of the report is the general "atmosphere" at Benson High School regarding school district property, with documentation and discussion of misuse and theft of such property by several school district employees. The investigation report also discusses the policies in place at the school regarding donated and surplus property, and the need for improvement regarding those policies and their enforcement by the school district.

We have been referred to no specific exemptions for equal employment opportunity investigations conducted by local public agencies. ORS 192.501(8) conditionally exempts civil rights investigation material relating to any complaint filed under ORS 659.040 or 659.045. Although admittedly inapplicable to the public record request here, this exemption is valid only until such time as the complaint is resolved or a final administrative determination is made.

Petitioner is seeking the investigative reports and documents relating to his complaints of discrimination involving the "locker" incident and tangential events. Under the particular circumstances of this investigation, we conclude that petitioner's request for records relating to EEO #00-001 must be granted.[1]

II. **IAD Complaint Histories.**

The City asserts the personal discipline exemptions of ORS 192.501(12) and 181.854 and argues that the complaint histories themselves constitute information about a personnel investigation of a public employee. The City acknowledges that its current practice with respect to requests for IAD complaint histories is inconsistent with the 1997 S.O.P. cited by petitioner. Nonetheless, the City maintains that it will only release such histories upon the express consent of the affected Bureau individuals. According to the City, none of the 32 officers gave such consent.

The Attorney General has taken the position that the exemption for completed disciplinary actions is to be narrowly construed and draws a distinction between the protection of the public employee from ridicule for having been disciplined and the need for public access to government

[1] The City also asserts that certain portions of the report are exempt as Internal Advisory Communications, ORS 192.502(1), and as attorney-client privileged communications, ORS 192.502(8). We conclude that neither exemption is applicable to the two paragraphs referred to by the City.

processes. Attorney General's Public Records Manual, 1999, page 35. We would draw such a distinction here.

This office reviewed the case history print-outs and would note that much of the information is in code. A case history documents both sustained and nonsustained complaints and lists both open and closed investigations. There are thirteen listed catagories in a standard IAD case history, only eleven of which appear to be used.

The following headings arguably refer to the particular complaint and data under those headings should be considered exempt information about a personal investigation: Alleg. No., Reported, Complainant, Race, Type, and Disp. On the other hand, the following headings more correctly relate to the IAD process itself and data under those headings should be made available to the public: Complaint, Division, Assigned, Stat, and Closed. We conclude that the IAD case histories should be disclosed after redacting the exempt material.[2]

III. Kelvin Knudsen IAD Investigation.

This office was provided with a seven-page report and a fifteen-page transcription of interviews with petitioner and Portland Police Bureau Sergeants Paul Weatheroy, Irv McGeachy, and Bill Sinnott. The investigation included reports of misconduct involving Portland Police Officer Kelvin Knudsen. We also reviewed the IAD file itself including the specific outcome of the investigation. For purposes of this order, it is sufficient for us to relate that Officer Knudsen received an economic sanction on a sustained violation of a general order of the Bureau. There is no indication of a pattern of misconduct on the part of Officer Knudsen.

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 IJ, 144 Or App 180 (1996) (Public interest required disclosure of discipline investigation and sanction of school employees for misuse and theft of school property).

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[2] With the exception of the one investigation of Kelvin Knudsen, petitioner has not requested the IAD investigations listed in the 32 IAD case histories. Accordingly, we will not comment on whether the public interest requires disclosure of any of the listed complaints.

The Attorney General's Public Records Manual, 1999, page 35, 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 at 552. 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 by 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 recent Oregon Court of Appeals decision of City of Portland v. David Anderson and The Oregonian, 163 Or App 550 (1999) discusses allegations of misconduct of supervisory personnel of a law enforcement agency. In that case, the Court upheld the disclosure of the personnel discipline action materials regarding the sustained discipline of Portland Police Bureau Captain John Michael Garvey. In Anderson, the Court of Appeals identified the presence of a public interest even when dealing with allegations of off-duty, non-criminal and not *per se* illegal conduct of a high-ranking law enforcement manager:

> The public has a legitimate interest in confirming his integrity and his ability to enforce the law evenhandedly. The police investigation that resulted in discipline concluded that Garvey had engaged in sexual conduct through an escort service that may serve as a front for prostitution. That information bears materially on his integrity and on the risk that its compromise could affect the administration of his duties. Portland v. Anderson, 163 Or App at 554.

Upon examination of the IAD file, we could find nothing to indicate serious or systematic misconduct, ineffective management, or irrational administration of discipline. The allegations do not involve the conduct of high-ranking police managers.

This office does not agree with petitioner's contention that the public will benefit from exposure of the contents of the IAD investigation. There is nothing to indicate the disciplinary process was other than thorough and fair to both the accused police officer and petitioner. We conclude that there has been no showing of any public interest in the further airing of these complaints.

IV. Polaroid Photos of Petitioner's Locker.

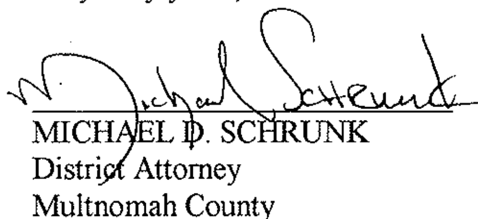
Deputy City Attorney Harper has advised this office that the photograph taken by Sergeant Scott Winegar is maintained in evidence in the property room of the Portland Police Bureau as part of the criminal case investigation of the "locker" incident. Petitioner admits to having been allowed to inspect the polaroid photograph of his defaced locker on two separate occasions. That is all the public records law requires.

ORS 192.430(2) allows the custodian of records to adopt reasonable rules "necessary for the protection of the records and to prevent interference with the regular discharge of duties of the custodian." Deputy City Attorney Harper has assured this office that IAD Captain Bret Smith and his staff will accommodate petitioner's request to view the original photograph yet again. The City has not denied petitioner's request. Therefore, the District Attorney has no jurisdiction to order disclosure of the materials sought by petitioner.

<u>ORDER</u>

Accordingly, it is ordered that the City of Portland and the Bureau of Police promptly disclose the records sought in the first request in the petition and a redacted version of the records sought in the second request in the petition. The petition is otherwise denied.

Very truly yours,



MICHAEL D. SCHRUNK
District Attorney
Multnomah County

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 seven days formal notice of your intent to initiate court action to contest this order, or fail to file such court action within seven additional days thereafter.

01-05