



MICHAEL D. SCHRUNK, District Attorney for Multnomah County

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October 11, 2000

Paul Newton
Metropolitan Public Defender
630 SW Fifth, Suite 500
Portland, OR 97204-1405

Captain Bret Smith
Internal Affairs Division
Bureau of Police
1111 SW 2nd Avenue
Portland, OR 97204

Re: Petition of Paul Newton received October 2, 2000, to disclose certain records of the City of Portland

Dear Mr. Newton and Captain Smith:

BACKGROUND

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

All IAD files on Portland Police Officers Justin Faw #34010 and Meredith Hopper #36239.

On August 18, 2000, petitioner made his public records request for the IAD files after fellow Metropolitan Public Defender Joel Greenberg unsuccessfully sought the files by subpoena duces tecum. Portland Police Bureau IAD Captain Bret Smith replied to petitioner in an August 30 letter, advising petitioner that "as a general rule, non-sustained IAD investigations are no longer automatically available as public records." Captain Smith denied disclosure because, in his opinion, "petitioner had not "articulated any facts that would justify an exception to this general rule."

Petitioner submitted his petition together with correspondence to and from the Portland Police Bureau and Judge Beckman's order granting the state's motion to quash the subpoena. Petitioner acknowledges the position of this office with respect to SB 975 but argues that the case of City of Portland v. David Anderson and The Oregonian, 163 Or App 550 (1999) "strongly supports disclosure of personnel information of police officers."

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On October 9, 2000, Captain Smith submitted a letter response to the petitioner's filing with this office. Captain Smith provided for our review the complete IAD files of both officers. There is a two-page open complaint (unrelated) pending investigation in each file. One file contains an additional non-sustained complaint together with correspondence with the complainant, police reports, and interviews.

With respect to the open complaints, Captain Smith asserts that premature disclosure would seriously impair the internal investigations and that a "public body may postpone action on the request until the personnel matter is finally resolved." With respect to the closed complaint, the Police Bureau invokes the new Personnel Investigation of a Public Safety Employee exemption found in the 1999 legislature's Senate Bill 975. Captain Smith interprets Section 3 to prohibit "disclosure of personnel investigations of public safety employees that do not result in discipline, except certain specified instances." Captain Smith rejects petitioner's arguments that the "Garvey case" (Portland v. Anderson) is applicable.

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 only applies, however, when discipline has been imposed.

New legislation effectively extends this exemption to unfounded discipline actions of public safety employees. Senate Bill 975, Chapter 855, Section 3, effective October 23, 1999, provides in part:

- (3) A public body may not disclose information about a personnel investigation of a public safety employee of the public body if the investigation does not result in discipline of the employee.
- (4) Subsection (3) of this section does not apply:
 - (a) When the public interest requires disclosure of the information.
 - (b) When the employee consents to disclosure in writing.
 - (c) When disclosure is necessary for an investigation by the public body, the Department of Public Safety Standards and Training or a citizen review body
 - (d) When the public body determines that nondisclosure of the information would adversely affect the confidence of the public in the public body.

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Reading ORS 192.501(12) together with Senate Bill 975, Chapter 855, Section 3 leads to the conclusion that the legislature has provided that all records pertaining to personnel discipline actions of public safety employees are now conditionally exempt. The only question that remains is whether the public interest requires disclosure in the particular instance.

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, 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 legislature has now spoken with respect to cases involving unsustained discipline allegations. It is the statutory responsibility of the public agency, in this case the Police Bureau, to avoid nondisclosure of public records under circumstances which "would adversely affect the confidence of the public in the public body." Senate Bill 975, Chapter 855, Section 3, (4), (d). It is also the duty of the public agency to declassify the information when "the public interest requires disclosure." Senate Bill 975, Chapter 855, Section 3, (4), (a).

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.

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 Portland v. Anderson, 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.

An application of the *Foster* criteria and cases such as Portland v. Anderson, weigh heavily against disclosure here. Upon examination of the IAD files, we could find nothing to indicate serious or systematic misconduct, ineffective management, or irrational administration of discipline. Further, 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 files of the two uniformed officers. Two of the files involve active investigations of relatively minor alleged misconduct. The third file concerns allegations that were not sustained that again relate to relatively minor alleged misconduct. We conclude that there has been no showing of any public interest in the airing of these complaints.

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ORDER

Accordingly, it is ordered that the petition of Paul Newton to disclose certain records of the City of Portland is denied.

Very truly yours,


MICHAEL D. SCHRUNK
District Attorney
Multnomah County

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