



**MICHAEL D. SCHRUNK**, District Attorney for Multnomah County  
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June 9, 2000

Kathleen A. Pool  
Senior Assistant Counsel  
Metro  
600 NE Grand Avenue  
Portland, OR 97232

Roger Anthony  
The Oregonian  
1320 SW Broadway  
Portland, OR 97201-3499

Re: Petition of Roger Anthony for The Oregonian received May 30, 2000, to disclose certain records of Metro

Dear Ms. Pool and Mr. Anthony:

#### BACKGROUND

On this public records petition, ORS 192.410 et. seq., petitioner Roger Anthony for The Oregonian requests the District Attorney to order Metro and its employees to produce the following records:

1. We would like to see any descriptions or summations involving an incident on April 17 between one of the Oregon Zoo's elephant keepers and Rose-Tu.
2. We would like to see any medical reports or veterinarian evaluations pertaining to the elephant. This would include treatment records for any injuries she may have incurred.
3. We would like to determine whether the keeper who was terminated for this incident - Mr. Fred Marion - was also the keeper whose actions were investigated as a result of allegations in December by Ms. Karen Haberle.
4. We would also like to determine how the incident came to the attention of zoo management.

On May 3, 2000, petitioner submitted a letter request for documents pertaining to the April 17, 2000 incident involving the Zoo elephant Rose-Tu with Mr. Tony Vecchio, Director of the Zoo.

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Petitioner also asked for a fee waiver. Mr. Vecchio denied the records request in a May 6 letter to petitioner. The Zoo Director indicated that all the documents sought are "materials and documents supporting a personnel discipline action, and, thus, are exempt from disclosure pursuant to ORS 192.601(11), unless the public interest requires disclosure in this particular instance." Mr. Vecchio noted that petitioner's letter did "not identify any public interest, which would be served by disclosure."

Mr. Anthony argued in his petition that the readers of The Oregonian "have a serious and legitimate interest in happenings at their zoo. That entitles them to know, at a minimum, the findings of investigations into complaints about the behavior of Mr. Marion, the nature of his conduct and the circumstance leading to it." Petitioner pointed out that the alleged misconduct resulted in termination, that the zoo is operated with public funds, and that "this is a matter of tremendous public interest and concern" given the history of the Oregon Zoo and its elephants.

In a June 5 letter response to this office, Senior Assistant Counsel Kathleen Pool acknowledged that disclosure in the public interest might be indicated due to the seriousness of the offense charged and the discipline imposed. Ms. Pool urged that we make an exception under the circumstances of this particular incident:

However, even in cases of grave misconduct, the public interest is substantially protected if the accused employee is immediately suspended or otherwise rendered incapable of repeating the alleged offense...It should be noted the public interest may not always be served by public reporting of potentially inflammatory charges. Such reporting may either inhibit action out of fear the employee will be unfairly condemned, or it may prompt premature action out of a desire to reassure the public. Neither is in the public interest.

Ms. Pool noted that this office has recognized that "the public interest may be better served by maintaining the confidentiality of disciplinary records pending final agency action." We were advised in the June 5 letter that Mr. Marion's termination was still under substantive review by Metro. "The collective bargaining agreement provides that discipline is grieved to the department head and then to the Executive Officer." Ms. Pool anticipated that the Metro Executive Office would issue a decision by June 14, 2000.

This office received correspondence from Damon Mabee, Field Representative, Laborers' Local 483, Municipal Employees, in support of Metro's position of nondisclosure. He noted that the union, on behalf of Mr. Marion, is currently going through the grievance process and that further media attention will make the selection of a neutral arbiter more difficult. Mr. Mabee pointed out that if the matter goes to arbitration, most if not all of the information would become a matter of public record. In a subsequent telephone conversation with this office, Mr., Mabee indicated that the possible arbitration would take place in late summer or early fall.

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On June 9, 2000, Metro Counsel Pool advised this office that the grievance filed by Mr. Marion and his union had been denied. Ms. Pool indicated that on June 9 Metro forwarded its investigation to the Multnomah County District Attorney's Office for review for possible criminal prosecution. Ms. Pool amended her response to the petition by asserting the criminal investigatory material exemption, ORS 192.501(3).

## DISCUSSION

### **I. Personnel Discipline Action**

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 11, 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 general rule in Oregon with respect to public records favors disclosure. City of Portland v. David Anderson and The Oregonian, 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.

Here, the allegations of misconduct relate to the performance of the public's business and, arguably, the mistreatment of an elephant under the care and custody of a government employee. The decision to terminate an experienced elephant keeper with a good work record for his actions cannot have been made easily. We conclude that the actions of Mr. Marion, if true, amount to serious misconduct and are of such a nature that the public interest would be significantly promoted by disclosure of the requested documents.

We acknowledge that in previous decisions we have accepted the argument that it is premature to order disclosure pending resolution of internal discipline. Here, Metro has conducted a thorough investigation and completed both a pre-disciplinary hearing and a due process hearing before making the decision to terminate Mr. Marion. A post-termination review By Metro Executive Officer Mike Burton under the collective bargaining grievance procedure upheld the termination. The internal process of the public agency has, therefore, been concluded.

The remaining question is whether to delay disclosure pending completion of the grievance process. The long delay entailed in arbitration under the collective bargaining agreement weighs against postponement of an order of disclosure on this basis. Accordingly, this office concludes that the personnel discipline action exemption is not available to the agency.

## **II. Criminal Investigatory Material Exemption**

ORS 192.501(3) conditionally exempts:

Investigatory information compiled for criminal law purposes. The record of an arrest or the report of a crime shall be disclosed unless and only so long as there is a clear need to delay disclosure in the course of a specific investigation, including the need to protect the complaining party or the victim. Nothing in this subsection shall limit any right constitutionally guaranteed, or granted by statute to disclosure or discovery in criminal cases.

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An application of the criminal investigatory material exemption requires an identification and balancing of the various purposes for secrecy and a determination of the stage of the investigation or prosecution. See Jensen v. Schiffman, 24 Or App 11 (1976). This is a conditional privilege designed to protect active police investigations. "Information compiled in investigations connected with pending or contemplated prosecutions ordinarily will remain confidential because disclosure likely would interfere with law enforcement proceedings." Attorney General's Public Records Manual, 1997, page 28.

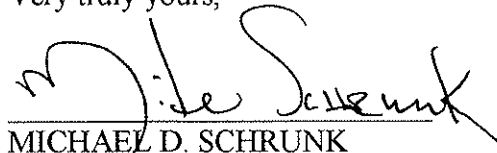
On this date, Metro submitted to this office the record of the internal investigation. Executive Director Burton requested that the District Attorney review the reports for consideration of prosecution.

The materials sought by petitioner will be carefully maintained and protected from public scrutiny for the limited period of time necessary to complete the criminal investigation. We conclude that the public interest in the orderly progress of the investigation outweighs the public interest in disclosure at this time.

ORDER

Accordingly, it is ordered that the petition of Roger Anthony for The Oregonian to disclose certain records of Metro is denied without prejudice to renewal upon completion of the criminal investigation.

Very truly yours,



MICHAEL D. SCHRUNK  
District Attorney  
Multnomah County

Cc: Damon Mabee, Field Representative, Laborer' Local #483  
Cc: Kenneth Lerner, Attorney at Law

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