



**MICHAEL D. SCHRUNK**, District Attorney for Multnomah County

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

April 26, 2000

Patrick Dinan  
12085 SW 135<sup>th</sup> #27  
Tigard, OR 97223

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

Re: Petition of Patrick Dinan received April 17, 2000, to disclose certain records of the City of Portland

Dear Mr. Dinan and Captain Smith:

#### BACKGROUND

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

#### **All reports in IAD files 99-035 and 00-044**

On February 23, 1999, petitioner filed complaints with the Internal Affairs Division (IAD) of police misconduct occurring in May 1998 at the Northeast Precinct and at the Multnomah County Courthouse. The Police Bureau rejected the complaints as unfounded on January 7, 2000. Petitioner made his public records request for the IAD files on March 10, after unsuccessfully seeking the consent of the various officers named in the investigations. Portland Police Bureau IAD Captain Bret Smith replied to petitioner in a March 27 letter, advising petitioner that "as a general rule, non-sustained IAD investigations are no longer public records."<sup>1</sup>

Petitioner first filed his petition with this office on April 10, 2000. At the request of this office, Petitioner resubmitted his petition together with correspondence to and from the Portland Police Bureau. Petitioner set forth in both his April 10 and April 17 petitions the "reasons" for requesting access to the IAD reports:

---

<sup>1</sup> In fact, IAD investigations are public records subject to certain potential exemptions from disclosure.

Some of the misrepresentation in the IAD report appears to have a discrediting affect on my character. Therefore I accrete my due process rights to face my accusers. The public will benefit from getting information exposed and answers to the questionable positions taken without the considering of ORS laws or General Orders guidelines.

On April 20, Captain Smith submitted a letter response to the petitioner's filing with this office. Captain Smith provided for our review the complete files of both IAD investigations (which have been essentially merged) as well as the contents of the Police Internal Investigations Auditing Committee (PIIAC) appeal. The IAD files contain correspondence with petitioner, police reports of the precinct incident, interviews with both police officers and civilians, and the investigative reports of Sergeant Jerrold Jones and Northeast Precinct Commander Derrick Foxworth.

The Police Bureau invokes the new Personnel Investigation of a Public Safety Employee exemption found in the 1999 legislature's Senate Bill 975, on the basis that "cases that are not sustained are now protected and are not to be disclosed, except under certain specific circumstances." Captain Smith rejects petitioner's arguments that there would be a public benefit in disclosure and asserts that petitioner simply has a "personal interest" which does not justify exposure of the discipline records.

#### 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.

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 declass 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.

The *Foster* principles are, to a great extent, relevant to our analysis here. Absent appellate case law setting forth different criteria, a request for personnel records of public safety employees under circumstances where there is no finding of misconduct will be evaluated under the six-point criteria below. Of necessity, the emphasis must shift from the discipline imposed to the nature of the alleged misconduct, the rank of the employee and management's own conduct in the process.

### ***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 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.

An application of the *Foster* criteria and cases such as Portland v. Anderson, weigh heavily against disclosure here. Over a period of eleven months, the Police Bureau investigated petitioner's allegations of false arrest, denial of access to a public area, injuries from handcuffing, and discourtesy. The investigation was thorough and exhaustive. The ultimate decision of Police Bureau management to not sustain any of the allegations was recently upheld by PIIAC, a citizen review committee.

Page 6  
April 26, 2000  
Re: Petition of Patrick Dinan

Upon examination of the IAD files, 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.

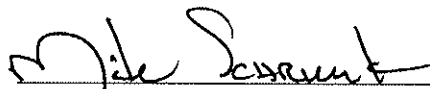
Petitioner has expressed concern about his reputation and the desire to face his accusers. Petitioner must keep in mind that he initiated the misconduct complaints and prompted the investigation. His expressed concern for his good character will be protected by the very response made by IAD Captain Smith to petitioner's public records request. That is, the interviews and reports will continue to be shielded by the public records law and will not become a matter of common knowledge.

This office does not agree with petitioner's contention that the public will benefit from exposure of the contents of the IAD investigation. Petitioner has made certain allegations of misconduct which were, without exception, disproved completely by the civilian and police witnesses. There is nothing to indicate the disciplinary process was other than thorough and fair to both the accused police officers and petitioner. We conclude that there has been no showing of any public interest in the further airing of these complaints.

ORDER

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

Very truly yours,

  
MICHAEL D. SCHRUNK  
District Attorney  
Multnomah County

00-09