



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

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August 17, 2004

Dee Lane  
Portland Editor  
The Oregonian  
1320 SW Broadway  
Portland, OR 97201-3499

Jacqueline A. Weber  
Assistant County Attorney  
Office of Multnomah County Attorney  
501 SE Hawthorne, Suite 500  
Portland, OR 97214

Re: Petition of David Austin for The Oregonian received July 23, 2004, to disclose certain records of the Multnomah County Community Justice

Dear Ms. Lane and Ms. Weber:

#### BACKGROUND

On this public records petition, ORS 192.410 et. seq., petitioner David Austin for The Oregonian requests the District Attorney to order Multnomah County Community Justice and its employees to produce an unredacted copy of the following record:

#### **The case review of Ladon Stephens SID#08038143**

On November 21, 2002, Department of Community Justice Assistant Director Pam Mindt submitted a three-page memorandum on the case review of Ladon Stephens to Director Joanne Fuller. Her report was based on a twenty-two-page confidential draft internal advisory memo. In a series of emails beginning July 15, 2004, petitioner requested the disclosure of the underlying memo. On July 21, Assistant County Attorney Scott Asphaug provided fourteen redacted pages of the memo. Relying on the internal advisory exemption of ORS 192.502(1), he segregated the factual material from the advisory recommendations and the identities of those individuals participating in the confidential review. He also redacted a psychological evaluation of Mr. Stephens purportedly under the requirements of HIPPA.

Petitioner noted that Ladon Stephens “raped and murdered while under the supervision of the county department.” He argued in his petition “the public has an almost unparalleled interest in what the county found upon review and what changes or recommendations if any it is considering as a result of this case.” Petitioner pointed out that there have been large county legal settlements in the case with no worker discipline. The lack of discipline should minimize the claim for confidentiality and the public has no way of judging whether the lack of discipline was appropriate. Petitioner takes the position that there is no basis for withholding the names of individual employees and that HIPPA does not apply to the psychological evaluation.

In response to the petition, Multnomah County Assistant County Attorney Jacqueline Weber submitted a three-page letter together with a significantly less redacted version of the draft case review as well as the complete twenty-two-page document. She claimed the subjective opinions of the author of the report as well as the recommendations were exempt as internal advisory communications under ORS 192.502(1). Ms. Weber argued that disclosing the names of the participants would violate the confidentiality agreement set out in the report and are therefore exempt as confidential submissions under ORS 192.502(4). Ms. Weber identified the psychological evaluation as part of a 1990 presentence report on Ladon Stephens. She correctly points out that under ORS 137.077, a presentence report is not a public record subject to inspection.

The Oregonian, through Managing editor/news Therese Bottomly, submitted a five-page response to the County. The Oregonian withdrew its petition with respect to the psychological evaluation and reiterated its argument regarding the Internal Advisory Exemption. Ms. Bottomly argued that the Confidential Submissions Exemption does not apply to information circulated within a public body; the agreement for confidentiality was not made in good faith; and the County has made no showing of potential harm to the public interest.

## DISCUSSION

### **I. Internal Advisory Communications (page 15-20)**

ORS 192.502(1) exempts:

Communications within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to any final agency determination of policy or action. This exemption shall not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure.

The confidential draft sets forth the “Rules of Engagement for Review:”

1. Try not to interrupt
2. No assignment of blame
3. Confidentiality of content
4. All input valued
5. No rank

The Attorney General's Public Records Manual, 2004, page 56, emphasizes the need for a strong showing of the “chilling effect” that disclosure may have on future communications within an agency to overcome the presumption favoring disclosure. While the rules appear to be intended to generate frank communication, the document itself effectively shields the participants from personal scrutiny. There is no listed author and none of the observations or recommendations on pages fifteen through twenty are attributed to any member of the review team.

More significantly, the content of the advice cannot be characterized as sensational or controversial. In fact, the criticism is muted and the recommendations unremarkable. The staff members listed in the memo are individuals that the public should expect to provide insight into the constructive changes necessary for the Department to better serve the community. The County has not made its case and the redacted materials should be disclosed.

## **II. Confidential Submissions (pages 1-14)**

ORS 192.502 (4) exempts:

Information submitted to a public body in confidence and not otherwise required by law to be submitted, where such information should reasonably be considered confidential, the public body has obliged itself in good faith not to disclose the information, and when the public interest would suffer by the disclosure.

Throughout the first fourteen pages of the draft memo, there are redactions of names, abbreviated position titles, and descriptions of work assignments. The County does not appear to seek protection of any confidential information but, rather, to omit identifying information regarding the participants in the case review and persons involved in the actual supervision of Ladon Stephens.

As stated in the Attorney General's Public Records and Meetings Manual, 2004, p. 68, there are “no less than five conditions that must be met” for the Confidential Submissions exemption to apply:

1. The informant must have submitted the information on the condition that the information would be kept confidential.
2. The informant must not have been required by law to provide the information.
3. The information itself must be of a nature that reasonably should be kept confidential.
4. The public body must show that it has obligated itself in *good faith* not to disclose the information.
5. Disclosure of the information must cause harm to the public interest.

The County contends that disclosing the names of the participants “would be a violation of the assurance of confidentiality, and would clearly chill the willingness of employees to participate in future internal reviews.” According to Ms. Weber, the Community Justice employees involved in the case review were informed, “their participation and their frank and open discussion of the case with the investigator was to remain confidential.” Ms. Weber argues that the public interest would suffer from release of the names of the participants, “as the promise of confidentiality allowed the agency to critically assess the conduct of the case, thereby providing information important to the improvement of the system of sex offender supervision.”

There is little evidence to support application of the exemption. We will accept that the County obligated itself in good faith not to disclose the employees names and that the informants were not required by law to provide the information. However, there has been no independent evidence presented that the participants would not have submitted the information in any case or that the information itself is of a nature that reasonably should be kept confidential.


Most importantly, it has not been established that disclosure of the names and other identifying information would cause harm to the public interest. The first fourteen pages are factual in nature and simply provide an identification of those Community Justice employees involved in Stephen’s supervision, background information on the parolee, DCJ policies, and an extensive supervision timeline of Stephens. Full disclosure best serves the public interest.

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ORDER

Accordingly, it is ordered that Multnomah County Community Justice promptly disclose the records sought in the above petition subject to redaction of the psychological evaluation of Ladon Stephens on pages four and five of the twenty-two-page Confidential Draft. Disclosure of the document ordered is subject to payment of the County's fee, if any, not exceeding the actual cost in making the information available, consistent with ORS 192.440.

Very truly yours,



MICHAEL D. SCHRUNK  
District Attorney  
Multnomah County, Oregon

04-06

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 7 days formal notice of your intent to initiate court action to contest this order, or fail to file such a court action within 7 additional days thereafter.