



MICHAEL D. SCHRUNK, District Attorney for Multnomah County

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July 8, 2004

Scott Upham
Attorney at Law
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Portland, OR 97229

Mary T. Danford
Senior Deputy City Attorney
City of Portland
Office of the City Attorney
City Hall, Suite 430
1221 SW 4th Avenue
Portland, OR 97204

Re: Petition of Scott Upham received June 25, 2004 to disclose certain records of
the City of Portland

Dear Ms. Danford and Mr. Upham:

BACKGROUND

On this public records petition, ORS 192.410 et. seq., petitioner Scott Upham requests the District Attorney to order the City of Portland to provide the following records:

**[A]ll of the public records... that have been created or received
by the City of Portland in connection with this [Rusia v. Thant
and Marks and Thant and Marks v. City of Portland]
dismissed civil litigation that are not exempt from disclosure.**

Senior Deputy City Attorney Mary T. Danford represents the City in the civil litigation. She asserted in a June 17 letter that the records in her files were exempt as litigation records, ORS 192.501. She noted that one of the civil lawyers representing Thant and Marks, Nick Dazer, advised her on June 11 that litigation was not, in fact, concluded. Ms. Danford advised petitioner that documents were produced in the civil suit under a protective order and continued to be subject to the litigation exemption. Ms. Danford also asserted that even when the litigation exemption is no longer applicable, the documents "are not public records and will be protected from disclosure."

On June 30, we met with Ms. Danford at the City Attorney's Office and reviewed the litigation correspondence and provisions of Judge Ellen Rosenblum's protective order in the civil case and discussed the nature of the documents contained in her litigation files. In a subsequent written response to the petition, Ms. Danford has identified eight categories of records maintained in her litigation files. The City continues to assert the litigation exemption with respect to most of the records and has asserted the additional exemptions of Personnel Discipline Actions, Attorney-Client privilege, Criminal Investigatory Material, and Personal Privacy. Certain documents are, in the opinion of Ms. Danford, not public records subject to disclosure.

DISCUSSION

The Exemptions

1. Litigation

ORS 192.501(1) exempts:

Records of a public body pertaining to litigation to which the public body is a party if the complaint has been filed, or if the complaint has not been filed, if the public body shows that such litigation is reasonably likely to occur. This exemption does not apply to litigation which has been concluded, and nothing in this subsection shall limit any right or opportunity granted by discovery or deposition statutes to a party to litigation or potential litigation[.]

According to the Attorney General's Public Records Manual, 2001, p. 27, the purpose of this exemption is to "place governmental bodies on an even footing with private parties before and during *court* litigation." The exemption has been construed very narrowly and applies only to records developed or compiled by the public body for use in the litigation and not records collected in the ordinary course of business. Lane County School Dist. v. Parks, 55 Or App 416, 419-20 (1981).

2. Attorney-Client Privilege

ORS 192.502(9) incorporates the lawyer-client privilege of ORS 40.225 (OEC 503(1)(b)) into an unconditional exemption under the Public Records Law. OEC 503(1)(b) provides:

"Confidential communication" means a communication not intended to be disclosed to third persons other than to those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

3. Personnel Discipline

ORS 192.501(12) conditionally exempts "A personnel discipline action, or materials or documents supporting that action[.]" The exemption applies when discipline has been imposed.

4. Criminal Investigatory Material

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.

5. Personal Privacy

ORS 192.502(2) conditionally exempts:

Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if the public disclosure thereof would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance. The party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy.

The Documents

1. Phone records

Ms. Danford asserts correctly that the home telephone records of the five named police officers are not public records. See ORS 192.410(10). Only one of the officers, Sergeant

Braskett, has a Bureau issued cell phone. These records are exempt as litigation records sealed under the protective order of Judge Rosenblum.

2. Officer's notebook entries

Although part of the litigation records held by the City Attorney's Office, the relevant notebook entries of the five named officers were ordered by Judge Rosenblum to be produced and have been provided to civil counsel. Although the particular copies of the records in Ms. Danford's litigation file are covered by the litigation exemption, the notebook entries should be made available to petitioner through the Police Bureau.

3. Training records

Again, the litigation exemption protects the particular copies of the training records contained in Ms. Danford's file. However, these Bureau records should be disclosed to petitioner.

4. Complaints that result in discipline to the officers

Judge Rosenblum ordered the production of sustained disciplinary complaints of the five officers under strict limitations of disclosure. These materials are exempt under ORS 192.501(3) as records of personnel discipline.

5. Radio logs

The BOEC information in Ms. Danford's file is not subject to the litigation exemption. (We note that the records were available to petitioner through a court order in the criminal case). The material consists of 718 pages of Computer Aided Dispatch (CAD) records identified by Ms. Danford in her response as Mobile Data Terminal (MDT) records. Disclosure is subject to redaction under the criminal investigatory and personal privacy exemptions. In addition, the records contain items from outside agencies such as LEDS and DMV.

BOEC is the actual custodian of the records but, by working agreement, there is coordination for any public records disclosure with the Portland Police Bureau. It is appropriate for the Police Bureau to review and disclose the records, subject to the various redactions.

6. Autopsy Photos

These documents are exempt both as litigation materials and as information of a personal nature. (Again, these materials were available to petitioner as part of criminal discovery).

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7. Police reports received from Thant and Marks

These materials were received from the civil litigants and are clearly exempt as litigation documents. (Again, petitioner should have received all relevant police reports maintained by the Portland Police Bureau through discovery in the criminal case).


8. Other documents in City Attorney's litigation file

Various other documents in Ms. Danford's file such as correspondence, pleadings, and notes of investigation and work product in the civil case are protected under the litigation exemption as well as the attorney-client privilege.

ORDER

Accordingly, it is ordered that the City of Portland promptly disclose the records sought in the above petition as follows: the officer's notebook entries, the training records, and the redacted radio logs. The petition is denied as to the balance of the documents maintained by the City in its litigation files. Disclosure of the documents ordered is subject to payment of the City of Portland's fee, if any, not exceeding the actual cost in making the information available, consistent with ORS 192.440 and this order.¹

Very truly yours,


MICHAEL D. SCHRUNK
District Attorney
Multnomah County, Oregon

Cc: Debra Haugen, PPB Records
Cc: Patrick Jones, BOEC

¹ The records should be made available through Debra Haugen, Manager of the Records Division of the Portland Police Bureau.

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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 court action within 7 additional days thereafter.