



MICHAEL D. SCHRUNK, District Attorney for Multnomah County
600 County Courthouse • Portland, Oregon 97204 • (503) 248-3162 • FAX (503) 248-3643

February 21, 1997

Lars Larson
KPTV News 12
P. O. Box 3401
Portland, OR 97208

Frank Hudson, Esq.
Deputy City Attorney
City Hall
1220 SW Fifth Avenue, Room 315
Portland, OR 97204

Re: Public records petition of Lars Larson for KPTV News 12 dated November 18, 1996 (renewed December 30, 1996 second renewal February 4, 1997) to disclose certain records of the Portland Police Bureau

Dear Mr. Larson and Counselor Hudson:

1. The petition and exemption claims.

On this public records petition, ORS 192.410 et seq., petitioner Lars Larson for KPTV Channel 12 requests the District Attorney to order the Portland Police Bureau to disclose "...reports and other documents related to the Commander Mike Garvey investigation." This office previously twice denied the petition with leave to renew, denied December 4, 1996 and January 15, 1997, and petitioner has each time renewed the petition. Mike Garvey was the Commander of the Central Precinct of the Portland Police Bureau until placed on administrative suspension in June of 1996. There has been substantial news media publicity regarding various aspects of the ensuing investigation of Mr. Garvey's conduct. A Multnomah County grand jury reviewed evidence regarding possible criminal prostitution activity involving Mr. Garvey, but concluded on or about August 30, 1996 that no criminal charge should be issued on the evidence it reviewed. The Portland Police Bureau then pursued an internal affairs investigation to determine whether or not the former commander had violated any rules or policies of the police bureau, and if so, whether and what sanctions should be imposed. That internal affairs investigation has continued and is still unresolved at this date.

The city has claimed that the records and reports compiled in the course of the criminal investigation and internal affairs investigation are exempt from disclosure as discipline action materials, ORS 192.501(12), or materials pertaining to litigation, ORS 192.501(1). The city did receive a tort claim notice letter dated November 22, 1996 from attorneys Steven A. Houze and Elden M. Rosenthal, representing Mr. Garvey. We will discuss these two exemption claims in turn.

2. Discipline action materials exemption, ORS 192.501(12).

The discipline action materials exemption does not apply if the disciplinary investigation has been concluded and no discipline actually has been imposed, City of Portland v. Rice, 308 Or 118, 775 P2d 1371 (1989). Although the appellate court decisions have not specifically ruled upon the application of this exemption to an incomplete disciplinary investigation, the Attorney General advises, and this office agrees, that the exemption is implicitly applicable to an active but incomplete disciplinary investigation. See, Attorney General's Public Records and Meetings Manual (1995), at 32.

Nevertheless, even when the exemption clearly applies to the type of records in question it is only a "conditional" exemption which must yield if "...the public interest requires disclosure in the particular instance...." ORS 192.501. Because of the high rank of former commander Garvey and the significant public interest which exists in monitoring the conduct of police business at that level of the public service, this office recognizes that there is a strong public interest in the disclosure of documents relating to this matter. However, this office also is aware that distinct issues regarding possible disciplinary violations have been pursued by the police bureau's investigators following the grand jury action of August 30, 1996. It is certainly in the public interest that these additional disciplinary issues should be fully pursued to a final decision before this office orders disclosure of materials related to investigatory actions which followed the grand jury action.

The purpose of this office's previous two denials of disclosure, with leave to renew, was to allow time for the Police Bureau to complete its internal affairs investigation and to make final findings respecting possible disciplinary violations and sanction, if any. We believe that the Bureau in fact has been progressing towards final disposition of the other disciplinary issues, but that process still is incomplete.

Recognizing, therefore, the somewhat unusual nature of this lengthy investigation we have determined that partial disclosure is immediately required in the public interest, namely, disclosure of all records relating to the criminal investigation up to the point of grand jury action on August 30, 1996. Disclosure of those reports will be ordered forthwith. On the other hand, the internal affairs investigation is still continuing and we have determined that disclosure of records generated since the grand jury action of August 30, 1996 need not be presently disclosed in the public interest; but petitioner should have leave to renew his petition regarding those later-generated materials when the disciplinary investigation has been concluded.

Independently of the discipline action materials exemption just considered, some additional documents are exempt from disclosure under another exemption (as discussed in Part 3 following).

Letter to Lars Larson and Frank Hudson, Esq.

3. The litigation materials exemption, ORS 192.501(1), and the attorney-client privilege, ORS 192.502(8), ORS 40.225(OEC Rule 503).

As already noted, Mr. Garvey's attorneys issued a tort claim notice letter to the city in November, 1996. This certainly establishes that the city reasonably believes that litigation is likely to occur. However, the appellate court decisions, as reflected in the Attorney General's Manual, have very narrowly construed this "litigation materials exemption," ORS 192.501(1).

"The Court of Appeals has construed this exemption very narrowly, in order 'to further the statutory policy that government records are open to the public.' The court held that the litigation exemption applies only to records 'compiled or acquired by the public body for use in on-going litigation or ***litigation [that] is reasonably likely to occur.' In the court's view, the exemption 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 even if those records subsequently become relevant to litigation." (Emphasis added) Citing, Lane County School District v. Parks, 55 Or App 416, 419-20, 637 P2d 1383 (1981). Attorney General's Public Records and Meetings Manual (1995), at 21-22.

Thus, as this office has previously understood and applied the litigation materials exemption, only the kind of materials which would be protected by the attorney-client privilege, such as confidential communications between the city's attorneys and its responsible officers and agents, or very closely related material specifically prepared for the purpose of litigation, is covered by the exemption. Generally speaking, all of the investigatory police reports and the internal affairs investigation interviews or reports generated in the Garvey investigation would not be subject to the litigation materials exemption, since those reports would merely have been generated in the ordinary course of criminal investigation business, or internal discipline investigation business. That these documents now have proven to be relevant to potential litigation is not a sufficient basis to justify the litigation materials exemption, as we understand the appellate court decisions.

Therefore, disclosure will be denied respecting only such attorney-client documents as the Office of the City Attorney identifies as such to this office. If this office should disagree with the city attorney's classification of any document as a confidential attorney-client communication or equivalent attorney work-product document a separate disclosure order will be issued on that subject.

ORDER

Accordingly, it is ordered that the petition of Lars Larson for KPTV Channel 12 is granted in part: the city shall promptly disclose all records and reports generated in the criminal investigation phase of its investigation relating to former Commander Mike Garvey, up to and including the date of grand jury action, August 30, 1996;

Page 4

Letter to Lars Larson and Frank Hudson, Esq.

disclosure of internal affairs investigation materials generated subsequent to the grand jury action is denied, with leave to petitioner to renew his petition after the disciplinary inquiry has concluded; disclosure of litigation materials constituting confidential attorney-client communications or equivalent attorney work-product documents is denied; and disclosure of the documents ordered disclosed is subject to payment of the city's fee, if any, not exceeding its actual cost in making the information available, consistent with ORS 192.440.

Very truly yours,

/s/

MICHAEL D. SCHRUNK
District Attorney
Multnomah County, Oregon

MDS:kg

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's 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.

96-32