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February 4, 2004

Robin Franzen
Reporter The Oregonian
1320 SW Broadway
Portland, OR 97201-3499

Debra R. Haugen
Manager Records Division
City of Portland
Bureau of Police
1111 SW 2nd Avenue
Portland, OR 97204

Re: Petition of Robin Franzen for The Oregonian received January 16, 2004, to disclose certain records of the City of Portland

Dear Ms. Franzen and Ms. Haugen:

BACKGROUND

On this public records petition, ORS 192.410 et. seq., petitioner Robin Franzen for The Oregonian requests the District Attorney to order the City of Portland and its employees to produce copies of the following records:

Portland Police Bureau case No. 03-10136.

Petitioner made her request for the above information in correspondence dated January 6, 2004 to Records Manager Haugen. On that date, a Mark Edward Stevens was sentenced in Multnomah County Circuit Court on charges associated with the requested police report. Ms. Haugen replied by letter on January 7 and noted that the report was an investigation into an accusation of rape. The City claimed the report as exempt under ORS 192.502(2), Personal Privacy. Ms. Haugen asserted, "[d]isclosing the information included in this report would constitute an unreasonable invasion of privacy of the victim. It is impossible to protect the victim's privacy by redacting her identity, as it is known that she is the wife of the accused." Ms. Haugen also noted that petitioner made no argument that "release of this highly personal and embarrassing information is in the public interest."

Petitioner submitted this petition and argued that The Oregonian has "a right to view the police reports to learn exactly what Stevens was accused of doing." Ms. Franzen pointed out that it was "not the policy of the newspaper to publish the name of rape victims." Petitioner indicated that she had read the indictment, "which suggests release of the police reports may well be in the public interest in that the rape involved that appears to be the repeated drugging of someone's spouse over a four-year period."

In a January 20 response to the petition, Ms. Haugen reported that [w]ithin the body of the police report the victim talks about how embarrassed she is to be telling police about what transpired. It is clear to us that it would be traumatic to the victim, and an unreasonable invasion of her privacy to release the report to The Oregonian." Ms. Haugen concluded by asserting, "[r]evealing the extensive details of the acts serve no purpose, other than to further embarrass the victim."

Petitioner submitted a five-page argument on January 27. She contends that The Oregonian has a federal and state constitutional right of access to the report. Next, petitioner submits that ORS 192.501(3), Criminal Investigatory Material, is the only available exemption, but is inapplicable. Finally, Ms. Franzen takes the position that release of the report would not be an "unreasonable" invasion of privacy and that the "public interest in effective administration of the criminal justice system requires that the records be released."

DISCUSSION

I. Constitutional Right to Access

Petitioner maintains that the "police incident report was part of the official court file in front of the judge who decided whether to accept a guilty plea and subsequently convict a defendant." As such, "the document is part of the judicial record and should be released." Petitioner cites the First Amendment right under the United States Constitution and the Article I, Section 8 provision of the Oregon Constitution to gather the news as well as the Oregon Constitutional provision of Article 1, Section 10 that justice will be openly administered without secrecy in court proceedings. We respectfully disagree with petitioner.

Petitioner cites two Oregon Supreme Court decisions to support her argument. State ex rel Oregonian Pub. Com. v. Deiz, 289 Or 277 (1980 and Oregonian Pub. Co. v. O'Leary, 303 Or 297 (1987). In Deiz, the court upheld the right of a reporter (and the public) to attend juvenile court hearings involving a 13-year old girl involved in the drowning of a child. In O'Leary, the court upheld the right of a reporter and other members of the public to attend a summary hearing out of the presence of the jury in a highly publicized murder trial." The court found insufficient the action of the trial judge in making a hearing transcript publicly available at some time after the hearing.

In a concurring opinion by Justice Hans Linde, 289 Or at 287, the limitations on the Constitutional right to freedom of expression were noted:

> It assures reporters and editors, along with any other observer or interested citizen, the freedom to discuss what they know, or think they know, or surmise, or advocate, without fear of sanctions beyond civil damages for private harm. [citation omitted]. But this unrestrained freedom to speak, write, print, and express opinions 'on any subject whatever' is not itself an 'Open, Sesame" to public offices or records, or other information. It does not give journalists a constitutional claim to the information which it gives them the freedom to publish. That they are left to get for themselves.

In O'Leary, 303 Or at 303, the court pointed out that Article I, Section 10 "does not require that police investigations of crime although a part of the administration of justice, be open to public scrutiny." The court cited State ex rel KOIN-TV v. Olsen, 300 Or 392, 410 (1985), which held that a television station was not entitled under Article 1, Section 8 or 10 to copy a videotaped deposition played in open court. "Apparently KOIN and Fisher believe that it is self evident that the constitutional text [of section 8] applies to copying an exhibit. To us it is not self evident. We have not been given any reasoning to support the claim that the constitutional text grants the right to copy." The court in Olsen, 303 Or at 411 went on to reject the federal constitutional arguments as well. "In Nixon v. Warner Communications, Inc. supra, the court specifically held that neither the First Amendment guarantee of freedom of the press nor the Sixth Amendment guarantee of a public trial required release and copying of the tapes."

If the police reports have been submitted to the court and retained as a public record in the criminal proceedings, petitioner can seek those documents from the Multnomah County trial court administrator. A denial of the right to inspect the report under the Public Records Law would be a matter for subsequent review by the State Attorney General.

II. Personal Privacy Exemption

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 purpose of this exemption is not to prevent disclosure of personal information, as such, but rather to protect privacy from unreasonable invasion." Jordan v. MVD, 308 Or 433, 441 (1989). Only personal information that would constitute an unreasonable invasion of privacy if publicly disclosed is protected under this exemption. In Jordan, 308 Or at 442, the court noted that the trial court found that the affidavit filed in the trial court

> ...sufficiently established that disclosure to the requester would more likely than not unreasonably invade her privacy because providing the information would allow Jordan to harry her incessantly to the extent than an ordinary reasonable person would deem highly offensive.

"[T]he information is not exempt absent an individualized justification for exemption." Attorney General's Public Records Manual, 2001, p. 58. This determination must be made on a case-by-case basis. A blanket policy of nondisclosure is not enforceable. Guard Publishing v. Lane County School Dist, 310 Or 32, 38-40 (1990).

We have reviewed the documents in question. They consist of three reports totaling sixteen pages and an eight-page transcription of a telephone conversation between the victim and the suspect. Each report contains either personal identification of the victim or explicit references to the unlawful sexual conduct engaged in by the suspect. Two of the reports include graphic police descriptions of incidents captured on videotape by the suspect as the victim was sleeping.

Petitioner is correct that a person who enters into a public prosecution or investigation of a crime "is asking the public to act on his or her behalf." Petitioner is also correct that the "fact that embarrassment may result does not automatically mean an unreasonable invasion of privacy has occurred." Much of the documents contain the normal investigative information found in police reports of criminal activity. The personal privacy exemption simply does not apply to these passages and must be disclosed to petitioner.

Certain information, however, is extremely personal to this rape victim. It would clearly be an unreasonable invasion of her privacy to disclose such information. The Oregonian has not satisfied its burden of showing that "public disclosure would not constitute an unreasonable invasion of privacy." ORS 192.502(2).

The remaining question is whether The Oregonian has established "the public interest by clear and convincing evidence requires disclosure in the particular instance." Petitioner argues that the "public also has a compelling interest in knowing how horrific the criminal acts were." We respectfully disagree. Petitioner has presented no circumstances indicating that the indictment, plea, and sentencing were inconsistent with the nature of the criminal acts or that potential victims need to know the graphic details of the sexual assaults.

III. Criminal Investigatory 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.

This exemption is usually invoked to exempt information compiled in investigations connected with pending or contemplated prosecutions. However, "[u]nlike the litigation exemption in ORS 192.501(1), the criminal investigative exemption does *not* expire when litigation is completed or abandoned." Attorney General's Public Records Manual, 2001, p. 31. Although the governmental interest in maintaining such records will be diminished, the Court of Appeals decision in Jensen v. Schiffman, 24 Or App 11, 16 (1976), set out five general categories of continuing exemption:

> Information compiled in investigations not connected with pending or contemplated prosecution will remain secret only if the public body establishes that disclosure would:
>
> deprive a person of a right to a fair trial;
>
> constitute an unwarranted invasion of privacy;
>
> disclose the identity of a confidential source or confidential information furnished by the confidential source;
>
> disclose investigative techniques and procedures; or
>
> endanger the life or physical safety of law enforcement personnel.

The analysis under this exemption is no different than under the personal privacy exemption above. The disclosure of those parts of the reports that provide the intimate details of nonconsensual sex between the victim and the suspect would, without a doubt, "constitute an unwarranted invasion of privacy."

IV. Redaction

The usual practice of the Records Division would be to redact the name and identification references and disclose the balance of the report. That is not an available option here because the victim is the wife of the suspect, and is known to the public because of the criminal prosecution. The only available resolution to carry out the dictates of the exemption is to redact the personal identification together with the highly offensive sections of the report.

ORDER

Accordingly, it is ordered that the City of Portland Bureau of Police promptly disclose the records sought in the above petition subject to redaction of certain personal information highlighted in yellow in the report attached to the City's copy of this order. 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.

Very truly yours,

MICHAEL D. SCHRUNK
District Attorney
Multnomah County, Oregon

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.