



MICHAEL D. SCHRUNK, District Attorney for Multnomah County

600 County Courthouse • Portland, Oregon 97204-1193 • (503) 248-3162

May 14, 1999

Debra Haugen
Police Records Manager
Portland Police Bureau
1111 SW Second Avenue
Portland, OR 97204

Steve Duin
Metro Columnist,
The Oregonian
1320 SW Broadway
Portland, OR 97201-3499

Re: Petition of Steve Duin, for The Oregonian,
dated May 4, 1999, to disclose certain records
of the Portland Police Bureau

Dear Ms. Haugen and Mr. Duin:

BACKGROUND

On this public records petition, ORS 192.410 et. seq., petitioner Steve Duin, for The Oregonian, requests the District Attorney to order the Portland Police Bureau and its employees to produce a copy of the following records:

**The "Black book(s)" seized in conjunction with
the Hipps/Wylie/Peters investigation.**

Debra Haugen, Records Division Manager of the Portland Police Bureau, denied the petitioner's request and cited the personal privacy exemption of ORS 192.502 (2) which 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

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disclosure would not constitute an unreasonable invasion of privacy [.] (Letter response dated April 23, 1999).

Ms. Haugen denied the petitioner's request on the separate ground of the Criminal Investigatory Material exemption of ORS 192.501 (3) which exempts "[i]nvestigatory information compiled for criminal law purposes."

The position of the Portland Police Bureau was more fully detailed in a letter to this office on May 10, 1999. Ms. Haugen again cited the two exemptions and further contended that the seized documents were not public records subject to the Public Records Law. (See attached letter dated May 10, 1999).

DISCUSSION

On May 23, 1997, officers of the Portland Police Bureau Drug and Vice Division arrested Michael F. Hipps and executed a search warrant at his residence at 2320 SW Cactus Drive #5, Portland, Oregon. The officers seized numerous items including two address books. On November 12, 1997, Mr. Hipps stipulated to the civil forfeiture of certain items related to the distribution of controlled substances including the two address books. Mr. Hipps plead guilty to Conspiracy to Deliver and Possess the controlled substance cocaine and was sentenced on August 17, 1998.

1. Public Record

The first question to be addressed is whether items seized pursuant to a search warrant and forfeited to the City of Portland are public records as defined in ORS 192.410 (4):

"Public record" includes any writing containing information relating to the conduct of the public's business, including but not limited to court records, mortgages, and deed records, prepared, owned, used or retained by a public body regardless of physical form or characteristics.

The term "writing" is defined by ORS 192.410 (6) to include:

Handwriting, typewriting, printing, photographing and every means of recording, including letters, words, pictures, sounds, or symbols, or combination thereof, and all

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papers, maps, files, facsimiles or electronic recordings.

The Police Bureau points out that the address books were taken as evidence in the course of a criminal investigation and continue to be stored in the Property Evidence Unit. Ms. Haugen argues that although a continuing source of information to investigators, the books are not information "relating to the conduct of the public's business." The Police Bureau maintains that the retention is temporary and that the books will be returned or destroyed at some unstated point in time.

The Attorney General's Public Records Manual, 1997, page 6, provides some guidance in evaluating the Police Bureau's position:

Records need not have been prepared originally by the public agency to qualify as public records. If records prepared outside government contain "information relating to the conduct of the public's business," and are "owned, used or retained by the public body, the records are within the scope of the Public Records Law....

However, a document prepared by a private entity does not become a public record merely because a public official reviews the document in the course of official business so long as the official neither uses nor retains the document.

The two address books were seized as evidence in a criminal investigation almost two years ago. Michael Hipps has been convicted and sentenced and his seized property has been forfeited to the City of ~~Portland~~. The Portland Police Bureau has continued to retain and use what is now its own property in the conduct of the public's business: drug enforcement. The only reasonable conclusion is that the address books are now public records.

2. Personal Privacy Exemption ORS 192.502 (2)

Two questions must be answered as a threshold matter when considering a privacy claim under the Public Records Law:

- 1) whether the information is of a personal nature, and
- 2) whether disclosure unreasonably invades privacy.

Jordan v. Motor Vehicles Division, 308 Or 433, 781 P2d 1203 (1989).

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Of course, the public records law is predominately a disclosure statute not a privacy statute. Consequently, public bodies for the most part are not obligated to claim exemptions from disclosure under this law, although they may do so. Even when the statutory exemption claim is left to the discretion of the public agency, a cautious exercise of the discretion may be needful.

Jordan v. MVD, supra, goes on to note that a public interest may require disclosure in the particular instance. The exemption applies and may only be erased in favor of disclosure if either:

- 1) clear and convincing evidence of the public interest in disclosure of the record is produced, or
- 2) if the showing of unreasonable invasion is overcome.

The two address books in question should more properly be identified as name (or nickname) and telephone number books. We have been advised that the names and numbers include the innocent friends, relatives, and tradesmen of Michael Hipps as well as individuals associated with Mr. Hipps' drug activities. Some of the numbers are nonpublished.

We have had conversations with Portland Police Officer John Cordell, lead investigator in the Hipps and related criminal investigations and prosecutions. We have also been contacted by Whitney Boise, counsel for Mr. Hipps. Apparently, several individuals and/or their attorneys have expressed concern that their names and telephone numbers would be disclosed to the public.

There is no question that the information in the address books constitutes information of a personal nature and that the disclosure of such innocent person's names and telephone numbers would be an invasion of privacy. However, the Police Bureau has made no showing that the disclosure of any particular name and address would be an unreasonable invasion of that person's privacy.

The Police Bureau (and Mr. Hipps) are urged to contact the individuals listed in the address books and seek affidavits outlining the reasons why "disclosure to the requester would more likely than not unreasonably invade" their privacy. See Jordan v. MVD, supra, 308 Or at 442. The Police Bureau would then be in a position to respond to a renewed request for disclosure by seeking redaction of particular names and addresses as exempt from disclosure under ORS 192.502 (2).

3. Criminal Investigatory Exemption ORS 192.501 (3)

An application of the criminal investigatory material exemption requires an identification and balancing of the various

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purposes for secrecy and a determination of the stage of the investigation or prosecution. See Jensen v. Schiffman, 24 Or App 11 (1976). This is a conditional privilege designed to protect active police investigations. "Information compiled in investigations connected with pending or contemplated prosecutions ordinarily will remain confidential because disclosure likely would interfere with law enforcement proceedings." Attorney General's Public Records Manual, 1997, page 28.

In evaluating this public records petition, we contacted Assistant United State Attorney Claire Fay, assigned to the federal prosecution of David Tarlow. Ms. Fay advises that the case is scheduled for sentencing on October 12, 1999. The address books seized from the residence of Michael F. Hipps are part of the investigation of Mr. Tarlow conducted by Internal Revenue Service criminal investigator Michael Maney. Ms. Fay indicates that until sentencing the criminal investigation is continuing and that it would be inappropriate to release the address books until the prosecution of Mr. Tarlow is completed.

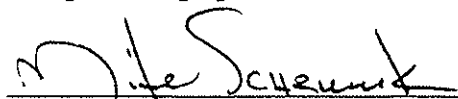
Portland Police Officer Cordell indicates that names in the address books are still being reviewed and that the criminal investigation is not yet complete. We would urge the Portland Police Bureau to complete its work in the next few months.

We agree with the reasoned judgment of the public officials in charge of the pending criminal investigations as well as the custodian of the records in question. The public interest in the orderly progress of the Tarlow prosecution and completion of the Hipps-related investigations outweighs the public interest in disclosure at this time.

ORDER

Accordingly, it is ordered that the petition of Steve Duin, for The Oregonian, to disclose certain records of the Portland Police Bureau is denied without prejudice to renewal after October 12, 1999.

Very truly yours,



MICHAEL D. SCHRUNK
District Attorney
Multnomah County

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99-05

cc: Maureen O'Hagan, Reporter, Willamette Week
cc: Whitney Boise, attorney for Michael F. Hips



CITY OF
PORTLAND, OREGON
BUREAU OF POLICE

VERA KATZ, MAYOR
Charles A. Moose, Chief of Police
1111 S.W. 2nd Avenue
Portland, Oregon 97204

May 10, 1999

John K. Hoover
Deputy District Attorney
600 County Courthouse
Portland, OR 97204

Dear Mr. Hoover:

Re: Petition of Steve Duin, May 4, 1999 to disclose certain records held by the Portland Police Bureau.

In order to respond to this appeal I have spoken extensively with Portland Police Bureau Drugs and Vice Division Lieutenants Larry Kochever and Ed Herbert, and with former Drugs and Vice investigator John Cordell. All strongly maintain that the so called "black books" from the Peters/Hipps/Wylie case should not be released.

First, we do not believe these books to be public records and subject to disclosure. They were taken as evidence in the course of a criminal investigation and continue to be stored in the Property Evidence Unit with other items related to the original investigations, and certain subsequent investigations. While they have been a continuing source of information for investigators in a number of instances, they are not information "relating to the conduct of the public's business", as is specified in ORS 192.420. Also, while they are currently being "retained" by the Portland Police Bureau, it is a temporary retention and they will at some point be subject to return or destruction as is appropriate under property/evidence procedures. Although the books have been in the Police Bureau's possession for some time, at least one subject related to the original investigation, David Tarlow, has yet to be sentenced, making it not at all out of the ordinary that they are still in police custody.

In the event the District Attorney does not agree with our assertion that the books are not a public record, we would further argue that they then should not be disclosed based on several exemptions. While most of the names listed in the books are persons of interest to investigators regarding the sale and use of illegal drugs, some are merely the relatives or acquaintances of suspects. For instance, the home address and telephone number of Michael Hipps' mother is listed. ORS 192.502(2), the Personal Privacy Exemption clearly applies in her case. Disclosing the personal address and telephone number of the close relatives of subjects arrested and prosecuted in the course of a major, well publicized drug investigation would undoubtedly be offensive to them or

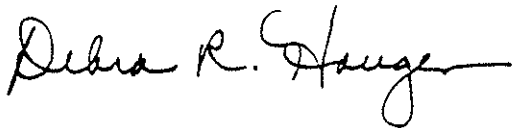
any other "reasonable person", and would constitute an unreasonable invasion of their privacy. It should also be noted that in the case of personal privacy matters, such as an address and telephone number, it is the party seeking disclosure who has the burden of proof in showing that public disclosure would not constitute an unreasonable invasion of privacy. I have not seen where Mr. Duin has even attempted to do so.

Other persons listed in the books have cooperated with law enforcement in the original and subsequent investigations. Disclosure of their names could have a seriously detrimental impact on both their personal safety and privacy. In addition, some would fall under the protection of ORS 192.502(4) Confidential Information Submitted by Citizens. Sgt. Cordell advises that several persons listed in books provided information regarding drug related activities. When they provided information those persons believed that their identities would be kept confidential by the Police Bureau. While most of the persons listed in the books know they are listed, they do not necessarily know who else is. Persons outside of law enforcement who are aware from the trials, news reports and other sources that police have certain pieces of information, and who suddenly learn the names of persons in the books might be able to (correctly or incorrectly) determine who supplied certain items of information to police. This could potentially place them in peril and would certainly have a "chilling effect" on they or others providing any future information to investigators.

The most far reaching and important exemption applicable to the books is ORS 192.501(3) Criminal Investigatory Material. As mentioned above, Mr. Tarlow's case is not yet disposed. In discussing the case with Sgt. Cordell, I asked if there were subject's names that could be separated out and released because they were not related to any investigations. He explained that it was really not possible to eliminate any of the persons of interest as not being suspects, potential witnesses, or informants because the people in the books are in most cases associates of one another and are entangled in each other's activities. In trying to describe to me how deeply intermixed the relationships are, Sgt. Cordell tried to illustrate his point by asking me, "how deep is the ocean?". His point was that officers have found more connections between names in the books each time they uncover a new layer of information, or some person provides another piece of information. One name invariably leads to another, and it's very unclear how deep it might go. They are also very concerned that if the names in the books are revealed the people who have been cooperative will be afraid to continue once others know they are listed and potential informants.

If you ave any further questions, please feel free to contact me at 823-0056. (However, please note I will be on vacation and unavailable as of May 13, 1999.) You may also want to talk to Sgt. Cordell regarding the books. Although he is no longer assigned to Drugs and Vice, he has continued to be involved in matters related to this investigation.

Sincerely,

A handwritten signature in black ink that reads "Debra R. Haugen". The signature is written in a cursive style with a long horizontal flourish extending to the right.

DEBRA R. HAUGEN
Manager
Records Division

DRH/drh

c: Mary Danford/Deputy City Attorney