



ROD UNDERHILL, District Attorney for Multnomah County

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January 17, 2013

Maxine Bernstein
The Oregonian
1320 S.W. Broadway
Portland, OR 97201-3499

Catherine Riffe
Chief Deputy City Attorney
City Hall, Suite 430
1221 S.W. 4th Avenue
Portland, OR 97204

Re: Petition of Maxine Bernstein for *The Oregonian* received January 10, 2013, to disclose copy or copies of the contents of the disciplinary or demotion letter to now-Lt. Todd Wyatt.

Dear Ms. Bernstein and Ms. Riffe:

BACKGROUND

On January 10, 2013 Ms. Bernstein requested the District Attorney of Multnomah County to order the Portland Police Bureau and its employees or agents to produce a copy or copies of the contents of the disciplinary or demotion letter to now-Lt. Todd Wyatt.

She requested to inspect those records by email on January 4, 2013, and the request was denied by the following person:

Ryan C. Rees
Senior Police Administrative Support Specialist
Portland Police Bureau
Records Division

In its denial, the police bureau asserted: "As far as the 'demotion letter,' unfortunately any record regarding personnel discipline action or materials or documents supporting that action is exempt from disclosure per ORS 192.501(12)."

In her response to the denial, the petitioner accurately points out that each of the conditional exemptions listed in ORS 192.501 exempts a specific type of record or information

“unless the public interest requires disclosure in the particular instance.” Petitioner argues that the public interest in disclosure outweighs the public employee's interest in confidentiality, despite the imposition of a disciplinary sanction.

The city agrees that the public has a legitimate interest in confirming Lt. Wyatt's integrity and his ability to enforce the law evenhandedly but argues that in this case ample information has been made available to the public through the disclosure of the ten page Police Review Board findings and recommendations memorandum. This memorandum provides a detailed account of the actions that resulted in Lt. Wyatt's demotion as well as the Review Board's reasoning behind its recommendation of termination. The city's position is that disclosure of the disciplinary letter is unnecessary and duplicative and would merely subject Lt. Wyatt to continued humiliation and harassment at a time when he is trying to move on with his career. In the alternative, the city also contends that even if the disciplinary letter is ordered disclosed the names of witnesses and complainants should be redacted under the personal privacy exemption. ORS 192.502(2). The petitioner agrees with that assertion and is not asking that the names be disclosed.

In reaching its decision this office reviewed the petition of Ms. Bernstein, The Police Review Board findings and recommendations memorandum, as well as the original and redacted letter of discipline by the police chief. We also reviewed a confidential letter from the city attorney articulating the need for further redaction.

DISCUSSION

I. Personnel Discipline Action

ORS 192.501(12) conditionally exempts:

A personnel discipline action, or materials or documents supporting that action.

This is a conditional exemption that may be overcome if it is shown that “...the public interest requires disclosure in the particular instance.” The exemption only applies to materials or documents that support completed disciplinary actions when a sanction has been imposed.

The Portland Police Review Board voted 5-1 recommending that Portland Police Chief Mike Reese terminate then-Capt. Wyatt. Factors to consider in weighing the public interest in disclosure against the employee's interest in confidentiality include the employee's position, the basis for the disciplinary action, and the extent to which the information has already been made public. This case involves a high-ranking police officer who was disciplined after numerous incidents. Without disclosure of the letter the public does not know what the police chief's reasoning was on why the discipline imposed was less severe than that recommended by the Review Board.

Our office agrees with petitioner that this case has parallels to the issue presented in *City of Portland v. Oregonian Publishing Co.*, 200 Or App 120 (2005). In that case, which involved an officer shooting and killing a civilian during a traffic stop, our office, the Multnomah County

Circuit Court, and the Oregon Court of Appeals ordered disciplinary information released in the public interest. In ordering the disclosure of the documents the Court of Appeals held that the public's confidence "comes from transparency and its value is not outweighed by the speculation that transparency will quell candor at some future date. This is not a close case." *Id* at 127.

We also agree with petitioner that Lt. Wyatt's case fits squarely into the "Foster" criteria that our office has used in the past for evaluating public records requests involving personnel disciplinary disclosures in that he is a high ranking public official and that his misconduct was serious and repetitive. His misconduct involved reprehensible conduct toward female employees, untruthfulness, questionable judgment and the bringing of criminal charges by a prosecutor in Idaho regarding a traffic dispute (although a jury acquitted him). The public has a right to know all the facts and to question his ability to adequately serve the citizens in Portland with evenhandedness and integrity. The public also has the right to be fully informed about the decision making of the police chief and the integrity of the entire police review process especially since the imposed discipline was less severe than that recommended by the majority of the Police Review Board.

Our office agrees with *The Oregonian*, for all the reasons detailed above, that the public interest compels disclosure of the disciplinary letter in this case. Non-disclosure could adversely affect the public's confidence in the bureau and its ability to fulfill its mission.

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 that an ordinary-reasonable person would deem highly offensive.

The attorney general has taken the position that “[g]enerally, disclosure of a name itself would not constitute an unreasonable invasion of privacy.” Attorney General’s Public Records Manual, 2008, p. 68. However, the identities of candidates for university president were not disclosed in a 1988 letter of advice. “[A] person’s name may be exempt in certain contexts, due to a person’s desire for confidentiality to avoid stigmatizing or other undesired effect.” Attorney General’s Public Records Manual, 2008, E-6.

The exemption asserted by the city has a certain threshold requirement. “[T]he information is not exempt absent an individualized justification for exemption.” Attorney General’s Public Records Manual, 2008, p. 67. 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).

The Guard Publishing Co. test was applied in Mail Tribune, Inc. v. Michael S. Winters, 236 Or App 91,96 (2010), where the Court held that the Sheriff of Jackson County had “failed to satisfy his burden of producing evidence that disclosing the list of concealed handgun licenses would constitute an unreasonable invasion of an individual’s personal privacy.” The Court of Appeals rejected arguments that the very purpose of the license was secrecy, that disclosure would lead to embarrassment, or that the guns would be stolen:

Those hypothetical purposes do not satisfy the sheriff’s burden of proof, because they do not establish individualized bases for nondisclosure. Put another way, the sheriff has failed to satisfy his burden because he has not connected his stated purpose with any particular individual, as required by Guard Publishing Co.

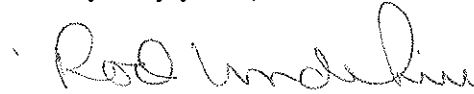
The city’s assertion of this exemption for the redaction of the quotation on page 6, paragraph 6 of the disciplinary letter can be differentiated from the situation in Guard Publishing Co. in that in this case we have an unreasonable invasion of privacy of a specified individual’s privacy rights. The specific individual referenced on page 6 paragraph 5 has told the City Attorney to not disclose the contents of the redactions due to privacy concerns. The disclosure of the content of the quotation could also potentially reveal the identity of the otherwise unknown complainant. The city has therefore established an individualized basis for the application of the personal privacy exemption.

ORDER

Accordingly, it is ordered that the City of Portland promptly disclose the records sought in the above petition subject to the redactions as submitted by the City Attorney to our office regarding the names of the witnesses and complainants as well as the quotation on page 6 and

other potentially identifying information in paragraph 4 of that same page. The city is ordered to un-redact line 18 of page 8 except as to the identity of the complainant. 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,

A handwritten signature in black ink, appearing to read "Rod Underhill". The signature is fluid and cursive, written over a horizontal line.

ROD UNDERHILL
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.