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April 29, 2015

Joseph Rose
Staff Writer/Columnist
The Oregonian
1320 SW Broadway
Portland, Oregon 97201

Kimberly Sewell
Director Legal Services
TriMet
1800 SW 1st Avenue, Suite 300
Portland, OR 97201

Re: Petition of Joseph Rose on behalf of *The Oregonian* to disclose TriMet video recordings of a March 23, 2012 incident

Dear Mr. Rose and Ms. Sewell:

After due consideration, and for the reasons expressed in this letter, my office has decided to grant *The Oregonian's* request for the release of the TriMet video recordings of an incident that occurred on March 23, 2012 at Gateway Transit Center.

Background

On March 23, 2012, a juvenile was struck by a TriMet Rail Supervisor at the Gateway Transit Center after he violated TriMet code and became verbally abusive towards the Supervisor's partner. The juvenile was pushed onto the tracks, but ultimately was uninjured and was subdued on the platform until Portland Police and Transit Police arrived. Video cameras recorded the incident, which resulted in a personnel investigation and the imposition of discipline. Originally demoted to Rail Operator, the Supervisor initiated grievance proceedings and the imposed discipline was reduced to a one-day suspension.

Under Oregon Public Records Law, *The Oregonian* requested a copy of the video. The request was denied in accordance with the personnel disciplinary exemption ORS 192.501(12). *The Oregonian* renewed its request twice and was denied under the same exemption. Asserting that the video should be released in the public interest, *The Oregonian* filed this appeal.

The Claimed Exemption

ORS 192.501(12) conditionally exempts a personnel discipline action or materials or documents supporting that action. “Only completed disciplinary actions when a sanction is imposed, and materials or documents that support that particular disciplinary action, fall within the scope of this exemption.” Oregon Attorney General’s Public Records and Meeting Manual (2014) (the “AG Manual”) at 50. Here, TriMet bears the burden of showing that the records fit into the exemption. *See City of Portland v. Anderson*, 163 Or App 550, 553 (1999). That burden is daunting. Oregon has a “strong and enduring policy that public records and governmental activities be open to the public,” *Jordan v. MVD*, 308 Or 433, 438 (1989), a policy embodied in a statutory presumption that documents will be disclosed to the public. ORS 192.420. Exemptions from disclosure are to be narrowly construed. *Oregonian Publ Co v. Portland Sch Dist No 1J*, 144 Or App 180, 184 (1996).

In evaluating whether TriMet can meet this high burden, this office finds it unclear whether the video can be properly classified as a record subject to the personnel disciplinary exemption. Unlike witness interview transcripts and internal correspondence generated in support of a disciplinary investigation, the video at issue existed entirely independent of the disciplinary action. It recorded an interaction that occurred in a public place, in full view of known surveillance cameras. The policy underlying this narrowly construed exemption – to “protect[] the public employee from ridicule for having been disciplined” – seems hardly to apply where the public employee acted in full public view. *City of Portland v. Rice*, 308 Or 118, 124, n.5 (1989).

Moreover, it makes little sense to allow a governmental agency to use an after-the-fact disciplinary action to shield materials created in the course of the agency’s routine operation.

Public Interest Balancing

Even if the video recordings at issue qualify as records relating to a personnel discipline action, any private interest in confidentiality is outweighed by the public interest in disclosure in this case. Both parties advocate the application of the “Foster Criteria,” principles adopted by this office to guide the determination of whether the public interest overrides the disciplinary record exemption. *See* Public Records Order, February 6, 1997 (Foster).

1. Serious misconduct by a government employee should be disclosed in the public interest; relatively minor misconduct need not be disclosed if the public interest would not be significantly promoted by doing so.
2. Generally, termination from employment or other discipline for cause is serious misconduct if it is based upon corruption in the discharge of the public’s business (including theft of public property), abuse of official power by employing such power for a purpose not related to any lawful government objective or by use of illegal or impermissible means in the pursuit of a governmental objective, misconduct which impairs or imperils the mission of the government agency, or criminal behavior

(particularly when job-related) which constitutes proper ground for discharge from employment or other discipline.

3. Discipline for acts or faults of government employees falling short of the preceding kinds of serious misconduct may also be determined to require disclosure if the simulation of repeated disciplinary violations fairly raises the issue whether continued employment of the particular employee in itself constitutes an imprudent or improper management decision not to impose more severe sanctions or termination of employment.
4. Discipline cases that evidence systematic misconduct, i.e., misconduct affecting multiple employees and involving similar improper acts or omissions may require disclosure even when the acts or faults in question do not individually rise to the level of the serious misconduct described in points 1 and 2, where the overall pattern of discipline violations indicates there may be a concentrated personnel problem in a particular agency or part of any agency, or sheds light on the effectiveness of management's efforts to properly control the behavior in question.
5. Other cases of disciplinary records may merit disclosure in the public interest even though the conduct of the disciplined employee is not serious misconduct as previously described, where circumstances raise an issue of unduly harsh (or unduly lenient), arbitrary, irrational or discriminatory administration of discipline by management and thus illuminate management's conduct of the public business.
6. Finally, public employees should not be subjected to public disclosure of disciplinary violations not of the kind specified in the preceding guiding principles, when such disclosure would merely subject the employee to added humiliation and would not significantly promote the public's understanding of the manner in which the programs and services of government are being carried out. Part of the purpose of employee discipline is to encourage the employee's morale while correcting undesirable conduct, which goal is not promoted, as we think, by a process of indiscriminate public pillory – and which consideration presumably was part of the Legislative Assembly's motivation for the enactment of the "disciplinary action" exemption in the first place.

The application of these principles compels the conclusion that public interest outweighs any private interest in confidentiality. First, given the Supervisor's responsibility to interact with and protect the public, his use of physical force against a member of the public is more than "relatively minor misconduct." He violated TriMet's policy against physical confrontation, thereby using impermissible means in pursuit of a government objective, and engaged in potentially criminal behavior. Under *Foster*, these factors weigh in favor of disclosure.

In the *Foster* analysis, and under Oregon precedent, it is not dispositive that the Supervisor was not criminally convicted. Criminal charges were referred to the Multnomah County District Attorney's Office, but were declined for legal insufficiency. The decision not to prosecute, however, has not been a bar to a finding of public interest. In *City of Portland v. Anderson*, 163 Or App 550, for example, a high-ranking police officer was disciplined for off-

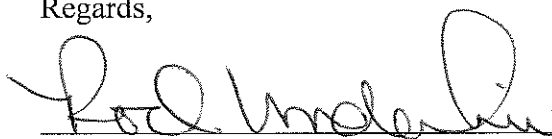
duty use of an escort service allegedly involving prostitution. The City urged the court to shield the records at issue because grand jury did not indict and therefore the conduct was “non-criminal.” The court declined to do so, finding a legitimate interest in confirming the officer’s integrity and ability to enforce the law, even without an underlying criminal conviction.

Finally, disclosure of the video recordings would allow the public to evaluate the severity of the misconduct and the subsequent adequacy of TriMet’s disciplinary sanction, as contemplated in paragraph 5 of the Foster criteria.

Conclusion and Order

Accordingly, the petition of *The Oregonian* is granted and TriMet is ordered to promptly disclose the video recordings of the March 23, 2012 incident at Gateway Transit Center.

Regards,



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’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.