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June 26, 2015

Lee van der Voo, Reporter
InvestigateWest
909 N. Beech St., Ste 209B
Portland, Oregon 97227

Beverly Pearman, Esq.
Assistant General Counsel
Port of Portland
7200 NE Airport Way
Portland, Oregon 97208

Re: Petition of Lee van der Voo of InvestigateWest for the disclosure of documents concerning an internal investigation of an alleged sexual assault by a Port of Portland employee.

Dear Ms. van der Voo and Ms. Pearman:

BACKGROUND

This appeal arises out of a February 2015 public records request submitted to the Port seeking the disclosure of documents relating to an alleged sexual assault during an out-of-state training event where both parties, the “accused” and the “victim,” were Port employees. During the pendency of Ms. van der Voo’s original petition the Port agreed to provide many of the documents requested, rendering much of her appeal moot. To the extent that Ms. van der Voo’s petition sought unredacted documents to include identifying details about the victim or other private matters, this office denied the petition in Public Records Opinion 15-12 dated June 8, 2015. Ms. van der Voo filed a second petition on June 16, 2015 after the Port reversed course and refused to provide the documents it had previously agreed to provide.

In response the Port asserts that as it prepared to produce the records sought, counsel for the accused submitted a public records request for all materials about to be provided to the media and then indicated, on June 16, 2015, that the accused would speak with Port investigators. As a result, the Port reopened their previously suspended investigation and declined to produce the documents they had previously agreed to produce.

According to the Port, an interview with the accused is currently scheduled for next week, and arbitration relating to the imposition of discipline on the accused is scheduled for July 7 and July 8, 2015.

This office has reviewed the Port’s investigation file including emails, meeting notes, interview notes, a copy of at least one document submitted to law enforcement in Texas, and memoranda of phone communication between the Port and outside counsel.

The factual background of the underlying petition has not changed except as mentioned above and the parties may refer to this office's previous opinion for a more thorough summary.

DISCUSSION

In addition to the same objections that the Port raised in response to Ms. van der Voo's last appeal it asserts the Personnel Investigatory Exemption under ORS 192.501(12) and, as to a single document, the Criminal Investigatory Exemption under ORS 192.501(3). On these same facts this office previously held that some documents at issue were protected by attorney-client privilege and that other documents, or portions thereof, fell within the personal privacy exemption. ORS 192.502(9) and 192.502(2) respectively. We do not at this time see cause to revisit those determinations. The additional developments since the last petition affect only the exemption claimed under 192.501(12).

A. Personnel Investigatory Exemption - ORS 192.501(12)

ORS 192.501(12) is a conditional exemption that protects from disclosure "a personnel discipline action, or materials or documents supporting that action." This office has consistently held that, because the agency cannot say whether discipline will be imposed until the investigation is concluded, an ongoing investigation is covered by 192.501(12). See, *In re petition of Schmidt for The Oregonian*, MCDA PRO 14-26 (2014), *In re petition of Damewood for Willamette Week*, MCDA PRO 13-15 (2013). In this instance, in addition to the ongoing investigation, discipline for insubordination has already been imposed on the accused as a result of this investigation. ORS 192.501(12) thus applies to the records sought by petitioner.

The second step in analyzing a conditional exemption is assessment of whether the public interest requires disclosure in a particular instance. With respect to open investigations, we have recognized that "[g]enerally, unless the public interest at the time of the request requires disclosure, the investigation process should be completed before the release of information is ordered." *Damewood*, PRO 13-15, at 5. Accordingly, each request for records must be evaluated independently, at the time it is made.

At the time that Ms. van der Voo made her initial request, the Port agreed that, "the public interest in disclosure weighs in favor of releasing all interview notes and related background information contained in the investigation file." Response to May 21, 2015 Petition at 2. The Port now states that it was willing to disclose those materials because it did not know when, or if, the accused would chose to cooperate and the investigation reactivated. Since the accused has agreed to be interviewed, and that interview is scheduled for June 29, 2015, the Port now believes it should not have to disclose any investigative materials until such time as the investigation is complete.

Certainly the Port may not indefinitely leave open an investigation in an attempt to thwart the purposes underlying the Oregon Public Records Law. However, we agree with the Port that the very recent (June 16, 2015) agreement of the accused to provide a statement to Port investigators changes the public interest analysis from that discussed in our previous order in this matter. The Attorney General has recognized that, "in determining whether the public interest at the time of the request requires disclosure, one relevant factor is the extent to which the disciplinary proceedings might be adversely affected by public disclosure while the matter is

pending.” Attorney General’s Public Records Manual, p.52 (2014). Allowing a suspect to review other witness statements prior to his own interview would permit him to adjust his story to match that of others and thereby limit potential inconsistencies that are key to demonstrating the truth or falsity of a statement.

In the Port’s own assessment the public interest does require disclosure of these records, but we agree that it does not require their immediate disclosure. Consistent with our decisions in similar circumstances it is proper for the Port to complete its investigation prior to disclosing any records. See, *Schmidt, MCDA PRO 14-26 (2014)*.

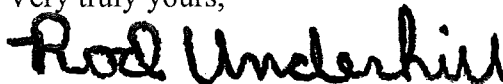
B. Criminal Investigatory Exemption - ORS 192.501(3)

The Port asserts the Criminal Investigatory exemption as to a single document prepared by the victim for the use of the investigating detective in the case. The deputy district attorney investigating the underlying sexual assault allegation in Tarrant County, Texas has informed this office that she does not believe that disclosure of the Port’s records would impair her investigation, which is ongoing. Given the position of the assigned prosecutor, this exemption is not a basis to withhold records. To be clear, this document is still presently covered by the exemption under ORS 192.501(12).

ORDER

Accordingly, it is ordered that the petition is denied with leave for the petitioner to resubmit upon completion of the Port’s investigation.

Very truly yours,



ROD UNDERHILL
District Attorney
Multnomah County, Oregon