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June 29, 2015

Laura Frazier  
The Oregonian  
1500 S.W. First Ave., Suite 400  
Portland, Oregon 97201

Heidi Brown  
Deputy City Attorney  
Office of the City Attorney  
1221 S.W. 4<sup>th</sup> Ave., Suite 430  
Portland, Oregon 97204

Re: Petition of Laura Frazier for the disclosure of documents concerning the current employment status of Michael Rosen.

Dear Ms. Frazier and Ms. Brown:

#### **BACKGROUND**

In her public records petition under ORS 192.410 et seq., petitioner Laura Frazier, on behalf of The Oregonian, requests the district attorney to order the City of Portland to release the following records:

**Documents stating the current employment status for Michael Rosen, employee with the Bureau of Environmental Services, including whether he still works for the city, was placed on paid or unpaid leave and the date of this action, has been suspended and/or discipline and the date of this action, and the reason for any change in employment status or disciplinary action. This includes any documentation between Rosen and the city regarding his employment status and/or disciplinary record from April 1, 2015, through present [May 14, 2015].**

Much of the substance of the records sought has not previously been disclosed publicly. As the Court of Appeals has noted, it is exceedingly difficult to write an opinion that explains the basis of our decision, and thereby provide appropriate guidance for the future, without discussion of the facts contained in the underlying records. *Turner v. Reed*, 22 Or App 177 (1975). With this in mind, the following is by necessity general or based on information already available to the public.

Michael Rosen is presently on leave from his position as a Watershed manager with the City of Portland Bureau of Environmental Services (“BES”). The city has previously disclosed, with Mr. Rosen’s permission, that he is on paid sick leave. At BES Mr. Rosen is a mid-level

manager. First level supervisors report to Mr. Rosen, who in turn reports to the Watershed Services group manager, who reports to the Bureau director, who reports to the commissioner.

On May 14, 2015, when Ms. Frazier first requested these documents, Mr. Rosen was a candidate for the Portland Public School Board. On May 18, 2015 Mr. Rosen was elected to that position.

The city has provided the records responsive to Ms. Frazier's petition to this office for our review pursuant to ORS 192.470(2).

## DISCUSSION

Oregon Public Records Law has long recognized a "strong and enduring policy that public records and government activities be open to the public." *Jordan v. MVD*, 308 Or 433 (1989). As such, the public body seeking to withhold records, in this case the City of Portland, bears the burden of establishing that any claimed exemption applies. The city has asserted three exemptions as to various portions of these documents: personnel discipline, personal privacy, and attorney-client privilege. We address each in turn.

### A. Personnel Discipline – ORS 192.501(12)

Records of a personnel discipline action, or materials or documents supporting that action are conditionally exempt from disclosure. The exemption may be overcome by a showing that the public interest requires disclosure in the particular instance. ORS 192.501(12). The courts have narrowly construed this exemption holding that it, "protects the public employee from ridicule for having been disciplined but does not shield the government from public efforts to obtain knowledge about its processes." *City of Portland v. Rice*, 308 Or 118, 124 n.5 (1989).

To evaluate a claimed exemption under ORS 192.501(12) we have established guidelines known as the *Foster* criteria. *In re petition of Foster for The Oregonian*, MCDA PRO 96-31 (1997). These guidelines are, in summary:

1. Serious misconduct by a government employee should be disclosed;
2. Generally, termination from employment or other discipline for cause is serious misconduct if it is based on corruption (including theft of public property), abuse of power, misconduct that impairs the mission of the agency, or criminal behavior;
3. Less serious misconduct may require disclosure if repeated violations fairly raises the issue of imprudent management of public employees;
4. Cases evidencing systematic misconduct within a particular agency or part of an agency that shed light on the effectiveness of management may require disclosure even if, individually, the instances of misconduct are not serious;
5. Less serious misconduct may require disclosure in the public interest where circumstances raise a question of unduly harsh (or unduly lenient), arbitrary, irrational or discriminatory administration of discipline by management;
6. Lastly, public employees should not be subjected to public disclosure of disciplinary violations that do not fit into a category above where such would not significantly

promote the public's understanding of the manner in which government business is carried out.

In applying the *Foster* criteria, this office has recognized that the rank of the public employee in question is relevant in weighing the public interest. Public interest is heightened when the employee in question is high ranking, but elevated position alone does not compel disclosure. Compare, *In re petition of Sanders for the Portland Tribune*, MCDA PRO 06-05 (2006) (no disclosure ordered for old internal investigation records into a police officer who had since risen to the rank of assistant chief) with *In re petition of Bernstein for The Oregonian*, MCDA PRO 13-04 (2013) (disclosure ordered for internal investigation of police captain because the public "have a strong interest in knowing that workplace complaints involving high ranking public officials are thoroughly, fairly and evenhandedly investigated.") On the other hand low rank alone will not shield a public employee's misconduct from the public eye. *In re petition of Foster for The Oregonian*, MCDA PRO 96-31 (1997) (disclosure ordered as to investigation into an office assistant's misuse of a postage meter).

Although a manager, the city asserts in its response that Mr. Rosen is not a high level official, and thus the public interest in him is less. The records reviewed by this office do refer to Mr. Rosen as a "high level manager," but we need not decide on these facts whether or not his position as a division manager is elevated enough to warrant increased public interest. Mr. Rosen has just been elected to the Portland Public School Board. And, at the time this records request was made he was a candidate for that position. As a part of his campaign, per his campaign website, he referenced his managerial experience and lengthy work record as a public manager with the city. He also published endorsements from multiple elected City officials, including the commissioner ultimately responsible for managing him at the BES. With these actions Mr. Rosen made his employment record with the city a matter of public interest.

Without disclosing the details of the underlying records, suffice it to say that they could be viewed in one of two ways: either 1) the records suggest serious misconduct has occurred; or 2) the records "raise an issue of unduly harsh (or unduly lenient), arbitrary, irrational or discriminatory administration of discipline." *Foster*, 96-31 (1997). We need not, and do not, express any opinion on the relative merits of these two interpretations because, per our guidance in *Foster*, and due to Mr. Rosen's unique position as both a city manager and an elected official, in either instance the public interest requires disclosure.

The city has proposed two redactions to a May 6, 2015 letter it deems responsive but exempt. We do not agree that these redactions are required by any asserted exemption.

B. Personal Privacy – ORS 192.502(2)

The Public Records Law exempts from disclosure: "Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if public disclosure would constitute an unreasonable invasion of privacy." ORS 192.502(2). Even if the public body meets its burden of establishing that a record meets this definition, the record may still be disclosed if petitioner shows that the public interest requires disclosure.

Records may not be shielded under this provision unless the city establishes, on an individualized basis, that disclosure would constitute an unreasonable invasion of privacy. This is a high bar to meet for the City. *Jordan v. MVD*, 308 Or 433 (1989). ("The purpose of this

exemption is not to prevent disclosure of personal information, as such, but rather to protect privacy from unreasonable invasion.”)

In seeking the cover of this exemption, the city asserts only that Mr. Rosen has a high privacy interest in his medical information. No specific claim of privacy is made to any other information contained in the documents. As we have previously recognized, “disclosure of any medical information is presumptively an unreasonable invasion of privacy.” *In re petition of Hinkle for The Oregonian*, MCDA PRO 05-03 (2005). However, having reviewed the records responsive to petitioner’s request, they do not contain medical information relating to Mr. Rosen, apart from the already disclosed information that he is on sick leave. As Mr. Rosen apparently consented to this disclosure, it is not an unreasonable invasion of his privacy. The city has not made sufficient showing to establish the initial applicability of ORS 192.502(2) to these records.

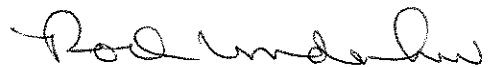
C. Attorney Client Privilege – ORS 192.502(9)

Attorney-client privilege is an unconditional exemption to the public records law. If the records at issue fall within this exemption then the public interest may not be considered. The city is correct that the documents they seek to withhold are privileged and not subject to disclosure. These documents reflect specific legal advice and do not contain factual information not contained in other documents responsive to this petition.

**ORDER**

Accordingly, the petition is granted in part and denied in part. The City of Portland is ordered to promptly disclose all records responsive to this request for which the city has not asserted attorney client privilege. This disclosure is subject to payment of fees to the city, if any, not exceeding the actual cost in making the information available.

Very truly yours,



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 seven days formal notice of your intent to initiate court action to contest this order, or fail to file such court action within seven additional days thereafter.