



ROD UNDERHILL, District Attorney for Multnomah County

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July 9, 2015

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

Lory Kraut
Sr. Deputy City Attorney
1221 S.W. 4th Ave, Suite 430
Portland, OR 97204

Re: Petition of Maxine Bernstein for The Oregonian requesting records relating to an investigation of Fire Chief Janssens.

Dear Ms. Bernstein and Ms. Kraut:

BACKGROUND

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

[T]he contents of the human resources investigation into the conduct of Fire Chief Erin Janssens

As is our practice we discuss the contents of the records at issue only to the extent they are either already in the public record or are essential to a fair description of our analysis. Much information from this investigation has already been published.

On December 4, 2013 a meeting was held in Portland Fire Chief Janssens' office regarding the artwork budget for a fire station construction project. At that meeting were Chief Janssens, Brian Alcid, Deputy Chief Marco Benetti, and two others. After the meeting Chief Janssens asked Mr. Alcid and Deputy Chief Benetti to remain in her office. Once behind closed doors Chief Janssens expressed her displeasure at a position taken by Mr. Alcid during the meeting and placed her hands on him. The exact nature of the physical contact is in dispute, but all agree that Mr. Alcid was not physically injured as a result.

On October 13, 2014 investigators from the city's bureau of human resources interviewed Mr. Alcid. A declaration submitted by the city states that these investigators were working in concert with a deputy city attorney. In that interview, a transcript of which has already been published by The Oregonian, Mr. Alcid acknowledges waiting almost a year before reporting the incident. He also identifies Deputy Chief Benetti as the other witness to the altercation, and

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states that both he and Deputy Chief Benetti made written memoranda of the event in its immediate aftermath.

On May 6, 2015 David Rhys, assistant director of the Bureau of Human Resources, sent a letter to Mr. Alcid stating that “while some of the very precise details were unclear, we were able to substantiate your complaint. Further, the matter is being squarely and appropriately addressed.”

On June 1, 2015 petitioner made the public records request quoted above. The city denied the request on June 2, 2015, citing ORS 192.502(2) (personal privacy) and 192.502(9) (attorney-client privilege) as the basis for the denial.

On June 3, 2015, in response to a request for comment from petitioner, Commissioner Saltzman, via staff, made the following statement:

After reviewing the investigation by the City Attorney’s office and the Bureau of Human Resources of Mr. Alcid’s complaint, it was clear to me that a retired employee was attempting to undermine Chief Janssens’ authority. In my view the mistake by Chief Janssens was minor, she has learned from the experience, and discipline was not warranted.

In an interview with petitioner on June 3, 2015, Chief Janssens appears to have given her account of what happened. Portions of that interview are reflected in an article published on that date on The Oregonian’s website.¹

As part of our consideration of this matter the city has made available, and this office has reviewed, the contents of the investigation file at issue including: transcripts of witness interviews, an investigation report, and two supporting documents prepared by the witnesses.

DISCUSSION

A. Attorney Client Privilege – 192.502(9)

Attorney client privilege is an unconditional exemption to the public records law that does not require balancing of the public’s interest in disclosure of the information. ORS 192.502(9). Petitioner does not challenge the general applicability of attorney-client privilege to an investigation conducted under these circumstances, but asserts that the statutory exception set forth in ORS 192.502(9)(b) nonetheless requires disclosure.² As petitioner notes attorney-client privilege does not shield the production of purely factual information when the following statutory elements are present:

1. The basis for the claim of exemption is ORS 40.225;

¹ http://www.oregonlive.com/portland/index.ssf/2015/06/portland_fire_chief_explains_w.html

² Accordingly we need not, and do not, decide whether or not the produce of a human resources investigation directed by a deputy city attorney is properly shielded by ORS 40.225.

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2. The factual information is not prohibited from disclosure under any applicable state or federal law, regulation or court order and is not otherwise exempt from disclosure under ORS 192.410 to 192.505;
3. The factual information was compiled by or at the direction of an attorney as part of an investigation on behalf of the public body in response to the information of possible wrongdoing by the public body;
4. The factual information was not compiled in preparation for litigation, arbitration or an administrative proceeding that was reasonably likely to be initiated or that has been initiated by or against the public body; and
5. The holder of the privilege under ORS 40.225 has made or authorized a public statement characterizing or partially disclosing the factual information compiled by or at the attorney's direction.

The city concedes that the first four elements are present, but contests whether or not a qualifying public statement has been made.

Petitioner identifies three statements she claims satisfy the statutory requirement: Chief Janssens' June 3, 2015 interview with *The Oregonian*; David Rhys' May 6, 2015 letter to Mr. Alcid; and Commissioner Saltzman's June 3, 2015 response to petitioner's request for comment. Because it is dispositive, we address only the third statement.

As a member of the City Council and the fire commissioner, Commissioner Saltzman holds the attorney-client privilege for purposes of ORS 192.502(9)(b)(E). *In re petitions of Schmidt & Jaquiss*, MCDA PRO 13-10 (2013). In *Schmidt & Jaquiss* we found a statement that a city employee was not disciplined because an investigation found no wrongdoing sufficient to meet the requirements of ORS 192.502(9)(b)(E). Commissioner Saltzman's statement, quoted on page two of this order, characterizes the underlying investigation and expresses an opinion on the appropriateness of the outcome. It falls within the exception to the attorney-client privilege exemption.

The city correctly observes that Commissioner Saltzman's statement was not issued until after the city denied Ms. Bernstein's records request on June 2, 2015. It may well be that, at the time the city made its initial decision to deny release, ORS 192.502(9)(b)(E) did not apply. But we do not evaluate whether the city, on June 2, made the correct decision. We evaluate whether or not, at the time of writing this order, the law requires the records released.

B. Personal Privacy

ORS 192.502(2) 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, 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.

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Chief Janssens has provided a declaration stating that disclosure of the names of participants in the investigation and their statements would harm morale in the fire department and impair future investigations. Although we have no specific reason to doubt this assertion, a blanket policy of exemption from disclosure on personal privacy grounds cannot stand. *Guard Publishing v. Lane County School Dist.*, 310 Or 32, 38-40 (1990). The city must establish on an individualized basis that disclosure of this particular information is an unreasonable invasion of privacy to this particular witness.

Three individuals have relevant privacy interests, all of whom have already been identified in the public record: Chief Janssens, Brian Alcid, and Deputy Chief Marco Benetti. As to Chief Janssens and Mr. Alcid, both have already given public statements to reporters recounting their versions of what happened during this incident. As each has voluntarily given a statement, he or she has waived any privacy interest in his or her rendition of the incident. Indeed the official transcript of Mr. Alcid's interview with city human resources investigators has already been published in its entirety.

As to Deputy Chief Benetti, he asserts, by way of a declaration submitted in confidence, that he opposes the disclosure of his notes and interview and believes disclosure would invade his privacy. We have previously approved redaction of documents in a city human resources investigation to preserve the anonymity of witnesses. *In re petition of Bernstein for The Oregonian*, MCDA PRO 13-02 (2013) (noting that disclosure could "reveal the identity of the otherwise unknown complainant"). *Bernstein* is distinguishable from the present case: Deputy Chief Benetti's identity as a witness is already known to the public. Since ensuring the confidentiality of his name or involvement is not at issue, the question remains: is his factual narrative of the event (both in his own written statement and his interview) "information of a personal nature."

The Attorney General writes that "'personal' information includes all information relating to a particular person, such as a person's home address, age, weight, and residential telephone number." Attorney General's Public Records Manual, p.75 (2014). We have previously afforded protection under this section to information beyond personal identifiers to include: medical information, psychological records, and factual details of sexual assault. *In re petition of Hinkle for The Oregonian*, MCDA PRO 05-03 (2005) (medical records); *In re petition of Young for Willamette Week*, MCDA PRO 96-06 (1996) (psychological records); *In re petition of Franzen for The Oregonian*, MCDA PRO 04-02 (2004) (rape). We do not find that a factual recitation of an event such as this is "personal" information within the meaning of ORS 192.502(2).

We recognize that, in order to encourage city employees to give full and frank testimony in compulsory interviews and cooperate with internal investigations, the city has a real interest in assuring employees of confidentiality. But, as a public employer, the city is bound by the

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requirements of Oregon's public records law. Absent a specific statutory exemption, promises of confidentiality must yield to the general presumption of disclosure.³

ORDER

Accordingly, Ms. Bernstein's petition is granted. The City of Portland is ordered to promptly produce the interview transcripts, written statements by the witnesses, and any factual information contained in the human resource investigative report. As petitioner has sought these materials under ORS 192.502(9)(b), and we agree that the requirements of the exception are met, the city may, if it chooses, provide an appropriate factual condensation of this report pursuant to ORS 192.423 in lieu of the original document.

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.

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³ In many cases, these interviews will be exempted from disclosure by operation of ORS 192.501(12), the personnel discipline exemption. In this case, the city's decision not to impose discipline as a result of its investigation eliminated this option.