



**ROD UNDERHILL**, District Attorney for Multnomah County

1021 SW 4<sup>th</sup> Ave., 600 County Courthouse • Portland, Oregon 97204 • 503 988-3162 • FAX 503 988-3643  
www.meda.us

September 9, 2015

Nick Budnick  
The Oregonian  
1500 S.W. 1<sup>st</sup> Ave.  
Portland, OR 97201

Jeff Condit  
Miller Nash Graham & Dunn LLP  
111 S.W. 5th Ave., Suite 3400  
Portland, OR 97204

Re: Petition of Nick Budnick for The Oregonian requesting a memorandum mentioned in a 2011 Portland Community College auditor's report.

Dear Mr. Budnick and Mr. Condit:

In his public records petition under ORS 192.410 et seq., petitioner Nick Budnick, on behalf of The Oregonian, requests the district attorney to order Portland Community College (PCC) to provide the following records:

**A memo mentioned in a 2011 PCC Internal Auditor's report regarding the PCC bond measure of 2008.**

In 2008 voters approved a \$374 million bond measure for PCC to fund new construction and facility improvements. In 2011 PCC's internal auditor performed an audit of the bond program and generated a 24 page report summarizing his findings that he presented to PCC's board. This document is in the public record. During the course of his audit the auditor discovered additional information not included in the public report. He wrote:

In addition to this report, the IA [Internal Auditor] communicated sensitive findings and recommendations to PCC management under a separate internal memo in accordance with Oregon Revised Statute 192.501(12), which exempts certain sensitive information from public disclosure.

PCC has provided this office with the two-page memorandum referenced in the public report, which is the subject of this petition.

PCC has cited ORS 192.501(12), the personnel discipline exemption, and ORS 192.502(2), the personal privacy exemption, as the basis for withholding the memorandum.

In the most general terms the memorandum summarizes the early stages of a personnel investigation relating to certain contracts practices and procedures not being followed by a PCC manager. The manager had approved contracts worth over \$400,000 under circumstances suggesting an improperly disclosed conflict of interest. Counsel for PCC has informed this office that the employee who was the subject of that memorandum resigned his position prior to the imposition of any discipline.

## DISCUSSION

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

ORS 192.501(12) conditionally exempts from disclosure:

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

If an agency completes a disciplinary investigation and does not impose discipline, then ORS 192.501(12) does not apply. *In re petition of van der Voo for InvestigateWest*, MCDA PRO 15-17 (2015). Likewise, when an agency does impose discipline, we have a framework for evaluating whether or not the public interest requires disclosure notwithstanding the facial applicability of ORS 192.501(12). *In re petition of Foster for The Oregonian*, MCDA PRO 96-31 (1997). Here the subject of the investigation resigned prior to completion of the disciplinary processes. We have not previously decided if the personnel discipline exemption applies in such circumstances. For purpose of our analysis we will assume, without deciding, that the exemption does apply.

Where misconduct is “major” we have uniformly concluded that the public interest requires disclosure. In the context of alleged fiscal misconduct, we previously found that violation of an official contract policy by a member of the Portland Development Commission, resulting in issuance of a \$100,000 contract, was sufficiently major misconduct to warrant disclosure. *In re petition of Frank for The Oregonian*, MCDA PRO 05-19 (2005). Guided by our reasoning in *Frank*, we likewise conclude that even if ORS 192.501(12) applies to these facts, the public interest requires disclosure.

### B. Personal Privacy – ORS 192.502(2)

ORS 192.502(2) exempts from disclosure:

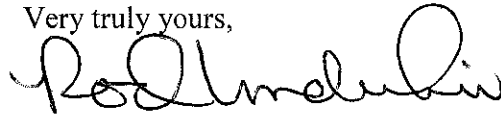
Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if public disclosure would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance. The party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy.

Having reviewed the memorandum in question, it does not contain any personal information of note that is not already addressed by our analysis above under *Frank*. Of course no public employee would want allegations of his or her misconduct aired publically, but that cannot be an independently sufficient basis to exempt records from disclosure. To hold otherwise would render any record relating to a disciplinary investigation exempt from disclosure and overturn years of precedent ordering just such disclosures.

**ORDER**

Accordingly, the petition is granted. Portland Community College is ordered to promptly disclose the two-page memorandum sought by petitioner. This disclosure is subject to payment of fees to PCC, 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.