



ROD UNDERHILL, District Attorney for Multnomah County

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October 1, 2015

Brad Schmidt
The Oregonian
1500 S.W. First Ave., Suite 400
Portland, OR 97201

Ken McGair
Senior Deputy City Attorney
Office of the City Attorney
1221 S.W. Fourth Ave., Suite 430
Portland, OR 97204

Re: Petition of Brad Schmidt for The Oregonian seeking records relating to enforcement of the City of Portland Arts Tax

Dear Mr. Schmidt and Mr. McGair:

In his public records petition under ORS 192.410 et seq., petitioner Brad Schmidt, on behalf of the Oregonian, requests the district attorney to order the City of Portland to provide the following records:

- 1. A copy or copies of the city's currently used database tracking notices sent to residents presumed to be required to pay the Arts Tax.**
- 2. A copy or copies of the city's currently used database of residents for which late fees have been imposed (by fiscal year).**

In a subsequent submission as part of this appeal, petitioner narrowed his request stating that he now sought only the names and addresses of the residents in each category above, and not any "financial information" associated with their accounts.

The city has already released to petitioner the names and addresses of those residents who have paid their Arts Tax for the past three fiscal years. The Portland City Code expressly permits this release of information. PCC 5.73.100(B). Petitioner now seeks the city's records showing 1) the names and addresses of all residents on the city's tax rolls; 2) the names and addresses of all residents who are not exempt from the tax who have failed to pay the tax in a timely fashion (i.e., all those residents who have incurred late fees). The city refused to provide the requested data, asserting that this would reveal financial information protected by PCC 5.73.100 and, further, that disclosure of this information would constitute an unreasonable invasion of privacy under ORS 192.502(2).

The city has provided this office with a database schematic showing the various tables and fields in which the Portland Revenue Bureau stores data related to the Arts Tax. In that

schematic the city has indicated which fields it considers “financial information” and which fields it considers “personally identifiable information.”

DISCUSSION

A. ORS 192.502(9) and PCC 5.73.100 – Confidentiality of Arts Tax financial information

The city’s reliance on its own ordinances to exempt records from disclosure under the State’s public records law holds up only if the Portland City Code is considered “Oregon law” for purposes of ORS 192.502(9). Because of our disposition below we need not definitively answer this question today.

ORS 192.502(9) exempts from disclosure,

Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law.

Portland City Code 5.73.100 provides that,

It is unlawful for any City employee, agent or elected official, or for any person who has acquired financial information pursuant to Chapter 5.73 or the Bureau’s administrative rules to divulge, release or make known in any manner any financial information submitted or disclosed to the City under the terms of the Arts Education and Access Income Tax, unless otherwise required by law.

Even assuming, as we do for purposes of this analysis, that ORS 192.502(9) incorporates the confidentiality provisions of PCC 5.73.100, we do not believe that names and addresses constitute “financial information” within the meaning of the ordinance. To the extent that the imposition of a late fee is “financial information” it is information independently generated by the city and not “submitted or disclosed” to the city. PCC 5.73.100 only prohibits the disclosure of “financial information submitted or disclosed to the City” and, accordingly, does not cover the specific records sought by petitioner.

B. ORS 192.502(2) – Information of a personal nature

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.

As the city has already publicly released the names and addresses of those Portland residents who have paid the Arts Tax, it would be logically incongruous to conclude that disclosure of names and addresses in themselves is an unreasonable invasion of privacy. The Public Records Law requires us to look to the specific circumstances of each individual disclosure to determine whether or not the information is “personal” and whether or not it constitutes an unreasonable invasion of privacy.

A blanket policy of non-disclosure is not enforceable under the Public Records Law. *Guard Publishing v. Lane County School District*, 310 Or 32 (1990). As to each record sought to be shielded by this exemption, the burden is on the public agency to establish an individualized basis for that exemption. *Mail Tribune v. Winters*, 236 Or App 91 (2010). This is particularly true where, as here, the type of information sought is not *per se* an unreasonable invasion of privacy. *Kotulski v. Mt. Hood Community College*, 62 Or App 452 (1983) (home addresses are regularly given out to strangers so are not generally information of a personal nature).

Requests for names and addresses have been the subject of many public records opinions, both from this office and from the courts. As the preconditions for establishing an exemption under ORS 192.502(2) are frequently misunderstood or misapplied by litigants before this office, a somewhat lengthier discussion of the applicable precedent is appropriate:

- *Jordan v. Motor Vehicles Division*, 308 Or 433 (1989). Mr. Jordan filed a public records request with the Motor Vehicles Division (MVD) seeking the home address of a particular woman in whom he was interested. The woman in question had written the MVD requesting they not give out her information due to a particular individual exhibiting an obsession with her. The court found that an affidavit from the woman setting out the particulars of her situation sufficiently established an individualized basis that disclosure of her home address would constitute an unreasonable invasion of her privacy in this instance.
- *Guard Publishing v. Lane County School District*, 310 Or 32 (1990). The Lane County School District sought to withhold from disclosure the names and home addresses of replacement teachers that it had hired during a teacher's strike. The Supreme Court held that, "[t]he school district's blanket policy, exempting public records from disclosure without an individualized showing, violates the Inspection of Public Records law, ORS 194.410 et seq, and is therefore unenforceable." *Id.* at 40.
- *Mail Tribune v. Winters*, 236 Or App 91 (2010). The Jackson County Sheriff sought to exempt from disclosure the list of people in his county with concealed handgun licenses. In support of this he testified generally that, "(1) the purpose of obtaining a concealed handgun license is to carry a weapon without public knowledge, (2) disclosure would expose concealed handgun licensees to criminal activity by creating a virtual shopping list for anyone bent on the theft of handguns, and (3) gun ownership is a potentially embarrassing detail of one's personal life." The court rejected this claim holding that, "[t]hose hypothetical purposes do not satisfy the sheriff's burden of proof, because they do not establish individualized bases for nondisclosure. Put another way, the sheriff has failed to satisfy his burden because he has not connected his stated purposes with any particular individual, as required by *Guard Publishing Co.*"
- *In re petition of Driesch for IUOE Local 701*, MCDA PRO 06-08 (2006). A local union sought payment records, including personal contact information, for every contractor on an ongoing public project. Despite specific examples of ongoing harassment of these (non-union) contractors by the union, the records had to be disclosed because the city did not present this office with the case-by-case analysis necessary to sustain the exemption.

We held that, “[a] blanket non-disclosure policy extrapolated from a few incidents is simply not enforceable.” *Id.* at 5.

- *In re petition of Barbara Diamond*, MCDA PRO 97-02 (1997). An attorney requested the names and home addresses of all substitute teachers used by a school district. This request came in the context of an imminent teacher’s strike and, again, in the face of concerns, backed up by anecdotal evidence, about harassment of substitutes by striking union members. We ordered the records disclosed finding that, “the school district has not produced any specific information relating to any of the hundreds of names on its substitute teacher list which would indicate specific reasons why it would be an unreasonable invasion of privacy to release the names in question.” *Id.* at 2.

Among these cases, *Jordan* provides the only instance where disclosure of a name and home address was found an unreasonable invasion of privacy. And, in that case, the agency created a substantial factual record demonstrating how—as applied to a specific individual’s information—disclosure would constitute an unreasonable invasion of privacy.

We do not write on a blank slate and must apply our appellate courts’ direct precedent in resolving a public records petition. Given the repeated decisions on this topic outlined above, it is apparent that the city has not established the requisite individualized bases to conclude that ORS 192.502(2) applies as to any particular record at issue in this petition. We recognize that in a data set likely containing hundreds of thousands of names, it is difficult if not impossible to create an individualized record in any meaningful fashion. That practical reality does not, however, alter the clear requirement of the law. To the extent that the parties disagree with our interpretation or application of ORS 192.502(2) we would encourage them to seek judicial review of this order as provided in ORS 192.450 and 192.460.

C. Public records held in databases

Due to the nature of modern data storage and retrieval techniques, a report documenting exactly what petitioner seeks likely does not exist. Generally, a public agency is under no obligation to create public records that it does not already maintain in response to a public records request. In the case of a database, as here, the records sought by petitioner do already exist: in fields within the database. The Attorney General writes that, “if the public body has computer programs that it uses to retrieve data for its own purposes, it must use those same programs to retrieve data requested under the Public Records Law.” ATTORNEY GENERAL’S PUBLIC RECORDS MANUAL, p. 8 (2014); see also ORS 192.440(3). The city undoubtedly runs queries against that database to develop reports for its own use. The city can, and must under the Public Records Law, run queries against that data using its existing software to retrieve non-exempt data for public review.

ORDER

Accordingly, the petition is granted, as narrowed by petitioner. The City of Portland is hereby ordered to promptly disclose to petitioner any record contained in the City of Portland’s Arts Tax database of the name and address of, 1) individuals sent notices indicating the City believes them subject to the Arts Tax; and 2) individuals against whom a late fee was imposed.

This disclosure is subject to payment of fees to the city, if any, not exceeding the actual cost in making the information available and consistent with ORS 192.440.

Very truly yours,

A handwritten signature in black ink, appearing to read "Rod Underhill". The signature is fluid and cursive, with the first name "Rod" being particularly prominent.

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.