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November 23, 2015

Rob Cruser
P.O. Box 1556
Fairview, OR 97024

Lori Kraut
Deputy City Attorney
Office of the City Attorney
1221 SW Fourth Avenue, Suite 430
Portland, OR 97204

Re: Petition of Rob Cruser for the disclosure of the transcripts of the witness interviews conducted during the Bureau of Human Resources investigation of Assistant Fire Marshal Doug Jones

Dear Mr. Cruser and Ms. Kraut:

After due consideration, and for the reasons expressed in this letter, my office has decided to grant the request for the release of the redacted interview transcripts from the Bureau of Human Resources' investigation of Assistant Fire Marshal (AFM) Doug Jones.

BACKGROUND

Club Sesso, a private business located at 824 SW First Avenue in Portland, applied for a permit to host an event on June 28, 2014. The fire marshal denied the permit. On June 27, 2014, the club's owner, Paul Smith, called AFM Jones to talk about the denial. During this conversation, AFM Jones told Mr. Smith that no public assembly inspectors were scheduled for the date of his club's event. Based on this representation, the event went forward as planned, without the required permit.

Petitioner Rob Cruser is a Fire Inspector with Portland Fire & Rescue assigned to the Public Assembly Unit in the Fire Prevention Division. Public Assembly Inspectors conduct inspections of businesses in the Portland entertainment district to ensure such businesses protect the safety of their patrons. Unbeknownst to AFM Jones, Mr. Cruser conducted an unscheduled inspection of Club Sesso on June 28, 2014 and discovered the unpermitted event.

Mr. Cruser subsequently learned of AFM Jones' disclosure to Paul Smith and he filed a complaint with the City of Portland's ombudsman. That complaint became the basis of an investigation conducted by the Bureau of Human Resources. As a result of that investigation, Portland Fire & Rescue disciplined AFM Jones.

On January 20, 2015, Nigel Jaquiss of the Willamette Week submitted a public records request to Portland Fire & Rescue seeking the disclosure of the investigation report and all

interview transcripts from the investigation of AFM Jones. On February 4, 2015, Maxine Bernstein of *The Oregonian* submitted a public records request seeking a copy of the investigative report. While the City asserted that several exemptions could apply, it acknowledged a compelling public interest in disclosure and made a copy of the interview transcripts available to the *Willamette Week* and copies of the report available to both newspapers. Names were redacted, but in some instances job titles and employment history were disclosed.

Upon receipt of the disclosure, *The Oregonian* immediately published an article online and provided a link to the redacted report. To date, the *Willamette Week* has not uploaded the report or transcripts to its website or otherwise made the documents available to the public. No agreement or understanding limits any such distribution in the future.

On February 20, 2015, after the disclosures to the *Willamette Week* and *The Oregonian*, Mr. Crusier submitted the following public records request:

I am the “whistle-blower” in the Club Sesso/Assistant Fire Marshal Doug Jones investigation. I have had a couple of recent meetings with Ombudsman Margie Sollinger and I would like to request my own copies of the full transcripts of all interviews conducted during this investigation. I feel as the person who reported this incident, it would be appropriate that I should have the fees waived for this request. Thank you.

The City denied Mr. Crusier’s request and withheld the requested transcripts in reliance on exemptions ORS 192.501(12), ORS 192.502(1), ORS 192.502(2), and ORS 192.502(9).¹ The City’s primary concern is that, as a Portland Fire & Rescue employee, Mr. Crusier will be able to identify the participants and cooperation with future investigations will be chilled

DISCUSSION

A. Waiver of exemption by way of prior disclosure

In an effort to avoid the obvious conclusion that they have waived any claim to confidentiality, the City asks this office to consider their “selective disclosure to Mr. Jaquiss as a disclosure to a single individual rather than to the public at large.” However, there is no basis in law—or in reason—to conclude that disclosure to a reporter at a major newspaper is “selective disclosure.” This office declines to distinguish between Mr. Jaquiss and the newspaper that employs him as the City urges.

The City acknowledges, as they must, that they disclosed in this case because there was a compelling public interest that outweighed AFM Jones’ privacy interests. They cannot now exempt certain members of the public from that public disclosure.²

¹ ORS 192.502(9) is a catchall provision incorporating exemptions from other Oregon statutes that the City cites but does not discuss. This order does not address this provision because the City fails to explain what additional statutory exemptions might apply.

² Mr. Crusier is not uniquely situated. This office has reviewed the redacted transcripts and found that even where names were removed, titles and other identifying information were included in the copies made available to the

In reliance on Attorney General OP-6217, the City argues that a partial disclosure does not necessarily undermine the rationale for an exemption; however, the facts that gave rise to that opinion letter are completely contrary to the situation at hand. *See* Letter of Advice (OP-6217), Mar. 29, 1988. In OP-6217, the Attorney General held that by sharing raw data or preliminary reports with private parties in a research cooperative, a public body did not waive its discretion to refuse to provide the same documents to the public. Here, the situation is exactly reversed. The City *first* shared the information with a newspaper reporter, with the understanding that the newspaper could make the information public, and in fact likely would due to a strong public interest in the matter. An argument that this is a selective waiver that allows withholding the same documents from a single member of the public is not supported by this letter of advice or any other that this office could find.

The City asserts it has an “interest in maintaining the confidentiality of the witness interviews” However, having failed to do so, they cannot now seek the protection of the public records exemptions they enumerate. *See* ATTORNEY GENERAL’S PUBLIC RECORDS AND MEETING MANUAL (2014) at 120 (noting public bodies must be “sensitive to circumstances under which disclosure of information can act as a waiver of exemptions that might otherwise be available.”)

B. ORS 192.501(12) – Personnel Disciplinary Action

ORS 192.501(12) exempts from disclosure a “personnel discipline action, or materials or documents supporting that action.” All of the exemptions described in ORS 192.501 are conditional; they exempt certain types of information from disclosure “unless the public interest requires disclosure in the particular instance.” MANUAL at 29. “Disclosure decisions should be based on balancing those public interests that favor disclosure of governmental records against those public interests that favor governmental confidentiality, *with the presumption always being in favor of disclosure.*” *Id.* The conditional exemptions require public bodies to carefully balance confidentiality against the public interest.

The Court of Appeals has held that public interest requires disclosure of records pertaining to an investigation and disciplinary action where a high ranking Portland Police officer’s integrity and ability to enforce the law evenhandedly was at issue. *City of Portland v. David Anderson*, 163 Or. App. 550 (1999). Here, where the City’s decision to disclose the interview transcripts was an acknowledgement of the high public interest in the integrity of the permit process and evenhanded law enforcement, any claim of exemption must yield to the public’ interest.

C. ORS 192.502(1) – Internal Advisory Communications

ORS 192.502(1) exempts communications within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to any final agency determination of policy or action.

Willamette Week. Other Portland Fire & Rescue employees and certainly others outside the department, including business owners who had obtained permits etc., could identify the individuals by the information included. This did not prevent the City from making the information available to Willamette Week and cannot justify withholding it from Mr. Crusier.

The exemption does not apply unless the public body can show that, in the particular instance, the public interest in encouraging frank communications clearly outweighs the public interest in disclosure. The burden is on the public body to justify application of this exemption. MANUAL at 68. Rather than attempting to meet this burden, however, the City chose to disclose the report and the interview transcripts. Any risk to frank communications in future investigations is of their own making.

The Oregon Court of Appeals has considered the balancing under this exemption and emphasized the heavy burden on the public body to satisfy its terms. *Coos County v. Oregon Dept. of Fish and Wildlife*, 86 Or App 168 (1987). The records in dispute were individual questionnaire responses to a survey sent by the Department of Fish and Wildlife to biologists, to solicit their ratings of the effectiveness of the Forest Practices Act. After examining the responses at issue, the court ordered disclosure based on its assessment of the public interest:

Any “chilling effect” that disclosure may have on future communications within the agency, because of potential embarrassment to the agency or its employees, is not sufficient, in and of itself, to overcome the presumption favoring disclosure.

Id. at 173.

D. ORS 192.502(2) – Information of a Personal Nature

To be exempt from disclosure, the information at issue must be personal and release must constitute an unreasonable invasion of privacy. We have previously considered disciplinary investigation interviews within the fire department and concluded, “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).” *In re petition of Bernstein for The Oregonian*, MCDA PRO 15-14 (2015). We do not see any basis on the facts of this case to reconsider that conclusion.

ORDER

This office finds that disclosure to Mr. Jaquiss was public disclosure and that the City made a voluntary decision to disclose. Therefore, the City of Portland is hereby ordered to provide to Mr. Crusier the transcripts at issue in the same redacted form as previously made available to *Willamette Week*. 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,



ROD UNDERHILL
District Attorney
Multnomah County, Oregon

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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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