



ROD UNDERHILL, District Attorney for Multnomah County

600 County Courthouse • Portland, Oregon 97204 • 503 988-3162 • FAX 503 988-3643
www.mcda.us

October 14, 2016

Samantha Swindler
The Oregonian
1500 S.W. First Avenue, Suite 400
Portland, Oregon 97201

Jason Loos
Deputy City Attorney
City Attorney's Office
1221 S.W. Fourth Avenue, Suite 430
Portland, Oregon 97204

Re: Petition of Samantha Swindler, on behalf of The Oregonian seeking Portland Police Report 14-59523.

Dear Ms. Swindler and Mr. Loos:

In her public records petition, dated October 5, 2016, petitioner Samantha Swindler requests this office to order the Portland Police Bureau (PPB) to disclose copies of the following records:

PPB report 14-59523.

On August 22, 2016 petitioner requested a copy of the above referenced police report, which documents the investigation of a sexual assault allegation. On August 25, 2016 PPB denied her request, citing ORS 192.502(2), the exemption for information of a personal nature. On October 5, 2016 petitioner filed a petition for review with this office.

In response to this petition, PPB has conceded that ORS 192.502(2) does not apply in this instance, but instead asserts the confidential submission exemption, ORS 192.502(4).

In very brief summary, the report documents allegations of sex abuse perpetrated on the victim by an acquaintance while in the victim's apartment. Detective Weinstein of the Portland Police Bureau investigated the case and conducted multiple interviews with the victim as well as other witnesses identified by the victim. Detective Weinstein ultimately suspended his investigation at the request of the victim and the case was never submitted for prosecution.

The city tells us that PPB has adopted a policy where all sexual assault victims are given the option of having their report filed as "confidential." If the victim elects to have their report marked "confidential," then he or she will be contacted if a public records request is made for the report to state a position on disclosure.

This public records case presents some unusual procedural facts. First, in response to a previous public records request, made by the victim, PPB has already released an unredacted version of these police reports to her. Second, the city reports that, in preparing its response to

this petition, it contacted the victim who told them that she already provided The Oregonian with a copy of the reports at issue but that she did not consent to any further release by PPB.

DISCUSSION

We have previously recognized that limited redaction to police reports documenting sexual assaults can be appropriate in certain circumstances under ORS 192.502(2). *In re petition of Franzen*, MCDA PRO 04-02 (2004). As discussed further below, we do not believe that a report of crime by an alleged victim meets the elements of the confidential submission exemption in ORS 192.502(4) and, accordingly, we agree with petitioner that the report must be disclosed in this instance.

A. Confidential Submissions – ORS 192.502(4)

ORS 192.502(4) exempts from disclosure,

Information submitted to a public body in confidence and not otherwise required by law to be submitted, where such information should reasonably be considered confidential, the public body has obliged itself in good faith not to disclose the information, and when the public interest would suffer by the disclosure.

This exemption presents five elements that must be met by an agency seeking to withhold records. A failure on any one means the exemption does not apply.

The police report in this case indicates that the victim was told that her statement, and those of other witnesses, would be submitted to the district attorney for a charging decision. PPB could not in good faith oblige itself to keep confidential what it in fact intended to submit for prosecution. We do not believe that information submitted to a law enforcement agency, by a crime victim, for the purpose of reporting a crime, can be “confidential” within the meaning of ORS 192.502(4).

This is not to say that information submitted to a law enforcement agency can never qualify as a confidential submission. See, *In re petition of Jenny Duchêne*, MCDA PRO 15-37 (2016) (confidential informant, not needed as witness, permitted to remain confidential). But, where a person reports events to police to which he or she would be an essential witness to any criminal prosecution, and that report is made with the hope or expectation of future prosecution, that report cannot meet the standard set out in ORS 192.502(4) for exemption from public disclosure.¹

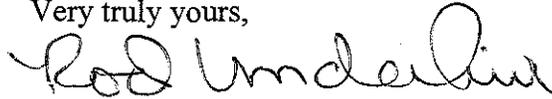
We recognize that the details of a sexual assault and identity of a victim can be extremely private and it takes courage on the part of victims to come forward and make a report. The public records law recognizes that certain information of a highly personal nature is exempt from public disclosure. The bounds of those protections are codified in ORS 192.502(2) and well explored in our precedent and that of Oregon’s appellate courts. In light of the posture of this case PPB has, rightly in our view, conceded that it cannot make the individualized showing necessary to establish an exemption under ORS 192.502(2) in this instance.

¹ Where a case remains open, ORS 192.501(3) would likely exempt those statements from disclosure, but this petition involves a closed case.

ORDER

The petition is granted. The Portland Police Bureau is ordered to promptly disclose all records responsive to this request. 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,

A handwritten signature in black ink that reads "Rod Underhill". The signature is written in a cursive style with a large initial "R" and "U".

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.