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November 1, 2016

Brad Schmidt
The Oregonian
1500 S.W. First Avenue, Suite 400
Portland, Oregon 97201

Mark Amberg
Chief Deputy City Attorney
City Attorney's Office
1221 S.W. Fourth Avenue, Suite 430
Portland, Oregon 97204

Re: Petition of Brad Schmidt, on behalf of The Oregonian, seeking a letter from the U.S. Department of Justice to the City of Portland.

Dear Mr. Schmidt and Mr. Amberg:

In his public records petition, dated October 19, 2016, petitioner Brad Schmidt, on behalf of The Oregonian, asks this office to order the City of Portland to disclose copies of the following records:

> **Written guidance/comments from the U.S. Department of Justice received during the week of Sept. 5 regarding proposed changes to directives manual 1010.10.**

In 2012 the United States Department of Justice (DOJ) filed suit against the City of Portland alleging a pattern of excessive use of force on the part of the Portland Police Bureau against individuals with mental illnesses. The city and DOJ agreed to settle the lawsuit as set out in a lengthy settlement agreement that went into effect in 2014. Since then, discussion has been ongoing between DOJ and the city as to proposed policy changes and events within the scope of this litigation. Directive 1010.10, the topic of this records request, is the Portland Police Bureau's policy on procedures to follow after an officer has used deadly force in the course of his or her duties.

Believing that DOJ had weighed in on a proposed contract amendment between the city and the police union, and specifically on amendments to 1010.10, petitioner filed this request on September 13, 2016. On October 11, 2016 the city denied petitioner's request citing Federal Rule of Evidence 408 (the settlement communications privilege).

On October 12, 2016, amidst significant protests, the Portland City Council approved these amendments that addressed, among other things, investigation of officer uses of force and body camera policy. Local media covered the event extensively. This appeal followed.

In response the city acknowledges that it possesses one document responsive to this request, a letter dated September 5, 2016. The letter itself is captioned "Subject to Common Law Settlement Privilege and Fed. R. Evid. 408." On appeal the city maintains its assertion of FRE

408, by way of ORS 192.502(8), but has additionally asserted the confidential submissions exemption in ORS 192.502(4). This office has reviewed the letter at issue. The city has also made available for this office's review additional communications between the DOJ and the city to provide context to the letter actually at issue.

DISCUSSION

A. "Settlement Privilege" – FRE 408 / ORS 192.502(8)

ORS 192.502(8) exempts from disclosure under the public records law,

> Any public records or information the disclosure of which is prohibited by federal law or regulations.

Federal Rule of Evidence 408 provides, in relevant part,

> Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction: (1) furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and (2) conduct or a statement made during compromise negotiations about the claim [...]

FRE 408, and its Oregon counterpart ORE 408, shield settlement discussions from being admitted against a party at trial. They do not provide a basis for exemption of records from disclosure under the public records law. *In re petition of Lane for The Oregonian*, MCDA PRO 03-06 (2003) (rejecting a similar claim under FRE 408, holding that "a rule of trial admissibility is not a rule of disclosure.") ORS 192.502(8) requires that, for a Federal law to exempt a record from disclosure it must "prohibit" its disclosure. Nothing in the language of FRE 408 prohibits the disclosure of settlement negotiations, rather the rule restricts the admissibility of such negotiations in a trial. This case does not present a reason to revisit our holding in *Lane*: FRE 408 does not create a public records exemption.

B. Confidential Submission – 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.

A failure of any one of the five elements of this exemption renders it inapplicable. It is clear from the records reviewed that DOJ submitted the information with the intent that it remain confidential and that it was not required by law to be submitted. The letter is marked confidential and should, thereby, reasonably be considered confidential. The remaining two elements warrant more detailed consideration.

We believe the city did oblige itself in good faith to keep the submission confidential. The contextual communications provided to this office by the city show that their attorneys expressly, and prospectively, indicated to DOJ that it considered the communications from DOJ that ultimately resulted in the letter at issue here to be confidential and would assert public records exemptions if the document were requested. This is what distinguishes the present case

from previous similar decisions. See, *In re petition of Lane for The Oregonian*, MCDA PRO 03-06 (2003) (unsolicited pre-filing offer, captioned "CONFIDENTIAL SETTLEMENT COMMUNICATION," from DOJ not a confidential submission because no indication that the city told DOJ it would keep the matter confidential before it was submitted); *Petition of Meadowbrook*, Att'y Gen. PRO (Apr. 5, 2002) (written offer captioned "For Settlement Purposes Only – Confidential" ordered disclosed because "silence on the part of the public body" is not sufficient showing of ex ante commitment not to disclose). We cannot think of anything more that the city could have done to prospectively signal its intent to keep this document confidential.

The final, and thorniest, question is whether the public interest would suffer by the disclosure of this letter. The public has many relevant interests, some of which would suffer by disclosure, others of which would be promoted by disclosure. Among these are:

- transparency of city government as to a significant issue;
- effective and efficient civil rights enforcement;
- assessing DOJ in its civil rights enforcement mission; and
- a police union contract that promotes effective and accountable law enforcement in our community.

The test under this section cannot be whether any one interest would suffer by disclosure but rather, on balance, whether the sum total of the public interest would suffer. This is an amorphous standard, but is what the public records law requires us to assess.

As it stands now, the public knows what the final draft of the police union contract is, what was changed, and which city commissioners voted for it. The public does not know what, if any, effect DOJ had on the final product.

We have previously held that the back-and-forth of union contract negotiations is exempt from disclosure under the public records law. *In re petition of Szeto for Oregon Politico*, MCDA PRO 10-03 (2010). In *Szeto* we held that "there is no greater need for frank communication between employers and employees than over the bargaining table." *Id.* at 3. We found, under a different public records exemption in that case, that during a particularly contentions union contract negotiation involving TriMet, the public interest in encouraging frank communication clearly outweighed the public interest in disclosure.

The present case differs from *Szeto* in that it involves a tripartite negotiation between the city, the police union, and DOJ, each of which bring different interests to the table. The increased complexity of this negotiating posture, we believe, increases the need for free and frank communication between the parties.

Applying our reasoning from *Szeto*, as well as our general assessment of the situation, it is clear that the public interest in efficient civil rights enforcement would suffer by disclosure. A precedent would be set for future negotiations under this litigation. Efficient resolution of potential disputes can be more easily had through less formal discussion than in the harsh light of adversarial litigation. The public can, albeit imperfectly, evaluate DOJ's enforcement action by its end results and periodic public court proceedings. The stronger argument for disclosure is in evaluating the actions of the city's negotiating team, and elected officials ultimately responsible for ratifying their actions. The extent to which their decisions are altered or not altered by DOJ involvement would certainly be of interest to the public.

We admit that the choice between these competing interests is a close one but, in this instance, we agree that the city may keep the requested document confidential if it chooses. DOJ's presence in what would otherwise be confidential negotiations should not, in itself, cause those negotiations to become public. Rather, DOJ's presence as an outside observer serves to assure the public that its interests are being looked after. The public may assess if this is, in fact, the case through the annual public review of the settlement agreement in front of Judge Simon.

ORDER

The petition is denied.

Very truly yours,

ROD UNDERHILL
District Attorney
Multnomah County, Oregon

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