



ROD UNDERHILL, District Attorney for Multnomah County

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June 20, 2016

Nigel Jaquiss
Willamette Week
2220 N.W. Quimby St.
Portland, Oregon 97210

Linda Law
Deputy City Attorney
Office of the City Attorney
1221 S.W. Fourth Ave., Suite 430
Portland, Oregon 97204

Re: Petition of Nigel Jaquiss, for Willamette Week, requesting records relating to complaints made against former Fire Chief Janssens

Dear Mr. Jaquiss and Ms. Law:

In his public records petition under ORS 192.410 et seq., petitioner Nigel Jaquiss, on behalf of Willamette Week, requests this office to order the City of Portland to disclose the following records:

Anything that Fire Bureau employees or their agents presented to the city in writing or verbally (of which there are notes or other written or audio record) regarding Chief Janssens and/or her management of the bureau prior to the mediation.

Former Portland Fire Bureau Chief Erin Janssens retired from the bureau in April of this year after 31 years as a firefighter and just under four years as chief. Petitioner states that his investigation has led him to believe that that departure was precipitated, in part, by one or more senior fire officials coming forward to the city with complaints about Chief Janssens.

He filed an initial public records request, which was denied on the grounds that the records involved a mediation.¹ A subsequent records request, reframed as stated above, was denied on the grounds that the information sought was submitted to the city in confidence. This second denial is the basis of the present petition.

The city has provided this office with the records at issue for purposes of our statutory review.

¹ The Oregonian reported in January that the city's human resources director had offered to organize "mediated conversations" with the chief, her command staff and non-sworn employees.

DISCUSSION

A. Confidential Submission – 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.

As both parties agree, the city is obligated to satisfy five elements in order to exempt a record under this section:

- 1) The informant must have submitted the information on the condition that it would be kept confidential.
- 2) The informant must not have been required by law to provide the information.
- 3) The information itself must be of a nature that reasonably should be kept confidential.
- 4) The public body must show that it has obliged itself in good faith not to disclose the information.
- 5) Disclosure of the information must cause harm to the public interest.

It is readily apparent from the city's confidential submission that the first and fourth elements are satisfied.

As to the second element, petitioner points to Human Resources Administrative Rule 11.03 which provides "all city employees are expected to report observed unlawful or improper actions by a city official." An administrative rule setting out an "expectation" for city employees is not a "law" that would require disclosure under the second element.

Resolution of the fifth element controls the third. That is, if disclosure of the information would harm the public interest then under any but the most bizarre circumstances it must be of a nature that reasonably should be kept confidential.

We have recently ordered the city to disclose investigatory human resources investigative interviews, including those pertaining directly to Chief Janssens. *In re petition of Bernstein for the Oregonian*, MCDA PRO 15-14 (2015). Accordingly, we reject the premise that any public agency's human resources work must inherently be kept confidential. Likewise, the mere fact that the agency promises confidentiality cannot, itself, support a finding that disclosure would harm the public interest. To read the statute that way would eliminate all but the first and fourth elements.

The distinction between this case and *Bernstein* is two-fold, 1) the interview subjects in *Bernstein* had already been identified in print; and 2) the records in *Bernstein* were the result of a formal city investigative process whereas the records in this case are unsolicited submissions from a city employee.

In most cases where we address the public's interest in disclosure of records we must find that the public interest requires disclosure. ORS 192.502(4) is unique in that it requires a finding that the public interest would be actively *harmed* by the disclosure of the record at issue in order to uphold a claim of exemption. This is a higher burden for the agency.

A review of applicable precedent reveals strong agreement that the identity of informants promised confidentiality should be maintained.² See, e.g., *Hood Tech. Corp. v. Oregon Occ. Safety & Health Div.*, 168 Or App 293, 306 (2000) (“Where a complainant has acted in good faith, disclosure [of his identity] is contrary to the public interest.”) We agree that the public interest would be harmed by disclosure of any information that would tend to identify the informant.

The city argues that disclosure of even non-source identifying information would deter employees from reporting concerns in the future. Be that as it may, the Court of Appeals has previously rejected that argument. *Gray v. Salem-Keizer School District*, 139 Or App 556, *rev. den.* 323 Or 265 (1996). *Gray* involved a school teacher who was denied employment based, in part, on two negative references completed by past colleagues. As here, the agency asserted that disclosure, even of the non-identifying contents of the forms, would chill future cooperation with the evaluation process. While agreeing that the public had a high interest in fully vetting applicants for teaching positions, the court found that,

[t]o the extent that the District's ‘chilling effect’ concern is well-founded, that concern can only pertain to sources’ names or to information tending to disclose their identities. We perceive no reason—and the District offered none—why the disclosure of the reference forms, with source-identifying information deleted, would deter future sources from submitting candid evaluations to the District.

Id. at 566. We have inquired of the city and, as in *Gray*, the city cannot offer a reason why the disclosure of non-identifying contents of the complaint would chill future participation in investigations and, thereby, harm the public interest.

The city does assert that the public interest is harmed by the disclosure of an unverified complaint. We disagree. The public has an interest in the operations of its government. That includes how (and indeed whether) its government chooses to vet allegations against high-ranking government officials. The city is, of course, free to provide as much additional information as it likes to contextualize, rebut, or otherwise address the information contained in these records.

The records submitted include a three page printed document and a two page handwritten document. Attached to the city's copy of this order is the printed document with redactions indicated that we believe effect the reasoning of this order.³ The handwritten document is

² The one outlier is *In re petition of Bottomly for The Oregonian*, MCDA PRO 10-06 (2010), where we held that in the case of a fatal officer-involved shooting the public interest compelled disclosure of the names of civilian eyewitnesses even where they had been assured of confidentiality by investigators.

³ For example, the names of certain fire employees appear in the records. It can reasonably be inferred that those employees are not the informant and, as such, would properly be redacted because that would “tend to identify” the informant within his or her particular unit.

sufficiently fragmentary and illegible that it is not readily discernable what exactly might or might not be able to identify the complainant. It may be withheld.

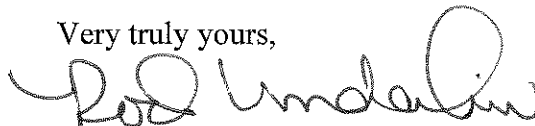
We readily acknowledge that as outside observers it is not possible for this office to assess with perfect accuracy whether a particular piece of information would or would not be able to be used by someone intimately familiar with fire bureau operations to identify the complainant. It seems that the majority of the information is general and not able to be traced back to a particular source. But, we will consider additional argument from the city if it believes that additional, specific, redactions are needed to preserve the anonymity of the complainant.

We do not, however, find that information that locates the complainant as working, along with many others, in a particular building, station, or office environment is information that would "identify the complainant" as we use that phrase here.

ORDER

The petition is granted as to the three page type-written document, subject to redaction consistent with this opinion. The petition is denied as to the two-page handwritten document.

Very truly yours,

A handwritten signature in black ink, appearing to read "Rod Underhill". The signature is fluid and cursive, with a large loop at the end.

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.