



ROD UNDERHILL, District Attorney for Multnomah County

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February 21, 2017

Carli Brosseau
The Oregonian
1500 S.W. First Avenue, Suite 400
Portland, Oregon 97201

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

Re: Petition of Carli Brosseau, on behalf of The Oregonian seeking a July 29, 2016 memo from Portland Police Bureau Commander Dave Hendrie to Assistant Chief Matthew Wagenknecht.

Dear Ms. Brosseau and Ms. Bechthold:

In her public records petition, dated February 1, 2017, petitioner Carli Brosseau requests this office to order the Portland Police Bureau (PPB) to disclose the following record:

the July 29, 2016 memo from Commander Dave Hendrie to Assistant Chief Wagenknecht regarding an officer accused of intentionally hitting a cyclist with a patrol vehicle.

The United States Department of Justice (DOJ) cited, and quoted part of one sentence from, this memo in a October 2016 memorandum entitled "Settlement Compliance Assessment" that it filed in federal district court. This filing was in support of a status hearing on the settlement agreement between the City of Portland and DOJ in a civil rights lawsuit involving the Portland Police Bureau. Our discussion of the facts in this case is substantially restricted because little beyond what DOJ put in its memorandum is known publicly about the underlying facts or the subsequent internal investigation.

Based on the DOJ filing, the public is aware in relevant part that: 1) a police officer used his police vehicle to intentionally strike the back tire of a bicycle; 2) there was disagreement between Independent Police Review (IPR) and PPB as to whether or not this case should be investigated as a "use of deadly force." We feel comfortable adding to this that the use of force was in furtherance of the officer's official duties. Notwithstanding DOJ's summary of this incident, the city attorney's office has confirmed that this incident was, in fact, investigated as a use of deadly force. The records reviewed by this office in this case support the conclusion that, whether or not this was technically a "use of deadly force" within PPB policy, the incident was reviewed as such.

DISCUSSION

A. Police Personnel Investigations – ORS 181.854(3)

ORS 181.854(3) provides that:

A public body may not disclose information about a personnel investigation of a public safety employee of the public body if the investigation does not result in discipline of the employee.

The memorandum at issue contains information about the conduct of a personnel investigation, which means this exemption presumptively applies. However, the exemption is conditional and may exempt records only if the public interest does not require disclosure. ORS 181.854(4)(a).

We have long followed the criteria announced in *Petition of Foster*, MCDA PRO 96-31 (1997), in evaluating the public interest in personnel discipline cases. *Foster* pre-dated the enactment of ORS 181.854(3), and thus necessarily assumed that misconduct had occurred, and a disciplinary sanction had been imposed. Now, ORS 181.854(3) shields this information for investigations of police officers not resulting in discipline as well. In *Foster* we found that,

cases of disciplinary records may merit disclosure in the public interest even though the conduct of the disciplined employee is not serious misconduct as previously described, where circumstances raise an issue unduly harsh (or unduly lenient), arbitrary, irrational or discriminatory administration of discipline by management and thus illuminate management's conduct of the public business.

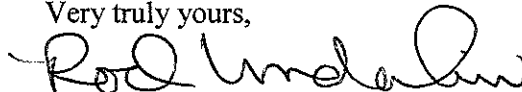
We believe the quoted reasoning from *Foster* is likewise applicable to evaluating the public interest under ORS 181.854(4)(a).

The main point of initial disagreement between PPB and IPR appears to have been whether the intentional use of a police vehicle against a bicycle qualifies as a "use of deadly force" or a "use of force" under PPB policies. The underlying facts are less sensational than one might conclude from reading the necessarily brief summary of the incident in DOJ's memorandum. This case is unusual because of the involved vehicles, but does not particularly illuminate PPB's investigation or review process as distinct from any other use of force case. Having reviewed the records at issue we are satisfied that the concerns outlined in *Foster* are not implicated in this case.

ORDER

Accordingly, the petition is denied.

Very truly yours,



ROD UNDERHILL
District Attorney
Multnomah County, Oregon