



ROD UNDERHILL, District Attorney for Multnomah County

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May 10, 2017

Mark J. Makler
Code 3 Law, LLP
515 N.W. Saltzman Road #811
Portland, Oregon 97229

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

Re: Petition of Mark Makler seeking records from the Independent Police Review

Dear Mr. Makler and Mr. Amberg:

In his public records petition, dated April 26, 2017, petitioner Mark Makler requests this office to order the Portland city auditor's office to release:

all IPR [Independent Police Review] materials associated with IPR Cases 2016-B-0030; and 2016-B-0014; and 2016-B-0011.

The city auditor's office, of which IPR is a part, denied petitioner's request on April 25, 2017 citing ORS 181A.830(3), this appeal immediately followed.

Petitioner has specifically requested IPR materials in his request, and we confine our review and discussion to those materials generated by IPR in the course of their work on these matters. As to B-0011, this is a single page letter memorializing IPR's review of the internal affairs investigation. As to the other two files, IPR had a more direct role in the investigation and, accordingly, possesses extensive materials.

IPR case 2016-B-0014 involves the city's investigation of former police chief Lawrence O'Dea after his accidental shooting of a friend during a hunting trip. IPR case 2016-B-0030 covers the connected investigation of the then-assistant chiefs and the internal affairs captain relating to what each knew and what each then did after former-Chief O'Dea told them about the shooting. IPR case 2016-B-0011 generally involves an investigation into a non-sworn police employee accused of making racially inappropriate remarks as well as sworn employees' responses to learning this information.

Each of these investigations is at different stages, some have recommended findings, but none have reached a final determination of exoneration or imposition of discipline.

Petitioner is an attorney who represents one of the subjects in the B-0030 and B-0011 investigations. However, he additionally asserts a public interest in these cases beyond his particular representation as a reason to order disclosure.

Constantin Severe, the IPR director, acknowledges the intense public interest in the investigations related to the O’Dea shooting, and has informed this office that he intends to release the B-0030 and B-0014 investigations publicly upon their completion. He anticipates this to occur within a month.

For the reasons discussed below, we do not believe that the public interest compels a more immediate disclosure of these materials.

DISCUSSION

A. Law Enforcement Personnel Investigations – ORS 181A.830(3) / 192.501(12)

ORS 181A.830(3) conditionally exempts from disclosure:

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.

ORS 192.501(12) conditionally exempts from disclosure:

A personnel discipline action, or materials or documents supporting that action.

Under Oregon law all disciplinary investigations of public safety employees are exempt from disclosure unless the public interest requires in a particular instance.

Absent unusual circumstances not present here, these exemptions provisionally apply to ongoing investigations because the public agency cannot yet determine if discipline will be imposed or not. See, e.g. *Petition of Schmidt*, MCDA PRO 14-26 (2014).

Two of the subjects of these investigations, Assistant Chief Donna Henderson and Chief O’Dea have retired from law enforcement since their commencement. We have never expressly addressed whether or not ORS 192.501(12) applies in cases where the employee resigns or retires prior to the conclusion of the investigation. *Petition of Schmidt*, MCDA PRO 15-03 (2015) (so noting). Here again, we need not decide that question because the involved employees were law enforcement employees covered by ORS 181A.830(3). The investigations are unquestionably “personnel investigations,” and, since the individuals are no longer employed by PPB, the investigation cannot result in discipline. Accordingly, we can apply the same analysis to those individuals still employed by PPB and those who have retired or resigned.

Since the exemptions facially apply, we turn to the public’s interest in disclosure. IPRs agreement to release the B-0030 and B-0014 investigations upon their conclusion acknowledges and concedes the public interest in these investigations. However, petitioner has articulated no compelling argument why the public interest requires disclosure now as opposed to in the near future once they are final. His representation of one of the involved parties could probably benefit from immediate disclosure, but this is a private interest that does not weigh in the balancing required by ORS 192.501 and 181A.830(4)(a). ATTORNEY GENERAL’S PUBLIC RECORDS MANUAL (2014) at 30 (“Public interest means the value to the public at large, not to a particular person at a particular time.”)

As to the B-0011 investigation, it is not such an unusual case as to justify an exception to the general rule that investigations should reach their natural conclusion before determining release. We do not find there is a public interest in disclosure of the IPR materials relating to this investigation at this time. This could, of course, change if the investigation results in unduly harsh, unduly lenient, or arbitrary discipline. These are all factors that weigh in the public

Page 3
May 10, 2017
Petition of Mark Makler

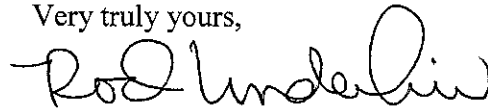
interest calculus under *Foster* and are factors that we cannot address at this time since the issues are not ripe. *Petition of Foster*, MCDA PRO 96-31 (1997).

In sum, we are not today finding that the public has no interest in these cases. To the contrary the B-0030 and B-0014 cases are amongst the most watched investigations IPR has ever handled. Rather, we find that public's interest is not sufficiently advanced by disclosure to this requestor, at this time, to justify overriding the public records exemptions contained in ORS 192.501(12) or 181A.830.

ORDER

Accordingly, the petition is denied at this time, with leave to renew upon conclusion of the investigations.

Very truly yours,

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

ROD UNDERHILL

District Attorney

Multnomah County, Oregon