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January 29, 2018

Benjamin Kerensa

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

Re: Petition of Benjamin Kerensa seeking a memo from the Independent Police Review to the Portland Police Bureau regarding case 2016-C-0407

Dear Mr. Kerensa and Mr. Amberg:

In his public records petition, dated January 17, 2018, petitioner Benjamin Kerensa requests that this office order the City of Portland's Independent Police Review (IPR) to disclose the following records:

copy of memorandum prepared by IPR/CRC addressed to Portland Police Bureau informing of the CRC [Citizen Review Committee] determination in IPR case 2016-C-0407.

IPR case 2016-C-0407 involves a complaint filed by Mr. Kerensa arising out of an interaction he had with a Portland Police Bureau (PPB) sergeant during a protest.¹ According to the case summary published on IPR's website, the involved sergeant was accused of improperly threatening to arrest Mr. Kerensa as a result of Mr. Kerensa filming him during a protest. PPB's initial determination about the allegation against the sergeant was: "Not Sustained with Debrief."

IPR disagreed with this determination and voted unanimously to recommend a finding of "Sustained." The Portland Mercury has published multiple stories about the IPR proceedings in this case and recounts that, in the Citizen Review Committee's public meeting, it was made public that the sergeant admitted that he had lied to petitioner when he told him that he "could be arrested" for filming the police.² Whether or not the false statement that petitioner "could be arrested" constituted a "threat" was the issue under consideration. CRC recommended that PPB reverse its determination and sent the case back for further action by PPB. On January 16, 2018

¹ Although we do not identify the sergeant in this order, the sergeant's name is known to petitioner and has also been published in the Portland Mercury's reporting on this case.

² "A Cop Lied to Get a Portland Activist to Stop Filming," Portland Mercury (Dec. 13, 2017) (<https://www.portlandmercury.com/news/2017/12/13/19542462/a-cop-lied-to-get-a-portland-activist-to-stop-filming>)

the Mercury reported that the chief of police decided to adopt the CRC's recommendation and sustain the allegation against the sergeant.³

The memo sent to PPB communicating CRC's decision is the document at issue in this appeal. The city asserts that the memo is exempt from disclosure under the public records law as a result of ORS 192.501(12), the personnel discipline action exemption, and ORS 181A.830(3), which applies to certain investigations of law enforcement officers that do not result in discipline.

For the reasons discussed below, we grant the petition in part and deny the petition in part.

DISCUSSION

A. Personnel Disciplinary Records – ORS 192.501(12)

ORS 192.501(12) conditionally exempts from disclosure,

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

The city is correct that we have generally considered ORS 192.501(12) presumptively applicable to pending disciplinary proceedings. This is because 1) it is not yet possible to determine if discipline will or will not be imposed and 2) many of the factors that relate to assessing the public's interest in disclosure relate to the ultimate resolution of the disciplinary action which, self-evidently, cannot be assessed until the final imposition of discipline.

We do not see any uniqueness here that would demand a different result in this case. We do not write separately to address the applicability of ORS 181A.830(3) because the outcome is the same.

However, having reviewed the memorandum at issue, the final two paragraphs do not relate to a disciplinary action. Rather, the CRC has used some facts from this case to alert PPB to policy and training concerns that, in their view, PPB must immediately address. These policy recommendations from a citizen watchdog agency do not fit within the meaning of either ORS 192.501(12) or ORS 181A.830.

These two paragraphs do contain "information" about a personnel investigation of a public safety officer that has not, yet, resulted in discipline, but to the extent that ORS 181A.830 applies, we find that the public interest requires disclosure under ORS 181A.830(4)(a).

We reach this conclusion because the substance of the factual information contained in the paragraph beginning "In addition to the Committee's recommendation..." that relates to the sergeant's potential discipline has already been published in the Mercury and discussed in a

³ "Chief Outlaw Sides With Civilian Oversight Board, Agrees a Sergeant Should be Disciplined for Wrongly Threatening to Arrest an Activist," Portland Mercury "Blogtown," (Jan. 16, 2018) (<https://www.portlandmercury.com/blogtown/2018/01/16/19609174/chief-outlaw-sides-with-civilian-oversight-board-agrees-a-sergeant-should-be-disciplined-for-wrongly-threatening-an-activist>)

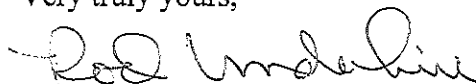
public meeting. The redisclosure of this information would not materially increase the risk of public pillory for misconduct that these exemptions seek to address. On the other hand, the information is directly relevant to a generally applicable policy issue of serious concern to the citizens overseeing the police discipline process. The last sentence of this paragraph, beginning "The Bureau..." may be redacted as supporting a disciplinary action.

It is unclear if the facts related in the last paragraph of the memo have yet been publicized, however they do not purport to recount misconduct on the part of the sergeant. Rather, the facts in the first sentence of this paragraph are the sergeant's observation on general practices in the police bureau. The remainder of the paragraph is an exhortation to the police bureau's command staff to address a policy issue. We do not find any of this even provisionally within the scope of ORS 192.501(12) or ORS 181A.830.

ORDER

The header information of the memo (to, from, date, re) and the last two paragraphs (excepting the one sentence identified above) must be disclosed, as to the rest of the memo, the petition is denied. This disclosure is subject to payment of fees, if any, not to exceed the bureau's actual cost in making the records available.

Very truly yours,



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.

18-01