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

Re: Petition of Benjamin Kerensa Independent Police Review case file 2016-C-0407

Dear Mr. Kerensa and Ms. Bechthold:

In his public records petition, dated March 1, 2018, petitioner Benjamin Kerensa requests that this office order the City of Portland's Independent Police Review (IPR) to disclose the following records:

a copy of the entire IPR/CRC file for case 2016-C-0407.

In response to this request, the City provided petitioner with all communications between him and IPR, the transcript of his own interview with the IPR investigator, and certain documents that were already publicly available. The City has also provided him a copy of a December 12, 2017 memo from IPR to the Portland Police Bureau redacted consistently with this office's January 29, 2018 order resolving Mr. Kerensa's first public records petition to this office in this matter.

In that January 29, 2018 order we summarized the factual and procedural background of this case as follows:

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. 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."

[The Citizen Review Committee (CRC)] 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. 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 the Mercury reported that the chief of police decided to adopt the CRC's recommendation and sustain the allegation against the sergeant.

Petition of Kerensa, MCDA PRO 18-01 (2018) (Kerensa I).

In the time since we last addressed this case, the decision as to what, if any, discipline will be imposed on the sergeant as a result of this misconduct finding has not been made. The disciplinary process is ongoing. The City also informs us that, at petitioner's request, PPB is conducting a criminal review of the sergeant's conduct in this case for eventual referral to this office.

The City has made available to us the entire IPR/CRC file in this case, which we have reviewed. In so doing we did locate four documents (the minutes of the December 6, 2017 CRC meeting, a copy of a newspaper article, a printout from the Oregon eCourt Information System, and a generic schedule) that the City now agrees should be disclosed. Because the City has indicated it will disclose these to Mr. Kerensa, there is no longer a disagreement for us to resolve as to these documents and we do not address them further.

As to the remaining documents, the City asserts they are exempt from disclosure under ORS 192.345(12), the personnel disciplinary exemption; ORS 181A.830(3), the law enforcement discipline investigation exemption; and ORS 192.345(3), the criminal investigatory exemption. For the reasons discussed below, we deny the petition under ORS 192.345(12) and, as a result, do not write separately to address the other asserted exemptions.

DISCUSSION

A. Personnel Disciplinary Records – ORS 192.345(12)

ORS 192.345(12)¹ conditionally exempts from disclosure,

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

As a threshold matter, petitioner agrees (or at least has chosen not to contest) that this exemption applies to any materials generated by the police bureau as part of its disciplinary process. Rather, he takes the position that IPR is a separate agency and that any materials that it generated as part of its review of the case cannot be exempted because IPR is, by its name and purpose, "independent" of the police bureau.

ORS 192.345(12) does not reference the specific public body to which it applies. Reading ORS 192.345 in its relevant entirety it states: "The following public records are exempt from disclosure under ORS 192.311 to 192.478 unless the public interest requires disclosure in the particular instance: [...] A personnel discipline action, or materials or documents supporting that action." Nothing in this language limits the reach of this exemption to only documents generated by the department or agency of a city for which the disciplined employee works.

¹ In 2018 ORS Chapter 192 was administratively renumbered, without substantive change. All exemptions formerly cataloged in ORS 192.501 are now found in ORS 192.345.

Additionally, it is clear here that IPR is a “part” of the formal disciplinary process for PPB. This particular case illustrates the point: the review and opinion of the CRC and IPR directly resulted in a misconduct finding, which would otherwise have been dismissed, being sustained. The IPR process and file would thus be “documents supporting” a personnel discipline action presuming that some form of discipline is ultimately imposed.

ORS 192.345(12) is a conditional exemption, meaning that, if it applies, we must then consider whether the public interest nonetheless requires disclosure.

In *Kerensa I* we wrote:

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.

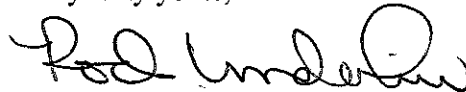
We do not see any uniqueness here that would demand a different result in this case. We do not write separately to address the applicability of ORS 181A.830(3) because the outcome is the same.

In the two months since *Kerensa I*, there has not been a significant change in circumstance that would lead us to reconsider our public interest analysis. In *Kerensa I* our previous disclosure order was narrow; we found only that the public interest required disclosure of the very limited information about the sergeant contained in the last two paragraphs to illustrate the larger policy recommendations of the CRC. As to the portions of the memorandum actually relevant to the disciplinary process, our assessment was as quoted above.

ORDER

Accordingly, the petition is denied.

Very truly yours,



ROD UNDERHILL

District Attorney

Multnomah County, Oregon