



**ROD UNDERHILL**, District Attorney for Multnomah County

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May 21, 2018

Maxine Bernstein  
The Oregonian  
1500 S.W. First Avenue, Suite 400  
Portland, Oregon 97201

Nick Budnick  
Portland Tribune  
6605 S.E. Lake Road  
Portland, Oregon 97222

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

Re: Petitions of Maxine Bernstein, on behalf of The Oregonian, and Nick Budnick, on behalf of the Portland Tribune, seeking a copy of an arbitration order relating to Portland Police Officer Alfonso Valadez

Dear Ms. Bernstein, Mr. Budnick, and Ms. Bechthold:

In her public records appeal, dated May 8, 2018, petitioner Maxine Bernstein, asks this office to order the Portland Police Bureau to disclose:

**the arbitrator's ruling that overturned the Portland police firing of Officer Alfonso Valadez Jr.**

In his public records appeal, dated May 18, 2018, petitioner Nick Budnick requests, among other things, access to these same records.<sup>1</sup>

Officer Valadez's employment was terminated last year by then Portland Police Chief Marshman. The Police Review Board (PRB), which evaluates officer misconduct cases and makes recommendations to the chief, released an anonymized case summary dated June 27, 2016 that states as follows:

"Complainant alleged Employee #1, while off duty, had oral sex and intercourse with complainant while complainant was unable to consent during a party at Employee #1's home. Complainant went to the hospital to have a sexual assault examination the following day and reported the incident to the local jurisdiction."

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<sup>1</sup> We will resolve separately the other disputed records in Mr. Budnick's petition, and write here only to address the arbitration order.

The PRB recommended that this allegation of sexual misconduct not be sustained. But did recommend a suspension without pay of 40 hours for acting “unprofessionally and in a matter tending to bring reproach or discredit to the Police Bureau by having sexual contact with complainant after complainant had consumed alcohol.” The PRB summary noted that the Chief disagreed with these findings, sustained the first allegation, and terminated the employee. Nothing in the PRB summary connects this particular case to Officer Valadez, but Mr. Budnick has publicly reported the connection in the Portland Tribune.

Reporters from at least two news organizations have made public records requests in Clark County, Washington for criminal investigation materials relating to a reported sexual assault at Officer Valadez’s home which, they believe, is the same incident for which he was disciplined. In response to that request, Officer Valadez has filed suit in Clark County Superior Court seeking to enjoin the Clark County Sheriff’s Office (CCSO) from releasing any investigation reports, stating that the involved records pertain to the investigation of “an unsubstantiated allegation of sexual assault against Valadez at his then residence in Clark County, Washington.”

In response to a union grievance relating to the termination of Officer Valadez, an arbiter ordered his employment be reinstated. It is this order that is the subject of the present appeal.

The Portland Tribune reports that Officer Valadez returned to active employment on April 5, 2018. On April 19, 2018 while on duty, Officer Valadez pursued a fleeing car, suspected of hit and run, the wrong way down I-84. The pursuit ended when the pursued driver crashed into an oncoming car and died.<sup>2</sup> Officer Valadez is presently pending a new personnel investigation relating to that incident.

The city has provided us with three documents responsive to this request, a 20 page arbitration “Opinion and Award,” a two page “Clarification Letter,” and a one page “Amended Award.” For the reasons discussed below, we order these records released.

## DISCUSSION

### A. Personnel Discipline Action – ORS 192.345(12)

ORS 192.345(12) conditionally exempts from disclosure,

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

The arbitration order in this case is a document that supports a personnel discipline action because, Officer Valadez’s reinstatement notwithstanding, the order did validate some level of discipline. The question, then, is whether the public interest nonetheless requires disclosure of that order.

To evaluate the public’s interest in disclosure under ORS 192.345(12) we rely on guidelines known as the *Foster* criteria. *Petition of Foster for The Oregonian*, MCDA PRO 96-31 (1997). These guidelines are, in summary:

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<sup>2</sup> See, “Portland cop probed after wrong-way pursuit ends in death,” PORTLAND TRIBUNE (Apr. 26, 2018) (<http://pamplinmedia.com/pt/9-news/393717-286537-portland-cop-investigated-after-pursuit-ended-in-death>)

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1. Serious misconduct by a government employee should be disclosed;
2. Generally, termination from employment or other discipline for cause is serious misconduct if it is based on corruption (including theft of public property), abuse of power, misconduct that impairs the mission of the agency, or criminal behavior;
3. Less serious misconduct may require disclosure if repeated violations fairly raises the issue of imprudent management of public employees;
4. Cases evidencing systematic misconduct within a particular agency or part of an agency that shed light on the effectiveness of management may require disclosure even if, individually, the instances of misconduct are not serious;
5. Less serious misconduct may require disclosure in the public interest where circumstances raise a question of unduly harsh (or unduly lenient), arbitrary, irrational or discriminatory administration of discipline by management;
6. Lastly, public employees should not be subjected to public disclosure of disciplinary violations that do not fit into a category above where such would not significantly promote the public's understanding of the manner in which government business is carried out.

The city has interpreted our precedent to stand for the proposition that “in order to give effect to the legislature’s intent in enacting public records exemptions, [the district attorney] must uphold the exemptions unless extraordinary circumstances require disclosure.” Rather, in *Petition of Brosseau*, MCDA PRO 16-04 (2016), we wrote,

We must give effect to the legislature’s intent in choosing to enact a public records exemption. If ORS [192.345(12)] is to have any meaning then, absent extraordinary circumstances not present in this case, it must at very least cover discipline imposed on low ranking employees of an agency that does not lead to termination of employment.

The city’s gloss of this statement would read the public’s interest in disclosure out of the public records law generally, which we cannot accept. That said, we do find the present circumstances to be extraordinary.

The immediate effect of the arbitration order in this case, which overturned the chief’s decision to terminate his employment, was to place Officer Valadez back on the street where, two weeks later, he was again under investigation and this time in an incident involving a fatality. To the public’s eye the outcome in this case is either the result of an unfortunate coincidence of explainable and individually justifiable events involving Officer Valadez, or symptomatic of a structural deficiency in the police disciplinary process. In either case, secrecy would severely undermine the public’s confidence in the administration of effective discipline at the police bureau.

Under the fifth and sixth *Foster* factors we believe that release of this order will substantially advance the public’s understanding of the complex police disciplinary process in

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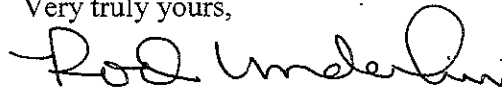
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general, and provide much needed clarity as to the unusual twists and turns of this case in particular. We do not mean to suggest that release of arbitration orders will always, or even frequently, be of such public interest as to override the applicable exemptions in cases involving police officers. But on the unique facts of this case, the public interests requires disclosure.

**ORDER**

Accordingly, the petition is granted. The city is ordered to promptly disclose to petitioners the arbitration opinion and award, the clarification letter, and the amended award. This release is subject to payment of fees, if any, not to exceed the actual costs in producing the records.

Very truly yours,



ROD UNDERHILL

District Attorney

Multnomah County, Oregon

**Notice to Public Agency**

Pursuant to ORS 192.411, 192.415, and 192.431(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.

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