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Maxine Bernstein
Staff Writer
The Oregonian
1320 S.E. Broadway
Portland, OR 97201-3499

Stephanie Harper
Deputy City Attorney
Office of the City Attorney
1221 SW 4th Avenue, Suite 430
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Re: Petition of Maxine Bernstein for The Oregonian received June 6, 2012, to disclose certain records of the City of Portland.

Dear Ms. Bernstein and Ms. Harper:

BACKGROUND

On this public records petition, ORS 192.410 et. seq., petitioner Maxine Bernstein requests the District Attorney to order the City of Portland and its employees to produce the following records:

> **The Ronald Frashour arbitration transcripts for the testimony of Chief Mike Reese, Lt. Robert King and training instructor Ryan Coffey, as well as all the Portland bureau's training review drafts written and presented for the arbitration proceeding,**

Petitioner made her request for the documents in an April 30, 2012 email to Kim Sneath, Office Administrator at the City Attorney' s Office. Deputy City Attorney Stephanie Harper sent an email response on May 9, 2012. Ms. Harper asserted that both the arbitration transcripts and the training review drafts were exempt under ORS 192.501(12), personnel discipline actions. Ms. Harper further maintained that the training drafts were exempt under ORS 192.502(1), internal advisory communications, and subject to a protective order of Federal Judge Michael Mosman. She also cited attorney-client privilege.

In her petition, Ms. Bernstein argued that the public had " a strong interest in viewing the transcripts of the case before the arbitrator. City of Portland taxpayers continue to foot the bill as the city fights reinstatement of Frashour." She noted that the City had already released the disciplinary letters for the other three officers disciplined in the Aaron Campbell shooting and that the grand jury transcripts of the criminal investigation had also been released.

Petitioner asserted that the " pending" grievances of the officers should not alter the fact that the " disciplinary actions are completed for the purposes of the public records law." She pointed out that the guidelines of this office require disclosure in cases of serious misconduct such as termination of employment.

Ms. Bernstein rejected the application the Internal Advisory exemption on the basis that the City made no showing that " the public interest in encouraging frank communications between officials and employees of public bodies clearly outweighs the public interest in disclosure."

In a confidential submission to the District Attorney, the City contended that the training review documents are subject to a protective order by the federal court and unconditionally exempt under ORS 192.502(8), as prohibited from disclosure by federal law or regulation. Ms. Harper also cited ORS 192.502(9)(a), which exempts public records or information prohibited or restricted from disclosure or otherwise made confidential or privileged under Oregon law. The City argued that ORS 192.502(9)(a) also exempts the transcripts under State labor law; they are the subject of a protective order pursuant to the arbitration proceeding authorized under ORS 243.672(1)(e) and ORS 243.672(2)(d).

With respect to the public interest, Ms. Harper argued that the " public has an interest that legal proceedings involving the public' s business are handled in an impartial, orderly, and fair manner." She noted that the City Auditor and the U.S. Department of Justice were conducting separate reviews that " should be allowed to continue uninterrupted without selective portions of testimony and records being disclosed prematurely."

DISCUSSION

I. Personnel Discipline Actions

ORS 192.501(12) exempts: "A personnel discipline action, or materials or documents supporting that action[.]" This exemption only applies, however, when discipline has been imposed. This is a conditional exemption that may be overcome if it is shown that "...the public interest requires disclosure in the particular instance [.]"

The appellate courts have spoken with respect to cases involving sustained discipline complaints. "T he policy intended by the legislature, which we enforce, protects the public employee from ridicule for having been disciplined but does not shield the government from

public efforts to obtain knowledge about its processes." City of Portland v. Rice, 308 Or 118, 124, n 5 (1989). (PPB Internal Affairs investigation ordered disclosed over claim of personnel discipline exemption). Accord, Oregonian Publishing Company v. Portland School District No IJ, 144 Or App 180 (1996) (Public interest required disclosure of discipline investigation and sanction of school employees for misuse and theft of school property).

The Attorney General's Public Records Manual, 2011, pages 43-44, provides some guidance in the application of the traditional Personnel Discipline Action exemption:

> Consistent with this policy, there are situations when the public interest in disclosure outweighs the public interest in confidentiality, despite the imposition of a disciplinary sanction. For example, the public interest typically favors disclosure if the conduct potentially constitutes a criminal offense or if the records relate to alleged misuse and theft of public property by public employees. Other factors to consider in weighing the public interest in disclosure against the employee's interest in confidentiality include the employee's position, the basis for the disciplinary action, and the extent to which the information has already been made public.

The general rule in Oregon with respect to public records favors disclosure. Portland v. Anderson, 163 Or App 550, 552 (1999). In Anderson, the court considered allegations including " conducting private business on police time, improper use of police telephones, improper use of a police office, and off-duty use of an escort service." The court declined to " shield from disclosure the materials pertaining to the off-duty allegations, because the conduct involved was 'non-criminal' ....Garvey is a high ranking police officer. The public has a legitimate interest in confirming his integrity and his ability to enforce the law evenhandedly." Anderson, supra at 554.

With respect to sustained discipline, this office continues to be guided by the principles enunciated in our Public Records Order, February 6, 1997, *Foster*, involving the disciplinary records of Gresham police Sergeant James Kalbasky.

FOSTER CRITERIA (in part)

1. Serious misconduct by a government employee should be disclosed in the public interest; relatively minor misconduct need not be disclosed if the public interest would not be significantly promoted by doing so.

2. Generally, termination from employment or other discipline for cause is serious misconduct if it is based upon corruption in the discharge of the public's business (including theft of the public's property), abuse of official power by employing such power for a purpose not related to any lawful government objective or by use

> of illegal or impermissible means in the pursuit of a governmental objective misconduct which impairs or imperils the mission of the government agency, or criminal behavior (particularly when job-related) which constitutes proper ground for discharge from employment or other discipline.

To quote the understated words of Deputy City Attorney Harper, Officer Frashour " was discharged following a review of the incident that led to the death of Aaron Campbell." This violent incident has spawned a federal civil suit by the estate of Mr. Campbell, a grand jury investigation, an internal affairs investigation of four officers, grievances, an arbitration proceeding, a City Auditor' s review and inquires by the U.S. Justice Department. The sustained discipline that led to Officer Frashour' s termination demands public scrutiny.

It has proved to be extremely costly for the City to defend itself against both the victim' s family and the police union. The conduct of City Hall, the Police Chief, Lieutenant King, the police union, and the four involved officers have all been the subject of public pillorying. The piecemeal disclosure of testimony from the arbitration hearings has not served to illuminate the truth or aid in the public discourse over this controversy. It is time to let the sunshine in. The public interest weighs heavily in favor of disclosure of all the materials related to the discipline of Officer Frashour.

The City has asserted several other conditional exemptions including internal advisory communications and litigation records. These exemptions necessarily fall when the public interest requires disclosure.

II. Federal Law Exemption

ORS 192.502(8) exempts: " Any public records or information the disclosure of which is prohibited by federal law or regulation." The commentary in the Attorney General' s Manual references the acts of Congress or the regulations promulgated by Federal agencies. Here, the City is asking that the exemption be applied to an order of the Federal Judiciary. It seems appropriate to treat coequal branches of the federal government in a similar fashion. This is particularly true when the federal court was acting to protect the rights of all litigants in a civil proceeding.

The Aaron Campbell suit is nearing the end stage. A settlement has been agreed to and all that is left is for the appointment of conservators for the minor children. It would appear that the purpose of the protective order has been accomplished and that the parties to the civil suit should approach Judge Mosman and seek the vacation of his order. It is time for the City to stop hiding behind the protective order. There should be no further interest in shielding the eleven training review drafts from the public. However, until the protective order is vacated, the training review drafts are exempt from disclosure.

Ms. Harper noted in her response to the petition that there are specific concerns of security measures and operational plans in the training review drafts that might require redaction under ORS 192.501(18) and (23). Those limited redactions can be addressed, if necessary, in a subsequent petition when the issues are ripe for our consideration.

III. Other Oregon Statutes Establishing Specific Exemptions

ORS 192.502(9)(a) exempts: " Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law."

The City and the police union representing Officer Frashour in the arbitration agreed that the proceeding " was a matter of private contract that was not open to the public." A stipulated protective order was executed and the public (and subsequently Aaron Campbell' s estate) was barred from access to the transcript testimony sought by petitioner. The City contends that this office should continue to honor that agreement.

Ms. Harper has cited ORS 243.706 which enumerates the powers of an arbitrator. It includes the power to compel the attendance of witnesses, administer oaths, adjourn the hearing, issue subpoenas and enforce the subpoenas with an order authrorizing the party to seek the aid of the court. There is nothing in this statute that gives an arbitrator the power to issue or enforce a protective order.

It may have been appropriate for the arbitrator to retain some control over the proceedings by agreeing to the stipulated protective order at least until she had the opportunity to render her opinion and award. That took place on May 14, 2012. More significantly, there is little question that one of the parties to the arbitration and stipulation has seen fit to disclose some of the testimony both to the police union newspaper as well as to The Oregonian. This has served no useful purpose and is not in the public interest. This office will not validate the privately negotiated protective order at this late date. The exemption cannot be upheld with respect to the three transcripts from the arbitration.

ORDER

Accordingly, it is ordered that the City of Portland promptly disclose the Ronald Frashour arbitration transcripts for the testimony of Chief Mike Reese, Lt. Robert King and training instructor Ryan Coffey. Disclosure of the documents ordered is subject to payment of the City's fee, if any, not exceeding the actual cost in making the information available consistent with ORS 192.440. The petition to order the disclosure of all the Portland Police Bureau's training review drafts written and presented for the arbitration proceeding is denied at this time subject to renewal upon the vacation of Judge Mosman's pro tective order.

Very truly yours,

MICHAEL D. SCHRUNK
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 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 7 days formal notice of your intent to initiate court action to contest this order, or fail to file such a court action within 7 additional days thereafter.