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March 6, 2013

Brad Schmidt
The Oregonian
1320 S.E. Broadway
Portland, OR 97201-3499

Linda Law
City Of Portland
Office of the City Attorney
1221 S.W. Fourth Ave, Suite 430
Portland, OR 97204

Re: The February 13, 2013 petition of Brad Schmidt regarding the investigation that may have taken place regarding letters to city officials that included racially motivated comments related to Bryant Enge.

Dear Ms. Law and Mr. Schmidt:

BACKGROUND

On this public records petition, ORS 192.410 et. seq., petitioner Brad Schmidt originally requested the District Attorney to order the City of Portland and its employees to produce the following records:

> All correspondence received regarding Bryant Enge's employment, qualifications and/or race, etc., as a city employee. The newspaper is also requesting all documents for any investigations, etc., conducted and related to Mr. Enge's tenure as the director of Internal Business Services, including any investigations that may have taken place regarding letters sent to city officials that included racially motivated comments. The newspaper is also requesting all performance reviews of Mr. Enge and complaints received about Mr. Enge.

Mr. Enge is the manager of the city's Bureau of Internal Business Services (BIBS) which is one of the divisions of the Office of Management and Finance (OMF). Pursuant to an anonymous written letter complaining of an employee's conduct, the City's Bureau of Human Resources (BHR) conducted an Equal Employment Opportunity (EEO) investigation of violations of Human Resources Administrative Rules (HRAR). This investigation did not pertain to the conduct or qualification of Mr. Enge for performance of any public functions. This investigation pertained to the conduct of a subordinate employee of Mr. Enge who is a program supervisor in one of the subunits of BIBS. Mr. Enge was the recipient or subject of the employee's conduct. Mr. Enge did not participate in the investigation as a complainant or witness.

Mr. Schmidt asked to inspect these records on Dec. 19, 2012, citing Oregon's public records law. The request was fulfilled in part and denied in part by Deputy City Attorney Jenifer Johnston. The City of Portland released 38 pages of documents on Jan. 28, 2013. The documents included Mr. Enge's performance planning goals, his employment agreement, his offer letter, his resume, several emails and 16 anonymous letters, purportedly from city employees, criticizing Enge's management style, qualifications and appointment to his high-ranking management position. Ms. Johnston confirmed in her letter that the City of Portland did conduct an investigation into a "lower level city employee" tied to racially motivated comments. The city refused to release documents tied to that investigation or the comments/letter in question and cited four exemptions – ORS 192.502(9) with ORS 40.225, ORS 192.501(12), ORS 192.502(2) and ORS 192.502(4).

The petitioner concedes that after the city disclosed the above mentioned materials that this public records request focused on the documents related to the disciplinary investigation of the individual that made the racially derogatory remarks about Mr. Enge. My office reviewed the unredacted disciplinary investigation records provided in confidence by the City Attorney, as well as the petition, and the response by the City Attorney.

DISCUSSION

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. "The 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, 2008, page 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'....but instead recognizing that the individual was a high ranking police officer. The Court found that the public has a legitimate interest in confirming that individual's integrity and ability to enforce the law evenhandedly. Anderson, supra at 554.

It is my belief that the city has met its burden in the applicability of the exemption. This, however, is a conditional exemption that may be overcome if it is shown that "...the public interest requires disclosure in the particular instance."

In the case at hand the petitioner has provided no information of a pattern of repeated misconduct by this employee. Unlike past situations where my office has ordered disclosure this employee is not a high profie public official. As the city points out a Google search would produce no media stories pertaining to this employee. According to the city this employee performs duties related to internal business administration, and does not routinely engage the public, citizens or the media. This employee is a subordinate several layers away from the decision makers in the Office of Management and Finance (OMF) and does not directly report to Mr. Enge. The employee's duties do not involve policy or decision making responsibility.

Furthermore, the city asserts that the public interest would not be promoted by disclosing the confidential personnel investigation of someone who is not a bureau/office or subunit manager as it would lead to undue embarrassment for the disciplined employee based on this one deviation from employee expectations. The city also maintains that disclosure of the contents of the investigation would also be an embarrassment to Mr. Enge who was not even the subject of the investigation. Finally, the city contends that disclosure would be contrary to the public interest because it would have a chilling effect on other employees who may want to report inappropriate or unlawful conducts to BHR investigators but fear the unwanted and the undesirable effects of publicity.

Although both the city and petitioner make credible arguments, my office finds that the exemption under ORS 192.501(12) applies and that the public interest does not require disclosure in this particular instance. This decision was made easier due to the amount of materials initially voluntarily disclosed by the city after the initial public records request. Also, petitioner's concerns about transparency have been ameliorated by the fact that the public is generally aware what occurred and that there was an investigation and discipline imposed. Because I find that this exemption applies there is no need to analyze the applicability of the other exemptions asserted by the city.

ORDER

Accordingly, it is ordered that the petition is denied.

Very truly yours,

Rod Underhill

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 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.

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