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Mark Amberg
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Office of City Attorney
City Hall, Suite 430
1221 S.W. 4th Avenue
Portland, OR 97204

Re: Petition of Andrea Damewood regarding documents surrounding the recent discipline of Captain Ed Hamann as well as documents surrounding an open investigation

Dear Ms. Damewood and Mr. Amberg:

BACKGROUND

On July 25, 2013 the City of Portland denied a request by Andrea Damewood of the Willamette Week for the following records:

> Any and all available documents and records surrounding the recent discipline of Capt. Ed Hamann for misconduct, including what that misconduct specifically involved and what his discipline was as well as all available documents and records surrounding an open investigation of Ed Hamann.

The city denied the request based on the provisions of ORS 192.501(12) which provides an exemption from disclosure for: "A personnel discipline action, or materials or documents supporting that action." The city also claims the requested records are not subject to disclosure under ORS 181.854(3) which provides: "A public body may not disclose information about a personnel investigation of a public safety employee of the public body if the investigation does not result in discipline of the employee." The city is correct that both of these statutes contain an exception to these exemptions when the "public interest requires disclosure." It is the city's position, however, that the public interest in this situation does not sufficiently outweigh the exemptions to justify disclosure of the requested records and that the city's denial of the request should be upheld.

Ms. Damewood contends that the public interest in disclosure outweighs the public employee's interest in confidentiality. In quoting from the Oregon Attorney General's Public Record Manual she argues that 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. She accurately asserts that the 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.

In reaching its decision my office reviewed the disciplinary records related to this public records petition.

DISCUSSION

As a preliminary matter the city argues that none of the matters involved resulted in discipline of Captain Hamann. According to Mr. Amberg, under the terms of the collective bargaining agreement between the city and the police union the consequence imposed on Captain Hamann would not be considered formal discipline. Therefore, the city contends that the analysis of this petition should be done under the provisions of ORS 181.854, not ORS 192.501(12).

My office, however, need not determine if discipline was actually imposed since the exemption under ORS 181.854(3) applies if there was no discipline while ORS 192.501(12) is applicable if Captain Hamann was disciplined. In either case, the basic issue to be resolved is whether there is sufficient public interest in disclosure to outweigh the presumption of exemption under the applicable statute.

I. PERSONNEL DISCIPLINE EXEMPTION

ORS 192.501(12) exempts: "A personnel discipline action, or materials or documents supporting that action[.]" This exemption only applies when discipline has been imposed and 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, 2011, 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'.... 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.

In the public records order leading to the Anderson decision, this office came to the following conclusion: "This matter has been one of great community concern both because of the allegation of misconduct against a former Portland Police Bureau Captain and his allegations against the city. Full disclosure can only prompt a more intelligent and informed public debate on the issues involved. Additionally, privacy concerns would seem to have been obviated by the public disclosure and debate that has already taken place."

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 a former Gresham police sergeant:

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 discharging 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 governmental 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.

3. Discipline for acts or faults of government employees falling short of the preceding kinds or serious misconduct may also be determined to require disclosure if the culmination of repeated disciplinary violations fairly raises the issue whether continued employment of the particular employee in itself constitutes an imprudent or improper management decision not to impose more severe sanctions or termination of employment.

4. Discipline cases that evidence systemic misconduct, i.e., misconduct affecting multiple employees and involving similar improper acts or omissions may require disclosure even when the acts or faults in question do not individually rise to the level of the serious misconduct described in point 1 and 2, where the overall pattern of disciplinary violations indicates there may be a concentrated personnel problem in a particular agency or part of any agency, or sheds light on the effectiveness of management's efforts to properly control the behavior in question.

5. Other cases of disciplinary records may merit disclosure in the public interest even though the conduct of the disciplined employee is not serious misconduct as previously described, where circumstances raise an issue of unduly harsh (or unduly lenient), arbitrary, irrational administration of discipline by management and thus illuminate management's conduct of the public business.

6. Finally, public employees should not be subjected to public disclosure of disciplinary violations not of the kind specified in the preceding guiding principles, when such disclosure would merely subject the employee to added humiliation and would not significantly promote the public's understanding of the manner in which the programs and services of government are being carried out. Part of the purpose of employee discipline is to encourage the employee's morale while correcting undesirable conduct, which goal is not promoted, as we think, by a process of indiscriminate public pillory – and which consideration presumably was part of the Legislative Assembly's motivation for the enactment of the "discipline action" exemption in the first place.

Petitioner argues that Captain Hamann's disciplinary records should be disclosed solely because of his rank, and the possibility that management is failing to police its managers. Ms. Damewood contends that there has been a pattern of discipline cases of high ranking police officials involved in misconduct. She indicates that there may be a concentrated personnel problem within the Portland Police Bureau so that it would be in the public's best interest to shed light on the effectiveness of management's efforts to properly control the behavior in question.

Although her argument is not without merit, and there have been a number of high ranking police officials disciplined over the years, we are not convinced that it would be in the public interest to order disclosure. In the case at hand, the Portland Police Bureau in response to an anonymous tip, thoroughly investigated a high ranking police official and found there to be relatively minor misconduct. In weighing the above *Foster* criteria we find that disclosure at this time would merely subject Captain Hamman to added humiliation and would not significantly promote the public's understanding of the manner in which his duties are carried out.

Captain Hamman's conduct that resulted in at least a form of discipline does not, by itself, constitute serious misconduct subject to disclosure under the above mentioned analysis. The sustained finding against him was for relatively minor misconduct and need not be disclosed because the public interest would not be significantly promoted by doing so. We find, and the city recognizes, that Captain Hamann's position as a command officer is a factor that weighs in favor of public disclosure. However, we agree with the city that just because an employee is in a command or high level position disclosure of an investigation is not automatic. This is especially true where allegations are unfounded, for minor misconduct, and no discipline is imposed. There also is not a strong public interest in subjecting command level employees to added humiliation of public disclosure when an allegation is unfounded or unproven. Obviously, this conclusion could change in the future if there are additional sustained disciplinary findings against Captain Hamann.

II. RECORDS PERTAINING TO AN INVESTIGATION THAT HAS NOT BEEN COMPLETED

Petitioner also asks for disclosure of an open investigation. When an investigation has not been completed, as a general matter, the records related to that investigation should not be disclosed. Public disclosure of a pending uncompleted investigation could compromise the integrity of the investigation. Furthermore, until the investigation and any potential discipline process is completed, it cannot be determined if discipline will or won't be imposed. A public body therefore is not able to determine which exemption would apply until after the investigation is complete.

We also agree with the city that pending the completion of an investigation and any discipline determination, the provisions of ORS 181.854 apply since the investigation has not "resulted in discipline." Generally, unless the public interest at the time of the request requires disclosure, the investigation process should be completed before the release of information is ordered.

III. 181.854 DISCLOSURE OF INFORMATION ABOUT CERTAIN PUBLIC SAFETY EMPLOYEES.

(3) A public body may not disclose information about a personnel investigation of a public safety employee of the public body if the investigation does not result in discipline of the employee.

(4) Subsection (3) of this section does not apply:
(a) When the public interest requires disclosure of the information.

This exception is not part of the Public Records Law (ORS 192.410, *et. seq.*). Instead it is one component of a separate statutory scheme implemented by the legislature that is designed to provide some level of protection for public safety employees – who do work for the public in risky and often high profile or controversial situations - from the potential for harassment or improper public disclosure of information regarding them.

By implementing ORS 181.854, the legislature has determined that information regarding personnel investigations of public safety employees that don't result in discipline, generally,

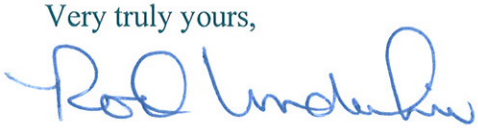
should not be made public. Subsection (3) of the statute affirmatively prohibits a public body from disclosing information about a personnel investigation of a public safety employee if the investigation does not result in discipline unless one of the four exceptions listed in subsection (4) applies. No similar exception exists for public employees who are not "public safety employees."

There are sound policy reasons for generally protecting this type of information from public disclosure: While employees in public safety professions should be held to high standards, such employees should not be subject to a public examination of every instance in which an investigation is conducted and no allegation of wrongdoing is sustained. The statute does contain an exception to the general rule against disclosure "when the public interest requires disclosure of the information." ORS 181.854(4)(a). This "public interest" exception is similar to the "public interest" exception found in ORS 192.501.[1]

ORDER

Accordingly, the petition at this time is denied. Once the investigation into any other misconduct is completed Ms. Damewood is free to petition our office again if the city decides not to release any requested materials.

Very truly yours,



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[1] The City submits the analysis is not the same and a stronger showing of public interest should be required when the records being considered fall under ORS 181.854 – i.e. when the matter being considered is one that did not result in discipline of the employee. We need not decide this issue for the purpose of this order since we find that the public interest analysis under either exemption would not require disclosure.