



MICHAEL D. SCHRUNK, District Attorney for Multnomah County

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February 8, 2011

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

Stephanie Harper
Deputy City Attorney
Office of City Attorney
City Hall, Suite 430
1221 S.W. 4th Avenue
Portland, OR 97204

Re: Petition of Maxine Bernstein for The Oregonian received December 20, 2010, 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:

**1. [T]he contents of the Portland Police internal affairs
investigative report relating to now-Capt. Mark Kruger**

In a December 14, 2010 letter request to Portland Police Bureau records, petitioner pointed out that Portland Police Chief Mike Reese “suspended Captain Kruger for 80 hours without pay and ordered additional training because he erected a public tribute to give Nazi-era German soldiers at a city park while employed by the Police Bureau.” Petitioner went on to note that “Captain Kruger also faced lawsuits between 2002 and 2005 alleging excessive force during downtown anti-war protests.” Ms. Bernstein said the officer’s conduct was clearly serious and fell within the guidelines published by this office for disclosure of disciplinary records. The Oregonian based its request on several factors, “the foremost being a belief that our readers have a serious and legitimate interest in the performance of their police officers.”

Christopher Paille, Professional Standards Division at the Police Bureau, responded to petitioner by noting that the Bureau had already provided the discipline action taken and a letter of apology issued by Captain Kruger. "These documents summarize the facts and outcome relating to the only proven allegation in this investigation." Mr. Paille cited six exemptions including ORS 192.501(12), Personnel Discipline Action, and ORS 181.854, Personnel Investigation of Public Safety Employee.

In her petition, Ms. Bernstein pointed out that the case of Captain Kruger came on the heels of recent police use of force incidents. She argued that the "public is served only if the press is able to independently monitor the actions of public officials who are given the power to arrest citizens or the power to shoot citizens in certain circumstances." Petitioner asserted that the public interest compelled disclosure: "nondisclosure could adversely affect the public's confidence in the bureau and its ability to fulfill its mission, given some of the comments of Chief Mike Reese." In urging the need for greater transparency and accountability, Ms. Bernstein stated: "[t]he case of Capt. Kruger raises significant and troubling questions about his ability to treat individual citizens in Portland with evenhandedness and integrity. The idea that a Portland policeman would enshrine Nazi-era military leaders, and admire their tactics, is chilling to some."

Deputy City Attorney Stephanie Harper responded to the petition in a January 18, 2011 letter. She noted that the IAD was given the task to cover a citizen-initiated complaint filed in October 2009. Other allegations surfaced in the media and during the IAD investigation itself. After several levels of investigation and the review of numerous accusations, one allegation was sustained and recommended to the Chief.

Ms. Harper noted that the Rocky Butte Park plaque allegation related to conduct in 1999, the event was off-duty, and that Mark Kruger did not hold the rank of captain at the time. She asserted six exemptions, two of which are necessary to this order.¹

The City did disclose the discipline letter although it could have asserted the Discipline Action exemption. Ms. Harper contended that the letter "provides the public with the information it needs to understand the disciplinary decision made, based on that official and final record." No public purpose is served, she argued, by releasing the sustained portion of the investigation beyond what has already been disclosed. Citing the policy of this office, Ms. Harper concluded that "[a]dditional disclosures would do nothing more than subject Mr. Kruger to "indiscriminate public pillory." (Foster #6)"

¹ The confidential information, personal privacy, and legal advice exemptions involve material located in the non-sustained allegations. The internal advisory communications are an integral part of the sustained allegation documents and are subject to the same public interest analysis.

The City emphasized the special protection provided to public safety employees in cases where discipline is not sustained. "The policy reasons are obvious: While it is appropriate to have high standards for employees in [the] public safety profession, such employees should not be subject to a public examination of every instance where an investigation is conducted but for whatever reason, does not support a disciplinary sanction."

DISCUSSION

I. Records where disciplinary action taken

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 II, 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’....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

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.
3. Discipline for acts or faults of government employees falling short of the preceding kinds of serious misconduct may also be determined to require disclosure if the cumulation 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 systematic 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 points 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.

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 Captain Garvey 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."

Here, Police Chief Michael Reese noted that Captain Kruger's "decisions around the plaque, as well as its content, are easily viewed in a negative light." The Bureau considered action of both demotion and termination. Chief Reese concluded that "we have a responsibility to the community, your co-workers, and the organization to develop and retain personnel in whom we are confident can effectively carry out the bureau's mission and priorities."

The discipline of a two work week suspension without pay is significant in itself. And it is discipline to a police captain. It is certainly a distinction here that Captain Kruger was an officer when the conduct began in 1999 and a sergeant at the time when the existence of the plaque first surfaced in 2003-2004 during civil right litigation. Perhaps if the Bureau had acted at the time of the 2005 Internal Affairs investigation (when he was then Lieutenant Kruger) the distinction would have merit.

It cannot be argued that the conduct of then Officer and Sergeant Kruger was not a serious error in judgment. Our community expects its police officers to represent the highest ethical and moral standards in both their on-duty and off-duty behavior. Moreover, a captain in the Portland Police Bureau serves as a role model both to other officers and to the citizens of Portland.

We are sensitive to the potential for the continued humiliation of Captain Kruger. That is regrettable. The materials in this extensive investigation may serve to open a window into the processes of the Internal Affairs and Independent Police Review Divisions as well as the review efforts of the command structure. Not all of the background material gathered as part of the sustained discipline allegation is necessary or appropriate for this purpose. At a minimum, the relevant IAD investigation report, the IPR letter, and the various command memoranda must be provided to petitioner.

II. Records where no disciplinary action taken

ORS 181.843(3) states: "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." Again, this exemption is conditional and disclosure is required if it is in the public interest in the particular instance.

The nature of the conduct alleged here raises no questions of corruption or serious wrongdoing by Captain Kruger. Neither the IPR or IAD investigations nor various levels of management review established any credible evidence to support the numerous accusations of the complainant.

The only public interest under such circumstances would arise from indications of an incomplete investigation, an inadequate review by the command structure, or arbitrary action by Chief Reese. There is absolutely no basis for such a conclusion and the public interest strongly weighs against disclosure. No useful purpose would be served by any further examination of the unfounded accusations of misconduct.

ORDER

Accordingly, it is ordered that the City of Portland promptly disclose the following redacted records relating to found discipline of now Captain Mark Kruger:

October 16, 2009 IAD Worksheet by IAD investigator Michael Barkley

Page 1 except Seaver personal information and IAD Case Closure Information Allegations other than Allegation #4; page 2 - witness Seaver and first three paragraphs of Incident Overview (except parents' address); page 3 - accusation 11 and allegation 4; page 4 - Directive 2.

Page 7
February 8, 2011
Re: Petition of Maxine Bernstein

December 21, 2009 letter to Robert Seaver from IPR Assistant Director

Entire page except for the allegations.

February 1, 2010 Confidential Investigative Report of investigator Barkley

Page 1 - Caption, citizen interviewed no. 3, Bureau member interviewed no. 1 (and Allegation #4), and Applicable Directive no. 2; page 2 - allegation 4; pages. 60 - 65 - allegation 4.

May 24, 2010 Case Overview by IAD Captain Edward Brumfield

All of page 1; page 2 - first three paragraphs and allegations 1 (Allegation 4) and 2; page 3 - Summary of Witnesses and first witness.

June 1, 2010 letter to Robert Seaver from IPR Assistant Director Pete Sandrock

Entire page.

June 16, 2010 Recommended Finding by Central Precinct Commander Dave Famous

Page 1 - Caption and Captain Kruger and Mr. Seaver as persons interviewed; page 2 - Directive 2 and the Summary; page 3 - allegation 4; pages 10 - 15 - Allegation Number 4.

August 6, 2010 Internal Memo by IPR Assistant Director Sandrock

Pages 1 - 2 - Caption and Allegation 2.

August 18, 2010 Table of Contents of IAD Exhibit Books

Table of Contents Exhibit Book #3: 2 (1, 2, and 4 through 7).

Copy of the Name Plates

September 7, 2010 letter to Robert Seaver from IAD Captain Brumfield

Page 1 - Caption, first paragraph, allegation 2, and next full paragraph; page 2 - first full paragraph and last two paragraphs to the end.

Page 8
February 8, 2011
Re: Petition of Maxine Bernstein

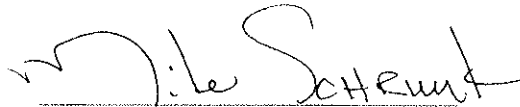
September 8, 2010 letter to Robert Seaver from IPR Assistant Director Sandrock

Page 1 - Caption and the first paragraph (including footnote 1); page 2 - 3 - first paragraph (including footnote 2) and part of the second paragraph ending with "Rocky Butte" and beginning with "If Captain Kruger" to the end.

November 17, 2010 Performance Review Board Recommendations by Assistant Chief Larry O'Dea

Page 1 - Caption; page 2 - Allegation #4; last line on page 5 through p. 7.

Very truly yours,



MICHAEL D. SCHRUNK
District Attorney
Multnomah County

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.