



MICHAEL D. SCHRUNK, District Attorney for Multnomah County

600 County Courthouse • Portland, Oregon 97204 • 503 988-3162 • FAX 503 988-3643
www.co.multnomah.or.us/da/

August 15, 2002

Maxine Bernstein
The Oregonian
1320 SW Broadway
Portland, OR 97201-3499

Debra Haugen
Manager Records Division
City of Portland
Bureau of Police
1111 SW 2nd Avenue
Portland, OR 97204

Re: Petition of Maxine Bernstein for The Oregonian received August 6, 2002,
to disclose certain records of the City of Portland

Dear Ms. Bernstein and Ms. Haugen:

BACKGROUND

On this public records petition, ORS 192.410 et. seq., petitioner Maxine Bernstein for The Oregonian requests the District Attorney to order the Portland Police Bureau and its employees to produce the following records:

Incident report No. 02-70401, involving police intervention and transport of an employee of the U.S. Marshal's Office who was intoxicated in a downtown Portland restaurant.

Petitioner made her request for the above information to Debra Haugen, Records Division Manager, by email on July 30, 2002. Ms. Haugen denied the request by email on July 31, 2002. An exemption was claimed under ORS 192.496(1), records less than 75 years old regarding physical or mental health or psychiatric care, as well as under ORS 192.501(12), personnel discipline action.

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Petition of Maxine Bernstein

In her petition, Ms. Bernstein notes that the first claimed exemption only applies if public disclosure would constitute "an unreasonable invasion of privacy." Petitioner contends that the public has "a compelling interest in the facts of this case" that outweighs any privacy concerns. Petitioner rejects the applicability of the second claimed exemption by asserting that an ongoing internal investigation by the U.S. Marshal "should have no bearing on the actions of the Portland Police Bureau."

In an August 12 letter response to the petition, Deputy City Attorney David Woboril asserts two exemptions: health care under ORS 192.496(1) and personnel discipline investigation under ORS 192.501(12). With respect to the first exemption, Mr. Woboril argues that the public interest in the civil detoxification system is supported by the Police Bureau's routine refusal to "release reports of incidents which result in a civil detoxification hold and transport to the Hooper Memorial facility." He cites ORS 430.399, which prohibits the release of detoxification treatment records in the absence of patient consent.

Mr. Woboril argues that the existence of a disciplinary investigation by the U.S. Marshal's Service should result in the postponement of a decision on disclosure until the investigation is completed. He cites language in the Attorney General's Public Records and Meetings Manual relating to the "public body" postponing action on a public records request until completion of an internal investigation of its own employee.

DISCUSSION

I. Physical or mental health or psychiatric care or treatment

ORS 192.496(1) conditionally exempts:

Records less than 75 years old which contain information about the physical or mental health or psychiatric care or treatment of a living individual, if the public disclosure thereof would constitute an unreasonable invasion of privacy. The party seeking disclosure shall have the burden of showing by clear and convincing evidence that the public interest requires disclosure in the particular instance and that public disclosure would not constitute an unreasonable invasion of privacy.

This office is sensitive to the privacy and confidentiality rules and policies guiding the actions of the employees of Hooper Memorial. Such interests would be materially undermined if the identity of a person taken to Hooper in a routine police action were the subject of public knowledge and discussion. The question raised by petitioner is whether the occupation of the person and the circumstances of the incident itself is of such public importance that disclosure is necessary and would not be an unreasonable invasion of privacy.

We have reviewed the contents of the incident report (actually four reports totaling ten pages plus property receipts) and discussed the matter with Deputy City Attorney Woboril. There is nothing in the nature of the incident itself or the response by the Portland Police officers that is remarkable. The distinguishing "public" interest asserted by petitioner is that the person was a U.S. Marshal employee, was intoxicated in a public place, and was armed with a gun.

The reports do not reflect the commission of a crime or illegal conduct and the U.S. Marshal employee appears to have been engaging in off-duty behavior. Nonetheless, the reports evidence the misuse of authority by a public servant. The disclosure of the reports to the employer of the individual does reflect the seriousness with which the Police Bureau and the U.S. Marshal view the incident, although any disclosure is somewhat inconsistent with the claimed privacy exemption.

We believe the Court of Appeals decision cited by petitioner is instructive. In City of Portland v. David Anderson and The Oregonian, 163 Or App 550, 554 (1999), the Court of Appeals identified the presence of a public interest even when dealing with allegations of off-duty, non-criminal and not *per se* illegal conduct of a high-ranking law enforcement manager:

The public has a legitimate interest in confirming his integrity and his ability to enforce the law evenhandedly. The police investigation that resulted in discipline concluded that Garvey had engaged in sexual conduct through an escort service that may serve as a front for prostitution. That information bears materially on his integrity and on the risk that its compromise could affect the administration of his duties.

The public nature of the initial disturbance coupled with the subsequent conduct of a U.S. Marshal employee armed with a gun cannot be overlooked. The public interest clearly outweighs any privacy interest this individual might have in maintaining his privacy or the confidentiality of his behavior.

This office is mindful of the public interest asserted by the City with respect to information relating to the Hooper Memorial facility. We have identified specific references to "detox" on pages two and three of the three-page special report, page three of the four-page special report, page one of the one-page special report, and pages one and two of the two-page investigative report. Those sentence references should be redacted as exempt under ORS 192.496(1) as reports of physical care or treatment of a living individual.

II. Personal discipline action

ORS 192.501(12) conditionally exempts:

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

A review of the Attorney General's Public Records and Meetings Manual and the cases cited therein lead to the conclusion that this exemption must be limited to situations where a particular public agency has generated reports and is conducting an internal investigation of its own employee. Here, an outside federal agency is conducting its own internal investigation and, presumably, is generating its own public records. Access to those personnel discipline action records, are, of course, beyond the scope of this petition.


The reports requested by petitioner contain information that might or might not support personnel discipline action by the U.S. Marshal. The creation of those reports does not, however, form a basis for exemption under ORS 192.501(12). See the November 9, 2000 Attorney General disclosure order, Attorney General's Public Records and Meetings Manual 2001, page F-44. The exemption asserted by the City is simply not available for the Portland Police Bureau incident reports.

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ORDER

Accordingly, it is ordered that the City of Portland promptly disclose the records sought in the above petition subject to redaction of references to the Hooper Memorial facility. Disclosure of the documents ordered is subject to payment of the City of Portland's fee, if any, not exceeding the actual cost in making the information available, consistent with ORS 192.440.

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.