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March 10, 2000

Michelle Roberts
The Oregonian
1320 SW Broadway
Portland, OR 97201-3499

Philip Dawdy
Willamette Week
822 SW 10th Avenue
Portland, OR 97295

Jeffrey L. Rogers
City Attorney
1221 SW 4th Avenue
Portland, OR 97204

Re: Petition of Michelle Roberts for The Oregonian received March 6, 2000 and
Petition of Philip Dawdy for Willamette Week received March 7, 2000 to disclose
certain records of the City of Portland

Dear Ms. Roberts, Mr. Dawdy and Mr. Rogers:

BACKGROUND

On these public records petitions, ORS 192.410 et. seq., petitioner Michelle Roberts for The Oregonian and Philip Dawdy for Willamette Week request the District Attorney to order the City of Portland and its employees to produce the following records:

Result of an investigation into overtime fraud, payroll issues and other possible abuses at the Multnomah County Bureau of Emergency Communications [BOEC].

[T]he special investigation into the [BOEC] performed by City Auditor Gary Blackmer, as well as...any correspondence from [Commissioner Saltzman's] office to BOEC director Sherrill Whittemore concerning her employment status (this includes the initial letter terminating Whittemore and the more recent one reprimanding her).

Petitioner Roberts initially made her public records request for the audit investigation to Jeffrey Rogers, the City Attorney, Gary Blackmer, the City Auditor, and Dan Saltzman, Portland City Commissioner, on January 13, 2000. The City elected not to release any portion of the audit.

On January 24, Mr. Rogers submitted a letter response to petitioner Robert's initial filing with this office. The City attorney provided for our review a copy of the **City Auditor's "Report on allegations at the Bureau of Emergency Communications"** together with fifteen separate reports of allegations. On January 28, 2000, this office denied the petition without prejudice to renewal in thirty days. On February 18, 2000, we received a letter from Director Whittemore's legal counsel, Janet Hoffman, together with a copy of a **February 17, 2000 ten-page letter to Commissioner Saltzman** with several attached exhibits.

Petitioner Roberts resubmitted her request to include the final disposition of the disciplinary proceedings against BOEC Director Whittemore. After the latest petition, the City provided us with the January 31, 2000 recommendations of Auditor Blacker to strengthen BOEC (now disclosed by the City) and a **four-page letter of discipline to Director Whittemore dated March 6, 2000**.

Petitioner Dawdy made his request to Commissioner Dan Saltzman on March 6, 2000 for Auditor Blackmer's special investigation together with any correspondence both to and from Director Whittemore or her representatives. The Commissioner's Office denied the request as a "personnel disciplinary matter." After this petition, the City provided this office with a **four-page letter of proposed discipline to Director Whittemore dated January 24, 2000** and noted that we had already received Counselor Hoffman's correspondence to Commissioner Saltzman.

The City initially invoked the Personnel Discipline Action exemption on the basis that the "investigation is part of a pending disciplinary matter that has not been completed." City Attorney Rogers acknowledges that the disciplinary matter has now been concluded but continues to assert this exemption. In addition, the City Attorney has requested the redaction of certain medical references as well as comments critical of another BOEC employee found in the correspondence from Director Whittemore's counsel.

Director Whittemore, through her counsel, maintains that the Auditor's report is exempt from disclosure as a communication within a public body, ORS 192.502(1) or as a disciplinary action, ORS 192.501(12). She argues that "because of substantial factual inaccuracies in the report," the public interest would not be furthered by its disclosure. Further, Ms. Hoffman contends that Director Whittemore still has an opportunity to respond to the March 6, 2000 letter of discipline. Under these circumstances, she argues, the disciplinary process has not been "finally resolved."¹

¹ We will not speculate on the outcome of further appeals to Commissioner Saltzman by Director Whittemore. It is enough to note that a final decision has been made and a letter of discipline has been issued.

DISCUSSION

We have combined the separate petitions of The Oregonian and Willamette Week with the intent to expedite the review of the various public records requests. We have carefully reviewed the four sets of documents identified above and together they can be said to constitute the "personnel discipline action, or materials or documents supporting that action" under the conditional exemption of ORS 192.501(12).

Now that the disciplinary process has been completed, at least with respect to the Director of BOEC, the question is whether the public interest requires disclosure of all the documents requested.

In our January 28 order which was limited to the Auditor's Report, this office concluded that "the audit is a public record which, in the public interest, should be disclosed in a timely manner." Public Records Order 00-01, page 3. Suffice it to say, the allegations of misconduct involve the on-duty actions of high-ranking management as well as misconduct of various subordinates. The City has provided no arguments that would place in question our determination that the public interest outweighs any privacy concerns of the public employees named in the report.

Of equal significance, the correspondence between Commissioner Saltzman and Director Whittemore or her counsel reveals a disciplinary process that potentially raises an issue of unduly harsh or lenient administration of discipline by management. It is clearly in the public interest to submit the BOEC investigation to public scrutiny considering the vital nature of this public safety agency.

Director Whittemore has requested that we label the Audit Report an Internal Advisory Communication. Although the City has not asserted this exemption, we will address it briefly. The investigation conducted by Auditor Blackmer is not a preliminary report and is not a recommendation for another agency's action. It contains factual matters only and cannot be characterized as advisory in nature. Any need for "frank communication" does not clearly outweigh the public interest in disclosure. In any case, Commissioner Saltzman has taken action on the report, thus ending any need for delay in disclosure.

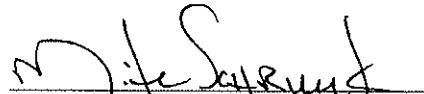
The City has requested redaction of certain references and comments in the correspondence from Janet Hoffman to Commissioner Saltzman. The ten-page letter and supporting attachments contain a small amount of material that is arguably exempt as Confidential Information Submitted by Citizens, ORS 192.502(4) or information of a personal nature protected under the Personnel Privacy exemption, ORS 192.502(2). We agree that the City should maintain the confidentiality of certain medical information as well as comments critical of a subordinate employee. We have identified these passages in a copy of Ms. Hoffman's letter, which will be attached to the order sent to the City Attorney. Ms. Hoffman and Director Whittemore are, of course, free to disclose the letter and supporting documents in its entirety.

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ORDER

Accordingly, it is ordered that the City of Portland promptly disclose the following records: Auditor Blackmer's Report (and supporting documents) on allegations at BOEC, the January 24 and March 6 letters to Director Whittemore, and a redacted version of the February 17 letter (and supporting attachments) from Janet Hoffman to Commissioner Saltzman.

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 seven days formal notice of your intent to initiate court action to contest this order, or fail to file such court action within seven additional days thereafter.

Cc: Janet Hoffman

00-01 and 00-04