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April 4, 2005

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Office of City Attorney
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Re: Petition of Charles Hinkle on behalf of The Oregonian received March 24, 2005, to disclose certain records of the City of Portland

Dear Mr. Hinkle and Mr. McGair:

BACKGROUND

On this public records petition, ORS 192.410 et. seq., petitioner Charles Hinkle requests the District Attorney to order the City of Portland and its employees to produce copies of the following records in summary:

1. **The name of each member of the City of Portland Fire and Police Disability and Retirement Fund (FPDR) who is receiving or received disability payments for the past five years. The state and zip code of the member's current residence, whether the member has ever disclosed outside income, whether the member is medically stationary, and the name of the member's physician.**
2. **The monthly benefit report from the February 8, 2005 FPDR board meeting which contains the names of police and fire bureau members who are receiving disability payments from FPDR, the amount of disability payments that each member receives each month, and certain medical information.**

3. **Electronic data records (1993 to date) on expenditures and transfers from certain accounts of the FPDR, including names, payment amounts, and other data relating to other expenditures by FPDR.**
4. **FPDR records in the archived papers of former Mayor Vera Katz.**

Two reporters for The Oregonian, Maxine Bernstein and Brent Walth, made the requests for the above information by email on February 3, February 9, February 24, and March 1, 2005. Denials came from the FPDR Administrator, Babette Heefle and the City Archivist, Diana Banning. The Board of Trustees adopted a resolution on March 8, 2005 denying all pending requests by The Oregonian reporters, based upon legal advice from the City Attorney's Office. The documents were claimed exempt under ORS 192.502(2), Personal Information.

Petitioner submitted this petition and argued that disclosure would not constitute an unreasonable invasion of privacy and that the public interest supported disclosure. The City responded that the records are exempt under the personal information exemption, as well as ORS 192.502(3), Public Employee Addresses, Social Security numbers, Birth dates, and Telephone numbers, ORS 192.502(12), PERS Nonfinancial Information About Members, and ORS 192,502(19), Workers' Compensation Claim Records.¹

DISCUSSION

ORS 192.502(2) conditionally exempts:

Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if the public disclosure thereof would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance. The party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy.

¹ The latter two exemptions are inapplicable to the records sought by petitioner. The workers' compensation exemption was created to prevent unlawful discrimination. The PERS exemption was a housekeeping measure intended to maintain the privacy of financial and personal information of the PERS membership.

“The purpose of this exemption is not to prevent disclosure of personal information, as such, but rather to protect privacy from unreasonable invasion.” Jordan v. MVD, 308 Or 433, 441 (1989). Only personal information that would constitute an unreasonable invasion of privacy if publicly disclosed is protected under this exemption. In Jordan, 308 Or at 442, the court noted that the trial court found that the affidavit filed in the trial court:

...sufficiently established that disclosure to the requester would more likely than not unreasonably invade her privacy because providing the information would allow Jordan to harr[y] her incessantly to the extent that an ordinary reasonable person would deem highly offensive.

“[T]he information is not exempt absent an individualized justification for exemption.” Attorney General’s Public Records Manual, 2004, p. 61. This determination must be made on a case-by-case basis. A blanket policy of nondisclosure is not enforceable. Guard Publishing v. Lane County School Dist., 310 Or 32, 38-40 (1990).

Personal information is not defined in the exemption. In Jordan v. MVD, *supra* at 441, the Supreme Court cited Webster’s Third New International Dictionary definition of “personal” as meaning “1. of or relating to a particular person: affecting one individual or each of many individuals: peculiar or proper to private concerns: not public or general*** (personal baggage):***6: exclusively for a given individual (a personal letter)***.”

In Guard Publishing Co. v. Lane School Dist., 310 Or 32 (1990), the Supreme Court commented on the Court of Appeal’s position that the test for whether information is personal under ORS 192.502(2) is “whether it normally would not be shared with strangers.” The Court of Appeals had applied that test in Guard Publishing Co. v. Lane School Dist., 96 Or App 463, 467 (1981) and held that one’s name is unquestionably information normally shared with strangers. In a footnote to its opinion, the Supreme Court noted:

In Jordan v. MVD, *supra*, we implicitly rejected this Court of Appeals test. The District did not seek review of the lower courts’ conclusion that it must disclose the replacement coaches’ names. However, because we hold that the District’s 1984 policy is not compatible with the disclosure statutes, we do not here decide whether a person’s name could ever be exempt from disclosure under ORS 192.502(2). 310 Or at 36, n4.

The Attorney General has taken the position that “[g]enerally, disclosure of a name itself would not constitute an unreasonable invasion of privacy.” Attorney General’s Public Records Manual, 2004, p. 62. However, the identities of candidates for university president were not disclosed in a 1988 Letter of Advice. “[A] person’s name may be exempt in certain contexts, due to a person’s desire for confidentiality to avoid stigmatizing or other undesired effect.” Attorney General’s Public Records Manual, 2004, E-6.

We agree with the Attorney General that a name, no less than a home address or telephone number, is theoretically covered by the exemption. We are mindful of the admonition in Jensen v. Schiffman, 24 Or App 11, 17 (1976) that “any privacy rights that public officials have as to the performance of their public duties must generally be subordinated to the right of the citizens to monitor what elected and appointed officials are doing on the job.”

ORS 192.502(3) exempts:

Public body employee or volunteer addresses, Social Security numbers, dates of birth and telephone numbers contained in personnel records maintained by the public body that is the employer or the recipient of volunteer services. This exemption:

(b) Does not apply to employees or volunteers to the extent that the party seeking disclosure shows by clear and convincing evidence that the public interest requires disclosure in a particular instance[.]

The various requests by The Oregonian can be broken down into seven categories: member name, zip code and state of residence, amount of disability, outside income, medically stationary, individual transaction records, and name of physician and medical diagnosis. This order will deal with each category and the availability of the asserted exemption.

1. Member Name.

The City contends, “disclosure of the identities of firefighters and police officers who have been hurt on the job does not serve a public interest but rather is meant to harass individuals who have filed claims with the FPD&R.” The City anecdotally notes “[s]everal members receiving disability payments from the FPD&R have already complained of harassment by reporters from *The Oregonian*.” The City has not made a sufficient case under ORS 192.502(2) that simple disclosure of the name of a public employee on disability in itself is an unreasonable invasion of privacy.

2. Zip Code and state of residence.

Petitioner maintains that the reporters "did not seek full addresses of members" and that a "person's state of residence and zip code are not enough information to allow the person to be located, and there is therefore no risk of harassment of any member through disclosure of that information." The reality is that the zip code and state of residence is the key to identifying the member's address when compared to other available databases.

Disclosure of the information sought would be tantamount to disclosing the full address itself. ORS 192.502(3) exempts the "addresses" of public employees unless the petitioner shows by "clear and convincing evidence" that the public interest requires the disclosure "in a particular instance." The zip code and state are part of the member's address and no showing has been made to overcome the exemption.

3. Amount of disability.

The City admits that the "Public Records Law does not exempt salary information" but argues that it does "exempt workers' compensation status, disability status, and personal medical information." The amount of disability and other related financial data is personal information but it cannot be considered an invasion of privacy for the public to know the level of compensation an officer is receiving in lieu of actual employment. In any case, it is not an unreasonable invasion of privacy and the public interest clearly outweighs any privacy claims.

4. Outside income.

One of the electronic data fields is a yes or no question whether the disabled member has reported outside income. The City advised us that this report is limited to wages earned from other employment. Petitioner points out that this "is one of the factors that determine the level of benefits that a member who is on disability receives. The fact that someone works or holds a job is itself not an unreasonable invasion of privacy." We agree with Petitioner that it would not be an unreasonable invasion of a disabled member's privacy to require that the public be told that a disabled member has outside earned income.

5. Medically stationary.

Another of the data fields is a yes or no question whether the disabled member is medically stationary. The City argues that the spirit of the worker's compensation and PERS exemptions are found within the personal privacy exemption. Petitioner also cites the provisions of the Health Insurance Portability and Accountability Act of 1998 (HIPAA). "ORS 192.502(2) expressly exempts from disclosure personal information in a medical file." Attorney General's Public Records Manual, 2004, p. 63. We agree with the City that the disclosure of any medical information is presumptively an unreasonable invasion of privacy. Petitioner has made no showing that the public interest requires the blanket disclosure of medical information in a disabled member's file.

6. Individual transaction records.

The various records here include the member's name, whether he reported outside income or is medically stationary, and the name of the member's physician together with physician billing information. Consistent with this order, the name of the member, disability payment information, and existence of outside earned income should be disclosed. Any health information should be redacted. Petitioner indicates that the request for physician billings is outside this petition.

7. Name of physician and medical diagnosis.

The personal privacy exemption applies with the greatest significance to the name of a disabled member's physician and the medical diagnosis. Again, petitioner has made no showing that in a particular instance the public interest would justify disclosure of such medical information.

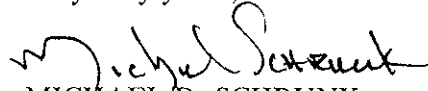
ORDER

Accordingly, it is ordered that the City of Portland promptly disclose the records sought as follows: Petition No. 1, disclose all records requested subject to redaction of any member address information including zip code and state of residence, whether the member is medically stationary, and the name of the disabled member's physician and medical diagnosis; Petition No. 2, disclose all records requested subject to redaction of the disabled member's physician and medical diagnosis; Petition No. 3, disclose all records requested subject to redaction of any member address information including zip code and state of residence, whether the member is medically stationary, the name of the disabled member's physician and any medical diagnosis; and Petition No. 4, disclose all records requested subject to redaction whether the member is medically stationary, the name of the disabled member's physician, and the medical diagnosis.

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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.

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EXHIBIT A
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