



MICHAEL D. SCHRUNK, District Attorney for Multnomah County

600 County Courthouse • Portland, Oregon 97204-1193 • (503) 248-3162

February 3, 1998

BARBARA SIMON
PUBLIC INFORMATION OFFICER
MULTNOMAH COUNTY SHERIFF'S OFFICE
12240 NE GLISAN ST.
PORTLAND OR 97230

J. TODD FOSTER AND STEVE MAYES
THE OREGONIAN
1320 SW BROADWAY
PORTLAND OR 97201-3499

Re: Petition of J. Todd Foster and Steve Mayes, for The Oregonian, dated January 22, 1998, to disclose certain records of the Multnomah County Sheriff's Office

Dear Ms. Simon and Mr. Foster:

BACKGROUND

On this public records petition, ORS 192.410 et. seq., petitioners J. Todd Foster and Steve Mayes, for The Oregonian, requests the District Attorney to order the Multnomah County Sheriff's Office to produce the following records:

All audiotaped jailhouse telephone conversations involving former inmate Cleveland "C.J." Brigham who was incarcerated June 16-19 and between July 7 and early September.

All existing work calendars maintained by sheriff's Lieutenant Vera Pool (Letter petition received January 22, 1998 attached as Exhibit A).

Barbara Simon, Public Information Officer for the Sheriff's Office, responded to the petitioner's oral request for Lt. Pool's records by indicating that the sheriff's Office did not have physical custody of the calendars and was, therefore, unable to forward that material to the petitioners. Ms. Simon advised the petitioners that the tapes would be made available at the conclusion of an on-going criminal investigation. (Letter response dated January 22, 1998 attached as Exhibit B).

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On January 28, 1998, this office received a response from Multnomah County Counsel Jacqueline A. Weber (Exhibit C). Ms. Weber has claimed an exemption for the Brigham jail telephone tapes under the continuing criminal investigation provision of ORS 192.501(3).

Ms. Weber indicates in her response that Franklin Planner calendars from 1995 and 1996 were left behind by Lt. Pool when she vacated her office in the Hanson Building. (Sheriff's Office personnel boxed up the Planners and other items and maintained their custody and control of the box). On Wednesday, January 28, 1998, this office received a package from the Sheriff's Office which we assume are the Franklin Planners. The package was (and continues to be) sealed marked "confidential."

With respect to other work calendars, Ms. Weber notes that the Multnomah County Sheriff's Office provides employees with calendars for use in the conduct of agency business. However, the Sheriff's Office does not retain the calendars once issued or require employees to keep them. Ms. Weber takes the position that Lt. Pool is the custodian of calendars she retains in her possession, ORS 192.410 (1)(b). No exemption has been claimed by the Sheriff's Office. Ms. Weber has notified Lt. Pool's attorney, Daryl Garrettson, that the Sheriff will direct Lt. Pool to provide her work calendar for 1997 to the District Attorney for review in the public records request.

This office received a copy of correspondence dated January 30, 1998, from Lt. Pool's attorney, Daryl Garrettson, to Sheriff Noelle regarding this public records request on February 2, 1998 (Exhibit D). No "work calendars" or other documents were submitted with this correspondence. Mr. Garrettson indicates that Lt. Pool received no county calendar in 1997. He states that Lt. Pool has purchased calendars where she has noted both personal information and on occasion work information. Mr. Garrettson asserts that these calendars are not public records, but are the private property of Lt. Pool.

DISCUSSION

I. AUDIO TAPES

An application of the criminal investigatory material exemption, ORS 192.501 (3) requires an identification and balancing of the various purposes for secrecy and a determination of the stage of the investigation or prosecution. See Jensen v. Schiffman,

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24 Or App 11 (1976). This is a conditional privilege designed to protect active police investigations. "Information compiled in investigations connected with pending or contemplated prosecutions ordinarily will remain confidential because disclosure likely would interfere with law enforcement proceedings." Attorney General's Public Records Manual, p. 25 (1995).

The Sheriff's Office has stated that there is an ongoing criminal investigation and that the audio tapes are being held as part of that investigation. The public interest in the orderly progress of that investigation outweighs the public interest in disclosure at this time.

II. 1995 and 1996 FRANKLIN PLANNERS/CALENDARS

There is an independent criminal investigation into the conduct of Lt. Vera Pool. The calendar material in the Franklin Planners will, in part, be the subject of that investigation. It would be inappropriate for this office to review or comment on such documents until the criminal investigation is complete except to refer to the exemption for criminal investigatory material under ORS 92.501 (3). The box apparently containing the Franklin Planners will be returned unexamined to the custody and control of the Multnomah County Sheriff.

III. OTHER CALENDARS

This office will proceed under the assumption that Lt. Pool is presently acting as custodian of any other work calendars in her possession. Correspondence from her attorney to County Counsel as early as November 26, 1997 establishes Lt. Pool's awareness of the importance of the retention of such documents (Exhibit E). In addition, it is a Class A misdemeanor if a person unlawfully and "...knowingly destroys, mutilates, conceals, removes, makes a false entry in or falsely alters any public record..." ORS 162.305.

The first question to be addressed is whether a work calendar is a public record as defined in ORS 192.410 (4):

"Public record" includes any writing containing information relating to the conduct of the public's business, including but not limited to court records, mortgages, and deed records, prepared, owned, used or retained by a public body regardless of physical form or characteristics.

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The term "writing" is defined by ORS 192.410 (6) to include:

Handwriting, typewriting, printing, photographing and every means of recording, including letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, files, facsimiles or electronic recordings.

Oregon Administrative Rules. Chapter 166, Archives Division, Division 40, General Schedules govern the retention of records and destruction schedule. OAR 166-40-060 (14) provides:

Employee Desk Notes.....1 year. Includes calendars, logs, and diaries recording information used in reports, except those recording a crisis or special event.

There is no corresponding retention schedule for County employee desk notes. Nonetheless, it is clear that calendars an employee uses to record the public's business in writing fits squarely within the statutory definition of a public record. It does not matter whether an employee purchases the writing materials (pen, paper, computer, disk, etc) or if the materials are supplied by the employer. The question is whether the materials have been used to record the public business.

Neither Lt. Pool nor her attorney have seen fit to furnish this office with copies of the calendars in question. Our letter to the Sheriff's Office dated January 23, 1998 specifically stated that "failure to promptly provide copies of the requested documents (or summary statement) also may be treated as ground for a default order of disclosure." The purpose of this admonition is to emphasize the need for this office to have the requested documents available for review in order to carry out our statutory duty to determine if disclosure is appropriate in a particular case.

The conduct of Lt. Pool has been and continues to be the subject of public interest. The disclosure of calendars which reflect the work of Lt. Pool has not been resisted by the Sheriff's Office. We respectfully disagree with Lt. Pool and her attorney that such calendars are per se private and not public records. This office recognizes that a calendar which is a public record may, and often does, contain private information not subject to disclosure. See personal privacy exemption of ORS 2192.502 (2).

The issue is not who has purchased the calendar, but whether the public's business has been recorded in the document. If public business has been recorded on such a calendar, the document is a public record. The public employee who chooses to record the

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public business on a privately purchased calendar can not conceal the public's business from access, review and disclosure.

Lt. Pool has handicapped this office in its review of her claimed privacy interest. Through her failure to produce the documents, this office has no choice but to decline to address her claim of a privacy exemption. All calendars must be disclosed. "

This office is mindful that Lt. Pool may continue to take the position that the calendars are exclusively private records and decline to produce them. This office reminds petitioners that should Lt. Pool refuse to comply with the order of production, petitioners retain the right to seek judicial review. This office expects that once before the court, petitioners will have the legal mechanism to enforce their statutory rights of public record disclosure.

ORDER

Accordingly, it is ordered that the petition of Todd Foster and Steve Mayes to disclose the audio tapes (and Franklin Planners) is denied without prejudice to renewal when the criminal investigation is concluded, ORS 192.502 (9).

It is further ordered that Multnomah County Sheriff's Office Lt. Vera Pool promptly disclose all other calendars in her possession sought in the above petition. - Disclosure of the documents ordered is subject to payment of the Multnomah County Sheriff's Office 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

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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 court action within 7 additional days thereafter.

JKH:JKH

cc: Jacqueline A. Weber, Assistant County Counsel

c.c. Daryl Garrettson

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