

ROD UNDERHILL, District Attorney for Multnomah County

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February 6, 2015

Mark Amberg
Senior Deputy City Attorney
Office of the City Attorney
City Hall
1221 S.W. Fourth Ave., Suite 430
Portland, OR 97204

Brad Schmidt
Reporter, The Oregonian
1500 S.W. First Ave., Suite 400
Portland, OR 97201

Re: Petition of Brad Schmidt for The Oregonian received January 23, 2015, for the City of Portland to disclose 2014 disciplinary records regarding Dean Marriott as well as related correspondence.

Dear Ms. Amberg and Mr. Schmidt:

BACKGROUND

On this public records petition, ORS 192.410 et. seq., petitioner Brad Schmidt for The Oregonian requests the District Attorney to order the City of Portland (“the city”), and its employees or agents to produce a copy or copies of the following records:

- 1) All disciplinary actions, reprimands, etc. made by the city against Dean Marriott in 2014, including but not limited to a May 23, 2014, Notice of Disciplinary Action -- Written Reprimand. This includes Marriott's response, if any.
- 2) 2014 correspondence to Dean Marriott by Nick Fish, Fish's staff, HR regarding Marriott's performance/discipline. This includes Marriott's response, if any. This includes but is not limited to a June 2, 2014, letter by Fish to Marriott stating, “you will wholeheartedly embrace my reform.”

Mr. Marriott was the former long term director of Portland's Bureau of Environmental Services (BES) and earned a salary of \$199,160 a year. The city placed Mr. Marriott on paid administrative leave last October in part due to a city audit critical of an over-budget BES office project called the Columbia Building. The city also hired an outside law firm to investigate the project and determine if any laws had been violated. Mr. Marriott challenged being placed on administrative leave to the Civil Service Board and ultimately reached a settlement with the city that paid him one year of salary as severance. He resigned on January 7, 2015.

Petitioner asked to inspect these records on January 12, 2015 citing Oregon's public records law. ORS 192.410 to 192.505. On January 13, 2015 the request was denied by Carrie Wilton, senior paralegal. The City of Portland cited the personnel discipline exemption as the basis for non-disclosure. 192.501(12). Both Mr. Amberg and Mr. Schmidt agree that this exemption is conditional and must be balanced against the public interest in disclosure but they dispute the applicability of the exemption. The Oregonian believes this exemption does not apply when an employee resigns during an employer investigation in lieu of facing disciplinary action, while the city views the requested records as a completed disciplinary action subject to the protection of ORS 192.501(12). Although both parties make compelling arguments regarding the applicability of the exemption, we don't have to decide that issue because we find that even if the exemption is applicable the public interest requires disclosure.

DISCUSSION

I. Personnel Discipline Action

ORS 192.501(12) conditionally exempts:

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

This is a conditional exemption that may be overcome if it is shown that "...the public interest requires disclosure in the particular instance." The exemption only applies to materials or documents that support completed disciplinary actions when a sanction has been imposed.

The policy underlying this narrowly construed exemption is that it "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 at 124, n.5., 775 P2d 1371 (1989).

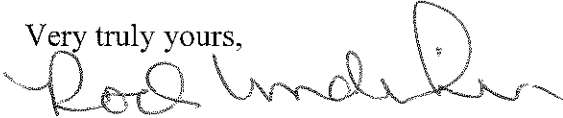
In deciding this case my office is guided by prior precedent. In *City of Portland v. Oregonian Publishing Co.*, 200 Or App 120 (2005), which involved an officer shooting and killing a civilian during a traffic stop, the Multnomah County District Attorney's Office, the Multnomah County Circuit Court, and the Oregon Court of Appeals ordered disciplinary information released in the public interest. In ordering the disclosure of the documents the Court of Appeals held that the public's confidence "comes from transparency and its value is not outweighed by the speculation that transparency will quell candor at some future date. This is not a close case." Id at 127.

According to petitioner, Mr. Marriott has alleged that disciplinary actions taken against him by the city were the result of political motivations, discrimination, and conspiracy by high ranking city officials. Although this order in no way comments on the legitimacy of these allegations, petitioner is correct that under our *Foster* criteria disclosure of disciplinary materials will more likely be warranted when “circumstances raise an issue of unduly harsh (or unduly lenient), arbitrary, irrational or discriminatory administration of discipline of management and thus illuminate management’s conduct of the public business.” MCDA Order, 96-31, *Foster* (1997). *Foster* also notes that disclosure should “promote the public’s understanding of the manner in which the programs and services of government are being carried out.” *Id.* In essence, the public interest is best served by full disclosure of all available information so the public is fully informed and in a position to evaluate the appropriateness of the imposed discipline and severance payment. *Id.*

Additional 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. (2011 Attorney Generals Manual, pg 44). Mr. Marriott was the city’s longest-tenured administrator, a bureau director with a staff of 520 employees, and was highly compensated. Furthermore, his paid administrative leave status and basis for discipline has already been made public by the news media, by his own actions in challenging his discipline, as well as by the city¹. All of these factors weigh in favor of disclosure in the public interest.

ORDER

Accordingly, it is ordered that the petition is granted and that the City of Portland promptly disclose the records sought in the above petition 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 and this order.

Very truly yours,


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

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¹ Last month in response to a separate public records request, the city provided Mr. Schmidt a copy of the October, 2014 Notice of Paid Administrative Leave, Mr. Marriott’s appeal to the Civil Service Board, and the separation agreement entered into between Mr. Marriott and the city.