



ROD UNDERHILL, District Attorney for Multnomah County

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

September 9, 2015

Lee van der Voo
Reporter
InvestigateWest

Beverly Pearman
Assistant General Counsel
Port of Portland
7200 N.E. Airport Way
Portland, Oregon 97208

Re: Petition of Lee van der Voo of InvestigateWest for the disclosure of documents relating to an internal investigation of an alleged sexual assault by a Port of Portland employee.

Dear Ms. van der Voo and Ms. Pearman:

PROCEDURAL HISTORY

In September of 2014 a Port of Portland (Port) firefighter (the victim) reported that a co-worker (the accused) had sexually assaulted her during a Port-sponsored training in Texas. Petitioner, an investigative reporter, filed her first public records request in February 2015 requesting a copy of the Port's internal investigation file. After negotiation between the parties, the Port agreed to provide the bulk of the records requested. This office issued a limited order denying the petition to the extent it would disclose identifying information about the victim and acknowledging that the remainder of the petition was moot in light of the Port's concession that disclosure of the records was in the public interest. *In re petition of van der Voo (van der Voo I)*, MCDA PRO 15-12 (June 8, 2015)

On June 16, 2015, petitioner filed a second petition after the Port cited changed circumstances and refused to provide the documents it had previously agreed to release. The Port stated that the accused firefighter had agreed to give a statement to their investigators in the immediate future, which weighed against disclosure at that time. We agreed with the Port that delaying disclosure of the records for a few weeks given the imminent completion of the investigation was reasonable. *In re petition of van der Voo (van der Voo II)*, MCDA PRO 15-17 (June 26, 2015).

Since our last order, the Port has interviewed the accused, concluded its disciplinary process, and terminated the accused's employment. A Tarrant County, Texas grand jury has indicted the accused for sexual assault arising out of this incident. The Port still asserts that the records are exempt from disclosure. The Port primarily relies on the new indictment as a change in circumstances that caused it to revisit its original public interest analysis.

Also new to this petition, petitioner now additionally seeks disclosure of all personnel complaints filed by or against the victim, the victim's husband, and the accused.

As to the complaints, the Port has variously claimed they are exempt from disclosure as information of a personal nature, ORS 192.502(2); as documents relating to a personnel discipline action, ORS 192.501(12); and as documents gathered in anticipation of litigation, ORS 192.501(1). The Port has provided this office two sets of responsive emails and notes: one contains complaints that are open and based on which disciplinary action might still be taken, and the other contains closed complaints. In addition, the Port provided a list, generated in April of this year, of all internal complaints made by Port of Portland firefighters dating back to 2011.

DISCUSSION

A. The investigation file

Except as specifically limited or excluded below, the Port must promptly release its investigative file. Our analysis in *van der Voo II* leaves little room to conclude otherwise.

i. *Personnel discipline exemption – ORS 192.501(12)*

ORS 192.501(12) exempts records relating to a personnel discipline action from disclosure unless the public interest requires otherwise. In this case, the Port has imposed discipline, which makes the exemption facially applicable. We turn then to the public's interest in disclosure.

The analytical framework set out in *Foster* guides our public interest evaluation. *In re petition of Foster for The Oregonian*, MCDA PRO 96-31 (1997). The first and second *Foster* factors in our *Foster* analysis are dispositive in this case:

- (1) Serious misconduct by a government employee should be disclosed in the public interest. [...]
- (2) Generally, termination from employment or other discipline for cause is serious misconduct if it is based on [...] criminal behavior (particularly when job-related) [...].

The purported sexual assault of a co-worker while at a Port-sponsored training is "serious misconduct" and should be disclosed.

ii. *Information of a personal nature – ORS 192.502(2)*

Having already concluded that the public interest requires disclosure under 192.501(12), the similar analysis under 192.502(2) leads to the same conclusion. The Port asserts that disclosure of the employee interviews performed as a part of this investigation will have a chilling effect on future investigations and impair the department's ability to heal in the wake of this event. We have no basis to dispute the factual accuracy of this assertion, however, we have previously considered and rejected this argument in the specific context of fire departments. *In re petition of Bernstein for The Oregonian*, MCDA PRO 15-14 (2015) (ordering disclosure of Portland Fire Department disciplinary investigation over objection that it would harm morale and impair future investigations).

That said, unlike the personnel discipline exemption, the burden under ORS 192.502(2) lies with the petitioner to establish that the disclosure does not constitute an unreasonable invasion of privacy. Disclosure of certain categories of information is presumptively unreasonable. Factual details of a sexual assault are one such category. *In re petition of Franzen for The Oregonian*, MCDA PRO 04-02 (2004). Absent specific approval from the victim, her personal account of the physical details of the sexual assault should be redacted from the record of her interview. Limited additional redaction of the victim's account of the events is also appropriate. These include: personal cell phone numbers for co-workers and an inflammatory, and completely irrelevant to this incident, statement about the personal lives of two co-workers. Attached to the Port's copy of this letter are two documents containing the victim's statement with appropriate redactions indicated in yellow highlighter.

Notes and other records of the accused's interview appear in the Port's file. He too describes a sexual encounter. For the same reasons discussed above, we believe that disclosure of a person's description of a sexual encounter (whether consensual or not) is an unreasonable invasion of privacy. Accordingly, attached to the Port's copy of this letter are the notes from the accused's interview with appropriate redactions indicated in yellow highlighter. To be clear, any physical description of the sexual acts at issue in this investigation may be redacted by the Port prior to disclosure regardless of where in the file they are located.

From the submissions in this matter it is clear that petitioner already knows the identities of all parties involved in this incident. Although we have no authority to restrict or limit what she chooses to publish we reiterate our previous holding on this point from *van der Voo I*:

Given that the identity of an alleged sexual assault victim is not often publicly disclosed without the victim's consent and, as of this writing, the victim has not consented to disclosure, this office finds the exemption should be employed to protect the victim's privacy. Ms. van der Voo has not met her burden of showing that the public interest requires a different result. Therefore, the Port of Portland is hereby ordered to redact any disclosed documents to protect the victim's name and other identifying information.

iii. Attorney-client privilege – 192.502(9) / 40.225

The Port asserts attorney-client privilege as to specific documents identified in a privilege log supplied in its submission. We agreed with the Port's assertion of privilege as to these documents in *van der Voo I* and see no basis to revisit that determination.

iv. Summary of exempt investigation file documents

In summary, the Port may withhold: 1) the documents it has specifically listed as privileged in its privilege log; 2) the details of the sexual encounter as recounted by the victim or the accused and other personal information consistent with the redactions attached to the Port's copy of this letter; and 3) any personal identifying information of the victim.

B. Personnel complaints filed by or against the victim, the victim's husband, and the accused

For the reasons set forth below the complaints responsive to petitioner's request are exempt from disclosure under the Public Records Law.

i. Personnel discipline exemption – ORS 192.501(12)

As to ongoing personnel investigations we have consistently held that ORS 192.501(12) exempts these records from disclosure. Having reviewed the specific complaints in question, they contain no compelling reason to depart from this precedent. The emails documenting complaints still under active investigation are exempt from disclosure.

ii. Litigation exemption – ORS 192.501(1)

This exemption places government agencies and their attorneys on the same footing as private litigants by exempting attorney work product from disclosure. The courts have interpreted the litigation exemption to only apply to records that were “compiled or acquired by the public body for use in [...] litigation.” *Lane County School Dist. v. Parks*, 55 Or App 416, 419 (1981). The exemption does not apply to “records collected in the ordinary course of business even if those records subsequently become relevant to litigation.” *Id.* See also, *In re petition of Larson for News 12*, MCDA PRO 96-32 (1996). Even assuming that the Port has established that litigation is “reasonably likely” to occur, these internal personnel complaints were gathered in the ordinary course of business, not in specific anticipation of litigation. Accordingly, ORS 192.501(1) does not exempt these complaints from disclosure.

iii. Information of a personal nature – ORS 192.502(2)

ORS 192.502(2) exempts from disclosure:

Information of a personal nature such as but not limited to that are kept in a personal, medical or similar file, if public disclosure 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.

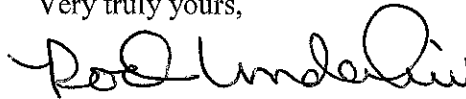
Personnel complaints are precisely the type of information that would be contained in an employee's personal human resources file. The complaints provided for our review reflect workplace friction, but do not allege any major misconduct such that the public interest would outweigh the presumptive privacy interests of the involved employees.

ORDER

Accordingly, it is ordered that the petition is granted in substantial part with respect to the Port's investigation file and denied with respect to previous complaints by or against the parties involved. The Port is ordered to promptly disclose all records contained in the investigation file except for: 1) the documents it has specifically listed as privileged in its privilege log; 2) the details of the sexual encounter as recounted by the victim or the accused and other personal information consistent with the redactions attached to the Port's copy of this letter; and 3) any

personal identifying information of the victim. This disclosure is subject to payment of fees to the Port, if any, not exceeding the actual cost in making the information available.

Very truly yours,

A handwritten signature in black ink, appearing to read "Rod Underhill". The signature is fluid and cursive, with the first name "Rod" being more prominent.

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's 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.

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