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April 5, 2016

Carli Brosseau
The Oregonian
1500 S.W. First Ave., Suite 400
Portland, Oregon 97201

Jeni Woods
Senior Assistant City Attorney
Gresham City Attorney's Office
1333 N.W. Eastman Parkway
Gresham, Oregon 97030

Re: Petition of Carli Brosseau for The Oregonian requesting 2009 disciplinary records relating to GPD Officer Jason Justus.

Dear Ms. Brosseau and Ms. Woods:

In her public records petition under ORS 192.410 et seq., petitioner Carli Brosseau appeals the denial of her request for the following documents from the Gresham Police Department (GPD):

any records relating to Officer Jason Justus in connection with an internal affairs investigation in 2009.

On November 5, 2009 the Portland Mercury published an article in which it stated that a fellow police officer with GPD had filed a complaint regarding Officer Justus using inappropriate and racially charged language to refer to black people. At the time the Mercury published its article GPD stated that a personnel investigation was ongoing and declined further comment. It has since been publicly disclosed that Officer Justus was disciplined as a result of the investigation, that the conduct underlying the discipline occurred while Officer Justus was off duty, and that it did not occur while Officer Justus was acting in a law enforcement capacity.

On March 21, 2016 petitioner requested the above described records from GPD. On March 23, 2016 a GPD representative informed petitioner that all but one document responsive to her request had been destroyed in accordance with GPD's document retention schedule. As to the remaining document, GPD asserted that it was exempt from disclosure by operation of ORS 192.501(12), the personnel discipline exemption.

On March 25, 2016 petitioner filed this appeal. The City of Gresham has provided this office with the document at issue and continues to assert that it is exempt by operation of ORS 192.501(12).

DISCUSSION

A. Personnel Discipline – ORS 192.501(12)

ORS 192.501(12) conditionally exempts from disclosure:

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

Petitioner concedes it is likely that the document at issue fits within the scope of ORS 192.501(12) and instead focuses her argument on whether or not the public interest nonetheless requires disclosure. Having reviewed the document in question, it clearly meets the terms of the personnel discipline exemption. We must, then, determine whether or not public interest requires disclosure in this particular instance.

This office has frequently been called on to decide whether or not the public interest requires disclosure of disciplinary documents relating to public employees generally and police officers specifically. In order to promote consistency and fairness we have for the last 20 years followed guidelines known as the *Foster* criteria in evaluating the public's interest in disclosure of public employee discipline. *In re petition of Foster for The Oregonian*, MCDA PRO 96-31 (1997). These guidelines are, in summary:

1. Serious misconduct by a government employee should be disclosed;
2. Generally, termination from employment or other discipline for cause is serious misconduct if it is based on corruption (including theft of public property), abuse of power, misconduct that impairs the mission of the agency, or criminal behavior;
3. Less serious misconduct may require disclosure if repeated violations fairly raises the issue of imprudent management of public employees;
4. Cases evidencing systematic misconduct within a particular agency or part of an agency that shed light on the effectiveness of management may require disclosure even if, individually, the instances of misconduct are not serious;
5. Less serious misconduct may require disclosure in the public interest where circumstances raise a question of unduly harsh (or unduly lenient), arbitrary, irrational or discriminatory administration of discipline by management;
6. Lastly, public employees should not be subjected to public disclosure of disciplinary violations that do not fit into a category above where such would not significantly promote the public's understanding of the manner in which government business is carried out.

We have regularly, though not universally, found that the public has an overriding interest in disclosure where the police officer was of high rank or power within the department. See, for example, *In re petition of Bernstein for The Oregonian*, MCDA PRO 13-04 (2013) (disclosure ordered of HR investigation into police lieutenant); *In re petition of Bernstein for The Oregonian*, MCDA PRO 11-11 (2011) (disciplinary records leading to termination of the police union president); *In re petition of Bernstein for The Oregonian*, MCDA PRO 10-11 (2011) (police captain disciplined for off-duty conduct). The Oregon Court of Appeals has agreed that

high rank can justify disclosure even when the conduct at issue is off-duty. *City of Portland v. Anderson*, 163 Or App 550 (1999) (police captain's use of an escort service off duty, and resulting discipline, subject to disclosure).

Conversely, we have usually found that the public did not have an overriding interest in disclosure where the police officer did not hold command rank. *In re petition of Schmidt for The Oregonian*, MCDA PRO 08-13 (2008) (reprimand of K-9 officer not subject to disclosure where conduct was non-criminal and off-duty); *In re petition of Schmidt for The Oregonian*, MCDA PRO 08-07 (2008) (request for all internal investigations over an 18 month period denied in part because no affected officers were high ranking); *In re petition of Damon Woodcock*, MCDA PRO 01-05 (2001) (police officer denied access to disciplinary records of another police officer).

Petitioner has not alleged, and we find no reason to believe, that the conduct underlying the discipline in this case was criminal in nature or that it involved an abuse of power or corruption. Our precedent then instructs that, unless the discipline sheds light on irrational or arbitrary management of the police bureau, it is not subject to disclosure.

We must give effect to the legislature's intent in choosing to enact a public records exemption. If ORS 192.501(12) is to have any meaning then, absent extraordinary circumstances not present in this case, it must at very least cover discipline imposed on low ranking employees of an agency that does not lead to termination of employment. As we stated in *Foster*:

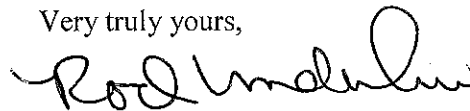
[P]ublic employees should not be subjected to public disclosure of disciplinary violations not of the kind specified in the preceding guiding principles, when such disclosure would merely subject the employee to added humiliation and would not significantly promote the public's understanding of the matter in which the programs and services of government are being carried out. Part of the purpose of employee discipline is to encourage the employee's morale while correcting the undesirable conduct, which goal is not promoted, as we think, by a process of indiscriminate public pillory – and which consideration presumably was part of the Legislative Assembly's motivation for the enactment of the "discipline action" exemption in the first place.

In re petition of Foster for The Oregonian, MCDA PRO 96-31, p.6 (1997). On these facts we do not see a basis to depart from the settled principles established in *Foster*.

ORDER

Accordingly, the petition is denied.

Very truly yours,



ROD UNDERHILL
District Attorney
Multnomah County, Oregon