



**ROD UNDERHILL**, District Attorney for Multnomah County

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June 13, 2016

Nick Budnick  
Portland Tribune  
6605 S.E. Lake Road  
Portland, Oregon 97222

Jenny Madkour  
Multnomah County Attorney  
501 S.E. Hawthorne Blvd., Suite 500  
Portland, Oregon 97214

Re: Petition of Nick Budnick, for the Portland Tribune, requesting records relating to the investigation of Sheriff Daniel Staton

Dear Mr. Budnick and Ms. Madkour:

In his public records petition under ORS 192.410 et seq., petitioner Nick Budnick, on behalf of the Portland Tribune, requests this office to order Multnomah County to disclose the following records:

**All witness statements, affidavits, letters or other submissions from current or former Sheriff's employees or their representatives (including but not limited to lawyers), as well as any interview recordings or interview notes or transcripts of interactions with current and former Sheriff's employees.**

In response to petitioner's request, the county has provided him with the letters it has received from employees or their representatives. We thus deny that portion of the petition as moot. Remaining at issue are the notes taken by the human resources investigators while conducting their interviews. The county provided these notes for this office's review as required by statute.

This public records request comes amid a drumbeat of articles in the local media examining the sheriff, his management practices, the claims of his subordinates regarding his conduct in office, and notices of tort claim filed against him by various parties. The Oregon Department of Justice (DOJ) conducted an investigation into whether the sheriff had engaged in any criminal wrongdoing, which it publicly released upon its conclusion. After the release of the DOJ investigation, the county chair initiated her own investigation of the sheriff, the fruits of which are the subject of the present petition. Against this backdrop the sheriff has announced that he will be leaving office on August 16, 2016, just over two months from now.

After the sheriff announced his retirement the county indicated that its own investigation was "suspended." In her filing with this office, county counsel writes that, "[a]lthough the investigation has been characterized as temporarily suspended, the County's review and assessment of these matters is ongoing. Witness interviews are not complete, recommendations

have not been issued, and legal review continues. The investigation is conservatively expected to conclude in the next 4 months.”

For the reasons discussed below, we agree with petitioner that there is a significant public interest in disclosing the details of this investigation, but, after balancing the competing interests, we do not believe that disclosure is mandated today.

## DISCUSSION

### A. Personnel Discipline – 192.501(12) / 181.854(3)

ORS 192.501(12) conditionally exempts from disclosure:

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

ORS 181.854(3) provides that:

A public body may not disclose information about a personnel investigation of a public safety employee of the public body if the investigation does not result in discipline of the employee.

Petitioner asserts that the county chair, or her designee in the human resources department, may not as a legal matter impose discipline on the sheriff because the sheriff is an independently elected official. If true, it follows then that the sheriff’s status would preclude application of this exemption. ORS 192.501(12) applies only to a disciplinary investigation that results in the imposition of discipline. Petitioner argues then, that even an incomplete investigation may not be exempted from disclosure under these circumstances because, regardless of its findings, it could not result in a “disciplinary action.” Although an interesting question, we need not resolve it in this opinion because, as applied to peace officers, which Sheriff Staton is, ORS 181.854(3) exempts from disclosure personnel investigations that do not result in discipline.<sup>1</sup> Thus, if the chair is able to discipline the sheriff, ORS 192.501(12) exempts the records from disclosure; if she is not, ORS 181.854(3) exempts them from disclosure.

This does not end the analysis. The exemptions found in ORS 192.501(12) and 181.854(3) are both conditional exemptions that yield if the public interest so requires. This office recognizes that allegations of misconduct by the county’s sheriff are of intense public interest. We also recognize that the public has an interest in fair and orderly investigations conducted by its public bodies, and in encouraging public bodies to actively police the conduct of their officials and managers. The results of this investigation, whatever they may be, should be disclosed in the public interest. However, that the public interest requires disclosure does not mean that it requires immediate disclosure. See, e.g., *In re petition of Van der voo*, MCDA PRO 15-17 (2015).

This case presents a unique circumstance in that the person being investigated is an elected official with unilateral and continued authority over the careers and continued

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<sup>1</sup> Although the sheriff may not be an “employee,” in the usual sense, of the Sheriff’s Office, ORS 181.854(1)(b) defines “public safety employee” as “a certified reserve officer, corrections officer, parole and probation officer, police officer or youth corrections officer as those terms are defined in ORS 181.610.” Because the sheriff is a police officer, he is thereby a “public safety employee” for purposes of ORS 181.854(3).

employment of the witnesses in the investigation. Given that the sheriff has announced his intent to leave office on August 16, 2016 delay of disclosure until that date will also provide a measure of protection to those employees of the sheriff who have already spoken with investigators, and to those who may yet cooperate with the investigation.

The public has an unquestionably high interest in the conduct of its high-ranking law enforcement officers. *City of Portland v. Anderson*, 163 Or App 550 (1999) (so finding as to a Portland police captain). Much, though not all, of the substance of the county investigation is already in the public eye, having been made public either by the DOJ investigation or in the various tort claim notices that have been filed and published. We do appreciate petitioner's argument that the source of the information matters. An allegation from a civil claimant is different from a statement by a high-ranking non-litigant employee. But, on balance, we do not find that a two-month delay in disclosure will unduly impede the public's understanding of the allegations against the sheriff.

We caution that the existence of a dormant investigation does not permit a public body to thwart the purpose of the public records law. The county indicates that work on this investigation is again "ongoing." We will reassess our assessment of the public interest if the investigation is not pursued and concluded with due diligence.

B. Litigation records – 192.501(1)

ORS 192.501(1) conditionally exempts from disclosure:

Records of a public body pertaining to litigation to which the public body is a party if the complaint has been filed, or if the complaint has not been filed, if the public body shows that such litigation is reasonably likely to occur. This exemption does not apply to litigation which has been concluded, and nothing in this subsection shall limit any right or opportunity granted by discovery or deposition statutes to a party to litigation or potential litigation.

As the county points out, multiple tort claim notices have been filed against the county based on the conduct of the sheriff. This exemption is a conditional exemption just like the personnel investigation exemptions discussed above. Having just concluded that the public interest requires the eventual disclosure of the investigation, we see no basis on which to reach a different conclusion under the litigation records exemption.

C. Attorney-client privilege – 192.502(9)(a)

The county is not asserting privilege as to any entire document or even as to any large section of a document. Rather the interviews occasionally stray into discussions of contact between management level employees and an attorney for the county. The redaction of these few lines when the records are eventually released is appropriate and will not impair the legibility of the interviews as a whole. The exemption of course applies only to mention of legal advice or opinion and not to any mention of an attorney.

County counsel may end up using the completed investigation records in order to provide legal advice that would properly be exempt from disclosure. This would not, however, shield the factual investigation itself under the public records law.

D. Internal Advisory Communications – 192.502(1)

ORS 192.502(1) exempts from disclosure:

Communications within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to any final agency determination of policy or action. This exemption shall not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure.

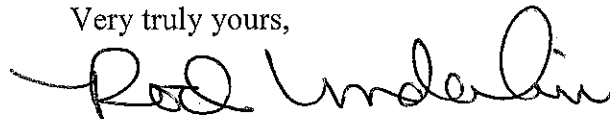
The county asserts that the notes from the investigation are internal advisory communications under ORS 192.502(1). Without disclosing the substance of the notes it suffices to say that the vast majority of them relate to “purely factual materials” and we decline to apply this exemption to that material.<sup>2</sup>

In sum, although the public interest in transparency as to the conduct of this county’s sheriff is undeniably high, this is counterbalanced by the public interest in a complete and fair investigation and in protection of cooperating sheriff’s office employees. Today, we do not find that the public interest demands immediate disclosure. We expect that analysis will be different by mid-August when the sheriff has left office.

**ORDER**

The petition is denied at this time, with leave to renew after August 16, 2016.

Very truly yours,



ROD UNDERHILL

District Attorney

Multnomah County, Oregon

16-09

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<sup>2</sup> The last page of notes from one of the interviews, the only one conducted on 5/25/16, contains policy discussion and opinion that comes closest to fitting within the scope of the exemption. Given our disposition of the other claims of exemption we need not finally resolve that question today.