



ROD UNDERHILL, District Attorney for Multnomah County

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February 6, 2017

Nigel Jaquiss
Willamette Week
2220 N.W. Quimby Street
Portland, OR 97210

Lory Kraut
City Attorney's Office
1221 S.W. Fourth Avenue, Suite 430
Portland, Oregon 97204

Re: Petition of Nigel Jaquiss for Willamette Week requesting a Portland Fire Bureau report.

Dear Mr. Jaquiss and Ms. Kraut:

In his public records petition, dated January 25, 2017, petitioner Nigel Jaquiss, on behalf of Willamette Week, requests that this office order the Portland Fire Bureau (PFB) to disclose a copy of the following record:

Portland Fire report RP17-2607 dated 1/9/17.

Mr. Jaquiss filed this request on January 17, 2017. On January 24, 2017 PFB denied his request, citing HIPAA and its state counterpart. This appeal followed. Acknowledging the recent decision in *OHSU v. Oregonian*, 278 Or App 189 (2016), PFB has shifted its argument and now claims the records are exempt under ORS 192.502(2), which protects information of a personal nature.

BACKGROUND

On January 9, 2017 the Portland Fire Bureau responded to a medical incident involving a homeless woman with a newborn infant out in the bitter cold. The infant was either stillborn or died shortly after birth.

Mr. Jaquiss' reporting on this matter indicates that there is conflicting available information about the circumstances of the baby's death. He quotes the State Medical Examiner's Office as stating their autopsy concluded the baby had been stillborn. He writes that the Portland Police Bureau reports relating to the incident include a statement from an OHSU doctor who said that the child was "viable." Mr. Jaquiss further cites the 911 dispatch log that includes a written statement from dispatchers that "baby is conscious and breathing okay, but has been outside this entire time." See, Jaquiss, N. "A Baby is Dead After Being Found With His Homeless Mother at a Portland Bus Stop." WILLAMETTE WEEK (Jan. 16, 2017) (retrieved from <http://www.wweek.com>).

The Portland Fire Bureau has released its incident and responder's reports to petitioner, but asserts that the pre-hospital case report is exempt from disclosure. The released fire reports

contain little relevant information other than dates, times, and responding personnel. The fire bureau has provided this office with the two page, unredacted, pre-hospital case report for our review. The pre-hospital care report documents in narrative form the observations of and actions taken by the responding firefighters. For the reasons stated below, we respectfully deny the petition.

DISCUSSION

A. HIPAA / ORS 192.502(8)

ORS 192.502(8) exempts from disclosure:

Any public records or information the disclosure of which is prohibited by federal law or regulations.

HIPAA affords general privacy rights to patient medical information held by covered entities. However, the court of appeals' recently held in *OHSU v. Oregonian*, 278 Or App 189 (2016), that HIPAA cannot provide a basis to withhold records under the public records law. Even assuming that the Portland Fire Bureau is a HIPAA covered entity, we are bound by our appellate court's present interpretation of the interplay between HIPAA and the public records law.

B. ORS 192.502(2) – Information of a Personal Nature.

ORS 192.502(2) exempts from disclosure:

Information of a personal nature such as but not limited to that 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.

We have previously recognized that the “disclosure of any medical information is presumptively an unreasonable invasion of privacy.” *Petition of Hinkle for The Oregonian*, MCDA PRO 05-03 (2005). This “unreasonable invasion” may only be overcome by clear and convincing evidence that the public interest requires disclosure.

Petitioner argues that factual discrepancy in available records as to the timing of the baby's death “leaves unanswered important questions about the training and professionalism of first responders who provide critical public safety services.” He further argues that, because so much information has already been released by other agencies (the police bureau and the medical examiner's office) that the additional invasion of privacy would be minimal if the fire bureau's records were also released.

Petitioner also cites the intense public interest in this case. Specifically invoking this death, protesters shut down a January 25, 2017 meeting of the Portland City Council.

There could be little more wrenching or personal to a parent than the death of a child. While we readily acknowledge that there has been much recent outcry and activism in our community about homelessness in general, and this incident in particular, we disagree that resolving the factual conflict in this case will further that conversation. The public is aware that a mentally ill homeless woman lost her child. The public can reasonably conclude that the child

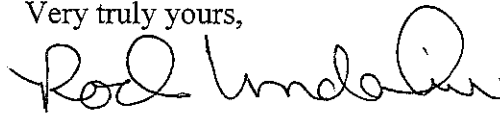
would have had a higher likelihood of survival had his mother not been homeless or, at least, been engaged with services. The exact timing and cause of this baby's death would not galvanize public interest any more than the tragic facts already known, or at least would not do so to such an extent that it outweighs the unreasonable invasion of privacy in this case.

Having reviewed the firefighters' narrative account contained in the report, we do not believe that the public interest requires its disclosure by clear and convincing evidence.

ORDER

Accordingly, the petition is denied.

Very truly yours,

A handwritten signature in black ink, appearing to read "Rod Underhill". The signature is fluid and cursive, with a large loop at the end.

ROD UNDERHILL
District Attorney
Multnomah County, Oregon