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August 2, 2017

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

Conrad Wilson  
Oregon Public Broadcasting  
cwilson@opb.org

Heidi K. Brown  
City of Portland  
Office of the City Attorney  
1221 S.W. Fourth Avenue, Room 430  
Portland, Oregon 97204

Re: Petition of Nick Budnick, for The Portland Tribune, joined by Conrad Wilson, of Oregon Public Broadcasting, seeking the names of the finalists for Portland Police Chief

Dear Mr. Budnick and Ms. Brown:

Mr. Budnick, of The Portland Tribune, requested from the City of Portland the names of the six candidates for Portland Police Chief. The City of Portland declined to disclose the names. Petitioner filed this petition on July 24, 2017. Mr. Wilson, of Oregon Public Broadcasting, filed a similar request on July 25, 2017, and has asked to be included in this matter.

By July 24, 2017, the six candidates had been narrowed to four finalists. Of the four finalists, the City of Portland indicated that two finalists were asserting confidentiality. The finalists that were not asserting confidentiality were Michael Marshman and Larry Sciroto. Petitioner has narrowed his request to the names and agency affiliations of the two unnamed finalists, in the minimum form necessary to convey the information.

Petitioner asserts that the public should have as much time as possible to assist in vetting potential police chiefs. Public vetting, which means to make a careful and critical examination, is essential to the process, as information can be revealed by the public to assist the Mayor in making an informed decision. Since 1999, the Portland Police Bureau has had six police chiefs. In three of those instances, petitioner asserts, public vetting would have revealed information that would have provided assistance to the Mayor and would have decreased the risk of the Portland Police Bureau and the City of Portland having police chiefs of limited duration.<sup>1</sup>

The City of Portland has provided an affidavit of Anna Kanwit, who currently serves as the Director for the Bureau of Human Resources for the City of Portland. After a previous Public

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<sup>1</sup> Supplement Submission of Petitioner (July 25, 2017).

Records Order by this office<sup>2</sup>, the City of Portland began to notify finalists for bureau director level positions that their names would be released in response to any public records requests. In August of 2015, one candidate who was identified as a finalist for Director of the Housing Bureau, declined to proceed in the selection process upon learning that the candidate's name would be released to the public due to a public records request. This was repeated in June of 2015 when another candidate identified to be a finalist for Director of the Bureau of Environmental Services declined to continue in the process, due to concerns that her current employer was not aware that she was seeking other employment. The City of Portland has now committed "to maintaining the confidentiality of candidate information, including name, unless ordered otherwise."<sup>3</sup> There is a check box on a supplemental questionnaire for the applicant to affirmatively request confidentiality.<sup>4</sup>

The City of Portland has asserted that information regarding the candidates, including their names, is exempt from disclosure due to ORS 192.502(4) and ORS 192.502(2). The City of Portland has stated that "it is not in the public interest to limit the pool of candidates applying for high level positions." By allowing public exposure during the hiring process, many "candidates will either not apply or will withdraw from consideration,"<sup>5</sup> due to concerns that candidates may be viewed adversely by their current employers.

## DISCUSSION

### A. Confidential Submissions – ORS 192.502(4)

ORS 192.502(4) exempts from disclosure,

Information submitted to a public body in confidence and not otherwise required by law to be submitted, where such information should reasonably be considered confidential, the public body has obliged itself in good faith not to disclose the information, and when the public interest would suffer by disclosure.

There are five conditions that must be met for this exemption to apply:

1. The informant must have submitted the information on the condition that it would be kept confidential;
2. The informant must not have been required by law to provide the information;
3. The information itself must be of a nature that reasonably should be kept confidential;

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<sup>2</sup> *Petition of Brad Schmidt*, MCDA PRO 13-08 (June 14, 2013).

<sup>3</sup> Declaration of Anna Kanwit (July 26, 2017).

<sup>4</sup> The check box states, "I am submitting this application with the understanding that the City will keep it confidential and will only disclose the application if ordered to do so. I would not submit this application without the promise of confidentiality."

<sup>5</sup> City of Portland's Response (July 28, 2017).

4. The public body must show that it has obliged itself in good faith not to disclose the information; and
5. Disclosure of the information must cause harm to the public interest.

B. Personal Privacy Exemption – ORS 192.502(2)

ORS 192.502(2) conditionally exempts:

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

It is arguable that, under ORS 192.502(2), the candidates' names are of such a personal nature that it would constitute an unreasonable invasion of privacy to reveal their names, given the circumstances in this particular matter.

We find that the City of Portland has provided sufficient information to satisfy the first four considerations under ORS 192.502(4).

As to both exemptions, one consideration remains, which is to balance the public interest. The existence of an adverse public interest must be weighed against the positive public interest in disclosure. Will the disclosure of their names cause harm to the public interest, or will it benefit the public interest? Both sides have provided compelling arguments, which have also taken into consideration events that have occurred subsequent to our decision in *Petition of Brad Schmidt*.

With regard to the adverse public interest, we took note in *Schmidt* of the potential chilling effect that public exposure might have upon a candidate, as the candidate could then be viewed adversely by a current employer. This consideration was in the abstract. The City of Portland has now presented evidence that at least two candidates for other bureau positions withdrew upon learning that their names would be revealed to the public. The City of Portland also has presented evidence that two of the current finalists for police chief have affirmatively requested confidentiality in this process. Only one of the four finalists will become police chief, which means that the remaining three could face the risk of losing their current jobs. Throughout this process, the City of Portland has taken several measures to include the public, such as meeting with a portion of community members to discuss qualifications, utilizing online surveys to form questions, and including numerous and diverse members of the community in an interview panel.<sup>6</sup> The final thrust of the City's argument is that without providing confidentiality, the pool of candidates may be adversely limited. Disclosure of their names may have a chilling effect on future candidates for bureau positions within this city.

With regard to the positive public interest in disclosure, the position of chief of police is among the most important non-elected positions in this city. The police chief oversees hundreds

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<sup>6</sup> A full list of the names of twenty-member panel that interviewed the candidates can be found at <http://www.portlandmercury.com/blogtown/2017/07/21/19179851/heres-who-interviewed-the-police-chief-finalists>

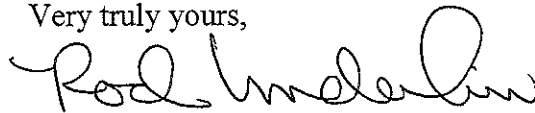
of sworn officers who are providing public safety each and every day, which has a direct impact on the public. Members of the community may have information that would assist in the vetting process. Petitioner points out that public vetting may have assisted in uncovering concerning issues prior to the appointment of previous chiefs of police, as some of the information that came to light was in the hands of community members. "A willingness to be a public finalist would indicate a measure of bona fide interest in becoming a public servant in Portland."<sup>7</sup> Other cities release finalists' names when seeking to fill a position as important as chief of police.

In weighing all of these factors, we conclude that disclosure of the names would cause public harm. The chilling effect of the loss of confidentiality for current finalists, who could withdraw their candidacy if the City were ordered to disclose their names at this time, and future candidates combined with the efforts by the Mayor to form such a diverse group of members of the public to be included in the interview process, satisfies us that it is in the interest of the public that the names of the remaining finalists remain confidential during this process.

**ORDER**

Accordingly, your petition is denied.

Very truly yours,



ROD UNDERHILL

District Attorney

Multnomah County, Oregon

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<sup>7</sup> Supplemental Submission of Petitioner (July 31, 2017).