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October 13, 2017

Ben Straka
Freedom Foundation
P.O. Box 18146
Salem, Oregon 97305

Heidi Brown
Senior Deputy City Attorney
City Attorney's Office
1221 S.W. Fourth Avenue, Suite 430
Portland, Oregon 97204

Re: Petition of Ben Straka, on behalf of the Freedom Foundation, requesting a list of members of Laborers' Local 483 represented city employees

Dear Mr. Straka and Ms. Brown:

In his public records petition, dated October 4, 2017, petitioner Ben Straka, on behalf of the Freedom Foundation, requests that this office order the City of Portland to disclose the following records:

the names of all City of Portland employees who are represented by Laborers' Local 483, excluding Seasonal Maintenance Workers and Recreation Employees.

The city denied petitioner's request, asserting that the names are exempt from disclosure by operation of ORS 192.502(2), the personal privacy exemption, and ORS 192.502(9) to the extent it incorporates the unfair labor practices prohibitions of ORS 243.672(1).

In addition to the submissions from the Freedom Foundation and the city, we have also received a letter from counsel on behalf of Laborer's 483 supporting the city's position that disclosure of these records would be an unfair labor practice under Oregon law.

For the reasons discussed below, we conclude that petitioner is entitled to the records he seeks.

DISCUSSION

A. 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 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.

Any claim of exemption under this section must be individualized to the person affected by the disclosure. *Mail Tribune v. Winters*, 236 Or App 91 (2010). The city, correctly, observes that we have not required an individualized determination in the context of medical information. See, *Petition of Hinkle for The Oregonian*, MCDA PRO 05-03 (2005) (“Disclosure of any medical information is presumptively an unreasonable invasion of privacy.”) We have not previously extended this rational beyond the realm of medical information and decline to do so in this case. Certain union members are indeed proud and public about their union membership whereas others may wish to keep it private. This varying response is precisely what motivates the requirement of an individualized basis for non-disclosure.

The city asserts anticipated harassment of union members by the Freedom Foundation as justification for withholding the list of names. We have previously ordered names of non-union members released to union organizers despite generalized employee concerns about harassment and retaliation by union organizers. *Petition of Driesch for IUOE Local 701*, MCDA PRO 06-08 (2006) (employee records of non-union city contractors ordered released to union organizers despite expressed concerns of harassment); *Petition of Barbara Diamond*, MCDA PRO 97-02 (1997) (request for information about substitute teachers made by a teachers union made in the lead-up to a strike). We cannot in good faith reach a different result simply because it is a union that now objects to the information being released.

The city has informed us that fifteen employees provided reasons why disclosure would particularly violate their privacy. We have not reviewed these asserted individualized bases for exemption because petitioner has agreed, without conceding that these names are actually exempt under the public records law, that the city may withhold these fifteen names at this time.¹

In addition to the city’s arguments, counsel for Laborer’s 483 asserts that the city is contractually obligated to release these names only to the employees’ authorized representative (Laborer’s 483). Whether accurate or not, and we express no opinion on that question, the city may not supersede state law by contract. *Guard Publishing v. Lane County School Dist.*, 310 Or 32 (1990) (“Disclosure is the norm; exclusion is the exception that must be justified by the public body. Nor may a public body exempt public records from disclosure simply by promising the contributor confidentiality.”) The terms of the city’s agreement with Laborer’s 483 are irrelevant to the public records analysis.²

B. Unfair Labor Practice – ORS 243.672(1) / 192.502(9)

ORS 192.502(9) exempts from disclosure

Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law.

¹ We take petitioner’s concession in the spirit it was offered: to expedite consideration of the matter at hand and as a good faith point of compromise. We note that any subsequent proceedings in this matter in the circuit court would be considered *de novo* and the parties would not be bound by positions taken or arguments made before this office.

² Because we find that the city has not established an individualized basis for non-disclosure, evaluation of the public interest is not triggered and, accordingly, we may not consider whether providing these names to petitioner is in the public interest.

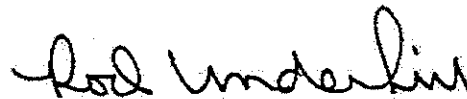
The city anticipates that the Freedom Foundation will use these names in an attempt to convince members to leave the union. As such, it asserts that providing these names would constitute an unfair labor practice in violation of various provisions of ORS 243.672(1), including the requirement that the city not “interfere with or assist in the formation, existence or administration of any employee organization.” We disagree.

If the records at issue are not exempt under ORS 192.502(2) then disclosure is required by state law. See, *OHSU v. Oregonian*, 278 Or App 189 (2016) (“if the information is not otherwise exempt from disclosure under the [public records law], its disclosure is ‘required by’ ORS 192.420” and thereby not subject to HIPAA). The provisions of ORS 243.672(1) nowhere expressly make any particular records confidential and we decline to read in such an exemption. *Colby v. Gunson*, 224 Or App 666, 676 (2008) (“if there is a plausible construction of a statute favoring disclosure of public records, that is the construction that prevails.”) And if disclosure is required by law, it would be perverse to conclude that complying with a legally mandated obligation is an unfair labor practice.

ORDER

Accordingly, the petition is granted. The City of Portland is ordered to promptly disclose the requested records with the exception of the names of the fifteen employees who asserted individualized basis for nondisclosure. This disclosure is subject to payment of fees to the city, if any, not exceeding the actual cost in making the information available.

Very truly yours,



ROD UNDERHILL
District Attorney
Multnomah County, Oregon

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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.