

ROD UNDERHILL, District Attorney for Multnomah County

600 County Courthouse • Portland, Oregon 97204 • 503 988-3162 • FAX 503 988-3643
www.mcda.us

January 8, 2018

Jeff Merrick
4800 SW Meadows Rd., Suite 300
Lake Oswego, Oregon 97035

Maja Haium
Deputy City Attorney
Portland City Attorney's Office
1221 S.W. Fourth Avenue, Suite 430
Portland, Oregon 97204

Re: Petition of Jeff Merrick seeking contact information from Portland's "One Point of Contact" database

Dear Mr. Merrick and Ms. Haium:

The procedural history of this case is long, complex, well known to the parties, and, because it is irrelevant to our decision on the merits of this case, we do not repeat it here.¹

As this case is presently before us, petitioner, Mr. Merrick, is seeking any personal contact information for people who have submitted a report to the City of Portland's "One Point of Contact" system. The One Point of Contact system is a database into which members of the community can report information on unpermitted homeless camps and associated livability issues. As a part of this submission, which can be done via a webpage, smart phone app, or phone call, a person can provide a narrative of his or her concern and, optionally, an email address. Prior to June 2017, when petitioner made his initial public records request, the form also requested, again optionally, a person's name and phone number.

The city has provided petitioner with one month of One Point of Contact data, with the redactions it deems appropriate applied. Petitioner now challenges these redactions both for themselves, but also to establish a framework for how redactions may be applied to the remaining months of interest. We have before us the data from May 2017, which comprise 2,361 reports.

Petitioner states that his purpose in seeking this information is to organize community members who are interested in or affected by the rising number of homeless individuals camping in our community.

¹ Petitioner has requested we make a number of determinations regarding the conduct of the City of Portland's attorneys in this case. We do not do so here. The only questions ORS 192.450 and 192.460 authorize us to consider are 1) the applicability of public records exemptions to particular records and 2) the reasonableness of a body's decision to deny a fee waiver. We lack the inherent authority of a court of law to sanction anyone for anything and do not wish our silence on this matter to be interpreted as an endorsement or rejection of either party's position or actions in this litigation.

The city asserts that the contact information is exempt by operation of ORS 192.502(4), the confidential submission exemption, and that redaction is made mandatory by ORS 192.504; that certain details appearing in the free form entry field are also, in a few instances, exempt under ORS 192.502(2), the information of a personal nature exemption; and that ORS 192.502(4) exempts personal email addresses. Petitioner does not challenge this last assertion and we agree that it is supported by law. For the reasons discussed below, we grant the petition and order the remaining information disclosed.

DISCUSSION

A. Confidential Submissions – ORS 192.502(4)

ORS 192.502(4) exempts information from disclosure if all five of the following elements are satisfied:

- 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;
- 4) the public body must show that it has obligated itself in good faith not to disclose the information; and
- 5) disclosure of the information must cause harm to the public interest.

We begin our analysis with the fifth element, whether or not disclosure of this information would cause harm to the public interest. The city has cited our order in *Petition of Duchêne*, MCDA PRO 15-37 (2016) for the proposition that maintaining the confidentiality of informants is essential to law enforcement and, accordingly, in the public interest. That is true as far as it goes, however a comparison between the factual underpinnings of *Duchêne* and the present case illustrates the fundamental differences that lead us to a different result here.

Duchêne involved a resident seeking to learn who had complained about her overgrown sidewalk and caused the city to take enforcement action against her. In *Duchêne*, as here, the complaining party submitted a complaint through an online portal maintained by the City of Portland, but the similarities end there. In *Duchêne* the reporting system informed complainants that submitting their personal contact information was mandatory in order to submit a report; here it was optional. In *Duchêne* the city's webpage stated "Please note that complainant information is confidential and will not be provided to the public;" here the warnings stated, in relevant part "the City does not disclose ... personally [sic] information other than as necessary to complete a financial transaction, upon explicit permission from the applicable user, or *compelled by law*" (emphasis added). In *Duchêne* the City, at least as of the time of that opinion, continued to solicit code enforcement complaints and personal contact information from residents via its web page; here the City has ceased to solicit names and phone numbers as part of a One Point of Contact submission. Lastly, in *Duchêne* the interest of the requestor was in determining who had reported her to authorities; here the interest of the requestor is political organization. For all these reasons, *Duchêne* is distinguishable.

As petitioner correctly observes, contact information is generally published and made public in a variety of forms. To the extent any individual here had a particularized concern about release of his or her contact information—he or she did not have to submit it.

Our courts have consistently concluded that blanket policies promising confidentiality of personal contact information in a public body's possession are invalid as against a public records request. *Guard Publishing Co. v. Lane County Sch. Dist.*, 310 Or 32, 39 (1990) (a public body may not “exempt public records from disclosure simply by promising the contributor confidentiality”); *Kotulski v. Mt. Hood Comm. College*, 62 Or App 452 (1983). Indeed, the privacy notice cited by the city as its promise of confidentiality goes on to state that that, “In the event of a conflict between this Privacy Notice and the Oregon Public Records Act or other law governing the disclosure of records, the law will control.” This is an accurate statement of the law; it also undermines any claim that the privacy notice supports a claim of exemption under the public records law.

The city argues that many of the submitters could reasonably fear retaliation for their actions in reporting homeless camps near their homes. A small number of submitters did in fact express a fear of retaliation for their report with one stating, “I live at this address alone and fear retaliation.” A small handful of others out of the over 2,300 submissions expressed a similar sentiment.

We do not mean to discount this fear nor do we doubt its genuineness, but we do not write on a clean slate. The fear of retaliation was the primary issue in *Guard Publishing*, and factually that was more firmly grounded in recent past behavior than what is presented here. As Justice Peterson wrote in his dissent,

The district's concern for confidentiality was based upon events that occurred during a 1979 teachers' strike. During that strike, replacements were telephoned at all hours of the day and night. The district had difficulty contacting replacement teachers because they were afraid to pick up their phones for fear of being abused by regular staff. There were 11 incidents involving slashed tires, dents and scratches in the replacement teachers' vehicles.

Guard Publishing, 310 Or at 44 (Peterson, J. dissenting). If those factual circumstances do not constitute a basis to withhold personal contact information of substitute teachers hired during a strike, whom a public body had promised confidentiality, and who had expressly stated they did not want their information released, then the generalized fear of retaliation expressed by some of the voluntary reporters to the One Point of Contact surely cannot either.

For each of these reasons, ORS 192.502(4) does not exempt the contact information of individuals who submitted information to the One Point of Contact system.

B. 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.

The city states it has redacted names, addresses, or phone numbers under this section only where “(1) the reporter requested anonymity; (2) the reporter expressed fear of retaliation; (3) the reporter expressed fear of personal safety for themselves, family members, neighbors or business invitees; or (4) the reporter submitted a third party’s personal information.”

Guard Publishing establishes that expressing a preference for confidentiality is insufficient in itself to support redaction. For the same reason, an abstract fear of retaliation also is insufficient. The third basis has superficial merit, however a close review of the records shows that the specific fears expressed relate to the underlying problem (i.e. the homeless camps), and an expression of urgency for the city to fix it, rather than a specific, articulable, and factually grounded fear of retaliation for reporting the problem. As to the fourth, the only instance of this we could find involved business contact information for a property manager.

We pause again to note the extraordinarily high bar that our Supreme Court has set to exempt personal contact information. The only case of which we are aware in which such an exemption was affirmed involved an individual who was seeking a woman’s contact information as part of a lengthy and active campaign to stalk her. *Jordan v. MVD*, 308 Or 433 (1989).

Lastly, the purposes of the requestor are relevant here. *Id.* at 444 (Gillette, J., concurring) (“a disclosure ‘constitutes’ an unreasonable invasion of privacy if the agency’s act of releasing the information, *or the acts of those to whom the information is released*, are reasonably anticipated by the agency to lead to such an invasion of privacy”) (emphasis in original). Even if we assume for purposes of argument that disclosing a person’s address or phone number would invade his or her privacy, the wording of ORS 192.502(2) necessarily implies that not all invasions of privacy are unreasonable. It would indeed be an unreasonable invasion of privacy for a stalker to have access to his victim’s personal contact information. While it might be an annoyance to some for a political organizer to have access to that same information, we cannot say that it would be an *unreasonable* invasion of privacy.

Applying the strict interpretation of this section adopted by the Supreme Court, we do not find any of the proposed redactions supported by ORS 192.502(2).

C. Mandatory Redaction – ORS 192.504

ORS 192.504 provides in relevant part that

A public body that is the custodian of or is otherwise in possession of information that was submitted to the public body in confidence and is not otherwise required by law to be submitted, must redact all of the following information before making a disclosure described in ORS 192.502(4):

- (1) Residential address and telephone numbers;

- (2) Personal electronic mail addresses and personal cellular telephone numbers;
[...]

ORS 192.504 was enacted in 2015. Since then, neither the appellate courts nor the Attorney General have addressed its scope in a published opinion. We proceed then from the plain text of the statute.

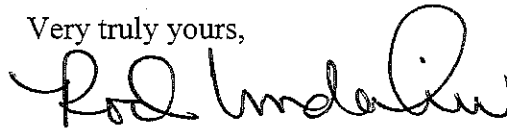
At the outset, this statute is difficult to reconcile with itself. It purports only to apply when a public body is “making a disclosure described in ORS 192.502(4).” But ORS 192.502(4) provides an *exemption* from disclosure and does not address when records must be disclosed. If ORS 192.502(4) applies, then records are exempt from disclosure; if it does not apply then a disclosure cannot logically be “described” by it.

We do not believe that this section creates any new exemption to the public records law. The City of Portland’s suggestion that this section requires a public body to redact certain information that is already exempt under ORS 192.502(4) is the only intelligible way to interpret the statute.² Viewed that way, this section is irrelevant to our analysis of whether or not the contact information at issue here is exempt from disclosure. Because ORS 192.502(4) does not exempt the requested information from disclosure, ORS 192.504 does not apply.

ORDER

Accordingly, the petition is granted, except that personal email addresses may be redacted pursuant to ORS 192.502(40).

Very truly yours,



ROD UNDERHILL

District Attorney

Multnomah County, Oregon

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.

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² Consistent with the premise that the public records law is a disclosure law and not a confidentiality law, public bodies are ordinarily free to release public records even if an exemption could apply to them. ORS 192.504 would then appear to remove that discretion from the public body and require that they withhold records that meet all five elements set out in ORS 192.502(4).