



ROD UNDERHILL, District Attorney for Multnomah County

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September 19, 2018

Katie Shepherd
Willamette Week
2220 N.W. Quimby Street
Portland, Oregon 97210

Jennifer Amriott
General Counsel
Office of the City Auditor
1221 S.W. Fourth Avenue, Suite 310
Portland, Oregon 97204

Re: Petition of Katie Shepherd seeking complaints filed with the Independent Police Review

Dear Ms. Shepherd and Ms. Amriott:

In her public records petition, dated September 10, 2018, petitioner Katie Shepherd, on behalf of Willamette Week, requests that this office order the City of Portland's Independent Police Review (IPR) to disclose "copies of all complaints submitted to the Independent Police Review related to the Aug. 4, 2018 protest held at Tom McCall Waterfront Park and downtown Portland."

On August 4, 2018 the Portland Police Bureau (PPB) engaged protestors during rival demonstrations that occurred in downtown Portland. In the aftermath, some accused PPB of not being evenhanded in its approach to the different groups of protestors and using excessive force and inappropriate tactics to disperse protestors.

IPR is a city agency, independent from the police bureau, that intakes and investigates complaints of police misconduct. Petitioner, a reporter for Willamette Week, made a public records request of IPR for any complaints related to the August 4, 2018 protest event.

IPR initially denied petitioner's request citing ORS 192.345(12) and ORS 181A.830(3). Upon further review, IPR is no longer relying on ORS 192.345(12) and rests its argument on ORS 181A.830(3).

IPR has provided this office with the complaints at issue, which we have reviewed. For the reasons discussed below, we grant the petition.

DISCUSSION

A. Investigations of Public Safety Employees - ORS 181A.830(3)

ORS 181A.830(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.

IPR is a formal part of the police disciplinary process and, accordingly, subject to any public records exemptions applicable to such actions or investigations. *Petition of Kerensa*, MCDA PRO 18-08 (2018). Any complaint that initiates a personnel investigation constitutes “information about” that investigation and would be included within the scope of ORS 181A.830(3).

The statute, however, only applies to investigations of particular public safety employees. Having reviewed the complaints at issue, the vast majority are complaints about the conduct of the Portland Police Bureau generally and not about individualized misconduct. In the cases where misconduct is described by individual officers, in all but a handful it was not possible to identify the officer.

The Supreme Court acknowledged that, among other interests, ORS 181A.830 “evidences a legislative intent to protect the privacy of officers whose alleged misconduct is not substantiated.” *ACLU v. City of Eugene*, 360 Or 269 (2016). This protection is unnecessary if neither the complaint nor the investigation are able to identify a particular officer.

All of the complaints that address the conduct of PPB generally on August 4, 2018 are not exempt under this section and must be disclosed. All of the complaints where neither the complainant nor IPR were able to identify the involved officer must be disclosed. Any complaint that names a particular officer, or where IPR was able to use the information provided to identify the involved officer, are conditionally subject to ORS 181A.830(3).

As to those complaints, of which there are three, we must then determine whether the public interest nonetheless requires disclosure. ORS 181A.830(4)(a) (“this section does not apply: when the public interest requires disclosure of the information.”) To evaluate such a claim the appropriate question is “whether the public interest in disclosure outweighs the competing interest in confidentiality, with the presumption in favor of disclosure.” *ACLU*, 360 Or at 285. In *ACLU*, the Supreme Court further noted that “when it comes to complaints about the use of force and the review of those complaints, the public interest in oversight is particularly strong.” *Id.* at 299.

Case 1439531 involves a general complaint about particular police conduct, and then an uncertain statement of two officer names who might have been involved. IPR was unable to confirm whether or not those officers were involved. The conduct described is generalized and the purposes of ORS 181A.830(3) can be served by simply redacting the names of the two officers from the sentence that begins “I heard their names were...” Under the *ACLU* standard, the interest in confidentiality, once this redaction is made, is minimal. The public interest requires disclosure of the remainder.¹

¹ This is not to say that every complaint of police misconduct can be “sanitized” by redacting only the officer’s name. Rather we find in this case that the overall nature of the complaints is so non-specific that such a redaction will accomplish the necessary policy objectives in this particular instance.

The “KJ” complaint was originally emailed to the city ombudsman on August 7, 2018. It relates to an officer whose name was known to the complainant. This complaint was administratively closed by IPR. The majority of the complaint is descriptive of the overall situation and general complaints about the police. The only allegations of misconduct about a specific officer are contained in one sentence at the top of page two. IPR may satisfy its obligation under ORS 181A.830(3) by redacting only the 14 words immediately following “... or even question anyone about the assault...” For the same reasons as complaint 1439531, the public interest requires release of the balance.

Case 1444617 involves an investigation that was administratively closed by IPR without discipline. The complaint itself does not identify the officer, but IPR was able to do so based on the contextual information provided. The substance of the allegation, although “related” to the protest in the loosest of terms, does not illuminate police tactics, use of force, or other allegations about the law enforcement presence on that day. The public interest does not compel its disclosure.

B. Photographs of Public Safety Employees – ORS 181A.830(2)

ORS 181A.830(2) provides, in relevant part, that,

A public body may not disclose a photograph of a public safety employee of the public body without the written consent of the employee.

One complaint, 1439549, includes three photographs that contain images of police officers. IPR states that it was unable to identify the officers in the photographs. Only one depicted officer is not in riot gear, and that one has his back to the camera. IPR asserts that, because it is impossible to obtain written consent from an unidentified person, ORS 181A.830(2) precludes them from releasing the photographs. Such an interpretation would create in this section the only absolute exemption from public disclosure in Oregon. This runs contrary to the purpose of the public records law. *Jordan v. MVD*, 308 Or 433, 438 (1989) (noting the “the strong and enduring policy that public records and governmental activities be open to the public.”)

Against this overarching purpose, we conclude that “photograph of a public safety employee” includes only photographs that identifiably depict a particular public safety employee. This identification may be directly from the photo, or from attendant circumstances or reports. Where, as here, the public body cannot identify the depicted officers by any means, this section does not apply.

C. Complainant Identities

IPR has additionally expressed concern about releasing the identities of the individuals who submitted complaints. While this concern is understandable, IPR has not been able to cite any public records exemption that would protect this information from disclosure. As IPR now concedes, applicable public records law precedent does not support such redactions in this case. See, *Petition of Merrick*, MCDA PRO 17-63 (2018) (names and contact information for people submitting complaints about homelessness-related issues were not shielded from disclosure).

Merrick discusses in some depth the “extraordinarily high bar that our Supreme Court has set to exempt personal contact information.” *Id.* at 4. As we wrote in *Merrick*,

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.[355](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.

Id. at 4. The present case involves a reporter, not a political organizer, and complaints about police misconduct rather than complaints about homeless encampments. We agree with IPR’s concession that these differences do not compel a different result here.

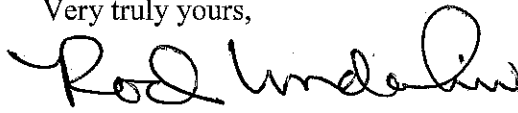
However, a few of these complaints do contain images of injuries sustained by the complainants. These images may be withheld pursuant to ORS 192.355(2).²

Many of these complaints also include the complainant’s email address. This information is exempt from disclosure under ORS 192.355(40) and may be redacted from any production.

ORDER

Accordingly, the petition is granted. IPR is ordered to promptly provide petitioner with copies of the requested records, except as expressly exempted above, subject to the payment of fees, if any, not to exceed IPR’s actual costs in producing the records.

Very truly yours,



ROD UNDERHILL

District Attorney

Multnomah County, Oregon

Notice to Public Agency

Pursuant to ORS 192.411(2), 192.415, and 192.431(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.

² IPR identifies three complaints, 1442201, “LC” from 8/9/18 8:46 AM, and “BP” from 8/9/18 1:49 as having injury photographs. Our review only reveals injury photographs associated with 1442201 and “BP,” but wherever the person injured can be identified (either because the complainant names herself or because the photograph shows a face) those photographs may be withheld.

Page 5
September 19, 2018
Petition of Katie Shepherd

18-43