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January 8, 2019

Casey and Felicia Ward
17795 Loundree Drive
Sandy, Oregon 97055

Jenny Madkour
County Attorney
Office of Multnomah County Attorney
501 S.E. Hawthorne Boulevard, Suite 500
Portland, Oregon 97214

Re: Petition of Casey Ward seeking a copy of his pre-employment background investigation from the Multnomah County Sheriff's Office

Dear Mr. Ward and Ms. Madkour:

In their public records appeals, dated December 21, 2018, petitioners Casey and Felicia Ward asks this office to order the Multnomah County Sheriff's Office (MCSO) to release a copy of the background investigation performed as part of Mr. Ward's application for employment as a sheriff's deputy.

Mr. Ward applied for, and was denied, a position as a Multnomah County Sheriff's deputy. Afterwards, he submitted a public records request for the background investigator's report related to his application for employment. MCSO denied that request, although some time later they did provide him with a summary of the reasons why he was denied employment, including a fairly detailed anonymized extract of one family member interview of particular concern to Mr. Ward.

MCSO asserts that petitioner has waived any right of access to these materials as part of the application process and that, in any event, the materials constitute confidential submissions under ORS 192.355(4). MCSO additionally asserts that the privacy of the references would be unreasonably invaded under ORS 192.355(2) were the contents of their statements released. Because we agree with MCSO's waiver and confidential submission arguments, we do not address the additional assertion of exemption under ORS 192.355(2)

DISCUSSION

A. Waiver

Applicants for sensitive government positions, such as a police officer or corrections officer, are subject to detailed background investigations in order to determine their suitability for the job. We have, on three occasions, previously considered whether or not such an applicant may access the materials that were the basis of being denied employment. *Petition of Southard*, MCDA PRO 04-03 (2004); *Petition of Royer*, MCDA PRO 03-13 (2003); *Petition of Gillespie*,

MCDA PRO 99-07 (1999). In each case we found 1) that the accounts of the reference interviews constituted confidential submissions and 2) that the waiver of access executed by the applicant was enforceable.

As to the waiver of access, Mr. Ward's case is not distinguishable from *Southard, Royer*, or *Gillespie*. Mr. Ward, too, executed a waiver of his access to any background investigation as a condition of MCSO considering his application for employment. In relevant part, the waiver that Mr. Ward signed states:

I have specifically waived any rights I, or my representatives, may have to review or inspect any and all of the information developed in this background investigation, so all responses will remain completely confidential. I understand that questionnaires may be sent to any and all references that I have listed on the Statement of Personal History or any other sources that are found during my background investigation. With the above statement in mind, I hereby waive any and all rights that I or my representatives may have to read, review, or in any way gain knowledge of the content of the completed investigation.

Mr. Ward does not dispute that he executed this waiver, rather he argues that it is ambiguous, unconscionable, and executed without proper consideration.

In each of our three prior opinions considering this matter we have rejected similar claims. See, e.g., *Petition of Southard*, MCDA PRO 04-03 (2004) ("There is nothing inherently coercive or unreasonable to require such a waiver as a pre-condition of applying for employment. It is particularly necessary for a law enforcement agency to be able to assure confidentiality to sources of information in a background investigation. This office is bound to honor the waiver executed by petitioner.") We see no basis on which to distinguish this waiver from those we have previously considered and likewise conclude that this Mr. Ward waived his right of access.

Mr. Ward's wife, Felicia Ward, filed an identical records request and a substantively identical appeal of the denial of her request. On these facts we have no trouble concluding that she is a "representative" of Mr. Ward for purposes of the waiver that Mr. Ward signed and find it likewise applicable to her request.

B. Confidential Submission – ORS 192.355(4)

ORS 192.355(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 the disclosure.

This exemption contains five elements, each of which the public body has the burden of establishing in order to withhold records under this section. Here, the first four elements are

clearly met and do not warrant further discussion. That leaves only an evaluation of the public interest, which we readily conclude would suffer by disclosure of information of this nature.

Petitioner asserts that there is a public interest in transparently evaluating police applicants to ensure that no improper motivations or actions affect the process. MCSO responds that there is critical importance in obtaining candid information about those who wish to be police officers and that certain references may not wish to be frank, or indeed respond at all, if the applicant could learn what they were going to say.

Petitioner acknowledges that we resolved this question contrary to his position in *Southard*, but urges us to reconsider that decision in light of *Grey v. Salem-Keizer School District*, 139 Or App 556 (1996) (finding that non-source identifying material in teacher reference forms should be disclosed). *Grey* pre-dates all three of our published decisions in this area and was expressly considered and discussed in two of them.

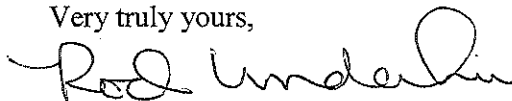
MCSO has provided to this office, and we have reviewed, Mr. Ward's background investigation report. Having done so, we find that the public interest would suffer by the disclosure, consistent with our prior holdings in *Southard*, *Royer*, and *Gillespie* and the Court of Appeals' decision in *Grey*.

Portions of the report do not squarely fit within this exemption, either because they summarize publicly available information, rather than information directly submitted in confidence, or are truly so generic as to not be "source identifying" under *Grey*. However, some of this information has already been provided to Mr. Ward by MCSO and the rest is subject to his waiver of access discussed in the previous section.

ORDER

Accordingly, the petition is denied.

Very truly yours,



ROD UNDERHILL
District Attorney
Multnomah County, Oregon