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Benjamin Kerensa
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Mark Amberg
Chief Deputy City Attorney
Portland City Attorney's Office
1221 S.W. Fourth Avenue, Suite 430
Portland, Oregon 97204

Re: Petition of Benjamin Kerensa seeking a memo from the Independent Police Review to the Portland Police Bureau regarding case 2016-C-0407

Dear Mr. Kerensa and Mr. Amberg:

In his public records petition, dated March 1, 2018, petitioner Benjamin Kerensa requests that this office order the City of Portland's Independent Police Review (IPR) to disclose "a copy of the entire IPR/CRC file for case 2016-C-0407."

This is the fourth petition to this office relating to this IPR file, and the third for the entire file. In response to the original request by petitioner, the City provided him with certain materials from the IPR file that he would already have had knowledge of, mostly communications to which he was a party. He appealed the denial of the bulk of his request in March, 2018. After a review of the full file we ordered released a few additional documents that did not directly bear on the discipline investigation, but denied the bulk of the petition on the grounds that the investigation was ongoing. *Petition of Kerensa*, MCDA PRO 18-02 (2018) (*Kerensa II*). In July, 2018, petitioner again appealed the denial of the same request. We again denied the petition, citing our order in *Kerensa II*. *Petition of Kerensa*, MCDA PRO 18-30 (2018) (*Kerensa III*). The present petition again appeals the same denial. The only change in circumstance since *Kerensa III* is that another 11 months have passed, still without final imposition of discipline by the Portland Police Bureau.

DISCUSSION

A. Personnel Disciplinary Records – ORS 192.345(12)

ORS 192.345(12) conditionally exempts from disclosure,

A personnel discipline action, or materials or documents supporting that action.

The City is correct that we have generally considered ORS 192.501(12) presumptively applicable to pending disciplinary proceedings. This is because 1) it is not yet possible to determine if discipline will or will not be imposed and 2) many of the factors that relate to assessing the public's interest in disclosure relate to the ultimate resolution of the disciplinary action which cannot be assessed until the final imposition of discipline.

As we have noted on prior occasions, that the length of time an agency took to conclude the disciplinary process, in egregious cases, was one factor in assessing whether or not to release materials from the investigation. See, *Kerensa III, Petition of Sordyl*, MCDA PRO 17-05 (2017). It has been roughly 30 months since the incident that spawned the disciplinary investigation in this case and, we are informed, a final determination is close, but has not yet occurred.

Our analysis under ORS 181A.830(3) below controls the outcome of this case so for purposes of ORS 192.345(12) we will assume, without deciding, that a delay of this extent removes the presumption of applicability of the personnel disciplinary exemption to an ongoing investigation.

B. 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.

Even if we frame this as a no discipline case given the extensive delay, the legislature's intent remains clear: absent a public interest personnel investigations of police officers are exempt, regardless of the outcome, unless the public interest requires otherwise.

Although discipline has not been imposed yet, it is public knowledge that Chief Outlaw sustained a finding against Sgt. Smith. We have reviewed the various internal memoranda outlining the conduct at issue, and the various PPB command staff assessments of that conduct, and feel comfortable enough with the facts to assess the public interest in disclosure notwithstanding that discipline is not yet final. Our *Foster* criteria for assessing public interest in discipline cases are equally applicable here:

1. Serious misconduct by a government employee should be disclosed;
2. Generally, termination from employment or other discipline for cause is serious misconduct if it is based on corruption (including theft of public property), abuse of power, misconduct that impairs the mission of the agency, or criminal behavior;
3. Less serious misconduct may require disclosure if repeated violations fairly raises the issue of imprudent management of public employees;
4. Cases evidencing systematic misconduct within a particular agency or part of an agency that shed light on the effectiveness of management may require disclosure even if, individually, the instances of misconduct are not serious;
5. Less serious misconduct may require disclosure in the public interest where circumstances raise a question of unduly harsh (or unduly lenient), arbitrary, irrational or discriminatory administration of discipline by management;
6. Lastly, public employees should not be subjected to public disclosure of disciplinary violations that do not fit into a category above where such would not significantly

promote the public's understanding of the manner in which government business is carried out.

Petition of Slovic, MCDA PRO 17-61 (2017) (summarizing *Petition of Foster*, MCDA PRO 96-31 (1997)).

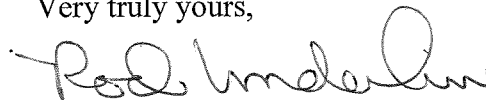
Having reviewed the nature of the alleged misconduct we are satisfied that it is not "serious misconduct" as that term is defined. This conclusion is bolstered by Sgt. Smith's relatively low rank in the Bureau. *Petition of Brosseau*, MCDA PRO 16-04 (2016). The significant delay noted above is the most significant item of interest, but the records in the IPR file provide little insight into the bureau process beyond what is already publicly known about this case in particular and PPB's disciplinary process in general. As such, we conclude that the public interest does not require disclosure of the entire contents of Sgt. Smith's IPR file as requested.

However, petitioner observes that the City has cited these exemptions as covering even the narratives of the police reports documenting the initial incident in November of 2016. The City in response to previous petitions has cited the criminal investigatory exemption as to these reports as, at petitioner's request, a criminal investigation of Sgt. Smith's conduct was initiated. That investigation has concluded and the City is no longer asserting any claim of exemption under ORS 192.345(3). We agree with petitioner that these police reports are not "information about a personnel investigation." The City has confirmed that it too agrees with this position and is willing to provide those reports to petitioner. As such that particular issue is moot.

ORDER

Accordingly, the petition is denied on the understanding that City has agreed to provide, subject to the payment of fees not to exceed its actual costs in producing the records, the police reports in case 16-383117.

Very truly yours,



ROD UNDERHILL
District Attorney
Multnomah County, Oregon