



ROD UNDERHILL, District Attorney for Multnomah County

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June 18, 2019

Simon Gutierrez
KPTV
14975 N.W. Greenbrier Parkway
Beaverton, Oregon 97006

Krista Stearns
Assistant General Counsel
Portland State University
P.O. Box 751
Portland, Oregon 97207

Re: Petition of Simon Gutierrez, on behalf of KPTV, seeking police body camera footage associated with Portland State University case 18-389

Dear Mr. Gutierrez and Ms. Stearns:

In his public records petition, received by this office on June 6, 2019, Simon Gutierrez, on behalf of KPTV, requests that we order Portland State University (PSU) to release the police body camera recording generated during an interaction between a PSU police officer and a PSU student on May 1, 2018.

On May 1, 2018 a PSU police officer responded to the registrar's office in response to a report of a disruptive student. The officer was equipped with a body-worn camera, which recorded just over nine minutes of audio and video from his interaction with the student and the employee who had called the police.

Nine months later, PSU received a public records request from the subject student for the body camera footage. Two weeks later, petitioner filed a public records request for the same video. Pursuant to the student access provisions of the Federal Educational Rights and Privacy Act (FERPA), PSU afforded the student the opportunity to review a, somewhat redacted, version of the video. Presumably at the student's invitation, but to the surprise of PSU, petitioner showed up with the student to review the video at the time the student had scheduled. PSU did not permit petitioner to view the video and this appeal followed.

In its response to this office PSU asserts that the body camera footage is exempt from disclosure under FERPA and, additionally, under the body camera recording exemption in our public records law. PSU has provided this office with the video recording, which we have reviewed.

For the reasons discussed below, we find that, on the unusual facts of this case, this is not (or almost certainly will not be) a FERPA protected record, but we agree with PSU that the body camera recording exemption applies and, accordingly, we deny the petition.

DISCUSSION

A. Federal Law – ORS 192.355(8)

ORS 192.355(8) exempts from disclosure:

Any public records or information the disclosure of which is prohibited by federal law or regulations.

FERPA is a federal law that prohibits, among other things, “the release of education records (or personally identifiable information contained therein [...]) of students without the written consent of their parents.” 20 U.S.C. § 1232g(b).¹

The term “education records” is defined under the FERPA’s regulations. An “education record” means a record or information “directly related to a student,” and “maintained by an educational agency or institution [...] for the agency or institution.” 34 C.F.R. § 99.3. The definition of “education records” also includes a list of types of records often maintained by an educational institution that, even if pertaining to a student, are not protected “education records,” which includes records of a law enforcement unit of the institution. *Id.* The regulations further clarify, however, that after the record is transferred from the law enforcement unit to a different component part of the university, it is no longer a law enforcement record as maintained by that office. 34 C.F.R. § 99.8(b)(2). The regulations expressly state that in order to be a record of the law enforcement unit of a university, and thus not subject to FERPA for public records purposes, the record must not only be created by the law enforcement unit, but it also must be used for law enforcement purposes and maintained by the law enforcement unit. 34 C.F.R. § 99.8(b)(1).

Here, the camera footage is an “education record” within the meaning of FERPA because the footage directly relates to the student, the footage is maintained by PSU, and the footage is no longer a “law enforcement record” as it is not retained by PSU’s public safety office. The recording exists solely in the files of the Office of Equity and Compliance for purposes not related to law enforcement. Pursuant to the public safety office’s regular retention schedule the video has been deleted; it is only due to the student’s complaint relating to this incident that a copy was retained elsewhere prior to its deletion as a law enforcement record.

Having concluded that the video is an educational record, this would ordinarily end the analysis. ORS 192.355(8) is an unconditional exemption, providing no room for consideration of the public interest. However, this case differs from most FERPA cases because the involved student has given KPTV consent to access the video. FERPA provides students over the age of 18 with the ability to provide written consent to allow third-parties access their educational records. 20 U.S.C. § 1232g(b)(1) (providing that FERPA only prohibits release of “educational records [...] of students without the written consent of their parents.”) At the time petitioner’s request was denied this consent was verbal, and thus insufficient for purposes of FERPA. But we

¹ Section 1232g(d) provides that students over the age of 18 have all the protections and rights under FERPA that parents of minor students enjoy.

have now been provided with a signed written consent, executed on a PSU form, from the student in favor of petitioner.

Federal law does not, itself, control access to public records in Oregon. Rather, ORS 192.355(8) incorporates federal law into the Oregon public records law by providing that records are exempt from disclosure if release “is prohibited by federal law or regulations.” Conversely then, if access is anything other than “prohibited” by federal law, ORS 192.355(8) does not exempt the record from disclosure. Because FERPA only prohibits the release of educational records without written consent we cannot say that ORS 192.355(8) provides a basis for exemption if a public school or university is presented with just such a written consent.

B. Police Body Camera Recordings – ORS 192.345(40)

ORS 192.345(40) conditionally exempts from disclosure,

Audio or video recordings, whether digital or analog, resulting from a law enforcement officer’s operation of a video camera worn upon the officer’s person that records the officer’s interactions with members of the public while the officer is on duty.

Both parties agree that the record at issue fits within this description, the contested issue is whether or not the public interest nonetheless would require disclosure in this instance.

Assessing the public interest in release of body-worn camera recordings is an inherently fact-specific exercise, but we must begin from the premise that by enacting ORS 192.345(40) the legislature has indicated that these recordings will usually not be subject to release. As such, a generalized interest in police oversight, as argued by petitioner, cannot suffice to justify release in any particular case. And petitioner’s status as a journalist, while a factor in assessing the public interest, is not dispositive. *Petition of Brown for KXL 750*, MCDA PRO 04-10 (2004).

Police interactions with people cover a broad range of subjects and circumstances, and body camera recordings will tend to document the more confrontational end of that spectrum by the nature of when policy directs that a camera must be activated. A determination by this office that there is or is not a public interest in release of a recording is not, and should not be interpreted as, a determination that the involved officer acted appropriately or inappropriately in a particular situation.

Although this case is undoubtedly of interest to the involved student, the surrounding circumstances and documented conduct do not suggest a broader public interest that would override the countervailing concerns implicit in the enactment of this exemption and those expressly argued by PSU. Here, the encounter with the police officer did not result in any arrest or detention; the officer responded to a dispatch call, as opposed to using discretion to make a stop or electing to have an encounter; no criminal allegations resulted; and no involved party used or threatened the use of force.

The only countervailing factor, and the root of petitioner’s specific public interest argument, is that the involved student has made a complaint of bias against the officer as a result

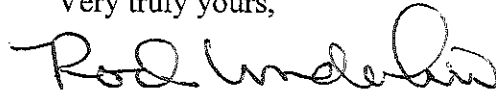
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of this incident. This complaint is the subject of the open investigation by PSU's Office of Equity and Compliance. Although the filing of a complaint alone cannot not establish a public interest under this section, we have reviewed the contents of the video with the nature of this complaint in mind. In light of this review and the factors discussed above we do not find that the public interest requires release of this record.

ORDER

Accordingly, the petition is denied.

Very truly yours,

A handwritten signature in black ink, appearing to read "Rod Underhill". The signature is fluid and cursive, with a large initial "R" and "U".

ROD UNDERHILL
District Attorney
Multnomah County, Oregon

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