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July 22, 2020

Nigel Jaquiss
Willamette Week
2220 N.W. Quimby Street
Portland, Oregon 97210

Heidi Brown
Chief Deputy City Attorney
Portland City Attorney's Office
1221 S.W. Fourth Avenue, Suite 430
Portland, Oregon 97204

Re: Petition of Nigel Jaquiss, on behalf of Willamette Week, seeking disciplinary records from the Portland Fire Bureau

Dear Mr. Jaquiss and Ms. Brown:

Petitioner, a reporter for Willamette Week, has appealed the denial of a public records request he made of the Portland Fire Bureau (PFB). Specifically, on June 15, 2020, petitioner asked PFB for:

all records related to any complaints received about [Firefighter] Perkins behavior; copies of any investigation or findings and the outcome of that complaint, including any discipline.

PFB responded and answered certain related questions, but declined to provide any records responsive to this portion of the request. In support of its decision to withhold records PFB cited ORS 192.345(12), which conditionally exempts from disclosure records relating to discipline of public employees.

By way of background petitioner describes that in the course of his reporting, he has obtained records indicating that Firefighter Perkins traveled to Nashville, Tennessee as a representative of PFB at a training conference in August of 2019. PFB has confirmed that Firefighter Perkins was placed on administrative leave from November 22, 2019 through June 9, 2020. Petitioner believes, and seeks records to confirm and elaborate, that this leave was the result of a racial incident involving Firefighter Perkins while in Nashville.

PFB has provided this office with three responsive documents, a discipline letter, a Memorandum of Understanding between PFB and the Portland Firefighter's Association, and a "Last Chance Agreement," all of which we have reviewed. For the reasons discussed below, we grant the petition.

DISCUSSION

A. Personnel Discipline Action – ORS 192.345(12)

ORS 192.345(12) conditionally exempts from disclosure,

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

Both parties have framed their arguments for and against disclosure in terms of the framework for analyzing the public interest in disclosure that we set out in *Petition of Foster*, MCDA PRO 96-31 (1997). In summary, that framework provides:

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.

As to the Memorandum of Understanding, although PFB states this document is responsive as relating to Firefighter Perkins' discipline, nothing on its face implicates any of the policy concerns that ORS 192.345(12) is designed to address. It does not mention Firefighter Perkins nor does it disclose the conduct or facts underlying the discipline. Because this document does not reflect poorly on the involved employee and does advance the public's awareness of internal operations at PFB, we conclude that ORS 192.345(12) does not exempt this record without reference to *Foster*. See, *Oregonian Publ. Co. v. Portland Sch. Dist. No.1J*, 144 Or App 180, 187 (1995) (that disclosure will not additionally intrude on employee's privacy is relevant in balancing interests under this section).

The *Foster* analysis cited by both parties does still guide our evaluation of the public's interest in release of disciplinary materials that do have the potential to intrude on an employee's privacy. As PFB correctly observes, we have generally found that discipline of low-ranking employees that does not result in termination is not "serious misconduct" under *Foster*. See, *Petition of Brosseau*, MCDA PRO 16-04 (2016) (so noting). Firefighter Perkins was not

terminated as a result of this incident, and is considered “low ranking” within PFB. However, the records themselves indicate that PFB regarded the conduct at issue as “serious” and even “egregious.” This would tend to indicate that a similar conclusion should be reached under the first *Foster* factor.

We appreciate, and do not brush aside lightly, PFB’s argument that public pillory of the involved firefighter would be counterproductive to the change that Chief Boone is working to bring about in the fire bureau. However, the sixth *Foster* factor states “Lastly, public employees should not be subjected to public disclosure of disciplinary violations that do not fit into [one of the other factors] where such would not significantly promote the public’s understanding of the manner in which the government business is carried out.” *Petition of Slovic*, MCDA PRO 17-61 (2017) (emphasis added) Whether or not the conduct at issue is “serious” for purposes of *Foster*, the records in this case do shed light on the issues of structural reform, race, and public employee union involvement in the disciplinary process. All three of which are of intense public interest at present. Having balanced the competing interests, we conclude that the public interest requires disclosure of these records.

The discipline letter and Last Chance Agreement contain certain medical and/or treatment details personal to Firefighter Perkins. These details add little to the information contained elsewhere in the documents to inform public’s understanding of how government business is carried out and would unduly intrude on Firefighter Perkins’ privacy. We do not find the public interest requires release of these details.

ORDER

Accordingly, the petition is granted. The Portland Fire Bureau is ordered to promptly provide petitioner with copies of the discipline letter, Last Chance Agreement, and Memorandum of Understanding. The discipline letter and Last Chance Agreement may be redacted as indicated in the copies of those documents we will separately send to PFB. This release is subject to the payment of fees, if any, as provided in ORS 192.324(4).

Very truly yours,



ROD UNDERHILL
District Attorney
Multnomah County, Oregon