



**MIKE SCHMIDT**, District Attorney for Multnomah County

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September 15, 2020

Alan Kessler  
805 S.W. Broadway, Suite 1580  
Portland, Oregon 97205

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

Re: Petition of Alan Kessler challenging the redaction of personal cell phone numbers from a public records production

Dear Mr. Kessler and Ms. Brown:

Petitioner has asked that this office order the Portland Police Bureau (PPB) to provide him with the personal cell phone numbers that were redacted in PPB's response to the following request:

All text messages sent or received by [Police Chief] Danielle Outlaw between August 1, 2019 and January 1, 2020.

Although PPB applied redactions to the production under multiple theories, the petition to this office narrowly challenges only those applied under ORS 192.355(3)

For the reasons discussed below, although we agree that ORS 192.355(3) does not provide a basis to exempt these records, we nonetheless deny the petition because the City has met its burden, on an individualized basis, of showing that all the information subject to ORS 192.355(3) is independently exempt under ORS 192.355(2).

## **DISCUSSION**

### **A. Employee Personal Information – ORS 192.355(3)**

ORS 192.355(3) exempts from disclosure:

public body employee or volunteer residential addresses, residential telephone numbers, personal cellular telephone numbers, personal electronic mail addresses, driver license numbers, employer-issued identification card numbers, emergency contact information, Social Security numbers, dates of birth and other telephone numbers contained in personnel records maintained by the public body that is the employer or the recipient of volunteer services.

As narrowly presented here, the question is whether this section exempts from disclosure enumerated personal information of public employees, as it exists outside of personnel records.

The dispute between the parties is whether the phrase “contained in personnel records” modifies every preceding category of information or solely “other telephone numbers.”

The Attorney General’s PUBLIC RECORDS AND MEETINGS MANUAL (2019) states that these categories of information are exempt “as long as that information is contained in the public employer’s personnel records.” MANUAL at 101. The MANUAL, is not binding on this office, but it is relevant and frequently persuasive.

The City has ably and thoroughly summarized the legislative history of this section as well as relevant canons of statutory interpretation in support of its position that the Attorney General’s advice is incorrect in this instance. In summary, the City argues that:

1. The “doctrine of the last antecedent” instructs that a modifying phrase applies only to the immediately preceding phrase unless a comma separates the modifying phrase from the list of antecedents. Therefore, “contained in personnel records” modifies only “other telephone numbers.”
2. With respect to telephone numbers, prior versions of what is now ORS 192.345(3) exempted “telephone numbers contained in personnel records.” But, in 2015, the legislature amended the statute to add personal cell phone and residential telephone numbers. To give this amendment meaning, it must apply more broadly than just telephone numbers contained in personnel records, because that information was already exempted by the “telephone numbers contained in personnel records” language prior to the 2015 amendments.

We also have to view this in the context of the greater purposes of the public records law, which has a presumption in favor of transparency and disclosure. *Colby v. Gunson*, 224 Or App 666, 676 (2008) (“if there is a plausible construction of a statute favoring disclosure of public records, that is the construction that prevails”).

Adopting the City’s interpretation, by limiting the modifying phrase to the last antecedent, would bring with it a sweeping unintended consequence: any public employee’s information would be exempt from disclosure in any public record, even those completely unrelated to their employment. For example, a firefighter’s home address would be exempt in county property records and her phone number would be exempt from BOEC records if she called to report a burglary at her home. Neither of these seem likely to be intended consequences because it would be impossible to effectuate this construction. A public body has no way of identifying if information it holds belongs to an employee of a different public body.

These adverse consequences are avoidable if the personal information listed in this section is constrained only to employees of the public body that receives the records request. And, indeed, that precise language appears at the end of ORS 192.355(3): “[...] contained in personnel records *maintained by the public body that is the employer or the recipient of volunteer services.*” However, if as the City argues, this modifying phrase applies only to the last antecedent then only “other telephone numbers” is limited to the specific employer and the other items are exempt wherever found.

The Attorney General has adopted a narrow interpretation of ORS 192.355(3) that avoids this result both in the PUBLIC RECORDS AND MEETINGS MANUAL and in a published order. *Petition of Brosseau*, Att’y Gen. PRO (May 5, 2015) (finding that police officer dates of birth not exempt under ORS 192.355(3) when contained in DPSST records because DPSST was not the officers’ employer).

Although we agree that the doctrine of the last antecedent supports the City’s position as a general matter, the doctrine is not without limits. See, *Price v. Lotlikar*, 285 Or App 692, 703 (2017) (noting a commonly recognized exception to the doctrine that, “[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all.”)

The City’s second argument is the most compelling. It is difficult to explain why the legislature felt the need to insert cellular and residential phone numbers to this list of exempt information, given that that information was already exempt if found in a personnel file, unless the intent was to make it exempt if located in other locations. This may indeed accurately reflect the legislature’s intent, and we would welcome a judicial or legislative clarification on this point. However, the concerns identified above about construing the statute as the City proposes and the Attorney General’s opinion are of at least equal force to the odd drafting identified here. It seems most likely that this section was enacted with little contemplation of a situation such as the one presented here and is ripe for amendment to clarify the legislature’s intent.

In sum, weighing the Attorney General’s interpretation of this statute and the potentially unworkable consequences that would flow from adopting the City’s position against the reasonable logic of the City’s legislative history analysis, either party’s construction is equally plausible (or perhaps equally implausible). This impasse is broken by the mandate of *Colby v. Gunson* that, “if there is a plausible construction of a statute favoring disclosure of public records, that is the construction that prevails.” 224 Or App 666, 676 (2008).

B. Information of a Personal Nature – ORS 192.355(2)

ORS 192.355(2) exempts from disclosure,

Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if public disclosure would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance. The party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy.

A personal cell phone number is “personal information” within this section, however, that does not mean that disclosure would, necessarily, constitute an unreasonable invasion of privacy. The burden is on the public body to demonstrate, on an individualized basis, that disclosure of this particular piece of information would unreasonably invade a specific person’s privacy. *Mail Tribune v. Winters*, 236 Or App 91 (2010). In this case, three different personal cell phone numbers appear in the production. The City describes them as follows:

Person #1: This person has been subjected to stalking and death threats. The person has obtained a protective order in the past and has had death threats made against them. Current death threats are being investigated by law enforcement. This person shared that in their position as a public employee they have been subjected to slurs based on their protected class status. This person therefore fears for their safety and fears they will be subjected to harassing and intimidating calls if their personal cell phone number is released.

Person #2: This person has also been subjected to stalking and doxing. The person has been the victim of identity theft. The person asked that no additional personal information be released which could increase those problems and further invade the person's privacy. This person similarly shared that in their position as a public employee, they have been subjected to slurs based on their protected class status. This person therefore fears for their safety and fears they will be subjected to harassing and intimidating calls if their personal cell phone number is released.

Person #3: In their position as a public employee, this person has been harassed and followed for blocks from public facilities. This person is in a high position within the City and fears an invasion of their privacy if their personal cell phone number is released.

This office has received additional information, in confidence, to include the identity of the three referenced individuals. Based on the totality of the information received, PPB has established an individualized basis to support a claim of exemption under ORS 192.355(2) as to each of the three unique phone numbers appearing in the records.

**ORDER**

Accordingly, the petition is denied.

Very truly yours,

A handwritten signature in black ink, appearing to read "Mike Schmidt". The signature is fluid and cursive, with a large initial "M" and a stylized "S".

MIKE SCHMIDT  
District Attorney  
Multnomah County, Oregon