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July 17, 2020

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Re: Petition of Alan Kessler seeking records matching police employee names to identification numbers

Dear Mr. Kessler and Ms. Johnston:

The petitioner has appealed the denial of a public records request for a document that shows the employee identification number for every Portland Police Bureau (PPB) employee. Specifically, petitioner's request of PPB read:

> Please provide documents correlating the internal personnel numbers used in lieu of badge numbers or name tags on police bureau personnel during the recent demonstrations with each names and badge numbers.

Petitioner additionally requests that we impose a $200 fine on PPB to the extent permitted by ORS 192.407(3).

Mass demonstrations have occurred in the City of Portland each of the last 50 nights as of the date of this order. On June 6, 2020, PPB distributed guidance indicating that officers were permitted to obscure their name on their uniform and replace it with their unique employee identification number, referred to in the submissions to this office variously as a "PRN," "PERNER," or "BHR" numbers.[1] In support of his request, petitioner argues that this is not good policy and that PPB must release records that facilitate identification of officers. Implicit in this argument is the presumption that an officer may be less likely to violate policy or use force if he or she may readily be identified by on-scene observers. Petitioner further argues that he has no interest in PERNER numbers, per se; only in the ability to identify a particular officer and that, the City should not be allowed to electively use the PERNER number as the public facing unique identifier and, thereby, make the actual identifying information exempt.

[1] This is a different number than a police officer's "badge number," which is a five-digit number issued by the state Department of Public Safety Standards & Training. The PERNER number is a city-issued employee identification number.

The City responds that it took these steps in response to specific instances of officers being personally identified and pursued, stalked, or threatened while off duty because of their work.[2] The City and the affected unions argue that the measures taken preserve accountability while at the same time making it more difficult for those hostile to police to threaten them or their families or accost them while off-duty. They further observe that neither complaints nor lawsuits, both methods the public has of holding officers accountable, require that an officer be identified by name to initiate the process.

The public policy questions raised by this situation involve weighty competing interests; however the legal question is comparatively straightforward. Under the plain language of the relevant statutes, and the statutory interpretation rules set out by the Oregon Court of Appeals, we must deny the petition.

DISCUSSION

A. Contents of Certain Requests for Disclosure – ORS 192.363

ORS 192.363, enacted into law in 2015, requires that an individual making a public records request for, as relevant here, "employer-issued identification card numbers" must provide in his request:

1. The names of the individuals for whom personal information is sought;

2. A statement describing the personal information being sought; and

3. A statement that shows by clear and convincing evidence that the public interest requires disclosure in a particular instance.

Because it is dispositive, we focus only on the first element, the names of the employees.[3]

Employee identification numbers may be released in response to a public records request only if the requestor demonstrates by clear and convincing evidence that the public interest so requires and the request complies with ORS 192.363. In this case, petitioner's request for the identification numbers did not include the names of the involved public employees as required by ORS 192.363 because it could not. The entire purpose of his request was to obtain those names, which were unknown to him. Petitioner does not argue that the requirements of the statute are ambiguous. Rather he asserts that, because of the City's elective actions, the nature of

[2] Unions representing PPB command staff, officers, and non-sworn personnel separately submitted letters to this office outlining the threats that their members have faced as a consequence of these demonstrations and articulated why easy access to employee names would further endanger their members' safety. Because our resolution of this petition hinges on the wording of the applicable statutes and not an evaluation of the public interest, we need not engage further with these arguments or assertions.

[3] Petitioner did not submit a statement that complies with (3), regarding the public interest, either. The content and context of the petition indicate that he is arguing a generalized public interest in transparency and police accountability rather than any employee-specific public interest.

his request makes compliance with those requirements impossible. The parties differ on what the legal consequence of that impossibility should be as to the underlying public records request.

We pause to note that ORS 192.355(3) and 192.363 provide a unique public records requirement on public bodies. The Attorney General describes the interplay of these two statutes as follows:

> Even though the Oregon Public Records Law typically gives a public body the discretion to disclose exempt public records, we note that under this exemption the public employer "shall disclose requested information *only if* [it] determines that the party seeking disclosure has demonstrated by clear and convincing evidence that the public interest requires disclosure."

ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2019) at p.101.

Although the policy questions behind whether, and to what extent, individual officers engaged in crowd control activities should be readily identifiable are complex, the legal question presented here is not. Petitioner argues that application of ORS 192.363 to the facts at hand will result in an absurdity. Specifically, to obtain a person's name he is required to provide the person's name. Absurd result or no, Oregon's courts have expressly held that the plain language of the statute controls against an as applied absurdity challenge on multiple occasions. As the Court of Appeals wrote in 2009:

> Defendant's argument is that the unambiguous wording of the statute should give way in the face of the "absurd" consequences that result from reading the statute as written. We confronted, and rejected, the very same argument in [*State v.*] *Chilson*, [219 Or App 136 (2008)], and we adhere to that decision here. See also *Folkers v. Lincoln County School Dist.*, 205 Ore. App. 619, 627, 135 P.3d 373 (2006) ("Where * * * the legislature's intent is clear from the statutory text and context, we cannot subvert the plain meaning of the statute to avoid 'absurd results.'").
>
> […] The argument is unavailing. The fact that it may, in some circumstances, prove impossible to comply with the terms of a statute might provide a defense to a charge of violating that statute, but it does not provide the courts with authority to rewrite the statute to mean something other than what it plainly says.

State v. Kelly, 227 Or App 553 (2009).

Apart from the "absurdity" argument, petitioner's most fundamental point is one of unfairness. He argues that "The City is […] leverag[ing] an obscure bit of the law for a purpose that fundamentally undercuts access to information and public accountability." In addressing similar arguments, the Court of Appeals has written that, "It is not within the province of the court to amend the terms of a statute because it operates unfairly in a particular instance, or to ignore it because it might not seem appropriate in a particular case." *State ex rel. Lucas v. Goss*, 23 Or App 501 (1975).

We recognize that the legislature likely did not contemplate the present circumstances when it enacted what is now ORS 192.363, however, we may not disregard the statute as written. Although, in many cases, a public body may elect to release information even if a public records exemption could apply ORS 192.355(3) is not such a case. ORS 192.363 prohibits PPB from releasing this information unless petition provides three pieces of information as to each person whose information is requested: 1) their name; 2) the nature of the information requested; 3) a statement establishing by clear and convincing evidence why this individual's information should be released. Petitioner's request in this case includes only (2), thus PPB may not provide him the information he seeks.

Petitioner's frustration at being asked to do the impossible (or impractical) is understandable. However, the unambiguous wording of ORS 192.363 and the interpretive framework consistently applied by our appellate courts all require that we deny this petition. Given the gravity of the policy concerns presented here, we would welcome judicial or legislative review of the statutory framework that leads to our conclusion today.

Having denied the petition on the merits, we lack any authority to levy a punitive fine under ORS 192.407(3).

ORDER

Accordingly, the petition is denied.

Very truly yours,

ROD UNDERHILL
District Attorney
Multnomah County, Oregon

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