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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 City of Portland to provide him with the personal cell phone numbers that were redacted in PPB's response to the following request:

Please provide an export of the Date, Sender, and Recipients fields for every message stored in or exportable from Smarsh. If it possible to include names or other identities of the senders and recipients please include those as well.

Smarsh is a service that the City of Portland uses to retain text messaging records for cell phones issued to City of Portland employees. Without reciting procedural information irrelevant to our resolution of this matter, the City ultimately produced one week's worth of responsive data, which is the subject of the present appeal. This production, which covered the first week of 2020, contained metadata from over 21,000 text messages. A sample of this production is reproduced below:

THREADID	MESSAGEID	DATE (UTC)	NETWORK	MESSAGE		
				TYPE	SENDER	RECIPIENTS
2911808023	7044125533	1/1/2020 5:33	Verizon	Message	8592794411	5038236420
2831804658	7044125711	1/1/2020 5:35	Verizon	Message	9038717372	5038236458
2980065260	7044126291	1/1/2020 5:36	Verizon	Message	9493383646	9713133344

This data set does not include any information that identifies any particular number as a personal cell phone number, nor does it provide the actual contents of the text message or the identity of the person to whom the number belongs. The City asserts, and we assume for purposes of argument, that it is straightforward to use a reverse lookup service to identify the owner of a particular phone number.

Although the City applied redactions to this production under multiple theories, the petition to this office narrowly challenges only those applied under ORS 192.355(3) and 192.355(2). For the reasons discussed below, we grant the petition in substantial part.

## 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 a public body's personnel records. We have recently, on materially indistinguishable facts, held that this section applies only to information contained in personnel records and that cell phone text messages are not "personnel records." *Petition of Kessler*, MCDA PRO 20-37 (9/15/2020). For the reasons discussed at length in that order we reach the same conclusion here. Specifically, the provisions of ORS 192.355(3), and the attendant procedural requirements of ORS 192.363, apply only when a requestor seeks personnel records of a public body. See, ATTORNEY GENERAL'S PUBLIC MEETINGS MANUAL (2019) at 101 (noting this exemption applies "as long as that information is contained in the public employer's personnel records.")

### 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.

The City asserts an alternative argument that the personal cell phone numbers of its employees are nonetheless exempt from disclosure under ORS 192.355(2). A personal cell phone number is indeed "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 a particular piece of information would unreasonably invade a specific person's privacy. *Mail Tribune v. Winters*, 236 Or App 91 (2010).

As we have previously noted, the Supreme Court has set an extraordinarily high bar for assessing public bodies' claims of exemption under this section. *Petition of Merrick*, MCDA PRO 17-63 (2018) (“We pause again to note the extraordinarily high bar that our Supreme Court has set to exempt personal contact information. The only case of which we are aware in which such an exemption was affirmed involved an individual who was seeking a woman’s contact information as part of a lengthy and active campaign to stalk her.”) (citing *Jordan v. MVD*, 308 Or 433 (1989)).

In *Merrick* we ordered released personal contact information for members of the public who had filed complaints with the City about homelessness-related issues. A number of the complainants expressed concerns about retaliation if their information were publicly released. In addressing that argument we wrote,

We do not mean to discount this fear nor do we doubt its genuineness, but we do not write on a clean slate. The fear of retaliation was the primary issue in *Guard Publishing*, and factually that was more firmly grounded in recent past behavior than what is presented here. As Justice Peterson wrote in his dissent,

The district's concern for confidentiality was based upon events that occurred during a 1979 teachers' strike. During that strike, replacements were telephoned at all hours of the day and night. The district had difficulty contacting replacement teachers because they were afraid to pick up their phones for fear of being abused by regular staff. There were 11 incidents involving slashed tires, dents and scratches in the replacement teachers' vehicles.

*Guard Publishing*, 310 Or at 44 (Peterson, J. dissenting). If those factual circumstances do not constitute a basis to withhold personal contact information of substitute teachers hired during a strike, whom a public body had promised confidentiality, and who had expressly stated they did not want their information released, then the generalized fear of retaliation expressed by some of the voluntary reporters to the One Point of Contact surely cannot either.

*Id.* at p. 3. The Attorney General has further noted that under this standard neither the fact that information would not ordinarily be shared with the public nor that the person has a general desire to be “let alone” is sufficient. ATTORNEY GENERAL’S PUBLIC RECORDS MANUAL (2019) at 93.

In *Kessler* (20-37) we upheld the City’s claim of exemption under ORS 192.355(2) for three personal cell phone numbers. We did so because the City provided concrete factual information about past harassment or stalking of these individuals and a logical connection between that past course of conduct and the need to exempt the personal information at issue. We found this sufficient to meet the City’s burden under *Mail Tribune* and *Guard Publishing*.

In the present case the City has submitted statements from 15 employees indicating that those employees would consider release of their personal phone numbers an unreasonable

invasion of their privacy.<sup>1</sup> As in *Merrick*, we have no reason to doubt the genuineness of those particular employees' feelings, but that is not the legal standard we must apply. Unlike the individualized factual accounts provided to us in *Kessler* (20-37) the information submitted here, with one exception, consists of conclusory statements about fears a particular employee has surrounding future interactions with the public, as a result of being a City employee, if their personal phone number were available. The one exception is the employee who writes:

I have received threats and abusive behavior because of my work for the City (including getting threatening physical behavior and I am very concerned about this person having any other means to harass and threaten me. Based on this conduct and conduct this person engaged in with others, we filed a complaint to the [professional licensing board]. After investigation, this person was [sanctioned]. I am very concerned if this person has any other means of contacting me, as I have been this person's number #1 target over the last two to three years.

To be clear, we see no public interest in making available personal phone numbers of public employees, particularly during a time when many employees were rushed into remote work without the benefit of pre-planning and used personal phones as a matter of necessity during that transition to do their part to assist with that transition.<sup>2</sup> However, the public records law requires that we assess the public interest only if the public body first makes the necessary factual showing that release of this information would unreasonably invade privacy, as that phrase has been interpreted by the Oregon Supreme Court. On this record we cannot find that that burden has been met, except as to the one phone number identified above.

### ORDER

Accordingly, the petition is granted, except as specifically noted above. The City of Portland is ordered to release to petitioner records responsive to his request without any redactions made under ORS 192.355(3) or (2) except as expressly noted in the discussion above. This release is subject to the payment of fees, if any, not to exceed those authorized by ORS 192.324(4).

Very truly yours,



MIKE SCHMIDT  
District Attorney  
Multnomah County, Oregon

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<sup>1</sup> A coalition of public employee unions also made available for review a number of statements of their members. While this office has traditionally welcomed legal argument and factual context submitted from any entity with an interest in public records litigation, it is important to note that the unions are not formal parties to this proceeding. The factual burden under ORS 192.355(2) is the public body's, not the unions'.

<sup>2</sup> The portion of the dataset at issue here pre-dates the COVID-19 pandemic, however the totality of the dataset, for which this is a legal test case, does include that period.

**Notice to Public Agency**

Pursuant to ORS 192.411(2), 192.415, and 192.431(3) your agency may become liable to pay petitioner's attorney's fees in any court action arising from this public records petition (regardless whether petitioner prevails on the merits of disclosure in court) if you do not comply with this order and also fail to issue within seven days formal notice of your intent to initiate court action to contest this order, or fail to file such court action within seven additional days thereafter.

**20-41**