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August 2, 2013

Ashley S. Berman
City of Gresham
Assistant City Attorney
1333 N.W. Eastman Parkway
Gresham, OR 97030

Kyle Iboshi
KGW, News Channel 8
1501 S.W. Jefferson St.
Portland, OR 97201

Re: Petition of Kyle Iboshi for any video or audio recordings of interviews involving Jonathan Daniel Holt conducted by the Gresham Police Department

Dear Ms. Berman and Mr. Iboshi:

BACKGROUND

On this public records petition, ORS 192.410 et. seq., petitioner Kyle Iboshi for KGW requests the District Attorney to order the City of Gresham and its employees to produce copies of the above mentioned records. On July 8, 2013 Jonathan Holt plead guilty to the Aggravated Murder of Whitney Heichel. Petitioner made his request for the information in correspondence dated July 10, 2013 and the request was subsequently denied by Ms. Berman.

The city's position is that the records are exempt from disclosure under ORS 192.501(3), Criminal Investigatory Material and ORS 192.502(2), Personal Privacy Exemption.

The city asserts that ORS 192.501(3) conditionally exempts investigatory information compiled for criminal law purposes. The city contends that even though Mr. Holt has pled guilty and been sentenced he still has the right to appeal and has additional post-conviction rights to challenge the sentence. Ms. Berman argues that it is in the public's interest to prevent disclosure of criminal investigatory information that might impact future prosecutions.

Furthermore, Ms. Berman contends that under ORS 192.501(3) criminal investigatory material is exempt from disclosure if disclosure would constitute an unwarranted invasion of privacy. She argues that the invasion of privacy in this case is that the disclosure of the requested records would further and unnecessarily impact the privacy of the deceased Ms. Heichel, her family and friends, as well as Mr. Holt and his family.

The city also argues that ORS 192.502(2) exempts information of a personal nature that would constitute an unreasonable invasion of privacy. Ms. Berman's position is that an ordinary person would find the contents of the information contained in the records to be highly offensive and it would be a terrible disservice to Ms. Heichel, the affected families, and the community to disclose the records. In addition, the city does not believe there is an overriding public interest that would outweigh the privacy interests of those personally affected by this tragedy.

DISCUSSION

I. Personal Privacy Exemption

ORS 192.502(2) conditionally exempts:

Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if the public disclosure thereof 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 purpose of this exemption is not to prevent disclosure of personal information, as such, but rather to protect privacy from unreasonable invasion." Jordan v. MVD, 308 Or 433, 441 (1989). Only personal information that would constitute an unreasonable invasion of privacy if publicly disclosed is protected under this exemption. In Jordan, 308 Or at 442, the court noted that the trial court found that the affidavit filed in the trial court

...sufficiently established that disclosure to the requester would more likely than not unreasonably invade her privacy because providing the information would allow Jordan to harru her incessantly to the extent than an ordinary reasonable person would deem highly offensive.

"[T]he information is not exempt absent an individualized justification for exemption." Attorney General's Public Records Manual, 2011, p. 67. This determination must be made on a case-by-case basis. A blanket policy of nondisclosure is not enforceable. Guard Publishing v. Lane County School Dist, 310 Or 32, 38-40 (1990).

In determining the applicability of this exemption my office reviewed detailed summaries prepared by the city of five separate videotaped interviews and had conversations with the two prosecuting attorneys, the petitioner, and Ms. Berman.

This case was prosecuted by Multnomah County Chief Deputy District Attorney Donald Rees and Clackamas County Deputy District Attorney Steve Mygrant. On July 19, 2013 Mr. Mygrant spoke with the victim's mother-in-law Marilyn Heichel. She reiterated that Whitney's husband Clint, and the family have a strong objection to the release of the sensitive materials regarding the sexual assault and murder of Whitney. Additionally, Ms. Heichel's family and the community have placed at least a dozen phone calls to the city and KGW. Chief Deputy District Attorney Donald Rees has also viewed the materials and has confirmed that there are portions of the videotaped recordings that are explicit and invasive in nature.

There are portions of the video-taped interviews that contain normal investigative information found in a typical police investigation of criminal activity. The personal privacy exemption simply does not apply to these passages and must be disclosed to petitioner.

Certain information, however, regarding the specific graphic factual circumstances related to the sexual assault and murder are extremely personal to the victim's next of kin. We agree with the city that the personal privacy exception in cases as tragic as this one should be interpreted to afford family members protections from disclosure. It would clearly be an unreasonable invasion of their privacy to disclose such information. KGW has not satisfied its burden of showing that "public disclosure would not constitute an unreasonable invasion of privacy." ORS 192.502(2).

The remaining question is whether KGW has established that "the public interest by clear and convincing evidence requires disclosure in the particular instance." The petitioner's position is that the public deserves to review these records to understand how public police business was conducted in this case. He correctly argues that this was a high profile investigation that involved numerous police agencies and members of the public. Petitioner also contends that the public deserves to know if Mr. Holt made any statements regarding motive, previous crimes, previous interaction with public safety, previous disclosures, his public education and the potential influence of social services. Although petitioner's argument is not without merit we find that the public interest does not require the disclosure of the entire un-redacted interview. This decision is made easier since the petitioner already has in his possession from a prior public records request certain police reports and photographs that were disclosed to him by the Clackamas County Sheriff's office.¹ The petitioner also acknowledged to this office that he is in possession of search warrants which detail the nature and circumstances of the crime. Also available to the petitioner would be additional sources of information regarding the crime contained in the official court file.² The amount of information related to this crime already within the public domain weighs strongly against the petitioner in the balancing of the public interest for additional disclosure.

¹ Clackamas County Deputy District Attorney Mygrant has informed this office that neither the released photos nor police reports were graphic or explicit as to the victim. He also stated that the search warrant affidavits gave an extensive summary of the evidence in this case.

² These documents would include the Indictment, probable cause statement, plea petition, judgment, and official recording of the proceedings.

II. Criminal Investigatory Exemption

ORS 192.501(3) conditionally exempts:

Investigatory information compiled for criminal law purposes. The record of an arrest or the report of a crime shall be disclosed unless and only so long as there is a clear need to delay disclosure in the course of a specific investigation, including the need to protect the complaining party or the victim. Nothing in this subsection shall limit any right constitutionally guaranteed, or granted by statute to disclosure or discovery in criminal cases.

This exemption is usually invoked to exempt information compiled in investigations connected with pending or contemplated prosecutions. However, “[u]nlike the litigation exemption in ORS 192.501(1), the criminal investigative exemption does *not* expire when litigation is completed or abandoned.” Attorney General’s Public Records Manual, 2011, p. 36. Although the governmental interest in maintaining such records will be diminished, the Court of Appeals decision in Jensen v. Schiffman, 24 Or App 11, 16 (1976), set out five general categories of continuing exemption:

Information compiled in investigations not connected with pending or contemplated prosecution will remain secret only if the public body establishes that disclosure would:

1. Deprive a person of a right to a fair trial;
2. Constitute an unwarranted invasion of privacy;
3. Disclose the identity of a confidential source or confidential information furnished by the confidential source;
4. Disclose investigative techniques and procedures; or
5. Endanger the life or physical safety of law enforcement personnel.

The analysis under this exemption is no different than under the personal privacy exemption above. The disclosure of those parts of the videotaped confession that provide the intimate details of the sexual assault and murder of the victim would, without a doubt, “constitute an unwarranted invasion of privacy.”³

³ The US Supreme Court reached a similar conclusion in 2004 regarding graphic photos of the deceased body of Vincent Foster, deputy counsel to President Clinton. Although their analysis was based on the Freedom of Information Act (FOIA) exemption 7(C) which excuses from disclosure “records or information compiled for law enforcement purposes” if their production “could reasonably be expected to constitute an unreasonable invasion of

III. Redaction

The usual practice of my office regarding the disclosure of investigatory materials after the prosecution was completed would be to order the redaction of the name and identification references of the victim and order the discloser of the balance of the materials.

Due to the explicit nature of the contents of this public records request, and the specific request of the deceased's next of kin not to release the information, the only available resolution to carry out the dictates of the exemptions are to redact the personal identifiers together with the sections of the videotapes directly related to the sexual assault and murder of Whitney Heichel. This would include, but not necessarily be limited to, subset 7 of record #1, subset 8 of record #2, and subsets #1, #4, #7 and #8 of record 3.

ORDER

Accordingly, it is ordered that the City of Gresham promptly disclose the records sought in the above petition subject to the redactions as described in III. The petition is denied as to the entire contents of records 4 and 5 as they almost entirely relate to the circumstances surrounding the victim's murder. Disclosure of the documents ordered is subject to payment of the City of Gresham's fee, if any, not exceeding the actual cost in making the information available, consistent with ORS 192.440.

Very truly yours,



ROD UNDERHILL
District Attorney
Multnomah County, Oregon

NOTICE TO PUBLIC AGENCY

Pursuant to ORS 192.450(2), 192.460 and 192.490(3) your agency may become liable to pay petitioner's attorney 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 7 days formal notice of your intent to initiate court action to contest this order, or fail to file such a court action within 7 additional days thereafter.

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personal privacy" my office finds the reasoning behind their denial of disclosure persuasive and relevant to the applicability of the criminal investigatory and personal privacy exemptions under Oregon's Public Records Law. We also adopt the holding of the court that the personal privacy protections under FOIA should be extended to the next of kin under Oregon state law. *National Archives and Records Administration v Favish*, 541 US 157 (2004).