



MIKE SCHMIDT, District Attorney for Multnomah County

1200 SW First Ave, Suite 5200 • Portland, Oregon 97204 • 503 988-3162 • FAX 503 988-3643
www.mcda.us

January 6, 2023

VIA EMAIL ONLY

PRADA
pradapdx@gmail.com

Trevor Byrd
Deputy City Attorney
Trevor.Byrd@portlandoregon.gov

Re: Petition of PRADA seeking records identifying certain police officers

Dear PRADA and Mr. Byrd:

On November 28, 2022,¹ PRADA petitioned this office for a public records order compelling the City of Portland to provide them with a table that correlates the identification numbers used in Table 40 of the July 10, 2019, Training Advisory Council (TAC) Report with individual officers.

The TAC is a “a citizens’ group with the mission of providing ongoing advice to the Chief of Police and the PPB Training Division in order to continuously improve training standards, practices, and outcomes through the examination of training philosophy, content, delivery, tactics, policy, equipment, and facilities.” TAC Report at 3. As part of the Settlement Agreement between the City of Portland and U.S. Department of Justice, the TAC is also tasked with “identifying and reporting to the Chief of Police any patterns in the Portland Police Bureau’s use of force.”

The July 2019 report covers use-of-force patterns from 2018 incidents. On the last page of the report is “Table 40: Point of Firearm Officer Data,” which contains the numbers at issue in this appeal. Table 40 provides 126 entries, the first four of which are reproduced below.

Officer	Officer Precinct	Officer Tenure
132261	North Precinct	1
156259	Central Precinct	19
166260	East Precinct	11
172561	East Precinct	8

The numbers listed under “Officer” are unique numbers that the City assigned to allow it to report on use-of-force patterns in a granular fashion without publicly identifying the individual officer involved in a particular use of force. Although this petition is limited to Table 40 of the

¹ We appreciate the parties’ patience as we worked through an unusual influx of other public records petitions.

TAC Report, it is our understanding that these numbers are used in other reporting contexts by the City.

The City argues that release of the names associated with these numbers would unreasonably invade the officers' privacy under ORS 192.355(2) and that they are, thus, exempt from disclosure under the public records law. The City further argues that as to any officers currently, or within the last six months, assigned to undercover duties, ORS 181A.672(2) prohibits their release.

DISCUSSION

A. Custodianship

PPB agrees that, factually, it possesses a list correlating police officer names to the unique use-of-force numbers. Although it does not have a record that contains *only* the officer names that appear in Table 40, a more comprehensive list is still responsive to petitioner's request. See, *Petition of Alan Kessler*, MCDA PRO 18-35 (2018) *aff'd sub nom Kessler v. City of Portland*, Mult. Co. Cir. Ct. 18CV43134 ("Nothing prevents an agency from releasing a record that contains more information than a requestor has asked for.") As such, we do not find that responding to this request would require PPB to create a new record.

B. Undercover Officers – ORS 181A.672(2)

The City is correct that it may not release information about officers assigned currently, or within the last six months, to undercover duties. This includes the name of the officer. *Petition of Bernstein*, MCDA PRO 20-46 (2020) ("PPB may properly redact information under this section for any employee who is, or has within the last six months, worked in an investigative capacity covered by Directive 640.95 [Undercover Safety and Operation Procedures]").

C. 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.

PPB argues that identifying officers who appear in Table 40 would place them and their families at risk of harassment. These are not hypothetical risks; the attempts to intimidate police officers and their families that have been brought to my attention over the last two years are deplorable. See, e.g., *Petition of Bernstein*, MCDA PRO 20-46 (2020) ("This office has reviewed each and every one of the over 400 personal safety exemptions submitted by PPB employees. It is clear that lines that we as a society have considered inviolable have long-since been crossed. The described conduct is despicable, and I condemn it in the strongest terms.") Since the

incidents detailed in *Bernstein* the City has provided additional examples of officers who have used deadly force being subjected to specific and personal hostile action directed at them or their families.

Partially in response to certain initial efforts PPB took to mitigate these risks, the legislature passed HB 3355 in the 2021 legislative session. HB 3355 has two primary functions. First, Section 2 establishes requirements for uniforms and identification for police officers performing crowd control functions. Second, Section 3 establishes a process that a member of the public may use to identify any law enforcement officer. The identification requirements in Section 3 have a single exception: they do not apply to officers actively engaged in an undercover operation. HB 3355, Sec. 3(3).

Section 3(2)(a) provides:

A law enforcement agency shall perform an investigation to identify a law enforcement officer upon request from a member of the public and receipt of:

- (A) A partial name of the officer;
- (B) The full or partial badge number or other identifying number of the officer;
- (C) A photograph of the officer;
- (D) A full or partial license plate or other identifying number of a police vehicle;
- (E) A physical description of the officer; or
- (F) The location, date and time at which the officer was present.

The section further provides that the results of that investigation shall be provided to the inquiring member of the public. Although we expect that the legislature was not aware that the City of Portland had published a report identifying police officers by unique numbers when it enacted this statute, this section clearly references “other identifying number” without qualification to any specific type of identifying number. The plain language of a statute is the most powerful indicator of what the legislature intended to accomplish with its enactment. *Carlson v. Meyers*, 327 Or 213, 224 (1998) (“In interpreting a statute, the court should neither insert what has been omitted by the legislature nor omit what the legislature has inserted.”) The unique identifying number used in the TAC report is, self-evidently, an identifying number for a police officer.

To be completely clear: this office has no authority to enforce the terms of HB 3355. We reference it only to inform our interpretation of whether or not the release of the information in this request would unreasonably invade the privacy of the officers who appear in Table 40. The legislature, by enacting HB 3355, has already compelled PPB to identify these officers. Indeed, language that would accomplish precisely what PPB seeks here was proposed to the legislature by the Oregon Coalition of Police and Sheriffs (ORCOPS):

A law enforcement agency's list of unique identifiers associated with law enforcement officer names is not subject to public release unless the provisions of ORS 192.363 are satisfied by the requestor.²

Such language was not included in the enacted version of HB 3355. HB 3355, as enacted, was "strongly supported" by both the Oregon Association of Chiefs of Police and the Oregon State Sheriff's Association.³

Given that the names of the officers appearing in this table, as associated with the unique use of force number, are already subject to unconditional release through a different legal mechanism we cannot find that making them available through a second path imposes any additional invasion of privacy. That invasion has already occurred by the independent actions of the City of Portland in publishing the data in the first place and the legislature in requiring that police agencies provide the name underlying a number used to identify a police officer.

Compounding the difficulty of the City's position, repeated judicial decisions have found public body's burden in establishing an exemption under ORS 192.355(2) to be extraordinarily high. *Petition of Merrick*, MCDA PRO 17-63 (2018) ("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)). For example, *Guard Publishing v. Lane County School Dist.*, 310 Or 32 (1990), ordered released the personal contact information of substitute teachers hired to work during a strike. 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.

Id. at 44 (Peterson, J. dissenting).

The Multnomah County Circuit Court on multiple occasions rebuffed efforts by the City to provide anonymized transparency to police operations. *Kessler v. City of Portland*, 21CV06317, November 10, 2021 (Thatcher, J.) (finding City's public usage of a number to identify an officer waived any claim that the number itself was private and ordering the City to "divulge the documents [...] showing officer names and associated PHR numbers"); *Reyna v. City of Portland*, Mult. Co. Cir. Ct. 20CV34926, May 26, 2022, Opinion and Order (Plank, J.)

² Letter of Michael Selvaggio obo ORCOPS, Nov. 15, 2020,
<https://olis.oregonlegislature.gov/liz/2021R1/Downloads/PublicTestimonyDocument/14135>

³ Letter of Jim Ferraris, OACP President, obo OACP & OSSA, May 12, 2021
(<https://olis.oregonlegislature.gov/liz/2021R1/Downloads/PublicTestimonyDocument/29850>)

(“Defendant cannot use its voluntary publication of information as a basis for evading production of other nonexempt information.”)

Informed by the legislature’s enactment of HB 3355, guided by the persuasive authority of Judges Plank and Thatcher in the closely related cases above, and controlled by the Supreme Court’s stark pronouncement in *Guard Publishing*, we conclude the City has not met its individualized burden under ORS 192.355(2) in this case as to any of the data in its concordance table.

ORDER

Accordingly, the petition is granted in part. The City shall either provide to petitioner the table in its possession, to the extent it contains the names of the officers appearing in Table 40 of the TAC report, after redacting the names and numbers of officers covered by ORS 181A.672(2), or within seven days of the date of this order provide notice of its intent to initiate further proceedings in the Circuit Court.

Regards,

A handwritten signature in black ink, appearing to read 'Mike Schmidt', with a stylized, looping flourish at the end.

MIKE SCHMIDT
District Attorney
Multnomah County, Oregon

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.

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