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Oregon Public Broadcasting
7140 S. Macadam Avenue
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Fallon Niedrist
Deputy City Attorney
Portland City Attorney's Office
1221 S.W. Fourth Avenue, Suite 430
Portland, Oregon 97204

Re: Petition of Jon Bial, on behalf of OPB, requesting records relating to the Portland Police Bureau's investigation of leaked investigative materials

Dear Mr. Bial and Ms. Niedrist:

Petitioner Jon Bial, on behalf of Oregon Public Broadcasting, has petitioned this office for an order requiring the Portland Police Bureau (PPB) to release:

A copy of the Police Review Board's report on the incident involving Officer Brian Hunzeker and leaked information falsely connecting Commissioner Hardesty to a hit-and-run.

A copy of the letter sent to Jo Ann Hardesty regarding the disposition of her complaint against the Portland Police Bureau.

Petitioner had made public records requests for these documents, each of which PPB denied. PPB's position was that, while it acknowledged the strong public interest in this particular case, as its disciplinary process was ongoing, it could not yet determine if discipline would be imposed and release would be premature.

PPB is correct that, generally, we have found that the balancing of interests supports allowing the disciplinary process to reach its natural conclusion prior to release of any related materials. See, e.g., *Petition of Kerensa*, MCDA PRO 18-01 (2018). In this case, however, due to a unique confluence of factors discussed in more depth below, we reach a different conclusion and grant the petition in part.

DISCUSSION

A. Factual Background

On March 3, 2021, there was a hit-and-run incident in Portland in which the victim reported to police that the driver who had struck her vehicle was Portland City Commissioner Jo Ann Hardesty. Approximately 12 hours later, this information was circulating in local media. Commissioner Hardesty denied any involvement. PPB promptly and publicly confirmed that this

was a mistaken identification by the victim and that Commissioner Hardesty was not involved and was not a suspect.

On March 16, 2021, PPB Ofc Brian Hunzeker, then the president of the Portland Police Association (PPA), resigned his position as PPA president citing a “serious isolated mistake” in relation to the investigation of the hit and run. Commissioner Hardesty lodged an official complaint with PPB and an internal affairs investigation was initiated. Upon conclusion of the initial factual investigation, pursuant to Portland City Code, PPB sent Commissioner Hardesty a letter summarizing the factual allegations against the involved officers and the initial determinations by their unit managers. There are many steps in the disciplinary process that come after the disposition letter to the complainant, but this represents completion of the factual portion of the investigation at this step of the process.

The subsequent step in the disciplinary process most relevant to our resolution of this petition is the Police Review Board (PRB). The PRB is a body created by city ordinance to review certain internal investigations and make recommendations to the chief of police regarding findings and imposition of discipline. PCC 3.20.140. The board has five voting members, consisting of a member of the community, a peer officer of the same rank as the involved officer, the involved officer’s assistant chief, the director of the Independent Police Review, and the involved officer’s commander or captain. PCC 3.20.140(C). A staffer assigned to the PRB issues a memo documenting their recommendations, as well as the opinions of any dissenting from the recommendation, for consideration by the chief.

On December 13, 2021 counsel on behalf of Commissioner Hardesty filed suit against the City of Portland, the Portland Police Association, Ofc Hunzeker, and Ofc Kerri Ottoman.

As of today, just shy of 10 months after the incident, PPB’s disciplinary process has not concluded and no official information has been released regarding its substance.

Throughout this period local media outlets including OPB, The Oregonian, Willamette Week, and KOIN, among others, have provided extensive and regular news coverage of what was known and believed about this incident.

B. Law Enforcement Disciplinary Investigations – ORS 181A.830(3) & 192.345(12)

ORS 181A.830(3) provides that,

A public body may not disclose information about a personnel investigation of a public safety employee of the public body if the investigation does not result in discipline of the employee.

ORS 192.345(12) conditionally exempts from disclosure,

A personnel discipline action, or materials or documents supporting that action.

Taken together, unless the public interest requires otherwise, these two statutes exempt from disclosure all disciplinary investigations of police officers. Since all the materials at issue here involve disciplinary investigations of police officers the only question is whether or not, in this instance, the public interest nonetheless requires disclosure.

In *Petition of Kerensa*, MCDA PRO 18-01 (2018), we wrote:

We have generally considered [former] ORS 192.501(12) presumptively applicable to pending disciplinary proceedings. This is because 1) it is not yet

possible to determine if discipline will or will not be imposed and 2) many of the factors that relate to assessing the public's interest in disclosure relate to the ultimate resolution of the disciplinary action which, self-evidently, cannot be assessed until final imposition of discipline.

Unlike in *Kerensa*, here we are presented with a confluence of factors that does allow us to assess the public interest in advance of the final imposition of discipline. First, this case involved the resignation of the president of a prominent labor union. Second, this incident initially involved allegations against a sitting city commissioner. Third, that commissioner has filed suit against the city, the union, and two of the involved officers outlining in detail factual allegations against them. Fourth, we are in a unique moment in local and national political discourse and action surrounding issues of race, policing, and appropriate community responses thereto. Fifth, the investigation of this matter is complete and will not be prejudiced by public release of factual information.¹ Lastly, this matter has been pending for 10 months during which period it has been subject to intense scrutiny and speculation across most major local media outlets.

Taken together these circumstances readily distinguish this case from any precedent cited by PPB. As such, we conclude that the public interest requires immediate release of the summary factual information contained in the disposition letters.

We reach a different conclusion as to the PRB memo. PRB memos contain the thoughts, impressions, and recommendations of the PRB members on matters that are not yet final. Whereas the factual investigation is functionally complete, the decision as to what to do with it is not. Whatever PPB elects to do in response to the findings in this case will undoubtedly be the subject of intense interest and scrutiny, but the public interest does not require the release of these preliminary recommendations at this time.

ORDER

Accordingly, the petition is granted in part. PPB is ordered to promptly provide the disposition letters sent to Commissioner Hardesty. The PRB memorandum remains exempt, pending completion of the disciplinary process. This release is subject to the payment of fees, if any, as authorized by ORS 192.324(4).

Regards,



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District Attorney
Multnomah County, Oregon

¹ We recognize PPB's argument that its investigative process is not truly complete until the imposition of final discipline due to the discretion of any decision maker to return the case to investigators for further development. Without prejudice to PPB asserting this argument in different cases in the future, our review of the specific factual record in this case leads us to conclude that is an extremely improbable eventuality here.

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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