

Salem REPORTER

Local News That Matters

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May 15, 2023

RE: PUBLIC RECORDS PETITION – City of Salem: SUPPLEMENT

Dear Madam District Attorney:

Please consider this a supplement to our original public records petition, responding to the city of Salem's submission of May 12, 2023.

As Marganne Allen lay dying on a city street in Salem, she deserved the effort of every government employee to "honestly, faithfully and competently" perform their functions.

Instead, her care was left to strangers until medics arrived.

Strangers shielded her from the rain with umbrellas.

No law enforcement officer did so.

Strangers warmed her with blankets from their home.

No law enforcement officer did so.

Strangers comforted the gravely injured cyclist.

No law enforcement officer did so.

What were the first law enforcement officers on the scene doing?

The driver of the pickup truck complained how the cyclist had struck his vehicle, apparently considering himself the victim.

Another officer quickly arriving on the scene occupied himself taking photos to share with the suspect's employer. He reportedly made no effort to care for the victim.

Meantime, the cyclist was taken to the hospital, where she was listed as a Jane Doe when undercover officers could have established her identity first before taking photos.

The family of Marganne Allen and the community deserves better than the continuing efforts by the city of Salem to keep secret information about the performance of public officials.

This matter is precisely the circumstance Oregon legislators had in mind in their crafting of the exemption for criminal investigatory material. They anticipated occasions when the government interest in police secrecy must yield to a compelling public interest in disclosure.

This is such an occasion.

Consider what the city of Salem did not dispute in the original petition.

1. The city does not dispute that in balancing competing public interests, extra weight is given to disclosure.

2. The city does not dispute that it was required to address “case-specific facts” instead resorting to general claims of law.
3. The city does not dispute that there is one suspect, that suspect is known, that the suspect is a law enforcement officer.
4. The city does not dispute that law enforcement officers disclosed evidence outside the investigation.
5. The city does not dispute that the record indicates investigators engaged in a “slow walk” of the investigation.
6. The city does not dispute that the city deliberately withheld the occupation of the driver from the public for three days.

In deciding this petition, we ask that you incorporate as undisputed those elements as findings. We now turn to the city’s defense of its exemption claims.

FOIA

The city defeats its own claims that the federal Freedom of Information Act can be used to protect city information. It cites a statute that protects records “made confidential or privileged under **Oregon law.**” [emphasis added]. FOIA is not Oregon law.

The city then says it can on its own decide the law, declaring that “Oregon law provides authority for a public body to assert federal exemptions to public records requests.”

There is no such law. That’s why the city didn’t cite a statute.

No Oregon court case is cited by the city’s legal team to support its assertion.

Even if the exemption through some municipal magic applies, the city still fails to justify its claim. It provides no “case-specific facts.”

The city shares no factual basis for representing that the DEA recipient of the undercover officer’s transmission of evidence photos was an undercover agent. The city provides no factual basis for the alarming claim that disclosing the recipient’s name would endanger the recipient’s life. The city should not and cannot treat suppositions, justified or not, as “case-specific facts.”

CRIMINAL INVESTIGATORY EXEMPTION

The city rests the bulk of its justification on a 1976 Oregon court case. We will turn to a closer examination of that in a moment, but first consider how case law has developed since then. Over and over, the courts have instructed public bodies to decide competing interests in favor of disclosure.

In 1999, for instance, the Oregon Court of Appeals declared, “The general rule in Oregon with respect to public records favors disclosure.” Reflecting on cases decided on public records, the court wrote: “Our decisions reflect the preference for a policy of governmental openness in Oregon.” (City of Portland v. Anderson)

In 2015, the Court of Appeals explained the law directed that “the court **must** balance the public interest in disclosure against the public body's interest in nondisclosure, with the presumption in favor of disclosure.” (ACLU v. City of Eugene, emphasis added)

We addressed this required balancing in depth in our original petition. The city of Salem disputes none of it.

Instead, the city of Salem relies on the case most often used by public bodies to shield criminal investigatory records – Jensen v. Schiffman. The key citation: “Investigations with pending or

contemplated proceedings will **ordinarily** remain secret because disclosure would likely 'interfere with enforcement proceedings.'" [emphasis added]

Here, the court recognizes what the city of Salem has never acknowledged.

The court leaves the door open to instances where investigative records will not remain secret. The Oregon Legislature has staked that as public policy. The Legislature is entirely capable of making records completely exempt from disclosure. The Oregon Public Records Law is replete with exemptions for which public interest in disclosure is not a consideration. Such exemptions are absolute if lawfully applied.

Concerning records related to criminal investigations, legislators provided no such unyielding exemption. They anticipated there would be instances where public disclosure was justified and specifically provided for such disclosure. They did not accidentally apply to this exemption the qualifying language "unless the public interest requires disclosure in the particular instance." (ORS 192.345)

We turn back to *Jensen v. Schiffman*. Courts often review the definitions of words in their analyses. We focus on the word "ordinarily" in the citation used by the city of Salem.

According to Merriam-Webster, "ordinarily" is defined as "in an ordinary manner or to an ordinary extent."

What is "ordinary"?

According to Merriam-Webster, ordinary is "of a kind to be expected in the normal order of events."

In contrast, something "extraordinary" is something "going beyond what is usual, regular, or customary," as defined by Merriam-Webster.

While investigation records "ordinarily" would be exempt, case-specific facts in this instance make this matter anything but "ordinary." The facts establish circumstances "going beyond what is usual, regular, or customary."

As noted in our original petition, Oregon courts want the public to have access to public documents to determine whether public agencies and officials are conducting themselves honestly and competently.

The records sought by Salem Reporter aim to do just that.

Witnesses report no law enforcement officer attempted to shield the victim from the rain.

Witnesses report no law enforcement officer attempted to shield the victim from the cold.

Witnesses report no law enforcement officer attempted to comfort the victim.

Witnesses report no law enforcement officer attempted to establish the identity of the victim.

And law enforcement officers, undercover or otherwise, were on the scene at the moment of the crash.

Witnesses report the law enforcement officer driving the pickup truck was upset that the cyclist hit his vehicle. They report he exhibited no concern for the victim.

As we have recounted previously, an undercover officer arriving at the scene exhibited no more concern for the victim than the driver, based on the account of witnesses.

In a matter of moments, this officer takes at least 24 photographs of the scene. Undercover officers are not traffic collision investigators. The officer rushed photographs to his DEA supervisor – as the bicycle remained crumpled on the street, light still blinking. By training, the officer knew or should have known such photographs were evidence. The officer knew or

should have known that immediately sharing evidence as he did runs contrary to standard and accepted police investigation practices.

The rush is unexplained. The DEA does not investigate traffic collisions. The DEA has no special right to evidence in such an investigation.

Both Salem and Keizer Police Departments have declared they consider these photographs to be evidence.

Law enforcement investigators don't "ordinarily" turn over photographic evidence to a suspect. A DEA supervisor in Seattle, Washington, who received the photographs was not being questioned. He was being tipped off.

How extraordinary was this behavior? The Oregon State Police sergeant who supervises accident reconstructionist officers at his agency said he could not think of a single circumstance where such disclosure would ever be warranted. There was nothing ordinary about the disclosure.

Yet the city of Salem casts this conduct as your usual day at the office, declaring officers commonly take photographs at accident scenes. That's likely true – for officers assigned to investigate. The city has made no showing whatsoever that the undercover officer had been tasked by the Salem Police Department to investigate.

The city's conduct in the days after the collision also was not conduct "ordinarily" expected of the Salem Police Department. That conduct provides circumstantial evidence that the department colluded with the DEA to keep the truth from the public.

Salem Reporter's original request of April 6 was crafted precisely to obtain records of that collusion. The news organization listed four categories of records. This included:

All communications between **any employee of SPD and **any official of DEA** from March 28, 2023, through Saturday April 1, 2023, in any manner related to the accident involving the DEA agent. The intent is to determine what alert, notification or other information was provided to the agency that is not participating in an investigation of the accident and to determine if DEA was given any preferential access to information.*

On April 28, the city of Salem produced records it represented as the total of what was responsive. Two weeks later, on May 12, the city of Salem admitted that wasn't true. (This is not the first time the city has belatedly discovered documents that, when disclosed, do not serve its public relations objectives.)

The city revealed that there was an email from Angela Hedrick – an "employee of SPD" – to a DEA PIO, who was an "official of DEA." The city released the contents of the document on May 15. The records showed that Ms. Hedrick sent two emails the day after the collision to Alison Grande, a public information officer for the DEA's Seattle division. The first email, sent at 11 a.m., contained a draft press release about the crash with no other explanatory information. That version of the statement did not identify the victim or the driver by name and incorrectly listed the victim's age.

Ms. Hedrick then sent another email to Ms. Grande with an updated press release, which named both the victim and the driver. That email was sent one minute before the city issued a press release that did not disclose the driver's occupation.

Law enforcement agencies don't "ordinarily" consult a suspect's employer about information in a press release before providing that information to the public.

In its petition response, the city said the document "technically" falls into that category of records sought as cited above. Technically? The city seems to suggest the email somehow didn't really qualify for disclosure. The city does not explain its failure to produce this document, which unquestionably was responsive to the request for "all communications between any employee of SPD and any official of DEA."

Ms. Hedrick was fully aware of Salem Reporter's inquiries and public records requests. Someone, somewhere in the Salem Police Department appears to have taken steps to deliberately conceal this document. That it exists, that it wasn't disclosed is uncontroverted. But events subsequent to that press release also raise questions about whether law enforcement officials were "honestly, faithfully and competently performing their function as public servants."

Three hours after the first press release, Salem Reporter contacted the DEA to verify that the named driver was in fact a DEA agent. The question was triggered by public court affidavits submitted by the agent.

By this time, the Salem Police Department possessed two key facts.

One, it knew that the agency had a financial contract with the DEA.

Two, it knew the driver of the pickup truck was a DEA agent.

Nonetheless, the Salem Police Department proceeded to investigate the collision itself. Only after Salem Reporter learned the occupation of the driver did the city decide to transfer the investigation to the Keizer Police Department. The agency won't explain why it took three days to address what agency officials themselves recognized as a troubling conflict.

Only after Salem Reporter learned the occupation of the driver did the Salem Police Department belatedly issue a press statement confirming information it had four days earlier and that would have been material to the public. Ms. Hedrick then would not answer questions on why the second press release was issued. This is "Alice in Wonderland" government – put out a public statement and then claim you are barred from discussing why the statement was issued. This is not transparency. This is obstruction of the truth.

The Salem Police Department took other steps to blunt public access to relevant information. The agency, for instance, won't address questions from Salem Reporter about the number of undercover officers on duty the day of the accident. The agency won't release the duty schedule for any undercover officer on duty that day. The city has already asserted that none of its officers were present at the time of the crash. The city's refusal to provide elementary information only adds to the questions about the honesty and competency in this matter.

And finally, the agency won't address questions about the delayed notification to the family of Ms. Allen. Instead, the family was left for hours to worry about her failure to return home as expected. But police had time to send photographs to the DEA.

We are not asking you to order the Salem Police Department to answer our questions. Rather, we provide this information in the context of the agency's effort to blunt access to information. Its redaction claims are part of that effort.

With this, the principle of "ordinarily" exempting investigatory records must yield to disclosure if citizens are to trust government in Salem.

The city posits harms for disclosure, contending that sharing the redacted information would “be detrimental to the outcome of the case.” The city of Salem cites not a single case, not a single court ruling, showing that disclosure of investigatory information has *ever* been found detrimental to a case. Making speculative claims doesn’t meet the requirement for “case-specific facts.”

In contrast, the city is silent on the disclosure of evidentiary photographs to the DEA and likely subsequently to the suspect. The city doesn’t answer why a suspect is entitled to photographic evidence but the people of Salem are not.

Concerning those 24 photographs, disclosure would serve the public interest by providing crucial information. Metadata on the photos will show the precise time the photos were taken. They will show what the undercover agent found so compelling that he could not tend to the victim. They will show the scene as it was at the moments following the crash – scenes on public streets. Nothing in those photographs would include information any neighbor, any passerby could not see.

The redactions in communications by the deputy police chief blunt the public’s understanding of why the city of Salem took so long to recognize a conflict and address it. By the city’s representation, there is no other record of the transfer of the investigation to the Keizer Police Department. As such, the redactions must yield so the public has the full information surrounding this unusual decision.

MISSING RECORDS

The failure to produce the March 29 email confirms our suspicions that the initial record search was inadequate.

The probability is high that the city of Salem still has not released all SPD-DEA communications, regardless of their format. The city, for instance, advised that the 24 photos are in evidence at the Salem Police Department – but shared no record of how that transfer occurred. How did they get there? More municipal magic?

Remember, the undercover agent was functioning on behalf of the DEA. Salem Reporter sought without limit communications between SPD and the DEA. The city has produced no record of communications between that undercover officer and SPD. It cannot excuse its duty by claiming the undercover officer worked for SPD and thus any SPD-to-SPD communications would not fall within our request. That would be parsing to avoid disclosure. And it would be wrong.

The undercover officer on March 28 was acting as a DEA official. The agreement between the Salem Police Department and DEA states at Paragraph 4: “The parent agency officers assigned to the Task Force shall be deputized as Task Force Officers of DEA pursuant to 21 USC S. 878.”

That federal statute leads to 5 U.S. Code § 3374 – “Assignments of employees from State or local governments.” That federal law declares that “During the period of assignment, a state or local government employee on detail to a federal agency...is deemed ***an employee of the agency.***” [emphasis added]

Any communications between that undercover officer or any other officer “deemed an employee” of DEA and Salem Police Department is subject to Salem Reporter’s request. As they exist, they should be ordered disclosed.

Finally, the email from Hedrick to the DEA PIO likely was not the first communication between Hedrick and the DEA – or the last regarding matters covered by our request. The city provided no record about other contacts between Hedrick and the DEA or any record about Hedrick’s authority to share information with the DEA.

CONCLUSION

*The city’s reliance on FOIA is improper and not lawful. Any information redacted based on that claim should be disclosed.

*The city’s general claims against disclosure of investigatory information fail to fulfill the “case-specific facts” standard to invoke the exemption.

*The city of Salem does not dispute that Oregon law requires that in balancing competing interests, agencies are required to favor disclosure.

*The public deserves the full record related to the clear manipulation of public information by the city of Salem.

*The failure of law enforcement officers to tend to the victim is unconscionable and they should not be protected from public accountability.

*The city of Salem failed to adequately search for responsive documents.

At Salem Reporter, we act on behalf of Marganne Allen and a community that deserves the truth. This is one of those extraordinary cases where there should be no reflexive claim to exemptions. To hold fast to those exemptions tells the community: We’ll disclose evidence to our law enforcement friends but you can’t be trusted with it.

Regards,

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CC:
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