

DUANE A BOSWORTH, OSB #82507

duanebosworth@dwt.com

DEREK D. GREEN, OSB # 042960

derekgreen@dwt.com

VANESSA A. USUI, OSB # 054804

vanessausui@dwt.com

DAVIS WRIGHT TREMAINE LLP

1300 S.W. Fifth Avenue, Suite 2300

Portland, Oregon 97201

Telephone: (503) 241-2300

Facsimile: (503) 778-5299

Attorneys for Intervenors The Associated Press,
Belo Corp. dba KGW-TV,
City of Roses Newspaper Company dba Willamette Week,
Fisher Communications, Inc. dba KATU-TV,
Meredith Corporation dba KPTV-Channel 12,
Montecito Broadcast Group dba KOIN-TV,
Oregonian Publishing Company and
Pamplin Media Group dba The Portland Tribune

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

AT PORTLAND

**JAMES P. CHASSE, JR.; JAMES P.
CHASSE; LINDA GERBER; and MARK
CHASSE**, individually and in his capacity as
Personal Representative of the **ESTATE OF
JAMES P. CHASSE, JR.**,

PLAINTIFFS,

v.

CHRISTOPHER HUMPHREYS; et al.,

DEFENDANTS.

Case No. CV 07-189 HU

**MEMORANDUM IN SUPPORT OF
MOTION TO INTERVENE AND IN
OPPOSITION TO CITY
DEFENDANTS' MOTION FOR
PROTECTIVE ORDER**

I. INTRODUCTION

Movants The Associated Press, Belo Corp. dba KGW-TV, City of Roses

Newspaper Company dba Willamette Week, Fisher Communications, Inc. dba KATU-TV, Meredith Corporation dba KPTV-Channel 12, Montecito Broadcast Group dba KOIN-TV, Oregonian Publishing Company, and Pamplin Media Group dba The Portland Tribune (collectively “the Media Organizations”) together move this Court for an order (1) allowing the Media Organizations to intervene for the limited purpose of opposing the entry of a protective order that would limit the public’s right of access to public records in a matter of great public concern, and (2) denying the protective order proposed by defendants Humphreys, Nice, City of Portland and TRI-MET (collectively “City Defendants”).

II. DISCUSSION

A. Intervention by the Media Organizations is warranted under Federal Rule of Civil Procedure 24.

Intervention by nonparty media organizations for the limited purpose of opposing a protective order is proper under Federal Rule of Civil Procedure 24(a) and 24(b). *See Jessup v. Luther*, 227 F.3d 993, 997 (7th Cir. 2000) (“[E]very court of appeals to have considered the matter has come to the conclusion that Rule 24 is sufficiently broad-gauged to support a request of intervention for the purposes of challenging confidentiality orders.”). As media entities and representatives of the public, the Media Organizations have a right to intervene under subsection(a) of Rule 24 because of their direct interest in orders that determine whether the Media Organizations, and through them the public, shall have access to important public records involved in this case. The Media Organizations have a direct interest in opposing an order here that would limit access to public records otherwise available under Oregon law. Alternatively, permissive intervention, under subsection (b) of Rule 24, by media nonparties to oppose a protective order is well-established in case law, as described herein.

1. The Media Organizations May Intervene as of Right.

A nonparty may intervene as of right where the nonparty “claims an interest relating to the property or transaction which is the subject of the action and the applicant is so

situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Fed. R. Civ. Proc. 24(a). The Media Organizations, as entities providing information to the public, have a direct interest in the outcome of proceedings that will affect the availability of public records on a matter of public concern. *See, e.g., Jessup*, 223 F.3d at 998 (discussing media's asserted right "directly and substantially related to the litigation, a right of access to court proceedings and documents born of the common law and the First Amendment"). The news media's special interests on behalf of the public, concerning public records, are not fully and adequately protected by any existing party to the litigation; the existing parties do not have the same interest in assuring full and complete access by the public to public records. *See Katzman v. Victoria's Secret Catalogue*, 923 F. Supp 580, 583 (S.D. N.Y. 1996) (granting intervention of right to media intervenor seeking to broadcast proceedings; "Important interests are best championed by those most directly affected by their impairment."). The Media Organizations should be allowed to intervene as of right.

2. Permissive Intervention on behalf of the Media Organizations is warranted.

Alternatively, permissive intervention by the Media Organizations under Rule 24(b) is warranted. Permissive intervention is a proper method for nonparties to oppose a protective order limiting access to discovery documents and materials. *See San Jose Mercury News, Inc. v. U.S. District Court*, 187 F.3d 1096, 1100 (9th Cir. 1999) ("Nonparties seeking access to a judicial record in a civil case may do so by seeking permissive intervention under Rule 24(b)(2)."); *Beckman Indus., Inc. v. Intern'l Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992) (recognizing that "Rule 24(b) permits limited intervention for the purpose of challenging a protective order"). The Ninth Circuit has approved the use of Fed. R. Civ. P. 24(b) by media nonparties to challenge protective orders. *San Jose Mercury News*, 187 F.3d at 1099, 1101, 1102-03 (granting mandamus relief to newspaper denied permissive intervention to oppose a

protective order, holding that the public has a right of access to court records).

The Media Organizations satisfy the requirements for permissive intervention. Permissive intervention ordinarily requires (1) an independent jurisdictional basis, (2) a timely motion, and (3) “a common question of law and fact between the movant’s claim or defense and the main action.” *Beckman Indus.*, 966 F.2d at 473. “[A]n independent jurisdictional basis is not required [when the] intervenors do not seek to litigate a claim on the merits,” however, because intervenors are not asking the court to exercise any power not already arising from the claims of the parties in the case. *Id.* A request to intervene to modify a protective order, for example, is merely a request for a court to “exercise that power which it already has, *i.e.*, the power to modify the protective order.” *Id.* Similarly, there is no need for a strong commonality requirement when the nonparty merely seeks to intervene. *Id.* at 473-74; *see also San Jose Mercury News*, 187 F.3d at 1100 (citing *Beckman Indus.* as holding that an “independent jurisdictional basis and strong nexus of fact or law are not required where [the] intervenor merely seeks to challenge a protective order”).

Because the Media Organizations seek to intervene only to challenge the proposed protective order, no independent jurisdictional basis is necessary and the commonality requirement is relaxed. *Beckman Indus.*, 966 F.2d at 473-74. Even if a more significant commonality requirement were necessary, the Media Organizations’ asserted right of access is sufficient. *See, e.g., Jessup*, 223 F.3d at 998. The present motion to intervene also is timely; a motion to intervene may be timely even *after* the entry of a protective order—and, indeed, even after the final resolution of the underlying matter. *See San Jose Mercury News*, 187 F.3d at 1101 (motion to intervene after entry of protective order was timely, observing that the motion to intervene in *Beckman Industries* was allowed two years after settlement). Here, this Court has yet to rule or hear argument on defendants’ proposed protective orders. The Media Organizations satisfy the requirements for intervention under Fed. R. Civ. P. 24(b).

B. City Defendants' Proposed Protective Order Is Not Warranted.

The Media Organizations ask the Court to deny City Defendants' motion for a protective order because the protective order may exempt from disclosure documents that would otherwise be available to the public through Oregon's public records law.

For purposes of this motion, the Media Organizations focus on the requested documents from (1) the Police Bureau's Internal Affairs Division; (2) the City Auditor's Independent Police Review Division; (3) the discipline files of defendants Humphreys and Nice; and (4) the Portland Police Bureau's After Action Report and Review Level findings. City Defendants attempt to prohibit disclosure of documents that are on their face public records. Pursuant to Oregon's public records law, these documents are subject to disclosure and not subject to exemption, as described herein. City Defendants overstate claimed privacy and "chilling effect" concerns and they ignore required analysis of the public interest. The requested protective order should be denied.

1. The grant of a protective order poses far-reaching consequences beyond the current lawsuit.

The entry of a protective order poses far-reaching implications for more than just the parties to this case. The proposed protective order may exempt from disclosure documents otherwise available to the public under Oregon's Public Records Law, thereby abrogating Oregon's strong policy in favor of the public's access to records.

Under Oregon law, "every person has the right to inspect any public record of a public body in this state, except as otherwise *expressly* provided by ORS 192.501 to 192.505." ORS 192.420(1) (emphasis added). Oregon's Public Records Law, ORS 192.410 to 192.505, expressly favors public access and the "statutory context [is] designed to enforce disclosure of public affairs." *Jordan v. Motor Vehicle Division*, 308 Or. 433, 438-39, 781 P.2d 1203 (1989); *see also City of Portland v. Rice*, 308 Or. 118, 121, 775 P.2d 1371 (1989) ("The policy mandating disclosure of public records is historically strong and pervasive in Oregon."). The

Oregon Supreme Court has made it abundantly clear that “[u]nder the statutory scheme, disclosure is the rule.” *Guard Publishing Co. v. Lane County School Dist. No. 4J*, 310 Or. 32, 37, 791 P.2d 854 (1990).

The Media Organizations, and the public at large, have a right to inspect the public records at issue here. ORS 192.420(1). As described herein, the documents do not fall under statutory exemptions from disclosure. City Defendants’ proposed protective order however, if granted, will pose a hurdle to public records disclosure without consideration of public records law. ORS 192.496(2) unconditionally, that is without reference to public interest, exempts from disclosure records “sealed in compliance with statute or by court order.” Although the Media Organizations would argue in the first instance that this Court’s protective order would not constitute sealing, and they do not herein concede otherwise, nevertheless were this Court to grant the protective order it would impose obstacles¹ to public access without having considered the public’s right to access under public records law. This Court should not impose these obstacles to the workings of the Oregon’s Public Records Law by granting the protective order without consideration of the far-reaching effect of its decision.

Oregon’s Public Record Law provides only specific, narrow exemptions to disclosure; exemptions are limited in their nature and in their scope of application. *Jordan, supra* at 438. These “[e]xemptions from disclosure are to be narrowly construed.” *Guard Publishing*, 310 Or. at 37. Indeed, any such construction is to be done “in a manner that promotes simple, quick and largely uniform application and that furthers the general rule favoring disclosure.” *Gray v. Salem-Keizer School Dist.*, 139 Or. App. 556, 563, 912 P.2d 938 (1996). “Oregon courts interpret the exemptions of the Public Records Law *narrowly*, and the

¹ The Media Organizations and the public would be required to argue and succeed in the argument that ORS 192.496(1) does not apply. Alternatively, the Media Organizations would be required to get a court order effectively reversing this Court’s order and reasoning, made without the benefit of consideration of the public records law, if the protective order were granted. ORS 192.496(2).

courts ‘presume’ that the exemptions do not apply.” *Attorney General’s Public Records and Meetings Manual*, p. 21 (citing ORS 192.490(1) and *Coos County v. Dep’t of Fish & Wildlife*, 86 Or. App. 168, 173 (1987); *Morrison v. School Dist.*, 53 Or. App. 148, 151 (1981)) (emphasis in original). The Oregon legislature has expressly decided that a public body which attempts to deny a public records request has the burden of proving that the record is in fact exempt from disclosure. ORS 192.490(1).

None of the requested Internal Affairs Division, City Auditor’s Independent Police Review Division, Humphreys and Nice discipline file, or the Portland Police Bureau’s After Action Report and Review Level findings documents are exempt from disclosure. Anticipating City Defendants’ arguments, the only exemptions to disclosure that address the documents at issue are those set forth in ORS 192.502(1), (2), and (4). Under each of these provisions, however, the City Defendants would be unable to overcome the presumption of public access favoring disclosure.

a. None of the documents at issue are exempt from disclosure under ORS 192.502(1).

ORS 192.502(1) exempts from disclosure “[c]ommunications within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to any final agency determination of policy or action. *This exemption shall not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure.*” (emphasis added) In interpreting this section, the Oregon Court of Appeals has stated that the burden City Defendants face “is daunting” and the exemption “does not impose an evenly weighted balancing test.” *City of Portland v. Oregonian Publishing Co.*, 200 Or. App. 120, 124 (2005). In *Oregonian Publishing*, the City of Portland attempted to prevent the disclosure of documents relating to an investigation of the police officer who killed Kendra James. The city argued that

disclosure of the documents would inhibit future internal investigations. The court rejected the city's argument that the need for confidentiality overcame the presumption in favor of disclosure. *Oregonian Publishing*, 200 Or. App. at 125. In language that is equally applicable to the current case, the court stated:

It is beyond dispute, however, that the public's (and the police bureau's) need to have complete confidence that a thorough and unbiased inquiry has occurred is most urgent and compelling in "high profile" cases where a police officer has killed a citizen in the line of duty. That confidence comes from transparency and its value is not outweighed by the speculation that transparency will quell candor at some future date. This is not a close case.

Id. at 127. As in *Oregonian Publishing*, the interest of the public here far outweighs the claimed need for confidentiality.

b. None of the documents at issue are exempt from disclosure under ORS 192.502(2).

Nor does ORS 192.501(2) shield the documents at issue. ORS 192.501(2) exempts from disclosure "[i]nformation of a personal nature." Information is not personal under the statute, however, if it does not "affect [the individual] exclusively and [is] not peculiar to his private concerns." *City of Portland v. Anderson*, 163 Or. App. 550, 556 (1999). In *Anderson*, the court found that the records of an investigation into a police captain's misconduct did not constitute information of a personal nature as the investigation did not solely affect the captain. *Id.* Similarly, the documents at issue here do not relate solely to officers Humphreys and Nice and do not fall under this exemption to Oregon's Public Records Law.

c. None of the documents at issue are exempt from disclosure under ORS 192.502(4).

Finally, the documents at issue are not subject to the exemption contained in ORS 192.502(4). ORS 192.502(4) relates to "[i]nformation submitted to a public body in confidence and not otherwise required by law to be submitted, where such information should reasonably be considered confidential, the public body had obliged itself in good faith not to disclose the information, and when the public interest would suffer by the disclosure." The Court of Appeals

has adopted the test set out in the *Attorney General's Public Records and Meetings Manual*.

Gray, 139 Or. App. at 563. The manual states:

1. The exemption applies only to information which is submitted voluntarily when the informant is under no legal obligation, by statute, rule, contract, or otherwise, to provide the information.
2. The agency must be in a position to show that the information was of a nature which reasonably should be kept confidential.
3. The agency must show that it has obliged itself in *good faith* not to disclose the information.
4. Disclosure must cause harm to the public interest.
5. The person must have, in fact, submitted the information in confidence.

Attorney General's Public Records and Meetings Manual at 41 (1993) (Emphasis in original).

Only if *all five* requirements are met is a public record exempt from disclosure. *Gray*, 139 Or App at 563.

City Defendants have not asserted that they have obligated themselves not to disclose information, or that any other requirement is met. Instead, they speak only in general terms about how Bureau employees “*may* be assured that statements made by them to the investigating officers will be treated confidentially,” how other people “generally assume” that the information will be kept confidential, or that “[*if asked*, [Independent Police Review] staff advises citizen complainants that it will keep their information confidential *to the extent allowable by law.*” (City Def’s Mem. at 5-6, and 9) (Emphasis added). City Defendants have not argued that any of these events in fact occurred here. They have not argued that they obliged themselves in good faith, in this instance, to keep the information confidential nor do they argue that employees and other witnesses have “in fact,” to quote the statute, submitted the information in confidence. For this reason alone, the exemption in ORS 192.502(4) does not shield the documents from disclosure.

Moreover, as City Defendants have stated in their memorandum, police officers

are under *an obligation* to respond to questions asked in an investigation. (City Def’s Mem. at 6). Therefore, information provided by the officers does not meet the first requirement of the *Gray* test. Furthermore, as discussed below, the public interest strongly favors disclosure and the benefits to the public confidence through transparency outweigh City Defendant’s allegations of potential harm. City Defendants’ proposed protective order should be denied.

2. Good Cause To Prohibit Disclosure Does Not Exist.

City Defendants’ proposed protective order should be denied for the additional reason that City Defendants have not shown the requisite good cause, pursuant to Fed. R. Civ. P. 26(c), to prohibit disclosure. The sweeping breadth of the protective order proposed by City Defendants is not supported by law and would infringe upon the public’s “well established” presumptive right of access to discovery materials. *See San Jose Mercury News*, 187 F.3d at 1103.² There is a general presumption in favor of public access to litigation documents and information produced during discovery. *Phillips v. General Motors Corp.*, 307 F.3d 1206, 1210 (9th Cir. 2002). To rebut this general presumption, “the party opposing the disclosure [must] show[] ‘good cause’ why a protective order is necessary.” *Id.* This “good cause” analysis has two steps. First, the party seeking the protective order must demonstrate that “specific prejudice or harm will result” from disclosure of information to the public. *Id.* at 1210-11. That showing must be specific to the documents in question. *See id.* at 1211. Second, upon the requisite showing of specific prejudice or harm, a court must then “balance[] the public and private interests to decide whether a protective order is necessary.” *Id.*

City Defendants cannot demonstrate that good cause exists for a protective order

² The Media Organizations agree with plaintiffs that the City Defendant’s proposed order is overly broad and effectively creates an impermissible blanket protective order. (*See* Pl’s Response to City Defendant’s Motion for Protective order.) For purposes of this motion, however, the Media Organizations focus on why City Defendants cannot demonstrate that “good cause” exists to prohibit disclosure of the requested documents from the Police Bureau’s Internal Affairs Division, the City Auditor’s Independent Police Review Division and the discipline files of defendants Humphreys and Nice, and the Portland Police Bureau’s After Action Report and Review Level Findings.

with respect to the documents at issue. As explained below, City Defendants' assertions that "specific prejudice or harm" will result from disclosure of the above-referenced documents are unsupported. Moreover, the subject of these documents is of utmost public interest, which weighs heavily in favor of access by the public.

a. Internal Affairs Documents

City Defendants assert that a protective order prohibiting public disclosure of "any Internal Affairs documents" is necessary "to protect the privacy interests of the people involved and to comply" with Oregon law. (City Def's Mem. in Supp. of Protective Order ("City Def's Mem.") at 5.) As an initial matter, City Defendants misconstrue the cited Oregon law, ORS 181.854, regarding disclosure of public safety records. City Defendants correctly state that "ORS 181.854(3) prohibits a public body from disclosing information about a personnel investigation of a public safety employee which does not result in discipline of the employee, except in certain specified instances." (City Def's Mem. at 5.) But City Defendants wait until their reply brief before footnoting those "specified instances":

- (a) When the public interest requires disclosure of the information.
- (b) When the employee consents to disclosure in writing.
- (c) When disclosure is necessary for an investigation by the public body, the Department of Public Safety Standards and Training or a citizen review body designated by the public body.
- (d) When the public body determines that nondisclosure of the information would adversely affect the confidence of the public in the public body. ORS 181.854(4)

Although claiming exemption from disclosure of the internal affairs reports under ORS 181.854, City Defendants have not demonstrated why the public interest does not "require[] disclosure of the above information." ORS 181.854(4)(a). The circumstances surrounding Mr. Chasse's death remain an issue of significant public interest, subject to extensive coverage within the past 30 days, alone. Briefing by co-defendants Multnomah County and Bret Burton acknowledge this point, stating that the case "has generated an enormous amount of public attention." (Mult. County and Burton Amended Mem. in Supp. of Protective Order at 3.) It

would be difficult to overstate the public interest in this issue. City Defendants’ memoranda takes the opposite approach, ignoring the public interest, including the issue of the public’s confidence in the public body.

City Defendants’ “good cause” argument against the release of the Internal Affairs reports is, in essence, two-fold: (1) public dissemination could cause a loss of privacy of those involved, and (2) public dissemination would have a chilling effect on candid internal investigation and reporting. (City Def’s Mem. at 5-8.) Neither argument demonstrates that “good cause” exists for a protective order.

First, City Defendants’ “chilling effect” argument presupposes that Portland Police officials may not be effective in their jobs unless shielded from public scrutiny. City Defendants acknowledge that officers are obligated under department policy to cooperate with internal affairs investigations and to answer questions honestly. (City Mem. in Supp. at 6; Tellis Aff ¶ 7.) Unless one assumes that officers will violate this obligation without an assurance of secrecy, City Defendants’ argument fails. *See Welsh v. City and County of San Francisco*, 887 F. Supp 1293, 1300-1301 (N.D. Cal. 1995) (discussing precedent reaching similar conclusion).

The public expects that police officials will tell the truth regardless of whether the information they provide could become public. *Cf. City of Portland v. Oregonian Publishing Co.*, 200 Or. App. 120, 127 (2005) (“To conclude that public disclosure of [the judgments of supervisors in police conduct reports], made pursuant to supervisory duties, would discourage future candor is an insult to the supervisors themselves.”). There is also reason to believe that the possibility of disclosure and more searching scrutiny could result in *more* candor on behalf of officials. *See Welsh*, 887 F. Supp. at 1300-1301.

Second, City Defendants do not explain how their past treatment of Internal Affairs investigation results is consistent with a concern over privacy or a chilling effect. City Defendants state that the “history as to whether a type of document has been protected from pretrial publishing is a consideration used by courts in balancing competing interests.” (Reply at

6.) This position supports the public dissemination of the Internal Affairs reports. As documented in the attached declaration of Maxine Bernstein, the City of Portland has turned over Internal Affairs investigation reports under Oregon’s public records law in the past, *particularly* when the matter is one of significant public interest. The attached declaration describes other incidents in which the Portland Police have released similar Internal Affairs and other similar reports. Sometimes that has been voluntary. Other times disclosure has come after an order by the District Attorney or a court, including the Oregon Court of Appeals. In every instance described in the declaration, the result was disclosure to the public. Prior practice regarding disclosure undercuts City Defendants’ present position.

To the extent there are potential privacy and “chilling effect” concerns regarding the release of the Internal Affairs documents, City Defendants have not demonstrated that these concerns outweigh the public’s interest in access to this information. *See Phillips*, 307 F.3d at 1211. Investigations of police conduct “concern matters of general concern to the workings of our democratic society,” *Doe v. Marsalis*, 202 F.R.D. 233, 239 (N.D. Ill. 2001), and the public “has a significant interest in monitoring the conduct of its police officers and a right to know how allegations of misconduct are being investigated and handled.” *Bond v. Utreras*, No. 04 C 2617, 2007 WL 2003085 at *3 (N.D. Ill. July 2, 2007); *see Oregonian Publishing*, 200 Or App at 125 (discussing the “benefit to be reaped by allowing the public to determine whether a full, frank, and thorough investigation of [a] highly inflammatory and widely reported incident occurred”). Any claimed benefits to privacy or the internal investigation process are outweighed by the loss of public confidence in its public body arising from confidential, never released investigations that provide no basis for the public to assess whether claims of police misconduct are adequately investigated and addressed.

b. City Auditor’s Independent Police Review Division Documents

City Defendants seek to prohibit any public dissemination of Independent Police Review (IPR) documents on the ground that some information within some IPR documents may

contain personal information about witnesses. (City Mem. in Supp. at 9.) City Defendants assert that disclosure of the reports would deter citizens from engaging in the complaint process. The entire basis for this assertion is the personal belief of Ms. Stevens, who provides little or no explanation or empirical support for this assumption. (Stevens Aff. ¶ 7.) Other courts have rejected similar arguments. *See, e.g., Welsh*, 887 F. Supp at 1301 (discussing case law holding that there is “even less reason to believe that the possibility of disclosure will discourage citizens from filing complaints against police officers” than there is to believe that public disclosure will negatively affect internal police witness cooperation). In fact, the affidavit in question provides some support for the opposite conclusion in its acknowledgment that “sometimes citizen complainants elect to publicly release their personal information.” (Stevens Aff. ¶ 5.)

Even more problematic for City Defendants is the fact that the stated reasons for the protective order do not—and cannot—support the breadth of the protective order requested. City Defendants provide no explanation as to how a concern about personally identifiable information supports the drastic measure of prohibiting public dissemination of these public records in any form. It is City Defendants’ burden to demonstrate that good cause exists for the requested protective order. Fed. R. Civ. P. 26(c). The fact that some contact information and birthdates may otherwise appear on certain reports is not good cause for suppressing the entire documents from the public. *See also* ORS 192.505. Particularly when weighed against the backdrop of the public’s interest in knowing about claims of police misconduct, City Defendants’ proposed protective order excluding documents in their entirety should fail.

c. Discipline Records of Officers Humphreys and Nice.

City Defendants provide only a single paragraph attempting to argue why officer Humphreys’ and Nice’s discipline records should be subject to a protective order. This paragraph does not establish “good cause.” City Defendants rely only on a 2004 District Attorney letter opinion which is factually inapposite. In any event, the opinion resulted in the production of many of the requested documents.

The 2004 letter opinion responded to a records request that arose during the 2004 mayoral campaign. The opinion describes disciplinary records relating to allegations of the past misconduct of an officer which were requested by the Oregonian, including documents relating to two 1993 incidents and one 1991 incident. The opinion found that the documents relating to the 1993 incidents had “nothing to do with the former police chief presently running for Mayor” and therefore, had no public interest value relating to the mayoral campaign. Conversely, to the extent that the documents relating to the 1991 incident reflected the management process or judgment of then-Chief Potter, they had to be “disclosed in the public interest.”

Contrary to City Defendants’ reading of the letter opinion, it did not create a blanket rule that past disciplinary documents never possess any public interest value. Instead, to the extent the documents had a relationship to the parties involved in the mayoral campaign, they were of public interest and had to be produced. Similarly here, there is a strong public interest in the prior disciplinary records of two police officers accused of misconduct that led to a citizen’s death. City Defendants have failed to establish that good cause exists to prevent the public disclosure of the discipline files.

d. The Portland Police Bureau’s After Action Report and Review Level Findings

Although the Media Organizations recognize that the After Action Report and Review Level Findings have not yet been completed, they request that they not be subject to a protective order. As with the Internal Affairs Documents, the crux of City Defendants’ objection regarding the After Action Report and Review Level Findings is a concern that disclosure will have a “chilling effect” on future internal reviews. (City Mem. in Supp. at 22). As with the arguments regarding the Internal Affairs Documents, City Defendants have failed to overcome the presumptive right of access to discovery materials and fail to demonstrate “good cause” justifying the imposition of a protective order.

City Defendants do not explain why their previous public disclosures of other

After Action Reports have not “chilled” internal reviews and hampered the continued improvement of the Police Bureau. *See* Declaration of Maxine Bernstein (discussing the City’s prior public disclosures of After Action Reports from other incidents). Nor have they explained why public scrutiny of the internal review process would not itself lead to improvements and self-critical evaluation. *See Welsh*, 887 F. Supp. at 1300-1301. Instead they rely on the statements of personal belief provided by Mr. Martinek. (Martinek Aff. ¶ 14). Regardless of whether the internal review leads to disciplinary action or not, the public has a compelling interest in ensuring that a fair and thorough review of any highly controversial incident has occurred.

III. CONCLUSION

For the foregoing reasons, the Media Organizations respectfully request that this Court grant their Motion to Intervene and further request that this Court deny City Defendants’ proposed protective order.

DATED this 10th day of October, 2007.

DAVIS WRIGHT TREMAINE LLP

By /s/ Duane A. Bosworth

Duane A. Bosworth, OSB #82507

duanebosworth@dwt.com

Telephone: (503) 241-2300

Facsimile: (503-778-5299

Of Attorneys for Intervenor Media Organizations