

The Oregonian

Portland's mayor pressing for alternatives to DA's opinion on officers' compelled statements

By Maxine Bernstein

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Portland Mayor Ted Wheeler is pressing for possible alternatives to a legal opinion that would delay police interviews of officers involved in deadly force, his spokesman said Monday.

Multnomah County District Attorney Rod Underhill has cited an Oregon Supreme Court ruling that he believes requires police internal affairs investigators to hold off from forcing an officer to give a statement after killing someone on duty until after a criminal investigation and grand jury review.

Wheeler wants to speed up the timing.

"Here's the questions we're asking: Is the DA's interpretation accurate? Are there in fact ways to wall off an internal investigation from a criminal investigation? Are there other procedural changes we can make to internal accountability to work around this?" said the mayor's spokesman Michael Cox. "These are unsettled questions."

The Mayor's Office is talking to city attorneys, the district attorney and officials from the Oregon and federal Justice Departments, Cox said. "These are complicated legal questions that we continue to work through," he added.

The National Lawyers Guild has joined with the Albina Ministerial Alliance, a Portland community group, to urge the mayor to hold a public hearing before allowing the Portland Police Bureau to adopt Underhill's interpretation of the law.

"Despite finally striking the widely despised '48-Hour Rule' from the Portland Police Association contract last fall, which allowed officers two days before producing testimony after employing deadly force, this new policy would extend that timeline considerably," the Lawyers' Guild wrote in a letter to the mayor and City Council. "Therefore, it is paramount that the public be allowed to critically examine this dismaying new rule."

The mayor doesn't plan to hold a hearing on the issue, honoring the bureau's timeline for making changes to its use-of-force policy, Cox said.

"The DA is the person in charge of bringing prosecutions in these cases. If he won't prosecute or take a case to grand jury if there's a compelled statement to IA by an officer, that's the reality we have to live with then," Cox said. "As of today, that's the reality, but we continue to explore what options we have."

Underhill said he won't prosecute an officer for an offense related to a deadly force case if the officer was compelled to make a statement to internal affairs investigators before police have finished their criminal investigation and a grand jury hears the case. That could take weeks.

He cited a 1984 Oregon Supreme Court ruling in *State v. Soriano* that he believes requires someone forced to make a statement by an employer to receive automatic immunity from prosecution for a crime related to those statements.

Based on Underhill's legal analysis, the Portland Police Bureau has proposed a policy change that would require internal affairs investigators to gain written approval from the district

attorney before making an officer who has killed someone on duty to give a statement for an internal affairs administrative review, done separately from the criminal investigation.

The proposed directive cites an exception when information is "immediately necessary to protect life and/or ensure the safety of the public" and notes that in those circumstances, the Police Bureau "shall ensure" that information gathered from an internal affairs interview won't be shared with criminal investigators.

Some legal observers have asked why that exception can't be the rule – setting up a sufficient wall between the internal affairs investigation and the criminal investigation -- when an officer takes a life on duty.

Others question why Underhill issued his legal analysis before anyone has challenged the internal affairs investigation process and pushed this matter before a court for a judicial ruling.

"Involving a blanket rule that destroys the credibility of the department in critical cases is absurd, and it flies in the face of the DOJ settlement," wrote Amanda Marshall, former Oregon U.S. attorney, in a Facebook comment in response to The Oregonian/OregonLive story that reported on Underhill's legal reasoning last week. Marshall served when the city reached the settlement agreement with the U.S. Justice Department over using force against people with mental illness.

But Kevin Sali, a criminal defense attorney, said waiting for a court to rule on the issue would be too late. The court could preclude a prosecution of an officer based on a compelled statement and then the district attorney's hands would be tied, he said.

Underhill's legal ruling ultimately could spur more long-term efforts to remove Portland police from conducting criminal investigations of their own officers who kill someone on the job and have an outside agency, such as state police or the Oregon Department of Justice, step in. Such a move would put more distance between the internal affairs and criminal investigations.

The National Lawyers Guild is doing its own a legal analysis of Underhill's opinion.

"I would find it very discouraging if we couldn't come up with something to work around it based on what we want out of our government in terms of police accountability," said J. Ashlee Albies, a member of the guild who represents the Albina Ministerial Alliance's Coalition for Justice and Police Reform in the city's settlement with the Justice Department.

"There's got to be a workaround to this because historically the DAs have not prosecuted officers for use of force on duty," she said.

The Portland Tribune

City Hall Update: Tenant protections likely to continue beyond October

By Jim Redden

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Plus, city opens Poet's Beach again to publicize safety of swimming in the Willamette River and budget cuts cause the Oregon Symphony to cancel its annual end of free performance

A majority of the City Council indicated they will extend and perhaps expand the six-month-old tenant protection policy when it is scheduled to expire in October.

The policy, adopted Thursday, requires landlords to pay relocation costs between \$2,900 and \$4,500 to tenants forced out with no-cause evictions or who choose to move after their rents are raised more than 10 percent a year. It recently was upheld by a Multnomah County Circuit Court judge.

During a Wednesday hearing on extending some of the deadlines in the policy, Mayor Ted Wheeler lamented that the 2017 Oregon Legislature did not repeal the statewide ban against local rent control programs.

"It is difficult to be here roughly six months from where we started and realizing that we're going to have to go on our own. It means we have a lot of work ahead of us, and we're up to the job," Wheeler said at the hearing where the change were approved, which Commissioner Nick Fish missed. Commissioner Chloe Eudaly has said it should be expanded.

Downtown beach opens again

Mayor Ted Wheeler and members of the Human Access project swam in the Willamette River on Thursday morning as part of the grant opening of Poet's Beach, a sandy stretch along the east side of the river near the Marquam Bridge.

Although the beach has been open for three years, the event was held to publicize the safety of swimming in the river following the completion of the Big Pipe project that has all but eliminated summer combined sewer overflows into it. The Oregon Department of Environmental Quality tests the river that runs through Portland every week and has consistently found bacteria samples below state health standards.

Lifeguards will be stationed at the beach from 11 a.m. to 7 p.m. daily through Sept. 4.

Symphony hits sad note, cancels free show

The Oregon Symphony announced Wednesday that it has canceled its annual end-of-summer show in Gov. Tom McCall Waterfront Park after the city withdrew its financial support.

"The city is in the midst of a housing and homelessness emergency and had to make a lot of tough budget choices," Michelle Plambeck, a spokeswoman for Portland Mayor Ted Wheeler, told Oregon Public Broadcasting.

The popular free concert has been held almost every year since 1999. Staffing, logistics and other costs for the show total about \$300,000. The city has traditionally picked up about two-thirds of the bill.

Controversial Montavilla resolution against homeless sweeps not legitimate

By Lyndsey Hewitt

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Upcoming July 29 neighborhood town hall meeting barring media designed to protect attendees who wish to remain anonymous.

It turns out that a controversial Montavilla Neighborhood Association board resolution to ban homeless sweeps, which has made news headlines in recent weeks, wasn't actually legitimate due to a procedural error.

The association didn't include the resolution as an agenda item for consideration in advance of a "special board meeting" on June 19, a requirement of the city Office of Neighborhood Involvement standards.

The resolution was critical of the city, calling sweeps a waste of taxpayer money and asked leaders to find a better long-term plan to address homelessness.

The information came to light after the Portland Tribune asked the city Office of Neighborhood Involvement (ONI) about an upcoming town hall meeting planned by the neighborhood association that barred media attendance.

The town hall meeting, to discuss issues around homelessness, is still planned to take place from 10 a.m. to noon July 29, at the Montavilla United Methodist Church, 232 S.E. 80th Avenue.

According to Paul Leistner, program coordinator at ONI who has studied the neighborhood system extensively, the association will have to "take action" on the resolution again at a future meeting, as long as it provides adequate notice. Jonnie Shaver, the neighborhood association chair, has not responded to requests for comment.

The association wasn't labeling it a public meeting, according to the event description, to protect the privacy of attendees. The rationale was to enable people to feel comfortable about attending anonymously.

The agenda, posted on Facebook, included examining the role and impact of neighborhood associations, a panel discussion and community Q&A session, and "identifying community ideas for actionable solutions in Montavilla." Resolutions Northwest, a local organization that helps resolve conflict and mediate conversations between groups, is facilitating it.

Priority was given to neighborhood residents and business owners. The event filled up, and anyone else wanting to attend may request to be placed on a waitlist.

According to Leistner, Oregon's public records or meetings laws don't govern neighborhood associations since they are not government bodies, and instead are independent nonprofit organizations. However, they are required to abide by ONI standards, and city policy that states that neighborhood associations must follow the state law as if they were governed by it.

However, the association wasn't planning any decision-making at the town hall — a requirement of the state law.

Jack Orchard, an attorney at Ball Janik LLP with expertise in public records law, says that an agenda that "discusses potential 'actionable solutions,' it seems that the meeting is designed to deliberate toward something.

"I'll guess that any homeless person who wants to attend will be given the right to do so," he says.

Leistner says this issue hasn't come up before.

"The current standards don't speak to this type of neighborhood association event, so no standards appear to be violated," says Leistner. "It clearly would be helpful to take up these issues again when we next update the ONI standards.

Some neighbors are planning to file a grievance.

Leistner says that many people "who get involved in civic life in Portland may not have strong leadership and organization management skills when they start out.

"Training and support on the front end, and minimum standards and processes to help resolve conflicts on the back end are important aspects of any healthy participatory democracy system."

Though it doesn't receive money directly from the city, the neighborhood association is eligible for funding for communications-related expenses through ONI grants to the Southeast Uplift Neighborhood Coalition, Leistner says.

Crypto options to be considered by advisory committee Tuesday

By Jim Redden

July 17, 2017

Short deadline for City Council to decide on treatment option repeatedly questioned at first public hearing on the issue

The Portland Utility Board was created by the City Council two years ago to keep a promise made by former Mayor Charlie Hales and Commissioner Nick Fish in the heat of a political campaign.

The 11-member volunteer board is about to find out how much that promise was worth.

The PUB, as everyone calls it, was created to increase independent oversight of water and sewer bureau spending. Hales and Fish promised such additional oversight if voters defeated a 2014 ballot measure to create an independent commission to run the water bureau. The voters did, and the PUB was first funded in the fiscal year that began on July 1, 2015.

Now the PUB is scheduled to meet Tuesday morning to recommend how the council should respond to a demand from the Oregon Health Authority that the city spend up to \$500 million to fight a parasite in the Bull Run watershed that has never been proven to make anyone sick. The meeting will take place at in City Hall at 11 a.m. July 18.

The council will meet two weeks later to make its decision. It is not legally bound by PUB's recommendation.

The parasite is cryptosporidium, which is found in animal and human feces. Although some strains can sicken people and even kill those with a weakened immune system, they have never been documented in the watershed. But the U.S. Environmental Protection Agency, which adopted the rule the OHA is enforcing, doesn't distinguish between those strains that threaten people and those that don't.

Water bureau officials last Tuesday presented PUB members with three options the council is considering. The first is a treatment plant that will kill the cryptos, as the parasite is commonly called, with ultraviolet light. It would cost \$105 million to build and increase the combined water/sewer/stormwater management bill by as much as \$3.01 a month by 2024.

The second is a filtration plan that removes a wide range of contaminants from water, including crypto. It is estimated to cost between \$300 million and \$500 million, and could increase the bill by as much as \$18.14 a month in 2030.

The third is to build the UV plant first and begin setting money to help fund a filtration plant later. This option was offered because a UV plant can be built quicker, in about five years, while building a filtration plant could take 10 or more years. The UV plant could then be operated until it needs major maintenance in 20 to 25 years, at which time a filtration plant could have been completed to replace it.

This option, dubbed "UV Plus," would increase the bill by as much as \$7.54 by 2034, with a yet-to-be determined increase when construction starts on the filtration plant.

The project-related increases would finance 25-year construction bonds to pay for one or both of the projects.

Forced to comply

PUB members heard multiple opinions on the options at its July 11 meeting.

For starters, water bureau officials said the city has no choice but to comply with OHA demand, despite the lack of a proven health risk, because it is backed by a U.S. Environmental Protection Agency rule. Water Quality Manager Yone Akagi said that if money is no object, the bureau would build a filtration plant because it will allow more water to be drawn from the Bull Run Reservoir in summers. It could also screen out mud from landslides and ash from wildfires in the watershed, she said.

But when it came time for the public to testify, almost everyone was against spending any money to fight crypto. They included officials with the Oregon Physicians for Social Responsibility, Friends of Reservoirs and the League of Women Voters of Portland. They cited the health officials who say there is no actual health threat to fight.

"They're both nearly, equally bad options, I mean we don't have a public health problem, we have a 125-year history of no disease in the community. We don't have infectious cryptosporidium," said Floy Jones, co-founder of the community-based Friends of the Reservoirs, which has fought changes to the city's water system for years.

More than that, most witnesses also wanted the council to challenge the short deadline imposed on it by OHA. After crypto was repeatedly found in Bull Run water in January and February, the OHA notified the city on May 19 that it would revoke the variance it had granted to the EPA rule on Sept. 22. It then gave the council until Aug. 11 to make a treatment decision and agree on interim measures until it can be completed.

"There should be no rush to judgment," said Regna Merritt of Oregon Physicians for Social Responsibility, who decried the limited public process on the decision so far.

Even some PUB members expressed concern about the deadline.

"They should give the city more time to make the best decision," said Mike Weedal said of the OHA.

But water bureau officials said if Portland does nothing, the OHA and EPA could fine the city and even take control of the water system. And if anyone is subsequently proven to be sickened by crypto in the water, city officials could face criminal charges.

Water Bureau Director Mike Stuhr said doing nothing is not a viable option.

"When we made the decision (to request a variance), we claimed our water was as clean as a treatment plant. This spring we proved it is not," Stuhr said.

The EPA adopted its Long Term 2 Enhanced Surface Water Treatment Rule in 2006. Called LT2 for short, the rule is intended to reduce illnesses linked to crypto and other disease-causing microorganisms in drinking water. Among other things, the rule requires all municipal water providers to decommission their open water reservoirs, something Portland has done in recent years. It also requires that water from unfiltered water sources be treated for crypto.

At the urging of the city, the OHA granted the city a variance from the treatment requirement in 2012 because Bull Run water has historically been so clean. But the city promised to test for crypto and report its findings to the OHA. None was detected until this year, when heavy rains are thought to have washed into the reservoir. The OHA then decided the city could no longer comply with the terms of the variance and decided to revoke it.

To read a previous Portland Tribune story on the issue, go to tinyurl.com/yamarw3n.