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November 13, 2001

Pat Forgey
News-Register
611 E. Third Street
P.O. Box 727
McMinnville, OR 97128

Re: *Petition for Public Records Disclosure Order:*
Department of State Police

Dear Mr. Forgey:

This letter is the Attorney General's order on your petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition, which we received on November 6, 2001, asks the Attorney General to direct the Department of State Police (OSP) to make available "copies of any police reports or internal investigation reports involving Trooper Dan Lewis as a suspect." You provide the case number as 01109070. For the reasons that follow, we respectfully deny your petition.

While your petition requests the Attorney General to issue an order for disclosure of "police reports" and "internal investigation reports," your records request to OSP, received by the agency on October 15, 2001, was for only "a police report done by your department regarding state police officer Dan Lewis." Your petition states that OSP Sergeant David Scholten provided you with a responsive report, from which OSP redacted certain information, including the names of "undercover officers and members of the Drug Enforcement Section." You specify that you are not seeking the disclosure of other information redacted from the disclosed report, concerning Trooper Lewis' personal accounts and confidential reliable informant information. Because the Attorney General has authority to consider petitions for disclosure only when an agency has denied a records request, your petition with regard to records other than the disclosed report is premature. ORS 192.450. Therefore, this order addresses only the redaction of law enforcement officers' names in the disclosed report.

The Public Records Law confers a right to inspect any public records of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. If a public record contains exempt and nonexempt material, the public body must separate the materials and make the nonexempt material available for examination if it is "reasonably possible" to do so while preserving the confidentiality of the exempt material. *Turner v. Reed*, 22 Or App 177, 186 n 8, 538 P2d 373 (1975). According to your petition, OSP cited ORS 181.852 as a basis for segregating the names of certain law enforcement officers prior to disclosing the record in question. We consider whether either that statute or ORS 192.501(3) allows OSP to maintain the confidentiality of officers' names in this instance.

1. Disclosure of information about certain employees of law enforcement agencies

ORS 181.852(2) provides, in relevant part, that

> a law enforcement agency may not disclose information about an employee of the agency while the employee is assigned duties the agency considers undercover investigative duties and for a period of six months after the conclusion of those duties.

The Public Records Law exempts from disclosure "[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law." Therefore, to the extent that ORS 181.852(2) permits OSP to maintain the redacted names as confidential, they are exempt from disclosure.

ORS 181.852 identifies the "information" that a law enforcement agency may not disclose.[1] "'Information' *includes, but is not limited to*, an address, telephone number, date of birth and photograph." ORS 181.852(1)(b) (emphasis added). Your petition suggests that the legislature's omission of "name" from this definition demonstrates an intent to not maintain the confidentiality of undercover officers' names. The Oregon Supreme Court has recognized that "including" or "includes" can be interpreted as a term of enlargement, illustrative application or as a word of limitation. *See Premier Products Co. v. Cameron*, 240 Or 123, 125, 400 P2d 227 (1965). In this instance, modification of "includes" by the phrase "but is not limited to" belies the suggestion that the legislature intended the examples following in the definition of "information" to act as a limitation on the pieces of information exempt from disclosure under ORS 181.852(2).

Considering the text and context provided by the entirety of ORS 181.852, the legislature intended to provide law enforcement agencies with a means to protect the true identity of officers engaged in undercover activities. This protection impacts the safety of those officers, as well as the accomplishment of law enforcement activities. We conclude that maintaining the confidentiality of an undercover officer's name protects the officer's identity in much the same way as maintaining the confidentiality of items such as photographs, which are specified in the definition of "information." Therefore, OSP may maintain the confidentiality of names under

[1] OSP is a "law enforcement agency." ORS 181.010(5).

this statute, if the named officers are OSP employees assigned to duties that OSP considers "undercover investigative duties."

Sgt. Scholten informs us that OSP does not consider two of the officers whose names were redacted from the report to be assigned to undercover investigative duties. Sgt. Scholten has agreed to provide you with copies of the pages of the report in which the names of those officers appear. According to Sgt. Scholten, OSP considers the other officers whose names were redacted from the report to be assigned to undercover investigative duties. Because ORS 181.852(2) leaves this characterization to the agency's discretion, we do not question OSP's conclusion regarding the nature of the officers' duties. Sgt. Scholten has stated that either the officers in question continue on undercover assignment or six months has not elapsed since the conclusion of their undercover assignments. Therefore, the only issue to be addressed is whether the officers are employees of OSP.

"Employee" is not defined in ORS 181.852. Accordingly, we must give that term its plain, natural and ordinary meaning. *See PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993). One definition of "employ," related to people, is "to use or engage the services of." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 734 (1993). An "employee" is "one employed by another usu. in a position below the executive level and usu. for wages." *Id.*

The undercover officers whose names were redacted from the report supplied to you are members of the Yamhill County Interagency Narcotics Task Force. The task force includes officers from the Yamhill County Sheriff's office, city police departments from within Yamhill County, and OSP.[2] Sgt. Scholten informs us that OSP is the lead agency for the task force and, in that role, directs the activities of the task force members. In other words, OSP is the agency responsible for determining the assignments of each officer acting as a member of the task force, regardless of which law enforcement agency supplied that officer to the task force. Because of OSP's responsibilities within the task force, we conclude that the task force members are "employees" of OSP for purposes of ORS 181.852(2). To interpret the statute in this manner is consistent with a plain, natural and ordinary meaning of employee, and with an intent to protect the identity of the undercover officers.[3]

ORS 181.852(2) permits OSP to disclose an undercover officer's name if the officer provides consent in writing. Therefore, OSP has contacted the undercover officers whose names have been redacted from the disclosed report to inquire as to whether they would consent to disclosure in this instance. According to Sgt. Scholten, one of the officers, Sergeant Craig A. Durbin, has consented to the disclosure of his name in the report at issue. Sgt. Scholten has

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[2] Each agency participating in the task force is a "law enforcement agency" under ORS 181.010(5).

[3] While a narrower interpretation of "employee," tied to the agency from which an officer receives compensation, also may be a plain, natural and ordinary interpretation of the term, it would be inconsistent with the purpose of the statute. *See Steele v. Employment Dept.*, 143 Or App 105, 113-14, 923 P2d 1252 (1996), *aff'd* 328 Or 292, 974 P2d 207 (1999) ("subject and purpose of the statute, together with the statutory language that surrounds the word in question, narrow the array of definitional choices that dictionaries alone afford and go far in identifying the intended meaning of the word as used in the statute").

agreed to provide you with copies of the pages of the report in which Sgt. Durbin's name appears. None of the other officers named in the report has consented to disclosure. Under the facts of this case, OSP may maintain the confidentiality of those undercover officers' names on the basis of ORS 181.852 and 192.502(9).

2. Disclosure of Criminal Investigatory Information

ORS 192.501(3) conditionally exempts from disclosure:

> Investigatory information compiled for criminal law purposes. The record of an arrest or the report of a crime shall be disclosed unless and only for so long as there is a clear need to delay disclosure in the course of a specific investigation, including the need to protect the complaining party or the victim.

The scope of this exemption "extends to prevent disclosure of documents not originally created for, but later gathered for, criminal law enforcement purposes." ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 30 (1999) (AG'S MANUAL). According to Sgt. Scholten, the report from which the officers' names have been redacted was used in the investigation that led to the prosecution of Trooper Lewis. Therefore, information in the report is potentially exempt under ORS 192.501(3). This exemption is qualified only with respect to "the record of an arrest or the report of a crime," neither of which describes the report at issue. While the prosecution of Trooper Lewis has concluded, this exemption does not expire when litigation is completed or abandoned, although the governmental interest in maintaining confidentiality will be diminished. AG'S MANUAL 28-29.

The exemption for criminal investigatory information applies to information, the disclosure of which would "endanger the life or physical safety of law enforcement personnel." *Id.* at 29 *citing Jensen v. Schiffman*, 24 Or App 11, 16, 544 P2d 1048 (1976). As discussed above, ORS 181.852 recognizes that disclosure of information regarding the identity of undercover officers may endanger their safety.[4] The safety of undercover officers may be compromised by disclosure of identifying information, even when the disclosure is not related to a particular undercover investigation. For example, disclosure of the identity of particular officers as members of the Yamhill County Interagency Narcotics Task Force may endanger their safety when undertaking existing or future undercover operations. For this reason, we conclude that the undercover officers' names in the disclosed report are exempt under ORS 192.501(3) "unless the public interest requires disclosure in the particular instance."

As noted above, OSP has disclosed, or has agreed to disclose, the subject report to you with the exception of the names of all but one of the undercover officers, and additional information that you have stated you do not seek. In addition to the public interest in the safety of undercover officers, according to Sgt. Scholten, OSP is concerned that disclosure of the undercover officers' names would compromise continuing law enforcement activities. On the other hand, your petition states that "public accountability requires the release of public employee names so the public can see what specific employees are doing." In this particular

[4] ORS 181.852(4) authorizes a person injured by disclosure of information in violation of ORS 181.852(2) to bring a civil action for damages against the disclosing law enforcement agency.

instance, we can find no benefit to the public interest in the public being able to connect specific law enforcement officers with the activities detailed in the report. Given that OSP disclosed the majority of the report to you, and has agreed to disclose the names of three officers cited in the report, we conclude that the public interest does not require disclosure of additional officers' names in this instance.

For these reasons, we deny your petition as moot as to the names of the three officers that OSP has agreed to disclose, and we deny your petition for disclosure of the names of the remaining undercover officers because those names are exempt from disclosure under ORS 192.502(9) and ORS 181.852(2), and under ORS 192.501(3). Furthermore, for the reasons explained on page 1 above, we deny your petition as premature with respect to records other than the report that is the subject of this order.

Sincerely,

Peter D. Shepherd

PETER D. SHEPHERD
Deputy Attorney General

AGS09000
c: Sgt. David Scholten, OSP