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January 28, 2010

Richard Legrand Cockle Jr.
The Oregonian
PO Box 634
LaGrande, Oregon 97850

Re: Petition for Public Records Disclosure Order:
Oregon State Police Records

Dear Mr. Cockle:

On January 11, 2010, you filed a petition with the Attorney General seeking an order under Oregon's Public Records Law that would require the Department of State Police (OSP) to disclose certain information.[1] Specifically, you seek disclosure of "[a]ny personnel disciplinary records relating to the case involving Mark Hemstreet and Gregg Clapper." For the reasons explained below, we deny your petition.

The Public Records Law confers a right to inspect any public records of a public body in Oregon, subject to certain exemptions and limitations. ORS 192.420. If a state agency denies a request for disclosure of records, the requestor may petition the Attorney General for review of the denial. ORS 192.450(1). The state agency bears the burden of sustaining its action.

Your petition states that you asked to inspect or copy these records on December 11, 2009, and that your request was denied by Loree Fogleman, Risk Manager of OSP. We spoke with Ms. Fogleman and also reviewed your December 11, 2009 public records request. That request sought "the *identity* of an Oregon State Police employee who was disciplined but not terminated in the $295,000 Oregon State Police settlement with Mark Hemstreet and Gregg Clapper on or about Nov. 4, 2009" (emphasis added). The request did not seek the actual disciplinary record of that employee. As a result, we would generally deny the petition as premature, because the Public Records Law contemplates that agencies have an opportunity to respond to public records requests before a requester has recourse to the Attorney General or to the courts. In this case, however, Ms. Fogleman advises us that OSP would deny the request for the employee's disciplinary records, and has authorized us to proceed as though OSP had actually done so. Accordingly, we proceed to the merits of your petition.

[1] You allowed us until January 28, 2010 to issue this order. Thank you for that courtesy.

ORS 192.501(12) conditionally exempts from disclosure "[a] personnel action, or materials or documents supporting that action." ***City of Portland v. Rice***, 308 Or 118, 123, 775 P2d 1371 (1989). Such records are exempt from disclosure "* * * unless the public interest requires disclosure in the particular instance." ORS 192.501. The Oregon Court of Appeals has indicated that "all of the documents relating to allegations" for which a public body actually imposes discipline upon an employee are within the scope of the exemption. ***City of Portland v. Anderson***, 163 Or App 550, 998 P2d 402 (1999). We have reviewed the records you request. Because they clearly fall within the scope of the exemption provided by ORS 192.501(12), we proceed to consider whether the public interest requires disclosure in this instance. We conclude that the public interest does not require disclosure.

In reaching that conclusion, we are mindful of many factors. Your petition recites a number of them, including the fact that the settlement agreement with Mr. Hemstreet and Mr. Clapper entails the expenditure of $295,000.00 in public funds and the fact that Mr. Hemstreet and Mr. Clapper's suit against the state alleged politically-motivated enforcement of the state's criminal laws by state police. That is a serious allegation. The disciplinary action taken by OSP against its employee relates to the events underlying the litigation and settlement.

You infer that the disciplined employee's conduct "led to a $295,000 cost to taxpayers, on top of the cost of the initial investigation and defense of a federal lawsuit." But OSP disputes that the employee's conduct played a causal role in the decision to settle the case for that sum. After reviewing the disciplinary records, we have no reservations about accepting OSP's position. The record does not disclose any deficiencies with respect to the employee's ethics, honesty, truthfulness, or veracity. Nor does the record suggest that the employee violated the criminal law or misused public property. The disciplinary action was not related to the employee's integrity or ability to evenhandedly enforce the law. Instead, the discipline related to perceived deficiencies with respect to the employee's exercise of his supervisory authority.

We recognize that OSP released statements to interested members of the media that could be read to suggest a causal connection between the conduct underlying the discipline and the decision to settle. But the fact is that the employee's conduct was not a factor in the decision to settle. This reality, along with the comparatively minor nature of the actual misconduct disclosed in the records, informs our view that the public interest in disclosure of these materials is not particularly strong.

We turn to the public interests that would be served by nondisclosure of the requested record. The purpose of ORS 192.501(12) is to "protect" the public employee from ridicule for having been disciplined." ***Oregonian Publishing v. Portland School Dist.***, 144 Or App 180, 925 P2d 591 (1996) *mod.* 152 Or App 135, 952 P2d 66 (1998) *aff'd on other grnds* 329 Or 393, 987 P2d 480 (1999). We conclude that this interest is sufficient to overcome the somewhat attenuated public interests in disclosure identified above. We recognize that the fact of discipline and the identity of the disciplined employee have already been publicly disclosed, as have statements that could be read to imply a connection between the discipline and the $295,000 paid to settle claims of serious misconduct by state police. Even so, the details of the conduct that *actually* led to the discipline are not widely known, and their disclosure would implicate the

purposes of ORS 192.501(12). And, as we describe above, the reality is that the conduct underlying the disciplinary action has a tenuous connection to the settlement.

For the reasons given above, we find that the requested records are exempt from disclosure under ORS 192.501(12), and we deny your petition.

Sincerely,

MARY H. WILLIAMS
Deputy Attorney General

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c: Loree Fogleman, OSP