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October 21, 2016

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James Comstock
PO Box 230204
Portland, OR 97281

Re: Petition for Public Records Disclosure Order
Oregon Department of Corrections
DOJ File No.: 291011-GA0119-16

Dear Mr. Comstock:

This letter is the Attorney General's order responding to your September 27, 2016, petition for disclosure under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition asks the Attorney General to order the Oregon Department of Corrections (ODOC) to produce the "staff misconduct report issued on 7/29/2012 for Snake River Correctional Institution, with all related investigation records or reports."

We respectfully deny your petition because, as discussed below, the responsive reprimand letter is exempt from disclosure as a personnel discipline action under ORS 192.501(12). Although that exemption does not apply when the public interest requires disclosure, here ODOC's interests in confidentiality outweigh the public interest in monitoring corrections officer misconduct.

The Public Records Law confers a right to inspect any public record of a public body in Oregon, subject to certain exemptions contained in ORS 192.501 to 192.505. *See* ORS 192.420(1). Any person denied the right to inspect or to receive a copy of a public record of a state agency may petition the Attorney General to review the record and determine if it may be withheld. ORS 192.450(1). The agency carries the burden to sustain any such denial. *Id.*

Your initial petition alleged that ODOC had constructively denied your records request by failing to either produce the requested records or assert an exemption. After we received your petition, ODOC located the responsive record, a reprimand letter, but asserted that the reprimand

is exempt from disclosure under ORS 192.501(12), which applies to "[a] personnel discipline action, or materials or documents supporting that action" unless the public interest requires disclosure.[1]

In response to ODOC's claim of exemption, you submitted a supplemental petition arguing that the exemption does not apply to the reprimand for two reasons: 1) the public interest requires disclosure here because transparency in governmental operations is particularly significant when dealing with misconduct by corrections officers, who have a great deal of power relative to the inmates they monitor; and 2) ODOC has already produced detailed information from its disciplinary files to *The Statesman Journal*, which has posted an online database of this information.[2] We must now decide whether the reprimand at issue is exempt from disclosure under ORS 192.501(12).

As a threshold matter, we have reviewed the reprimand and find that it qualifies as "a personnel discipline action"; therefore, it is exempt from disclosure unless the public interest requires otherwise.

To determine whether the public interest requires disclosure, we "must balance the public's interest in disclosure against the public body's interest in confidentiality, with the presumption in favor of disclosure." *ACLU of Or., Inc. v. City of Eugene*, 360 Or 269, 280 (2016). You argue that there is a strong public interest in examining corrections officer misconduct, and primarily rely on a recent Oregon Supreme Court case, *ACLU of Oregon, Inc. v. City of Eugene*, that ordered disclosure of an internal affairs investigation of a police officer. While we agree that there is a public interest in learning about corrections officer misconduct, the circumstances in *ACLU* that led the court to find a particularly strong public interest are absent here.

First, the *ACLU* court emphasized the strong public interest in oversight of police actions where there are complaints about the use of force. *Id.* at 299 (ordering disclosure where officer had allegedly used excessive force in arresting a protester). Here, on the other hand, the reprimand does not concern any use of force, or any mistreatment of inmates. Nor are the events discussed in the reprimand related to any incident involving the use of force or injury. Furthermore, the officer's conduct here, unlike other Oregon cases that have ordered disclosure of personnel disciplinary records, does not involve alleged criminal conduct by a high-ranking officer[3] or alleged misuse and theft of public property[4]. While the reprimand here does involve

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[1] There was initially some confusion over how many separate disciplinary files were responsive to your request. The reprimand we examine in this order matches the entry in *The Statesman Journal* database that you referenced in your initial petition. Another reprimand dated July 29 does exist; that reprimand is listed in the database under its original July 28 date. Because that reprimand is not responsive to your records request to ODOC, we do not address it in this order.

[2] That database is available at http://community.statesmanjournal.com/data/prison_misconduct.php.

[3] *City of Portland v. Anderson*, 163 Or App 550, 554 (1999).

the failure of a corrections officer to follow proper procedures, it does not implicate the public interest to the same extent as these other cases.

Second, the *ACLU* court relied on evidence showing that there was particularly strong public interest in reviewing the dynamic between Eugene's Civilian Review Board and the police department. 360 Or at 299 (noting the public interest in determining whether the Board "fulfilled its responsibility to review the police chief's recommendations with rigor and without bias"). That same dynamic does not exist here, and there is no evidence to show that this particular reprimand is unique from other disciplinary files for purposes of the public interest.

Third, the *ACLU* court emphasized the importance of permitting public oversight to foster mutual trust between police officers and citizens, due in part to the power disparity between the two groups. *Id.* at 298–99. While, as you point out, there is an even greater power disparity between inmate and corrections officer, the reprimand here does not implicate that disparity; that is, the focus of the conduct at issue is certain safety procedures, not an officer's treatment of an inmate.

Turning to ODOC's interest in confidentiality, Oregon's courts have recognized the following interests in similar cases: protecting employees' privacy interests[5] and allowing effective review of a public body's own actions and discipline[6]. In addition to affirming ODOC's assertion of these recognized interests, ODOC's Assistant Director for Human Relations, John Nees, told us that maintaining the reprimand letter as confidential promotes ODOC's maintenance of a unified and cohesive work environment. According to Mr. Nees, disclosure of disciplinary records would erode corrections officers' sense of common purpose and shared experience and their confidence and reliance upon one another, which are essential in order for department staff to maintain internal order and security and to protect against staff abuse of inmates and other staff in Oregon's prisons. We agree with Mr. Nees's articulation of ODOC's interests in confidentiality of the reprimand letter.

When examining the strength of these confidentiality interests, we note an important distinction between the circumstances present in *ACLU* and those present here: in *ACLU*, the court found a substantially diminished privacy interest where the officer's identity and alleged misconduct had already been made public. 360 Or at 299. Here, however, ODOC has only released minimal information on this particular reprimand: the information it disclosed to *The Statesman Journal* shows only that a written reprimand was issued on July 29, 2012, to a correctional officer at Snake River Correctional Institution, with a very general description of the

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[4] *Oregonian Publ'g Co. v. Portland Sch. Dist. No. 1J*, 144 Or App 180, 187 (1996), *adh'd to as modified on recons.*, 152 Or App 135 (1998), *aff'd on other grounds*, 329 Or 393 (1999).

[5] *Rice*, 308 Or at 124 n 5; *Oregonian Publ'g*, 144 Or App at 187 (discussing lack of intrusion into employees' privacy as fact favoring disclosure).

[6] *ACLU*, 360 Or at 296.

allegations.[7] Neither the officer's identity nor specifics on the officer's conduct has been released. Therefore, ODOC's confidentiality interests have not been diminished by this prior disclosure.

When weighing the public's interest in transparency of ODOC's operations against ODOC's interests in confidentiality, we pay particular attention to the lack of anything unique about the conduct involved with this reprimand, and the lack of any preexisting public information about the conduct (apart from the very basis information previously disclosed). We therefore find that the public interest in disclosure is outweighed by ODOC's interests in confidentiality, and conclude that the reprimand is exempt from disclosure.

We turn next to your argument that the reprimand is not exempt due to ODOC's previous release of information from its disciplinary files. We consider this to be an argument that ODOC has waived any exemption that might have applied. The Court of Appeals has held that a public body may waive an exemption by disclosing information from the otherwise exempt record. *E.g.*, *Oregonian Publ'g Co. v. Portland Sch. Dist. No. 1J*, 152 Or App 135, 139–40 (1998), *aff'd on other grounds*, 329 Or 393 (1999). However, courts have found waiver only where the public body had disclosed detailed portions of the exempt record. *Id.* at 142 (investigating officer's testimony at unemployment hearing had revealed substantially all of the information in the exempt report); *Springfield Sch. Dist. No. 19 v. Guard Publ'g Co.*, 156 Or App 176, 182 (1998) (public body had disclosed detailed information on the circumstances of the investigation and the findings of misconduct).

However, here ODOC disclosed only minimal information about this reprimand: as discussed above, the officer's identity was not disclosed nor was any specific information about the officer's conduct disclosed. Therefore, we find that ODOC's prior release of information from this disciplinary file did not waive the exemption. In addition, we find that ODOC's release of more detailed information from *other* disciplinary files does not waive the exempt status of this particular reprimand: Even at its broadest, waiver applies only when a "significant part of the matter" has been disclosed. OEC 511. We are unable to say that disclosure of information from other disciplinary files qualifies as a "significant part" of this particular disciplinary file. *See Springfield*, 156 Or App at 183 (no waiver of employees' disciplinary records that were referred to in passing in another employee's disclosed record).

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[7] The disclosed details of the allegation are "failure to follow essential procedures," "poor judgment," "safety and security of institution," "safety violation," and "adherence to clear directives."

To summarize our discussion, we find that the reprimand at issue qualifies as a personnel discipline action under ORS 192.501(12), and that nothing in the reprimand indicates that the public interest requires disclosure. Further, we find that ODOC did not waive this exemption through its previous disclosures. Therefore, we respectfully deny your petition.

Sincerely,

Frederick M. Boss
Deputy Attorney General

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