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June 22, 2017

VIA EMAIL ONLY: cbrosseau@oregonian.com and linsay.hale@state.or.us

Carli Brosseau
The Oregonian
1500 SW 1st Ave Suite 400
Portland, OR 97201

Linsay Hale
Professional Standards Division Director
Department of Public Safety Standards & Training
4190 Aumsville Hwy SE
Salem, OR 97317

Re: Petition for Public Records Disclosure Order
Department of Public Safety Standards & Training
DOJ File No.: 259001-GA0104-17

Dear Ms. Brosseau and Ms. Hale:

This letter is the Attorney General's order responding to Ms. Brosseau's June 15, 2017, petition for disclosure under the Oregon Public Records Law, ORS 192.410 to 192.505. Her petition asks the Attorney General to order the Department of Public Safety Standards & Training (DPSST) to produce its full certification review file for Portland Police officer Scott Dunick.

As discussed below, we grant Ms. Brosseau's petition because the public interest requires disclosure of these records. Substantial information detailing the disciplinary action and allegations against Dunick is already publicly available, which indicates a diminished privacy interest in nondisclosure of additional records, and more complete information on DPSST's decision not to attempt to revoke or suspend Dunick's certification will further the public interest in monitoring a public body's actions.

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.*

DPSST, among other things, has the power to certify police officers and to suspend or revoke an officer's certification. ORS 181A.630(1), 181A.640(1). DPSST is required by ORS 181A.640(4) to revoke or suspend an officer's certification if DPSST finds that the officer has been discharged for cause, a standard that is defined in rule. OAR 259-008-0070(3)(a). And DPSST may suspend or revoke an officer's certification in other circumstances, such as when the officer does not meet certain standards. ORS 181A.640(1)(c).

In this case, the publicly available portions of DPSST's file show that Portland Police discharged Dunick based on the following allegations: marijuana use, providing Xanax to a fellow officer, an arrest for driving under the influence, and unauthorized absences. However, an arbitrator subsequently determined that a 90-day suspension was the appropriate discipline. Based on the arbitrator's ruling, the reduction of Dunick's discipline from discharge to suspension, and the evidence in Portland Police's file, DPSST decided not to take any action against Dunick.

DPSST produced portions of its file to Ms. Brosseau in response to her public records request, but withheld records it received from Portland Police as exempt under 192.501(12), which applies to "a personnel discipline action, or materials or documents supporting that action" unless the public interest requires disclosure in the particular instance. In doing so, DPSST relied on a letter from Portland Police Chief Michael Marshman, who asserted that the public interest does not outweigh Dunick's privacy interests. Chief Marshman noted that Dunick's discipline did not involve egregious misconduct and that the discipline was not the subject of widespread public interest, and cited several public records orders from the Multnomah County District Attorney as support for nondisclosure.[1]

Assuming that the withheld records qualify as a discipline action or materials supporting that action, we must balance the public's interest in disclosure against the relevant interests in nondisclosure, with the presumption in favor of disclosure. *ACLU of Or., Inc. v. City of Eugene*, 360 Or 269, 280 (2016).

Protecting a public employee's privacy is the primary interest underlying the exemption for disciplinary actions. *Attorney General's Public Records & Meetings Manual* 50 (2014). However, that interest is weaker here where DPSST's publicly available file reveals the discipline against Dunick, as well as the basic details underlying that discipline. *See ACLU*, 360 Or at 299 (public body's interest in protecting officers' privacy was "substantially diminished because the identity of those officers and their alleged misconduct had already been made a matter of public record"). In addition, DPSST's file shows that details of Dunick's conduct were reported on publicly; for example, an article in *The Oregonian* reported on Dunick's plea of no contest to driving under the influence, and discussed an internal affairs

[1] While the Attorney General has authority to review denials of records requests by state agencies, district attorneys possess that authority for local public bodies such as Portland Police.

investigation into Dunick's alleged drug use.[2] Another article[3] revealed information contained in the arbitrator's opinion, and in fact that opinion (one of the withheld documents) is publicly available on *The Oregonian*'s website.[4] This publicly available opinion outlines the allegations against Dunick in great detail, and reveals substantially all the information contained in the other records DPSST withheld. Given the extent of information already publicly available about the discipline against Dunick, there is a minimal privacy interest in nondisclosure of the withheld records.

Turning to the public interest in disclosing these records, Ms. Brosseau contends that there is a public interest in understanding DPSST's administrative closure process, as closed investigations do not provide the public with the same detailed information that results from DPSST cases that proceed to an administrative hearing or from the discretionary violations discussed at a public meeting of a DPSST policy committee. She explains that there is also an interest in reviewing DPSST's decision not to pursue discretionary discipline against Dunick.

Ms. Brosseau notes that "the public interest in the transparency of government operations is particularly significant when it comes to the operation of its police departments and the review of allegations of officer misconduct." *ACLU*, 360 Or at 298. She adds that "the Public Records Law expresses the legislature's view that members of the public are entitled to information that will facilitate their understanding of how public business is conducted." *Guard Publ'g Co. v. Lane County School District No. 4J*, 96 Or App 464, 469–70 (1989), *rev'd on other grounds*, 310 Or 32 (1990).

While Chief Marshman cites to Multnomah County District Attorney orders concluding that the public interest does not require disclosure of personnel actions against low-ranking employees that does not involve egregious misconduct, the context changes once those internal personnel investigations are disclosed to DPSST to further its investigations. While the legislature, by enacting ORS 192.501(12), has chosen to conditionally protect internal personnel discipline actions and the related investigations from disclosure, it has not expressed the same need to keep DPSST's investigations confidential. For example, DPSST is required to issue a report once it completes an investigation "relating to a person's qualifications for employment, training or certification under [ORS 181A.640]." ORS 181A.640(8). And records relating to such an investigation are conditionally exempt only until that report is issued. ORS 192.501(35). While in practice DPSST's investigation into an officer's discharge consists primarily of the relevant police department's personnel investigation, were DPSST to conduct an independent investigation the information gathered would generally be publicly available once the investigation was completed. We can see no reason why in this instance the confidentiality of the records related to DPSST's investigation should depend on the source of the information.

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[2] This article is available at http://www.oregonlive.com/portland/index.ssf/2010/10/portland_police_officer_will_g.html.

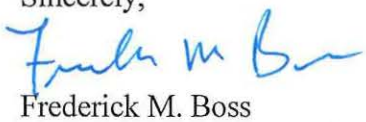
[3] This article is available at http://www.oregonlive.com/portland/index.ssf/2013/02/fired_portland_police_officer.html.

[4] The opinion is available at http://media.oregonlive.com/portland_impact/other/Dunickarb.pdf.

Weighing the competing interests, we conclude that the public interest requires disclosure in this particular instance. The typical interest in protecting an employee's privacy is weakened here where substantial information on Portland Police's discipline action and related investigations is already publicly available, while the public has a significant interest in monitoring DPSST's decision not to take action against Dunick. For the public to effectively review the information underlying DPSST's decision, it must have access to Portland Police's disciplinary file.

Because the records DPSST received from Portland Police are not exempt from disclosure under ORS 192.501(12), we grant Ms. Brosseau's petition for those records. DPSST must produce the records within seven days or issue a notice to the Attorney General and by certified mail to Ms. Brosseau of its intent to institute proceedings for injunctive or declaratory relief. ORS 192.450(2). DPSST may make redactions to officers' personal contact information. If you wish to contest any of those redactions, you may submit a new petition to this office.

Sincerely,



Frederick M. Boss
Deputy Attorney General

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