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August 25, 2017

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

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The Oregonian
1500 SW 1st Ave Suite 400
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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-GA0121-17

Dear Ms. Brosseau and Ms. Hale:

This letter is the Attorney General's order responding to Ms. Brosseau's August 8, 2017, petition for disclosure under the Oregon Public Records Law, ORS 192.410 to 192.505.[1] Her petition asks the Attorney General to order the Department of Public Safety Standards & Training (DPSST) to produce its full certification review files for the following police officers: Dane Reister, Isaac Lackey, Marco Espinoza, and Christina Urenia.

As discussed below, we grant Ms. Brosseau's petition. These records mostly contain law enforcement agencies' personnel discipline actions and the supporting investigations, and are therefore conditionally exempt from disclosure under ORS 192.501(12). However, we conclude that the public interest requires disclosure. Given the authority that is entrusted to police officers, there is a significant public interest in monitoring the investigations that DPSST undertakes to determine whether a police officer's certification should be suspended or revoked. Because DPSST's investigations rely in a large part on these personnel investigations, public

[1] We thank Ms. Brosseau for granting an extension on the deadline to issue an order.

oversight of DPSST would be severely constrained were these records withheld. In addition, these officers' privacy interests are diminished where the fact that they were disciplined and their alleged misconduct is publicly disclosed through DPSST's internally generated records.

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 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. ORS 181A.640(4). And DPSST has the discretion to suspend or revoke an officer's certification in other circumstances, such as when the officer does not meet certain minimum standards. ORS 181A.640(1).

In the four files at issue here, DPSST produced to Ms. Brosseau the records it had created, but withheld any personnel investigation records obtained from the law enforcement agencies employing these officers. After consulting with these agencies, DPSST asserted that the records were exempt 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.

Because most of the records at issue here qualify as conditionally exempt under ORS 192.501(12), we must determine whether the public interest requires disclosure. To do so, we 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 in confidentiality underlying ORS 192.501(12). *Attorney General's Public Records & Meetings Manual* 50 (2014). That privacy interest is weaker where information about the conduct at issue is already publicly available. *E.g.*, *ACLU*, 360 Or at 299 (interest in protecting officers' privacy was substantially diminished where the identity of the officers and their alleged misconduct had already been made a matter of public record).

To evaluate the public interest in disclosure, we look to whether disclosure would aid the public in learning how a public body is conducting its business and administering particular programs. *Attorney General's Manual* 31. The public interest in disclosure is stronger "when it comes to the operation of [] police departments and the review of allegations of officer misconduct." *ACLU*, 360 Or at 298. And the public interest encompasses not just oversight of the law enforcement agency's disciplinary process, but also of DPSST's certification investigations. *See id.* at 292–93 (trial court erred in determining as a matter of law that the public had no cognizable interest in monitoring a civilian review board's review of an internal police investigation).

Officer Espinoza

The records already disclosed to Ms. Brosseau show that DPSST investigated Espinoza after he was convicted for disorderly conduct in the second degree; Espinoza also entered into a diversion program on charges of driving under the influence and interfering with a police officer. After his conviction, Espinoza was discharged by the Springfield Police Department. The Board on Public Safety Standards & Training decided not to revoke Espinoza's certification, which was consistent with the recommendation of its Police Policy Committee. A *Register-Guard* article in DPSST's file contains detailed information about the conduct at issue and indicates this matter was of media interest; and one of the withheld records supports this indication.

As an initial matter, several records withheld by DPSST do not qualify under ORS 192.501(12) as "a personnel discipline action, or materials or documents supporting that action," and therefore are not exempt from disclosure. These records do not appear to have been submitted by the Springfield Police Department from its personnel investigation file. They include a letter from the Springfield Police Association to DPSST in support of Espinoza; a letter from Espinoza to DPSST explaining why his certification should not be revoked, and supporting exhibits that contain letters of support and various awards; and reports from the Eugene Police Department relating to its criminal investigation of the misconduct in its role as law enforcement, not as an employer.

The remaining withheld records do contain records from Springfield Police Department's personnel investigation; however, we find that the public interest requires disclosure of these records. Espinoza's privacy interest is substantially diminished where accounts of his conduct are available from the records already produced by DPSST, through the Eugene Police Department's criminal investigation,[2] or through articles published by *The Register-Guard*. In particular, the police reports contain detailed statements from Espinoza and the other parties involved.

The Springfield Police Department contends, however, that there is another nondisclosure interest to consider: the department's ability to effectively investigate alleged misconduct and discipline officers. The department asserts that disclosure would discourage complainants from coming forward and would chill witness cooperation. This may be a valid interest in certain circumstances. *See ACLU of Or.*, 360 Or at 297, 299 (although trial court was correct to consider the public body's abstract interest in effective discipline, evaluation, and training, this interest carried little weight where no evidence of potential harm was introduced). However, the department does not explain which complainants and witnesses at issue here need to be protected. For example, the department does not point to any witness statements that were provided only on the condition of confidentiality, or to any request by witnesses to have their identities protected. The Eugene Police Department's publicly available reports reveal all the involved parties and their detailed statements. In addition, the Springfield Police Department

[2] The exemption for criminal investigatory information that would apply to the Eugene Police Department's reports typically does not apply once a prosecution has concluded. *Jensen v. Schiffman*, 24 Or App 11, 16 (1976). There is no evidence here indicating that these reports would not be publicly available from that department.

does not explain how it could protect complainants' or witnesses' identities and information from the officer under investigation: public safety officers have a broad right to inspect their own personnel records. ORS 652.750(7)(a).[3]

We conclude that the public interest in monitoring DPSST's investigations of Espinoza, as well as the public interest in monitoring the Springfield Police Department's personnel investigation in a relatively high-profile case, outweigh the public interest in nondisclosure where the identity of the officer, his termination, and details of the conduct leading to the discipline are already public record.

Officer Reister

The records disclosed by DPSST show newspaper articles indicating that this was a very high-profile incident: Reister was indicted on third and fourth degree assault charges for seriously injuring a suspect by mistakenly loading a beanbag shotgun with lethal rounds. One article reveals that the City of Portland settled the victim's resulting suit for $2.3 million, the largest settlement in the city's history.

These circumstances indicate a strong public interest in reviewing the Portland Police Bureau's personnel investigation. *E.g.*, *ACLU*, 360 Or at 298–99 (public interest in oversight is particularly strong when it comes to review of complaints about police officer's use of force). More importantly, most if not all of these records are already publicly available from an article in *The Oregonian*.[4] Because of the diminished privacy interest due to the substantial amount of information that is already publicly available, we conclude that the public interest here requires disclosure.

Officer Lackey

The records disclosed by DPSST show that it withdrew its notice of intent to revoke Lackey's certification after his termination from Portland Police was rescinded. The disclosed records also reveal basic details about the conduct at issue: allegations that Lackey conducted personal business while on duty, refused to go to a homicide scene, made a derogatory comment about his supervisor, and provided contradictory statements to the internal affairs investigator.

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[3] Context suggests that the right to inspect personnel records includes to the right to inspect personnel records that were used in taking disciplinary action: ORS 652.750(2) gives public employees the right to inspect "personnel records . . . that are used or have been used to determine the employee's qualification for employment, promotion, additional compensation or *employment termination or other disciplinary action*." (Emphasis added.) ORS 652.750(7) then specifically grants only public safety officers the right to inspect their own personnel records, without any limitation.

[4] *See* Maxine Bernstein, *Fired Portland Police Officer Dane Reister Carried Beanbag Shotgun for Years Without Proper Training, Records Show*, The Oregonian, Nov 21, 2013, http://www.oregonlive.com/portland/index.ssf/2013/11/fired_portland_police_officer_1.html.

Ms. Brosseau's petition states that Portland Police produced these records after a public records order issued by the Clackamas County District Attorney.

Ms. Brosseau contends that there is a public interest in understanding why DPSST did not pursue its investigation under one of its discretionary bases for suspending or revoking a license. She stresses that the alleged conduct included dereliction of duty and dishonesty. Portland Police counters that Lackey was a not a high-ranking officer and his misconduct did not involve serious criminal conduct, corruption, or abuse of authority. In addition, Portland Police asserts that disclosure would have a negative impact on its ability to conduct personnel investigations; in particular, disclosure would discourage civilian witnesses from cooperating with these investigations.

While less serious misconduct among low-ranking officers might be grounds for finding that the public interest doesn't require the disclosure of personnel records in the custody of Portland Police, the context changes once those internal personnel investigations are submitted to DPSST to further its certification investigations. While the legislature, by enacting ORS 192.501(12) and ORS 181A.830,[5] has chosen to conditionally protect internal personnel investigations of public safety employees from disclosure, it has not expressed the same need to keep DPSST's investigations confidential. 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). In practice DPSST's investigation of an officer's discharge consists primarily of the relevant police department's personnel investigation. But if DPSST were to conduct an independent investigation the information gathered would generally be publicly available once the investigation was completed. We can see no reason why the confidentiality of information concerning the officer's conduct should depend on the source of the information, at least in this instance.

In addition, Lackey's privacy interest is somewhat diminished here where his alleged misconduct and later-rescinded discharge are already public record. While we appreciate the concern that witnesses outside the Portland Police might be chilled from coming forward, Portland Police has not pointed to any specific witnesses here who gave statements only on the condition of confidentiality. And we assume that witnesses would potentially be chilled primarily by disclosure to the officer under investigation; as we discussed above, officers have broad rights to access their personnel records under ORS 652.750(7). In addition, Portland Police has not explained why the need to protect witnesses would result in the entire investigatory record being exempt from disclosure, as opposed to only those portions that identified the witnesses. *See* ORS 192.505 (requiring public bodies to produce the nonexempt information from records that contain some exempt information).

We conclude that the public interest requires disclosure of these records.

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[5] While ORS 192.501(12) applies only to personnel investigations that result in discipline, ORS 181A.830(3) applies to personnel investigations of public safety employees that *do not* result in discipline.

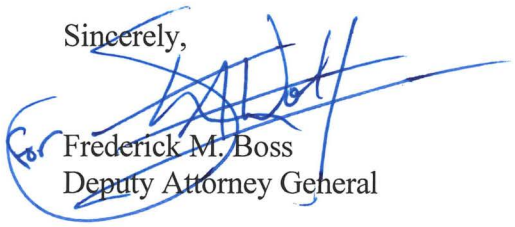
Officer Urenia

For the same reasons as discussed above regarding Officer Lackey, we conclude that the withheld disciplinary records relating to Officer Urenia are not exempt under ORS 192.501(12) because the public interest requires disclosure. DPSST has already disclosed some information about the conduct at issue, as well as the fact that Urenia was subject to a probationary discharge. And the witnesses here were all higher-ranking officers; we doubt that concerns about public disclosure would have affected their reports on Urenia.

Conclusion

Because we find that the public interest requires disclosure of these records, we conclude that they are not exempt from disclosure under ORS 192.501(12). We therefore grant Ms. Brosseau's petition. 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 Ms. Brosseau wishes to contest any of those redactions, she may submit a new petition to this office.

Sincerely,



For Frederick M. Boss
Deputy Attorney General

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