THEODORE R. KULONGOSKI
ATTORNEY GENERAL

THOMAS A. BALMER
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
1162 Court Street NE
Justice Building
Salem, Oregon 97310
Telephone: (503) 378-4400
TDD: (503) 378-5938

July 3, 1995

Daryl S. Garrettson
Attorney at Law
Hoag, Garrettson & Goldberg
1313 NW 19th
Portland, OR 97209

Re: ***Petition for Public Records Disclosure Order: Oregon State Police District IV Investigation***

Dear Mr. Garrettson:

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 June 2, 1995,[1] asks the Attorney General to direct the Oregon State Police (OSP) to make available the documentation that it produced regarding personnel investigations and the resulting records. Specifically, you seek:

a. The investigations conducted by former Captain McCafferty of the Oregon State Police, Steve Krohn of the Attorney General's Office, Major Russell of the Oregon State Police and Captain Downey of the Oregon State Police into alleged misconduct by members of the Oregon State Police in District IV during the period January 1, 1993 through the date of this petition.

---

[1] We appreciate your courtesy in permitting us to exceed the seven-day statutory deadline for issuance of this order.

b. Any other investigations conducted by any other members of the Department of State Police into alleged misconduct in District IV for the period January 1, 1993 through the date of this petition.

c. Records of any disciplinary recommendations made against any members of the Oregon Department of State Police as a result of the above-listed investigations.

d. Any disciplinary documents reflecting discipline imposed as a result of any of the investigations listed above.

In a phone conversation with Assistant Attorney General Amy Veranth on June 5, 1995, you narrowed and clarified the scope of your records request with respect to item (b) in the petition. You stated that, in item (b), you are not seeking records of investigations of all citizen complaints of alleged misconduct by OSP members in District IV. Rather, you are seeking only those records of investigations into alleged misconduct by OSP managers in District IV during the period January 1, 1993, through May 26, 1995, other than those identified in item (a), including specifically any investigation of a complaint by Steven Cupernall.

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).

Our review of the records provided to us by OSP leads us to conclude that your petition encompasses investigations involving the following OSP District IV managers: Sergeant Steven Cupernall, Lieutenant Gerald Hays, Lieutenant Terry Springer, Lieutenant Victor Preston, Lieutenant Randy Windsor and Captain Randal Sitton.

For the reasons that follow, we respectfully deny your petition because: (1) Certain materials regarding Captain Sitton and Lieutenant Windsor are exempt from disclosure under ORS 192.502(8) as confidential communications between a lawyer and a client; (2) certain materials regarding Captain Sitton and Lieutenant Preston are

exempt from disclosure under ORS 192.501(13) as personnel discipline documents; (3) certain materials regarding Captain Sitton are exempt from disclosure under ORS 192.501(3) as investigatory information compiled for criminal law purposes; and (4) with respect to the remaining records, your petition is moot. These remaining records are regarding misconduct investigations that did not result in discipline, including materials related to Captain Sitton, Lieutenant Hays, Lieutenant Springer and Sergeant Cupernall, and will be provided to you by the OSP in accordance with the Public Records Law. We discuss each of these categories of records below.

1. Privileged Communications

ORS 192.502(8) provides that records that are privileged under Oregon law are exempt from disclosure. ORS 40.225 creates the lawyer-client privilege. This privilege is incorporated into the exemption from disclosure in ORS 192.502(8).

Under ORS 40.225, confidential client communications with a lawyer are privileged, and a client has the right to refuse to disclose certain confidential communications made for the purpose of facilitating the rendition of professional legal services.

ORS 40.255(2) provides, in relevant part:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
>
> (a) Between the client or the client's representative and the client's lawyer or a representative of the lawyer;
>
> (b) Between the client's lawyer and the lawyer's representative;
>
> (c) By the client or the client's lawyer to a lawyer representing another in a matter of common interest;
>
> (d) Between representatives of the client or between the client and a representative of the client.

The records that you request include written materials created by Assistant Attorney General Stephen D. Krohn in his capacity as an attorney for the OSP. He was acting in this capacity both with respect to a personnel investigation involving Captain Sitton and in defense of a tort claim made against the state by Lieutenant Windsor. In addition, the records you request include notes and reports made by OSP officials at the request of Mr. Krohn for the purpose of facilitating the rendition of professional legal services to the client. These notes and reports meet the requirements of ORS 40.225 and, therefore, are exempt from disclosure under ORS 192.502(8). Accordingly, your petition is denied to the extent that it seeks those records.

2. Personnel Discipline Action

ORS 192.501(13) conditionally exempts from disclosure, unless the public interest requires disclosure in the particular instance:

> A personnel discipline action, or materials or documents supporting that action[.]

You have requested investigatory material that supported disciplinary action, records of discipline and disciplinary recommendations. Each of the categories of documents you have requested fall within the ORS 192.501(13) exemption.

This exemption requires the balancing of public and private interests in confidentiality against the public interest in disclosure. The term "public interest" in disclosure is not defined in the Public Records Law. However, the Oregon Court of Appeals has stated, "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 Publishing Co. v. Lane County School Dist.***, 96 Or App 463, 468-69, 774 P2d 494 (1989) *rev'd on other grounds*, 310 Or 32, 791 P2d 854 (1990). The Court of Appeals also characterized the public interest in disclosure as "the right of the citizens to monitor what elected and appointed officials are doing on the job." ***Jensen v. Shiffman***, 24 Or App 11, 17, 544 P2d 1048 (1976).

The conditional exemption contained in ORS 192.501(13) covers completed disciplinary actions where a sanction was imposed. Our review of the records

discloses that both Captain Sitton and Lieutenant Preston received a disciplinary sanction. In *City of Portland v. Rice*, 308 Or 118, 775 P2d 1371 (1989), the court noted: "The policy intended by the legislature, which we enforce, protects the public employee from ridicule for having been disciplined but does not shield the government from public efforts to obtain knowledge about its processes." *Id.* 308 Or at 124 n 5. We have been informed by Major Lee Erickson that the material you seek from the investigations conducted by Captain Downey, Major Russell, Steve Krohn and Captain McCafferty was considered in reaching the decision to discipline Captain Sitton and Lieutenant Preston. Therefore, it is material supporting discipline action and exempt from disclosure under ORS 192.501(13), unless the public interest requires disclosure in this particular instance.

Ordinarily a disciplinary sanction and the documents supporting that action are matters of primary significance to the employer and employee with little relevance to the public interest. In particular instances, the balance may favor disclosure.

In a previous public records order, our office evaluated a request for disciplinary documents of the OSP. There we stated:

> In the particular circumstances of this request, we view the following factors to both increase the public interest in disclosure and to also reduce the privacy expectations of the employees:
>
> 1. The employees are law enforcement officers with supervisory responsibilities;
>
> 2. The basis for the discipline of both employees is virtually identical to allegations which resulted in criminal prosecution and criminal sanction;
>
> 3. The criminal proceedings have been concluded; and
>
> 4. The criminal allegations and disposition have been made public.

Therefore, the confidentiality an employee and employer would ordinarily expect when discipline is imposed is largely absent in this

> case. This diminished expectation is outweighed by the public interest in knowing how the OSP deals with criminal offenses committed by its supervisory law enforcement officers.

Public Records Order, January 27, 1992 (Moody).

The records you have requested in the current petition do not include factors 2, 3 and 4 above. Therefore, we need not rely on the balancing of public disclosure and confidentiality interests present in that order.

In support of your request for records disclosure you state:

> The Association believes that it is necessary that this information be disclosed to serve the public's interest that the integrity of the Department of State Police be preserved and the public's right to expect that misconduct of members will be fully and fairly investigated regardless of rank. The Association has reason to believe that the above-listed investigations were incomplete and did not follow normal investigative techniques.
>
> The Association also believes that certain members represented by the Association may have been retaliated against by the individuals subject to the investigations requested above and the files may reveal evidence relating to that retaliation.

Regarding the allegations of retaliation, we note that the association, as an exclusive labor representative, has available to it rights and remedies under the Public Employees Collective Bargaining Act. The Employment Relations Board has determined that as part of an employer's duty to collectively bargain in good faith under ORS 243.672(1)(e), an employer must provide certain records to a labor organization. While the records you seek may be pertinent to a labor organization's defense of its membership from alleged employment retaliation, that is not a matter of "public interest" as that term is used in the public records law. We have previously held that individual interests that are present in private litigation are not synonymous with the public interest. Public Records Order, June 8, 1990 (Madrid); *cf.* ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 10-11 (1993) (under fee waiver statute, "public interest" not satisfied by private party's desire to use records to

aid his defense against criminal prosecution, or by allegation that agency has treated individual oppressively). The same rationale is present regarding a labor union's request for information of possible relevance to its duties as an exclusive representative. We do not believe this represents the public interest as defined in the Public Records Law.

As a further basis for disclosure you assert that the public expects misconduct to be fairly investigated and that disclosure of the records will further that public interest. We do not believe your "public interest" assertions are different than those present in any request for discipline disclosure. The generic nature of the "public interest" you identify is no different than the interests considered by the legislature when it enacted ORS 192.501(13).

Accordingly, we conclude that the investigatory material considered by Major Erickson in taking disciplinary action against Captain Sitton and Lieutenant Preston is exempt from disclosure under ORS 192.501(13).

3. Investigatory Information Compiled for Criminal Law Purposes. ORS 192.501(3)

You have requested records that include information compiled for criminal law purposes. In a letter dated December 22, 1994, Gregory L. Baxter, District Attorney for Baker County, reserved possible criminal prosecution of a District IV member through the period of the two-year statute of limitations which ends February 1996. In a phone conversation with Assistant Attorney General Amy Veranth on June 28, 1995, the district attorney reiterated that position and indicated that he does not want the investigation records disclosed before the end of the two-year statute of limitation.

The public policy reflected in ORS 192.501(3) is obvious: Criminal prosecution is dependent on the discreet acquisition of information, the early disclosure of which would often allow wrongdoers to avoid prosecution.

You have made no particular showing of public interest that outweighs the policy favoring nondisclosure. Therefore, your request is denied.

4. Mootness

With respect to the remainder of the records that you requested, Major Lee Erickson informs us that OSP will provide you with a copy of the records. These records consist of materials that did not result in discipline, are not attorney-client privileged and are not criminal investigatory records. Please contact Sergeant Fred Douthis to make arrangements to obtain a copy of the records.[2/] Accordingly, your petition is denied as moot with respect to the remainder of the records because they are being provided to you.

Sincerely,

Elizabeth S. Harchenko

ELIZABETH S. HARCHENKO
Special Counsel to the Attorney General

ESH:GMC:AV:jpl:JGG0BE17

c: Major Lee Erickson, OSP

[2/] The agency may charge you a fee to reimburse it for its actual cost in making such records available, including its photocopy costs and the time spent by agency staff and its attorneys in reviewing and segregating the records. *See* ORS 192.440(3), OREGON ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 8.