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May 5, 2020

VIA EMAIL ONLY: dsupham58@gmail.com

Donald Scott Upham
3906 SW Altadena Ave
Portland, OR 97239

Re: Petition for Public Records Disclosure Order
Oregon State Police
DOJ File No.: 257001-GA0046-20

Dear Mr. Upham:

This letter is the Attorney General's response to your petition for disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478. Your petition, which we received April 28, 2020, asks the Attorney General to order the Oregon State Police (OSP) to disclose records generally relating to personnel investigations it conducted against several OSP officers. For the reasons that follow, we respectfully deny your petition.

The Public Records Law confers the right to inspect public records in Oregon, unless such records are exempt under ORS 192.338, 192.345, or 192.355. ORS 192.314(1). The law is a disclosure law and exemptions from disclosure must be express. 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 192.411(1). The agency carries the burden to sustain its actions. ORS 192.411(1).

The record indicates that you, along with two former clients, filed several complaints against OSP between 2017 and 2019 relating to its investigation of Dylan Sullivan. On August 23, 2019 you requested OSP disclose any documents it created or received relating to your allegation that an OSP officer obtained a search warrant under false pretenses in the Sullivan case. And on August 25, 2019, you requested the disclosure of any records OSP created or received regarding the personnel investigations of the various OSP officers who participated in the Sullivan investigation. OSP denied both requests in a consolidated response dated

October 30, 2019.[1] OSP asserted the records were exempt from disclosure because they contain information about personnel investigations against OSP officers that did not result in discipline. OSP also claimed at that time that some of the records were exempt because they were related to ongoing civil litigation. As that litigation is now concluded, you ask us to order OSP to disclose any records responsive to your requests.

We contacted Mary Beth Allen, OSP Risk Manager, regarding your petition. She explained that OSP no longer asserts the records are exempt under the litigation exemption, ORS 192.345(1), because the relevant litigation has concluded. However, she explained OSP's position that the records you seek remain exempt because the personnel investigations prompted by these complaints did not result in disciplinary action. OSP cites ORS 181A.830(3) in support of its position. That provision prohibits the disclosure of "information about a personnel investigation of a public safety employee of the public body if the investigation does not result in discipline of the employee." And records or information, the disclosure of which is prohibited or restricted under Oregon law, are exempt from disclosure under the public records law. *See* ORS 192.355(9)(a). The prohibition on disclosure does not apply, however, if: (a) the public interest requires disclosure; (b) the employee consents in writing to disclosure; (c) disclosure is necessary for an investigation by the agency, by the Department of Public Safety Standards and Training, or a citizen review body designated by the agency; or (d) the agency determines that nondisclosure would adversely affect the public's confidence in the public body. ORS 181A.830(4).

After reviewing the personnel investigation records that OSP identified as being responsive to your requests, we conclude that OSP was permitted to withhold them from you under ORS 181A.830(3).[2] The records relate to "public safety employee[s]," as that term is defined by ORS 181A.830(1) to include police officers (as further defined by ORS 181A.355(14)). The records were prepared and compiled by OSP in connection with

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[1] OSP's response also denied an October 15, 2019 request you made "pursuant to ORS Chapter 181A *** to be informed of everything [OSP has] regarding the investigation and disposition of my said complaints." Although OSP treated this as a records request and you have appealed OSP's denial, we find that your October 15, 2019 information request was not a public records request within the meaning of the public records law. *See, e.g.*, ORS 192.311(5)(a), 192.314(1), and 192.324(1). The request was not submitted in accordance with OSP's records request procedure, and it does not mention public records or otherwise implicate the public records law. Rather, your reference to ORS Chapter 181A indicates to us that you were requesting information to which you may be entitled as a complainant under subsection (5) of ORS 181A.830. That provision states that, notwithstanding the nondisclosure rule in subsection (3), if an investigation "results from a complaint," the agency "may disclose to the complainant the disposition of the complaint and, to the extent the public body considers necessary to explain the action of the public body on the complaint, a written summary of information obtained in the investigation." Although this provision permits the disclosure of some investigatory *information* to complainants, it does not operate as an exception to nondisclosure rule in subsection (3) as that rule applies to investigatory *records*. We therefore conclude OSP's denial of your October 15, 2019 information request is not subject to review by the Attorney General. *See* ORS 192.411 (the Attorney General's authority in the context of a public records petition is generally limited to evaluating whether a state agency properly withheld requested public records). As a practical matter, however, our determination has no bearing on the outcome of your petition because your October 15, 2019 information request was largely redundant with your August 25, 2019 records request, which is addressed herein.

[2] We were not asked to address, and need not address, OSP's claim that the records were previously exempt under the litigation exemption, ORS 192.345(1).

personnel investigations. And according to Ms. Allen, no OSP officers were disciplined as a result of those investigations. ORS 181A.830(3) therefore prohibits OSP from disclosing the records to you unless one of the enumerated exceptions applies. According to Ms. Allen, none of the officers have consented to the disclosure of these records and there are no ongoing investigations that would otherwise permit OSP to disclose them to you in this instance. We have no reason to second-guess Ms. Allen's representations. She also explained that OSP has determined that nondisclosure in this instance would not adversely affect the public's confidence in OSP. Having reviewed the records, we have no reason to question OSP's statutorily entrusted determination. *See* ORS 181A.830(4)(d).

We now turn to whether the public interest requires disclosure in this instance. We observe that you have not asserted any public interest in the disclosure of the personnel investigation records. According to Ms. Allen, OSP has not received any other inquiries related to these complaints or personnel investigations. Moreover, she observed that, because you are one of the complainants in this matter and have been involved in related litigation, your interest in these records appears to be private in nature. Under the circumstances, we conclude that the public interest does not require disclosure in this instance. *See Attorney General's Public Records and Meetings Manual* at 53 (2019) (an interest in private litigation does not qualify as a public interest requiring disclosure).

For the reasons discussed above, we conclude that OSP was permitted to withhold the personnel investigation records under ORS 181A.830(3) and by operation of ORS 192.355(9)(a). We therefore respectfully deny your petition.

Sincerely,



Frederick M. Boss
Deputy Attorney General

FMB:pjn/DM10220962
c via email only: Mary Beth Allen (OSP)