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December 11, 2020

VIA E-MAIL ONLY: jay@realworldpolice.com and holly.bolton@state.or.us

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3565 Trelstad Ave SE
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Re: Petition for Public Records Disclosure Order
Oregon State Police
DOJ File No.: 257001-GA0113-20

Dear Mr. Horowitz and Ms. Bolton:

This letter is the Attorney General's response to Mr. Horowitz's petition for disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478. His petition asks the Attorney General to order the Oregon State Police (OSP) to conduct a more comprehensive search for records responsive to a recent request, to grant his request for a fee waiver, and to disclose records OSP withheld from its initial response to him. For the reasons that follow, we deny the petition in part and grant it in part.

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. Even express exemptions are to be construed narrowly, meaning that "if there is a plausible construction of a statute favoring disclosure of public records, that is the construction that prevails." *Colby v. Gunson*, 224 Or App 666, 676 (2008). 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).

Agencies may also establish fees reasonably calculated to recover actual costs in making public records available, but "may furnish copies without charge or a substantially reduced fee if the custodian determines that the waiver or reduction of fees is in the public interest because making the record available primarily benefits the general public." ORS 192.324(4)–(5). The furnishing of public records primarily benefits the public when its greatest utility is to the

community or society as a whole. *See In Defense of Animals*, 199 Or App 160, 189 (2005). Even if waiving or reducing the fee is in the public interest, agencies have discretion whether or not to grant such waivers or reductions. *Id*. An agency's decision to deny a fee waiver or reduction must be reasonable under the totality of the circumstances. *Id*. at 190. Any person who believes their request for a fee waiver or reduction was unreasonably denied by a state agency may petition the Attorney General for review. ORS 192.324(6).

Mr. Horowitz's petition stems from a September 21, 2020 request for all records, to include all external communications received by OSP, relating to a January 8, 2019 traffic stop by an OSP trooper of a Lamborghini bearing foreign license plates. OSP replied on October 13, 2020, indicating that it was withholding certain personnel disciplinary records under ORS 192.345(12) and providing a fee estimate of $25.00 to furnish the remaining non-exempt records. On or about October 18, 2020, Mr. Horowitz requested OSP waive its fee or, alternatively, that OSP reduce its fee by 50%. He also asked OSP to reconsider its withholding of the personnel disciplinary records. OSP denied his request for a fee waiver on October 22, 2020 but agreed to reduce the fee to $20.00. OSP also declined to disclose the personnel disciplinary records. Thereafter, it appears Mr. Horowitz paid the original $25.00 fee estimate and OSP disclosed records consisting of the trooper's dashboard camera video and an e-mail relating to training. This petition followed.

First, Mr. Horowitz explains his belief that OSP did not conduct a comprehensive search for the records he requested because it is highly unlikely the single video and the single e-mail he received, in addition to the withheld disciplinary records, are the only records "memorializing any portion of the events of the traffic stop and/or subsequent discussions, communications, training reviews *** [including] all communications received by OSP regarding the stop." In response to this petition, Ms. Bolton informed us that OSP inadvertently overlooked the part of the request seeking external communications received by OSP. She explained that OSP has now conducted a search for those records, as well as a more expansive search for OSP records relating to the traffic stop generally. She indicated that OSP has located additional records and will be in contact with Mr. Horowitz soon regarding the results of the expanded search. Because OSP has already addressed Mr. Horowitz's request that we order OSP to conduct a more comprehensive search, we respectfully dismiss that aspect of the petition as moot.

Next, Mr. Horowitz asserts that OSP unreasonably denied his request for a public interest fee waiver or reduction. He contends that there is unprecedented public interest in this traffic stop, evidenced by the fact that a YouTube video of the incident has been viewed more than 32 million times. He argues that the incident calls into question the trooper's knowledge of the law, which is a high-profile matter because the prospect of being stopped without reasonable suspicion of having committed a crime is a matter of concern to all drivers. Mr. Horowitz notes that OSP has publicly acknowledged that the incident revealed some "training issues and professional issues." He also claims that many of the comments posted in response to the video express interest in whether or not the trooper faced any professional consequences, such as retraining or disciplinary action. Finally, as the producer of the program *Real World Police* on YouTube, Mr. Horowitz explains that he has the means and intent to disseminate this information to the general public. These factors, he argues, weigh in favor of a fee waiver or a

substantial fee reduction in this instance. He therefore asks us to order OSP to refund the $25.00 fee that he paid.

When reviewing claims that an agency has unreasonably denied a request for a fee waiver or denial, our role is to determine whether the agency has abused its discretion considering the totality of the circumstances. *See In Defense of Animals*, 199 Or App at 190. As the Oregon Court of Appeals has noted, "[i]t is significant … that, even if the public body determines that the requestor meets [the public interest] test, the public body is not required to grant the fee waiver or reduction. Rather, it 'may' do so; that is, the public body has discretion whether or not to grant a fee waiver or reduction." *Id.* at 189. However, a public body must exercise this discretion reasonably under the circumstances. *Id.* at 190. In applying this standard, we do not decide whether we would have made the same decision under the circumstances, but rather whether the agency's decision was consistent with its range of lawful options. *See* Public Records Order, Aug 14, 2018, Bahr (*citing* Public Records Order, Aug 4, 2015, Davis; and Public Records Order, Sept 10, 2009, Rogers/Fletcher).

Considering the totality of the circumstances, we cannot conclude that OSP abused its discretion in this instance. By granting Mr. Horowitz a 20% fee reduction, OSP acknowledged that disclosure will primarily benefit the public. And given the modest size of the initial fee estimate, this reduction appears reasonable. Ms. Bolton also advised us that OSP has agreed to refund the $5.00 overpayment even though, she explained, the actual costs to OSP of furnishing the initial set of records exceeded its initial $25.00 fee estimate. Moreover, Mr. Horowitz's ability to pay the fee demonstrates that the fee did not, in fact, impede the public's access to this information in this instance. *See* Public Records Order, Sept 10, 2009, Rogers/Fletcher (requester's ability to pay is relevant in considering whether the fee is likely to impede the public interest). For the foregoing reasons, we conclude that OSP did not unreasonably deny Mr. Horowitz's request for a fee waiver or reduction. We therefore deny this aspect of his petition.

We now turn to the personnel disciplinary records that OSP claimed to be exempt from disclosure under ORS 192.345(12). That provision provides that a "personnel discipline action, or materials or documents supporting that action" is exempt from disclosure "unless the public interest requires disclosure in the particular instance." *Id*. Mr. Horowitz asserts that the public interest requires OSP to disclose any personnel disciplinary records related to this incident for the same reasons described above in support of his request for a fee waiver. He also contends that disclosure will help the public understand and monitor how OSP responds to such incidents and that disclosure will not impede OSP from performing its business. Finally, he argues that the trooper's privacy interests are substantially diminished in this case because his identity is already public knowledge and his potential misconduct is depicted in the YouTube video.

Determining whether the public interest requires the disclosure of conditionally exempt information is a two-step process that involves (a) identifying the competing interests in disclosure and nondisclosure, and the significance of those interests; and (b) weighing those interests to determine which one prevails, with the presumption in favor of disclosure. *See Attorney General's Public Records and Meetings Manual* at 32 (2019) (citations omitted) ("*Manual*"). We have observed that in making this determination, agencies should consider

factors such as "the importance of the particular governmental activity at issue; how high-profile the matter is; whether disclosure would impede government functions; whether disclosure would help the public better monitor public business; and the effect of disclosure on any privacy interests." *Id*. at 32-33. Finally, in the context of employee disciplinary records, the significance of the public interest in disclosure typically depends upon the seriousness of the alleged misconduct and upon the nature of the employee's position within the agency. *Id*. at 65.

In this instance, OSP relies generally upon the public interests in the nondisclosure of law enforcement disciplinary records that have been recognized elsewhere, such as protecting officer privacy and OSP's ability to effectively discipline, evaluate, and train its officers. *See Manual* at 33-34 (*citing ACLU of Or., Inc. v. City of Eugene*, 360 Or 269, 297 (2016) (analyzing the exemption for personnel investigations of law enforcement personnel that do not result in discipline)). OSP argues that the public interest favors nondisclosure in this case because disclosing the disciplinary records now, nearly two years after the underlying incident, will unnecessarily subject the trooper to another round of public ridicule. OSP also contends that the public interest in disclosure in this incident is diminished because of the trooper's low rank and the relatively minor nature of the underlying incident. Finally, OSP suggests that because this incident occurred nearly two years ago, the public interest is stale, particularly in light of the public's interest in more recent and serious issues of police misconduct and accountability.

We have reviewed the personnel disciplinary records at issue and, on balance, we conclude that the public interest requires their disclosure in this instance. For the most part, the public interests identified by OSP in the nondisclosure of these records are present in every case. In contrast, we find that there has been and remains significant public interest in this incident. In the time since Mr. Horowitz' originally submitted his records request to OSP, there appear to have been approximately 1.5 million additional views of the incident on YouTube. We also observe that the video has received nearly 105,000 comments, to include several hundred in just within the last week. Under the circumstances, we cannot conclude that there remains only modest public interest in this incident or that the public's interest is stale. We acknowledge the trooper's low rank and that the underlying incident was not particularly serious. But we also observe continued public interest in learning about how OSP responded to this highly publicized incident. Disclosing the personnel disciplinary records in this case will meaningfully address those interests. We also find that the trooper's privacy interests have been greatly diminished by this publicity such that we do not believe that disclosing the disciplinary records will constitute an unreasonable invasion of his privacy, particularly since by invoking ORS 192.345(12), OSP has, in effect, publicly acknowledged that some personnel disciplinary action was taken in this case. Finally, given the circumstances surrounding this particular incident, we do not believe that disclosing the disciplinary records will substantially impair OSP's ability to discipline, evaluate, and train its personnel in the future. Weighing the various public interests in disclosure against the public interests in nondisclosure, with the presumption favoring disclosure, we conclude that the public interest requires OSP to disclose the personnel disciplinary records in this instance.

For the reasons discussed above, we conclude that OSP did not unreasonably deny Mr. Horowitz's request for a fee waiver and therefore deny his request that we order OSP to

refund his fee. We grant the petition with respect to the personnel disciplinary records OSP withheld and order OSP to disclose them to Mr. Horowitz. Consistent with ORS 192.338, OSP may redact from those records information that it determines to be otherwise exempt from disclosure. OSP has seven days within which to comply or announce its intention to seek judicial review. ORS 192.411(2).

Sincerely,

Frederick M. Boss
Deputy Attorney General

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