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Robert A. Birk
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Linsay Hale
Department of Public Safety Standards and Training
4190 Aumsville Hwy SE
Salem, OR 97317

Re: Petition for Public Records Disclosure Order
Department of Public Safety Standards and Training
DOJ File No.: 259001-GA0037-21

Dear Mr. Birk and Ms. Hale:

This letter is the Attorney General's order responding to Mr. Birk'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 Department of Public Safety Standards and Training (DPSST) to disclose complaints made in 2020 against one of his clients, who is a DPSST licensed investigator and a journalist.[1] For the reasons discussed below, we grant Mr. Birk's 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. Even express exemptions are to be narrowly construed, meaning that "if there is a plausible construction of a statute favoring

[1] Mr. Birk also asks the Attorney General to order DPSST to disclose the complaints as a matter of due process as they relate to DPSST's investigation against his client. This is not the appropriate forum for addressing Mr. Birk's due process claims. The Attorney General's authority in the public records petition context is generally limited to evaluating a state agency's denial or partial denial of a request, a denial of a request for a fee waiver or reduction, or an agency's failure to comply with the processing timeframes provided in ORS 192.329. *See* ORS 192.407(1) and 192.411(1).

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).

DPSST denied Mr. Birk's request for the complaints citing ORS 703.480(2)(a). That provision states that when DPSST investigates a complaint against a licensed investigator, "all information about the alleged violation and the investigation is confidential and is not subject to disclosure under [the Public Records Law] if the department determines that the allegation is *false*." *Id*. (emphasis added); *see also* ORS 192.355(9)(a) (exempting from disclosure records or information made confidential or privileged under other Oregon law). In this instance, DPSST determined that the allegations against Mr. Birk's client were "unfounded" rather than "false." But in its response to Mr. Birk's request, DPSST explained its longstanding policy that "DPSST interprets the public records exemption found in ORS 703.480(2)(a) to include allegations that the DPSST determines to be *false*, *unfounded* and *invalid*." DPSST Policy #129, Public Records, March 12, 2020 (emphasis added). DPSST's response also explained that its "legislative research into this statutory language and its intent supports our interpretation that false, unfounded and invalid are interchangeable when applying this exemption."

Mr. Birk's petition requires us to determine whether DPSST has properly interpreted ORS 703.480(2)(a) to apply to the "unfounded" complaints at issue here. We conclude that DPSST's interpretation is incorrect. First, such an interpretation is not supported by the plain text of the statute, which is limited to instances where DPSST determines an allegation is "false." The term "unfounded" does not appear in the statute and we are not permitted to add to, or subtract from, the words that appear in a statute. *See* ORS 174.010. It is also clear from DPSST practice that it does not use the terms "unfounded" or "invalid" interchangeably with "false" when making final determinations about allegations. Rather, the term assigned by DPSST serves to differentiate between distinct categories of determinations. This practice significantly undermines any argument that these three terms are interchangeable for purposes of applying the exemption, which is expressly limited to only one of those terms.

DPSST's interpretation of the statute also broadens the scope of information that could be withheld, which is inconsistent with the requirement to construe the statute narrowly and to apply a plausible interpretation that favors disclosure. *See Colby v. Gunson*, 224 Or App at 676. Construing ORS 703.480(2)(a) narrowly means that the exemption applies only to allegations that DPSST determines are "false." Although the legislature did not provide a definition for "false" within the meaning of ORS 703.480(2)(a), it is a word of common usage for which we may consult dictionary definitions to determine its meaning. *See Comcast Corp. v. Dept. of Rev.*, 356 Or. 282, 296 (2014) (courts assume that if the legislature did not give the term a specialized definition, "the dictionary definition reflects the meaning that the legislature would naturally have intended"). For our purposes, "false" is defined as "1a: not corresponding to truth or reality; not true *** b: intentionally untrue." *Webster's Third New Int'l Dictionary* 819 (unabridged ed 2002). And "unfounded" is defined as "lacking a sound basis in reason or fact." *Id*. at 2496. The terms are similar, and we observe that in most instances a false allegation would

also meet the definition of an unfounded allegation because it would lack a sound basis in fact. But it is not the case that all unfounded allegations are also false. For example, the fact that an allegation is lacking in evidence may make the allegation unfounded, but it does not make the allegation false. And even a true allegation may be deemed unfounded if the conduct alleged is not a violation of an investigator's licensing conditions. We therefore conclude that the terms are not synonymous. By its express terms, ORS 703.480(2)(a) applies to unfounded allegations only if DPSST also determines that the allegations are false.

In this instance, DPSST determined the complaints involved the conduct of Mr. Birk's client in his capacity as a journalist and not as a DPSST licensed investigator. DPSST therefore characterized the complaints as unfounded due to a statutory exception for media activities. *See* ORS 703.411 (statutes regulating the activities of investigators do not apply to the media when obtaining information for disseminating news to the public). Importantly, DPSST did not make a determination that the allegations were false. It follows that DPSST was not permitted to withhold the complaints from Mr. Birk under ORS 703.480(2)(a). As DPSST has not identified any other basis for withholding the complaints, we grant the petition and order DPSST to disclose the complaints to Mr. Birk. DPSST 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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