ELLEN F. ROSENBLUM
ATTORNEY GENERAL

LISA M. UDLAND
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

Justice Building
1162 Court Street NE
Salem, Oregon 97301-4096
Telephone: (503) 378-6002

April 18, 2024

VIA E-MAIL ONLY: mbernstein@oregonian.com and holly.bolton@osp.oregon.gov

Maxine Bernstein
The Oregonian/OregonLive
1500 SW First Ave, Ste 500
Portland, OR 97201

Holly Bolton
Oregon State Police
3565 Trelstad Ave SE
Salem, OR 97317

Re: Petition for Public Records Disclosure Order
Oregon State Police
DOJ File No.: 257001-GA0035-24

Dear Ms. Bernstein and Ms. Bolton:

This letter is the Attorney General's response to two petitions submitted by Ms. Bernstein seeking disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478. Her petitions, which we received March 28, 2024,[1] ask the Attorney General to order the Oregon State Police (OSP) to disclose the reports of two internal personnel investigations. For the reasons discussed below, we grant Ms. Bernstein's first petition and deny her second 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. *Id*.

a. Background.

Ms. Bernstein's first petition stems from her request for the report of OSP's 2019 personnel investigation into what she characterizes as a "hazing" incident during a remote OSP training event in 2005 (the "hazing incident report"). Her second petition relates to a request for the report of OSP's 2020 personnel investigation into an alleged inappropriate relationship between Major Andy Heider and a civilian subordinate (the "Heider report"). OSP denied

[1] We thank Ms. Bernstein for granting an extension of time in which to respond to her petitions.

both requests by asserting that the investigative reports are exempt in their entirety under ORS 181A.674(3) because neither resulted in discipline. That provision prohibits agencies from disclosing information about a personnel investigation of a public safety employee employed by the agency if the investigation does not result in discipline. *Id*.[2] The prohibition on disclosure does not apply when the public interest requires disclosure in the particular instance, or when the agency determines that nondisclosure would adversely affect the public's confidence in the agency. ORS 181A.674(4)(a) and (c).

Ms. Bernstein's petitions appeal OSP's denials. She asserts that the public interest requires disclosure of both investigative reports in this instance and that nondisclosure will adversely affect the public's confidence in OSP.

b. Arguments For and Against Disclosing the Hazing Incident Report.

We understand that Ms. Bernstein first learned of OSP's investigation of the 2005 hazing incident when reporting on the 2019 dismissal of an OSP trooper for making anti-gay remarks while on duty. In support of her position that the public interest requires disclosure, she asserts her belief that the hazing incident involved anti-gay behavior, occurred on duty, and that it became "normalized" by inaction or acceptance by OSP leadership. She argues that the public has a strong interest in knowing the outcome of the investigation; whether it was thorough, fair, and consistent with similar investigations; and why no discipline was imposed. She also contends that disclosure will inform the public's strong interest in understanding police bias by, for example, helping the public evaluate the propriety of dismissing a trooper in 2019 for an anti-gay remark in the context of "what might be longstanding anti-gay behavior" within OSP that may be "tolerated and even promulgated by superiors and trainers."

OSP argues that the public interest does not require disclosure of the hazing incident report in this instance. First, OSP believes the public interests in disclosure identified by Ms. Bernstein – i.e., evaluating whether OSP conducted a proper investigation; learning whether OSP leadership participated in or otherwise condoned unprofessional conduct; and understanding why discipline was not imposed – are true in every case and that she has not identified a specific rationale for the disclosure of this particular report. Contrary to Ms. Bernstein's assertions, OSP also reports that the 2005 incident did not occur as part of a formal training activity, did not occur during duty hours, was not part of a recurring pattern, and was not known to OSP leadership until it was discovered in 2019.

OSP states that it does not condone the behavior revealed by its investigation and that it condemns any expressions of bias against any protected class. As support for its position, OSP notes that when it learned of the alleged incident in 2019, it thoroughly investigated the matter notwithstanding the many years that had passed, and even though all of the supervisory and most of the non-supervisory employees who participated were no longer employed by OSP. According to OSP, this included all of the principal subjects of the investigation, which is why disciplinary action was not an option at the time. OSP also contends that any public interest in the incident is stale because it occurred more than 19 years ago. OSP asserts that disclosing

[2] This statute is incorporated into the Public Records Law by virtue of ORS l 92.355(9)(a), which exempts from disclosure "[p]ublic records or information the disclosure of which is prohibited * * * under Oregon law."

information about such historical events risks misleading the public about whether it reflects current affairs, thereby discounting recent improvements to OSP's culture and practices and potentially undermining public confidence in law enforcement.

Finally, OSP asserts that the public interest favors nondisclosure in this instance because disclosure could cause harm and embarrassment to the employee who was the target of the incident, and also could chill misconduct reporting or cooperation by OSP employees in future investigations. In support of its position, OSP notes that the targeted employee did not consider himself to be a victim of the 2005 incident, did not wish to file a complaint about the matter, was reluctant to recount the incident during the investigation, and was upset that the matter became associated with the 2019 dismissal of a trooper for making an anti-gay remark.

c. Hazing Incident Report – Discussion and Conclusion.

To determine whether the public interest requires disclosure in this instance, we must balance the public's interest in disclosure against the public's interest in nondisclosure, with the presumption in favor of disclosure. *See ACLU v. City of Eugene*, 271 Or App 276 (2015). The Oregon Court of Appeals has described the public interest in disclosure as the right of the public at large to monitor how public business is conducted and how public officials are performing their jobs. *See Guard Publishing Co. v. Lane County School Dist.*, 96 Or App 463, 469 (1989); and *Jensen v. Schiffman*, 24 Or App 11, 17 (1976).

Weighing the public interests in disclosure against the public interests in nondisclosure in this instance, with the presumption favoring disclosure, we conclude that the public interest requires OSP to disclose the hazing incident report. OSP has acknowledged that its 2019 investigation substantiated the 2005 hazing incident and that the incident involved expressions of bias against a protected class that warrant public condemnation. As we observed in a 2023 order directing OSP to disclose a 2017 personnel investigation that substantiated allegations of racially biased statements made by a former trooper several years prior to the investigation:

> [T]here has been substantial and ongoing public interest in the topic of racial bias in policing for a long time, and that interest has been heightened over the last several years. Policing reform continues to be a priority for many communities and policymakers. By informing the public about a past instance of racially-charged misconduct, we conclude that the disclosure of this investigatory information will meaningfully advance this public interest.

Public Records Order, May 1, 2023, Bernstein and Bolton. We reach a similar conclusion in this instance. Notwithstanding the passage of time, OSP's leadership deemed the allegations serious enough to investigate them when they came to light in 2019. Moreover, the investigation revealed expressions of bias by certain OSP employees that were sufficiently egregious back in 2005 that OSP has publicly condemned the behavior in 2024. Under the circumstances, OSP's recent response to the incident suggests to us that the matter is not stale and that the public interest will be meaningfully advanced by disclosure in this instance.

In contrast, OSP has not identified any public interests in the nondisclosure of the report that are not present in every case (e.g., protecting the privacy of subjects, victims, and witnesses; and avoiding the chilling effect on reporting and cooperation in future investigations). Given the passage of time and in light of new reporting requirements enacted by the legislature in 2020, we cannot conclude that disclosure in this instance is likely to have a significant chilling effect on future investigations.[3] We also recognize that the target of the 2005 hazing incident is still an OSP employee, that he did not wish to report the matter at the time, and that he was reluctant to recount the incident during the 2019 investigation. However, we believe his privacy interests can be adequately protected in this instance by redacting his personally identifying information from the report, a measure to which Ms. Bernstein has agreed. We therefore grant her first petition.

d. Arguments For and Against Disclosure of the Heider Report.

Next, we consider Ms. Bernstein's argument that the public interest requires OSP to disclose the Heider report and that nondisclosure has already adversely affected the public's confidence in OSP. She cites authority from the Oregon Court of Appeals that the public has a legitimate interest in the conduct of high-ranking police officers where their on- or off-duty conduct bears on their integrity or ability to perform their duties. *See City of Portland v. Anderson,* 163 Or App 550, 554 (1999). She explains her belief that OSP's investigation stemmed from a complaint or rumors that Maj Heider, who is a high-ranking officer, was having an affair or unprofessional relationship with a civilian subordinate. She argues that the public needs to know the results of the investigation insofar as they may bear on Maj Heider's integrity and ability to perform his duties.

Ms. Bernstein also raises questions about the integrity of the investigation. First, she states that the officer who investigated the matter may have had a conflict of interest because she believes the investigator either reported directly to, or had a close personal relationship with, Maj Heider at the time. She has also reported on a recent civil complaint by a former trooper that alleges, in part, that OSP made a deal with the Oregon State Police Officers Association (OSPOA) in which OSPOA withdrew its request for the Heider report in exchange for OSP dropping disciplinary actions against six OSPOA-represented employees.[4] Under the circumstances, she argues, the public has a strong interest in reviewing the investigation to ensure it was thorough, competent and fair, and to evaluate whether OSP's decision not to discipline Maj Heider was consistent with similar cases.

OSP contends that the major premises of Ms. Bernstein's public interest arguments are based upon erroneous information and baseless third-party allegations, and that the public interest does not otherwise require disclosure in this instance. First, OSP explains that the

[3] ORS 181A.681 now mandates that police officers intervene, report, and cooperate in the investigation of police misconduct, which is defined to include allegations of sexual harassment, sexual misconduct, or discrimination against a protected class. Failure to cooperate with such investigations is now express grounds for disciplinary action and possible suspension of an officer's certification by the Department of Public Safety Standards and Training.

[4] *See* Maxine Bernstein, *Fired Trooper Alleges Misconduct by OSP Brass*, OregonLive (Feb 1, 2024), *available at* https://www.oregonlive.com/crime/2024/02/fired-trooper-alleges-misconduct-by-osp-brass.html (accessed Apr 4, 2024).

investigation was not prompted by a complaint but rather was initiated to address internal gossip and rumors of an inappropriate relationship. According to OSP, "it quickly became clear that the gossip was based on conjecture and idle speculation, not facts or verifiable evidence. In sum, the evidence and interviews did not support any violation of law or policy, and the investigation findings did not substantiate any allegations." And because the investigation revealed no bases for imposing discipline against Maj Heider, OSP asserts that disclosing the report will not meaningfully inform the public about Maj Heider's integrity and ability to perform his duties.

OSP also contends that there are no credible reasons to question the integrity of the investigation. Contrary to Ms. Bernstein's claims, OSP insists that the investigation was not conducted by someone that Maj Heider supervised or with whom he had a close personal relationship. OSP also states that the allegation about a deal with OSPOA regarding the Heider report is baseless because there was no such deal.

Finally, because both subjects of the investigation are current employees, OSP argues that disclosing the 2020 report may unnecessarily reignite gossip about them. That, in turn, could unnecessarily impair the public interests in protecting employee privacy and fostering productive employee relations, which OSP believes ORS 181A.674 was enacted to protect. OSP therefore believes the public's interest is best served by nondisclosure in this instance. OSP also informs us that it does not believe that withholding the report in this instance will adversely affect the public's confidence in OSP. *See* ORS 181A.674(3)(d).

e. Heider Report – Discussion and Conclusion.

After reviewing the Heider report and balancing the public interests in disclosure and nondisclosure, we conclude that the public interest does not require disclosure in this instance. We observe that the investigation did not involve the sorts of behavior by law enforcement officials that tend to draw increased public scrutiny, such as criminal or official misconduct, unlawful bias, excessive use of force, or abuse of authority when interacting with the public. Rather, the investigation addressed a personal relationship between two OSP employees that was rumored to violate employment policies. OSP determined the rumors were unfounded and the investigation did not reveal any other violations of law or policy. After reviewing the report, we find that the evidence and testimony collected during the investigation was sufficient and that it supported OSP's final determination that discipline was not warranted. After conferring with OSP's DOJ-assigned contact counsel, we also have no reason to second-guess OSP's representations that the investigator did not have a conflict of interest and that OSP did not make a deal with OSPOA regarding the Heider report. And our review of the report did not disclose any independent grounds for us to question the quality or integrity of the investigation.

More importantly, we cannot conclude from the available record that disclosure in this instance will meaningfully inform the public about Maj Heider's integrity or present ability to perform his duties. *See City of Portland v. Anderson,* 163 Or App at 554. Similarly, it is not apparent to us to us how the matters investigated by OSP in 2020 are relevant to any current public interest in how OSP conducts its business or how its officials are doing on the job. *See Guard Publishing Co. v. Lane County School Dist.*, 96 Or App at 469; and *Jensen v. Schiffman*, 24 Or App at 17. Our analysis might be different if Maj Heider or other OSP employees were

currently under scrutiny for similar or recurring behavior, which might then significantly increase the public interest in understanding how OSP has addressed prior allegations. *See* Public Records Order, Jul 14, 2014, Zaitz and Redding (after OSP official was convicted of official misconduct relating to his employment, public interest in how OSP handled prior personnel investigations involving the official that did not result in discipline was significantly increased and required disclosure). But we are not aware of any such scrutiny in this instance.

Because we conclude that the public interest does not require OSP to disclose the Heider report in this instance, ORS 181A.674(3) prohibits disclosure unless OSP determines that nondisclosure would adversely affect the public's confidence in OSP. *See* ORS 181A.674(4)(c). OSP reports that it has made the opposite determination in this case; i.e., that nondisclosure will *not* adversely affect the public's confidence in the agency. Having reviewed the report, we have no reason to question OSP's statutorily entrusted determination. *See* Public Records Order, May 5, 2020, Upham (this determination is statutorily entrusted to the employing agency). We therefore respectfully deny Ms. Bernstein's second petition.

f. Conclusions.

For the foregoing reasons, we grant Ms. Bernstein's first petition and order OSP to disclose the hazing incident report. OSP is permitted to redact the targeted employee's identifying information from the report, in addition to any other material that it concludes is exempt for reasons other than under ORS 181A.674. If Ms. Bernstein disagrees with any such additional redactions, she may again petition this office for review. OSP has seven days within which to comply with this order or announce its intention to seek judicial review. ORS 192.411(2). We respectfully deny Ms. Bernstein's second petition because we conclude that the public interest does not require OSP to disclose the Heider report in this instance.

Sincerely,

Lisa M. Udland

LISA M. UDLAND
Deputy Attorney General

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