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September 24, 2024

VIA E-MAIL ONLY: mbernstein@oregonian.com

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

Re: Petition for Public Records Disclosure Order
Oregon State Police
DOJ File No.: 257001-GA0086-24

Dear Ms. Bernstein:

This letter is the Attorney General's response to your petition seeking disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478. Your petition, which we received August 30, 2024,[1] asks the Attorney General to order the Oregon State Police (OSP) to disclose the report of an internal personnel investigation of now retired OSP Sergeant First Class Mark Davie. We respectfully deny your petition for the reasons discussed below.

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*.

Your petition stems from a request for a copy of any professional standards investigation, findings or fact, interviews, and disciplinary action stemming from complaints involving then-Sergeant Davie while he worked in OSP's training section. OSP denied your request claiming the records are exempt under ORS 181A.674(3) (prohibiting disclosure of information about personnel investigations of public safety employees that do not result in discipline), and ORS 192.345(12) (exempting from disclosure personnel disciplinary actions, including materials or documents supporting such actions). Both exemptions are conditional, meaning that neither

[1] We thank you for granting an extension of time in which to respond to your petition.

applies if the public interest requires disclosure in the particular instance. *See* ORS 192.345 and ORS 181A.674(4)(a).

Your petition argues that neither of the exemptions cited by OSP apply because the public interest requires disclosure in this instance. Your petition expresses your belief that at the time of the investigation (1) then-Sergeant Davie was a supervisor for state police training; (2) Mr. Davie's wife was the OSP Superintendent; (3) OSP's union requested the investigation be conducted by an independent party outside of OSP; and (4) Mr. Davie was not disciplined. Although Mr. and Mrs. Davie are now retired from OSP, you assert that the public has a legitimate interest in evaluating his integrity as a manager and in assessing the integrity of OSP's investigation against the Superintendent's husband at the time. You argue that if allegations were substantiated and discipline was proposed or recommended, the public has a legitimate interest in why it was not imposed. Alternatively, you argue, if discipline was not recommended or imposed, the public has a substantial interest in knowing whether that disposition was consistent with similar inquiries.

In response to your petition, OSP acknowledges that Mr. Davie was the subject of a 2017 internal investigation but argues that because the investigation did not result in discipline, ORS 181A.674(3) prohibits disclosure because the public interest does not require disclosure in this instance. OSP explains that two premises of your public interest argument are inaccurate because at the time of the investigation (1) Mrs. Davie was the Deputy Superintendent, not the Superintendent (she did not become the Superintendent until November 2020); and (2) although Mr. Davie exercised some supervisory responsibilities, he was not a manager or supervisor. Therefore, OSP does not believe that disclosure will meaningfully inform the public about Mr. Davie's integrity as a manager or whether he received preferential treatment during his wife's tenure as the Superintendent.

OSP also states that the investigation did not implicate the sort of aggravating factors or notoriety that might elevate the public's interest in this instance. For example, OSP notes that the investigation only involved internal personnel matters and did not involve allegations of improper police interactions with the public; use of force; unlawful discrimination; sexual misconduct; or other conduct bearing on a high-ranking officer's integrity, ability to perform their duties, or ability to enforce the law evenhandedly. *See, e.g., ACLU,* 360 Or at 299 (the public interest in oversight is particularly strong when it comes to complaints about the use of force and the review of those complaints)*; City of Portland v. Anderson,* 163 Or App 550 (1999) (public interest required disclosure of disciplinary investigation against Captain of Portland Police Bureau for off-duty involvement with escort service); Public Records Order, Apr 18, 2024, Bernstein and Bolton (public interest required disclosure of hazing incident investigation that substantiated officers' expression of bias against a protected class); and Public Records Order, May 1, 2023, Bernstein and Bolton (public interest in OSP's demotion of Trooper who demonstrated racial bias required disclosure, particularly given prior publicity). OSP therefore argues that your petition fails to identify any current or heightened public interest in these materials that are not also present in each of its personnel investigations.

OSP also explains its position that the interests in confidentiality that ORS 181A.674 was enacted to protect outweigh the public interest in disclosure in this instance. As previously

acknowledged by the Oregon Supreme Court, those interests in confidentiality include (1) protecting the privacy of officers whose alleged misconduct was not substantiated; (2) preserving the agency's ability to effectively review its own actions and provide discipline, evaluation, and training for its officers; and (3) encouraging witness candor and protecting witness concerns about potential retaliation. *See ACLU v. City of Eugene,* 360 Or 269, 295 (2016). OSP informs us that the investigation was not prompted by a formal complaint against Mr. Davie, but instead was initiated by OSP after receiving unfavorable comments about him during its investigation of a different employee. OSP states that it is not aware of any past or present publicity or heightened public interest in this investigation that might diminish OSP's duty to protect the privacy interests of the relevant parties, including Mr. Davie, the witnesses and other OSP employees named in the report.

In evaluating whether the public interest requires disclosure in this instance, we must determine whether the public's interest in disclosure outweighs the competing interests in confidentiality, with the presumption favoring disclosure when the parties' interests are of equal value. *See ACLU*, 360 Or at 280 (2016). 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).

After weighing the competing interests in this instance, we conclude that the interests in confidentiality predominate. After reviewing the 2017 investigative report and discussing it with OSP, we do not perceive any heightened public interest in its disclosure at this time. The investigation involved internal personnel matters, did not involve police interactions with the public, did not implicate Mr. Davie's ability to enforce the law evenhandedly, did not involve a high-ranking officer or manager, and did not involve the sorts of behavior by police officials that tend to draw increased public scrutiny. And because the Davies have since retired from OSP, disclosure at this time will not meaningfully inform the public about their integrity as public officials or their ability to perform their duties. *See Anderson*, 163 Or App at 554. Similarly, it is not apparent to us how the matters investigated by OSP in 2017 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*, 96 Or App at 469; and *Jensen*, 24 Or App at 17. Although the public may have had a heightened interest at the time in learning whether Mr. Davie received special treatment because of his spouse's high-ranking position, the available record does not suggest to us that there were ever any claims or evidence of such preference. And our review of the materials did not disclose any independent grounds for us to question the quality or integrity of OSP's investigation or its decision not to impose discipline against Mr. Davie. Under the circumstances, we perceive only modest public interest in this matter.

In contrast, we find that OSP has adequately demonstrated that the general interests in confidentiality that ORS 181A.674 was enacted to protect are present in this case and that they outweigh the modest public interest in disclosure in this instance. The investigation occurred seven years ago, and it does not appear to have drawn any public scrutiny or publicity that would diminish OSP's interests in protecting the legitimate privacy interests of the various parties to the investigation. *Cf. ACLU*, 360 Or at 296 (where officer's identity and alleged conduct is already a

matter of public record, the agency has a significantly diminished interest in protecting the officer's privacy). OSP has also expressed concerns that public disclosure could impair productive relations among current employees and have a chilling effect on the candor of witnesses in future investigations which, in turn, could impair its ability to conduct effective investigations. On this point, we have noted that public disclosure is less likely to chill cooperation in cases where officers are now statutorily required to report and cooperate in investigations of certain types of police misconduct.[2] However, we do not perceive that OSP's concerns about chilling cooperation have been diminished in this case because the matters investigated do not appear to rise to the threshold of a mandatory report and investigation. Moreover, our review of the investigatory material disclosed that most of the witnesses had at least some expectation that OSP would not share their testimony with coworkers or disclose it to the public. Under the circumstances, we find that disclosure could impair productive relations and threaten to chill witness cooperation and candor in future investigations, at least in discretionary inquiries where their cooperation is not otherwise compelled. On balance, we conclude that these interests in confidentiality outweigh the modest public interest in disclosure in this instance.

For the foregoing reasons, we conclude that the public interest does not require OSP to disclose the 2017 investigation in this instance. We therefore respectfully deny your petition.

Sincerely,

Lisa M. Udland

LISA M. UDLAND
Deputy Attorney General

ACF:pjn
c via e-mail only: Holly Bolton (OSP)

[2] Enacted in 2020, ORS 181A.681 mandates that police officers intervene, report, and cooperate in the investigation of police "misconduct," defined as the use of unjustified or excessive force, unlawful discrimination, sexual harassment or misconduct, or commission of a crime. Because failure to report or to cooperate with such investigations is now express grounds for disciplinary action and possible suspension of an officer's certification, we have concluded that public disclosure in such cases is less likely to have a significant chilling effect upon future mandatory investigations. *See* Public Records Order, May 1, 2023, Bernstein.