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October 17, 1997

Rhonda Fenrich
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209 West Fifth
Eugene, OR 97401

Re: *Petition for Public Records Disclosure Order: BPSST Internal Investigation*

Dear Ms. Fenrich:

This letter is the Attorney General's order on your petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505.[1/] Your petition, which we received on September 4, 1997,[2/] requests the Attorney General to order the Board of Police Standards and Safety Training (BPSST) to make available an internal affairs investigation report. For the reasons stated below, we deny the petition

The Public Records Law confers a right to inspect any public record of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. Your petition raises the issue of whether the records sought fall within the exemptions from disclosure set out in the personnel discipline action exemption, ORS 192.501(12), and internal advisory communications exemption, ORS 192.502(1).

[1/]Your petition was filed on behalf of your client, Jerry Johnson. Although not in the form of a petition, *see* ORS 192.470, we treat your letter as a petition for a public records disclosure order.

[2/]We appreciate your extending the time within which the law would have otherwise obligated us to respond to the petition.

1. ORS 192.501(12) - Personnel Discipline Actions

ORS 192.501(12) conditionally exempts from disclosure:

> A personnel discipline action, or materials or documents supporting that action[.]

Mr. Johnson is a part-time instructor at BPSST. The report at issue relates to a personnel investigation conducted by BPSST into allegations that Mr. Johnson and other part-time instructors of BPSST engaged in conduct that potentially could lead to disciplinary action.

This exemption covers only completed disciplinary actions where a sanction is imposed. ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 31 (1995). In this instance, none of the BPSST instructors whose conduct was investigated were disciplined. Therefore, the investigation report is not exempt from disclosure under ORS 192.501(12).

2. ORS 192.502(1) - Internal Advisory Communications

Your petition also raises an issue under ORS 192.502(1), which exempts from disclosure:

> (1) Communications within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to any final agency determination of policy or action. This exemption shall not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure.

The purpose of this exemption is to encourage frankness and candor in communications within or between public bodies. MANUAL at 37. Under ORS 192.502(1) a record is exempt from disclosure if it meets all of the following criteria:

- It is a communication within a public body or between public bodies;
- it is of an advisory nature preliminary to any final agency action;

- it covers other than purely factual materials; and

- in the particular instance, the public interest in encouraging frank communication clearly outweighs the public interest in disclosure.

The report at issue contains witness statements and the investigator's conclusion and recommendation. Major Bill Garland of BPSST has agreed to disclose the portion of the report containing the witness statements. Thus, we need consider only whether ORS 192.502(1) exempts the remaining portion of the report, i.e., the "Conclusion and Recommendation" section.

The Conclusion and Recommendation section of report clearly meets the first and second parts of the internal advisory communication exemption. Andrea Sloan, the BPSST employee assigned to conduct the investigation, is advising Bill Garland, a BPSST manager, of her conclusion and recommendation regarding the allegations of misconduct. This report was prepared prior to any final agency determination regarding discipline.

By its very nature, the Conclusion and Recommendation section of the report is inherently "other than purely factual" and therefore meets the third part of the exemption.

Turning to the fourth part of the exemption, we must determine whether, in this particular instance, the public interest in encouraging the frank communication by the investigator to the BPSST manager clearly outweighs the public interest in disclosure. We conclude that it does.

Public employers are frequently called on to investigate alleged misconduct by public employees, and the purpose of the investigation is to determine whether facts exist that support the allegations. In such situations, it is essential that the investigator report her frank and candid assessment of the allegations and the evidence so that the public body may consider that uninhibited advice in making its decision whether to impose discipline. Clearly, the investigator's conclusion and recommendation come within the purpose for which the ORS 192.502(1) exemption was created.

Thus, we find that all four parts of the exemption are met as to the Conclusion and Recommendation section of the internal affairs investigation report.

Accordingly, with respect to the Conclusions and Recommendation section of the report, we deny your petition on the basis that the information is exempt from disclosure

under ORS 192.502(1). With respect to the remainder of the report, i.e., the witness statements, we deny your petition as moot because BPSST has agreed to disclose that information to you.

Sincerely,

DAVID SCHUMAN
Deputy Attorney General

DS:SMH:AV:clr/JGG10C09
c: Major Bill Garland, BPSST
Jeri Hemmer, BPSST