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November 30, 2020

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The Oregonian/OregonLive  
1500 S.W. First Avenue, Suite 400  
Portland, Oregon 97201

Fallon Niedrist  
Deputy City Attorney  
Portland City Attorney's Office  
1221 S.W. Fourth Avenue, Suite 430  
Portland, Oregon 97204

Re: Petition of Maxine Bernstein, on behalf of The Oregonian/OregonLive, requesting unredacted salary information for PPB employees

Dear Ms. Bernstein and Ms. Niedrist:

Petitioner, Maxine Bernstein on behalf of The Oregonian/OregonLive, seeks access to an unreacted list of Portland Police Bureau (PPB) personnel and salary information.

Historically, PPB has released these records upon request by the media. This year, however, when PPB released these records 419 names were redacted. PPB asserted that these were personal safety exemptions under ORS 192.368(1) made in response to specific requests by PPB employees (both sworn and non-sworn personnel). Additionally, as to 34 of the redactions, PPB asserts they are additional supported by ORS 181A.825(2), which prohibits the release of information about officers assigned to undercover duties. As a secondary argument, PPB advances that even if ORS 192.368(1) does not apply, disclosure of employee names in the current political climate would constitute an unreasonable invasion of privacy under ORS 192.355(2).

For the reasons discussed below we find that 1) the 34 redactions under ORS 181A.825(2) are technically proper; 2) the personal safety exemption in ORS 192.368(1) does not apply to an employee's name or salary; and 3) the personal information exemption in ORS 192.355(2) does not apply because the relevant portions of this information is already freely available online.<sup>1</sup> Because release to petitioner would not trespass additionally on any privacy interest, the information must be disclosed.

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<sup>1</sup> Petitioner has agreed to allow six of the names to be redacted from this production at this time without a decision on the merits of their individual claim of exemption. In PPB's submission to us these are numbers 76, 180, 187, 218, 426, and 444. These specific names need not be produced at this time.

## DISCUSSION

Before describing our analysis in detail, it is important to recite precisely and succinctly what we have to decide. Where a person is already publicly identified as an employee of PPB in freely available online sources, does it constitute an unreasonable invasion of that person's privacy to release their name and salary a second time.

It can be difficult to detach the genuineness of the safety concerns raised by the men and women presently employed by PPB, which are grounded in actual incidents that have occurred during the unprecedented turmoil this year, from this relative straight forward legal question. Nothing in this order, which interprets the provisions of the public records law, requires that any person not already publicly identified as a PPB employee be so identified.

### A. Personal Safety Exemption – ORS 192.368

ORS 192.368(1) provides:

An individual may submit a written request to a public body not to disclose a specified public record indicating the home address, personal telephone number or electronic mail address of the individual. A public body may not disclose the specified public record if the individual demonstrates to the satisfaction of the public body that the personal safety of the individual or the personal safety of a family member residing with the individual is in danger if the home address, personal telephone number or electronic mail address remains available for public inspection.

PPB has submitted for our inspection over 400 written personal safety requests that it has approved under this section. However, the information at issue in this appeal is not covered by this statute. Nowhere in ORS 192.368(1) does “name” or “salary” appear and we must apply the law the legislature wrote. We recognize that at the time ORS 192.368(1) was drafted it likely was not as easy to determine a person's home address given only a name and city as it is today, but if a change in law is warranted by a change in circumstances that must fall to the legislature, not an adjudicative body. *Carlson v. Meyers*, 327 Or 213, 224 (1998) (“In interpreting a statute, the court should neither insert what has been omitted by the legislature nor omit what the legislature has inserted.”)

The City has pointed out that some employees may be domestic violence survivors or have stalkers, but has not drawn our attention to any specific examples. Our decision today does not foreclose the possibility that release of the name of an employee who finds themselves in such a situation might constitute an unreasonable invasion of privacy under ORS 192.355(2), however ORS 192.368(1) cannot be stretched to include something it plainly does not.

### B. Information about Undercover Police – ORS 181A.825(2)

With qualifications not relevant to this petition, ORS 181A.825(2) provides:

a law enforcement agency may not disclose information about an employee of the agency while the employee is assigned duties the agency considers undercover investigative duties and for a period of six months after the conclusion of those duties.

This statute is clearly worded and petitioner does not advance an argument that the information at issue here does not fit within its scope. Rather, due to the way that PPB's response was worded, petitioner feared that PPB was considering this section applicable to any police officer who was working in a protest-related assignment with his or her name badge obscured. This is not the case. PPB has provided us with Directive 640.95 (Undercover Safety and Operation Procedures)<sup>2</sup> and asserts that 34 of the redactions in the production are for employees to whom this section applies.

We agree with all parties that a policy providing that name badges be obscured does not constitute "undercover investigative duties." PPB may properly redact information under this section for any employee who is, or has within the last six months, worked in an investigative capacity covered by Directive 640.95.

C. Personal Information – ORS 192.355(2)

ORS 192.355(2) exempts from disclosure:

Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if public disclosure would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance. The party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy.

There are two pieces of information about each employee that are at issue here: name and salary. It is well-settled that a public employee's salary is not exempt from disclosure. ATTORNEY GENERAL'S PUBLIC RECORDS MANUAL (2019) at 97 ("a public employee's gross salary was not exempt because the public interest in knowing this information indicated the lack of a reasonable expectation of privacy.")

Under Oregon law it has been rare, even in the face of significant evidence of likely harassment of public employees, that their names be withheld from disclosure. *Petition of Straka for the Freedom Foundation*, MCDA PRO 17-44 (2017) (names of city employees represented by a particular union are not exempt); *Guard Publishing v. Lane County School Dist.*, 310 Or 32 (1990) (names of substitute teachers during a strike were not exempt despite factual record of significant attempts to intimidate and harass). That said, the vitriol directed at our community's police officers at present well exceeds that described or anticipated by either of these prior decisions.

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<sup>2</sup> <https://www.portlandoregon.gov/police/article/529154> (containing text of directive)

This office has reviewed each and every one of the over 400 personal safety exemptions submitted by PPB employees. It is clear that lines that we as a society have considered inviolable have long-since been crossed. The described conduct is despicable, and I condemn it in the strongest terms. The following are examples of what was submitted by PPB employees:

- An officer had multiple persons tell him that they intend on looking up him information from online sources and that they would “kill[] my wife,” “firebomb[] my house,” and “hav[e] my children raped.” The officer had multiple protestors and rioters threaten to find his residential address.
- A person threatened to kill an officer and his wife. A different person threatened to rape his wife. The person explained to the officer how he would find his address online using the officer’s name. The suspect was very specific. The officer checked his method himself online and located his home address in less than two minutes.
- An officer wrote: I was told by several protestors while standing in formation that if they would find out where I lived they would kill me and my family. They said they would rape my wife and kill my children. During the days of these frequent and regular threats, a fellow coworker had his name plate on his chest read out loud by a protester. The protester then looked up the name on his phone and immediately called out my coworkers home address based on a search. The crowd then chanted the address out loud and said they would burn his house down. They said they would burn all of our houses down.
- An individual photographed an officer’s personal vehicle leaving the precinct. Individuals have said they wanted that officer dead, threatening: “I will kill you Officer (name omitted).” Individuals have threatened to burn the officer’s house down. The officer had seen two separate vehicles watching his home. A different vehicle drove on the officer’s property around the house and appeared to be looking for access to the home. The officer found a person crouching down inspecting the officer’s property from the fence line.

The concerns expressed above, and other similar ones, do not involve a particular tie to release of a police officer’s salary. Rather they involve the hostile environment and being named as a police officer, or non-sworn police bureau employee, at all.

We do not in any way doubt or discount the genuineness of the safety concerns expressed by the employees who submitted personal safety exemption requests. And, as we held in *Petition of Kessler*, MCDA PRO 20-37 (2020), we will consider fact-specific showings that release of a particular piece of information will constitute an unreasonable invasion of privacy. In 20-37 the City made showings of active and ongoing harassment of four specific individuals and established a nexus between that harassment and the information at issue: personal cell phone numbers. We reached a similar conclusion last month relating to a non-police employee’s personal cell phone number. *Petition of Kessler*, MCDA PRO 20-41 (2020). Nothing in this order undermines the availability of this exemption in similar cases moving forward.

As to the names that remain at issue here we have confirmed that a publicly accessible national database of government employees identifies each one as an employee of the Portland Police Bureau along with his or her salary in 2019. PPB's argument to the contrary notwithstanding, the incremental changes in rank or salary between 2019 and 2020 do not meet the necessary legal standards to sustain an exemption under ORS 192.355(2).

In sum, release of employee names is not an unreasonable invasion of privacy because that list is already available. Release of employee salaries is not an unreasonably invasion of privacy because that is well-settled precedent under the public records law.

### **ORDER**

Accordingly, the petition is granted in part and denied in part. PPB is ordered to promptly provide to petitioner a copy of the name and salary table for its employees. The only information that may be redacted is that relating to undercover, or formerly undercover, officers as described in ORS 181A.825(2) and those names listed in footnote 1, which are no longer at issue.

Very truly yours,



MIKE SCHMIDT

District Attorney

Multnomah County, Oregon

### **Notice to Public Agency**

Pursuant to ORS 192.411(2), 192.415, and 192.431(3) your agency may become liable to pay petitioner's attorney's fees in any court action arising from this public records petition (regardless whether petitioner prevails on the merits of disclosure in court) if you do not comply with this order and also fail to issue within seven days formal notice of your intent to initiate court action to contest this order, or fail to file such court action within seven additional days thereafter.

**20-46**