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Portland City Attorney's Office
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Re: Petition of Alan Kessler seeking disciplinary records for all Portland Police Bureau officers holding the rank of captain or higher

Dear Mr. Kessler and Ms. Niedrist:

Mr. Kessler has petitioned this office under the public records law seeking an order requiring the Portland Police Bureau (PPB) to provide:

> copies of all disciplinary records for every individual at the Portland Police Bureau who holds a rank of Captain or higher whether or not a given matter resulted in discipline.

Petitioner requested these records from PPB and, apart from one assistant chief who consented to release of his records, PPB denied his request citing, alternatively ORS 192.345(12) and ORS 181A.830(3).

Petitioner does not dispute the general applicability of these statutes, the first of which exempts documents that are part of the process of imposing discipline on public employees, and the second exempts investigations of police officers that do not result in discipline, rather he argues that the intense present interest in matters relating to police discipline and uses of force during the unrest this summer create sufficient public interest to override the general applicability of these exemptions.

Pursuant to ORS 192.422(2) PPB has summarized for this office the nature of each responsive investigation. Based on our review of those summaries, we are satisfied that the time involved in personally reviewing all of the documents in each underlying investigation would not be of added benefit to the resolution of this matter.

For the reasons discussed below, consistent with the Oregon Supreme Court's interpretation of the public interest under these statutes, and this office's long-standing precedent, we must deny the petition.

DISCUSSION

A. Police Disciplinary Actions – ORS 192.345(12) & 181A.830(3)

ORS 192.345(12) conditionally exempts from disclosure,

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

ORS 181A.830(3) provides that,

> A public body may not disclose information about a personnel investigation of a public safety employee of the public body if the investigation does not result in discipline of the employee.

As to police officers these two statutes serve to exempt from public disclosure all records relating to personnel investigations of police officers, regardless of their outcome, unless the public interest in a specific record requires otherwise. The Supreme Court has stated that, among other interests, ORS 181A.830 "evidences a legislative intent to protect the privacy of officers whose alleged misconduct is not substantiated." *ACLU v. City of Eugene*, 360 Or 269, 295 (2016).

With respect to sustained discipline, we have long been guided by the factors set forth in *Petition of Foster*, MCDA PRO 96-31 (1997). These guidelines are, in summary:

1. Serious misconduct by a government employee should be disclosed;

2. Generally, termination from employment or other discipline for cause is serious misconduct if it is based on corruption (including theft of public property), abuse of power, misconduct that impairs the mission of the agency, or criminal behavior;

3. Less serious misconduct may require disclosure if repeated violations fairly raises the issue of imprudent management of public employees;

4. Cases evidencing systematic misconduct within a particular agency or part of an agency that shed light on the effectiveness of management may require disclosure even if, individually, the instances of misconduct are not serious;

5. Less serious misconduct may require disclosure in the public interest where circumstances raise a question of unduly harsh (or unduly lenient), arbitrary, irrational or discriminatory administration of discipline by management;

6. Lastly, public employees should not be subjected to public disclosure of disciplinary violations that do not fit into a category above where such would not significantly promote the public's understanding of the manner in which government business is carried out.

Petitioner advances the argument that, as a result of these command officer's high rank and their sway over issues of great public import in the context of this summer's demonstrations

and resulting complaints about officer conduct in response, there is a heightened public interest in their own records.

We have previously addressed the role an officer's current rank should play in evaluating disclosure of past investigations. *Petition of Sanders*, MCDA PRO 06-05 (2006). In *Sanders*, a reporter sought access to a 12 year-old disciplinary action against an officer who had subsequently risen to the rank of assistant chief. In denying that petition we wrote:

> The City correctly points out that the investigation resulted in "low-level disciplinary action taken in response to the rule violation." There is no evidence of systematic misconduct or repeated disciplinary violations. The conduct itself was not criminal in nature, and did not involve corruption in the discharge of the public's business or abuse of power. If this petition had been presented in 1997, there is no question the *Foster* criteria would not support disclosure.
>
> The only public interest implicated in this relatively minor misconduct is the high rank achieved by Assistant Chief Elmore in the nine years since the matter was closed. Disclosure would, in effect, punish Ms. Elmore for the good efforts she has made in her professional career. That makes no sense. In the absence of any public concerns about the current job performance of Ms. Elmore, maintaining the confidentiality of the discipline action is appropriate.

The records in the present case are not materially distinguishable from what is described in *Sanders*. They mostly involve 15-20 year old non-disciplinary use of force reviews, minor regulatory violations, and similar. The most recent is from 2017, but involves a minor incident relating to a vehicular accident that we readily conclude does not warrant disclosure under *Foster*. The largest concentration of records involve routine use of force reviews from periods consistent with these now-command officers being on patrol duty, reaching as far back as 1998.

As to the very small handful of incidents that have occurred within the last few years when the involved officers held command rank, none of them warrant disclosure under *Foster*, even taking rank into consideration. We resolved a similar situation involving a PPB command officer in 2013, and in so doing wrote:

> We find, and the city recognizes, that Captain Hamann's position as a command officer is a factor that weighs in favor of public disclosure. However, we agree with the city that just because an employee is in a command or high level position disclosure of an investigation is not automatic. This is especially true where allegations are unfounded, for minor misconduct, and no discipline is imposed. […] this conclusion could change in the future if there are additional sustained disciplinary findings against Captain Hamann.

Petition of Damewood, MCDA PRO 13-15 (2013). Conversely, where discipline was for potential criminal conduct by a command officer, this office and the courts have found the public interest did warrant disclosure. See, *City of Portland v. Anderson*, 163 Or App 550 (1999) (affirming this office's decision to order records released relating to a PPB captain's use of an escort service allegedly involving prostitution).

While we are mindful of the intense public interest at this moment in all matters relating to police, the current state of Oregon law is unchanged with respect to police disciplinary investigations. Unless the public interest as to any particular record requires otherwise, ORS 192.345(12) exempts from disclosure those records of completed disciplinary actions and ORS 181A.830(3) exempts records of investigations that do not result in discipline. It may well be that the legislature will choose to amend these statutes to rebalance the competing interests, but until such time as it does we may not interpret them out of existence based solely on an officer's rank. The public interest we evaluate must be as to the specific record in the context of a specific request, and not as to an entire category of records or an entire category of employees. See, ATTORNEY GENERAL'S PUBLIC RECORDS MANUAL (2019) at 32.

Consistent with our prior decisions in *Damewood* and *Sanders*, and the Supreme Court's guidance in *ACLU v. City of Eugene*, we find that the disclosure is not required as to any of the specific records at issue in this case.

ORDER

Accordingly, the petition is denied.

Very truly yours,

MIKE SCHMIDT
District Attorney
Multnomah County, Oregon

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