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

Re: Petition of Clifford Davidson challenging certain redactions and withholdings by the Portland Police Bureau regarding retired Detective Jeff Meyers

Dear Mr. Davidson and Ms. Niedrist:

Petitioner Clifford Davidson has asked this office to review redactions made by the Portland Police Bureau (PPB) in responding to a large records request. The underlying request sought materials in twenty different categories all related to now retired PPB Detective Jeff Meyers. PPB produced records, but redacted many responsive documents, and withheld some in their entirety, citing a lengthy list of exemptions. This appeal ensued.

Subsequent to the filing of this appeal, the parties conferred and were able to substantially narrow the issues presented on appeal. We appreciate the effort and professionalism demonstrated by both sides. The disputes that remain to be resolved are PPB's application of ORS 192.345(12) and ORS 181A.830(3) to discipline and investigations not resulting in discipline for Det. Myers and the PPB's application of ORS 192.355(2) to Det. Myers' performance evaluations.

For the reasons discussed below we deny the petition as to the disciplinary investigations and grant it as to any responsive performance evaluations.

DISCUSSION

A. Law Enforcement Disciplinary Investigations – ORS 181A.830(3) & 192.345(12)

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.

ORS 192.345(12) conditionally exempts from disclosure,

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

Taken together, unless the public interest requires otherwise, these two statutes exempt from disclosure all disciplinary investigations of police officers. These exemptions facially apply to the relevant records at issue here.

As PPB notes in its submission to this office we have historically evaluated the public interest in disclosure of disciplinary investigations under the factors set out in *Petition of Foster*, MCDA PRO 96-31 (1997); *Petition of Kerensa*, MCDA PRO 19-20 (2019) (holding *Foster* factors applicable to ORS 181A.830 public interest assessment). PPB applied these factors and made the decision to release a not-insignificant amount of material pursuant to the public interest. Having evaluated the rest of it, we agree with PPB's assessment that it does not rise to the level of "serious misconduct" as that term is defined in *Foster*, nor does it particularly illuminate PPB's disciplinary process. As such, we conclude that the material withheld under ORS 181A.830(3) and 192.345(12) was lawfully exempt from disclosure.

B. Information of a Personal Nature – 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 [...]

PPB asserts this exemption applies to annual written evaluations of Det. Meyers' performance drafted by his supervisors. Over the last 40 years three Attorneys General have opined on the applicability of this section to performance evaluations, with differing results.

Attorney General Frohnmayer analyzed the applicability of (now) ORS 192.355(2) to performance evaluations at length in an official 1981 opinion. Attorney General Opinion No. 8018, 41 Or. Op. Atty. Gen. 437 (1981). After canvassing the applicable caselaw, he determined that where a performance evaluation does not touch on an employee's "health, family status, personal finances or similar subjects" disclosure does not constitute an unreasonable invasion of privacy. This is because, "there is little reason for such an employee to believe that how effectively he or she performs official duties will be kept confidential." *Id.* This opinion arose in the context of a school district superintendent's performance evaluation. The attorney general noted that a different conclusion might be reached "in the case of employees performing only ministerial functions, such as clerks, secretaries and food service workers." *Id.*

A decade later, Attorney General Crookham reached a different conclusion when evaluating the applicability of this exemption to performance evaluations of Department of Human Services supervisors. *Petition of Owen*, Att'y Gen. PRO (7/28/1992). He concluded that release of performance evaluations for relatively low-level employees would be detrimental to agency moral, impair the effectiveness and frankness of the evaluations, and, as such, constituted an unreasonable invasion of the employee's privacy. That said, AG Crookham concluded there remained a significant public interest in knowing how these employees as a class were performing their jobs and ordered anonymized evaluations released.

We understand Attorney General Rosenblum to hew more closely to the Frohnmayer interpretation, citing Op. 8018 for the broad conclusion that "[i]nformation concerning the manner in which any public officer or employee carries out the duties of the office or employment generally will not come within this exemption." ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2019) at 96. And, more specifically, "[d]isclosure of a public

officer's or employee's performance evaluation generally is not an unreasonable invasion of privacy for purposes of exemption from the Public Records Law." *Id.* at 168.

Having noted this divergence in approaches, we are guided by the instruction that ORS 192.355(2) may not be asserted on a blanket basis. Rather each record must be assessed individually on its own contents and context. *Guard Publishing v. Lane County School Dist.*, 310 Or 32 (1990); *Mail Tribune v. Winters*, 236 Or App 91 (2010). In this case, having reviewed the performance evaluations for Det. Meyers submitted by PPB, we find them to be routine evaluations focused solely on how he performed his official duties. Given that Det. Meyers is retired, the particular contents of these evaluations, and the context of information already published in local media about Det. Meyers, their release is unlikely to have any detrimental effect on agency operations or cause additional embarrassment or ridicule for the involved employee.¹

ORDER

Accordingly, the petition is granted in part. PPB is ordered to promptly provide performance evaluations for Det. Meyers responsive to petitioner's initial request. This production is subject to fees, if any, not to exceed those authorized by ORS 192.324(4). As to the disciplinary investigations, the petition is denied.

Regards,



MIKE SCHMIDT
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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.

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¹ The City has stated that, if we order release of these evaluations, it would like to redact Det. Meyers' personnel number pursuant to ORS 192.355(3). This number is almost certainly irrelevant to petitioner's purpose, and it may well be that he will agree to its redaction, but we cannot endorse this redaction as consistent with the public records law. Recent Multnomah County judicial construction of this exemption found it not to cover the City's identification numbers. See, *Kessler v. City of Portland*, Mult. Co. Cir. Ct. 21CV06317, Letter Opinion of Nov. 10, 2021 (J. Thatcher) ("[ORS 192.355(3)] contains no express exemption of *all* employer-issued identification numbers. It only exempts employer-issued identification *card* numbers. Nothing in the record indicates that PHR numbers are ever used as part of a City-issued identification card.") (emphasis in original)