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Deputy General Counsel
Oregon Public Broadcasting
7140 S. Macadam Avenue
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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 Jon Bial, on behalf of Oregon Public Broadcasting, requesting review of redactions made to records released by the City of Portland

Dear Mr. Bial and Ms. Niedrist:

Jon Bial, counsel for Oregon Public Broadcasting (OPB), has petitioned this office for an order requiring the Portland Police Bureau (PPB) to release “the internal affairs investigation into Officer Joseph Webber's alleged membership in the Oath Keeper militia.” An OPB reporter, Jonathan Levinson, made the underlying public records request, which PPB denied. In support of its denial, PPB cited ORS 181A.674(3),¹ the exemption for personnel investigations of police officers that do not result in discipline. This appeal ensued.

Mr. Levinson had previously published a story discussing the Oath Keepers and information obtained from a data leak identifying members of Oregon law enforcement agencies who were members of the organization.² The Southern Poverty Law Center describes the Oath Keepers organization as follows:

The Oath Keepers, which claims tens of thousands of present and former law enforcement officials and military veterans as members, is one of the largest far-right antigovernment groups in the U.S. today.³

¹ PPB actually cited ORS 181A.830(3), however, as of January 1, 2022 this section has been renumbered to ORS 181A.674(3). No substantive changes to the law relevant to this petition accompanied this amendment. For the sake of clarity, all citations in this order are to the current numbering of the law, including in quoted passages from older opinions.

² Jonathan Levinson, Dozens of Oregon law enforcement officers have been members of the far-right Oath Keepers militia, OPB (October 15, 2021), (associated press article) <https://www.opb.org/article/2021/10/15/dozens-of-oregon-law-enforcement-officers-joined-far-right-oath-keepers-militia/>

³ Southern Poverty Law Center, Oath Keepers, <https://www.splcenter.org/fighting-hate/extremist-files/group/oath-keepers> (accessed July 8, 2022)

In May of 2022, Oath Keepers described itself on its own website as follows:

Oath Keepers is a non-partisan association of current and formerly serving military, police, and first responders (as well as “Associate Members” see below) who pledge to fulfill the oath all military and police take to “defend the Constitution against all enemies, foreign and domestic.” That oath, mandated by Article VI of the Constitution itself, is to the Constitution, not to the politicians, and Oath Keepers declare that they will not obey unconstitutional orders, such as orders to disarm the American people, to conduct warrant-less searches, or to detain Americans as “enemy combatants” in violation of their ancient right to jury trial.”⁴

Regarding Officer Webber specifically, Mr. Levinson reported that, “[a]ccording to data leaked earlier this month and reviewed by OPB, Webber — who is still a Portland police officer — is among more than two dozen current and former police officers, sheriff’s deputies, corrections officers, and members of the military in Oregon who appear to have joined the Oath Keepers militia since the group was founded in 2009.” He further states that Webber “appears to have joined” the organization in 2018 and that, based on the nature of the data leak, it is not possible to determine if most individuals included remained members as of the story’s 2021 publication date.

In support of further reporting, Mr. Levinson requested the report of PPB’s internal investigation into Officer Webber’s association with the Oath Keepers. The fact of PPB’s assertion of ORS 181A.674(3) necessarily discloses that PPB conducted an internal investigation and that Officer Webber was not disciplined as a result.

As elaborated below, given the information already in the public sphere, the Oregon Supreme Court’s decision in *ACLU v. City of Eugene* requires that we grant the petition and order the investigative report released.

DISCUSSION

A. Law Enforcement Personnel Investigations – ORS 181A.674(3)

ORS 181A.674(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 181A.674(4) provides that:

Subsection (3) of this section does not apply: (a) When the public interest requires disclosure of the information.

The requested records are, as petitioner acknowledges, subject to the exemption in ORS 181A.674(3). The dispute is whether the public interest nonetheless requires the disclosure of these records as provided in ORS 181A.674(4)(a). In making a public interest determination under this section, the Supreme Court has instructed that we “must balance the public’s interest

⁴ Oathkeepers.org, About Oath Keepers, accessed via archive.org
(<https://web.archive.org/web/20220526202342/https://www.oathkeepers.org/about-oath-keepers/>)

in disclosure against the public body's interest in confidentiality, with the presumption in favor of disclosure." *ACLU v. City of Eugene*, 360 Or 269, 280 (2016).

In *Petition of Shepherd*, MCDA PRO 17-50 (2017), this office addressed a similar case involving a request the internal investigation of three sheriff's deputies who had communicated with immigration authorities, potentially in violation of agency policy. We ordered the records released, based on *ACLU*:

One of the legislative purposes in enacting ORS [181A.674] was to protect the privacy of officers whose alleged misconduct was unsubstantiated. [*ACLU*] at 295. Here, the identities of, and any facts that would tend to reflect negatively on, the involved deputies are already publicly available. In such circumstances, the court held, "[t]he public body's interest in protecting the privacy of officers whose conduct was questioned was substantially diminished because the identity of those officers and their alleged misconduct had already been made a matter of public record." *Id.* at 299. In this case, the internal investigation reports provide context essential to understanding the actions of these three deputies and also serve to inform the public on the progression of policy and training by MCSO in the area of its interactions with ICE.

Shepherd at 2.

In the present case, the parties dispute the applicability of our long-used "*Foster* factors" for evaluating the public's interest in disciplinary investigations to ORS 181A.674. See, *Petition of Foster*, MCDA PRO 96-31 (1997). Petitioner argues that first, the factors pre-date *ACLU* and cannot survive in its wake. Alternatively, petitioner asserts that in evaluating whether or not misconduct is "serious" for purposes of the *Foster* analysis we should assess whether the *allegation* made against the employee is "serious" as, otherwise, the factors inexorably lead to a non-disclosure outcome when no discipline is imposed. The City argues that this outcome is precisely the point: there will rarely be a public interest under the *Foster* analysis where an employee is not disciplined and that is the correct outcome.

We need not resolve the extent to which *Foster* survives *ACLU* today. The relevant facts of the present case are materially indistinguishable from our application of *ACLU* in *Shepherd*. All the facts that would reflect most negatively on the involved officer have already been published in local media. ORS 181A.674, as articulated by the Supreme Court, protects the privacy of officers investigated and exonerated. As both the allegation and identity of the officer are matters of public record, their re-disclosure does not significantly invade the officer's privacy. Having reviewed the report in question, it contains nothing additional that would implicate the interests in confidentiality identified by the court in *ACLU*.

As this matter has already been the subject of reporting in a major local media outlet, we can say with confidence that there is some public interest. This interest is sufficient to outweigh to the minimal, if any, additional invasion of privacy that will be caused by release of the investigation report in this case.

ORDER

Accordingly, the petition is granted on the following terms: Officer Webber's personal contact information may be redacted pursuant to ORS 192.355(3); two sentences on page 3 of 10 beginning "There was..." and ending "...PPB." may be redacted pursuant to ORS 181A.674(3)

as they pertain to a different officer. The remainder of the 10-page investigative report and the supporting exhibit shall be promptly provided to petitioner. The release is subject to the payment of fees, if any, not to exceed those authorized by ORS 192.324(4).

Regards,

A handwritten signature in black ink, appearing to read 'MIKE SCHMIDT', with a stylized flourish extending to the right.

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.

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