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RE: Public Records Appeal

Mr. Schaper and Ms. Kraaz,

This matter comes before the District Attorney on Mr. Schaper's appeal of a denial of a public records request by the City of Springfield (City).

Mr. Schaper submitted a request for:

1. Records that indicate the total number of Springfield Police Officers who are currently on administrative leave.
2. Records that indicate the name and rank of Springfield Police Officers who are currently on administrative leave.
3. For officers who are currently on administrative leave, records that indicate the reason they were placed on leave.

On April 12, 2021, the City acknowledged receipt of the request, and issued a denial, citing ORS 192.345(12), the personnel disciplinary action exemption. On April 14, 2021, the Springfield City Attorney submitted a response to the District Attorney, again asserting that the records are exempt from disclosure pursuant to ORS 192.345(12), and further asserting exemption under ORS 192.345(1), the pending litigation exception.

On April 13, 2021, the District Attorney requested that the City provide to the District Attorney the answer to questions one and two, and to provide a summary of the reasons for being placed on leave. The City provided that information. On April 14, 2021, the District Attorney requested that the City provide to the documents constituting the reasons regarding one of the officers. The City provided two complaints. One being 17 pages, the other 181 pages, those documents are identified as follows.

Document #1 is what appears to be correspondence with the Oregon Department of Public Safety Standards and Training (DPSST), about a complaint regarding the conduct of Springfield Police Department (SPD) Chief Richard Lewis. The complaint was filed by Amanda McIntyre. McIntyre attaches multiple documents, described below:

- a. A copy of what is labeled a “BOLI” complaint by McIntyre against SPD, that appears to contain substantially the same information as in a tort claim notice filed with the City of Springfield by Amanda McIntyre.
- b. A copy of a February 20, 2021 letter from Scott McKee, purportedly addressed to Lane County District Attorney Patricia W. Perlow.
- c. A November 27, 2020 SPD memorandum to Amanda McIntyre from SPD Lieutenant Tom Rappe.
- d. A DPSST Personnel Action-Separation form regarding Amanda McIntyre.

Document #2 is what appears to be correspondence with the Oregon Department of Public Safety Standards and Training (DPSST), regarding a complaint about the conduct of Springfield Police Department (SPD) Chief Richard Lewis. The complaint was filed by Scott McKee. McKee attaches multiple documents, described below:

- a. A copy of an internal SPD memorandum from Rick Lewis to Scott McKee placing him on administrative leave.
- b. A copy of a February 2, 2019 SPD memorandum from Rick Lewis to Scott McKee regarding McKee’s administrative leave.
- c. A document labeled “background,” that appears to be a 61-page outside investigators report to the City of Springfield regarding the allegations against McKee.
- d. A copy of a March 9, 2021 letter to the United States Department of Justice outlining McKee’s complaints against SPD.
- e. An untitled document authored by McKee alleging that the Lane County District Attorney’s Office, Lane County Medical Examiner, SPD, and the State Medical Examiner, covered up a murder.
- f. A copy of an August 7, 2020 letter to Springfield City Manager Nancy Newton regarding his administrative leave.
- g. A copy of a February 20, 2021 letter from McKee to District Attorney Perlow. This appears to be the same attachment included in McIntyre’s complaint.
- h. A copy of a February 1, 2017 SPD internal investigation memorandum from McKee to Lewis regarding former SPD Officer Haltunen.
- i. A copy of a March 13, 2017 internal investigation report from McKee to Lewis regarding former SPD Officer Marco Espinoza.
- j. A copy of a December 17, 2017 internal investigation report to Lewis from McKee regarding SPD officer Pankey.
- k. A copy of a June 17, 2020 internal investigation report from McKee to Lewis regarding former SPD Officer Stone.
- l. An April, 4, 2018 internal investigation report from McKee to Lewis regarding former SPD Officer Stone.
- m. A January 23, 2020 opinion editorial titled “Plausible Deniability,” authored by McKee.
- n. What appears to be some type of internet post titled “Exposed Truths,” authored by McKee.

o. A March 13, 2017 internal investigation report from McKee to Lewis regarding a SPD dispatcher. It should be noted that this contains extremely sensitive material, including protected health information.

p. A copy of an email string between DPSST and McKee. The first email is dated March 8, 2021 from McKee to DPSST referencing his attached complaint, and requesting that the materials should be treated as “confidential.” On March 10, 2021, DPSST responds to McKee that all records he submits are considered public records under Oregon Law, and asking McKee to confirm that he wants to proceed in light of his request for confidentiality (Note: Page 2 of the DPSST complaint form states in bold type that all information provided to them is a public record. The last email is a March 10, 2021 email from McKee to DPSST telling DPSST to proceed, and again requesting that the records be redacted.

On April 14, 2021, the District Attorney’s Office requested the specific documents that SPD relied upon in placing the officers, other than Lewis, on administrative leave. On April 15, 2021, the District Attorney received a total of 5 pages of documents.

ORS 192.354 provides that the following public records are conditionally exempt from disclosure:

(12) a personnel discipline action, or materials or documents supporting that action.

Records conditionally exempt pursuant to ORS 192.345, are subject to release if the “public interest requires disclosure in the particular instance.”

Oregon has “a strong and enduring policy that public records and governmental activities be open to the public.” *Jordan v. MVD*, 308 OR 433(1989). Disclosure is the rule and exemptions from disclosure are to be narrowly construed. *Jordan, supra*.

The conditional nature of the exemptions contained within ORS 192.345, have been described as:

“... disclosure decisions should be based on balancing those public interests that favor disclosure of governmental records against those public interests that favor governmental confidentiality, with the presumption always being in favor of disclosure.” *Turner v. Reed*, 22 Or App 177(1975)

So what are the competing interests in this particular case? Mr. Schaper argues that the public has an interest in knowing how many officers are on leave and for what reason, in effect arguing that any time an officer is placed on leave, the records should be disclosed. This argument fails to address the requirement that it be demonstrated that the public interest in disclosure exists in the particular circumstance. Mr. Schaper further argues that the number of officers on leave could affect readiness levels. There is no evidence to support this.

Lastly, Mr. Schaper argues that “a police department must have the faith and confidence of the people who live in the community. Transparency and trust are key elements to any relationship.” Once again, this argument asserts that in effect ORS 192.345(12) should

not apply to police departments. This argument ignores the plain wording of the statute, and Oregon case law.

The above being said, it must be stated that Mr. Schaper does not have access to the documents. It cannot be expected that a person be able to put forth a specific argument based upon the contents of the records.

The primary argument advanced by the City is that ORS 192.345(12) should exempt the records from disclosure until the investigation is complete, and a decision can be made regarding discipline. The City argues that this is necessary because ORS 181.830(3) exempts such records from disclosure if “the investigation does not result in discipline.”

ORS 181A.830(3) provides:

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

ORS 181A.830(4) provides that the prohibition of (4) does not apply:

(a) when the public interest requires disclosure.

The City’s argument is not persuasive. Much like Mr. Schaper’s arguments for across the board disclosure, the City asks for a blanket exception to disclosure while an investigation is pending. The legislature could have easily and clearly provided such an exception. It has not.

The City also argues that the records are exempt from disclosure under ORS 192.345(1). This section protects records which pertain to litigation the public body is currently involved in, or is reasonably likely to occur. This section is subject to the same public interest balancing test as described above.

When applying the two sections cited by the City, the public interest remains the same. However, the interest of the public body in non-disclosure may be different. Presumably, the legislature did not intend to protect the public body from litigation, but rather to protect the body’s ability to investigate and defend itself. The City does not set forth any particular prejudice to the interests from disclosure.

In reaching this decision, April 14, 2021, I ran a Google search of main subjects related to the material outlined above (McKee/McIntyre), and noted there are multiple news stories from established local news outlets, a YouTube video, and a copy of McKee’s tort claim notice. There has clearly been significant publicity of this matter.

On balance, except as noted below, I find that the public interest in disclosure outweighs the need for confidentiality, and the records are ordered disclosed.

This decision however has several exceptions.

Items 2(h), 2(l), 2(j), and 2(o) above appear to be internal investigation reports that have nothing to do with the persons currently on administrative leave, nor with the McKee/McIntyre matter. These reports contain, among other things, interviews with private citizens, and information obtained by McKee from the Federal Bureau of Investigation (FBI), including an agent's name and cell phone number. Item 2(o) in particular involves a non-sworn employee and appears to have been included by McKee simply to embarrass or humiliate this employee. The information is extremely sensitive and of a personal nature, such that no person would like to have such information disclosed about themselves, and such information is generally protected from disclosure by federal law. In fact McKee acknowledges the personal nature of the information in his March 8, 2021 email to DPSST. McKee also acknowledges the information is HIPPA protected, and discloses the information to DPSST, knowing it will become a public record.

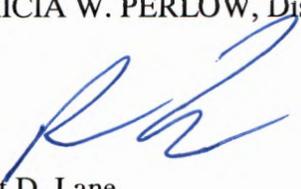
However, the actions of a private citizen do not change the City's obligation to protect privacy, and it does not change how the District Attorney must rule in the event of an appeal. That the public may now obtain this information from another source does not create an obligation on the City to disclose. Therefore, in these instances, I find that the public interest in the disclosure of the documents does not override the need for confidentiality, and they are not ordered to be disclosed.

Further, contained within the document provided on April 15, 2021 are two pages of emails between the City Attorney and the attorney for an officer. The City asserts the attorney work-product exception to disclosure, and protection under ORS 659A.218. Therefore, pursuant to ORS 192.355(9)(a), these documents are exempt from disclosure. The remaining 3 documents provided on April 15, shall be disclosed.

Pursuant to ORS 192.411(2), the City shall comply with this order within 7 days of issuance, unless it issues a notice of its intention to institute proceedings in Lane County Circuit Court.

Sincerely,

PATRICIA W. PERLOW, District Attorney



Robert D. Lane  
Deputy District Attorney