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Re: City's response to appeal by Ardeshir Tabrizian submitted on September 19, 2022  
appealing the City of Salem's denial of access to certain records

Dear Ms. Clarkson:

Thank you for the opportunity to provide a response on behalf of the City of Salem to Mr. Tabrizian's appeal of the City of Salem's denial of access to certain records he requested.

On August 11, 2022 Mr. Tabrizian submitted a public records request. He sought several records related to former Salem Police Department Deputy Chief Steven Bellshaw. Some of the requested materials were provided - certain communications with Mr. Bellshaw's attorney, and the email log. Disclosure of other records was denied, the legal basis for which was provided. Responsive materials that were not provided include two administrative leave memos and certain communications with Mr. Bellshaw's attorney.

For the reasons discussed below, the withheld records are properly exempted from disclosure in response to Mr. Tabrizian's public records request.

The requests and the City's summary responses are below, followed by a more detailed analysis.

1. The letter to Steven Bellshaw notifying him of his placement on administrative leave, with supporting documentation

City's Response: There are two responsive documents. Both are part and parcel of the Professional Standards Investigation matter, and are exempt from disclosure under ORS 192.355(9) and ORS 181A.674.

2. Any and all communications between City of Salem officials and any legal representative of Steven Bellshaw.

City's Response: Certain materials were provided. Others are exempt from disclosure under ORS 192.355(9), ORS 40.225, and ORS 40.190; *also* ORS 192.355(4) (confidentiality), and ORS 192.345(2) (trade secret).

3. Email log of Steven Bellshaw's work emails sent and received in the final 60 days of his employment.

City's Response: The city created such a log to include the requested information to the fullest extent possible, and this was provided.

### Statutes

The statutes relevant to this matter are set out below.

ORS 192.345(2) Trade Secrets. "Trade secrets," as used in this section, may include, but are not limited to, any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within an organization and which is used in a business it conducts, having actual or potential commercial value, and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it.

ORS 192.355 Public records exempt from disclosure. The following public records are exempt from disclosure under ORS 192.311 to 192.478:

(4) Information submitted to a public body in confidence and not otherwise required by law to be submitted, where such information should reasonably be considered confidential, the public body has obliged itself in good faith not to disclose the information, and when the public interest would suffer by the disclosure.

(9)(a) Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law.

(b) Subject to ORS 192.360, paragraph (a) of this subsection does not apply to factual information compiled in a public record when:

(A) The basis for the claim of exemption is ORS 40.225;

(B) The factual information is not prohibited from disclosure under any applicable state or federal law, regulation or court order and is not otherwise exempt from disclosure under ORS 192.311 to 192.478;

(C) The factual information was compiled by or at the direction of an attorney as part of an investigation on behalf of the public body in response to information of possible wrongdoing by the public body;

(D) The factual information was not compiled in preparation for litigation, arbitration or an administrative proceeding that was reasonably likely to be initiated or that has been initiated by or against the public body; and

(E) The holder of the privilege under ORS 40.225 has made or authorized a public statement characterizing or partially disclosing the factual information compiled by or at the attorney's direction.

## Discussion

### *Overview*

Exemptions under ORS 192.345 are conditionally exempt from disclosure, unless the public interest requires disclosure in the particular instance. Exemptions under ORS 192.355 are not conditionally exempt. However, ORS 181A.674(4)(a) provides that the exemption available under 181A.674(3) does not apply when the public interest requires disclosure of the information. ORS 192.355(9) does not appear to require a balancing test, and the requestor did not provide information in his original request as to why disclosure is in the public interest other than in support of his fee waiver request. On this point, he stated only that the information gained from this request will be disseminated to the public and help inform the community about its police department.

### *Specific Exemption – ORS 192.345*

One document would be covered by ORS 192.345(2) – the cost of COBRA to former employees. The City considers this information proprietary in nature. It is given only to employees and former employees. A broad public release of this information would not benefit the public, but *would* benefit competitors, who would be able to reverse engineer the data and adjust their own rates accordingly. The release of this information would actually harm the public interest because it could lead to increased rates and lack of competition. It would also affect future procurement efforts by the City which is a detriment to the City, public employees, and the public that funds the City's operations. Finally, insofar as this was a factor considered by the City in negotiations, it is also exempt from release.

### *Specific Exemption – ORS 192.355*

In applying ORS 192.355(9), the City relies on ORS 40.225 (attorney-client privilege and attorney work product), ORS 40.190 (negotiations), ORS 181A.674(3) (formerly 181A.830) (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), and ORS 192.355(4) (Confidential Submissions).

Among the emails that were withheld is one that includes only Mr. Bellshaw's personal phone number and personal email address. This was provided in the course of negotiations, and should be exempt under ORS 192.355(9) and 40.190. Additionally, this was personal information of a public employee and is exempt from disclosure under ORS 192.355(3).

The provisions of ORS 181A.674(3) *prohibit* disclosure of personnel information regarding a public safety employee if the investigation does not result in discipline. ORS 181A.674(4) allows disclosure when (a) the public interest requires disclosure, (b) when the employee consents, (c) When necessary for an investigation by the public body or DPSST, (d) when required under ORS 181A.667 (public body must provide the records to another law enforcement agency as part of a pre-offer of employment investigation), or (e) when the public body determines that nondisclosure of the information would adversely affect the confidence of the public body. These elements are not met in this situation.

There are several documents prohibited from disclosure by ORS 181A.674(3) - which are administrative leave memos maintained as part of the Professional Standards Investigation matter in accordance with SPD's procedures and practices, and the arbitration decision which has already been considered by the District Attorney's Office.

The administrative leave memos were issued in the course of the Professional Standards Investigation matter, which is subject to this exemption. Professional Standards investigations are sensitive. Additionally, release of these records could be interpreted as a waiver of the entire exemption, which the City declines to do at this time. Disclosure of these documents will harm the public interest because release of this type of information may dissuade other individuals from becoming involved or fully cooperating in future investigations because their role and their feedback would become public. The Salem Police Department must be able to evaluate its employees, and proceed as appropriate to the situation, whether with discipline or not. Finally, employees on leave generally consider this fact a private personnel matter and would reasonably expect that the general public not be given visibility into their employment records. No information about the underlying personnel matter(s) has been made public, nor do they concern the types of conduct discussed in several of the public records cases and opinions in which disclosure was required (*e.g.* use of force, drug use, DUIs, misuse of resources).

The Attorney General's Public Records Manual ("Manual") states that "some prohibitions on disclosure expressly provide for public disclosure in certain circumstances. For example, a police department may not disclose its personnel investigation of a police officer if no discipline results, but must disclose that investigation if the public interest requires disclosure or if the department determines that nondisclosure would adversely affect the public's confidence in the department. ORS 181A.830(3)-(4)." (Pg. 30). One main case discussed in the Manual is *ACLU of Oregon, Inc. v. City of Eugene*, 360 Or 269, (2016), rev'g 271 Or App 276, (2015). "The Supreme Court held that portions of an internal police investigation of alleged misconduct that were reviewed by a civilian review board were not exempt under ORS 181A.830 because the public interest required disclosure. The court explained that the interest in disclosure was particularly significant in cases of alleged misuse of force by police officers, and that evidence established the public had a particular interest in whether the civilian review board properly oversaw the internal investigation." Pg. C-16. The circumstances in *ACLU* that led the court to find a particularly strong public interest are absent here. No review board has reviewed these materials, and they are not otherwise public.

The Requestor correctly notes that an investigation was opened. The investigation ended when Mr. Bellshaw decided to retire. The exemption from disclosure mandated under ORS 181A.674(3) is triggered if the investigation does not result in discipline, which is the case here. There is no requirement under ORS 181A.674.(3) that an investigation be “completed”, particularly where an employee has retired.

Communications between the City and Mr. Bellshaw's attorney are exempt from disclosure under ORS 192.355(4), 40.190, 40.225, and 192.355(2).

Exemptions under ORS 192.355(9)(a) are available when the information is described as confidential, exempt, privileged, not subject to inspection or that the entity may or shall not disclose the information. Manual at Pg. 110. That is precisely what is provided by ORS 40.190 (OEC 408). This statute provides that evidence of conduct or statements made in compromise negotiations is likewise not admissible in legal matters.

If an agency has discretion related to records, this should be evaluated on a statute by statute basis. Manual at Pg. 111. Applied here, the protections of ORS 40.190, which protects negotiations, should be upheld.

ORS 40.225 protects documents that are subject to the attorney-client privilege. Generally speaking, communications by an attorney on behalf of a client are privileged, and therefore records subject to these provisions are exempt from disclosure under ORS 192.355(9)(a) and 40.225. Communications made for the purpose of facilitating the rendition of legal advice are also covered by this privilege. Manual at C-15; Manual at 167; *Port of Portland v. Or. Ctr. for Env'tl. Health*, 243 P.3d 102, 238 Or.App. 404 (Or. App. 2010). The Manual further discusses the fact that parties can have a common interest even if they might also have adverse interests. This is precisely the situation at issue here. The Manual also describes the attorney-client privilege as available where the communications were not intended to be disclosed to third persons. Manual at Pg. E-15. At the time of these communications, Mr. Bellshaw was an employee of the City. The City Attorney's office communicated with Mr. Bellshaw's attorney for purposes of discussing a possible resolution in the pending investigation and for the purpose of providing advice to City officials. The parties had a common interest in resolution, even if their interests may have been adverse in other ways.

Separately, there are a few documents dated after the separation agreement was executed. These relate to Mr. Bellshaw's personal financial information. They are properly covered by ORS 40.225 because they were for the purpose of providing advice to City staff about City staff's actions and possible claims by Mr. Bellshaw. Additionally, to the extent the materials include highly confidential information (e.g. social security number, bank account numbers, etc.) it would properly be considered an unreasonable invasion of privacy to release this information to the media and the general public. Finally, interactions concerning personal finances, not involving public funds, should not be considered a matter of public interest.

The available exemption for confidential submissions is also properly applied here. Ongoing settlement discussions subject to OEC 408 reflect a condition and/or understanding that the discussions were confidential. *See* Manual at Pg. 103. Further, every draft of the separation

agreement that was exchanged included the provision that the parties would not discuss the terms of the agreement with third parties. This is properly interpreted as including the negotiations that resulted in the terms of the final agreement, and reflect the City's agreement not to disclose those negotiations, which were exchanged with a full expectation of confidential treatment pursuant to OEC 408 and therefore also covered by ORS 192.355(4)(confidential treatment).

The City contends that the release of any material that is privileged could result in an argument that the privilege was waived as to all materials that are privileged. The City declines to agree to such a waiver, and contends that a complete waiver surely cannot be the intent of the public records laws.

#### Additional Considerations

The City has worked diligently with its available resources, actively worked on this matter and addressed it in as timely a manner as possible. The City has not mishandled this matter, notwithstanding Mr. Tabrizian's dissatisfaction with not receiving certain requested records. As discussed above, the points of public interest offered by the requestor are not sufficient to override the application of the available exemptions to the documents that were withheld.

In addition to the above, the City contends that release of negotiations between parties would have a wide-ranging and substantial chilling effect on the business of the City in many different areas, such as litigation, handling of tort and other claims, resolving matters informally where the parties desire to do so, risk management issues, and others.

The amount to be paid to Mr. Bellshaw was a matter of negotiation, the process of which is protected under state law. The City considered various factors, and arrived at a mutually agreeable figure that was reasonable based on Mr. Bellshaw's experience and the circumstances. Providing details of the incremental back-and-forth would not aid the public and in fact would hurt future negotiations of all kinds. If parties negotiating with the City cannot rely on the legal protections generally available, and must anticipate every email, every question, every point and counterpoint to be made widely available to the general public, this would severely limit the City's ability to effectively and efficiently manage its affairs, and would lead to lead to an increase in litigation and other costs.

Evaluation of the public interest in allegations of possible misconduct are properly balanced in this instance with the fact that the investigation had not been completed when Mr. Bellshaw retired.

The City has consistently declined to provide information about employees being placed on administrative leave. This almost always relates to a sensitive personnel issue, subject to investigation and appropriate conclusion whether that involves discipline or not.

Even if the District Attorney's Office were to accept the requestor's background of this matter, this actually hurts and does not help the analysis of the appeal. The City has consistently fairly interpreted and applied the public records laws. Disclosure of the records that have thus far been withheld would impair the City's ability to effectively investigate and manage personnel matters.

Even if there has been a handful of emails from the public about this matter, that is not reflective of the City as a whole and is not determinative in this case. The City must exercise its judgment and steward potential legal matters in the best interests of the City.

Mr. Tabrizian asserts that ORS 181A.674 was meant to protect police officers when an investigation does not substantiate allegations. The Oregon Court of Appeals has found the statute was established by "a legislative intent to protect the privacy of officers whose alleged misconduct is not substantiated." If that is correct, then that is in fact the case here – there are no substantiated findings related to Mr. Bellshaw.

### Conclusion

For the reasons set out in this letter, the City of Salem asks that you deny Mr. Tabrizian's appeal of the denial of access to the records discussed above. Alternatively, if you conclude that any of the records must be released, the City contends that certain redactions would be appropriate.

To allow full review of the City's partial denial of disclosure of certain records, you have requested access to the records sought by Mr. Tabrizian. I will separately provide you with a copy of the information for this limited purpose. In doing so, the City is not consenting to the further disclosure of this information, but expressly reserves and does not waive any available privileges and asserts that the information is exempt from disclosures for the reasons set forth herein.

Thank you for your consideration of matter. Please let me know if there is any additional information you would like from the City of Salem regarding this matter.

Sincerely,



Michelle Teed  
Assistant City Attorney

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