

Salem REPORTER

Local News That Matters

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Paige Clarkson
Marion County District Attorney
Salem, Oregon

May 3, 2023

PUBLIC RECORDS PETITION – City of Salem/DEA records

Dear Madam District Attorney:

Please consider this a petition under the Oregon Public Records Law. Salem Reporter asks that you issue a Public Records Order compelling the city of Salem to release unredacted versions of public records and to disclose other public documents that may be in the city's custody.

Salem Reporter filed a public records request via the city of Salem records portal on April 6, 2023, subsequently referenced by the city as #P026948-040623. That request:

**The most recent MOU or other agreement between the city of Salem/Salem Police Department and the U.S. Justice Department/DEA concerning joint task force participation or related shared arrangement.*

**All communications between any employee of SPD and any official of DEA from March 28, 2023, through Saturday April 1, 2023, in any manner related to the accident involving the DEA agent. The intent is to determine what alert, notification or other information was provided to the agency that is not participating in an investigation of the accident and to determine if DEA was given any preferential access to information.*

**All records related to the SPD press release issued March 31, 2023, concerning the fatal bicycle accident. The intent is solely to determine the history of this press release, who requested it be released, and what role if any the DEA or any other arm of the U.S. Department of Justice had in reviewing or approving the press release. Please note this request does NOT seek information about the investigation itself - only the circumstances surrounding the issuance of a public statement.*

**Any record held by SPD that documents the request to the Keizer Police Department to take over investigation of the March 28 accident. The intent is to establish when the request was made, to whom, and what explanation was provided.*

On April 28, 2023, the city of Salem notified Salem Reporter that it had "completed processing" the request and provided seven documents. Redactions were made in nearly every document. The city did not indicate that it was withholding any documents responsive to the request.

The city asserted three claims to justify the redactions:

"All redactions are pursuant to ORS 192.345(3), except for the following: redactions of the identity of any federal law enforcement agents is made pursuant to 5 U.S.C. §552(b)(7)(F);

redactions of the identity of any Salem Police Department personnel is made pursuant to ORS 181A.825(2)."

At our request, the city elaborated on the claims by email on Tuesday, May 2, assigning exemption claims to specific documents:

- *"20230428094311481_Redacted_.pdf*
 - o *The redaction is related to the ongoing investigation*
- *Email_Redacted_.pdf*
 - o *The redaction is related to the ongoing investigation*
- *Message_from_SPD_to_DEA_3_28_2023 redacted*
 - o *The redaction for the recipient is based upon the federal exemption we cited*
 - o *The Photo redaction was based upon this being an ongoing investigation*
 - o *The sender of this message is not disclosed based upon the sender being an undercover officer*
- *PF_-_Salem_Police_Department_-_FY23_SA (document)*
 - o *The signature block on page 3 is related to the federal exemption we cited*
 - o *The redaction on page 5, line numbered 1. Grantee Name and Address: is based upon the officers being undercover"*

We recognize the policy of your office to in every instance allow agencies to withhold records regarding a criminal investigation regardless of the public interest. We anticipate that your policy won't change in this circumstance, but we feel that the public interest will be served with the creation of this record and your subsequent order.

FACTUAL BACKGROUND

On March 28, 2023, 53-year-old Marganne Allen was riding her bicycle south on High Street, leaving her state job for her afternoon ride home. High Street is a common route for cyclists traveling from downtown to areas of south Salem.

According to accounts, Ms. Allen was riding downhill when a pickup truck driven by an on-duty U.S. DEA agent crossed into her path. Pavement markings later showed that the agent did not instantly stop, but instead pulled through the intersection and parked next to a curb at the southeast corner of the intersection of High and Leslie Streets. The DEA agent's path along Leslie Street was controlled by a stop sign. The stop sign would indicate Ms. Allen had the legal right-of-way at that intersection.

In a press release on March 31, 2023, the Salem Police Department declared, "No Salem Police employees were present at the time of the crash."

Dispatch logs show that medics, police and fire crews were dispatched to the scene at 3:44 p.m. They arrived in just a little over three minutes.

Records and city statements establish that an undercover Salem police officer took 24 photos of the scene – a crime scene – and almost immediately electronically transferred them to a DEA official. The photos were sent at 4:08 p.m. – 21 minutes after first responders arrived on the scene. It is likely Ms. Allen was still being tended at the scene. Disclosed records do not indicate when the undercover officer arrived at the scene or why he was there.

Ms. Allen succumbed to her injuries hours after the collision. The Salem Police Department did not release information about the accident or identify the driver until one day later. The release said the driver of the pickup truck was Samuel Landis, 37. No other identifying

information was released. The release said the police department's Traffic Team was investigating. The release did not refer to the accident as a criminal act. There was no description of the investigation being criminal in nature.

On March 31, 2023, the Salem Police Department in a second press release disclosed that Mr. Landis "is a special agent with the US Drug Enforcement Administration and was on duty at the time of the collision." The release said there was a "long-established partnership through a task force" between Salem Police Department and the DEA. As a result, the police department asked the Keizer Police Department to take over the investigation. The release did not refer to the accident as a criminal act. There was no description of the investigation being criminal in nature.

In October 2022, the city of Salem and DEA entered into a contract for staffing a drug task force in Salem. Under terms of the contract, the Salem Police Department was to assign three officers to the task force. The contract specifies that the Salem officers "will be under the direct supervision and control of DEA supervisory personnel assigned to the Task Force."

OREGON PUBLIC RECORDS LAW - THE BASICS

Oregon law for more than half a century has provided citizens the right to see government documents. Over and over again, appellate courts have described the intent of that law and its essential purpose of providing oversight of government and public officials. Such oversight is meant to detect corrupt or unacceptable practices, to allow a full understanding of government practices, to ensure fair treatment of all before the government and to ensure fundamental trust in public institutions that exercise tremendous power.

"Writings coming into the hands of public officers in connection with their official functions should generally be accessible to members of the public so that there will be an opportunity to determine whether those who have been entrusted with the affairs of government are **honestly, faithfully and competently performing** their function as public servants," our appellate courts have ruled [emphasis added].

The appellate courts have concluded that "the burden is cast upon the agency to explain why the records sought should not be furnished" and if competing interests in disclosure and nondisclosure are of equal value, "the public's interest in disclosure predominates."

That public interest is heightened regarding law enforcement, particularly those in leadership roles.

"The public interest in the transparency of government operations is particularly significant when it comes to the operation of its police departments and the review of allegations of officer misconduct." (360 Or 269 (2016))

THE EXEMPTION CLAIMS

FOIA - 5 U.S.C. 552 (b)(7)(F)

The city asserts this exemption to redaction of "the identity of any federal law enforcement agents."

The exemption cited is an element of the federal Freedom of Information Act. FOIA applies to federal agencies and federal officials. The city of Salem is not a federal agency and is not governed by FOIA.

The city attempted to apply this exemption to the name of the DEA special-agent-in-charge who signed the October 2022 agreement. The discretionary federal exemption allows withholding of information if disclosure "could reasonably be expected to endanger the life or

physical safety of any individual.” The city at our request reviewed that claim and reversed its position as to the contract document. We appreciate that consideration and amendment. The city did not, however, revoke that FOIA claim as justification for two other critical redactions.

In the document provided under the title of “Message from SPD to DEA 3.31.2023,” the city redacted the recipient’s name in a message to a DEA employee that inquired about how the agent involved in the traffic collision was doing. In the document provided under the title of “Message from SPD to DEA 3.28.2023,” the city redacted the identity of the DEA employee receiving the 24 scene photos.

The redactions are not legally justified. The city of Salem cannot invoke FOIA for its records.

The identity of the receiving DEA employee is critical to public understanding of who was being contacted within moments of this deadly accident and later showing concern for the suspect in what Salem officials now say is a criminal investigation. The community deserves the full record of these exchanges.

ORS 181A.825(2)

This statute prohibits a public agency from disclosing information about an employee acting in an undercover capacity.

The city appears to apply this exemption to the two exchanges with DEA officials - Message from SPD to DEA 3.31.2023 and Message from SPD to DEA 3.28.2023. We acknowledge the restriction but we ask that your office conduct an in-camera review to verify that the redacted information regarding Salem Police Department officers in fact concerns undercover agents. If the identity of the undercover officers has been revealed in public court filings, whether state or federal, the claim is moot.

ORS 192.353(3) – criminal investigatory information

The exemption allows – but does not REQUIRE – a public body to withhold from disclosure “investigatory information compiled for criminal law purposes.” The exemption applies only if there is a “clear need” to withhold such records. The exemption is not absolute – disclosure of “investigatory information” can still be required to serve the public interest.

The statute requires a balancing to assess whether the public interest in a particular instance requires disclosure. The city of Salem has produced no evidence that it met its obligation to perform such an analysis.

In such balancing assessments, the law directs public bodies such as the City of Salem to always lean towards disclosure.

“The public body must balance the public interest in disclosure against the competing interest in confidentiality. ***The law presumes that the public interest favors disclosure.***” [Attorney General’s Public Records Manual, emphasis added]

“The public’s interest in disclosure encompasses the public’s interest in information about the manner in which public business is conducted and the right of the public to monitor what officials are doing on the job.” (Defense of Animals v. OHSU)

The state gives clear guidance to public bodies on weighing these interests.

“This involves looking to the exemption at issue and any case-specific facts, including the records themselves. Second, the public body should weigh those interests and determine which one predominates, with the presumption in favor of disclosure.” [AG Manual]

That work requires “analyzing the case-specific facts” and not just reaching a summary judgment. This involves “considering the importance of the particular governmental activity at issue; **how high-profile the matter is**; whether disclosure would impede government functions; **whether disclosure would help the public better monitor public business**; and the effect of disclosure on any privacy interests.” [AG Manual, emphasis added]

The Salem Police Department itself tells the community of the value of transparency. The agency’s transparency web page promises such to the community: “By openly sharing data, policies, reports, and other information that directly impacts the public, we strive to engage residents in knowledge-sharing, **while demonstrating openness and accountability.**” [emphasis added]

The agency’s Strategic Plan notes that “instilling a culture of transparency and accountability is an essential means to legitimacy.” Such transparency is developed in part, the plan says, with **public communications “emphasizing relevancy and timeliness.”** [emphasis added]

A threshold issue is whether the criminal investigatory exemption applies to the records sought by Salem Reporter. To apply, the documents the city seeks to protect must be compiled for review.

Turning to the records at issue, there is a question whether what is being conducted is, in fact, a criminal investigation.

As noted, the Salem Police Department has never referred to the investigation as such. In its first press release, the agency said its traffic unit was handling the investigation – not detectives assigned to criminal investigations.

That is clear in the various drafts of the press release issued on March 31. Deputy Chief Skip Miller in his proposed language describes this as an “ongoing **collision** investigation.” [emphasis added] The district attorney in an email chain regarding that press release proposed referring to the investigation as “an on-going matter.”

If this is a traffic or “collision” investigation, the criminal investigatory exemption does not apply and the redactions are not legally justified.

But even if the records at issue here are now belatedly considered criminal law documents, there are two reasons the exemption claim should not stand.

First, the exemption can be applied “only so long as there is a clear need to delay disclosure.”

Second, the public interest in these records is compelling and overrides the exemption claim.

Concerning the “need to delay,” the city of Salem has made no showing of such a need. It simply asserts the exemption. The law requires more careful attention to the law than that.

Consider the circumstances. There is one possible suspect – a federal drug enforcement agent. He has training in criminal investigations. He knows what evidence there is and can be found. His agency was provided crime scene photos almost immediately after the accident – an extraordinary disclosure. There is no risk that the suspect would flee. There is no risk at this point that the suspect can conceal evidence. This is not a “whodunit.”

As to the public interest, the purpose of records disclosure is key here. As the courts have said, citizens have an “right in information about the manner in which public business is conducted” and to monitor what “officials are doing on the job.”

That is precisely the issue here.

The records sought are part of the record of how the Salem Police Department and its law enforcement allies “conducted” their “public business.” They are pieces of the puzzle about that conduct.

The issue of “conduct” concerns in part the pace of this collision investigation. The investigation started March 28 and was delegated to the Keizer Police Department on March 31. The collision involved just two individuals – the victim and the driver. The collision involved a single scene – the intersection. In contrast, the Salem Police Department recently handled the investigation of a fatal freeway shooting involving multiple witnesses and a large crime scene. The agency concluded that investigation in just nine days.

By comparison, the collision investigation apparently remains unfinished after nearly five weeks. Every document sought is one piece of the puzzle about why that is. The pacing raises questions about whether police have “slow walked” their work to delay or even avoid prosecution of a fellow law enforcement officer. The close ties between police and the DEA is captured in the March 31 text message in which an undercover police officer asks, “How is Samuel doing?” That police are asking about the status of a suspect is extraordinary. But the response is even more revelatory, when the DEA employee responds that the suspect “was pretty angry though about his name and age in the press release.” That a law enforcement agent would be angry about routine disclosure of information and that the anger would be shared with an agency involved in the collision investigation belies the cozy relationships in play in this matter.

The records also address in part what an undercover Salem police officer is “doing on the job” – a legitimate disclosure. By concealing certain information, the Salem Police Department is shielding documents about that officer’s role.

Recall that the Salem Police Department asserted in its March 31 press release that “no Salem Police employees were present at the time of the crash.” If that is accurate, the presence and conduct of the undercover Salem police officer is of significant public interest. Why?

An undercover officer is assigned to drug investigations. The officer would not be assigned to a collision investigation. If the officer wasn’t already on the scene, contrary to the agency’s representation, then what was he doing there?

More importantly, why was an undercover officer taking 24 photos of a crime scene and then dispatching them to the agency employing the suspect? The officer had to arrive at the scene, take multiple photos and dispatch them to the DEA – all within 21 minutes. That suggests an urgency to get crime scene information to the DEA.

As your office has stated many times, disclosure of evidence outside of an investigation is not allowed. The undercover officer contravened that practice. Who authorized this officer to disclose evidence to the DEA? Was this officer acting under the direction of DEA masters? For what possible purpose would crime scene photos be shared with an outside agency? And the speed of the delivery is breathtaking – this officer acted within minutes of arriving on the scene of a deadly collision.

This conduct is compounded by the city of Salem’s unexplained decision to belatedly disclose key information about the suspect. There is little doubt that investigators knew moments after arriving at the scene that the suspect was a DEA agent. A city officer working

with that agent, after all, was on the scene in moments. The initial press release, issued the day after the accident, made no mention of a DEA agent.

In fact, the city concealed from the community for three days that highly relevant fact. That a law enforcement agent was the suspect was material information. The city concluded so by issuing its unusual second press release finally providing that information – three days after the collision. It also kept from the public until a Friday evening dispatch that the city itself was in a partnership with the DEA. Turns out, the city is reliant for funding from the DEA through that partnership. Asked the reason for the second press release, the Salem Police Department declined to explain.

Another element of public agency “conduct” concerns the redactions used to shield information about the “official request” that the Keizer Police Department investigate. The redacted element of the 6:12 a.m. text message from Skip Miller to “Adam” likely contains crucial information about what the city of Salem knew and why it was seeking an outside investigation.

In sum, the public interest in this instance demands disclosure. The city of Salem should not be allowed to conceal relevant information about its conduct. The apparent collusion between the Salem Police Department and the DEA warrants the fullest disclosure. That includes identifying who the undercover officer was, what photos were shared and to whom they were sent are essential in apparent violation of police and prosecution protocols regarding evidence. The DEA had no more legal right to that information than the people of Salem. That Salem police would share confidential information with colleagues at a federal agency – which has zero jurisdiction in collision investigations – but not with the community only underscores concern about possible and inappropriate collusion.

ADEQUACY OF RECORDS SEARCH

The city of Salem advised Salem Reporter that it would take more than \$1,000 in labor to search and produce responsive records. In the end, just seven documents were provided. A close review raises questions about whether the city of Salem diligently performed the search required under the Oregon Public Records Law.

One of the primary objectives of Salem Reporter’s public records request was to determine under what circumstances the Salem Police Department released its March 31 press release. Why did the agency decide this was necessary? Our request sought to answer that with public documents, as we outlined to the city of Salem: “The intent is solely to determine the history of this press release, who requested it be released, and what role if any the DEA or any other arm of the U.S. Department of Justice had in reviewing or approving the press release.”

Not a single record was produced to address that matter. To believe the city, the idea of a press release emerged at 12:55 p.m. on Friday, March 31, when Deputy Chief Skip Miller sent an email with a draft of the statement.

There is not a single email message provided regarding the need for such a statement.

There is not a single text message provided regarding the need.

There are no documents provided from Miller’s own files, no handwritten notes, nothing at all about this statement.

There are no documents provided from Angela Hedrick’s own files, no handwritten notes, nothing at all, about this statement.

There is not a single record provided reflecting any consultation with the DEA regarding disclosing the driver's connection to the agency.

The request also sought to obtain records to trace the evolution of transferring this investigation to the Keizer Police Department.

Mr. Miller refers in a text message to "official request for assistance" but nowhere in documents provided is there any record of such an official request. Transferring a criminal investigation into a death would seem a significant event. Yet, the city of Salem is representing that there is not a single record of such a request.

Concerning "Message from SPD to DEA 3.28.2023," the city of Salem has provided no other record than the text message containing photos. No document provided contains what would seem customary information - "Here are the photos you wanted" or "I thought you could use these" or some explanation for the content. This suggests that not all documents related to the transmission of these photos have been provided - including any internal Salem Police Department record later documenting the transmission and information regarding the circumstances.

SUMMARY

The city of Salem's efforts to shield vital information about its conduct in a high-profile collision investigation is contrary to the public interest.

Regarding the redacted documents, the city has made no showing of a "need" to delay disclosure of the information from these records. The city has made no showing that it ever considered whether there is a public interest.

Instead, the record suggests only agency self-interest.

We ask that you issue a Public Records Order with the following findings:

*That use of FOIA as a basis for exemption is not lawful and information redacted based on that claim must be disclosed.

*That the identity of undercover officers may be withheld only upon evidence that officers are, in fact, undercover officers.

*That the criminal investigatory exemption does not apply to information gathered in a collision investigation.

*That, in the alternative, the public interest in honest police work overrides any law enforcement need and that information redacted on that claim must be disclosed.

*That the city of Salem be required to conduct another search for responsive documents or, in the alternative, attest under oath that no other responsive documents exist.

As always, Salem Reporter is prepared to provide you any additional information or documents you may need. We request that if the city of Salem responds to this petition, we be given the opportunity to review the response and file a supplement as may be warranted.

We thank you for your courtesies in this matter.

Regards

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Enc:

*Public records request – April 6, 2023

*City response – April 28, 2023

*City response – May 2, 2023

CC:

City Manager Keith Stahley