



**LEGAL DEPARTMENT / ROOM
225**

555 Liberty Street SE
Salem, OR 97301
Telephone: (503) 588-6003
FAX: (503) 361-2202

May 10, 2023

Sent via email only

Paige E Clarkson
District Attorney
Marion County District Attorney's Office
555 Court Street NE
Salem, OR 97309

1City Attorney
Daniel B. Atchison
Deputy City Attorneys
Thomas V. Cupani
Assistant City Attorneys
Lori L. Evans
Douglas C. Hanson
Brian P. Luse
Nicole M. Theobald
Marc A. Weinstein
Fred Wilson

Re: City's response to appeal by Ardeshir Tabrizian of the Salem Reporter (SR) dated May 3, 2023, appealing the City of Salem's denial of access to certain redacted content of requested records

Dear Honorable 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 redacted content of requested records.

PUBLIC RECORDS REQUEST TIMELINE SUMMARY

On April 6, 2023, Mr. Tabrizian submitted a public records request to the Salem Police Department (SPD) documented under request number P026948-040623 in the "GovQA" system, seeking the following information:

“*The most recent Memorandum of Understanding (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."

Additional history relevant to this petition:

On April 27, 2023, SPD advised Mr. Tabrizian that the PD was, "actively processing your public records request and need to seek clarification" related to a portion of the request. The question was, "Are you asking for this information with respect to the updated press release that was released on March 31, 2023, or to both the March 31, and the original press release that was made on March 29, 2023?"

Mr. Tabrizian responded on the same date, stating, "To clarify - the request asked only about the March 31, 2023, press release. Thank you."

On April 28, 2023, the Salem Police Department provided the records requested by Mr. Tabrizian. Within the response, was the following information:

"The following exemptions have been applied to the records you have requested:

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).

Pursuant to ORS 192.401, 192.411, 192.415, 192.418, 192.422, 192.427, and 192.431 if portions of the record have been redacted or withheld, this decision may be appealed to the Marion County District Attorney."

The documents provided to SR are entitled follows:

*"20230428094311481_Redacted_.pdf," further described as a text message from Assistant Chief (AC) Skip Miller on Friday, March 31, at 8:12 a.m., which reads "Adam, I let Keizer know we were making an official request for assistance." There is a redaction below this language.

* “Email_Redacted_.pdf” is further described as an email thread beginning on March 31, 2023, including AC Miller, District Attorney Paige Clarkson, Chief Trevor Womak and Deputy Chief (DC) Jacob Burke, which contains proposed language for an updated press release related to the incident at hand. This email chain contains a redaction related to the ongoing investigation.

* “Message_from_SPD_to_DEA_3_28_2023 (Redacted)” is further described as a screenshot of a text message, the time in the upper left corner reads, 10:09 (for identification). The screen shot has the intended recipient name redacted, due to the message being sent to a Federal DEA Agent. The screenshot captures that on Tuesday, March 28 at 16:08 hours, 24 photos were sent from a member of Salem Police Department. The sender of the photos is not identified due to that person being an undercover officer, pursuant to ORS 181A.825(2). The text message shows a redaction of the photos pursuant to ORS 192.345(3).

**“PF_-_Salem Police_ Department_-_FY23_SA Signed (Redacted)” is 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. The record sent to SR contained two redactions. One redaction was located on page 3 of the document, redacting the name and signature of the “Acting, Special Agent in Charge.” This redaction was based on 5 U.S.C. §552(b)(7)(F) which provides for redactions of the identity of any federal law enforcement agents. The second redaction in this MOU is located on the last page, “1. Grantee Name and Address:” This area is redacted relying on ORS 181A.825(2), as it listed names of undercover officers. As discussed below, an updated version with only one redaction to the MOU was later sent to Mr. Tabrizian.

“Message_From_SPD_to_DEA_3_31_2023_(Redacted)” is further described as a screen shot of an iMessage sent on Friday, March 31 at 9:34 a.m. The text inquires, “How is Samuel doing?” The response is, “I think as well as can be expected. He was pretty angry though about his name and age in the press release.” There is one redaction of the name of the recipient, which is based upon the Federal exemption, 5 U.S.C. §552(b)(7)(F) supported by ORS 192.355(8) provides that any public records or information the disclosure of which is prohibited by federal law or regulations are exempt from disclosure under ORS 192.311. The iMessage sender’s name is not disclosed pursuant to ORS 181A.825(2), as the officer is an undercover officer.

On May 1, 2023, SPD received another message from Mr. Tabrizian requesting clarification, asking if the PD could, “please identify which exemptions cited by the city go to which argument.”

On May 2, 2023, Mr. Les Zaitz with SR emailed a letter to the City Manager, Keith Stahley. Mr. Zaitz expressed concern related to redactions to the MOU with DEA provided to the SR as well as asserting that other responsive documents must have been withheld from SR. Mr. Zaitz pointed out that DEA itself publicly shares the name of the special agent-in-charge on its website, as well as being cited in public press releases.

On May 2, 2023, a response to Mr. Tabrizian’s May 1, 2023, request for clarification, which reads,

“* 20230428094311481_Redacted_.pdf - The redaction is related to the ongoing investigation

*Email_Redacted_.pdf - The redaction is related to the ongoing investigation

*Message_from_SPD_to_DEA_3_28_2023 redacted - The redaction for the recipient is based upon the federal exemption we cited. The Photo redaction was based upon this being an ongoing investigation. The sender of this message is not disclosed based upon the sender being an undercover officer

*PF_-_Salem Police Department_-_FY23_SA (document) – (The requested MOU, hereinafter the “MOU”) The signature block on page 3 is related to the federal exemption we cited. The redaction on page 5, line numbered 1. Grantee Name and Address: is based upon the officers being undercover.”

In his response, Mr. Tabrizian pointed out that one of the document redactions had not been addressed in the response advising which exemption applied to which record and how.

In response, on May 3, 2023, the PD provided the additional supporting redaction information for the record, which read,

“Message_From_SPD_to_DEA_3_31_2023_Redacted - The redaction for the recipient is based upon the Federal exemption we cited ORS 192.355(8) - Exempts from disclosure records which are exempt under Federal law or regulations.”

Omission of this message from the May 2, 2023, response was inadvertent on the City’s part.

In the same response, the PD provided a modified redacted version of the MOU. The modification removed the redaction allowing the name and signature of the “Acting, Special Agent in Charge,” to be seen on page 3. The only remaining redaction on page 5 of the MOU is pursuant to ORS 181A.825(2), related to protecting the identity of the undercover officers.

On May 3, 2023, Mr. Tabrizian sent a Public Records Petition to Marion County District Attorney, Paige Clarkson.

THE REDACTED RECORDS WERE APPROPRIATELY REDACTED

Mandatory redactions for undercover assignments

As a housekeeping matter, the City cited ORS 181A.825, in response to Mr. Tabrizian. It appears that ORS 181A.825, which was formerly numbered as 181.852, was again renumbered to 181A.672 in 2021. The same language applies, and the subsection the City relies on is 181A.672(2).

THE MOU

The first requested record was 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. The only redaction in the second version of the record provided to SR is the redaction of the names of the three SPD officers assigned to the task force.

SPD has asserted that the names of certain police officers in the requested records are subject to mandatory redaction under (ORS 181A.825(2)) ORS 181A.672(2), which provides in part, “a law enforcement agency **may not disclose** information about an employee of the agency while the employee is **assigned duties the agency considers undercover investigative duties** and for a period of six months after the conclusion of those duties.”

The statute specifically provides the standard for determining if the duties of the officer qualify as undercover, is the “employee is assigned duties the **agency considers undercover investigative duties.**”

The MOU provided to SR outlines the concerns related to trafficking in narcotics and dangerous drugs in the Salem, Oregon area, which has a substantial and detrimental effect on the health and general welfare of the people of Oregon. The parties to the MOU acknowledge within the agreement that “1. The Salem Resident Office (RO) Task force will perform the activities and duties described below: c. conduct undercover operations where appropriate...”

The complexity of the type of drug trafficking organizations DEA focuses their enforcement efforts on is akin to a very complex business organization. The organizations make concerted efforts to identify the law enforcement officers who are working to disrupt the illegal drug trade and the organization’s profits. Once discovered, the identities of those officers are widely circulated among the organization, placing those officers in grave danger.

Mr. Tabrizian acknowledges that ORS 181A.825(2) (renumbered to 181A.672(2)), prohibits a public agency from disclosing information about an employee acting in an undercover capacity. Mr. Tabrizian acknowledges the restriction and is requesting the DA’s Office conduct an in-camera review to verify that the redacted information regarding Salem Police Department officers in fact concerns undercover agents.

The City asserts that based upon the plain language within the statute, the deciding factor as to whether the officers are “undercover” lies within the discretion of the agency and whether SPD considers the duties of their officers to be undercover investigative duties. There is no balancing test associated with ORS 181A.672(2).

The redaction of the names of the SPD officers in the MOU are proper.

Claim of Mootness as to Identity of Undercover Officers by Mr. Tabrizian

Mr. Tabrizian asserts, “[i]f the identity of the undercover officers has been revealed in public court filings, whether state or federal, the claim is moot.” ORS 181A.672(2) states, “a law

enforcement agency ***may not disclose information...***” The City has not found any supporting statute or caselaw which supports Mr. Tabrizian’s assertion. If Mr. Tabrizian provides the authority for this statement, the City will provide a response if needed.

Communications between SPD and DEA

Mr. Tabrizian made a request for records of communications between 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.

As stated above, SPD provided the two text messages from SPD to DEA, which took place on 3.28.2023 and 3.31.2023.

The Message from SPD to DEA 3.28.2023, contains two redactions. The first redaction is the name of the DEA Agent the communication was sent to. The second was a redaction of photographs.

Authority to cite federal law exemptions

The authority to withhold the DEA Agent’s name in both text messages was provided as, “redactions to the identity of any federal law enforcement agents is made pursuant to 5 U.S.C. §552(b)(7)(F). In the clarification response on May 3, 2023, SPD also cites ORS 192.355(8), which exempts from disclosure records which are exempt under Federal law or regulations.

There are several provisions within ORS 192, which provide for a public body to assert federal exemptions from disclosure. ORS 192.355(9)(a) specifically exempts from disclosure, “public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law.” Additionally, ORS 192.329(2)(b) provides, [a] public body’s response to a public records request is complete when the public body asserts any exemptions from disclosure that the public body believes apply to any requested records and, if the public body cites ORS 192.35(8) or (9), identifies the state or federal law that the public body relied on in asserting the exemptions. As previously discussed, the City asserted 192.355(8) in the clarification on May 3, 2023.

The City asserts the Oregon law provides authority for a public body to assert federal exemptions to public records requests, therefore, the redaction of the recipient’s name on both text messages were appropriate.

Exemption pursuant to 192.345(3) information compiled for criminal law purposes

The photographs in Message from SPD to DEA 3.28.2023, were redacted pursuant to 192.345(3). Unless the public interest requires disclosure in a particular instance, ORS

192.345(3) exempts from disclosure “investigatory information compiled for criminal law purposes.”

Evidence compiled during a criminal investigation contains information about the investigation, is maintained as part of the investigation, is provided to the prosecuting agency when the matter is referred for prosecution, and, if the matter is prosecuted, is provided to defense counsel during discovery. The photographs in question were logged into SPD evidence and are in possession of Keizer Police Department. They are part of the criminal investigation.

Mr. Tabrizian asserts a threshold issue as to whether the criminal investigatory exemption applies was that this matter did not involve a criminal investigation, as it was merely a collision investigation. He asserts that this could not be a criminal investigation because the SPD detectives were not called to the scene. Mr. Tabrizian’s assertion that the Traffic Unit was handling the investigation therefore the investigation could not be criminal in nature, falls short. The SPD Traffic Unit is a specialized Unit trained to conduct crash reconstruction investigations. Among other responsibilities, the Traffic Unit investigates crashes to determine any potential criminal liability on behalf of any of the involved parties.

In 1976, the Oregon Appellate Court discussed the legislative intent related to ORS 192.500(1)(c), subsequently renumbered to ORS 192.345(3). In footnote 2, the Court stated, [w]e assume that “criminal law purposes” in ORS 192.500(1)(c) is not limited to literal investigations of crimes, but includes investigations to determine whether a crime has been committed. *Jensen v. Schiffman*, 24 Or App 11, (1976). The City’s position is that the language in ORS 192.345(3), “investigatory information compiled for criminal law purposes,” is not limited to only investigations of crimes, but includes investigation to determine whether a crime has been committed. Based upon the current posture of the investigation, the exemption under ORS 192.345(3) should control.

This was an incident where Ms. Marganne Allen lost her life. In situations such as this, the criminal justice system works by investigations being completed by law enforcement and then a separate assessment by the District Attorney’s Office to determine if there is criminal culpability. At this time, the release of the investigatory information pursuant to a public records request before the case has been fully reviewed by the District Attorney’s Office and any subsequent prosecutorial process being completed, would be detrimental to the outcome of the case.

ORS 192.245(3) conditionally exempts disclosure of investigatory information compiled for criminal law purposes. The assessment of the conditional exemption requires balancing the public interest against the rationale for the need to exempt disclosure. The Oregon Court of Appeals has long held that “investigations connected with pending or contemplated proceedings will ordinarily remain secret because disclosure will likely interfere with enforcement proceedings.” *Jensen v. Schiffman*, 24 Or App 11, 16 (1976)(internal quotations omitted). The Oregon Attorney General has held that “investigatory information in pending criminal investigations or prosecutions is exempt from disclosure because the public has a strong interest in seeing persons who have violated the law successfully prosecuted.” Public Records Order, July 8, 2016, *Iboshi* at 2 (Referring to Public Records Order, November 10, 2015, *Bernstein* at 3. Nondisclosure “serves the purposes of protecting the integrity of criminal investigations and avoiding any compromise of a potential criminal prosecution that might result

from such investigations.”).

It is in the public’s interest to allow the police to complete the investigation, the District Attorney to review the matter, and if there is criminal culpability, to hold the appropriate person accountable. The first step in that process is allowing the criminal justice system to work as it is designed to; without compromising the process. It is in the public’s best interest for exempt information to remain undisclosed, so as to not interfere with enforcement proceedings or deprive a person of a right to a fair trial or an impartial adjudication.

Information related to the SPD press release issued March 31, 2023

The request for, “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.”

SPD provided an email exchange with AC Miller, Chief Womak, DC Burke and District Attorney Paige Clarkson. AC Miller sent a draft of an updated press release to the above parties. Ms. Clarkson responded with proposed edits and Chief Womak responded, “Agree to all. Thank you.”

SPD redacted a portion of the response from Ms. Clarkson, as those portions were related to the ongoing criminal investigation. The City cites ORS 192.345(3), as discussed above. The City asserts the redacted portion of the email was appropriately redacted.

Requested records related to SPD requesting Keizer lead the investigation

This request was for, “[a]ny 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.”

SPD responded to the request with several documents, including a text message from AC Miller on Friday March 31, 2023 at 8:12 am. This message reads, “Adam, I let Keizer know we were making an official request for assistance.” Below that exchange was language which the City asserts would be exempt pursuant to ORS 192.345(3).

Also responsive to this request, SPD provided two unredacted emails. One email begins on March 31, 2023 at 2:34 pm from Angela Hedrick to Chief Womak, AC Miller and DC Burke, advising of a press release going out. AC Miller then forwarded that email and attached press release to Keizer Lieutenant (Lt) Andrew Copeland on the same day at 4:25 pm. The second email is a continuation of that email string, where Lt. Copeland responded, and then AC Miller thanked Lt. Copeland again. This was sent at 6:37 am on April 1, 2023. Neither of these emails have any redactions nor did the City cite any exemptions.

For the reasons set out in this letter, the City of Salem respectfully asks that you deny Mr. Tabrizian's appeal of the redactions made to the requested records provided to SR.

Upon receipt of the petition in this matter, while working on this response, and in an effort to confirm all documents responsive to the original request had been located, assessed and provided, or were otherwise exempt from disclosure, I learned of the existence of an email from the SPD Public Information Officer (PIO), Angela Hedrick, sent to the DEA PIO on March 29, 2023, at approximately 1:32 pm.¹ I am in the process of obtaining a copy of that document. Upon receipt and to the extent that the record is disclosable, I will provide a copy of that record, including the attached media release on Monday, May 15, 2023.

The City will separately provide you with unredacted copies of the records sought by Mr. Tabrizian to allow for your full review of the City's response to this appeal. 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 disclosure for the reasons set forth herein.

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

Sincerely,

/s/ Lori L Evans

Lori L Evans
Assistant City Attorney

cc: *Ardeshir Tabrizian, via email only to: ardeshir@salemreporter.com
Les Zaitz, via email only to: les@salemreporter.com
Dan Atchison
Marc Weinstein*

¹ This email is not responsive to the request for records related to the updated press release on March 31, 2023, however, upon further review, it technically falls within the request for records of communications between 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.