

May 22, 2024
Location: WebEx
Sunshine Committee Members

Charlie Fisher, OSPIRG State Director / Co-chair
Morgan Smith, Polk County Counsel / Co-chair
Cameron Miles, Government Accountability Attorney, Governor’s Office
Elliot Njus, Editor, The Oregonian
Selena Deckelmann, Chief Product and Technology Officer, Wikimedia Foundation
P.K. Runkles-Pearson, Chief Legal and Risk Counsel, Office of Secretary of State LaVonne Griffin-Valade
Michael Kron, Special Counsel, Office of Attorney General Ellen Rosenblum
Mark Landauer, Lobbyist, Special Districts Association of Oregon

Guests

Andy Foltz, Public Records Counsel, Department of Justice
Erin Jansen
Alec MacDonald-Factor

Agenda

AUDIO STREAM 0:00:00-0.5

First Agenda Item – Minutes for March 20, 2024 meeting

Committee went over last meeting minutes. **Mr. Landauer** moved to approve minutes, **Chair Fisher** 2nd that motion to approve minutes. Committee approved March 20, 2024, meeting minutes.

Second Agenda Item –Review and Discuss Law Enforcement Misconduct Transparency Legislation

Mr. Foltz presented a summary of legislation that was passed during the 2020-2021 time frame, for which he had also prepared as a written summary for the meeting materials, relating to transparency around law enforcement misconduct in response to the Black Lives Matter movement. He indicated that the legislation that he reviewed does not address scenarios where allegations of law enforcement misconduct are either never investigated or are not substantiated. First, he discussed ORS 181A.681, which applies to law enforcement agencies, and defines terms such as law enforcement officials and misconduct. The term “misconduct” is defined broadly, as unjustified or excessive use of force, unlawful discrimination based on race or protected class, sexual harassment or sexual misconduct or the commission of any kind of crime. Mr. Foltz said he could come up with examples of questionable behavior that would not qualify as misconduct for the purposes of investigation reporting.

The statute requires local and state law enforcement agencies to investigate and report to DPSST certain types of misconduct by law enforcement officers and violations of minimum standards for physical, emotional and moral fitness. It makes law enforcement officials mandatory reporters of misconduct, and it mandates that the employer investigate the allegations and report to DPSST the results of certain investigations. It only requires them to report substantiated investigations of misconduct, and they are not required to report unsubstantiated allegations.

Second, ORS 181A.684 directs DPSST to maintain an online database of suspensions and revocations of DPSST certifications, as well as discipline against law enforcement officers that

involve economic sanctions. There are about 1,000 entries in the current online database. DPSST is not required to post misconduct that does not result in economic sanctions. Third, ORS 181A.689 requires law enforcement agencies to adopt policies that set standards for speech and expression by officers in and outside the course and scope of their employment. **Mr. Foltz** highlighted those three major statutes but there were others outlined in his written summary.

Chair Fisher asked whether the committee was of the mind to make recommendations around the reporting of unsubstantiated investigations.

Mr. Foltz repeated the previous recommendation on the record, “The Sunshine Committee would like to see greater transparency in the professional oversight of law enforcement officers starting at the agency level in order to increase public confidence in the regulation of law enforcement.”

Mr. Njus questioned what exemptions were in place regarding investigatory materials.

Mr. Kron brought up a concern about investigations getting buried in the process if they got resolved before getting to DPSST.

Mr. Foltz indicated that new legislation that required law enforcement officers to be mandatory reporters provided one way of addressing that issue. He also said in response to Mr. Njus’s question, that the applicable exemptions would be the general exemption for disciplinary actions of state workers, which has its own public interest balancing test, and law enforcement has an additional exemption for any personal investigative information that does not result in discipline. The broad employee exemption is ORS 192.345(11) and the specific law enforcement exemption is ORS 181A.830.

Mr. Kron said that he would like to know if a law enforcement officer has been the subject of a pattern of similar complaints over time, as what happens with other professionals like in the medical field.

Co-Chair Smith said he was comfortable with the level of transparency provided by DPSST and didn’t see a big return on investment for the committee to look at the issue.

Ms. Runkles-Pearson shared Mr. Kron’s concerns regarding transparency of patterns of complaints.

Chair Fisher said there could be a limited investigation into the issue of to what extent the public can review current law to find out if there are officers that have been subject to multiple investigations for whatever reasons. But since subcommittee members couldn’t come to a consensus for majority support for a recommendation, he wanted to know if it was worth it for the committee to dig into that topic.

Mr. Landauer suggested adding a statement to the recommendation, expressing the concern that a pattern of complaints that do not meet the misconduct definition ought to be addressed by the appropriate groups.

After some limited discussion regarding how various professions handled unsubstantiated complaints, **Chair Fisher** asked if there could be information reported about how various agencies responded to requests for unsubstantiated investigations in the past.

Mr. Njus said that reporting by Oregonian reporter Maxine Bernstein has provided at least two cases that were investigated and didn’t result in substantiation. He said they were good examples of how the public interest test plays out and would send links to the group.

Ms. Runkles-Pearson said that on the TSPC side of things, there is a general concern among the community of elementary educators that there might be “bad apples” that cannot be easily identified who have continually skipped scrutiny.

Mr. Kron said that there is a similar concern with several professions, people we entrust with power and who are doing public service among our communities. He wondered if the chairs of the committee could write a letter to the sheriff's association or the association of chiefs of police, to get an answer from the official side.

Mr. Landauer said that the public records legislative subcommittee could make this request of LPRO.

Mr. Foltz said that in theory district attorneys are sending their public records orders to DOJ, but that DOJ has not really receive any orders relating to requests for records about law enforcement misconduct. He said they could focus on district attorneys that have a higher volume of cases, such as Multnomah County.

Chair Fisher said that it sounded like a problem across several agencies and not just law enforcement, and maybe the committee could make their recommendation more general.

Mr. Kron said it's more of a problem in specific areas like law enforcement and TSPC and it's just in those few areas where there's also an exemption where it could be a potential problem.

Chair Fisher suggested leaving it as is and moving on, or adding a statement that the committee sees it as a potential problem.

Mr. Kron suggested that the chairs work on the verbiage for that sentence and bring it back to the committee for a vote. Committee members agreed.

Third Agenda Item – Discuss Special Projects Subcommittee Recommendations

Mr. Kron said the special projects committee met and heard from stakeholders on the question of teacher exemptions and the discussion unfolded in a way that surprised him, in terms of the agreement between the teacher and reporter communities on this issue. They heard from reporter Rachel Alexander, who is active in SPJ and an education reporter, and Louis De Sitter, who was speaking on behalf of the Oregon Education Association. They both had a lot more agreement over the dangers of too much transparency in this area not just for teacher reputation but also for school communities and privacy issues for teachers than Mr. Kron expected. Mr. Kron is also a parent and some of their concerns resonated with him. In light of the information from stakeholders, the subcommittee looked further at its previous recommendation. The subcommittee didn't change it much from the original recommendation drafted by Bennett Hall, who is no longer with the subcommittee and committee. Mr. Hall had suggested the Colorado model, which basically requires disclosure of information in unsubstantiated cases if the public interest requires disclosure.

There was also some support for something similar to what the subcommittee recommended in the context of physicians, where the information would be available statistically but not in regard to specific patients, so that you had X doctor had X number of complaints over a specific time period.

After hearing from the stakeholders, the committee felt there should be a third option, to require a more heightened standard for the public interest test. The group felt that might be overly complicated for its purview but more in keeping with the wishes of the teacher and reporter communities as expressed in their testimony.

Mr. Kron said the heightened public interest test would be something like the clear and convincing evidence standard.

Ms. Runkles-Pearson said she worried that the heightened public interest test would be difficult for people to apply in specific instances, though it sounded like a laudable goal.

Mr. Njus agreed with Ms. Runkles-Pearson and said that adding a heightened analysis for a public interest test is just going to lead to less transparency because it will lead to paralysis by analysis. He supported shifting the burden of proving the public interest to the requestor.

Mr. Miles supported the idea of a heightened standard but thought that this could be added on as a sentence after the original recommendation.

Chair Fisher suggested that a pro-transparency direction that still takes into account the privacy interests of teachers would be using the clear and convincing evidence standard with the burden put on the requestor to demonstrate that fact.

Mr. Miles urged caution in redacting information when it came to children, since children could be more easily identified in certain circumstances.

Ms. Runkles-Pearson supported the idea of shifting the burden to the requestor.

Mr. Kron offered an amendment to the motion to add the burden-shifting piece to the recommendation explicitly.

Mr. Njus seconded the motion.

Chair Fisher asked about whether the committee wanted to include the recommendation that aggregated information should be available. He offered an amendment to the motion on the table in which the burden is on the requestor to demonstrate that it is in the public interest for that information to be disclosed, with the addition that the committee thinks that aggregate information should be available.

Mr. Njus seconded the motion.

Mr. Kron clarified that the recommendation on the table is recommendation two with the addition of only the sentence about burden-shifting to the requestor. He said the aggregate information part of the recommendation needs further work.

Chair Fisher reiterated that the recommendation on the table is recommendation number two, with the addition that the burden is on the requestor to demonstrate that the investigation requires disclosure.

Mr. Kron seconded the motion.

The committee unanimously approved the motion.

They next discussed revising the sentence regarding aggregate information.

Ms. Deckelmann said the subcommittee was concerned about the oversight of the conduct of the agencies, and not whether unfounded complaints were disclosed immediately.

Chair Fisher suggested verbiage that the committee wants the aggregate information to be readily available to the public on a regular basis and easily accessible, and if the agency doesn't do that then the legislature should require that.

Mr. Kron suggested framing it as a recommendation to the legislature to make sure aggregate information is freely and readily available.

Ms. Deckelmann made the motion to add the sentence suggested by **Mr. Kron** as a second amendment to the recommendation.

Mr. Njus seconded.

The committee unanimously passed the amendment.

Fourth Agenda Item – Review and discuss biannual report to the legislature

Co-Chair Smith said the report was available in the meeting materials and asked whether it needed to be submitted by this fiscal year.

Mr. Kron proposed that the report ought to be directed to a more substantive committee given all the committee's work on it.

Mr. Miles suggested including a statement requesting that it be directed to the rules committee during a regular legislative session day.

Mr. Kron motioned that one of the committee's two co-chairs add a short paragraph respectfully requesting that the committee's recommendation go to the rules committee in connection with a regular legislative session.

Mr. Landauer seconded the motion.

The committee unanimously voted in favor of the motion.

Chair Fisher added that committee members can provide non-substantive changes that will be accepted at the discretion of the co-chairs.

Mr. Kron made the motion to amend the motion to indicate that.

Mr. Njus seconded the amendment.

The committee voted unanimously in favor of the amendment.

Fifth Agenda Item – Unfinished business and/or future agenda items

Mr. Foltz said that the next exemption in their list that could be readily summarized by the next meeting was regarding background check information.

Mr. Kron asked whether there was some procedure they could implement to expedite the process of reviewing exemptions.

Mr. Kron said that he will have an announcement at the next meeting regarding the new member who will replace Bennett Hall, who is no longer on the committee.

No other issues were raised prior to adjournment.

Adjournment