

LEGAL MEMORANDUM

TO: West Linn City Council

FROM: Tim Ramis, City Attorney
Jerry Gabrielatos, City Manager

DATE: February 26, 2021

RE: **U.S. Attorney Declines Prosecution in Michael Fesser Investigation**

Summary

On February 19, 2021 the Office of U.S. Attorney announced its decision not to pursue criminal prosecution of the West Linn police officers involved in the investigation and arrest of Mr. Michael Fesser.

The announcement briefly explains that current law creates a very high bar for this type of prosecution which could not be satisfied beyond a reasonable doubt on the evidence discovered in the *Fesser* case. The laws which the U.S. Attorney found problematic are subject to amendment. Effort's at legislative change are underway at state and federal levels which aim to address police accountability. Passage of reform legislation would not change the outcome in the *Fesser* case, but could impose greater accountability in future cases.

Discussion

The statement issued by the U.S. Attorney was short and conclusory. The specifics of the evidence were not discussed. The U.S. Attorney is not obligated to release a full report on its investigation and did not do so.

The U.S. Attorney's announcement said only that there was insufficient evidence to prove beyond a reasonable doubt that West Linn officers "willfully violated" Mr. Fesser's civil rights on federal corruption statutes. Prosecutors and FBI investigators could not meet the burden of proving that officers had the required specific intent to violate the laws. The decision explained that prosecutors could not win a conviction based on an officer making a mistake, exercising bad judgment or acting by accident. The requirement in current law is to prove that the actions were willful and done with the intent to violate federal statutory and constitutional protections. This is a very high standard which can shield officers from responsibility in many cases.

Currently there are efforts underway to reexamine laws affecting police procedures. The policy goal of this reexamination is to bring the law into alignment with the public's desire to see greater responsibility and accountability in policing. In reviewing the bills passed and those under consideration I do not see a specific bill addressing the required standard of intent, willful conduct, that was problematical for the U.S. Attorney in the *Fesser* case, but there may be public interest groups working on this problem. Our office will do additional research to see whether there are bills addressing this issue.

Below are summaries of legislation recently passed and under consideration for future action. We have included links to the specific bills.

The legislature began looking at the current legislative session last summer when they began discussing several bill drafts focused on police reform. These bills were passed by the legislature, signed by the governor and became effective June 30, 2020.

- [HB 4201](#) — Establishes the Joint Committee on Transparent Policing and Use of Force Reform.
- [HB 4203](#) — Bans police use of choke holds and other methods of impeding a person's ability to breathe, unless use of deadly physical force is warranted.
- [HB 4205](#) — A law designed to protect whistleblowers in law enforcement and requires any officer who observes misconduct to report the incident within 72 hours.
- [HB 4207](#) — Establishes a public, statewide online database of police officers who have been suspended or had any certifications revoked, and requires every law enforcement agency to review personnel records before hiring police officers with previous experience in other jurisdictions.
- [HB 4208](#) — Bans police use of tear gas and long-range acoustic devices in crowd control, unless a gathering has been categorized as a riot.
- [SB 1604](#) — Lays out an alternative for law enforcement agencies seeking to discipline officers, restricting use of binding arbitration.

The following is a list of Legislative Concepts, or bill drafts, that are being discussed but have not been introduced.

- [LC 742](#) — Regulates use of chemical incapacitants, kinetic impact projectiles and sound devices by law enforcement agencies, an amendment to HB 4208, passed at the first special session earlier last year.
- [LC 743](#) — Establishes requirements for peace officer uniforms. Establishes requirements for displaying identifying information on peace officer uniforms and for disclosing identifying information to public upon request.
- [LC 744](#) — Relating to police officer misconduct, an amendment to HB 4205 passed during the legislature's first special session last year. It would require law enforcement units to investigate reports of misconduct and direct Bureau of Labor and Industries to establish and maintain form and database for reports of misconduct.

- [LC 745](#) — Provides that peace officer or corrections officer may not use force that impedes normal breathing or circulation of blood of another person by applying pressure on throat or neck under any circumstances, an amendment to HB 4203 passed in June as part of the special session earlier last year.
- [LC 746](#) — Imposes limitations on arbitrators' decisions concerning alleged misconduct by law enforcement officers.
- [LC 751](#) — Establishes Task Force on Uniform Statewide Law Enforcement Disciplinary Standards. Sunsets December 31, 2021. Declares emergency, effective on passage.
- [LC 761](#) — Modifies justification defenses available to peace officer who uses physical force or deadly physical force upon another person. Requires peace officer to give verbal warning, and reasonable opportunity to comply, before using physical force or deadly physical force if reasonable opportunity to do so exists. Requires peace officer to consider alternatives to deadly physical force if reasonable opportunity to do so exists.
- [LC 762](#) — Directs Department of Public Safety Standards and Training to establish publicly available database of certain information about misconduct and discipline of public safety employees established by Department of Public Safety Standards and Training. Requires reporting of complaints, allegations, charges, disciplinary proceedings, certain judicial findings and prosecutorial determinations of unreliability, suspensions and revocations of certification and certain resignations of public safety employees to department for inclusion in database. Amendment to HB 4207 passed during the first special session last year.
- [LC 763](#) — Directs Oregon Criminal Justice Commission to establish statewide database of reports of use of physical force by peace officers and corrections officers. Requires commission to report annually to appropriate committee or interim committee of Legislative Assembly on reports. Requires law enforcement units to report on use or threat of physical force, and deaths of persons in custody, to commission.

Introduced in House on June 8, 2020, [H.R. 7120 – George Floyd Justice in Policing Act of 2020](#).

This bill addresses a wide range of policies and issues regarding policing practices and law enforcement accountability. It includes measures to increase accountability for law enforcement misconduct, to enhance transparency and data collection, and to eliminate discriminatory policing practices.

The bill facilitates federal enforcement of constitutional violations by state and local law enforcement. It also:

- Lowers the criminal intent standard from willful to knowing or reckless, to convict a law enforcement officer for misconduct in a federal prosecution;
- Limits qualified immunity as a defense to liability in private civil action against a law enforcement officer or state correctional officer; and
- Authorizes the Department of Justice to issue subpoenas in investigations of police departments for a pattern or practice of discrimination.

The bill also creates a national registry, the National Police Misconduct Registry, to compile data on complaints and records of police misconduct.

It establishes a framework to prohibit racial profiling at the federal, state and local levels.

The bill establishes new requirements for law enforcement officers and agencies, including to report data on use of force incidents, to obtain training on implicit bias and racial profiling, and to wear body cameras.