



MICHAEL D. SCHRUNK, District Attorney for Multnomah County

600 County Courthouse • Portland, Oregon 97204-1193 • (503) 248-3162

December 31, 1997

BRUCE L. CAMPBELL
MILLER, NASH, WEINER,
HAGER & CARLSEN LLP
111 S.W. FIFTH AVENUE
PORTLAND OR 97204-3699

LARS LARSEN
OREGON NEWS 12
PO BOX 3401
PORTLAND OR 97208

Re: Petition of Lars Larsen, on behalf of KPTV,
December 18, 1997, to disclose certain records of
the Portland Public School District

Dear Mr. Campbell and Mr. Larsen:

BACKGROUND

On this public records petition, ORS 192.410 et. seq., petitioner Lars Larsen, for KPTV, requests the District Attorney to order the Portland Public School District to produce a copy of the following records:

An audit of alleged financial irregularities at
Binnsmeade [sic] school

An unnamed attorney for the school district refused access to the records, according to petitioner, on the basis that the document was exempt because it "may become the subject of a personnel discipline action against employees of the School." Public Records Petition of Lars Larsen dated December 18, 1997. Petitioner requested that non-exempt materials in the audit be separated and provided to petitioner. This was rejected by the School District, according to petitioner, on the ground that all of the material was exempt.¹

¹ It should be noted that petitioner's request to the School District was not in writing and neither was the response from the School District. This lack of documentation results in confusion and delay in the consideration of both petitioner's public record request and any claimed exemption(s).

Page 2
December 31, 1997
RE: Petition of Lars Larsen

Bruce Campbell, attorney for the School District, submitted a response to the petition on December 26, 1997, and claimed the audit report is exempt from under ORS 192.501 (12) which provides:

A personnel discipline action, or materials or documents supporting that action [.]

The School District points out that the Oregon Supreme Court concluded in City of Portland v. Rice, 308 Or 118 (1989) that this exemption only covers completed disciplinary actions. We are then referred to the Attorney General's Public Records Manual, p. 32 (1995):

Neither ORS 192.501 (12) nor the court decision specifies how the statute applies when a person seeks records in a file in a pending personnel disciplinary matter. We believe, however, that in those circumstances a public body may postpone action on the request until the personnel matter is finally resolved in order to determine whether those records are exempt.

The School District asserts that although the audit report does not identify any Binnsmead employees by name, allegations of financial irregularities or problems would cause the reader to focus on a limited number of individuals. The School District does not believe it can successfully separate exempt from non-exempt materials and that, in any case, the exemption covers all materials that support a disciplinary action. Petitioner has characterized this position as "absurd."

DISCUSSION

The School District has provided this office with an eight page document from the office of Finance/Information Services regarding Binnsmead Middle School to be reviewed strictly for purposes of the public records request. It clearly contains information which could form the basis of disciplinary action. It would not be reasonably possible to attempt to separate non-exempt material (if any could be identified) and genuinely preserve the confidentiality of the exempt material. See Turner v. Reed, 22 Or App 177, 186 n. 8 (1975) interpreting the predecessor to ORS 192.505. The audit report would be exempt unless the public interest required disclosure in the particular instance. ORS 192.501.

Page 3

December 31, 1997

RE: Petition of Lars Larsen

Mr. Campbell points out in his letter that the investigation of the situation at Binnsmead Middle School will be finished in early January and that a determination whether to impose disciplinary sanctions would be made. It must be pointed out that the audit report should be distinguished from any investigatory reports prepared strictly for disciplinary purposes involving School District employees. The latter are not part of this public records request. Such documents would be placed in the employee's personnel file and would be exempt material (again subject to disclosure if shown to be in the public interest).

The audit report is a document with significance to Binnsmead Middle School Administration, teachers, other employees, parents, and students. As such, the public interest in disclosure of the audit upon the completion of any disciplinary action would appear to be in the public interest. See Oregonian Publishing v. Portland School Dist. No 1J, 144 Or App 180 (1996). As stated in Turner v. Reed, supra at 103:

We now hold that another category is per se available for public inspection, specifically those public records whose only interest in confidentiality is to protect public officials from criticism of the manner in which they have discharged their public duties. Citizens are entitled to inspect public records to learn what their government is doing --this means learning of government's possible shortcomings, not just government's successes.

This office is not in the position to determine whether or not any disciplinary action will occur upon completion of the investigation. If there is no discipline, the exemption will not apply. See City of Portland v. Rice, supra at 124. If there is disciplinary action, the School District would then have to decide if a continued claim of exemption of the audit report is appropriate. To assist the School District (and petitioner) we have attached the letter opinion dated February 6, 1997 regarding the petition(s) of Todd Foster, for the Oregonian. On pages five and six are found the guiding principles the Multnomah County District Attorney's Office applies in reviewing public record petitions for disclosure of discipline case records. Without prejudging the issue, we would note that Oregon has "a strong and enduring policy that public records and governmental activities be open to the public." Jordan v. MVD, 308 Or 433, 438 (1989).

Page 4
December 31, 1997
RE: Petition of Lars Larsen

The School District has requested in its letter response of December 26, 1997, that it should be permitted to defer action on petitioner's request "until the School District determines whether it will impose disciplinary sanctions." It would appear to this office that the School District should be able to complete its disciplinary process in the next few weeks. The public interest in the orderly completion of the disciplinary process outweighs the public interest in disclosure at this time.

ORDER

Accordingly, it is ordered that the petition of Lars Larsen, on behalf of KPTV, to disclose certain records of the Portland Public School District is denied without prejudice to renewal when the disciplinary process is concluded, 192.502 (9).

Very truly yours,

A handwritten signature in cursive script that reads "Michael Schrunk". The signature is written in dark ink and is positioned above a horizontal line.

MICHAEL D. SCHRUNK
District Attorney
Multnomah County

MDS:WG
cc: Merle Bradford

97-51