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August 19, 2010

Beth Slovic
Willamette Week
2220 NW Quimby Street
Portland, OR 97210

Jollee Faber Patterson
General Counsel/Board Secretary
Portland Public Schools
501 N. Dixon St.
Portland, OR 97208-3107

Re: Petition of Beth Slovic on behalf of Willamette Week, received August 9, 2010 to disclose certain records of the Portland Public Schools.

Dear Ms. Slovic and Ms. Patterson:

BACKGROUND

On this public records petition, ORS 192.410 et. seq., petitioner Beth Slovic requests the District Attorney to order Portland Public Schools and its employees or agents to produce full and unredacted copies of the following records:

[A]ll tort claim notices from June 2009 (the date of my last request) until the present, June 17, 2010.

On July 8, 2010, General Counsel Jollee Patterson provided to petitioner redacted copies of the tort claim notices. Ms. Patterson cited the Personal Privacy Exemption, ORS 192.502(2). Petitioner took the position that a "person who files a public tort claim notice" should not be able to claim "the sharing of his name is highly offensive."

In an August 4, 2010 email, Ms. Patterson recalled the redactions fell into two categories: minor students with a tort claim notice related to physical injuries, and a woman who claimed a district employee subjected her to inappropriate sexual conduct.

Petitioner agreed in an August 17, 2010 email to withdraw her request for the names of children under 18. Petitioner noted that the District redacted the names of parents, teachers, and other adults in the tort claims about students. Petitioner also pointed out that in the sexual misconduct claim, the names of witnesses as well as the accused and accuser were redacted.

Petitioner provided this office with copies of the redacted tort claim notices. Two adult tort claim notices relate to an allegation of sexual misconduct brought by a student's mother and a claim of District employment discrimination brought by a teacher. Tort claims relating to students included two ski accidents and a playground accident.

Ms. Patterson submitted a thorough explanation of the various redactions in a letter dated August 17, 2010. It has been weighed carefully. If nothing else, it should provide pause to petitioner in any subsequent publications.

DISCUSSION

Personal Privacy Exemption

ORS 192.502(2) conditionally exempts:

Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if the public disclosure thereof would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance. The party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy.

"The purpose of this exemption is not to prevent disclosure of personal information, as such, but rather to protect privacy from unreasonable invasion." Jordan v. MVD, 308 Or 433, 441 (1989). Only personal information that would constitute an unreasonable invasion of privacy if publicly disclosed is protected under this exemption. In Jordan, 308 Or at 442, the court noted that the trial court found that the affidavit filed in the trial court

...sufficiently established that disclosure to the requester would more likely than not unreasonably invade her privacy because providing the information would allow Jordan to harrly her incessantly to the extent than an ordinary reasonable person would deem highly offensive.

The Attorney General has taken the position that "[g]enerally, disclosure of a name itself would not constitute an unreasonable invasion of privacy." Attorney General's Public Records Manual, 2008, p. 68. However, the identities of candidates for university president were not disclosed in a 1988 Letter of Advice. "[A] person's name may be exempt in certain contexts, due to a person's desire for confidentiality to avoid stigmatizing or other undesired effect." Attorney General's Public Records Manual, 2008, E-6.

The exemption asserted by the School District has a certain threshold requirement. “[T]he information is not exempt absent an individualized justification for exemption.” Attorney General’s Public Records Manual, 2008, p. 67. This determination must be made on a case-by-case basis. A blanket policy of nondisclosure is not enforceable. Guard Publishing v. Lane County School Dist., 310 Or 32, 38-40 (1990).

The Guard Publishing Co. test was applied in Mail Tribune, Inc. v. Michael S. Winters, 236 Or App 91,96 (2010), where the Court held that the Sheriff of Jackson County had “failed to satisfy his burden of producing evidence that disclosing the list of concealed handgun licenses would constitute an unreasonable invasion of an individual’s personal privacy.” The Court of Appeals rejected arguments that the very purpose of the license was secrecy, that disclosure would lead to embarrassment, or that the guns would be stolen:

Those hypothetical purposes do not satisfy the sheriff’s burden of proof, because they do not establish individualized bases for nondisclosure. Put another way, the sheriff has failed to satisfy his burden because he has not connected his stated purpose with any particular individual, as required by Guard Publishing Co.

We disagree with petitioner’s contention that a person who files a tort claim notice automatically gives up his or her interest in privacy. However, such a document must be distinguished from materials normally contained in a personnel or medical file. It also is generally in the public interest to know what potential civil suits may be pending in a school district. We do sympathize with the desire of the District to protect sexual assault victims and employees with disabilities. With that in mind, we have reviewed the five notices and find nothing that would constitute “an unreasonable invasion of privacy.”

First, the April 22, 2010 notice. This office has often been called upon to review the redactions in police reports involving sexual assault victims. In certain circumstances, we have determined that either the name of the victim or certain graphic passages have been appropriately deleted. The reported assault or harassment here is not such a case. It would be of assistance in the future if the District contacted the alleged victim and sought her position on the release of her name or certain passages in the tort claim notice.

Second, the discrimination claim of June 29, 2009. The nature of the disability (legally blind) appears to be one that was well known and recognized in the work place. It is not the kind of private disability (such as being HIV positive or having a heart condition) that an employee could understandably want to remain secret. Again, it would be of assistance in the future if the District contacted the employee and sought her position on the release of her name or references to her disability.

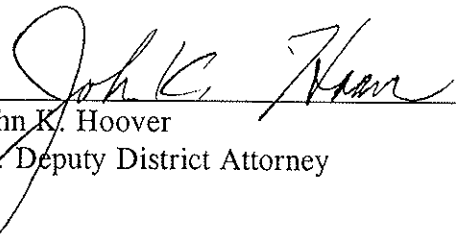
In both cases, other adults were mentioned in the tort claim notices. Disclosure of their names does not constitute an unreasonable invasion of their privacy.

The three student claims, August 12, 2009, May 20, 2010, and September 21, 2009, are quite commonplace in nature. Without more, disclosure of the names of parents, guardians, teachers, or other adult witnesses is not an unreasonable invasion of their privacy.

ORDER

Accordingly, it is ordered that the Portland Public Schools promptly disclose the unredacted records sought in the above petition. Disclosure of the documents ordered is subject to payment of the School District's fee, if any, not exceeding the actual cost in making the information available, consistent with ORS 192.440.

Michael D. Schrunk
District Attorney
Multnomah County, Oregon

By 
John K. Hoover
Sr. Deputy District Attorney

NOTICE TO PUBLIC AGENCY

Pursuant to ORS 192.450(2), 192.460 and 192.490(3) your agency may become liable to pay petitioner's attorney fees in any court action arising from this public records petition (regardless whether petitioner prevails on the merits of disclosure in court) if you do not comply with this order and also fail to issue within 7 days formal notice of your intent to initiate court action to contest this order, or fail to file such a court action within 7 additional days thereafter.