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February 12, 1998

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ATTORNEY AT LAW
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111 SW FIFTH AVENUE
PORTLAND OR 97204-3699

KAREN RUTLEDGE
13141 NE SAN RAFAEL
PORTLAND OR 97204-30

Re: Petition of Karen Rutledge, Parkrose School Board,
dated February 3, 1998, to disclose certain records
of Parkrose School District #3

Dear Ms. Cameron and Ms. Rutledge:

On this public records petition, ORS 192.410 et. seq.,
petitioner Karen Rutledge, Parkrose School Board member¹, requests
the District Attorney to order the Parkrose School District to
produce the following records:

**The Wage and Tax Statement (W-2) for Parkrose School
District Business Manager James Fenstermaker for 1996 and
1997.**

BACKGROUND

Petitioner made her request to the School District Business
Manager, James Fenstermaker, on January 21, 1998. Petitioner also
requested expense reports of all central office staff and

¹The Parkrose School District has made it perfectly clear that
the petitioner is not acting on behalf of either the School
District or the School Board in making this Public Records Request.
Petitioner may have remedies as a School Board member who has been
denied requested information but, for purposes of this decision,
the District Attorney's Office will consider petitioner to be a
private citizen and interested member of the Parkrose School
District.

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administrative staff (including the Superintendent) from July 1, 1997 to present.

Attached to the petition was a February 3, 1998 memorandum from Parkrose School District Superintendent Jacki Cottingim. Superintendent Cottingim noted that the January 21 request for documents went directly to Mr. Fenstermaker and not to her, which caused a delay in the School District response to petitioner's public records request. Superintendent Cottingim asked petitioner to put her demands/requests in writing or leave the Superintendent a voice mail message if that was easier. Petitioner was also requested to give the administration ample time to meet petitioner's demands and to accept the word of staff they would get to her as soon as they could.

Superintendent Cottingim denied petitioner's request for Mr. Fenstermaker's W-2 statements. She also relayed that Mr. Fenstermaker asked that his W-2 not be released until he could block out (for privacy reasons) the parts he was entitled to and to provide him with a reasonable opportunity to consult with his own personal attorney.

On February 11, 1998, Parkrose School District legal counsel, Donna Cameron, hand delivered a response to the public records request).² The School District has claimed exemption from disclosure pursuant to ORS 192.502(2), personal privacy. Ms. Cameron argues that disclosure of the W-2 forms would be an "unreasonable invasion of privacy." She details the "harassment" which followed almost immediately from the disclosure of Superintendent Cottingim's W-2 forms, the false accusations of fraud and embezzlement, and the resulting civil suit for defamation filed by Superintendent Cottingim against petitioner.

The School District response asserts that the petitioner:

did not discuss her accusation against the superintendent with other members of the School Board before going public. She has not complied with Board policy...about interaction with District personnel (Letter Response p. 4)."

²Ms. Cameron has requested that the School District response not be disclosed to the petitioner. As is common to such public records cases, we will respect that request except to the extent that it is necessary to make reference to the School District's assertions and arguments.

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Ms. Cameron has provided examples of the fliers, press releases and other dissemination of petitioner's accusations to television stations, radio, and newspapers. The School District has taken the position that petitioner would subject Mr. Fenstermaker to the same kind of harassment if petitioner obtains his W-2 forms. "She has stated the reason she wants his W-2 forms, if that she believes he is misappropriating District Funds" (Letter Response, p. 4).

The School District has requested that the District Attorney's Office deny petitioner's request because she has not allowed a reasonable time for the School District to respond. Ms. Cameron has proposed guidelines for future public records requests.

DISCUSSION

I. PERSONAL PRIVACY EXEMPTION

ORS 192.502(2) 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 Attorney General has written that a determination whether a public body may withhold personal information should depend, in part, upon "whether disclosure would constitute an invasion of privacy that an ordinary reasonable person would deem highly offensive." **The ATTORNEY GENERAL'S PUBLIC RECORDS MANUAL** (1995), p. 43. Public employee salary information has been specifically addressed by the Attorney General:

With respect to an employee's gross pay, we concluded that the employee did not have a reasonable expectation that such information would not be subject to public scrutiny because of the public's interest in knowing the amount that a public employee is compensated for his or her services. However, the amount of voluntary payroll deductions from an employer's paycheck are exempt from disclosure under this exemption. The

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public does not have a legitimate interest in knowing how a public employee spends that paycheck.

In Jordan v. Motor Vehicles Division, 308 Or 433, 442 (1988), the court upheld the claimed personal privacy exemption of a Motor Vehicles Division employee's home address. The court accepted the employee's position that disclosure would allow Jordan to "harry her incessantly to the extent that an ordinary reasonable person would deem highly offensive." Jordan was followed by the decision in Guard Publishing Company v. Lane County School District, 310 Or 32, 39 (1990), where the court considered the question whether the names and addresses of replacement teachers hired by a school district during a teacher's strike were exempt from disclosure under the personal privacy exemption:

The District's blanket policy of non-disclosure is antithetical to the legislative intent reflected in the Inspection of Public Records Law. That intent strongly favors openness, *i.e.*, disclosure. Exemptions are to be narrowly construed, *i.e.*, they are to be made on an individualized basis and are to be based on a sufficient showing of justification.

Donna Cameron, counsel for the Parkrose School District, has made a compelling argument that petitioner would use (and abuse) the information contained in Mr. Fenstermaker's W-2 forms. The District Attorney's Office is reticent to judge the past actions of petitioner with respect to Superintendent Cottingim or the prospective conduct with respect to Mr. Fenstermaker. We recognize that misuse of public record information could be actionable in a civil court.

Nevertheless, we are extremely concerned with the fact that Superintendent Cottingim felt that it was necessary to file a defamation suit because of alleged misuse shortly after her records were voluntarily disclosed to petitioner. There is a significant difference between the responsible free flow of information in the public domain and reckless allegations of fraud and embezzlement. That, however, is not the question to be resolved in this public records petition.

The "total compensation" of a public employee is an appropriate subject of scrutiny and it is in the public's interest to foster a candid evaluation of the expenditure of the public's resources. There has not been a sufficient showing by the School District that disclosure of such information is private or that the disclosure is otherwise unreasonable. Petitioner is entitled to

disclosure of Mr. Fenstermaker's salary information. However, the Wage and Tax Statement is a document created for the private use by Mr. Fenstermaker to fulfill his reporting obligations to the Internal Revenue Service and the State of Oregon. This office is prepared to acknowledge the claimed exemption with respect to the specific documents requested by petitioner.

II. SUGGESTED GUIDELINES FOR FUTURE PUBLIC RECORDS REQUESTS

The dispute between petitioner and the Parkrose School District Administration over requests for documents and information has been ongoing for many months. This public records request could and should have been resolved short of a petition to the District Attorney's Office. It is strongly suggested that petitioner and the School District agree on a process for future public records requests consistent with the spirit of the Public Records Law.

The ATTORNEY GENERAL'S PUBLIC RECORDS MANUAL (1995), p. 6 and 15, provides two general limits on the public's right to inspect nonexempt records.

A. Proper and Reasonable Opportunity to Inspect

The public's 'reasonable' opportunity to inspect records correspondingly allows the public body a 'reasonable' time to respond to a records request. The amount of time that is reasonable will depend upon the volume of records requested, the staff available to respond to the records request and the difficulty in determining whether any of the records are exempt from disclosure.

B. Consultation with Legal Counsel

We believe that records custodians do not violate the Public Records Law when they briefly postpone action on a public records disclosure request because they first need to consult with their legal counsel....

We advise public bodies to consult with counsel when presented with physically extensive or legally complex requests for disclosure of public records. We have concluded that 'when a public body does so, it does not thereby actually or constructively deny the request.' Nor does a public body deny a request merely because it fails to comply with a deadline the requestor seeks to

impose [footnote omitted]. However, it is unreasonable to use consultation with counsel merely as a tactic to delay or to frustrate the inspection process.

The District Attorney's Office would interpret the remarks of the Attorney General to provide guidance for some reasonable and necessary ground rules for future public records petitions involving the Parkrose School District and petitioner. These suggested guidelines are intended to facilitate the request for information by petitioner and the response of the school district. In addition, these guidelines will provide the appropriate framework for submission of future public records petitions to the District Attorney's Office.

1. A request for public records should be in writing and directed to the Superintendent or her designee.
2. Absent unusual circumstances, a written response to the request should be made by the School District within thirty days.
3. In the event the School District requires more than thirty days to review petitioner's request, an extension of up to thirty days may be appropriate when it is documented in writing explaining the need for such additional time.

ORDER

Accordingly, it is ordered that the petition of Karen Rutledge to disclose the 1996 and 1997 W-2 forms of James Fenstermaker is denied. It is, however, further ordered that the Parkrose School District provide to petitioner the "total compensation" of James Fenstermaker for 1996 and 1997 as reflected in the W-2 statements.

Very truly yours,



MICHAEL D. SCHRUNK
District Attorney
Multnomah County

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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 court action within 7 additional days thereafter.

JKH:JKH
c.c. Jacki Cottingim, Superintendent of Parkrose School District

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