



MICHAEL D. SCHRUNK, District Attorney for Multnomah County

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November 3, 2005

Maya Blackmun
Staff writer
The Oregonian
15495 SW Sequoia Parkway
Suite 190
Portland, OR 97224

Randy J. Harvey, Ph.D.
Director of Human Resources
Tigard-Tualatin School District 23J
6960 SW Sandburg Street
Tigard, OR 97224

Re: Petition of Maya Blackmun for The Oregonian received October 25, 2005 to disclose certain records of the Tigard-Tualatin School District (District)

Dear Ms. Blackmun and Dr. Harvey:

BACKGROUND

On this public records petition, ORS 192.410 et. seq., petitioner Maya Blackmun for The Oregonian requests the District Attorney for Washington County, Robert Hermann, to order the Tigard-Tualatin School District and its employees to produce a copy or copies of the following records:

- 1. The completed report by the Tigard-Tualatin School District of its investigation of allegations of professional misconduct made against Ken Johnson, a former teacher and coach in the Tigard-Tualatin School District; including records of the complaint of such as submitted to district employee(s).**
- 2. Any correspondence submitted by Mr. Johnson and or his representatives indicating his intention to resign from the Tigard-Tualatin School District effective Oct. 10, 2005.**

Petitioner made her written request of School District Superintendent Rob Saxton on October 20, 2005. The goal was to “better understand what risks Mr. Johnson may pose to the public and the district’s response in handling concerns raised about an employee responsible for the coaching and teaching of youth.” District Human Resources Director Dr. Randy Harvey

replied to petitioner in a letter dated October 20, 2005. He claimed absolute exemption of Mr. Johnson's employee personnel record under ORS 192.509(9) and ORS 342.850(8).

District Attorney Hermann declared a conflict of interest in the matter and requested this office to assume responsibility for the petition. We received the necessary documentation from petitioner on October 25, 2005 and wrote to Dr. Harvey requesting a response and an opportunity to review the records.

In the petition, Ms. Blackmun stressed the presumption in favor of disclosure, the public need for disclosure, and the heavy burden of justifying nondisclosure. In an October 27, 2005 District response to the petition, Dr. Harvey stated that the records "are confidential teacher personnel records and not subject to release or disclosure." He indicated that Tigard High School suspended Mr. Johnson with pay when it became aware of inappropriate actions so that it could "complete an investigation to determine the appropriate evaluative or disciplinary action for alleged misconduct, if any." The internal investigation was accumulated and maintained in Mr. Johnson's personnel file for the purpose of evaluating his conduct. Dr. Harvey attached the District policy on personnel records.

On October 27, 2005, Dr. Harvey provided the three-inch thick personnel file for our review (approximately one inch of which constituted the investigative documents). The investigation materials can be described as follows:

- A series of interviews
- Memoranda from administrators
- Photographs of the interior of Tigard High School
- A charging letter (three pages)
- Drafts of a proposed separation agreement
- A draft letter of discharge
- Correspondence with Mr. Johnson's attorney
- Letter of resignation

DISCUSSION

The Oregon Public Records catchall exemption of ORS 192.502(9) incorporates the restrictions on the disclosure of public teacher evaluations and personnel file contents found in ORS 342.850(8):

The personnel file shall be open for inspection by the teacher, the teacher's designees and the district school board and its designees. District school boards shall adopt rules governing access to personnel files including rules specifying whom school official may designate to inspect personnel files.

In Oregonian Publishing Company v. Portland School Dist. No. 1J, 329 Or 393, 401 (1999), the Supreme Court provided a dictionary definition of "personnel file" and then noted the authority of a district to compile and maintain such files.

Such "personnel files" would usually include information about a teacher's education and qualifications for employment, job performance, evaluations, disciplinary matters or other information useful in making employment decisions regarding an employee.

The Oregon Courts have limited the absolute exemption in two respects. First, the information in the teacher's personnel file must be of the appropriate kind such as evaluations and reprimands. "A public body cannot make otherwise public information confidential by placing it in a personnel file." Guard Publishing Co. v. Lane County School Dist., 96 Or App 463, 468 (1988). "ORS 342.850(8) does not, however, authorize the district to exempt a public record from disclosure by placing it in a district personnel file and claiming an exemption based on the report's title or location, rather than its content." Oregonian Publishing Company v. Portland School Dist. No. 1J, 329 Or at 402.

Second, the school district or the employee cannot have waived the exemption by public distribution of the information. "Finally, we concluded in Oregonian Publishing [152 Or App 180 (1996), affirmed by the Supreme Court on other grounds] that the disclosure of a summary report or a significant portion of the information in a confidential report can result in a waiver of the applicable exemption." Springfield School Dist. # 19 v. Guard Publishing Co., 156 Or App 176, 182 (1998).

This office concludes that both limitations do not apply to the records sought in this petition. The Tigard-Tualatin School District Administrators received information concerning the questionable behavior of one of its teachers, Ken Johnson. An investigation was ordered as an internal personnel matter. It eventually became necessary for the District to take two actions: comply with the mandatory notification to law enforcement of suspected child abuse, and institute disciplinary proceedings against Mr. Johnson.

The materials provided by Dr. Harvey and his explanation of the procedural steps taken in this matter lead to the conclusion that the investigation was appropriately placed in Mr. Johnson's personnel file. There was no waiver of the exemption by disclosure of the documents to law enforcement. The records are exempt from disclosure at this time.¹

¹ The Oregonian points out that under legislation effective January 1, 2006, disciplinary records of school employees convicted of sexually abusing students would be made public.

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ORDER

Accordingly, it is ordered that the petition of Maya Blackman for The Oregonian to disclose certain records of the Tigard-Tualatin School District is denied.

Very truly yours,



MICHAEL D. SCHRUNK
District Attorney
Multnomah County, Oregon

bcc: Bob Hermann