



**ROD UNDERHILL**, District Attorney for Multnomah County

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October 24, 2016

Rachel Monahan  
Willamette Week  
2220 N.W. Quimby Street  
Portland, Oregon 97215

Kim Sordyl  
311 N.W. 12th Avenue  
Portland, Oregon 97209

Natalie Hval  
nat@hvaldwin.net [via email only]

Stephanie Harper  
Portland Public Schools  
General Counsel's Office  
501 N. Dixon Street  
Portland, Oregon 97227

Re: Consolidated public records petitions relating to allegations of undue delay by Portland Public Schools.

Dear Ms. Monahan, Ms. Sordyl, Ms. Hval, and Ms. Harper:

This office has consolidated the four pending public records petitions involving your requests for records from Portland Public Schools (PPS) for decision. Although each of these petitions presents unique facts, they share a common thread. This office has received eight public records petitions involving claims of unreasonable delay by PPS in responding to requests since July of this year, seven of which were filed in the last three weeks. To receive this many petitions as to a single agency in such short a time is, to say the least, remarkable. We feel the need to provide some guidance on the topic in the hopes of avoiding the need for future petitions to this office.

As explained below we conclude that PPS constructively denied Ms. Monahan's request and grant her petition in part. Ms. Hval's request has not been constructively denied, so her petition is denied for now. As to Ms. Sordyl's two petitions, one is denied, the other granted in part.

## **BACKGROUND**

### **A. Rachel Monahan for Willamette Week – Case 16-25**

On May 27, 2016 Ms. Monahan filed a public records request with PPS requesting any investigation reports and correspondence relating to the investigation of Pat Stickland, a PPS employee. Although her request was acknowledged promptly, she received no further indication

that her request had either been processed or denied as of October 13, 2016 when she filed a petition for review with this office.

PPS has, in response to Ms. Monahan's petition, now concluded that it intends to provide some of the requested records and assert an exemption under ORS 192.501(12), the personnel discipline exemption, as to certain others. We will address this claim of exemption below. However, because the issue of delay and constructive denial appears capable of repetition yet evading review, we will also address it notwithstanding the indication that PPS is now acting on the request.

#### B. Natalie Hval – Case 16-23

On August 2, 2016, Ms. Hval filed a records request with PPS requesting, emails regarding herself and her son between any of a list of ten individuals over a period of 18 months. The request was subsequently expanded on September 22, 2016 to add another ten names. There was much communication back and forth between PPS and Ms. Hval and, as becomes relevant later, Ms. Hval specified on August 30, 2016 that her request was a "FOIA" request.<sup>1</sup> PPS challenged that characterization, and chose to treat the request under the Federal Educational Rights and Privacy Act (FERPA.) On September 19, 2016 PPS made available to Ms. Hval 1,703 pages of emails. Ms. Hval again responded on September 22, 2016 indicating that the emails included many records not responsive to her request and did not include records she strongly believed existed that were responsive. She again clarified that she wanted her request treated as a "FOIA" request. Having not received the records she sought, or a response from PPS satisfactory to her, Ms. Hval filed a petition with this office on October 9, 2016.

#### C. Kim Sordyl – Cases 16-24 and 16-26

On September 1, 2016, Ms. Sordyl filed a public records request with PPS requesting all investigation reports into alleged wrongdoing by PPS employee Richard Gilliam. On October 13, 2016 PPS responded to petitioner indicating an intent to "delay" disclosure of the records because there was a pending personnel matter involving a complaint filed by Ms. Sordyl in which she might be a witness. Ms. Sordyl filed a petition for review with this office the same day. (Case 16-26.)

On September 8, 2016, Ms. Sordyl filed a public records request with PPS requesting resumes at time of hire and promotion for five PPS employees and an agreement, if any, with a sixth. Having not received a response to her request, Ms. Sordyl filed a petition with this office on October 13, 2016. (Case 16-24.)

### DISCUSSION

#### A. Constructive Denial

This office only has jurisdiction to order a public agency to produce records where there has been a denial of a records request. As to most of the petitions before us, PPS indicates it has

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<sup>1</sup> The Freedom of Information Act (FOIA) does not apply to state and local agencies. However we do not expect members of the public to draw fine legal distinctions between the Oregon Public Records Law and FOIA. The Attorney General writes, "public bodies should not deny a request for their records merely because the requester calls it a FOIA request." ATTORNEY GENERAL'S PUBLIC RECORDS MANUAL (2014) at 9. A request labeled a "FOIA" request is a public records request for purposes of Oregon's Public Records Law.

not, and does not expect to, deny the records requests. Rather it asserts it is still processing and reviewing the requests and records. The Attorney General has recognized that a request may be “constructively” denied if the delay in responding is too great. A constructive denial is a delay that is so unreasonable in the context of the particular request as to effectively deny access to the records.

To assist agencies in determining the reasonableness of their response time, the Attorney General has advised that “in the usual case, we think that it should be possible to make requested records available within ten working days. We recognize that in some cases more time – even significantly more time – may be required.” ATTORNEY GENERAL’S PUBLIC RECORDS MANUAL (2014) at 12 (hereinafter “MANUAL”). In its response, PPS has cited *Petition of Budnick for The Oregonian*, Att’y Gen. PRO (Jan. 14, 2014) for the proposition that a response time in excess of 10 days can be acceptable given other press of business. In *Budnick* a reporter had filed a petition based on a response to a public records request from Cover Oregon that amounted to: we are overwhelmed with records requests, and we will get to yours as soon as we can. The delay at the time that the Attorney General issued her opinion had been just under a month. At that time she denied the petition finding that no constructive denial had yet occurred.

While PPS has accurately stated the ultimate holding of *Budnick*, it has missed the point: the Attorney General found that Cover Oregon had allocated only one manager and one staff member to handle public records matters and that it had received 85 public records requests in the four months preceding the opinion. The Attorney General made clear that responding to public records requests is a statutory mandate that must take precedence over non-statutorily mandated activities. Although the Attorney General did deny the petition, finding that a delay of less than a month did not constitute a constructive denial under the public records law, the order’s indictment of Cover Oregon’s priorities and public records practices was severe.

We see alarming similarities between the situation at Cover Oregon, as described in *Budnick*, and that presented by Portland Public Schools with respect to public records issues. PPS has informed this office that, for an organization with over 6,000 employees, it has designated one attorney (the general counsel) and one paralegal to handle all public records requests. Both individuals have other significant and unrelated duties as well. PPS reports it has received 102 public records request in the last three months.

The public records law does not impose any bright-line deadline for providing public records. As noted above, the Attorney General’s guidance is 10 working days for an ordinary request. Although extraordinary public records requests can involve tens of thousands of pages of documents, and might reasonably take even a well-prepared agency many months to fulfill, these requests are not of that nature. See, e.g., *In Defense of Animals v. OHSU*, 199 Or App 160 (2005) (request for 75,000 pages of records); *Petition of Kellington*, Att’y Gen. PRO (Mar. 23, 2009) (request for over 21,000 pages of records).

We recognize that the present interim general counsel, Ms. Harper, has been in her position for less than two months. The majority of the delay in responding to Ms. Monahan’s request, the most egregious of those before us, is not her personal fault. The structural problems she has inherited are not of her making, but it falls to her and PPS’ present leadership to fix it. Ms. Harper provided this office with a stark summary of her incredible workload and the severe administrative staffing shortages facing PPS at present.

We accept that with its current staff assigned to handle public records matters PPS cannot respond to these requests more rapidly. However, that shortfall is the result of policy decisions at

PPS and we decline to give them the benefit of those decisions in assessing the reasonableness of their response.<sup>2</sup> It is a well-established principle in the criminal law that police may not create their own exigency in order to justify actions that would otherwise be illegal without the exigency. See, e.g., *State v. Roberts*, 75 Or App 292, 296 (1985) (“Police officers cannot create their own exigencies by failing to familiarize themselves with constitutionally mandated procedures.”) The analysis here is similar.

In *Petition of Wozniacka for the Associated Press*, Att’y Gen. PRO (Jan. 14, 2014), a companion case to *Budnick* cited above, the Attorney General found a delay of about a month based on Cover Oregon not prioritizing public records response did not constitute a constructive denial. The Attorney General reached that conclusion based on the following mitigating factors: a commitment by Cover Oregon to train two additional staff to process requests, a commitment to eliminate its substantial backlog of pending requests within 10 days of the date of the order, and that it had taken concrete steps to secure technical assistance from outside the agency in responding to requests. PPS has pointed us to a set of recommendations on how to improve public records handling made by departing Superintendent Carole Smith to the School Board in July of 2016. These suggestions are commendable and, if implemented, would likely mitigate the present situation. But, unlike Cover Oregon, PPS has presented no timelines or firm commitments for action.

We have addressed a somewhat analogous, if less extreme, situation previously in the context of an ongoing dispute between a school district and a frequent records petitioner. *In re petition of Karen Rutledge*, MCDA PRO 98-04 (1998). In *Rutledge* we wrote:

The dispute between petitioner and the Parkrose School District Administration over requests for documents 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.

*Id.* at 5. Based on the circumstances in *Rutledge*, we suggested the following ground rules for handling future records requests:

Absent unusual circumstances, a written response to the request should be made by the School District within thirty days. 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.

*Id.* at 6.

The root of the problem in *Rutledge* appears to have been a personal conflict between the parties rather than the resource allocation issues presented here. However, similar guidance would appear appropriate in this case. Although we would hope and expect that responses to routine public records requests could be made within the 10 days suggested by the Attorney General, we would suggest that, given present circumstances, requests should be fulfilled within 30 days, with the option of 30 additional days upon written explanation to the requestor of the unusual circumstances justifying the delay. This office will of course evaluate any future

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<sup>2</sup> We do not intend to minimize the present shortages among top administrators at PPS. Those who remain are being asked to pull double or triple duty covering portfolios for which they do not have the institutional knowledge or background.

petitions on their individual merits, but these proposed timelines are consistent with the Attorney General's precedent on constructive denial. See, *In re petition of Ringo*, Att'y General PRO (1/16/2009) (no response other than acknowledgement of request for two months constituted a constructive denial); *Petition of Forrester*, Att'y Gen. PRO (July 2, 2010) (one month delay a constructive denial where no unusual circumstances other than vacations by staff ordinarily assigned to handle public records duties).

As to the requestors, it is apparent to this office that Ms. Harper spent considerable time and effort briefing the four petitions for review that we are resolving today, and we appreciate the thoroughness with which she addressed the applicable issues. We have suggested some guidelines to PPS for handling cases moving forward, we would likewise suggest to petitioners that, unless and until it becomes apparent that an improvement in response time is not forthcoming, petitions to this office for review will serve only to further tax resources that could be devoted to actually responding to the records requests at issue.

B. Ms. Hval's request for emails, FERPA, and the Public Records Law – ORS 192.502(8)

PPS supplied 1,703 pages of emails it deemed responsive to Ms. Hval's August 2, 2016 request on September 19, 2016, a delay of a month and a half. Ms. Hval and PPS have different interpretations of the documents provided on that date – PPS believes it fulfilled Ms. Hval's initial request, Ms. Hval believes that PPS provided her a substantial amount of non-responsive records in order to obfuscate matters.<sup>3</sup> Ms. Hval has provided this office with the emails that PPS disclosed to her. Based on the sampling reviewed in preparing this opinion, a significant number of them are indeed non-responsive to her initial query. We would always prefer that a public agency err on the side of overproduction rather than underproduction, at least when, as here, it has elected not to charge for the time necessary to produce the records. Based on what we've reviewed, we decline to penalize PPS for providing more records than Ms. Hval requested.<sup>4</sup>

Ms. Hval's second, expanded, request was made on September 22, 2016. Based on a delay of just about a month, and the provision of a substantial number of responsive records to the earlier, narrower request, we decline to find this constitutes a constructive denial of the request. Although today we are denying Ms. Hval's petition, due to the ongoing nature of the dispute between these parties, it is advisable to address some of the recurring issues.

PPS generally explains its delay to date in responding to Ms. Hval by stating that it did not properly understand her request as a public records request, rather it interpreted it as a Federal Educational Rights and Privacy Act (FERPA) request. PPS points to the Attorney General's statement that student records are beyond the scope of the Public Records Manual. MANUAL at 90. This is, again, true as far as it goes. However, that certain records are beyond the scope of the standard reference work on the public records law does not mean they are beyond the scope of the public records law itself. The Public Records Manual states, immediately after the cited passage,

“Individual public bodies should be familiar with the laws and regulations applicable to any federal program with which they are involved. To claim this

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<sup>3</sup> Ms. Hval and PPS are presently involved in litigation and neither assumes the other is acting in good faith.

<sup>4</sup> As to Ms. Hval's assertion that records responsive to her request were not included among those provided, this office is not legally or practically in a position to challenge an agency's claim that it has, in fact, provided all the records it has that are responsive to a request. *In re petition of Mark Bartlett*, MCDA PRO 15-24 (2015).

exemption [ORS 192.502(8)], public bodies must be able to point to a specific federal law or regulation that prohibits disclosure.”

*Id.* PPS has not directed this office to any rule or regulation that would prohibit disclosure of these records to this requestor.

PPS states in its response to this office that “the day that we received notice from your office regarding this petition is the day we learned that Ms. Hval considered her email request to be under the public records law, which was Monday, October 10, 2016.” This statement by PPS is inexplicable. According to the emails between petitioner and PPS, which she submitted to this office as a part of her petition:

- On August 30, 2016 Ms. Hval wrote, “I \*should\* be able to just ask for this as a part of our PPS record (and not an FOIA request) but I've had problems in the past obtaining records so I'd appreciate it if you would please in all due diligence provide these records to me in electronic form as an FOIA request if that's what it will take to get them.”
- On September 15, 2016 Ms. Hval wrote, “I know you've passed me off to [the paralegal who handles FERPA requests] but is this normal FOIA/public records request behavior?”
- Then, a third time, on September 22, 2016, Ms. Hval wrote to PPS, “I would like this search (and the previous) treated as a F.O.I.A. request as I've had trouble obtaining personal records from PPS in the past.”

Turning to the substance of the claim, FERPA, as incorporated into the public records law by ORS 192.502(8), would indeed protect many of the requested email records regarding her son (who is a PPS student) as against a non-parent requestor.<sup>5</sup> FERPA does not supplant the public records law with respect to student records; it provides an exemption to the public records law for records that fall within its scope. Because the privacy provisions of FERPA do not apply to a parent, or at least PPS has not met its burden of showing that they do in this instance, the records are not exempt under ORS 192.502(8) and must be disclosed on the terms and timelines required by Oregon's public records law.

C. Ms. Monahan's request for investigation records relating to Pat Strickland – ORS 192.501(12)

Applying the principles explained at length above, we easily conclude that the five month delay in this case constructively denied Ms. Monahan's request.

PPS has identified two investigations that are responsive to Ms. Monahan's request. PPS asserts the personnel discipline exemption in ORS 192.501(12) as to what PPS characterizes as the “first” report and states that it will agree to disclose a “summary” of the second report. We agree with PPS that the “first” report is exempt.

As to the second, we likewise agree that the “Executive Summary” dated September 26, 2016 is subject to disclosure. However, Ms. Monahan's request was not limited to a “summary” of the investigation, but rather asked for “all investigatory reports and correspondence relating to

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<sup>5</sup> PPS has also cited potential HIPAA issues relating to these records. It is unclear if PPS is a “covered entity” to whom HIPAA would apply. 45 CFR 160.103. HIPAA does not apply to information, it applies to entities. Because it is not relevant to our decision today, we need not decide if HIPAA could indeed provide a basis for PPS to exempt records from disclosure.

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the investigation of Pat Strickland.” PPS has not provided any records relating to the investigation to this office beyond the aforementioned “Executive Summary.” If the summary is subject to disclosure, no argument has been advanced as to why the underlying records (if they exist) or correspondence would not likewise be subject to disclosure. They must be disclosed unless Ms. Monahan agrees that the summary is sufficient for her purposes.<sup>6</sup>

D. Ms. Sordyl’s request for investigative records relating to Mr. Gilliam – ORS 192.501(12)

When PPS informed Ms. Sordyl that her request was being “delayed” for reasons beyond an inability to provide the records, this constituted a denial of her request. This does not mean that that denial was unjustified. An in progress personnel investigation is exempt from disclosure under ORS 192.501(12). See, e.g., *In re petition of Damewood for Willamette Week*, MCDA PRO 13-15 (2013) (“Generally, unless the public interest at the time of the request requires disclosure, the investigation process should be completed before the release of information is ordered.”)<sup>7</sup> The documents at issue relate to matters that have not reached formal conclusion of the disciplinary process and are thus exempt from disclosure at this time.<sup>8</sup>

E. Ms. Sordyl’s request for resumes of certain PPS employees and a contract or agreement

As with Ms. Hval’s petition, PPS appears to have misinterpreted the scope of Ms. Sordyl’s request for resumes. Ms. Sordyl’s September 8, 2016 request, in relevant part, was for “Resumes at time of hire and promotion for [six identified employees].” On October 18, 2016 PPS responded that it had pulled many pages from the electronic applications of the employees and would need time, and money, to conduct a thorough review for possible redaction. Ms. Sordyl responded that, as her request stated she was not seeking applications, just resumes. There does not seem to be any dispute that these resumes, to the extent they exist for individual employees, must be disclosed subject to redaction of personal contact information.

As to the second part of Ms. Sordyl’s request, “any contract or agreement between PPS and Mary Elizabeth Harper in the past 6 months,” there has not been sufficient delay under the circumstances to constitute a constructive denial as of today. PPS has identified a document, provided it to this office, and indicated disclosure will likely be forthcoming after further review.

## ORDERS

As to Ms. Monahan’s petition, PPS is ordered to promptly provide a copy of all responsive, non-privileged, records of the investigation titled “PPS/Athletic Department/ September 26, 2016.” As to the “first” investigation, the petition is denied.

As to Ms. Hval’s petition, the petition is denied at this time.

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<sup>6</sup> We do see that the summary was prepared by a lawyer hired to investigate the allegations. PPS has not asserted any claim of attorney-client privilege, and it may not do so as to purely factual matters. See, *In re petition of Frank for The Oregonian*, MCDA PRO 05-19 (2005). That an investigator happens to be an attorney does not necessarily mean that PPS and the investigator enjoyed an attorney-client relationship. To the extent that PPS believes it has a legitimate claim of privilege as to non-factual materials responsive to this request we will permit it to assert such an exemption within the seven-day deadline to comply with this order or initiate court proceedings to challenge it.

<sup>7</sup> Ms. Sordyl’s status as a potential witness has no bearing on the applicability of this exemption.

<sup>8</sup> It is unclear from our review at this time if the records will or will not be exempt from disclosure once the disciplinary process has concluded. That question is not before us today and we express no opinion on it.

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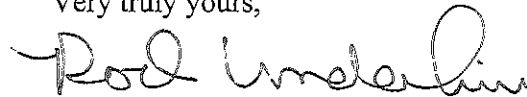
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As to Ms. Sordyl's petitions: PPS is ordered to promptly provide resumes of the identified employees consistent with the discussion above. As to the agreement with Mary-Elizabeth Harper, the petition is denied, for now, with leave to renew if a final determination is not made within the next 30 days. As to records pertaining to Mr. Gilliam, the petition is denied at this time.

As used in this section, "promptly" means within seven business days. ORS 192.490(3).

Very truly yours,

A handwritten signature in black ink that reads "Rod Underhill". The signature is written in a cursive style with a large, sweeping "R" and "U".

ROD UNDERHILL

District Attorney

Multnomah County, Oregon

**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's 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 seven days formal notice of your intent to initiate court action to contest this order, or fail to file such court action within seven additional days thereafter.

16-23, 16-24, 16-25, 16-26