



ROD UNDERHILL, District Attorney for Multnomah County

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February 6, 2017

Bethany Barnes
The Oregonian
1500 S.W. First Avenue, Suite 400
Portland, Oregon 97201

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

Re: Petition of Bethany Barnes for The Oregonian requesting investigation records and complaints relating to Astor school.

Dear Ms. Barnes and Ms. Harper:

In her public records petition, dated January 3, 2017, petitioner Bethany Barnes, on behalf of The Oregonian, requests that this office order the Portland Public School District (PPS) to disclose copies of the following records:

all formal complaints filed by Astor School parents since 2012, and

all emails between Karl Newsome and Molly Chun between Oct 18 and present.

Ms. Barnes filed this request on October 28, 2016. On November 28, 2016 a PPS spokesperson replied that a personnel investigation was ongoing and that response to Ms. Barnes' request would be "delayed" until that investigation was complete. Ms. Barnes then asked this office to order the records produced.

BACKGROUND

Karl Newsome was the principal of Astor K-8 School prior to being placed on leave last October. Molly Chun is the Senior Director for Portland Public Schools responsible for supervising the principals in the Roosevelt PK-8 cluster, which includes Astor School.

On October 18, 2016 Mr. Newsome wrote an email to all Astor School parents informing them that a teacher had been placed on administrative leave pending a police investigation. Petitioner wrote an article about this the same day.¹ Ten days later, after what was characterized as a "heated" meeting with parents, Mr. Newsome himself was placed on leave and Ms. Chun

¹ "Portland Police investigating teacher at Astor School." THE OREGONIAN (Oct. 18, 2016) (retrieved from <http://www.oregonlive.com/>)

issued an apology to parents for what their children had experienced at Astor. Few details of the actual incidents underlying either of these acts are publicly available.

PPS has provided for this office's review 76 pages of documents including emails responsive to Ms. Barnes' second request as well as what they have been able to gather of complaints by Astor parents, which all date from 2016. As to these records, PPS states multiple personnel investigations are in process and asserts that the records are exempt under ORS 192.501(12) and ORS 342.850.

PPS has informed this office that a centralized repository of "parent complaints" at Astor School does not exist and a search for any communication that could be termed a complaint about the school for the four years since 2012 would be laborious, expensive, and likely not productive. To the extent that PPS denied Ms. Barnes' request on this point, PPS informs us, their response was in error. A more proper response is that PPS is unaware if it possesses records responsive to the request and a fee estimate will be forthcoming to conduct the necessary search.

For the reasons discussed below, we grant the petition in part, and deny the petition in part.

DISCUSSION

A. Has access been denied?

A records requestor may only appeal to the district attorney's office under the public records law where access to records has been denied. The response in this case that PPS intended to "delay" providing records constituted a denial of Ms. Barnes' request. *Petition of Sordyl*, MCDA PRO 16-24 (2016) (delaying a request for reasons beyond inability to provide the records constitutes a denial for purposes of the district attorney's jurisdiction.)

As to the formal complaints filed by Astor School parents we do not find that the records request has been denied given PPS' retraction of its denial and intent to proceed with a fee estimate for conducting the research necessary to respond. On that understanding, we deny that portion of the petition as premature.

B. Personnel Disciplinary Records – ORS 192.501(12)

ORS 192.501(12) conditionally exempts from disclosure,

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

In the case of open investigations, an agency cannot yet know if this exemption applies and, thus, may generally assert the exemption until an investigation has reached its conclusion. *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.")

The use of the words "documents supporting that action" encompasses more than just the ultimate disciplinary notice. The question we are presented with here is, how broadly should "documents supporting that action" apply in the context of an open disciplinary investigation? PPS takes the position that any materials that may be relevant to the investigation are exempt from disclosure.

Records such as notes, reports, interviews, and emails that are generated as a part of the investigation clearly qualify as documents supporting a discipline action. As to records created or received in the ordinary course of business prior to the initiation of an investigation the question is less clear. We are aware of no authority construing these terms in this context, but we do find some analogs in the court's interpretation of other public records law exemptions.

For example, ORS 192.501(1) exempts "litigation records" from disclosure. Any number of documents can be relevant for litigation purposes whether or not generated during the litigation. The litigation records exemption does not apply to "records collected in the ordinary course of business even if those records subsequently become relevant to litigation." ATTORNEY GENERAL'S PUBLIC RECORDS MANUAL at 37 (2014), citing *Lane County School Dist. v. Parks*, 55 Or App 416 (1981).

A similar analysis is present in the court's discussion of what may and may not be considered part of a teacher's personnel file under ORS 342.850(8), which is discussed in more detail below.

In this case we find that the complaints that arose out of the incident that led to the suspension of the teacher, and then the principal, are documents supporting a potential disciplinary action and thus provisionally within the scope of ORS 192.501(12) pending final resolution of the investigation. The issue of older complaints, that do not arise out of these specific incidents, is not before us at this time given PPS' retraction of its denial.

Some of the emails between Mr. Newsome and Ms. Chun that we have reviewed are direct discussions of the events that gave rise to the investigations at issue and, we believe, properly exempted at this time. However, many of the emails reflect nothing more than the routine exchange of information between an employee and his supervisor. We decline to read ORS 192.501(12) so broadly as to reach this category of record. Attached to PPS' copy of this order are the documents provided for our review with redactions that we find justified indicated in red. The emails we believe subject to disclosure include generally:

- logistics surrounding preparations for the October emergency parent meeting,
- matters relating to teacher work assignments and curriculum, and
- emails sent to large groups of parents or teachers.

The remaining emails are exempt from disclosure at this time either due to the pending investigation under ORS 192.501(12) or for other reasons that do not warrant further discussion.²

Despite the parent outrage over recent events at Astor School, and the attendant media coverage, we do not believe that the public interest compels the disclosure of investigative records compiled to-date when compared against the interest in an orderly and fair investigative process. This analysis may well change if the disciplinary investigation is not prosecuted with reasonable diligence. See, *Petition of van der Voo*, MCDA PRO 15-17 (2015) (an agency may not thwart the purposes underlying the public records law by letting an investigation languish); *Petition of Sordyl*, MCDA PRO 17-05 (2017) (noting length of time to conclude disciplinary process as one factor affecting public interest in disclosure).

² To give two examples: some emails discuss details of an employee's medical leave exempt under ORS 192.502(2), others contain specifically identifiable student information exempted by Family Educational Rights and Privacy Act (FERPA.)

C. Teacher Personnel Files – ORS 342.850(8)

PPS has also asserted the records at issue are exempt by operation of ORS 342.850. This statute provides generally that access to teacher personnel files is restricted and that teachers have a right of response to any allegation or disciplinary action placed in their files. However, the court of appeals has made clear that a school (or any other public body) “cannot make otherwise public information confidential by placing it in a personnel file.” *Guard Publishing Co. v. Lane County School District*, 96 Or App 463, 468 (1988). See also, *Oregon Publishing Company v. Portland School District*, 329 Or 393, 402 (1999) (“ORS 342.850(8) does not [...] 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.”)

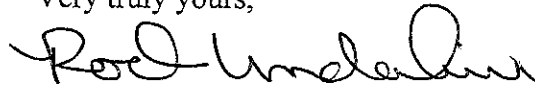
In this case, the ultimate decision to impose, or not impose, discipline on any of the involved employees would properly be placed in their personnel file and likely subject to the restrictions in ORS 342.850. We cannot say that an email or other record that was independently created outside of a human resources context can be exempted under this section merely because it is relevant to something that is ultimately placed in a teacher personnel file.³

ORS 342.850(8) does not provide a basis to exempt any of the records submitted for our review in this case.

ORDER

Accordingly, the petition is granted in part and denied in part. PPS is ordered to promptly release the records as indicated in the documents attached to PPS' copy of this order. This disclosure is subject to payment of fees to PPS, if any, not exceeding the actual cost in making the information available.

Very truly yours,



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.

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³ We need not decide here, and express no opinion on, whether a final investigator's report would fall within the scope of this exemption.