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November 23, 2005

Paige Parker
The Oregonian
1320 SW Broadway
Portland, OR 97201-3499

Jeff Austin
Attorney at Law
Miller Nash LLP
111 SW 5th Avenue, Ste 3400
Portland, OR 97204

Re: Petition of Paige Parker for The Oregonian to disclose certain records of the Portland Public Schools (the District)

Dear Ms. Parker and Mr. Austin:

On this public records petition, ORS 192.410 et. seq., petitioner Paige Parker for The Oregonian requests the District Attorney to order the District to provide access to the following materials:

Documents that explain Superintendent Vicki Phillips' termination of Steve Goldschmidt.

Petitioner requested the documents in an October 12, 2005 letter to District Superintendent Vicki Phillips. Ms. Parker argued, "it is obvious that decisions leading to Mr. Goldschmidt's termination and the arbitrator's decision [overturning that termination] involve a significant expenditure of taxpayer money." Petitioner took the position that the public interest overrode any privacy interests for the records.

In an October 20, 2005 letter to petitioner, District General Counsel Jollee Patterson declined to provide any documents responsive to the request. Ms. Patterson claimed exemption under ORS 192.501(12), Personnel Discipline Action. She argued that the public interest did not require disclosure. "This view is reinforced by the fact that an arbitrator has issued a decision which fully discusses these issues, and that decision has been disclosed to the public."

In an addendum to the petition, Ms. Parker noted that actions of the District "have cost taxpayers...more than $600,000 so far." Petitioner cited the District Attorney's guideline for releasing disciplinary records and took the position that the "circumstances raise an issue of unduly harsh...arbitrary, irrational administration of discipline by management."

Jeff Austin, an attorney at the Miller Nash law firm, submitted a response to the petition on behalf of the School District on November 17, 2005. Mr. Austin supplied the records in question, together with the arbitrator's report. The District took the position that, at most, "the requested documents might provided some additional background details." According to Mr. Austin, all of the records requested by petitioner "were generated pursuant to the termination of Mr. Goldschmidt or to support that decision in the arbitration proceedings held pursuant to Mr. Goldschmidt's employment contract with the District." Thus, all the documents are exempt as a personnel disciplinary action, ORS 192.501(12).

Certain information is claimed to be exempt as personal information, ORS 192.502(2), regarding Mr. Goldschmidt and other district officials and employees "relating to their discipline, job performance and/or concerns which would constitute, if disclosed, an unreasonable invasion of privacy." The attorney-client privilege, ORS 40.225, is claimed for one document entitled "June 6, 2005 - Notes for SG Deposition" prepared by Superintendent Vicki Phillips at the request of the District's legal counsel for the Goldschmidt arbitration.

Mr. Austin noted that the "Arbitrator and the parties took great pains to keep confidential personal and employment information relating to the Arbitration." In his report, Arbitrator John R. Barker cited the Public Records Law in his conclusion that the School District failed to prove either "that the public interest required it to publish information concerning the reasons for termination" or "that publication did not constitute an unreasonable invasion of Mr. Goldschmidt's privacy."

DISCUSSION

Personnel Discipline Action

In 1985, the Oregon legislature passed ORS 192.501(12), which exempts: "A personnel discipline action, or materials or documents supporting that action[.]" This is a conditional exemption that may be overcome if it is shown that "...the public interest requires disclosure in the particular instance [.]" The exemption applies when discipline has been imposed.

The appellate courts have spoken with respect to cases involving sustained discipline complaints. "The policy intended by the legislature, which we enforce, protects the public employee from ridicule for having been disciplined but does not shield the government from public efforts to obtain knowledge about its processes." City of Portland v. Rice, 308 Or 118, 124, n 5 (1989). (PPB Internal Affairs investigation ordered disclosed over claim of personnel discipline exemption). Accord, Oregonian Publishing Company v. Portland School District No IJ, 144 Or App 180 (1996) (Public interest required disclosure of discipline investigation and sanction of school employees for misuse and theft of school property).

The Attorney General's Public Records Manual, 2004, page 40-41, provides some guidance in the application of the traditional Personnel Discipline Action exemption:

> Consistent with this policy, there are situations when the public interest in disclosure outweighs the public interest in confidentiality, despite the imposition of a disciplinary sanction. For example, the public interest typically favors disclosure if the conduct potentially constitutes a criminal offense or if the records relate to alleged misuse and theft of public property by public employees. Other factors to consider in weighing the public interest in disclosure against the employee's interest in confidentiality include the employee's position, the basis for the disciplinary action, and the extent to which the information has already been made public.

The general rule in Oregon with respect to public records favors disclosure. City of Portland v. David Anderson and The Oregonian, 163 Or App 550, 552 (1999). With respect to sustained discipline, this office continues to be guided by the principles enunciated in our Public Records Order, February 6, 1997, *Foster*, involving the disciplinary records of Gresham police Sergeant James Kalbasky.

FOSTER CRITERIA

1. Serious misconduct by a government employee should be disclosed in the public interest; relatively minor misconduct need not be disclosed if the public interest would not be significantly promoted by doing so.

2. Generally, termination from employment or other discipline for cause is serious misconduct if it is based upon corruption in the discharge of the public's business (including theft of the public's property), abuse of official power by employing such power for a purpose not related to any lawful government objective or by use of illegal or impermissible means in the pursuit of a governmental objective, misconduct which impairs or imperils the mission of the government agency, or criminal behavior (particularly when job-related) which constitutes proper ground for discharge from employment or other discipline.

3. Discipline for acts or faults of government employees falling short of the preceding kinds of serious misconduct may also be determined to require disclosure if the cumulation of repeated disciplinary violations fairly raises the issue whether continued employment of the particular employee in itself constitutes an imprudent or improper management decision not to impose more severe sanctions or termination of employment.

4. Discipline cases that evidence systematic misconduct, i.e., misconduct affecting multiple employees and involving similar improper acts or omissions may require disclosure even when the acts or faults in question do not individually rise to the level of the serious misconduct described in points 1 and 2, where the overall pattern of disciplinary violations indicates there may be a concentrated personnel problem in a particular agency or part of any agency, or sheds light on the effectiveness of management's efforts to properly control the behavior in question.

5. Other cases of disciplinary records may merit disclosure in the public interest even though the conduct of the disciplined employee is not serious misconduct as previously described, where circumstances raise an issue of unduly harsh (or unduly lenient), arbitrary, irrational administration of discipline by management and thus illuminate management's conduct of the public business.

6. Finally, public employees should not be subjected to public disclosure of disciplinary violations not of the kind specified in the preceding guiding principles, when such disclosure would merely subject the employee to added humiliation and would not significantly promote the public's understanding of the manner in which the programs and services of government are being carried out. Part of the purpose of employee discipline is to encourage the employee's morale while correcting undesirable conduct, which goal is not promoted, as we think, by a process of indiscriminate public pillory -- and which consideration presumably was part of the Legislative Assembly's motivation for the enactment of the "discipline action" exemption in the first place.

The Oregon Court of Appeals decision of City of Portland v. David Anderson and The Oregonian, 163 Or App 550 (1999) discusses allegations of misconduct of supervisory personnel of a law enforcement agency. In that case, the Court upheld the disclosure of the personnel discipline action materials regarding the sustained discipline of Portland Police Bureau Captain John Michael Garvey. In Anderson, the Court of Appeals identified the presence of a public interest even when dealing with allegations of off-duty, non-criminal and not *per se* illegal conduct of a high-ranking law enforcement manager:

> The public has a legitimate interest in confirming his integrity and his ability to enforce the law evenhandedly. The police investigation that resulted in discipline concluded that Garvey had engaged in sexual conduct through an escort service that may serve as a front for prostitution. That information bears materially on his integrity and on the risk that its compromise could affect the administration of his duties. Portland v. Anderson, 163 Or App at 554.

The eight documents provided by the School District consist of the February 9, 2005 termination letter, notes made by Superintendent Phillips, redacted excerpts from the District's Arbitration Brief, and redacted excerpts from five depositions. The School District argues, "the public interest in disclosure has been met by the publication of the Arbitration Decision."

This office spent considerable time reviewing the twenty-five page Arbitration decision to determine if the information is already (substantially) available to the public. We conclude that it is not.

Termination letter. Superintendent Phillips handed Mr. Goldschmidt a letter notifying him of his immediate termination for gross neglect of duty. The arbitrator related the District's subsequent public statements published by the press to the effect that Mr. Goldschmidt's employment had been terminated and that there were two grounds under his employment contract for termination for cause – acts of moral turpitude or gross neglect of duty. The arbitrator concluded that these were false and malicious statements and awarded Mr. Goldschmidt $250,000. The Arbitrator noted that the letter "did not identify the acts or conclusions on which Phillips had made her decision." However, the termination letter does recite the basis for the termination in fairly clear and broad language.

Notes for Deposition. Superintendent Phillips recited in some detail to District Counsel the issues that led to Mr. Goldschmidt's termination. This document, of course, was never presented to the Arbitrator. (See discussion below on attorney-client privilege.)

District Arbitration Brief. There is no indication that the Arbitrator made the parties' legal briefs available to the public. The fourteen-page redacted brief contains much factual material and argument concerning the position of Dr. Phillips not reflected in the Arbitrator's decision.

Depositions of Vicki Phillips, Julia Brim-Edwards, Michael Howard Don, Henry Hewitt, and David Alan Gwyn Wynde. The seventy-three-page deposition of Superintendent Phillips provides an opportunity to evaluate her responses to examination under oath by Mr. Goldschmidt's attorney. The other four depositions provide the perspective of two school board members, a District employee, and a citizen attorney all who discussed the termination with Dr. Phillips. It is difficult to find reference to these depositions in the Arbitrator's decision.

It still remains to determine whether the public interest requires disclosure. The *Foster* criteria provide the answer. Steven Goldschmidt served the School District as Executive Director of Human Resources, a senior manager position. He engaged in conduct serious enough for the Superintendent of the School District to terminate his employment for cause. An arbitrator subsequently exonerated Mr. Goldschmidt and dealt punitively with the School District. The Arbitrator's award to Mr. Goldschmidt exceeded $600,000, certainly reflecting his opinion that the School District acted unduly harsh. This office concludes the public interest requires disclosure and the exemption does not apply.

Other Exemption Claims

The personal privacy exemption is claimed for information relating to two School District officials and five or six employees. Mr. Austin points out that "it would be difficult to redact names and personally identifiable information from most of these records and leave them with much meaning." We agree with Mr. Austin. The names and incidents related in the documents are central to the position of Superintendent Phillips in explaining her decision to terminate Mr. Goldschmidt's employment. However, we could identify no personal information that would constitute an unreasonable invasion of privacy.

An unconditional exemption is claimed for a three-page set of notes prepared by Superintendent Phillips for use by the District's counsel at Dr. Phillips' deposition. It is clearly a communication between an attorney and his client protected by the attorney-client privilege and incorporated in the Public Records Law by ORS 192.502(9). It is exempt from disclosure.

ORDER

Accordingly, it is ordered that the Portland Public Schools promptly disclose the records sought in the above petition, except for the three-page set of notes prepared by Dr. Phillips for use in her deposition. Disclosure of the documents ordered is subject to payment of the Portland Public School's fee, if any, not exceeding the actual cost in making the information available, consistent with ORS 192.440 and this order.

Very truly yours,

MICHAEL D. SCHRUNK
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 court action within 7 additional days thereafter.

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