



MICHAEL D. SCHRUNK, District Attorney for Multnomah County
600 County Courthouse • Portland, Oregon 97204 • (503) 248-3162

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Erin Hoover Schraw
Staff Writer, The Oregonian
1320 S. W. Broadway
Portland, OR 97201

Jeffrey B. Millner, Esq.
Attorney at Law
Miller, Nash et al.
3500 US Bancorp Tower
111 S. W. 5th Avenue
Portland, OR 97204-3699

Re: Petition of Erin Hoover Schraw, Staff Writer for The Oregonian dated July 29, 1993 to disclose certain records of Portland School District No. 1J

Dear Ms. Schraw and Counselor Millner:

1. The petition and exemption claims. On this public records petition, ORS 192.410 et seq., petitioner Erin Schraw, for The Oregonian newspaper, requests the District Attorney to order Portland School District No. 1J to disclose "All records contained in the Portland Schools Police investigation of the misuse of district property by Benson High School Principal Tom Parr and Vice-principal David Williams completed in July, 1993." By letter dated August 3, 1993 the district, through its counsel, Jeffrey B. Millner, Esq., of the Miller, Nash law firm, claims that these records are exempt from disclosure under several provisions of Oregon law: ORS 192.501(13) (materials or documents supporting a personnel disciplinary action), ORS 192.502(2) (information contained in a personal file disclosure of which would constitute an unreasonable invasion of privacy), ORS 192.502(3) (information submitted to a public body in confidence), and ORS 192.502(8) and ORS 342.850(7) (exemption from disclosure of records which are restricted, privileged or confidential under provisions of Oregon law outside the public records law, including ORS 342.850(7) regarding the personnel file of a teacher). The District also provided copies of its administrative regulations dealing with personnel records, Sections 5.20.110 and 5.20.111 (attached as Exhibit A).

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The exemption claim letter states in part: "The requested materials support personnel disciplinary actions against former Benson principal Tom Parr (resignation), former Benson vice-principal David Williams (resignation), and another employee (no longer employed by the District) and remain sealed in their respective personnel files. In short, the District has conducted a full personnel investigation of this matter and has received restitution for the misuse of the District property involved."¹ We resolve this public records petition by analysis of the exemption for materials filed in a teacher's personnel file, and thus need not discuss the other exemptions claimed.

2. The teacher's personnel file exemption, ORS 342.850(7), ORS 192.502(8). ORS 192.502(8) provides: "The following public records are exempt from disclosure under [the public records law]:...Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law[.]" (Emphasis added). The Attorney General of Oregon gives this explanation of the function of this provision of the public records law:

"This paragraph was added by the 1987 legislature. It replaces former ORS 192.500(2)(h), which listed statutes outside of the Public Records Law itself that provide for confidentiality of records. However, the list presented problems. Theoretically, the provision should have listed every statute outside of the Public Records Law that provides for confidentiality of records. In reality, it did not.

¹ The investigation -- now filed in the respective personnel files -- was conducted by the Portland Schools Police, who have the authority of "peace officers" as defined by ORS 161.015(4), but perform only such duties and exercise only such peace officer authority as is prescribed by the district school board of Portland School District No. 1J, as provided by ORS 332.531 (authorizing the district school board to establish a separate law enforcement agency in "...any school district having a population of more than 300,000...").

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"The confidentiality protection of any record covered by a statute outside of the Public Records Law is incorporated into the Public Records Law by ORS 192.502(8). Such a record is exempt, conditionally exempt or partially exempt from disclosure to the extent provided in the incorporated statute." ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (1989), at 36.

In other words, the legislature replaced a lengthy litany of statutory citations by enacting ORS 192.502(8) as a "catch-all" cross-reference to the many statutes which were listed in former ORS 192.500(2)(h) up to 1987. The fact that ORS 342.850(7) was one of the sections specifically listed by former ORS 192.500(2)(h) prior to the 1987 amendment evidences legislative recognition that that section was intended to restrict or render confidential the materials placed in a teacher's personnel file. Indeed, contemporaneously with the last revision of the public records Manual (in 1989), the Attorney General published a separately-issued Appendix to the Manual which attempts to perform the office of the former statutory provision by listing alphabetically the many agencies or public bodies affected by confidentiality provisions outside the public records law, including "Schools and Education/Institutions/Teacher personnel files/ORS 342.850." Ibid., at page 10.

ORS 342.850(7) is part of the state's Fair Dismissal Law, ORS 342.805 et seq., which regulates the grounds and procedure for dismissal of teachers or administrators in the public school systems of the state. This subsection states:

"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

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personnel files, including rules specifying whom school officials may designate to inspect personnel files."²

Although this statutory provision does not use the term "confidential," it is apparent that these provisions for controlling "access" to a teacher's personnel file are intended to have that effect. The very fact that the Legislative Assembly for many years specifically cited this section in former ORS 192.500(2)(h), and the fact that the Attorney General's Public Records Manual Appendix continues to carry reference to that section as a restrictive provision supports the construction that this provision is intended to limit access to a teacher's personnel file and vests in the district school boards the discretionary authority to regulate such access. We are, therefore, required to defer to that authority of the school board within the proper scope of its exercise.

Moreover, the context within which ORS 342.850(7) is placed convinces us that materials relating to the conduct (or misconduct) of a teacher are materials of a nature which is appropriately placed in the teacher's "personnel file." Immediately following ORS 342.850, ORS 342.865 sets forth the grounds for dismissal of a teacher including (among others) inefficiency, immorality, neglect of duty, conviction of a felony or of a crime involving moral turpitude and inadequate performance. ORS 342.865(1)(a), (b), (d), (f), (g). The subsection immediately preceding subsection (7), ORS 342.850(6), further supports the conclusion that materials relating to possible misconduct by teachers appropriately may be filed in a teacher's personnel file: "A teacher may make a written statement relating to any evaluation, reprimand, charge, action or any matter placed in the teacher's personnel file and such teacher's statement shall be placed in the personnel file." (Emphasis added). ORS 342.850(6).

In what appears to be the only appellate case which has relevantly discussed ORS 342.850(7) (although then only in passing), the Court of Appeals of Oregon seems to have impliedly accepted that this section protects confidentiality of materials properly placed in a teacher's personnel file, although

² The term "teacher" is broadly defined and includes administrators, such as principals or vice-principals, for purposes of the provision regulating access to the "teacher's" personnel file, ORS 342.815(1) and (8).

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the court found that the specific data at issue there -- the mere names of school employees -- were not within the scope of that protection.

"Defendant [school district] also contends that the names are exempt under ORS 192.502(8) and ORS 342.850(7), because that information was kept in those employees' personnel files and made confidential pursuant to school district policy. *** A public body cannot make otherwise public information confidential by placing it in a personnel file. ORS 192.502(8) does not exempt the names of replacement coaches from disclosure [during a teachers' union strike]." Guard Publishing Company v. Lane County School District No. 4J, 96 Or App 463, 468, 774 P2d 494 (1989), reversed on other grounds, 310 Or 32, 791 P2d 854 (1990).

Consistent with the apparent confidentiality purpose of ORS 342.850(7), the administrative regulations of Portland School District 1J clearly require that "The Superintendent shall establish procedures for the use of personnel records which will assure confidential use of such records...." Section 5.20.110(2)(a), and Sections 5.20.110 and 5.20.111 generally, attached as Exhibit A.

Indeed, on two past public records petitions this office has reached the same conclusion concerning the confidentiality purpose underlying the legislative policy vesting in district school boards the authority to regulate access to teacher's personnel files, viz., District Attorney's Public Records Order dated April 6, 1992 (Petition of Angela Wilson for Willamette Week) (Portland Schools Police reports prepared as part of an investigation of suspected thefts at an elementary school of Portland School District 1J, but which reports were thought insufficient to support a viable criminal prosecution, were properly filed in teacher's personnel file and were exempt from disclosure on this petition by a weekly newspaper staff member); District Attorney's Public Records Order dated September 25, 1984 (Petition of Elaine Peterson) (Written agreement or contract

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entered into between Corbett School District No. 39 and a resigned former principal, which was filed in the employee's personnel file, was exempt from disclosure under the public records law, ORS 342.850(7) and former ORS 192.500(2)(h), on this petition by an interested member of the general public).

This office is not privy to the reasons which may have motivated the Legislative Assembly to vest this discretion in district school boards, rather than leaving such records subject to the regular provisions of the public records law (as would be the case with the general run of other public agencies). Certainly, hypothetical cases may be posed --and this very case may be an example -- in which it may seem quite debatable whether the public interest is well served by effectively insulating teacher personnel records from the "public interest" balancing test which is applicable to many other public records law exemptions, e.g., ORS 192.501. Because this degree of insulation raises troubling questions of public policy we have considered whether there is any other overriding legal provision which imposes upon the school authorities an affirmative duty to disclose to law enforcement agencies, or to the public, records of this kind. For the reasons explained in the following sections, we conclude that such affirmative duty of disclosure as presently exists by law is quite limited in nature.

3. Example: Affirmative duty of school district personnel to report "child abuse" incidents to police and Children's Services Division: reporting duty not applicable to non-child abuse cases. There is no doubt that public school authorities have an affirmative duty to disclose to an appropriate law enforcement agency and/or to the state Children's Services Division (CSD), any incidents of "child abuse," broadly defined by ORS 418.740 et seq.³ Such child abuse includes physical injuries to children, mental injuries, sexual abuse, involvement in prostitution, negligent treatment or maltreatment of a child, or threatened harm to a child that creates a substantial risk of harm to the child's health or welfare. ORS 418.740(1). The duty to report such incidents to the police or CSD applies to all "Public or private official[s]," including a "school employee", "peace

³ Whichever agency receives such report -- police or CSD -- must then transmit the information to the other, so that both the police and CSD are informed. ORS 418.755.

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officer", or "attorney" (as well as many other specific categories, such as physicians). ORS 418.740(3)(c), (f), (m); ORS 418.750, 418.755, 418.760. The Legislative Assembly has declared the policy that "...[I]t is necessary and in the public interest to require mandatory reports and investigations of abuse of children." ORS 418.745.

However, even when these mandatory report provisions apply in cases of child abuse the reports are strictly confidential, as regulated by ORS 418.770, and would not be available to the generality of citizens, including the informational media. ORS 418.770 expressly protects the confidentiality of such child abuse reports "notwithstanding" any of the provisions of Oregon's public records law. ORS 418.770(1). Of course, there is no indication whatever that the reports which are in issue upon this petition have anything to do with child abuse. Rather, they relate to the conduct of only administrative and staff employees of Benson High School. We refer to the child abuse report provisions of ORS 418.740 et seq. only to illustrate that there are certain exceptional areas within which the legislature has mandated an affirmative duty to report certain conduct to the police (or to CSD).⁴

On the other hand, it is true that under the public records law itself any public agency has an affirmative duty to transmit its records for review by the office of the District Attorney (in the case of non-state public agencies), or by the office of the Attorney General (in the case of state agencies), which are the subject of a public records petition (as has been done in this present case). ORS 192.470(2). When such information coming to the attention of the law officers of the state discloses possible criminal law violations the prosecuting officials are, we believe, competent to act affirmatively to enforce the law in appropriate cases, as discussed following.

⁴ Nor is there any provision of Oregon law which imposes a generalized duty upon citizens to report to the police or prosecutor all instances of conduct which may be criminal. Oregon does not have, for example, any statute making "misprision", i.e., simple nondisclosure of information relating to crime, a crime in itself, similar to the ancient offense of "misprision of felony" which existed in England, but generally has not been adopted in the American states. Rollin M. Perkins, CRIMINAL LAW (2d Ed., 1969), at 512 ff.

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4. District Attorney's independent prosecutorial authority to investigate suspected crime or to subpoena witnesses or documents (through the grand jury). Of course, the District Attorney of each county has independent prosecutorial authority to initiate investigations of crime, or to subpoena witnesses or documents to a grand jury. ORS 8.630, 8.650, 8.660(1), and ORS Chapter 132. This office sees no reason why this prosecutorial authority of the District Attorney would be impeded or limited solely because the initial avenue by which the particular District Attorney learned of the contents of records happened to be by way of a public records law review of a citizen petition "appealing" from a denial of disclosure by a public agency. Indeed, the school district's own regulations (attached as Exhibit A) clearly recognize that a teacher's personnel file is not immune from review "By courts and public agencies with the power of subpoena ...when relevant to and necessary in the performance of their respective duties." District Regulation, Section 5.20.110(2)(a)(B). (Exhibit A).

When and if a prosecutorial investigation is initiated which results in transfer of records (or copies of records) from a teacher's personnel file to the police and to the prosecutor for prosecution review, those records then become subject to the public records law's exemption for "criminal investigation information," ORS 192.501(3). Excepting extraordinary cases in which the "public interest" might justify earlier disclosure, such records generally are disclosable to the general public under that exemption only after completion of investigation and prosecution; and even then, certain exceptional circumstances may exist justifying continued non-disclosure, such as that disclosure would: constitute an unwarranted invasion of personal privacy, disclose the identity of a confidential source of information, reveal unusual investigative techniques to the detriment of future investigations, or endanger the life or safety of police officers or other persons, Jensen v. Schiffman, 24 Or App 11, at 15-17, 544 P2d 1048 (1976).

But under Oregon law as it now stands, papers properly filed in a teacher's personnel file pursuant to ORS 342.850(7) are available to non-school personnel only to the extent that rules adopted by local district school boards grant such access, unless some overriding statute provides to the contrary. We

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find no such statute mandating disclosure of the records in question here at the instance of a member of the general public, such as the present newspaper staff writer. Whatever opinion this office might entertain concerning the wisdom (or lack of wisdom) of this policy is immaterial, since it is our duty only to implement the applicable statutes.

CONCLUSION AND ORDER

In private businesses it may not be unusual for a personnel problem involving limited misuse of company property or misappropriation of relatively small amounts of company funds to be resolved "administratively" by termination of the employee's job, with or without the payment of restitution. As we have observed, the law generally does not affirmatively mandate the reporting of such incidents to police or prosecuting authorities; and the particular business may wish to minimize unfavorable publicity, avoid the expenditure of time and effort prosecution entails, or even limit further consequences to a formerly valued employee out of compassionate consideration for what may have been many years of otherwise praiseworthy service. Yet, when such considerations come into play in personnel decisions of government agencies relating to public servants there is an added dimension of breach of the public trust which certainly weighs in favor of public disclosure.

The Court of Appeals, when determining the application of other exemptions of the public records law which incorporate a "public interest" balancing test, has said that records disclosing misconduct by government employees pre-eminently are the kind of information which virtually always will be required to be disclosed in the public interest, e.g., Turner v. Reed, 22 Or App 177, at 193, 538 P2d 373 (1975) (applying the conditional exemption for internal advisory communications, ORS 192.502(1), formerly ORS 192.500(2)(a)); Jensen v. Schiffman, supra, 24 Or App at 17 (applying the conditional exemption for criminal investigation information, ORS 192.501(3), formerly ORS 192.500(1)(c)). Here, however, ORS 342.850(7) delegates to the district school board -- and not to this office -- the task of balancing the public interest in disclosure or non-disclosure of the records in a teacher's personnel file.

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The district's regulations do not grant access to the present petitioner. We conclude that the Legislative Assembly has not empowered this office to override those regulations.

For that reason, it is ordered that the petition of Erin Hoover Schraw for The Oregonian to disclose the requested records of Portland School District No. 1J is denied.

Very truly yours,



MICHAEL D. SCHRUNK
District Attorney
Multnomah County, Oregon

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Attachment: Exhibit A

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at high risk to the disease or in a setting where there are persons who, because of physical, mental, or emotional immaturity, cannot control their conduct, the employee shall be temporarily excluded pending development of a plan or other administrative action.

(Administrative Regulation issued 4/86 as 440.211; amended 10/87 when that portion pertaining to staff was separated from 440.211 and given a personnel series number; amended 1/88.)

5.20.110 PERSONNEL RECORDS.

1. Maintenance and Control. The Superintendent of Schools shall establish, maintain and control records for employees which relate to the character, personal history, scholarship, school reports, and other data of a confidential nature, as may be needed.

2. Confidentiality.

a. The Superintendent shall establish procedures for the use of personnel records which will assure confidential use of such records as follows:

A. By members of his staff.

B. By courts and public agencies with the power of subpoena and attorney for the District when relevant to and necessary in the performance of their respective duties.

C. By the Board.

b. Those using such files shall maintain their confidential character by restricting their use to the official purposes for which such use was authorized

and shall allow others access thereto only to the extent necessary to performance of such purposes and in accordance with any restrictions specifically made applicable to their access thereto. In addition, the individual employee or his/her authorized representative may inspect his/her own personnel files as provided by other policies or agreements of the Board.

3. Access to Files.

a. The Superintendent shall designate those members of his staff who shall be authorized to have access to and the control of such files.

b. When requests by others than said designated members of staff are made for access to such files, the Superintendent or his designee shall determine in each case the appropriateness and extent of such access within the limitations described in this policy.

c. Except as otherwise expressly provided herein, no files shall be removed from the Office of the Superintendent for inspection by individual Board members, members of the staff, or other persons, unless such action is authorized by a vote of the majority of the Board.

(Board Policy adopted 6/71; amended 4/30/73.)

5.20.111 PERSONNEL RECORDS -- PROCEDURES FOR USE.

1. Authorized Personnel.

a. Records of School District employees shall be available for

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use by, and inspection only of, members of the Superintendent's staff, the employees of the Office of Personnel Services, as designated by the Director of Personnel, and the various department heads who shall have access only to the files of their employees or prospective employees. Information so obtained shall be kept confidential and shall be used only for official purposes.

- b. Personnel may have access to material in their own files received subsequent to the date of employment in this District, except that confidential recommendations from individuals or institutions shall not be made available.

2. Instruction for Use.

- a. A copy of these provisions shall be displayed in the Personnel Department in such a manner as to be obvious to all persons who desire to use the files.
- b. The Office of Personnel Services shall be responsible for maintaining systematic, complete, and current files for all personnel of the District, as appropriate.
- c. The legal name only of an employee shall be used while he/she is in the employ of the District. If any employee's name is changed by marriage or legal procedures, he/she shall immediately register such change with the Office of Personnel Services which shall be responsible for making the necessary changes.

See also additional provisions in Professional Agreement.

(Administrative Regulation issued 6/71; amended 11/71; amended 5/80[2].)

5.20.120 TEACHER RESIGNATIONS.

- 1. In Writing. All resignations shall be in writing, with the reason for resignation given, and must be signed by the teacher.
- 2. Resignation Abrogating Contract.
 - a. Timing. Every teacher desiring to resign either within 90 days prior to the commencement of a school year, or within the school year for which he/she is employed, shall submit his/her resignation as long in advance of vacating the position as circumstances reasonably permit.
 - b. No Penalty. If the Superintendent finds that District education programs will not be adversely affected and that the reason for resignation outweighs any inconvenience likely to result therefrom, he shall present such resignation to the Board of Directors with his recommendation that it be accepted without prejudice to any subsequent application for reemployment.
 - c. Penalty. If the Superintendent finds that school programs will be adversely affected by the resignation or that the reason for resignation does not outweigh the inconvenience likely to result therefrom, the teacher shall be so advised. He/she shall also be advised of the policy and procedures established herein and afforded an opportunity to withdraw such resignation.

- A. Superintendent Recommendation: If the teacher insists upon resigning, the Superintendent shall present the resignation to the School Board unaccompanied by a