

ROD UNDERHILL, District Attorney for Multnomah County

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February 15, 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, on behalf of The Oregonian, requesting Portland
Public Schools records documenting allegations of misconduct made against
Mitchell Whitehurst as well as any related investigative records.

Dear Ms. Barnes and Ms. Harper:

In her public records petition, dated January 30, 2017, petitioner Bethany Barnes requests that this office order the Portland Public School District (PPS) to disclose the following records:

all records of allegations of misconduct against Mitchell Whitehurst and all records related to investigations into allegations against Mitchell Whitehurst.

Ms. Barnes submitted this records request to PPS on September 19, 2016. On January 27, 2017 PPS denied Ms. Barnes' request citing ORS 342.850, which provides certain protections for the personnel files of teachers. On January 30, 2017 Ms. Barnes filed this appeal.

This office has received, and reviewed, approximately 160 pages of records from PPS as well as the over 90 pages of newspaper articles and related documentation submitted by petitioner. As petitioner notes, much information about the allegations surrounding Mitchell Whitehurst are already out in public. As is our practice, the discussion of background facts below is drawn entirely from publicly available information: published media reports, court documents, and other public records.

Mitchell Whitehurst worked in various capacities for PPS for almost 32 years, most regularly as a P.E. teacher or sports coach. He retired from PPS in 2015 while on administrative leave and after being criminally convicted for harassment of a co-worker.

In January of 2016, the Oregon Teacher Standards and Practices Commission (TSPC) revoked Coach Whitehurst's teaching license, finding that he, "did not possess the good moral character or mental and physical fitness" to hold a teaching license. In 2013, a PPS principal who supervised Coach Whitehurst had expressed concern about him being permitted to remain on campus during an investigation. She cited 30 years of "rumblings" about Coach Whitehurst and said she was "extremely concerned about this becoming a 'Penn State University' scandal." Coach Whitehurst was cleared by PPS' investigation and continued to teach.

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PPS acknowledges that, as early as 2001, it was aware of allegations against Coach Whitehurst, specifically:

- In 2001, a student working as a classroom aide made a written complaint about ongoing sexually inappropriate behavior by Coach Whitehurst directed at her.
- In 2008, a new substitute teacher and former PPS student, reported that Coach Whitehurst had asked her and another student to perform oral sex on him in 1983 shortly after he was hired.
- In December of 2010, an unknown individual put up flyers around Jefferson High School with Coach Whitehurst's photo alleging him to be a pedophile and warning parents be alert and report any misconduct to police.
- A PPS counselor interviewed by police in 2014 stated that she has notes from 3-4 years earlier of female students complaining about Coach Whitehurst recording them and invading their personal space in a "creepy" way.
- In 2012, the same teacher again reported the misconduct from 1983 to a different PPS administrator. PPS stated in deposition testimony, via counsel, that it is unaware of any follow-up investigation that was done at this time.
- In 2013, a group of middle school girls boycotted Coach Whitehurst's gym class because they claimed he was making remarks about their bodies, videotaping them, and calling them pet names. PPS interviewed the involved students and could not substantiate that there was sexual misconduct.
- In August of 2014, a PPS administrator witnessed Coach Whitehurst slap a coworker on the buttocks, verbally reprimanded him, and documented the incident in a memo to PPS human resources.
- On September 25, 2014, Coach Whitehurst is alleged to have inserted his finger or other object into or around the anus of a (clothed) coworker after twice previously being told by the co-worker not to touch his buttocks. This conduct resulted in a criminal conviction for harassment as well as a lawsuit that PPS settled for a \$250,000 payment to the victim.

The School Board narrowly approved the settlement of the civil lawsuit arising out of Coach Whitehurst's conduct. Three of the seven school board members voted against the resolution objecting to the high dollar amount of the settlement and called for a public airing of the facts. Director Buel called for an investigation into "how this whole thing came down." Director Rosen stated that he believed this settlement an unwise balancing of financial risk and reputational risk on the one hand against risk to children on the other.

It is against this extraordinary backdrop that we evaluate the public records exemptions asserted by PPS. PPS asserts that various of the involved records are exempt by operation of ORS 192.502(2), information of a personal nature; ORS 192.501(12), personnel disciplinary action; ORS 192.502(9)/ORS 326.565, student educational records; and ORS 192.502(9)/ORS 342.580, teacher personnel files.

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DISCUSSION

Given the above recital of facts now publicly known, and our review of the records at issue, it is clear the public interest requires disclosure of the records at issue. To the extent that any of these records are an unreasonable invasion of Coach Whitehurst's privacy, we find clear and convincing evidence that the public interest requires disclosure under ORS 192.502(2).

As to the individual students or adult victims at issue, in general the records must be disclosed, but may be redacted to eliminate names or other personal information that would identify the student. We do not see a basis under the public records law, particularly given the inapplicability of ORS 192.501(12), to redact the names of non-victims interviewed in the course of PPS' investigations. We find that there is a public interest in what conduct was reported, when, and to whom, but it would not advance the public interest to know the names of the people who felt victimized by Coach Whitehurst's conduct.

As to the co-worker who filed suit against PPS, we do not find that disclosure of his name in these records is an unreasonable invasion of his privacy. He has repeatedly identified himself and what happened to him in depositions and court filings. Although The Oregonian has not publicly identified him, his identity is a matter of public record as a result of his own decisions. Because disclosure of his identity would not be an unreasonable invasion of privacy we need not balance the public interest.¹

All administrative communications, either internal to PPS or between PPS and other agencies, contained in the records we reviewed must also be disclosed subject to the redactions authorized in the previous paragraphs.

The documents numbered Group 1_200063-64 and Group 1_200081 are a part of Mr. Whitehurst's personnel file and, thus, unconditionally exempt by operation of ORS 342.850 / 192.502(9).

Group 2_200102 is a school attendance sheet, an educational record, that may be exempted. Group 2_200103-200159 relate to interviews with the middle school girls who boycotted Coach Whitehurst's class. As to this group of records, we do not believe that an interview of a student, generated and maintained by PPS administrators and relating to investigating allegations of employee wrongdoing, is an "educational record" within the meaning of FERPA or ORS 326.565. Its purpose is to identify and rectify wrongdoing by school employees not to further the education of the student. However, they may be redacted to shield the personally identifying information of the girls and their parents, which should satisfy any privacy concerns under those statutes.

We appreciate, and in the abstract agree with, PPS' argument that it has a significant interest in obtaining candid responses from individuals (particularly students) when there is teacher conduct at issue. PPS asserts that public disclosure could chill that participation in future investigations. However, for all the reasons previously stated, this is an extraordinary case.

¹ Reference to his, and any other, PPS employee's personal contact information may properly be redacted pursuant to ORS 192.502(3).

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ORDER

Except as expressly noted above, the petition is granted. PPS is ordered to promptly disclose the records responsive to petitioner's request. This disclosure is subject to the redactions noted above and 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.

17-08