



ROD UNDERHILL, District Attorney for Multnomah County

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October 19, 2017

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

Mark B. Comstock
Attorney at Law
1011 Commercial Street N.E.
Salem, Oregon 97301

Re: Petition of Kim Sordyl requesting responses to a satisfaction survey sent out by the Portland Public Schools Ombudsman.

Dear Ms. Sordyl and Mr. Comstock:

In her public records petition, dated October 9, 2017, petitioner Kim Sordyl requests this office to order the Portland Public School District (PPS) to disclose the following records:

All documentation showing data, responses, results from the Ombudsman customer survey. This should include any report or analysis done by or for PPS PR Dept., Superintendent, Board or other leadership.

On August 27, 2017 petitioner made the request for the above records. In her request, she noted that this was the second time she had made this request and that PPS had previously denied it "last year." On October 5, 2017 PPS' public records officer again denied petitioner's request, writing,

we have completed our analysis of the records you requested. Specifically, we considered them in light of ORS 192.502(4), the confidential submissions exemption, and determined that the ombudsman's customer survey results are properly considered confidential submissions under this exemption.

This petition ensued. PPS now asserts, via counsel, 1) that the Office of the Ombudsman is not a public body to which the public records law applies, 2) that the Ombudsman is a separate agency from PPS and, therefore, PPS does not possess the records at issue so cannot produce them, and 3) that the records themselves are confidential submissions under ORS 192.502(4) and exempt from disclosure.

For the reasons discussed below, we conclude that the Ombudsman is a part of PPS for purposes of the public records law and that by failing to produce records for this office's review, as required by the public records law, PPS has failed to meet its burden in support of its claim of exemption under ORS 192.502(4).

DISCUSSION

A. Is the PPS Ombudsman a public body?

ORS 192.410(3) defines a “public body” as

every state officer, agency, department, division, bureau, board and commission; every county and city governing body, school district, special district, municipal corporation, and any board, department, commission, council, or agency thereof; and any other public agency of this state.

PPS asserts that the records at issue are in the sole custody of the Ombudsman, and that the Ombudsman is not a public body subject to the public records law. We disagree.

PPS’ own webpage lists the Ombudsman as a “department” of the school district.¹ ORS 192.410(3) includes within its definition of “public body” a “school district [...] and any [...] department [...] thereof.” Although PPS may have created this department to exercise operational independence and limited its direct accountability to the board or the administration, this does not make it less of a “department” of the district. The particular circumstances here further reinforce this conclusion:

- The Ombudsman’s office was created by a governmental body as a permanent position.
- The Ombudsman is a PPS employee, is paid out of the PPS budget, maintains office space in PPS facilities, and is provided with administrative support by PPS.
- PPS’ adopted budget for 2017/2018 includes a district organizational chart that not only includes the Ombudsman, but places her in a position indicating a direct relationship between her and the district’s communications department.
- The Ombudsman’s mid-year report states that “the Ombuds reports for administrative purposes to the District Superintendent.”²
- The Ombudsman’s office performs an essential function for the district: fielding and resolving complaints. The accessibility of a complaint process is mandatory under state law.³
- The Ombudsman’s complaint intake form contains the disclaimer that “This form was created inside of Portland Public Schools.”⁴

¹ pps.net, “Departments Directory” (<https://www.pps.net/site/Default.aspx?PageType=1&SiteID=4&ChannelID=32&DirectoryType=6>)

² *Ombudsman Mid-Year Report*, February 2017 (republished by the Portland Tribune at <http://pamplinmedia.com/documents/artdocs/00003573558757.pdf>)

³ OAR 581-022-2370. See also, Letter of State Deputy Superintendent Rob Saxton to Carole Smith and Caroline Fenn (March 13, 2014).

- The Ombudsman herself acknowledged in a 2014 media interview that her job is located within the PPS communications office.⁵

PPS argues that the factors set forth in *Marks v. McKenzie High Sch. Fact-Finding Team*, 319 Or 451 (1994), weigh against finding that the Ombudsman is the “functional equivalent” of a public body for purposes of the public records law. The overwhelming weight of the available evidence shows that the PPS Ombudsman is not the functional equivalent of a public body, it is a public body. Were we to apply the six *Marks* factors, we would reach the same conclusion.

B. Is the Ombudsman part of PPS?

PPS has further asserted to this office that, because its Ombudsman is independent, she is not part of PPS and, therefore, PPS does not have access to the records at issue. Having already concluded that the Ombudsman is a public body under ORS 192.410(3), we then must consider whether or not it is the same public body as PPS.

We agree in principle with PPS’ argument that we cannot order PPS, or any agency, to produce records that it does not possess. PPS points to a summary order of the Attorney General in support of its position that its Ombudsman is a separate entity. *Petition of Struble*, Att’y Gen. PRO (2/8/1999). In *Struble*, the Attorney General noted that records had been requested from both the Workers Compensation Division and the Workers’ Compensation Ombudsman. The Attorney General noted the Ombudsman stated he did not possess the records and, as such, could not be ordered to produce them but that the Compensation Division had agreed to provide them, so the issue was moot. *Struble* contains no substantive discussion of the legal relationship between these two entities. We agree that an Ombudsman can be a separate entity from the agency whose complaints he or she mediates, and *Struble* may indeed address one of those situations. However, looking at PPS’s situation we are unable to reach the same conclusion.

In addition to the close ties enumerated in the previous section, PPS’ public records team processed petitioner’s request in this case (and presumably the same one from last year) and denied it on the merits. Counsel for PPS has continued to assert public records exemptions on behalf of the Ombudsman’s office. Whatever administrative protections are in place to provide the Ombudsman with operational independence, these do not serve to establish a public records refuge within that office. Records maintained by the Ombudsman may well be exempt in some, or indeed many, circumstances given the nature of her work, but that is an argument that PPS must make in each case to overcome the presumption that public records shall be disclosed.

PPS asserts that it “cannot” provide us with the records, but has provided no source of law, board resolution, or other state or local regulation that supports this position. Repeatedly

⁴ <https://www.pps.net/Page/240> (Complaint Intake Form)

⁵ Kelly House, “9 questions with the new official complaint-taker for Portland Public Schools,” OregonLive.com (9/4/2014) (http://www.oregonlive.com/portland/index.ssf/2014/09/9_questions_with_the_new_offic.html) (“The communications office went through the whole process of getting parent input on my job description. My job was placed within the communications office because they’re the ones who manage parent communications, but that doesn’t mean my office isn’t independent.”)

stating that a department is “independent” does not make it so. By regularly responding to, and denying, public records requests for Ombudsman records PPS has acknowledged by practice that its Ombudsman is part of it for purposes of the public records law. When an agency receives a public records request it does not intend to fulfill, ORS 192.440 requires it to either state why the records are exempt or state that it is “not the custodian of the records.” ORS 192.440(2)(a)-(f). Additionally, if the Ombudsman were an independent body, it would be required by law to list on its website “the name of one or more persons to whom public record requests may be sent, with addresses.” ORS 192.440(7). The Ombudsman does not publish any information suggesting that public records requests should be directed anywhere other than to PPS.

In sum, some Ombudsmen may well be independent “agencies” for purpose of the public records law—PPS’ Ombudsman shows none of the signs of institutional separation that would lead to that conclusion in this case.

C. Confidential Submission – ORS 192.502(4)

ORS 192.502(4) exempts from disclosure:

Information submitted to a public body in confidence and not otherwise required by law to be submitted, where such information should reasonably be considered confidential, the public body has obliged itself in good faith not to disclose the information, and when the public interest would suffer by the disclosure.

On the merits, PPS asserts that the submissions to the Ombudsman’s office are confidential submissions under the Public Records Law. Some or all of these records may well be exempt from disclosure, but, despite multiple requests from this office, PPS insists that it cannot, or will not, provide this office with the records at issue as required by ORS 192.470. Because PPS has refused to provide us the records, we cannot evaluate the claim on the merits as it relates to the specific contents of each survey.

On the bare record before us we can conclude that disclosure of the names and personal contact information of complainants to the Ombudsman’s office would cause harm to the public interest. It is clear that core to an Ombudsman’s practice and professional ethics is an assurance of confidentiality. Individuals who have completed the customer survey have, by definition, previously submitted a complaint to the Ombudsman. We cannot similarly make any abstract assessment of the public interest as to the numerical scores ranking the quality of services received or the free-form entry fields on the survey.

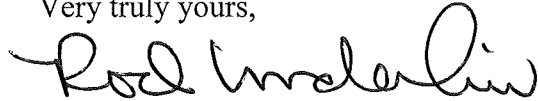
It is the public agency’s burden to establish that any record is exempt from disclosure. ORS 192.450(1). We cannot find that PPS has met that burden here.

ORDER

Accordingly, the petition is granted in part. PPS is ordered to promptly disclose any records responsive to this request maintained by the district—which, to be clear, we find includes the District Ombudsman—excepting the names and personal contact information of survey

respondents. 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,

A handwritten signature in black ink, appearing to read "Rod Underhill". The signature is fluid and cursive, with a large initial "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.

17-46