



**ROD UNDERHILL**, District Attorney for Multnomah County

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January 3, 2018

Beth Slovic  
Portland Tribune  
6605 S.E. Lake Road  
Portland, Oregon 97222

Mary Kane  
Portland Public Schools  
501 N. Dixon Street  
Portland, Oregon 97227

Re: Petition of Beth Slovic, on behalf of the Portland Tribune, seeking a unredacted information regarding Andrew Oshea.

Dear Ms. Slovic and Ms. Kane:

In response to a public records request from Ms. Slovic, the Portland Public School District (PPS) provided her with 282 pages of responsive records relating to a now-resigned special education teacher, Andrew Oshea. These records contained many redactions, which PPS explained to Ms. Slovic as being variously based on a then-pending personnel disciplinary action, a Teacher's Standards and Practices Commission (TSPC) investigation, and attorney-client privilege.

On December 15, 2017 Ms. Slovic filed a public records petition seeking this office's review of the redacted materials for compliance with the public records law.

By way of background, Andrew Oshea was a special education teacher who until recently worked for PPS at the Pioneer School. Petitioner has already written about Mr. Oshea, reporting in the Portland Tribune that PPS placed him on paid administrative leave in November of 2015.<sup>1</sup> Petitioner additionally reported that Mr. Oshea was arrested a total of six times after being placed on leave for allegations of domestic violence, DUII, and restraining order and probation violations in Deschutes and Hood River counties.<sup>2</sup>

While this public records appeal was pending, Mr. Oshea resigned from his position at Portland Public Schools with a negotiated severance payment.

In response to this appeal, counsel for PPS has clarified the scope and basis of the exemptions it is asserting. PPS has indicated a number of redactions that it made in the initial production of records relating to TSPC proceedings that it no longer intends to assert. These are identified in PPS submission to us as appearing on pages 18, 81, 90-92, 180, 202-206, 215, 223,

<sup>1</sup> Beth Slovic, "Why hasn't Portland Public Schools fired this man?" PORTLAND TRIBUNE (Aug. 9, 2017) (portlandtribune.com)

<sup>2</sup> Beth Slovic, "Portland teacher returns to jail." PORTLAND TRIBUNE (Sept. 5, 2017) (portlandtribune.com)

255, 257, 259–260, and 272. We do not address these redactions further given PPS’ intent to disclose the previously redacted information. As to the remaining redactions, PPS now asserts that matters relating to Mr. Oshea’s disciplinary records are exempt under ORS 342.850 and ORS 192.501(12); employee personal contact information (including Mr. Oshea’s) is exempt under ORS 192.502(3); certain records that could reveal medical information are exempt under ORS 192.502(2); and attorney communications are exempt under ORS 192.502(9) and ORS 40.225.

As discussed below, we agree with certain of the redactions, and disagree with others.

## DISCUSSION

### A. Teacher Personnel Files – ORS 342.850(8)

As to teacher personnel files ORS 342.850(8) provides,

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

The Oregon Supreme Court has concluded that documents in teacher personnel files are absolutely exempt from disclosure under the public records law based on the rules enacted by PPS to implement ORS 342.850(8). *Oregonian Publishing Co. v. Portland School Dist. 1J*, 329 Or 393, 400 (1999) (noting that PPS has enacted rules pursuant to this authorization that make these files confidential and absolutely exempt from disclosure by operation of ORS 192.502(9)).

Petitioner argues that the length of time Mr. Oshea was on leave (over 24 months), coupled with a large payment to him as part of a separation agreement, establishes a substantial public interest in the details of his misconduct. ORS 342.850(8), which PPS now asserts, does not permit this balancing. It merely requires that we determine if these documents are properly “in” Mr. Oshea’s personnel file.

A teacher’s personnel file is a carefully defined entity, subject to bargaining with the teacher’s union as to what can go into it, what may not go into it, and who may review it. See, Agreement: School District No. 1 Multnomah County Oregon and Portland Association of Teachers (“the Agreement”), Article 22. Article 22(A) of the Agreement provides “There shall be only one official District personnel file which shall be maintained by the Human Resources Department.” Article 22(D) provides,

a professional educator shall be provided a copy of any materials relating to the professional educator’s work performance if such materials are to be placed in the professional educator’s personnel file. A complaint shall not be placed in the professional educator’s personnel file unless accompanied by a written directive from the administrator

These provisions speak to a level of formality and process not present in most of the discipline-related redactions here. We do not believe that emails between administrators discussing complaints received about a teacher or a teacher’s present incarceration or other similar matters meet these criteria. By way of contract, page 21 shows Mr. Oshea being provided

a formal copy, as required by Article 22, of a reprimand that is to go in his personnel file. The email discussions by PPS administrators here undoubtedly relate to a disciplinary investigation and could be said to “support” a disciplinary action within the meaning of ORS 192.501(12), but we have not been provided evidence to suggest that these documents are actually “in” the official PPS personnel file referenced by ORS 342.850(8) and Article 22 of the Agreement.

That said, there are certain documents that are either final copies of disciplinary notices that would properly be in a personnel file or drafts of those documents subject to discussion by district administrators. That a document, or an initial draft of a document, that is ultimately placed in a personnel file is circulated by email does not remove its protected status. The following documents are unconditionally exempt from disclosure: 21 (attachment only); 203 (attachment “56105.pdf” only); 265 (attachment only); 271 (attachment only);

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.

As implied above, we find that many of the redactions at issue relate to information supporting a disciplinary action within the meaning of this section. However, that is not dispositive in this instance. Unlike ORS 342.850(8), ORS 192.501(12) only applies unless the public interest requires disclosure in a particular instance. To evaluate the public’s interest in disclosure under ORS 192.501(12) we rely on guidelines known as the *Foster* criteria. *Petition of Foster for The Oregonian*, MCDA PRO 96-31 (1997). These guidelines are, in summary:

1. Serious misconduct by a government employee should be disclosed;
2. Generally, termination from employment or other discipline for cause is serious misconduct if it is based on corruption (including theft of public property), abuse of power, misconduct that impairs the mission of the agency, or criminal behavior;
3. Less serious misconduct may require disclosure if repeated violations fairly raises the issue of imprudent management of public employees;
4. Cases evidencing systematic misconduct within a particular agency or part of an agency that shed light on the effectiveness of management may require disclosure even if, individually, the instances of misconduct are not serious;
5. Less serious misconduct may require disclosure in the public interest where circumstances raise a question of unduly harsh (or unduly lenient), arbitrary, irrational or discriminatory administration of discipline by management;
6. Lastly, public employees should not be subjected to public disclosure of disciplinary violations that do not fit into a category above where such would not significantly promote the public’s understanding of the manner in which government business is carried out.

As we have previously noted in another case involving PPS, the inordinately long time that an employee languishes on paid leave is a substantial factor in assessing the effectiveness of

PPS' disciplinary process under the fifth and sixth *Foster* factors. See, *Petition of Sordyl*, MCDA PRO 17-05 (2017). In applying ORS 192.501(12) the Supreme Court has stated, "[t]he 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).

If Mr. Oshea's separation from PPS was, effectively, a termination for cause based, in part, on criminal conduct this could provide a separate and independent basis to find the public interest compelled disclosure under the second *Foster* factor. However, given the clear applicability of the fifth and sixth *Foster* factors, we need not separately wade into the minutia of the negotiated separation agreement and the circumstances surrounding it.

We find that the public interest requires release of most of the redacted emails in this case for which PPS asserts a disciplinary exemption. We are not convinced that the public interest requires release of the audio recordings of Mr. Oshea's meetings with PPS administrators (p. 272) or dump of emails sent from Mr. Oshea's PPS account gathered during the investigation (pp. 84; 87, 142).

#### C. Other, non-disciplinary, redactions

Appearing on pages 144, 153, 216, 217, 245, 252, 253, and 263 is a list of teachers on paid administrative leave. We have previously ordered this information released. *Petitions of Sordyl and Slovic*, MCDA PRO 17-15 (2017). That order is the subject of pending litigation in the circuit court between PPS and petitioner. Without conceding anything on the underlying issue, both parties have agreed to wait for a final answer from the courts rather than asking us to rule a second time on the same question. We take no action at this time as to these redactions.

Throughout the documents PPS has redacted teacher and administrator personal email addresses and phone numbers pursuant to ORS 192.502(3), which unconditionally exempts from disclosure public employee personal contact information. These redactions are appropriate.

We likewise agree that PPS' assertions of attorney-client privilege are appropriate with two exceptions, on pages 57 and 95, that PPS has now agreed were redacted in error.

The balance of the miscellaneous redactions that we approve under 192.502(2), 192.502(3), and 192.501(12) are indicated in the records attached to PPS' copy of this order.

Lastly, PPS redacted an entire daily report of teachers who were absent from work in the district on pages 94, 104, and 105. We suspect that this material is of little interest to petitioner, nonetheless, it is not subject to blanket redaction. A teacher who is absent due to a family medical emergency may have a legitimate privacy interest in his or her status as absent where one on an approved vacation may not. If petitioner is interested in this material, PPS must perform a line-item redaction to redact only the exempt material. These redactions are subject to payment of costs to PPS not to exceed its actual costs in making the redactions.

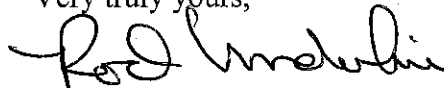
### ORDER

Accordingly, the petition is granted in part and denied in part as enumerated above. We have attached to PPS' copy of this order a version of the submitted records with the approved redactions indicated. Although we have made every effort to be consistent and complete in our

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review, to the extent there are inconsistencies between this order and the attached document, PPS may seek further written clarification from this office.

Very truly yours,

A handwritten signature in black ink, appearing to read "Rod Underhill". The signature is fluid and cursive, with the first name "Rod" being more prominent.

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.

**17-61**