



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

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January 9, 2018

Rachel Monahan  
Willamette Week  
2220 N.W. Quimby Street  
Portland, Oregon 97210

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

Re: Petition of Rachel Monahan, on behalf of Willamette Week, seeking unredacted information regarding Adam Kennybrew

Dear Ms. Monahan and Ms. Kane:

In her public records petition, dated December 16, 2017, petitioner Rachel Monahan requests this office to order the Portland Public School District (PPS) to disclose unredacted copies of the following records:

**any complaints regarding Adam Kennybrew and an[y] investigative findings or report as well as an underlying correspondence regarding those investigations**

**provide all text messages including photos sent by Kennybrew to [list of names] during Aug, Sept and Oct of 2016**

Petitioner made her initial request of PPS on August 14, 2017. PPS provided responsive records, with heavy redaction, on December 15, 2017. PPS notes that much of this delay was as a result of investigations stemming from this incident and PPS' handling of it. Petitioner asks that we order PPS to release an unredacted version of these records.

Adam Kennybrew was the Roosevelt High School football coach until he left that position in August. Mr. Kennybrew remains employed by PPS in a different capacity. In late May and early June multiple co-workers of Mr. Kennybrew reported to school administration that he had acted inappropriately towards them. They variously related that he sent them sexually explicit text messages, engaged in conversation at work about sex and the complainants physical appearance, and gave unwanted hugs. Letters from Filip Hristic, the Roosevelt High principal, to each of the complainants have been released to petitioner (with names redacted). These letters outline the general nature of each complaint as well as the principal's direction to the complainant as to how to handle any future similar behavior. PPS also formally disciplined Mr. Kennybrew as a result of this investigation.

Most of the redactions in the records released to petitioner are based on ORS 192.501(12), the personnel disciplinary action exemption, but PPS also asserts that information identifying the complainants as well as the substance of their communications to PPS are exempt under ORS 192.502(2) as information of a personal nature. Assorted other redactions are justified under ORS 192.502(3), as public employee contact information and, as to a few pages, ORS 342.850(8), relating to the contents of teacher personnel files.<sup>1</sup>

As discussed below, we agree with PPS' asserted redactions with a single exception.

## DISCUSSION

### A. Information of a Personal Nature – ORS 192.502(2)

ORS 192.502(2) exempts from disclosure:

Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if public disclosure would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance. The party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy.

Long standing issues of sexual harassment, workplace abuse, and similar malfeasance by men in positions of power have pervaded media coverage over the last six months. It is well and thoroughly a part of present public discourse. Those many conversations have reinforced the practical obstacles and impediments that prevent many victims of workplace harassment from coming forward. It is undoubtedly in the public's interest that anyone subjected to this conduct feel able to formally or informally report their experiences to those in a position to help. The converse is equally true: anything that would dissuade or hinder a complainant from seeking to report harassment is contrary to the public interest.

Here, the identities of the complaining parties and the statements they submitted are information of a personal nature and their disclosure would constitute an unreasonable invasion of privacy. Should these women choose to publicly come forward and describe what they experienced, they are free to do that, but unless and until they do so PPS may respect their privacy and decline to disclose this information.

### 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.

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<sup>1</sup> The redactions identified as under ORS 192.502(3) and 342.850(8) are squarely within the scope of these statutes. We approve them without further discussion.

The documents gathered during the investigation of Mr. Kennybrew can fairly be said to “support” PPS’ decision to discipline him. However, this exemption 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.

Misconduct that results in discipline is inherently aberrant behavior of some kind. The *Foster* criteria recognize that the mere fact that someone has misbehaved, and been officially sanctioned for it by his employer, does not itself establish a public interest in knowing the details of the misconduct. Indeed, even termination for cause will not always support a finding of “serious misconduct” within the meaning of *Foster*. The allegations raised in this case, as described in the records provided to us, do not constitute “serious misconduct” as that phrase is used here.

As to the other public interest factors, we are guided by our analysis in the previous section. Assuming that release of these details would inform the public’s understanding of PPS disciplinary process, it would not do so to such an extent as would justify publishing the details of sexual harassment claims without the assent of the individual complainants.

One document, a June 14, 2017 letter appearing on page 48, and referenced in an email of the same date on page 69, does not fit within the scope of ORS 192.501(12). It is a letter to Principal Hristic from two of the individuals who had submitted complaints with concerns about the disciplinary process itself rather than the underlying allegations. It cannot be said to be a document that “supports” a personnel discipline action because it is a criticism of the process,

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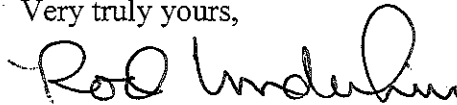
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not a part of the process. See, *City of Portland v. Rice*, 308 Or 118, 122 (1989) (“The word ‘supporting’ is not a synonym of ‘relating to.’”) As above, the names of the complainants may be redacted from this document, but otherwise it must be disclosed.

### ORDER

Accordingly, the petition is denied except as to page 48, which PPS is ordered to promptly release. This release is subject to the payment of fees, if any, not to exceed PPS’ actual costs in providing the document.

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.

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