



MIKE SCHMIDT, District Attorney for Multnomah County

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February 24, 2021

Margaret Olney
Bennet Hartmann, LLP
210 S.W. Morrison Street, Suite 500
Portland, Oregon 97204

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

Re: Petition of Margaret Olney seeking less-redacted copies of emails and documents

Dear Ms. Olney and Ms. Kane:

Petitioner, Margaret Olney, an attorney representing a Portland Public Schools (PPS) teacher in an employment action, seeks this office to order PPS to provide her with less redacted versions of records produced in response to the following request:

2. From September 27, 2019 to the present, copies of any emails between administrators and members of the Human Resource department and/or the Title IX office relating to the complaints against [petitioner's client].
3. Copies of all communication between District administrators and ODE (emails, letters or notes of conversations) regarding [petitioner's client], from September 27, 2019 to the present.¹

PPS produced 115 pages of documents in response to these two items, but these pages were heavily redacted. PPS asserts that, variously, the personnel discipline exemption (ORS 192.345(12)), attorney-client privilege and work product (ORS 192.355(9)), teacher personnel files confidentiality (ORS 342.850), and the Federal Educational Rights and Privacy Act (FERPA) (ORS 192.355(8)) support these redactions.

For the reasons discussed below, we find that the redactions made pursuant to attorney-client privilege are proper. We also find that the redactions made pursuant to personnel-related exemptions are overbroad. Accordingly, the petition is granted in part.

¹ Item 1 of the underlying request is not at issue in this petition.

DISCUSSION

A. Attorney-client privilege – ORS 192.355(9), ORS 40.225

i. *Legal principles*

The confidentiality of communications between an attorney and his or her client is a foundational principle of our system of laws. *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (“The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.”) This privilege extends to public organizations that employ or retain lawyers to give them legal advice and shields those communications from disclosure under the public records law. *Port of Portland v. Or. Ctr. for Env'tl. Health*, 238 Or App 404, 409 (2010) (noting incorporation of attorney-client privilege into the public records law by way of ORS 192.355(9)).

Oregon has expressly codified the attorney-client privilege in statute, and in so doing has established that the privilege applies to “confidential communications.” This is a more expansive statement of the privilege than the common law rule that continues to be applied in other jurisdictions, to include the federal courts.² Perhaps for this reason, the Oregon Supreme Court has looked unfavorably on authority from outside Oregon in this area. *State v. Riddle*, 330 Or 471 (2000) (privilege does not apply unless “unless such an application of that doctrine is dictated in some Oregon source of law”).

The Supreme Court has stated that OEC 503(2) “extends a privilege to any confidential information or statements that the lawyer communicated [...], as well as to the fact of and content of the [...] confidential communications.” *Id.* at 482. Although the decision in *Riddle*, and the elided language in the preceding quotation, dealt specifically with expert witnesses, there is no basis to conclude that any other category of person covered by the privilege in OEC 503(2) should be treated differently. The Court recognized that, for purposes of its analysis, the expert was a “representative of the lawyer” for purposes of OEC 503(2)(a); the individuals at issue in this matter are “client’s representatives,” also covered by OEC 503(2)(a).

As such, we must conclude that the “fact of and content of the [...] confidential communications” here are subject to the privilege and properly withheld from disclosure. *Id.*

² The common law of attorney-client privilege, which federal courts have continued to apply, makes clear that segregation is required if the non-privileged portion of the communication is “distinct and severable.” Judge Fisher summarized this principle in an opinion for the Ninth Circuit Court of Appeals:

[a]n entire document [...] may be privileged when it contains privileged portions that are so inextricably intertwined with the rest of the text that they cannot be separated. In contrast, “[i]f the nonprivileged portions of a communication are distinct and severable, and their disclosure would not effectively reveal the substance of the privileged legal portions, the court must designate which portions of the communication are protected and therefore may be excised or redacted (blocked out) prior to disclosure.” Rice, Attorney-Client Privilege § 11:21.

United States v. Christensen, 801 F.3d 970, 1007-08 (9th Cir. 2015) (some internal quotations and citations omitted).

ii. *Application*

Of the emails in this production that were addressed to counsel, we find they all fit within the parameters articulated in *Riddle* and *Port of Portland* and are unconditionally exempt from disclosure.

The redactions appearing on pages 13, 14, 16-39, 41-46, 48-70,³ are automated task list notifications set by, and sent to, a PPS paralegal, Gina King. Ms. King is responsible for maintaining operational awareness of and organizing legal matters relating to ongoing investigations on behalf of PPS' general counsel's office. The legal work product doctrine extends to paralegals working at the direction of lawyers to the extent that that work directly relates to the provision of legal services. As applied to these records, that standard is met.

B. Personnel Investigations – ORS 192.345(12) & ORS 342.850

It is not clear precisely what exemption PPS asserts applies to the bodies of the emails contained at pages 3, 4, 9, 15 but having reviewed them we cannot find any of the asserted exemptions applicable. They are procedural emails, not relating to any specific investigation, between members of PPS' human resources team. While we doubt they will be of much use to petitioner, they are not exempt from disclosure and must be produced.

Attached to the emails on pages 3, 4, 6, 9, 15, 40, and 71 are reports from PPS' ORIGAMI system. ORIGAMI is used to track matters pertaining to personnel investigations both for human resources and for legal. These reports are a snapshot in time, summarizing the present status of open complaints about PPS employees. These reports have been redacted in their entirety from this production.

Where these reports exist independent of a privileged transmission to counsel, they are not exempt *per se* and must be analyzed on a line-by-line basis as required by ORS 192.338.

PPS asserts that, at least as to complaints against teachers that have been substantiated, ORS 342.850 exempts these materials from disclosure. ORS 342.850, which makes confidential the contents of teacher personnel files, does not apply because the materials at issue never were, and never will be, part of a formal personnel file. The records here include a very brief (a sentence or less) description of an allegation that was the subject of a then-open personnel investigation. While these summaries may relate to, or summarize, materials that will eventually be placed in a personnel file, ORS 342.850 does not reach that broadly.

However, consistent with our interpretations of ORS 192.345(12) those rows of the report relating to investigations that, as of the date of this order, are either pending or resulted in the imposition of discipline may be redacted.

³ The document provided to us for review is a PDF with 117 pages, as the production was not Bates stamped, we take our numbering from that document, which includes two non-substantive cover pages. So, the first substantive responsive document, an email dated October 16, 2019 12:40:27 pm, appears on page 3.

ORS 192.345(12) is a conditional exemption, but given the nature of the records request in this case we find that the interest in these materials is private, not public, which does not overcome the facial applicability of the exemption.

C. ORS 192.355(8) – Federal Law (FERPA)

PPS has generally asserted FERPA applies in this matter. However, having reviewed the records, and inquired of PPS, we cannot find any specific redacted material that would implicate any FERPA concern.

ORDER

Accordingly, the petition is granted in part and denied in part. PPS is ordered to promptly release to petitioner a copy of the records redacted consistent with the discussion above. This release is subject to the payment of fees not to exceed those authorized by ORS 192.324(4).

Very truly yours,



MIKE SCHMIDT
District Attorney
Multnomah County, Oregon

Notice to Public Agency

Pursuant to ORS 192.411(2), 192.415, and 192.431(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.

21-04