



MIKE SCHMIDT, District Attorney for Multnomah County

1200 SW First Ave, Suite 5200 • Portland, Oregon 97204 • 503 988-3162 • FAX 503 988-3643
www.mcda.us

May 11, 2022

VIA EMAIL ONLY

Zane Sparling
The Oregonian/OregonLive
1500 S.W. First Avenue, Suite 400
Portland, Oregon 97201

Nancy Hungerford
Counsel for Multnomah ESD
653 S. Center Street
PO Box 3010
Oregon City, Oregon 97045

Re: Petition of Zane Sparling, on behalf of The Oregonian, seeking security video from the Multnomah Education Service District

Dear Mr. Sparling and Ms. Hungerford:

Petitioner, Zane Sparling, on behalf of The Oregonian, has appealed the denial of a public records request by the Multnomah Education Service District (MESD). Petitioner has requested two items from MESD: 1) the security video of a particular incident between a student and MESD employee; and 2) identifying information for that employee. MESD denied the request, citing the Federal Educational Rights and Privacy Act (FERPA).

After this petition was submitted, counsel for MESD additionally asserted the records were exempt under the litigation records exemption, ORS 192.345(1); the personnel discipline exemption, ORS 192.345(12); and the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

For the reasons discussed below we conclude that the video is not FERPA-protected, if properly redacted, but that the ongoing disciplinary process for the involved employee warrants a denial of the petition at this time consistent with our prior precedent on open disciplinary investigations. As such, we do not address the litigation records exemption.

DISCUSSION

A. Federal Law – ORS 192.355(8)

ORS 192.355(8) exempts from disclosure:

Any public records or information the disclosure of which is prohibited by federal law or regulations.

FERPA is a federal law that prohibits, among other things, “the release of education records (or personally identifiable information contained therein [...]) of students without the written consent of their parents.” 20 U.S.C. § 1232g(b).

The term “education records” is defined under the FERPA’s regulations. An “education record” means a record or information “directly related to a student,” and “maintained by an educational agency or institution [...] for the agency or institution.” 34 C.F.R. § 99.3.

No Oregon court has analyzed whether or not school security camera footage is an “educational record” within the meaning of FERPA. Looking to other jurisdictions no consensus emerges among those courts to have considered the question. *Compare Bryner v. Canyons School District*, 2015 UT App 131 (Utah Ct. App 2015) (footage of parent assaulting a student is an educational record); *Easton Area School District v. Miller*, 232 A.3d 719 (Penn. 2020) (school bus footage is an educational record only to the extent students are identifiable); *and Central Dauphin School District v. Hawkins*, 253 A.3d 820 (2021) (school bus surveillance footage is an educational record); *with, Lindeman v. Kelso Sch. Dist. No. 458*, 172 P.3d 329, 331-32 (Wash. 2007) (school bus footage is not an educational record); *Rome City School District Disciplinary Hearing v. Grifasi*, 806 N.Y.S.2d 381, 383 (N.Y. Sup. Ct. 2005) (security footage of a fight between students is not an educational record).

Of the authority referenced above, we find the Pennsylvania Supreme Court’s resolution of the matter the most persuasive and on point to the facts at issue in this case. In *Easton Area School District v. Miller*, 232 A.3d. 716 (Penn. 2020), a party sought security footage showing an altercation between a student and a teacher on a school bus. The school district had retained the footage as part of its personnel investigation of the involved teacher. The court in *Easton* concluded,

the students' images in the bus surveillance video are exempt from disclosure under FERPA and its regulations, and are thereby excluded from the RTKL's [Right to Know Law] disclosure requirements pertaining to public records; however, insofar as the students’ images can be redacted to remove their personally identifiable information, the video itself is not exempt, and it therefore must be disclosed.

Id. at 731. In the absence of controlling Oregon or federal authority, we agree with and adopt the Pennsylvania Supreme Court’s resolution of an indistinguishable situation.

Although the unredacted video is an educational record under FERPA, and thus exempt from disclosure under ORS 192.355(8), a redacted version of the video that blurs the identity of the student, and only the identity of the student, is not exempt and must be released if not otherwise exempt. Petitioner recognized this, and conceded in his petition to this office that he would accept a redacted version of the video that blurred the identity of the student. This is consistent with the segregation requirement found in Oregon’s public records law. ORS 192.338 (“If any public record contains material which is not exempt under ORS 192.345 and 192.355, as well as material which is exempt from disclosure, the public body shall separate the exempt and nonexempt material and make the nonexempt material available for examination.”)

B. Personnel Discipline Action – ORS 192.345(12)

ORS 192.345(12) conditionally exempts from disclosure,

A personnel discipline action, or materials or documents supporting that action.

MESD informs us that the involved employee remains on administrative leave while MESD completes its investigation and determines if discipline action is warranted. Absent extraordinary facts not present here, we have found this section applies during the pendency of the process. *See, e.g., Petition of Odighizuwa*, MCDA PRO 21-23 (2021), *Petition of Mayne*, MDCA PRO 18-52 (2018); *Petition of Sordyl*, MCDA PRO 17-31 (2017); *compare, Petition of Bial*, MCDA PRO 22-10 (2022) (finding sufficient public interest to warrant pre-completion disclosure of investigative materials in case involving sitting city commissioner and the resignation of the police union president).

We do, however, reject MESD’s related assertion that the involved employee’s right to due process of law under the Fourteenth Amendment provides a basis to exempt records from disclosure under the Oregon Public Records Law. That an employee facing disciplinary process has a right to due process in the proceedings before his employer is clear. However, MESD has cited no authority, and we are aware of none, that suggests that that employer being compelled by the public records law to release records relevant to an employee violates due process. Due process does not guarantee secrecy of process.

C. Questions

The second part of petitioner’s request was for “a copy of any record with the name, title and salary information of the worker shown in the video.” Essentially, this request is intended to answer the question, “who was the employee involved in the incident?” A public body is not required by the public records law to answer questions about its operations or records. It may choose to do so, if it wishes, but that is its decision. *See, Petition of Michael Kessler*, MCDA PRO 21-40 (2021) (analyzing at length the distinction between a public records request and a question). We have previously concluded that a request for any record that would identify a person in a particular photograph is on the “question” side of this line. *Petition of Alan Kessler*, MCDA PRO 20-28 (2020) (public records law does not require public body to tell requestor who a police officer was who is depicted in a particular picture).

ORDER

Accordingly, the petition is denied at this time without prejudice to resubmission upon completion of the disciplinary process.

Very truly yours,



MIKE SCHMIDT
District Attorney
Multnomah County, Oregon