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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF BENTON

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CORVALLIS SCHOOL DISTRICT 509J,

22CV05053
Case No.

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Plaintiff,

COMPLAINT

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vs.

(Declaratory Relief: ORS 192.411, ORS
28.010)

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KENNY JACOBY,

Fee Authority: ORS 21.135(2)(f)

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Defendant.

NOT SUBJECT TO MANDATORY
ARBITRATION

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Plaintiff alleges:

1.

This is an action for a declaratory judgment, pursuant to ORS 28.010, ORS 192.415(1),

and ORS 192.411(2).

2.

Plaintiff Corvallis School District 509J (“plaintiff”) is a public school district organized under ORS chapter 332.

3.

Defendant Kenny Jacoby (“defendant”) is an individual who has made public records requests to plaintiff. This court has jurisdiction over defendant by virtue of his public records activity within the state of Oregon.

4.

The Circuit Court for Benton County has subject matter jurisdiction over this action pursuant to ORS 192.411(2) and ORS 192.415(1)(b). Venue is appropriate in this court pursuant to ORS 192.411(2) and ORS 192.415(1)(b).

5.

On or about October 21, 2021, defendant made a public records request to plaintiff, seeking complaints, investigation reports, and disciplinary actions relating to a specific teacher employed by plaintiff.

6.

On or about October 26, 2021, plaintiff responded to the public records request by producing an appropriately redacted copy of a complaint against the teacher that was responsive to defendant's request. Plaintiff also informed defendant that other documents responsive to his request, including investigation reports, investigation findings, and disciplinary actions, were

1 exempt from disclosure under ORS 192.355(9), because they were made confidential by ORS
2 342.850 and plaintiff's board policy limiting access to teacher personnel files.
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5 7.

6 On or about January 5, 2022, defendant submitted an appeal of plaintiff's decision to
7 Benton County District Attorney John M. Haroldson, arguing that plaintiff's interpretation of the
8 relevant law was incorrect, and that the conditional exemption found in ORS 192.355(12) should
9 apply. Defendant further argued that the public interest in disclosure of the requested documents
10 overrode plaintiff's interest in keeping the material private. Through counsel, plaintiff submitted
11 a response to defendant's appeal, echoing the arguments made in plaintiff's initial response to
12 defendant's request.
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15 8.

16 On or about January 27, 2022, District Attorney Haroldson issued a letter opinion
17 granting defendant's appeal, and ordering plaintiff to disclose the requested records. That
18 opinion is attached here as Exhibit 1.
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22 9.

23 On or about February 3, 2022, plaintiff served defendant and District Attorney Haroldson
24 with notice that it intended to file this action to appeal District Attorney Haroldson's decision,
25 pursuant to ORS 192.411(2) and ORS 192.415.
26

CLAIM FOR RELIEF

10.

Plaintiff incorporates by reference paragraphs 1-9, above.

11.

A present and actual controversy exists between the parties in that defendant contends he

is entitled to disclosure of the requested documents under ORS 192.410 *et seq.*, and plaintiff contends that the requested documents are exempt from disclosure.

12.

Plaintiff seeks a declaration of this court that the documents ordered to be disclosed by Plaintiff's Attorney Haroldson are exempt from disclosure under ORS 192.355(9) and ORS 192.345(12). Alternatively, plaintiff seeks a declaration of this court that the documents are

NOW THEREFORE, plaintiff prays for judgment as follows:

1. Finding and declaring that the documents ordered produced by the District Attorney are exempt from disclosure and therefore protected from disclosure to defendant;
2. Finding and declaring plaintiff to be the prevailing party;
3. Awarding plaintiff its reasonable costs and disbursements incurred herein; and

1 4. Awarding plaintiff such other relief as the Court deems just and equitable.
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6 DATED: February 6, 2022.
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9 Respectfully submitted,
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12 *s/ Brett Mersereau*
13 Barrett C. Mersereau, OSB No. 023922
14 brett@brettmersereau.com
15 The Law Office of Brett Mersereau
16 503-673-3022
17 Of Attorneys for Plaintiff
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DISTRICT ATTORNEY

John M. Haroldson
120 NW 4th Street
Corvallis, OR 97330-4788

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Child Support Unit (541) 766-6817
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January 27, 2022

Kenny Jacoby
me@kennyjacoby.com

Brian Hungerford
brian@hungerfordlaw.com

Re: Public Records Request of Kenny Jacoby

Dear Mr. Jacoby and Mr. Hungerford:

Petitioner, Kenny Jacoby, requested that the Corvallis School District (“the District”) provide him with any and all “misconduct complaints filed against [teacher] KC Perley, as well as any investigation reports, investigation findings, and records of any disciplinary actions taken and sanctions imposed against him since January 1, 2018.” In response to petitioner’s request, the district provided one page of responsive documents—a complaint alleging that Perley had maintained an “inappropriate student teacher relationship” with a junior at Crescent Valley High School. The District declined to provide copies of any investigation report, findings, and disciplinary actions (“the records”), claiming that they are exempt from disclosure pursuant to ORS 192.355(9) and ORS 342.850.

Petitioner appeals to this office, arguing that the District erred in concluding that the records were subject to absolute exemption under ORS 192.355(9). Instead, petitioner contends, the records are subject to disclosure because they are “materials or documents supporting [a personnel disciplinary action]” under ORS 192.345(12) and the public interest requires disclosure.

After reviewing the parties’ submissions, our office has concluded that the records at issue are subject only to a conditional disclosure exemption under ORS 192.345(12). Although ORS 342.850 provides the District the authority to create rules restricting access to teachers’ personnel files so as to absolutely exempt them from disclosure pursuant to ORS 192.355(9), here the District’s policies fail to create such a restriction. Accordingly, because there is significant public interest in the subject matter of the records, they are subject to disclosure.

DISCUSSION

ORS 192.355(9) provides in relevant part that “[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law” are absolutely exempt from disclosure under the Oregon Public Records Act (“OPRA”). Teacher personnel files, in turn, can be made confidential under ORS 342.850(8), which 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.”

In *Oregonian Publishing Co. v. Portland School District No. 1J*, 329 Or. 393, 402, 987 P.2d 480 (1999), the Oregon Supreme Court explained that these two statutes work in concert to provide an absolute exemption from disclosure when a school district has adopted a rule under ORS 342.850(8) restricting access to a teacher's personnel file. However, the term “personnel file” is not defined in the statute and the court cautioned that ORS 342.850(8) was not meant to provide a school district limitless authority to restrict disclosure of any document by simply choosing to place it in a teacher's personnel file. *Id.* at 401-02. Rather, the protections of the statute were meant to apply only to the type of documents “usually” found in an employee's personnel file, meaning “information about a teacher's education and qualifications for employment, job performance, evaluations, disciplinary matters or other information useful in making employment decisions regarding an employee.” *Id.* at 401.

The District argues that the outcome in this case is squarely controlled by *Oregonian Publishing Co.* It notes that it has adopted Board policy GBL pursuant to ORS 342.850(8), which restricts access to personnel files to a specified list of individuals. Moreover, the District argues, “[t]here can be no doubt that investigation reports and any resulting disciplinary actions are directly related to a school district's decision making regarding the employment status of a teacher.”

In response, petitioner argues that Board policy GBL is not as restrictive as the District makes it out to be. Petitioner points out that, although the policy includes a list of specific individuals who are permitted to inspect employee files, it begins that list with the caveat that “[e]xcept as provided below, *or required by law*, district employees' personnel records will be available for use and inspection only by the following[.]” (Emphasis added). Accordingly, if the OPRA requires the District to disclose the documents in a teacher's personnel file, Board policy GBL, and thus ORS 192.355(9), do nothing to prohibit that.

Here, petitioner argues, the OPRA requires disclosure of the records because they are not subject to the conditional exemption contained in ORS 192.345(12). Under ORS 192.314, a public body is required to disclose any public record requested by any person unless that

document is specifically exempted from disclosure by another statute. One such statute, ORS 192.345(12), provides a conditional exemption for “materials or documents supporting [a personnel discipline action],” “unless the public interest requires disclosure in the particular instance.” Here, petitioner contends that the public interest requires disclosure of the investigation reports because they concern an alleged abuse of authority by a public employee trusted to keep children safe.

Petitioner’s argument places at issue the proper interpretation of the phrase “or required by law” as used in Board policy GBL. Notably, the courts have not yet addressed the proper standard for interpretation of rules adopted pursuant to ORS 342.850(8).¹ Nevertheless, we conclude based on both the text of the provision and context of other board policies that the phrase encompasses a disclosure required under the OPRA.

As a purely textual matter, the phrase “or required by law” does not differentiate between different legal requirements for disclosure in making its exception to Board policy GBL’s restrictions on inspection. Nothing about the phrase’s wording suggests that the exception was meant to apply only to, for example, court orders to disclose records.² On the contrary, when considered in the context of the District’s other policies, it seems that the phrase was meant to be interpreted broadly to be responsive to public records requests and encourage the dissemination of information to interested members of the public.

Board Policy GBL’s final paragraph contains only a single sentence, which provides that “[r]elease of personnel records to parties other than those listed above, will be in line [with] Board policy KBA - Public Records.” Board policy KBA, in turn, provides in relevant part:

“The Board supports the right of the people to know about programs and services of their schools and will make every effort to disseminate information. Each principal is authorized to use all means available to keep parents and others of his/her particular school's community informed about the school's program and activities.

“No records will be released for inspection by the public or any unauthorized persons—either by the superintendent or any other person designated as custodian for district

¹ Although ORS 342.850(8) grants school district boards the ability to adopt rules somewhat akin to that of an “agency” under the Administrative Procedures Act (APA), a school district is not an “agency” within the meaning of that Act because it is part of local rather than state government. *See Deyette v. Portland Community College*, 299 Or. App. 305, 309, 450 P.3d 1037 (2019) (concluding that Portland Community College is not an “agency” for purposes of the APA because it is not part of “‘state’ government”). Accordingly, the District’s rules are not subject to interpretation via the methodology set out in *Don’t Waste Oregon Committee v. Energy Facility Siting Council*, 320 Or. 132, 142, 881 P.2d 119 (1994).

² Notably, the copy of Board Policy GBL’s text provided by the District in its response does include a paragraph at the end which reads, “Release of personnel records to parties other than those authorized to inspect them will be only upon receipt of a court order.” However, the copy provided by petitioner does not contain that section. For our analysis, we use the version provided by petitioner because it is the version listed on the official Corvallis School Board website: <https://www.csd509j.net/about-us/school-board/policies-and-guiding-principles/>

records—if such disclosure would be contrary to the public interest, as described in state law.”

In addition to establishing transparency and keeping the public informed as primary goals for the District in handling public records, Board policy KBA specifically provides for the public interest to be used as the standard in determining whether to release public records. This is significant because whether disclosure is in the public interest is the precise standard employed under the conditional exemption statute, ORS 192.345, in determining whether certain records (including records related to disciplinary proceedings, like those at issue in this case) are subject to disclosure.

In sum, the text and context of Board policy GBL make clear that it was not meant to inhibit disclosure when it is “required by law” under the OPRA. Accordingly, the records are subject to disclosure under ORS 192.314 unless they are exempt from disclosure under ORS 192.345(12). As noted previously, that determination is dependent on whether “the public interest requires disclosure in the particular instance.” That determination occurs in two steps. *ACLU of Oregon, Inc. v. City of Eugene*, 360 Or. 269, 290, 380 P.3d 281 (2016). First, the court must determine the nature and significance of the competing interests in disclosure and confidentiality. *Id.* Second, the court must then weigh those interests and decide, as a matter of law, which one predominates. *Id.* Notably, in conducting this balancing, “the presumption [is] always * * * in favor of disclosure.” *Turner v. Reed*, 22 Or. App. 177, 187, 538 P.2d 373 (1975).

Here, the public interest in the disclosure of the records is strong. As petitioner notes, the allegations against Perley concern an abuse of authority by someone charged with the protection of children at schools. It is well established that the public has a significant and legitimate interest in “information about the manner in which public business is conducted and * * * [in] monitor[ing] what * * * appointed officials are doing on the job.” *In Defense of Animals v. OHSU*, 199 Or. App. 160, 175-76, 112 P.3d 336 (2005). By contrast, any interest that the District has in preventing disclosure to protect the privacy of the employee involved was significantly undercut by the release of the complaint, which lists Perley’s name and the nature of the allegations involved. Accordingly, the public interest requires disclosure of the records such that they fail to qualify for the conditional exemption in ORS 192.345(12).

ORDER

Therefore, it is ordered that petitioner’s appeal is granted. The District shall promptly disclose any and all “misconduct complaints filed against [teacher] KC Perley, as well as any investigation reports, investigation findings, and records of any disciplinary actions taken and sanctions imposed against him since January 1, 2018,” in accordance with petitioner’s request.

Disclosure of the documents is subject to the payment of the Corvallis School District fee, if any, not exceeding \$25 unless petitioner is first provided written notification of the estimated amount of the fee and confirms that he wishes to proceed. ORS 192.324(4)(c). The

District may not include as part of the fee the cost of the time spent by its attorney determining the applicability of the provisions of the OPRA to petitioner's request. ORS 192.324(4)(b).

Should either party be dissatisfied with our office's decision, ORS 192.411 and ORS 192.415 provide a right to further review of this matter by instituting proceedings for declaratory or injunctive relief in the Benton County Circuit Court. If the District intends to institute such proceedings, ORS 192.411 requires that it provide notice within seven days of the issuance of this order of its intent to do so and that the proceedings be commenced within the seven days following the issuance of that notice. ORS 192.411 also provides petitioner the right to institute declaratory or injunctive proceedings in the event that the District fails to comply with the above obligations and continues to withhold the records.

Sincerely,

John M. Haroldson
Benton County District Attorney
120 NW 4th Street
Corvallis, OR 97330