The Law and the Art of Dealing with the Media in School-Related News Events

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News Flash!

- “Parent says teacher taped ADHD student to chair in classroom.”
- “Fired principal claims sexual harassment by superintendent!”
- “Student leaves suicide note about school’s failure to protect him from bullies.”
School District’s Reaction?

“No response until we consult our attorney.”
“We can’t comment due to confidentiality requirements.”
“This is the first we have heard of any such claim. We’ll be looking into the matter.”
“We don’t comment on pending litigation.”

Legal Issues

What must be disclosed?

- Everything not otherwise exempted from Public Records Laws
- Information presented to board or board committee in Public Meeting
- To union, as required by collective bargaining laws/agreements
Legal Issues

• What must not be disclosed?
  ● Student records (FERPA)
  ● Personnel files, if provided by state statute or collective bargaining agreement provisions
  ● Information that would violate “confidentiality” requirements of professional licensure
  ● Generally complaints filed re: district

Legal Issues

• What MAY be disclosed?
  ● Directory information under FERPA
  ● Directives interpreting policies and administrative rules
  ● Internal communications in responding to public concerns
  ● District findings in complaint investigations (with redaction)
Public Relations Issues

• **What SHOULD be disclosed?**
  - Public confidence depends on transparency
  v.
  - Legal obligations restrict disclosure of some information

Public Relations Issues

• **HOW should the information be presented?**
Public Relations Issues

**WHO should be the presenter?**
- Consistent contact
- Train the “non-PR types”
- Limit the spokespersons

Public Relations Issues

**WHEN should information be presented?**
- 24-hour news cycles require initial immediate response
- Follow-up information to the public is also critical.
"Stay tuned at 11 for the latest on 14-year-olds’ experience with hazing and orgies at summer football camp."

"Two mothers from Our Town claim their sons were molested and shown pornographic movies while Our Town High School coaches did nothing!"
“We’d like to give the Superintendent the chance to comment on these reports of Crooked River High School students being hazed and molested at the summer football camp.”

What do you say?

A. “No thanks! We’re not talking with Channel 2 given your past inaccurate coverage.”

B. “We’ll contact you when we have consulted with our attorney.”

C. “The camp wasn’t a part of our program and the District had no responsibility for its operation, despite the fact that many team members and some coaches attended.”
What do you say?

D. “The District has a policy that prohibits hazing and harassment. The policy has a complaint procedure that ensures that a thorough investigation is done by an independent investigator. We annually inform all parents and students of this policy and procedure. We invite the two concerned parents to contact the Superintendent’s office and initiate a complaint so that we hear directly from them about their concerns and can promptly initiate an investigation.”

The NIGHTMARE
Part II

Your law firm has completed an investigation, finding lapses in supervision and training, and has provided an executive summary to the Superintendent as “confidential attorney-client communication”

Phone call from local newspaper sports reporter:

“I’d like a copy of the investigative report. I’m doing a story on your football program and I’d like to see the findings and hear what you are going to do about this mess.”

WHAT DO YOU SAY?
What do you say?

A. “The report is protected by attorney-client privilege, but we will be issuing a news release next week.”

B. “Our PR director is prepared to meet with you tomorrow and respond to your questions.”

C. “A full report will be given to the Board next month during open session and you are welcome to attend the meeting.”

What do you say?

D. “Our Athletic Director and PR Director are available to meet with you tomorrow. Of course, we cannot share confidential student or staff information, but we can respond to questions and share what the District plans in the way of training for students and staff regarding hazing and harassment.”
The NIGHTMARE
Part III

As a result of the investigation, the District has terminated the coaching contract of the assistant coach (not a teacher) and placed a written reprimand in the file of the head football coach (who is a teacher). The union has filed a grievance over that action.

Written request from the newspaper reporter:

“We want to see any and all disciplinary action taken against any staff member responsible for the lack of supervision at the camp.”

What do you do now?

The NIGHTMARE
Part IV

You receive a “tip” from Channel 2 that they will be at your high school covering the picketing by students protesting the removal of the assistant coach.

Statement by Channel 2 reporter:

“We also want to get some shots of football practice for visuals and interview the head coach about the season’s prospects.”

What do you do now?
What do you do now?

A. Let the head coach know he is not to talk to any media.

B. Bar the Channel 2 cameras from football practice and the next home game.

C. Call the parents of picketing students and tell them their children will be suspended if they don’t return to class right away.

D. Allow background footage of football practice to be filmed, at a distance. Have Athletic Director available for interview about the upcoming season and coaching staff.

E. Allow picketing to continue but have Principal talk to students, insisting they return to classes after lunch period. Make-up work is required for periods missed.
The NIGHTMARE Part V

Two months later, the District receives three letters (which have been sent to all the local media by the parent):

- A tort claim notice from the attorney representing the parents of one of the students allegedly “molested” and harassed (who is autistic), seeking damages of $800,000.

- A notice from the Office of Civil Rights that their staff is initiating an investigation into possible violations of Title IX and Section 504 regarding supervision of football players.

- A due process complaint alleging violation of IDEA regarding the same student for failure to provide a FAPE.

What do you do now?

A. Contact the District’s liability insurance carrier.

B. Have the District continue to provide counseling that was initiated soon after the initial complaint was filed.

C. Review the IEP to determine if the facts asserted in any of the complaints indicate a need for the team to meet again and revise IEP goals or services.

D. Make arrangements to attend the State Championship tournament since your football team is now 8-0!
Long-Term Planning

*How do you plan now for the next “PR Challenge”?*

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**Do Now**

- Develop a long-term, comprehensive strategy that includes regular communication with stakeholders and media.

- Identify and train spokespersons for the District.

- Train building administrators on appropriate and legal responses for likely situations.

- Involve the school attorney in advance planning.
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The Law and the Art of Dealing with the Media
Covering School-Related Issues

By Nancy J. Hungerford

I. Introduction

The challenges of dealing with the media and the public regarding "breaking
news" are familiar to every school superintendent and school attorney. Take these
recent cases:

• Call to Superintendent’s Office: “This is Jane Doe of KQZTV. We’ve received a
call from a parent of one of your female students at Roaring River Middle School,
indicating that she and several other mothers will be picketing the school today about
your failure to get rid of a teacher who is sexually harassing their daughters. We
thought the Superintendent would like an opportunity to comment and since we’ll be
covering the picketing at the school at 9 a.m. we’d like to do an interview with the
Superintendent at 11 a.m.”

• Newspaper headline: “District offers settlement to principal placed on leave for
domestic violence incident,” a matter discussed with the Board during last week’s
executive session.

• Story (and video clip) goes viral on social media: “A special education teacher
at Coast Elementary School in Newport duct-taped a student to a chair when the 8-
year-old boy wouldn’t stay in his seat during a reading lesson.”

And the school district’s response?

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Director for the North Clackamas School District in suburban Portland, Oregon.
• TV news reporter: “We contacted the Superintendent’s office but have had no response, as the Superintendent is out-of-state at a national conference.”

• Newspaper Story: “On advice of its attorney, the District declines to comment on any matter involving pending litigation.”

• Response to a community member who heads a local advocacy group for parents of special education students: “No one has contacted us to report any instance of a teacher taping a child to a chair, so I can’t tell you anything right now. We’ll be looking into it.”

While school districts generally have organized public relations programs and adeptly use communication plans for bond campaigns or new instructional initiatives, districts are frequently “flat-footed” when dealing with breaking news stories -- more and more fueled by listener call-ins or Facebook postings.

This paper explores legal considerations and constraints that the school attorney must observe in the process of guiding school districts through this “new frontier” of communications challenges. It also offers suggestions of communication strategies that can provide more transparency, and at the same time presenting the district’s perspective in a timely fashion.

Given the 24-hour new cycle and ephemeral public interest in any story, school districts rarely get a second chance to counter “news stories” that typically have an anti-public schools flavor.

II. LAWS POTENTIALLY GOVERNING A SCHOOL DISTRICT’S COMMUNICATION WITH THE MEDIA

Given the worries about potential litigation over defamation, breach of confidentiality requirements, and due process, the easiest response to accusations of school district malfeasance is typically “No response.”
While that response may be a reasonable anti-litigation strategy, it rarely serves as a good communications strategy. Advising school districts how they can accomplish both goals requires an understanding of the law governing what can and cannot be disclosed. While state law varies, most states have some version of a “public records law” as well as statutes governing disclosure of information regarding specific students and public employees. And, of course, school districts in all states are governed by the federal Family Education Rights and Privacy Act (FERPA) in the disclosure of information from student records.

In reviewing statutes and regulations, it is useful to sort information into three categories:

- **INFORMATION THAT MUST BE DISCLOSED TO THE PUBLIC.** Obvious examples are school district policies, minutes of board meetings, board meeting agendas, collective bargaining agreements, and the like. Salaries and benefits of public employees also fit in this category.

- **INFORMATION THAT CAN NEVER BE DISCLOSED TO THE PUBLIC.** Examples include information from “student records” (without parental permission) and, in some states, information from employee official personnel files.

- **INFORMATION THAT MAY BE BUT IS NOT REQUIRED TO BE DISCLOSED TO THE PUBLIC.** Examples include school board deliberations on a collective bargaining proposal and investigation reports (sometimes with redactions of “personally identifiable information” (PII)). In addition, “directory information” from student records may be disclosed, unless parents have affirmatively said “No.”
It is in this last category where school districts can be strategic about
information provided, and about when and how it is presented.

Determination of whether requested information falls in category A, B or C
requires an understanding of these laws and state and local education policy:

A. Public Records Laws

Most states have some version of a “public records law,” which governs state
executive, legislative and judicial bodies as well as local governments, including
school districts. In some states these are known as “Sunshine Laws,” reflecting the
legislative purpose of making most information about state and local government
open to the public, with specific exceptions.

Oregon’s Public Records Law, for instance, begins with a declaration that
“Every person has a right to inspect any public record of a public body in this state,
except as otherwise expressly provided by [statutory exceptions]. “ ORS 192.420.
“Public body,” of course, includes school districts. And “Public record” is defined
broadly as

“includ[in]g any writing\(^2\) that contains information relating to the conduct of
the public’s business, including but not limited to court records, mortgages, and
deed records, prepared, owned, used or retained by a public body regardless of
physical form or characteristics.”

Even where the legislature has created exemptions from this open access,
many of those exceptions are subject to a “public interest test.” In Oregon, these
records are “conditionally exempt from disclosure... unless the public interest

\(^2\) “Writing” is also defined broadly as “handwriting, typewriting, printing, photographing and
every means of recording, including letters, words, pictures, sounds, or symbols, or combination
thereof, and all papers, maps, files, facsimiles or electronic recordings.” 192.410(6).
requires disclosure in the particular instance.” ORS 192.501. The Oregon Attorney General’s Office advises that many of such exemptions require the “balancing of privacy rights, governmental interests, and other confidentiality policies, on the one hand, and the public interest in disclosure on the other,” and “the identity of the requester and the use to be made of the record may be relevant in determining the weight of the public interest in disclosure.”

Oregon Courts have required that public bodies seeking to withhold a public record must demonstrate the applicability of a specific exemption. Except where a specific federal or state law provides that records may not be released, both county district attorneys, who initially interpret the law, and the state courts, place the burden on the public body to justify withholding any record.

For example, ORS 192.501(12) conditionally exempts “A personnel discipline action, or materials or documents supporting that action,” but this exemption does not apply when a public employee resigns during an employer investigation or in lieu of disciplinary action. The policy behind this exemption is to “protect[] 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 (no. 5), 775 P2d 1371 (1989).

3 The Oregon Court of Appeals has stated that “the Public Records Law expresses the legislature’s view that members of the public are entitled to information that will facilitate their understanding of how public business is conducted.” Guard Publishing Co. v. Lane County School District, 96 Or App at 468-69, 774 P2d 494 (1989), rev’d on other grounds 310 Or 32, 791 P2d 854 (1990). The Court also characterized this public interest in disclosure as “the right of the citizens to monitor what elected and appointed officials are doing on the job.” Jensen v. Schiffman, 24 Or App 11, 17, 544 P2d 1048 (1976).
Even where public records are “exempt,” under ORS 192.502, not “conditionally exempt” under ORS 192.501, the specific exemption may contain its own preconditions. For example, ORS 192.501 exempts “Internal Advisory Communications” as follows:

“Communications within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to any final agency determination of policy or action. This exemption shall not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure.”

Under ORS 192.501, however, where the legislature had enacted another statute governing access to licensed education employee’s personnel file (ORS 342.850(8), the Oregon appellate courts have upheld refusals to allow public access to individual personnel files. Springfield School District v. Guard Publishing Co., 156 Or App 176, 967 P2d 510 (1998). Even then, documents from the personnel file that had been previously released to a state agency were not exempt from later requests for disclosure by news media.

Further, when the Oregon Court of Appeals upheld a school board’s withholding of an investigation report prepared by its attorney under the Oregon law recognizing attorney-client privilege (ORS 40.225)5, the 2007 legislature amended the Public Records Law, ORS 192.502(9), to narrow the availability of

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4 Under this subsection, the Oregon Court of Appeals ruled that the records of the police bureau concerning the investigation and discipline of a police officer who killed a civilian during a traffic stop were not exempt from disclosure. The court found that the value of transparency to public confidence in the investigation was not “outweighed by the speculation that transparency will quell candor at some future date.” City of Portland v. Oregonian Publishing Co., 200 Or App 120, 125-27, 112 P3d 457 (2005)

attorney-client privilege as an exemption to disclosure of factual information developed in response to allegations of public body wrongdoing.

Other state legislatures and state courts similarly have established broad public records disclosure laws and have interpreted any exemptions or exceptions narrowly. This is true for states found all over the country.6 For instance, Nebraska’s public records law states:

"Except as otherwise expressly provided by statute, all citizens of this state and all other persons interested in the examination of the public records . . . are hereby fully empowered and authorized to (a) examine such records, and make memoranda, copies using their own copying or photocopying equipment . . . and abstracts therefrom, all free of charge, during the hours the respective offices may be kept open for the ordinary transaction of business and (b) except if federal copyright law otherwise provides, obtain copies of public records . . . during the hours the respective offices may be kept open for the ordinary transaction of business." Neb. Rev. Stat. § 84-712.

Like other states, this public record law is fairly all encompassing. However, Nebraska’s courts have interpreted it even more dramatically.

The Nebraska Supreme Court has held that statutory exceptions shielding public records from disclosure must be narrowly construed, because the Legislature has expressed a strong public policy for disclosure. Evertson v. City of Kimball, 278 Neb. 1, 767 N.W.2d 751 (2009). Nebraska takes the scope of the public right to access government records further than most states, however. First, courts in Nebraska have found that the rights granted by these laws apply to citizens and non-citizens alike (i.e., “all other persons interested in the examination of public records.”), and do not require any showing of reason for review. See State ex rel. Sileven v. Spire, 2343 Neb. 451, 500 N.W.2d 179 (1993).

6 For purposes of comparison this paper focuses on similarities and differences between Nebraska, Florida, and Massachusetts.
Second, in Nebraska failure to comply with the public record laws can result in criminal prosecution. All responses to public record requests must include the name of the public official or employee responsible for the decision to deny the request. Neb. Rev. Stat. 84-712.04(1)(b). Any official who violates the laws “shall be subject to removal or impeachment and in addition shall be deemed guilty of a Class III misdemeanor.” Neb. Rev. Stat. 84-712.09.

Third, Nebraska allows for less turn-around time to provide responses to those requesting records. In Nebraska, responses are required in four business days. Neb. Rev. Stat. 840712(4). Compare this to Massachusetts, which requires a response within ten calendar days. G. L. c. 66, § 10(a-b); 950 CMR 32.05(2).

Another area where states differ is whether or not they consider unfinished documents to be “public records,” (i.e., the so called “unfinished business” exemption). In Nebraska, notes and drafts of documents within an agency which remain subject to approval by upper management and which have not been issued are preliminary materials, which are not “records” or “documents.” Op. Att’y Gen. No. 91054 (June 17, 1991). Conversely, “briefing papers” which have been circulated to the members of a public body prior to a meeting of the body are not “drafts.” Id.

These determinations must always be made on a case-by-case basis.

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7 Nebraska’s law has some other interesting details. A custodian of records does not have to make copies if copying equipment is not reasonably available. Neb. Rev. Stat. 84-712(3)(a). Custodians do not have to provide copies if the record is available online, unless the requester does not have reasonable access to the Internet. Neb. Rev. Stat. 84-712(3)(a) (as amended by 2013 Neb. Laws LB 363). However, the custodian is required to provide location of public record on Internet. Id.
But in Florida, the state Supreme Court has found that the definition of “public record”\(^8\) includes all drafts and notes. *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980):

> “Interoffice memoranda and intra-office memoranda communicating information from one public employee to another or merely prepared for filing, even though not a part of an agency’s later, formal public product, would nonetheless constitute public records inasmuch as they supply the final evidence of knowledge obtained in connection with the transaction of official business.” 379 So. 2d at 640. See also *Booksmart Enterprises, Inc. v. Barnes & Noble College Bookstores, Inc.*, 718 So. 2d 227, 229 (Fla. 3d DCA 1998).

However, public employees’ notes to themselves “*which are designed for their own personal use* in remembering certain things do not fall within the definition of ‘public record.’” (e.s.) *Justice Coalition v. The First District Court of Appeal Judicial Nominating Commission*, 823 So. 2d 185, 192 (Fla. 1st DCA 2002).

Another difference between states is in how their public records laws address the issue of subcommittees. In Nebraska nominating committees are not considered public bodies because nominations do not involve the formulation of public policy subject to the act. *Marks v. Judicial Nominating Commission for Judge of the County Court of the 20th Judicial District*, 236 Neb. 429, 461 N.W.2d 551 (1990). See also *Op. Att’y Gen. No. 92020* (February 12, 1992) Conversely, in Florida, courts look to whether the committee is “fact-finding” in nature or not. For example, in

\(^8\) Florida defines “public records” to include:

“All documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.” F.S. 119.011(12). The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business, which are used to perpetuate, communicate or formalize knowledge. *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980). And, this applies to charter schools, regardless of whether they operate as a public or private entity. AGO 98-48.
Wood v. Marston, 442 So. 2d 934 (Fla. 1983), the Florida Supreme Court determined that the sunshine law applied to an ad hoc advisory committee appointed by a university president to screen applications and make recommendations for the position of law school dean, because the committee, in deciding which applicants to reject for further consideration, performed a policy-based, decision-making function.

Nevertheless, there are many commonalities among states’ public records laws. For instance, many states agree that testing materials (e.g., test questions) are generally exempt. See, e.g., AGO 09-35 for Nebraska; and G. L. c. 4, § 7(26)(l) for Massachusetts.

Similarly, many states hold that the majority of information in an employee’s personnel files is exempt from disclosure. See, e.g., Wakefield Teacher’s Association v. School Committee of Wakefield, 431 Mass. 792, 802 (2000) (holding personnel files in Massachusetts are exempt from disclosure). That being said, states may vary on what specific information in a personnel file must be disclosed. For instance, in Nebraska, personal information in records regarding personnel of public bodies is exempt from disclosure, except for salaries and routine directory information. Neb. Rev. Stat. 84-712.05(7). The Attorney General has indicated that employee evaluations from personnel files and lists of employees receiving bonuses may be kept confidential. On the other hand, fiscal records which would allow a determination of which public employees received a bonus must be revealed. Op. Att’y Gen. No. 90015 (February 27, 1990).

Finally, school districts and their attorneys should be aware that while a few “public records laws” mandate certain public records that must NOT be disclosed, in
many other cases they leave the public body with the option of disclosure.\(^9\) An automatic response to refuse every public records request that could be denied may not meet district objectives of transparency and community relations. Each such request should be examined based on the district's global interests.

**B. Public Meetings Laws**

State legislatures have been similarly reluctant to allow governing bodies, such as school boards, to transact public business outside of the public view. Oregon's legislature long ago declared:

The Oregon form of government requires an informed public aware of the deliberations and decisions of governing bodies and the information upon which such decisions were made. It is the intent of ORS 192.610 to 192.690 [the “Public Meetings Law”] that decisions of governing bodies be arrived at openly.” ORS 192.620.

In furtherance of that goal, the Public Meetings Law requires that meetings of the governing board are open to the public, that the public has notice of time and place of meetings, and that meetings are accessible to persons wishing to attend. ORS 192.630. Detailed minutes must be kept, as well. ORS 192.650(1).

And the law applies even to a body, such as a subcommittee, that has authority to make decisions or even recommendations for a public body on “policy or administration.” ORS 192.610(3). A similar subcommittee with only the power to gather information is not subject to the Public Meetings Law. And, an advisory

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\(^9\) Those cases where the Oregon Public Records Law itself prohibits disclosure, without reliance on other statutes or regulations, are limited to disclosure of public employee’s home address or phone number or email address where a safety risk has been documented (ORS 192.445), and an employee ID card without the employee’s written consent if the card contains a picture (ORS 192.447). The AG’s Manual cautions that where outright release of personal privacy information such as Social Security numbers is exempt, accidental or knowing release of such information could result in claims of liability for damages or claims for declaratory or injunctive relief. *Oregon AG’s Manual* (2014), p. 24.
group to a superintendent or other public official is not a “public body” subject to
the law unless the superintendent cannot act and must merely pass the advice along
to the board. *AG’s Manual*, 2014, pp. 110-11. Florida has a similar approach to
advisory committees and subcommittees.10

Even under a public meetings law, a governing body is allowed to meet in
closed, executive session, for specified and limited purposes. In Oregon,11 this
provision is most widely used by school boards to consider the employment of a
public officer or employee (if the body has satisfied certain prerequisites), ORS
192.660(2)(a); to consider the dismissal or disciplining or the evaluation or
complaints against a public officer or employee if the person does not request an
open hearing, ORS 192.660(2)(b), (i); to consult with persons designated by the
body to carry on labor negotiations, ORS 192.660(2)(d); to consider exempt public

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10 In Florida, the public meetings law applies this “fact-finding exception” only to advisory
committees and not to boards that have “ultimate decision-making governmental authority.” *Finch v. Seminole County School Board*, 995 So. 2d 1068, 1071-1072 (Fla. 5th DCa 2008). In Finch, the court
held that the “fact-finding exception” did not apply to a school board as the ultimate decision-making
body; thus the board could not take a fact-finding bus tour without complying with the sunshine law
even though school board members were separated from each other by several rows of seats, did not
discuss their preferences or opinions, and no vote was taken during the trip. See *Knox v. District
School Board of Brevard*, 821 So. 2d 311, 315 (Fla. 5th DCa 2002), holding that the sunshine law
did not apply to a group of school board employees meeting with an area superintendent to review
applications, which were then sent by the area superintendent to the school superintendent with
advisory boards and committees created by public agencies may be subject to the sunshine law, even
though their recommendations are not binding upon the entities that create them. The “dispositive
question” is whether the committee has been delegated “decision-making authority,” as opposed to
mere “information-gathering or fact-finding authority.” *Sarasota Citizens for Responsible Government
v. City of Sarasota*, 48 So. 3d 755, 762 (Fla. 2010). “Where the committee has been delegated decision-
making authority, the committee’s meetings must be open to public scrutiny, regardless of the review
procedures eventually used by the traditional governmental body.” *Id.*

11 In Oregon, representatives of the news media are allowed to attend executive sessions but not
disclose the substance of the discussions as long as the executive session topic is properly covered in
an executive session and the prohibition on disclosure is announced. ORS 192.660(4). The lone
exceptions when media reps may not attend are for student suspension or expulsion hearings, ORS
332.061, and for consultation with labor negotiators.
records, ORS 192.660(2)(f); and to consult with legal counsel concerning current litigation or litigation likely to be filed, ORS 192.660(2)(h).

However, even then “No executive session may be held for the purpose of taking any final action or making any final decision.” ORS 192.660(6).

C. Privacy and confidentiality issues regarding students

While FERPA and similar state statutes restrict the disclosure of and dispersal of student records to non-authorized parties, there are other legal guarantees of “confidentiality” owed to students, as well.

1. FERPA and similar state laws regarding student records

FERPA defines “Education Records” as “those records that are (1) Directly related to a student and (2) Maintained by an educational agency or institution” or “by a party acting for the agency or institution.”12 34 CFR ¶ 99.3. And “record” is defined as “any information recorded in any way including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm and microfiche.” 34 CFR ¶ 99.3. 13

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12 Exceptions are listed for “records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record,” “records of the law enforcement unit” of a district, records of persons who are employees, records created after a student is no longer in attendance and do not relate to the person’s attendance as a student, and “Grades on peer-graded papers before they are collected and recorded by a teacher.” 34 CFR ¶ 99.3.

13 FERPA also defines “Personally Identifiable Information” (PPI) as including, but not limited to the student’s name, name of parent or other family members, home address, a personal identifier such as the student’s SSN, student number or “biometric record,” other direct identifiers such as date of birth, place of birth, and mother’s maiden name; other information “that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty”; or information requested by a person who the school reasonably believes knows the identity of the student to whom the education record relates. 34 CFR ¶ 99.3.
Parental approval (or student approval when the student is 18 or older) is required before the release of educational records. However, a number of exceptions apply. Most pertinent for this discussion is the category of “Directory Information,” which is defined as follows:

“Directory information includes, but is not limited to, the student’s name; address; telephone listing; electronic mail address; photograph; date and place of birth; major field of study; grade level; enrollment status (e.g., undergraduate or graduate, full-time or part-time); dates of attendance; participation in officially recognized activities and sports; weight and height of members of athletic teams; degrees, honors, and awards received; and the most recent educational agency or institution attended.” 34 CFR ¶99.3.

School districts are allowed to release Directory Information only if they have first given public notice to parents of students in attendance of the types of PII that the school district has designated as directory information, the right to refuse to allow the school to designate any or all of those types of PII as directory information, and a period of time for written notice by the parent. The school district may notify parents of a decision to disclose directory information to specific parties, or specific purposes, or both. 34 CFR ¶ 99.37.

FERPA also allows disclosure of PII from an education record to “appropriate parties, including parents of an eligible [18 or older] student, in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.” 34 CFR ¶99.36.

Further, a school district may include in the education records of a student “appropriate information concerning disciplinary action taken against the student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community," and disclose that
information to teachers and school officials within the school or other schools who have determined to have legitimate educational interests in the behavior of the student.

In making that determination to disclose, the school district may “take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals. It may then disclose any information from education records to any person whose knowledge of the information is necessary to protect health and safety. “If based on the information available at the time of the determination, there is a rational basis for the determination, the Department will not substitute its judgment for that of the educational agency or institution in evaluating the circumstances and making its determination.”

Such decisions are often made after consultation or request from the local law enforcement agency.

FERPA also contains provision for release of information from student records to outside parties in health and safety emergencies:

“If the educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. If based on the information available at the time of the determination, there is a rational basis for the determination, the Department will not substitute its judgment for that of the educational agency or institution in evaluating the circumstances and making its determination.” 34 CFR ¶99.36.14

14 Oregon regulations are more specific and restrictive, allowing release of information from student records to “law enforcement, child protective services and health care professionals, and other appropriate parties in connection with a “health and safety emergency” if knowledge of the information is necessary to protect the health and safety of the student or other individuals.” A “health or safety emergency” is defined to include but not be limited to “law enforcement efforts to locate a child who may be a victim of kidnap, abduction, or custodial interference and law enforcement or child protective services efforts to respond to a report of child abuse or neglect,” but warns that this section (4) is to be “strictly construed.” OAR 581-021-0380(4).
2. **Other restrictions on release of student information**

State law on student records often parallels the provisions of FERPA. See ORS 326.565-.591, OAR 581-021-0220 to -0430, for Oregon’s statute and administrative rules on this subject.\(^{15}\)

In addition, the code of ethics governing staff, particularly those required to hold a professional license, may require that “confidentiality” be observed regarding information gained in the school environment about students and even their families. In Oregon, teachers, administrators, speech therapists, psychologists, nurses, and social workers licensed by the Oregon Teacher Standards and Practices Commission (TSPC) are bound by the Standards of Competent and Ethical Performance of Oregon Educators, OAR 584-20-0005-0045, interpreting ORS 342.175(5). The Standards are the basis for revocation or suspension of licenses, and any other disciplinary action by TSPC. Included is:

The ethical educator, in fulfilling obligations to the student, will: (a) Keep the confidence entrusted in the profession as it relates to *confidential information* concerning a student and the student’s family” OAR 584-020-0035(1)(a) [emphasis added].\(^{16}\)

In addition, the “Grounds for Disciplinary Action,” OAR 584-020-0400, includes “gross neglect of duty,” defined to include “any serious and material

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\(^{15}\) Oregon has also affirmed that special education records are governed by FERPA provisions. OAR 581-015-2300.

\(^{16}\) “Confidential information” is not defined in the rule, but it is not restricted to written records or information gained from student records.
inattention to or breach of professional responsibilities,” which may include “[u]nauthorized disclosure of student records information received in confidence by the educator under ORS 40.245.”

D. Privacy and confidentiality issues regarding employees

State law, collective bargaining agreements, and individual employment agreements may similarly prevent school districts from releasing personal information relating to employees. In other cases, the state law exempts certain personnel documents from required disclosure, but would allow a public employer to choose to disclose personnel-related documents.

For example, Oregon’s statute “conditionally” exempts from disclosure certain personnel-related records or information. Oregon law, ORS 192.501(1) allows the withholding of these kinds of documents, but not if “the public interest requires disclosure in the particular instance”:

- “Records of a public body pertaining to litigation to which the public body is a party if the complaint has been filed, or if the complaint has not been filed, if the public body shows that such litigation is reasonably likely to occur. This exemption does not apply to litigation which has been concluded…” ORS 192.501(1).

17 Under Oregon’s Evidence Code, ORS 40.245, Rule 504-3 establishes a “school employee-student privilege” that provides that “[a] certificated staff member of an elementary or secondary school shall not be examined in any civil action or proceeding, as to any conversation between the certificated staff member and a student which relates to the personal affairs of the student or family of the student, and which if disclosed would tend to damage or incriminate the student or family.” In addition, “Certificated school counselors regularly employed and designated in such capacity by a public school shall not, without the consent of the student, be examined as to any communication made by the student to the counselor in the official capacity of the counselor in any civil action or proceeding or a criminal action or proceeding in which such student is a party concerning the past use, abuse or sale of drugs, controlled substances or alcoholic liquor.”
• “A personnel discipline action, or materials or documents supporting that action” are conditionally exempt under ORS 192.501(12), but only completed disciplinary actions, when a sanction is imposed, and materials or documents that support that particular disciplinary action, fall within the scope of this exemption.\textsuperscript{18}

•”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.” ORS 192.502(2).

• ORS 192.502(3) exempts “[p]ublic body employee or volunteer addresses, Social Security numbers, dates of birth and telephone numbers, contained in personnel records maintained by the public body that is the employer or recipient of volunteer services.” How even this exemption does not apply “to the extent that the party seeking disclosure shows by clear and convincing evidence that the public interest requires disclosure in a particular instance.”\textsuperscript{19}

Even in these cases, the governmental body is not compelled to refuse disclosure by the Public Records Law. Of course, other statutes or requirements may make disclosure forbidden or ill-advised. So, Oregon’s public records law allows a public body to refuse disclosure that is mandated by other statutes.

\textsuperscript{18} \textit{See City of Portland v. Rice}, 308 Or 118, 775 P2d 1371 (1989), explaining that the policy underlying this narrowly construed exemption is to “protect[] the public employee from ridicule for having been disciplined but does not shield the government from public efforts to obtain knowledge about its processes. 308 Or at 124, n 5. However, public interest will override any confidentiality interests of the employee if the conduct potentially constitutes a criminal offense or if the records relate to alleged misuse and theft of public property by public employees, or based on considerations of the nature of the employee’s position, the basis for the disciplinary action, and the extent to which such information has already been made public. \textit{Oregonian Publishing v. Portland School Dist.}, 144 Or App 180, 187, 925 P2d 591 (1996), \textit{modified} 152 Or App 135, 952 P2d 66 (1998), affirmed on other grounds 329 Or 393, 987 P2d 480 (1999).

\textsuperscript{19} And such exemption does not apply in the case of a substitute teacher when this personal information is “requested by a professional education association of which the substitute teacher may be a member.” This particular “exemption from an exemption” allows labor unions representing striking teachers to obtain the names, addresses and phone numbers of substitute teachers crossing the picket lines. Under ORS 243.672(1)(e), other information from employee personnel files, even those employees not part of a particular union, will be available to a labor union demonstrating “possible relevance” of the information to an unfair labor practice complaint or contractual grievance.
• For instance, a specifically-tailored Oregon statute requires that in the case of public school districts, evaluation reports of licensed teachers and administrators “shall be maintained in the personnel files of the district,” and provides that “[a]ll charges resulting in disciplinary action shall be considered a permanent part of a teacher’s personnel file and shall not be removed for any reason.” ORS 342.850(4), (7). This education-employee-specific law further requires that:

“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 of personnel files, including rules specifying whom school officials may designate to inspect personnel files.” ORS 342.850(8).

Oregon courts have found that this specialized statute governing only licensed educators creates an exemption to the Public Records Law, such that disclosure does not have to be made to individuals or entities who, according to the adopted local policy, are not entitled to access personnel files. Springfield School District v. Guard Publishing Co., 156 Or App 176, 967 P2d 510 (1998).

Collective bargaining agreements also typically contain provisions restricting the disclosure of information in covered employees’ personnel files.

In summary, under public records laws, school districts frequently have a choice about disclosing certain records. But where the law, with its many “conditional exemptions” from disclosure is not clear, a school district may be well advised to allow other agencies or even the courts to make that decision to prevent legal complaints or grievances over release of student or employee information. In Oregon, for instance, when a public body refuses to produce documents in response to a public records request, the county district attorney is charged with inspecting
the documents at issue, and determining whether they must be disclosed. If a school district acts in accordance with the DA’s advice, the district is shielded from paying requestor’s attorney fees, even if the requesting media or public citizen ultimately obtains a court ruling that the material must be disclosed under the law.

III. MANAGING THE FLOW OF INFORMATION TO/FROM THE PUBLIC AND MEDIA

A. General principles

Armed with legal advice about what must be disclosed, must not be disclosed, and what may be disclosed, school districts often have decisions to make about releasing information – particularly difficult decisions in the fast-paced breaking news situation. While instinctively district officials want to release as little information as possible, in today’s environment of limited trust in government, a response of “we can’t tell you anything, but trust us!” is not likely to satisfy the parents or the public constituency of any school district.

In a great many cases today, the best policy for districts will be to respond with the most complete and accurate information, as quickly as possible, while observing legal requirements to protect the rights of students and staff.

A comprehensive policy on “Communication with Parents, the Public and News Media” would be a good addition to school district policy books. Such a policy should emphasize:

- A commitment to communicating well in advance, to the involved stakeholders and communities, regarding issues such as changes in school programs, calendars, attendance areas.
• A commitment to two-way communication through a variety of “media,” including face-to-face meetings, public work sessions, on-line opportunities for comment.

• A commitment to parents and patrons, and news gatherers, that their questions will be answered in a timely manner, to the fullest extent possible without compromising the rights of involved students and employees.

B. Internal ground rules and advanced preparations

Because many public relations issues arise “out of nowhere” and at all times of the “24/7” news cycle, advance preparations and training are a must. These might include:

• Designation of two contact persons for decision-making about the district’s response – a primary and a “back-up.” In most districts of medium to large size, this would be the superintendent or assistant superintendent and the public relations director. Where board involvement is necessary, the board chair is the logical choice, but, in fact, designation of the board member with the greatest communication skill, availability, and connection to the community may make more sense.

• Arrangements for immediate accessibility and contact with legal counsel – preferably a designated attorney and a back-up attorney in the same firm – to resolve any legal issues in the immediate situation. Even so, as noted below, many situations fit a pattern of facts that can be anticipated and prepared for in advance with legal counsel. Generally, legal counsel are not the “face” that best represents
the district before the TV cameras. That role is better filled by an educator familiar to the community, who can maintain the focus on the ways in which the school system is addressing the needs of students and families.

- Training of all administrators as to (1) what kind of situations should be reported to the superintendent and/or PR director as potential “news events” in the making, and (2) a basic “script” for a statement when the TV cameras have arrived and there’s no time for even a single phone call to central office. In a crisis situation, few administrators will “naturally” say the right things, and all the right things – but they can utilize a pre-planned format for response that communicates concern and capability to resolve the issue or problem.

C. Advance preparations regarding “media” relations with community news sources.

A significant challenge today is the plethora of “media” that might be covering news events concerning a school district. The days when the “news reporters” consisted of a local daily or weekly newspaper and a few local radio and TV stations are gone. Thus, a school district must craft a communications strategy that anticipates there will be a broad array of news “reporters” for the community.

- First, identify where the community (and the larger metropolitan or regional community) gets its information about the school district.

- Second, establish and maintain a good working relationship with primary “news reporters” in the community, in advance of breaking news events.

- Third, anticipate and plan how to deal with those media outlets that operate with a “news diet” of hot button issues and “events” that are reported in by
disgruntled parents, dissatisfied ex- (or current) employees, or others who desire publicity. The flavor of most such reports is “anti-government,” and the focus of these stories is “what wrong did the school district commit today?” While it is tempting to write-off any dealings with such media outlets, they have access to significant portions of the community. A “no comment” statement may be tempting, but usually a lost opportunity.

IV. TYPICAL SITUATIONS AND LIKELY LEGAL ISSUES

A. Reports initiated by parent(s) accusing school teachers, administrators or other employees of “unjust” or “negligent” actions.

In these situations, a parent has chosen to divulge (or invent) partial information about school employee(s)’ dealings with a specific student, often in a disciplinary situation. News media then contact the school district, hopefully with a genuine desire to report “both sides of the story.” Here are examples of such “headlines in the making”:

“Kindergarten students traumatized when classmate brings gun to ‘show and tell.’”

“Student locked in closet when he won’t behave in the classroom.”

“Student suspended for wearing rosary at school.”

“Autistic student endures repeated bullying but school does nothing.”

In their response to news reporters, the school district can:

• Emphasize the district’s need to protect confidential information about students, such that details of the specific situation cannot be revealed BUT
• Talk about the policies and laws that govern such situations AND
• Talk about the investigation and complaint procedures that allow parents and 
students to seek correction or redress.

For example, when contacted about claims that a student was bullied, but the 
school did nothing, the district spokesperson can say:

“Our district has very explicit policy forbidding bullying, and a complaint 
procedure included in the student handbook that requires investigation of all such 
complaints. We cannot divulge or even confirm details of any specific student 
complaint, because the district is required by law to maintain confidentiality 
regarding any student who might be involved. We can tell you that the middle school 
initiated an anti-bullying education program for students last year because we know 
this is a society-wide problem. This program involved group activities to raise student 
awareness of the negative effects of bullying, and individual and small-group 
counseling when bullying was reported. We encourage any parent or student who has 
concerns to contact the school principal.”

• Where parents are selectively releasing information from student records, the 
district spokesperson can say to a reporter:

“You have obviously been provided with some records and information about this 
student and these allegations. If you want to be sure that you are getting the whole 
story, you can ask the parent to sign a release so that you can see all of the school 
records regarding this student. Without a release from the parent, we can’t talk to you 
about any specifics.”

Of course, even then, PII regarding other students would need to be redacted. 
Usually the parent will refuse to provide the news reporter with such a release 
authorizing the school to make available all information from the investigation and 
student record. But the district’s offer, and the parent’s refusal, may dissuade the 
media outlet from reporting just the parent’s selective “information.”

• Without divulging specific information about the particular student(s) and/or 
staff, the school officials can almost always respond regarding the “typical” way they 
respond to “this type” of situation. For instance, the district spokesperson could 
say:
“Our schools each have a dress code that promotes an orderly learning environment. We do not prohibit particular garments or accessories unless there would be a health or safety concern or the student’s dress would create a significant disruption in the classroom. We respect students’ First Amendment rights, but must protect a healthy school environment for all students. We may forbid certain items of dress or jewelry when our local law enforcement officers tell us that such garb is gang-related.

“I cannot speak about a specific student and any action the school might have taken, but I can provide you with a copy of the Student Handbook, which discusses appropriate dress for these middle school students. If a student violates the dress code rule, there is typically a conference with the student, parent and school counselor or principal. The Handbook lists possible disciplinary consequences for repeated violations of the dress code.”

B. Accusations by school employees, or ex-employees, regarding malfeasance by some supervisor or administrator or the board itself.

These situations present some of the same complications as the student scenarios when specific employees allege that they have been treated unfairly. However, even where public records laws allow some information to be withheld, unless there is law or contract language that forbids disclosure, school districts should consider the advantages of disclosing as much as legally possible:

• The district can confirm that accusations or complaints have or have not been received, and the process for (and possibly results of) an investigation:

  “The district last month received reports of employees using district maintenance equipment for personal projects at home. The district promptly initiated an investigation and found that there were a few incidents of that sort, most several years old and involving former employees. We have taken appropriate action to prevent any future personal use of district property, and have also taken steps to educate all our staff that publicly-owned equipment cannot be used for personal projects.”

• The district can confirm the current status and past employment history of an employee.

  “Teacher ________ is not currently reporting to work at ___ elementary school. She has been employed by the district as a physical education teacher since 1997. She
is currently on administrative leave. Any parent with a concern is invited to contact
Principal _____ or the superintendent’s office.”

- Where the district has taken action to remove employees, or employees have
resigned, the district can report that to the public and to parents:

“There has been **Principal _______** was been dismissed by the school board at last night’s board
meeting for failing to carry out duties associated with the evaluation and supervision
of staff. This dismissal action did not involve any matters relating to interaction with
students. **Retired principal ____** has been named as the interim at that building, and
a selection process for a new principal will begin immediately.”

- Where specific allegations have been made by the employee and the
investigation has been concluded, the district often can announce what were the
findings of its investigation:

“**As you have been informed by employee __________, three months ago this**
employee had filed complaints against several supervisory employees, alleging
harassment, intimidation and retaliation. **The matter was investigated by an**
independent investigator retained by the district. **The investigator did not find**
evidence to substantiate employee __________’s claims and the matter has been
closed.”

- In some instances, an employee who has been disciplined for offenses
against students or failing to supervise or teach properly may be willing to have
parents of involved students know the action the district has taken, as a way of
restoring credibility. Such communications (a letter of apology, an explanation that
the teacher will be returning with enhanced supervision and a plan of assistance)
are best arranged with the involvement of the teacher’s attorney, union
representative, or other adviser.

**C. Situations where parents or students are making claims of employees’
inappropriate actions toward children.**

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20 Of course, the district needs to consult with legal counsel about whether such a statement would
make the investigative report itself a public record, or otherwise open to disclosure, and to make
decisions with that knowledge in mind.
The school’s response will depend, of course, on whether any complaint or information has been previously communicated to the school district – or whether the parents or students immediately contacted news media or spread the accusations on social media.

• In the “no warning” situation, the district will have to be cautious about any statement defending staff, because there is, in fact, no way of knowing whether the reports have any validity. In such circumstances, the district/ school would be best off to emphasize the opportunities for parents to file complaints or seek resolution of their concerns – which have not been utilized – and to assure the parents and public that the matter will be speedily investigated, their children protected, and the results of the investigated made known.

• In appropriate instances, the district can discuss the requirements of its policies and state laws regarding the conduct of school staff, and the district’s efforts to inform and enforce those standards:

“The claims made by one of our parents about a staff member’s alleged sexual involvement with a 17-year-old student are, of course, very disturbing. As required by law, our staff has been trained regarding their obligation to report such reports of child abuse to law enforcement or the child protective service, and school officials made those reports immediately upon first hearing any claim of inappropriate involvement between a staff member and a student. We will be relying upon those outside agencies to investigate this matter. In the meantime, as is our practice in all instances where such a serious complaint has been made about a district employee, the employee has been placed on administrative leave.”

• While the instinct might be to hope that the parents, public and the media forget about the accusation, the district needs to communicate the “rest of the story,” at least to those closely involved, including parents with children at that school. Where the accused employee has been exonerated, that needs to be
communicated. Where the complaint has been substantiated and the employee has been charged criminally, that too needs to be communicated, along with the district’s profound regret, appreciation for those who made the reports, and plans for future education and remediation.

The difficult communication is when the situation is unresolved in black and white terms, and the employee has been retained but disciplined for a lesser offense because the offense of inappropriate touching cannot be substantiated to the level necessary to sustain a legal challenge. While the nature and fact of disciplinary action cannot be communicated under many collective bargaining agreements, and is not a public record under some state laws, the district can communicate to affected parents that “appropriate action has been taken after a thorough investigation, and the district will be making additional efforts to be sure that all staff understand the standard of conduct required by our policies and laws.”

V. CONCLUSION

The school attorney is called upon for advice in many difficult situations where the public is concerned, and media of all types are “looking for a story.” School districts can and need to do more than respond with a “No Comment” or “We’re waiting for advice from our attorney.” Districts benefit from pre-planning to provide background and reassuring information about the steps the school will take to ensure that children are protected and any misconduct is addressed.

Districts and their legal counsel can work together to provide all stakeholders with a broader perspective and store of information than is likely to be relayed
“over the airwaves” or “on-line” – even in those unanticipated “breaking news” situations.