requires disclosure in the particular instance." OR. REV. STAT. § 192.501. The Oregon Attorney General's Office advises that many 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."[3] *AG Public Records and Public Meetings Manual* (2014), p. 2.

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, OR. REV. STAT. § 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 n. 5, 775 P.2d 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 Sch. Dist.*, 96 Or. App. at 468-69, 774 P.2d 494 (1989), *rev'd on other grounds,* 310 Or. 32, 791 P.2d 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 P.2d 1048 (1976).

Even where public records are "exempt," under OR. REV. STAT. § 192.502, (not "conditionally exempt" under OR. REV. STAT. § 192.501) the specific exemption may contain its own preconditions. For example, OR. REV. STAT. § 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.[4]

Under OR. REV. STAT. § 192.501, however, where the legislature has enacted another statute governing access to licensed education employee's personnel files (OR. REV. STAT. § 342.850(8), the Oregon appellate courts have upheld refusals to allow public access to individual personnel files. *Springfield Sch. Dist. v. Guard Pub. Co*., 156 Or. App 176, 967 P.2d 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 (OR. REV. STAT. § 40.225),[5] the 2007 legislature amended the Public Records Law, OR. REV. STAT. § 192.502(9), to narrow

[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 Pub. Co*., 200 Or. App. 120, 125-27, 112 P3d 457 (2005)

[5] *Klamath County Sch. Dist. v. Teamey*, 207 Or. App. 250, 140 P3d 1152 (2006), *review denied* 342 Or. 46 (2006).

the availability of 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 have similarly established broad public records disclosure laws and have interpreted any exemptions or exceptions narrowly. This is true for other states.[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 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

[6] For purposes of comparison this paper focuses on similarities and differences between Nebraska, Florida, and Massachusetts.

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).

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. §§ 84-712(4).[7] Compare this to Massachusetts, which requires a response within ten calendar days. MASS. GEN. LAWS. ch. 66, § 10(a-b); 950 MASS. CODE REG. § 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." Neb. Op. Att'y Gen. No. 91054 (June 17, 1991). Conversely, "briefing papers" which have been

[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 the public record on the Internet. *Id.*

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.

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. 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.'" *Justice Coalition v. First Dist. Ct. of App. Jud. Nom. Comm'n,* 823 So. 2d 185, 192 (Fla. 2002).

Another difference between states is 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

[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.

FLA .STAT. § 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). This applies to charter schools, regardless of whether they operate as a public or private entity. Fla. Att'y Gen. Op. No. 98-48.

public policy subject to the act. *Marks v. Judicial Nom. Comm'n for Judge of the County Ct. of the 20th Jud. Dist.*, 236 Neb. 429, 461 N.W.2d 551 (1990). *See also* Neb. Att'y Gen. Op. No*. 92020* (Feb. 12, 1992). Conversely, in Florida, courts look to whether the committee is "fact-finding" in nature or not. For example, in *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.,* Neb. Att'y Gen. Op. No. 09-35; MASS. GEN. LAWS ch. 4, § 7(26)(l).

Similarly, many states hold that the majority of information in an employee's personnel files is exempt from disclosure. *See, e.g., Wakefield Teachers' Ass'n v. School Comm. 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. Neb. Att'y Gen. Op, No. 90015 (Feb. 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 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 OR. REV. STAT. § 192.610 to 192.690 [the "Public Meetings Law"] that decisions of governing bodies be arrived at openly.

OR. REV. STAT. § 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 the time and place of meetings, and that meetings are accessible to persons wishing to attend.

[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 (OR. REV. STAT. § 192.445), and an employee ID card without the employee's written consent if the card contains a picture (OR. REV. STAT. § 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* 24 (2014).

OR. REV. STAT. § 192.630. Detailed minutes must be kept, as well. OR. REV. STAT. § 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." OR. REV. STAT. § 192.610(3). A similar subcommittee with only the power to gather information is not subject to the Public Meetings Law. And, an advisory 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* 110-11 (2014). 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

[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 Sch. Bd.*, 995 So. 2d 1068, 1071-1072 (Fla. 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 Sch. Bd. of Brevard,* 821 So. 2d 311, 315 (Fla. 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). 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 Gov't 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. OR. REV. STAT. § 192.660(4). The lone exceptions when media reps may not attend are for student suspension or expulsion hearings, OR. REV. STAT. § 332.061, and for consultation with labor negotiators.

public officer or employee (if the body has satisfied certain prerequisites), OR. REV. STAT. § 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, OR. REV. STAT. § 192.660(2)(b), (i); to consult with persons designated by the body to carry on labor negotiations, OR. REV. STAT. § 192.660(2)(d); to consider exempt public records, OR. REV. STAT. § 192.660(2)(f); and to consult with legal counsel concerning current litigation or litigation likely to be filed, OR. REV. STAT. § 192.660(2)(h). However, even then "[n]o executive session may be held for the purpose of taking any final action or making any final decision." OR. REV. STAT. § 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. <u>FERPA and similar state laws regarding student records</u>

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. "Record" is defined as "any information recorded in any way including, but not limited to,

[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.

handwriting, print, computer media, video or audio tape, film, microfilm and microfiche." 34 CFR § 99.3.[13]

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, honor, 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.

[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.

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]

2. Other restrictions on release of student information

State law on student records often parallels the provisions of FERPA. *See* OR. REV. STAT. § 326.565-.591, OR. ADMIN. REG. § 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, OR. ADMIN. REG. § 584-20-0005-0045, interpreting

[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." OR. ADMIN. REG. 581-021-0380(4).

[15] Oregon has also affirmed that special education records are governed by FERPA provisions. OR. ADMIN. REG. 581-015-2300.

OR. REV. STAT. § 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.

OR. ADMIN. REG. 584-020-0035(1)(a) [emphasis added][16].

In addition, the "Grounds for Disciplinary Action," OR. ADMIN. REG. 584-020-0400, includes "gross neglect of duty," defined to include "any serious and material inattention to or breach of professional responsibilities," which may include "[u]nauthorized disclosure of student records information received in confidence by the educator under OR. REV. STAT. § 40.245."[17]

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

[16] "Confidential information" is not defined in the rule, but it is not restricted to written records or information gained from student records.

[17] Under Oregon's Evidence Code, OR. REV. STAT. § 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, "[c]ertificated 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."

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, OR. REV. STAT. § 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. . ." OR. REV. STAT. § 192.501(1).

• "A personnel discipline action, or materials or documents supporting that action" are conditionally exempt under OR. REV. STAT. § 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.[18]

[18] *See City of Portland v. Rice*, 308 Or. 118, 775 P.2d 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. *Oregonian Pub. v. Portland Sch. Dist.*, 144 Or. App. 180, 187, 925 P.2d 591 (1996), *modified* 152 Or. App. 135, 952 P.2d 66 (1998), *aff'd on other grounds* 329 Or. 393, 987 P.2d 480 (1999).

•"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." OR. REV. STAT. § 192.502(2).

• OR. REV. STAT. § 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." 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." [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.

For instance, a specifically-tailored Oregon statute requires that in the case of public school districts, evaluation reports of licensed teachers and administrators

[19] 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 OR. REV. STAT. § 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.

"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." OR. REV. STAT. § 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 to personnel files, including rules specifying whom school officials may designate to inspect personnel files.

OR. REV. STAT. § 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 Sch. Dist. v. Guard Pub. Co*., 156 Or. App. 176, 967 P.2d 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 this advice, the district is shielded from

paying the 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.

II. MANAGING THE FLOW OF INFORMATION TO AND 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, and attendance areas.

• A commitment to two-way communication through a variety of "media," including face-to-face meetings, public work sessions, and 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 they learn about from 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 would be a lost opportunity.

III. TYPICAL SITUATIONS AND LIKELY LEGAL ISSUES

A. Reports Initiated by Parents 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:

> *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[20]:

> *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.

[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.

C. Situations Where Parents or Students Are Making Claims of Employees' Inappropriate Actions Toward Children

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*."

IV. 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.