WASHINGTON SCHOOL LAW UPDATE

PORTER FOSTER RORICK LLP

September 2021

A brief summary of legal developments relevant to Washington public school districts from the previous calendar month.

PFR Announcements

Public Records Disclosure Training

November 9, 2021, 9 am to 3 pm
Two Union Square Conference Center, Seattle

Join Jay Schulkin and Elizabeth Robertson for a full day of hands-on training in processing public records requests and avoiding mistakes that lead to liability. This workshop will satisfy the legally-mandated training for district officials and public records officers. The cost is $150 per person and includes lunch. Register by sending an e-mail with the names of attendees to info@pfrwa.com.

Ninth Circuit Court of Appeals

First Amendment

Ohlson v. Brady
No. 20-15656 (8/23/21)

The Ninth Circuit Court of Appeals held that a public employee does not necessarily speak as a private citizen when that speech is in "direct contravention" of a supervisor's orders. Greg Ohlson worked as a forensic scientist in the Arizona Department of Public Safety. His job entailed testing blood samples for alcohol content, reporting the findings, and regularly testifying in state court proceedings regarding the test results. The Department's practice was to analyze each individual sample, but then also review samples in batches for quality assurance and to catch malfunctions that might skew results. The Department's policy was to only release individual sample results to criminal defendants. Ohlson personally believed that the accuracy of individual test results was compromised without disclosure of the entire batch results, and he strongly advocated that the Department make batch results available to criminal defendants. Ohlson advocated for this both internally within his department, as well as in conversations with defense attorneys and in his testimony in criminal proceedings. In two separate criminal cases, Ohlson testified that the batch results should be disclosed to ensure accuracy of the individual results. Following this testimony, the Department placed Ohlson on administrative leave and ultimately forced him into early retirement. Ohlson filed a complaint in federal district court alleging First Amendment retaliation. The district court held that Ohlson's speech was protected because he was speaking as a private citizen on a matter of public concern. The district court determined that Ohlson spoke as a private citizen principally because he had defied his supervisors' orders in testifying to his personal views on disclosure of batch testing. The Ninth Circuit Court of Appeals disagreed that public

employee speech is necessarily protected when in defiance of a supervisor's orders. Instead, the Court held that this inquiry is one of several "guiding principles" to determine whether public employees are speaking as private citizens. Other principles to consider include whether the employee had confined the communications to the chain of command, as well as the subject matter of the communication. Nonetheless, the Court did not reach a conclusion as to whether Ohlson spoke as a private citizen because it determined that the law in this area was not clearly established, and the named defendants were therefore entitled to qualified immunity.

Washington Court of Appeals

Public Records Act

Hood v. City of Nooksack
No. 82081-8-I (8/2/21) (unpublished)

The Washington State Court of Appeals reversed summary judgment dismissal of Eric Hood's PRA lawsuit against the City of Nooksack, holding that the trial court applied an incorrect standard in evaluating the City's response to the request. In January 2019, Eric Hood sent an e-mail to the City asking for all records the City had received from the auditor as part of a state audit conducted in 2018, and all records of the City's response to the audit. The City's clerk responded to Hood's request by directing him to the Washington State Auditor's website without providing him a hyperlink. Hood filed a PRA lawsuit against the City, alleging that it had failed to properly respond to his request and failed to adequately search for responsive records. The trial court dismissed Hood's claims, concluding that the City had responded to Hood's request in an "adequate manner." The trial court acknowledged that the City had failed to provide Hood a hyperlink to the Auditor's website, but nonetheless concluded that this PRA violation was "de minimis" because it did not prejudice Hood. The Court of Appeals reversed, holding that agencies must strictly comply with the public disclosure obligations of the PRA. The Court reiterated well-established precedent rejecting a reasonable or substantial compliance standard by which to judge an agency's compliance with its statutory duties. Instead, the Court held that the only proper consideration was whether the City responded to Hood's request in any of the ways prescribed by statute. The Court held that the City failed to do so when it generally directed Hood to the Auditor's website because the PRA required the City to provide "an internet address and link on the agency's website to the specific records requested." The Court further held that questions of fact remained as to whether the City had adequately searched for responsive records and remanded to the trial court for further proceedings.

Public Records Act

Bogen v. City of Bremerton
No. 54656-6-II (8/10/2021)

The Washington State Court of Appeals held that the one-year statute of limitations for filing a complaint arising under the Public Records Act (PRA) begins the day after the triggering event. Plaintiff Bogen submitted a PRA request to the City of Bremerton in November 2018. The City provided two installments of responsive records. On January 28, 2019, the City informed Bogen there were no other responsive records and that his request was considered fulfilled and closed. On January 28, 2020, Bogen filed a complaint against the City alleging various PRA violations. The trial court dismissed Bogen's complaint as time-barred for exceeding the one-year statute of limitations. On appeal, the issue was whether the statute of limitations began running on January 28, 2019 (the day the City informed Bogen of the closure of the request—the "triggering event"), or January 29, 2019, the day after the triggering event. The Court held that RCW 42.56.550(6) does not plainly indicate how the one-year period should be

calculated. Heeding its duty to read statutes in context with other related statutes, the Court applied the computation of time principles in CR6(a) and the general counting statute, RCW 1.12.040, and held that under RCW 42.56.550(6), litigants must file their complaint within one year of the day after the triggering event. As a result, the Court of Appeals reversed the trial court's dismissal of Bogen's PRA claims, and remanded for further proceedings.

Deferral to Arbitration

American Fed'n of Teachers, Local 1950 v. PERC
No. 81322-6-I (8/23/2021)

The Washington State Court of Appeals held that the Public Employment Relations Commission (PERC) has broad authority to defer contractual disputes related to statutory unfair labor practice claims to arbitration. The American Federation of Teachers, Local 1950 and Shoreline Community College began negotiating a new collective bargaining agreement in 2017. A central issue in the bargain concerned the process for compensating faculty for past wage increases that the legislature had authorized, but not funded, since 2008. Negotiations eventually deteriorated, and the union filed an unfair labor practice complaint alleging that the employer had (1) refused to bargain over the methodology for calculating the increased compensation; (2) refused to provide requested information concerning the data related to compensation; and (3) unilaterally changed the amount and method of calculating compensation without providing an opportunity to bargain. PERC determined that the first two claims were statutory unfair labor practice claims, while the third was a contractual dispute subject to arbitration under the terms of the parties' CBA. The employer asserted an affirmative defense of waiver by contract to all three claims. On appeal from the Examiner's decision in favor of the union, in a split decision, PERC deferred the matter to arbitration to resolve the employer's waiver of contract defense to all three claims. The union appealed, arguing that a PERC regulation narrowed the scope of ULP charges that PERC could defer to arbitration to unilateral change allegations only. The Court of Appeals disagreed, holding that the applicable regulation gave PERC authority either to "retain jurisdiction" or "defer" alleged ULP violations "pending the outcome of related contractual dispute resolution procedures." The Court held that this language authorized PERC to defer consideration of the union's statutory ULP claims until the waiver by contract defense was resolved through the parties' arbitration process.

Public Records Act

O'Dea v. City of Tacoma
No. 53613-7-II (8/24/2021) (part published)

The Washington State Court of Appeals held that the City of Tacoma violated the Public Records Act (PRA) when it waited nine months to respond to a request for records, but also held that the trial court abused its discretion when it applied a per record multiplier to calculate the penalty. David O'Dea was a former lieutenant for the Tacoma Police Department. Following a shooting incident in August 2016, the City placed O'Dea on administrative leave and investigated his conduct. While Odea was on administrative leave, his attorney mailed two separate public records requests to the City. In November 2017, O'Dea sued the City, alleging violations of the PRA, and he attached the PRA letters his attorney had mailed to his complaint. The City filed an answer denying it had received the attached letters, but it did not transmit the letters to its PRA officer at that time, nor did it begin to respond to the PRA requests attached to the complaint. It was undisputed that the City did not receive the mailed requests prior to November 2017. Nine months later, the City forwarded the letters to its PRA officer, who acknowledged the request within five days of receipt. The trial court ruled that the City violated the PRA when it failed to timely respond following

receipt of O'Dea's complaint, and it imposed a $10 per day, per record penalty beginning on the date the City first received the requests and ending when the City first began responding. Because the request produced more than 700 records, this resulted in a more than $2.6 million total penalty. The Court of Appeals affirmed the trial court's ruling that the City violated the PRA by not timely treating the PRA request letters attached to the complaint as a PRA request. However, the Court reversed the "extreme penalty amount" because it was not justified with a "robust explanation" for the severity of the penalty. The Court held that the trial court abused its discretion by imposing a "manifestly unreasonable" penalty, especially in light of the trial court's minimal discussion of the penalty amount, which totaled five sentences, only referenced three aggravating factors, and found no bad faith by the City. The Court remanded to the trial court for recalculation of the penalty.

Public Records Act

Diemond v. King County
No. 81420-6-I (8/30/21) (unpublished)

The Washington State Court of Appeals affirmed summary judgment dismissal of a citizen's PRA lawsuit, holding that the appeal of the underlying order was untimely. Christy Diemond filed more than 25 separate PRA requests with the County. The County disclosed thousands of pages in ongoing installments. However, before the County had completed its response, Diemond filed a lawsuit, alleging that the County had "silently withheld" disclosable records in violation of the PRA. The County continued to provide installments of records as the lawsuit was pending, and Diemond continued to file new records requests. The County filed a motion for summary judgment and notified Diemond that it would set the hearing for October 19, 2018. Diemond did not file any responsive pleadings to the County's motion, and instead moved to continue the hearing due to unspecified employment obligations, a family emergency, and the need for additional time to hire an attorney. Diemond failed to appear on the scheduled hearing date. The trial court granted the County's motion for summary judgment, dismissing the PRA claims with prejudice. Diemond subsequently filed an untimely motion for reconsideration, which the trial court also denied. The Court of Appeals held that Diemond's appeal was also untimely because she waited more than 30 days after the trial court's order to file a notice of appeal. The Court acknowledged that a timely motion for reconsideration will extend the deadline for an appeal. However, the Court held that the deadline had not been extended here because Diemond's motion for reconsideration was untimely. The Court further held that the trial court appropriately granted summary judgment based on the declarations and exhibits the County submitted in support of its motion, which documented the public records officers' ongoing efforts to fulfill Diemond's PRA requests.

Welcome New PFR Attorneys

The attorneys and staff of Porter Foster Rorick are pleased to announce several additions to our team of attorneys providing responsive, practical, cost-effective legal advice to Washington public schools.

Macaulay E. Dukes

Macaulay Dukes advises public school districts on a wide range of legal issues, with a particular emphasis on special education, labor and employment law, and labor relations.

Macaulay is a 2015 graduate of the University of Washington and a 2019 graduate of Seattle University School of Law. During law school, Macaulay served as the President of the Moot Court Board, Article Editor of the Seattle Journal for Social Justice, and externed with the Snohomish County Prosecuting Attorneys' Office. Before joining PFR in the summer of 2021, Macaulay was a civil litigator representing businesses and individual clients with Helsell Fetterman.

Joshua L. Halladay

Josh Halladay represents public schools and other local governments in all areas of school and municipal law.

Josh is a 2012 graduate of the University of Oregon, a 2014 graduate of the University of Southern California's Price School of Public Policy, and a 2019 graduate with honors of the Seattle University School of Law. During law school, Josh was a Notes and Comments Editor of the Seattle University Law Review, externed with the Honorable Theresa Fricke of the U.S. District Court for the Western District of Washington, and clerked with the Washington Attorney General's Office. Prior to law school, Josh worked on state-wide ballot measure campaigns and served as an AmeriCorps VISTA in public schools in Reno, Nevada. Before joining PFR in the summer of 2021, Josh represented municipal clients with McGavick Graves.

Gregory M. Swanson

Greg Swanson advises and represents public school districts on diverse matters of school law and school administration, including negotiating collective bargaining agreements with public sector labor unions.

Greg graduated *summa cum laude* from Seattle University School of Law in 2019. During law school, Greg worked as a judicial extern with Judge Morgan Christen of the federal Ninth Circuit Court of Appeals, clerked with the Education Division of the Washington State Attorney General's Office, and served as a Lead Article Editor of the Seattle University Law Review. Prior to law school, Greg served as Civil Affairs Captain in the U.S. Army Reserves, training service members how to negotiate with foreign governments and local communities. Before joining PFR in November 2020, Greg clerked with Justice Susan Owens of the Washington State Supreme Court.

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Washington School Law Update is published electronically on or about the 5th of each month. To be added to or removed from our e-mail distribution list, simply send a request with your name, organization and e-mail address to info@pfrwa.com.

This information is intended for educational purposes only and not as legal advice regarding any specific set of facts. Feel free to contact any of the attorneys at Porter Foster Rorick with questions about these or other legal developments relevant to Washington public schools.

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