



DEPARTMENT OF JUSTICE

1162 Court Street NE
Justice Building
Salem, Oregon 97301-4096
Telephone: (503) 378-4400
TTY: (503) 378-5938

November 23, 2007

Amy Hsuan
West Metro News Bureau
1675 SW Marlow Ave, Suite 325
Beaverton, OR 97225

Re: *Petition for Public Records Disclosure Order:*
TSPC investigation: Curtis John Berger

Dear Ms. Hsuan:

This letter is the Attorney General's order on your petition for a Public Records Order dated November 14, 2007 under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition was received by our office on November 16, 2007. Your petition asks the Attorney General to order the Teachers Standards and Practices Commission (Commission) and its employees to make available for inspection, or to produce copies of, records related to the investigation and settlement involving Curtis John Berger.

The Public Records Law confers a right to inspect any public records of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. If a state agency denies a request for disclosure of records, the requestor may petition the Attorney General for review of the denial. ORS 192.450.

For the reasons that follow, we grant your petition with respect to the settlement agreement you requested, but respectfully deny your petition with respect to the additional records.

1. Background

a. The records you requested

The records that you have petitioned to be disclosed are as follows:

1. A settlement agreement between the Commission and Mr. [Curtis John] Berger and any accompanying documents related to the agreement;
2. All records regarding the investigation of the Berger case; and
3. All records regarding how the conclusion to the Berger case was reached, including any communication between TSPC and Berger and/or his representatives.

You originally requested those records in a letter addressed to the Commission's Executive Director, Vickie Chamberlain:

"I write to request a copy of the settlement agreement between the Teachers Standards and Practices Commission and Curtis John Berger. This would include but not be limited to any investigations or reports, file memos or communications with Berger and/or his legal representatives and the Teachers Standards and Practices Commission that pertain to a settlement agreement reached in 2005."

Although the "records regarding how the conclusion to the Berger case was reached" described by your petition may be a broader category than the documents you initially requested, we conclude that the same analysis would apply to either formulation of your request.

b. The Commission's response

The Commission responded to your request in a letter dated October 19, 2007 and signed by Ms. Chamberlain. She denied your request based on two statutory provisions, ORS 342.176(4) and ORS 192.502(9). The latter statute provides an exemption to required disclosures of public records where Oregon law provides for an exemption, establishes a prohibition on disclosure, or creates an applicable legal privilege against disclosure. The former statute creates an explicit exemption to public record disclosure requirements for certain records related to the investigation of alleged teacher misconduct. Ms. Chamberlain concluded that these exemptions entitled the Commission to withhold the settlement agreement and the other documents that you requested. We will address the propriety of the Commission's response below. But first, we will address your claims relating (1) to the statutory prohibition against certain confidential settlements and (2) to the attorney-client privilege.

2. ORS 17.095(1) and ORS 40.225 are not at issue

a. ORS 17.095 does not apply to the present proceeding

In your petition, you assert that the Commission's attempt to keep the settlement agreement confidential is illegal under ORS 17.095(1). That statute has no application here. ORS 17.095(1) provides as follows:

(1) A public body, or officer, employee or agent of a public body, who is a defendant in an action under ORS 30.260 to 30.300, or who is a defendant in an action under ORS 294.100, may not enter into any settlement or compromise of the action if the settlement or compromise requires that the terms or conditions of the settlement or compromise be confidential.

Ms. Chamberlain confirms that, at the relevant times, neither the Commission nor any relevant individual was a defendant in any action under ORS 30.260 to 30.300 or ORS 294.100 initiated by Mr. Berger. Consequently, the provisions relating to confidential agreements under ORS 17.095(1) do not apply.

b. TSPC did not cite ORS 40.225 in denying your request

You stated in your petition that the Commission improperly claimed that certain records are protected by the attorney/client privilege, ORS 40.225. We have reviewed Ms. Chamberlain's October 19 response to you, and found no reference to the attorney-client privilege as a basis for denial of your records request. You went on to clarify in your petition that you are not seeking attorney-client communications between the Commission and its lawyers. Consequently, there is no need to discuss denial of records based on the attorney-client privilege.

3. The Commission's assertions of confidentiality under ORS 342.176(4)

a. General background

The Commission is charged with licensing and regulating educators teaching in Oregon's public schools. Among its responsibilities, the Commission must investigate complaints it receives regarding allegations of educator misconduct. ORS 342.176(1). The statutes addressing the Commission's investigations of complaints provide for confidentiality of records as follows:

The documents and materials used in the investigation and the report of the executive director are confidential and not subject to public inspection unless the commission makes a final determination that the person charged has violated ORS 342.143 or 342.175.

ORS 342.176(4). Thus, documents and materials used in the Commission's investigations are confidential unless the Commission makes a final determination of a violation after charging the educator with alleged misconduct. In the present case, the Commission charged Mr. Berger with misconduct and referred the case for a hearing before the Office of Administrative hearings pursuant to ORS 342.177(1). The case was informally resolved without a contested case hearing under the provisions of ORS 183.415(5). The settlement agreement did not determine that Mr. Berger violated any of the applicable standards under ORS 342.143 or 342.175.

Having summarized the procedural history of the case, the next issue to address is whether, under these circumstances, the settlement agreement or the investigation materials are confidential and therefore exempt from public disclosure under ORS 342.176(4).

b. The settlement agreement is not confidential under ORS 342.176(4)

We conclude that the settlement agreement is not confidential under ORS 342.176(4).

As discussed above, the settlement agreement between Mr. Berger and the Commission was the result of a compromise that was reached after the Commission charged Mr. Berger of misconduct. The settlement agreement itself indicates it was entered into under the provisions of ORS 183.415(5). That statute allows agencies to informally resolve cases without a hearing, provided the agreement meets certain procedural requirements. Specifically, the agreement must (1) be in writing; (2) be signed by the parties to the proceeding; and (3) be incorporated by the agency into a final order.

In the present case, it appears that the settlement agreement meets the requirements of ORS 183.415(5). The settlement agreement is in writing and signed by the appropriate parties. It also appears that the settlement agreement was presented to the Commission during a scheduled meeting, and the Commission adopted the settlement agreement. The settlement agreement, as adopted by the Commission, constitutes part of a final order in a contested case. ORS 183.310(6)(b) defines a final order as a “final agency action expressed in writing.” The settlement agreement reflects a final decision by TSPC on the allegations in the case. It is not an action that precedes final agency action, or that contemplates further agency consideration of the matter after adoption of the agreement. Moreover, ORS 183.415(5)(b) explicitly requires the agency to incorporate the settlement agreement in its final order. By statute, the agreement itself is part of the order.

This analysis leads to two conclusions. First, because the settlement agreement represented a final outcome of the Commission’s investigation, the document was not among the “documents and materials used in the investigation” conducted by the Commission. Nor was it the “report of the executive director.” Therefore it is not exempt under ORS 342.176(4), and no other law would make the settlement exempt from disclosure under ORS 192.502(9). Second, the Commission releases publicly releases final orders in contested cases, and this is part of that final order. The agreement is not protected by ORS 192.502(9).

c. Documents related to investigation are confidential under ORS 342.176(4)

You also requested records relating to the investigation of the Berger case, including documents concerning communications between the Commission and Mr. Berger’s representatives.

We conclude that the documents that the Commission used in its investigation of Mr. Berger are exempt from public disclosure because the Commission did not make a final determination that Mr. Berger violated any provisions of ORS 342.143 or 342.175. By the terms

of ORS 342.176(4), the exemption is forfeit only if the Commission makes such a determination; the statute does not state that the exemption is also forfeit in the event of a settlement agreement entered into under the explicit authority of ORS 183.415(5). The exemption covers any records detailing communications between the Commission and Mr. Berger's representatives. Those communications concerned the appropriate resolution of the matter, and records documenting them are properly considered to be among the Commission's investigatory materials.

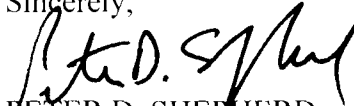
In the course of investigating complaints, the Commission staff may receive records from witnesses and school districts. The Commission staff may also interview witnesses and write reports summarizing those interviews. These documents and materials are obtained or created to be used in the investigation, and to be presented to the Commission for its consideration. The Commission may also receive records from the educator or the educator's legal representatives that relate to the investigation of the case or to the potential resolution of the case. In the present case, the Commission received records and interviewed witnesses in the course of investigating a complaint regarding Mr. Berger. Ultimately, the Commission did not make a final determination that Mr. Berger violated ORS 342.143 or 342.175. Consequently, the records that you requested regarding the investigation are exempt from public disclosure under ORS 192.502(9) pursuant to ORS 342.176(4).

4. Conclusion

In conclusion, we have determined that the settlement agreement between Mr. Berger and the Commission is not exempt from disclosure under Oregon's Public Records laws, and hereby order the Commission to provide it to you within seven days. ORS 192.450(2). In producing the document, the Commission may make such redactions as it believes in good faith are supported by Oregon's Public Records law. If you disagree with redactions made by the Commission, you may of course petition this office for review.

We have also determined that the investigation records relating to Mr. Berger's case, including communications between the Commission and Mr. Berger and his representatives, are confidential under the statutes cited by the Commission in its response to you dated October 19, 2007. With respect to those records, your petition is respectfully denied.

Sincerely,



PETER D. SHEPHERD
Deputy Attorney General

The Oregonian

ESTABLISHED 1850

1320 S.W. BROADWAY PORTLAND, OREGON 97201-3499

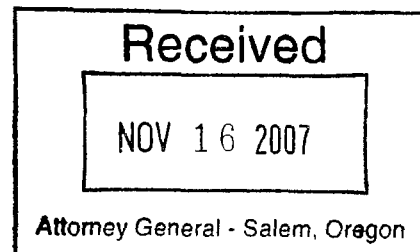
29188

Amy Hsuan
West Metro News Bureau
1675 S.W. Marlow Ave., Suite 325
Beaverton, OR 97225

Phone: 503-294-5954
Fax: 503-294-5902

Email: amyhsuan@news.oregonian.com

Hardy Myers
Attorney General's Office
1162 Court St. N.E.
Salem OR 97301



PUBLIC RECORDS PETITION

Nov. 14, 2007

Dear Attorney General Myers,

I, Amy Hsuan, a reporter for The Oregonian, request you to order the Teacher Standards and Practices Commission and its employees to make available for inspection records relating to Curtis John Berger. I requested these records on behalf of The Oregonian on September 12, 2007. Executive director Victoria Chamberlain denied the request on October 19, 2007.

In my original public records request to the Commission, I sought certain records related to the case of Curtis John Berger, a wrestling coach at Hermiston High School. Specifically, I sought the following:

- 1.) A settlement agreement between the Commission and Mr. Berger and any accompanying documents related to the agreement.
- 2.) All records regarding the investigation of the Berger case.
- 3.) All records regarding how the conclusion to the Berger case was reached, including any communication between TSPC and Berger and/or his representatives.

In its denial of my request, the Commission cites ORS 342.176(4) and ORS 192.502(9). ORS 192.502(9) is the "catchall" provision of the public records law, protecting records under other state laws which keep records confidential. Therefore, the Commission rests its decision to withhold largely on ORS 342.176(4).

The agency's decision to withhold the documents should be rejected for the following reasons:

1. ORS 342.176(4) does not cover settlement agreements.

ORS 342.176 (4) states "documents and materials used in the investigation and the report of the executive director are confidential and not subject to public inspection unless the Commission makes a final determination that the person charged has violated ORS 342.143 or 342.175."

Under Oregon law, no record may be withheld from public inspection unless a specific exemption designates it so. The Commission improperly interprets 342.176(4) to mean that "any records that may exist concerning this educator are exempt from disclosure." (Chamberlain to Hsuan, Sept. 5, 2007). This is an overly broad and clear misreading of the law. Only specific records – investigatory records and the executive director's report – are exceptions to the general rule of disclosure.

A settlement agreement is neither an investigatory record nor an executive director's report. A settlement is a distinct and specific type of document – in this case, an agreement between the state of Oregon, by and through the Commission and its agent, the executive director. A settlement is not "documents and materials used in the investigation" – a settlement is reached because the investigation has ended and conclusions have been drawn.

A settlement agreement also cannot be confused as “the report of the executive director.” This is defined under ORS 342.176(3), which says the executive director “shall report in writing any findings and recommendations to the Commission, meeting in executive session, at its next regular meeting following completion of the investigation; and the person against whom the charge is made.” The report that is exempt under 342.176 (4) is made prior to the signing of a settlement agreement. A plain reading of 342.176 (4) shows that a settlement agreement is in no way characterized as investigatory material or a report from the executive director, and therefore is in not exempt from disclosure.

Furthermore, under the commission’s own policies regarding settlement agreements, OAR 584-019-0035 states that a settlement agreement is “an agreement between the educator and the commission staff to resolution of a disciplinary matter without a hearing.” While there is no clear rule on how the commission approves settlement agreements, the common practice of the commission has been to discuss disciplinary proceedings in executive session and adopt a stipulated order in a public meeting through a vote. This particular settlement agreement between the executive director and Mr. Berger was never approved by the commission in a public session and never documented in the commission’s meeting minutes.

ORS 342.176 (4) was added to Oregon law by the 1991 Legislature. Research into the legislative history of the bill and subsequent law (1991 Oregon Laws Chapter 662) shows lawmakers clearly intended to prevent Commission investigations into teacher misconduct from being compromised while still in process. The original intent of the law was to give teachers due process and to protect their reputations prior to the investigation’s completion. A settlement – such as the one The Oregonian seeks here – is reached to resolve the matter. The Legislature, neither through statute nor intent, granted the Commission or its agents the authority to keep settlement agreements from public view.

2. The Commission action is made illegal by ORS 17.095.

O.R.S. 17.095 (1) states: “A public body, or officer, employee or agent of a public body, who is a defendant in an action under ORS 30.260 to 30.300, or who is a defendant in an action under ORS 294.100, may not enter into any settlement or compromise of the action if the settlement or compromise requires that the terms or conditions of the settlement or compromise be confidential.”

A settlement is defined as the conclusion of an issue or dispute. Black’s Law Dictionary defines settlement as “(a)n agreement ending a dispute or lawsuit.” As cited previously, the commission’s own definition of a settlement agreement is a “resolution of a disciplinary matter.” A settlement requires an agreement on behalf of the state, made by its agent – in this case, the Teacher Standards and Practices Commission, by and through the executive director or other authorized employee. The Commission grants its executive director the authority to enter such agreements. In an October 3 interview with The Oregonian, Ms. Chamberlain, the commission’s current executive director, said, “The executive director is only an agent of the Commission.” Furthermore, Ms. Chamberlain said that, “There has never been a decision made without first consulting the members of the Commission.” As a result, the Commission, by and through the executive director, agrees to a final action when a settlement is signed on its behalf. The agreement sets commitments on behalf of the state of Oregon and its people.

The settlement in question was viewed by reporters from The Oregonian in a public file of disciplinary actions. Commission agents then removed the settlement from the file, saying it was confidential. Before the settlement was removed from the file, the reporters took notes describing the settlement. The agreement appears to reference testimony from Mr. Berger before an Oregon Administrative Law Judge in 2005 regarding possible misconduct by Mr. Berger in his role as a wrestling coach at Hermiston High School.

State law clearly states that if a charge against an educator are not proven, the commission shall dismiss the case and those allegations never become public. ORS 342.177 (3) says “If the decision of the commission is that the charge is not proven, the commission shall order the charges dismissed.” Here, the commission did not dismiss the case against Mr. Berger. The settlement agreement demonstrates the commission had concerns over Mr. Berger’s contact with children. However, that concern is kept secret from the public.

This settlement falls squarely under the provisions of 17.095(1). Because the law prohibits a public body from making a confidential settlement agreement, there is no legal basis for withholding this settlement.

Government must operate in the sunshine of the public view wherever and whenever possible. Government cannot and should not make secret agreements or confidential settlements that bind the authority of the government – that is, the people of Oregon – without publicly disclosing the terms of those agreements or the conditions of the settlement.

This settlement in particular bound the public's right to act with regard to a teacher accused of sexual misconduct involving students. According to the Commission's logic, its decision to bind the state's authority and powers with regard to this teacher is something the public has no right to see.

3. Confidentiality is not asserted for other records.

The Oregonian also asked for all records regarding the investigation of the Berger case and all records regarding how the conclusion to the Berger case was reached, including any communication between the Commission and Berger and/or his representatives. The Commission said such records are protected from disclosure as attorney-client communications, ORS 40.225.

The Commission's citing of 40.225 diverts attention from the question at hand: The Oregonian isn't seeking attorney-client communications between the Commission and its lawyers. We are seeking communications between the Commission and Berger or his representatives. Can the Commission conceal all communications between it and Berger or his representatives?

The Attorney General has found in previous public record petitions that documents related to settlements by the Commission were not exempt from disclosure. (Public Records Order, April 5, 2002, Paul B. Meadowbrook and David Myton.) In this case, the documents in question were related to the negotiation of a settlement, and it had nothing to do with attorney-client privilege, as the Commission now asserts. Instead, the question came down to an interpretation of the confidential submissions exemption at 192.502 (4), which the Commission did not cite in this case. In the Meadowbrook order, the Attorney General applied the five-point test and found that there had been no offer of confidentiality. However, in this matter, the Commission has made no effort to invoke the five-point test, all of which must be met.

The Oregonian bases its request on several factors, the foremost being a belief that our readers have a serious and legitimate interest in the performance the state's only agency empowered to license and discipline teachers. That interest entitles them to know, at a minimum, the details of an investigation and a resulting settlement agreement involving the behavior of teachers, the nature of the conduct at issue and the circumstances surrounding it.

In sum, the documents requested are not exempt from disclosure under Oregon law. We request your office order TSPC to release them.

Sincerely,

A handwritten signature in black ink, appearing to read "Amy Hsuan", with a long horizontal flourish extending to the right.

Amy Hsuan