

DEPARTMENT OF JUSTICE

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

December 24, 2007

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

Re: Petition for Public Records Disclosure Order:
Teachers Standards & Practices Commission Settlement Agreements

Dear Ms. Hsuan:

This letter is the Attorney General's order on your petition for a Public Records Order dated December 12, 2007 under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition was received by our office on December 17, 2007. Your petition asks the Attorney General to order the Teachers Standards and Practices Commission (Commission) and its employees to make available for inspection all settlement agreements in which the Commission:

1. agrees not to subject an educator to discipline
2. and/or agrees not to place an educator's name on its annual discipline list
3. and/or agrees not to enter an educator into the NASDTEC national database

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 agreements you requested.

1. Background

You requested the records referenced above in a November 30, 2007 letter addressed to the Commission's Executive Director, Vickie Chamberlain. Ms. Chamberlain responded to your request on behalf of the Commission in a letter dated December 7, 2007 indicating there was one agreement matching the criteria you listed (Glenn M. Kinney, Jr.). 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 you requested. We will address the propriety of the Commission's response below. But first, we will address your claim relating to the statutory prohibition against certain confidential settlements.

2. ORS 17.095(1) is 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 was not the Commission's Executive Director at the time that the agreement was entered into. However, she has confirmed with the Risk Management Division of the Department of Administrative Services that Mr. Kinney did not file a tort claim in connection with this matter. Consequently, the provisions relating to confidential agreements under ORS 17.095(1) do not apply.

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. Kinney with misconduct and Mr. Kinney requested a hearing. Mr. Kinney and the Commission resolved the case without a hearing. The settlement agreement did not determine that Mr. Kinney violated any of the applicable standards under ORS 342.143 or 342.175. Nor did the Commission separately make such a determination.

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). We note at the outset that while the analysis in this case leads to the same result as in the Public Records Orders concerning the settlement agreements involving Richard Lorenzen and Curtis Berger, those Public Records Orders were, by their terms, limited to the documents identified in those Orders. We do not interpret the Commission's denial of the records requested in the instant case to contravene the previously referenced Public Records Orders.

As discussed above, the settlement agreement between Mr. Kinney and the Commission was the result of a compromise that was reached after the Commission charged Mr. Kinney with misconduct. The agreement was presented to and adopted by the Commission on July 14, 2000 during the course of a regularly scheduled meeting. The settlement agreement was not a document that was used in the investigation of complaints, but instead memorialized the outcome following the investigation. Nor was the agreement the report of the executive director summarizing the results of the investigation. Consequently, the agreement is not a document that is covered by the confidentiality provisions of ORS 342.176(4).

It also appears that the Commission treated the agreement as equivalent to a final order in a contested case. *See*, ORS 183.310(6)(b) and (2)(a). This treatment makes sense, as the settlement agreement reflects a final decision by TSPC on the allegations in the case – specifically, a decision to dismiss the pending charges. It is not an action that precedes final agency action, or that contemplates further agency consideration of the matter after adoption of the agreement.

This analysis leads to two conclusions. First, because the settlement agreement does not fall under the terms of ORS 342.176(4) or of any other applicable Oregon law, the exemption contained in ORS 192.502(9) is not applicable. Second, the Commission publicly releases final orders in contested cases. The Commission's decision to treat this akin to such an order confirms the propriety of requiring its disclosure.

c. Investigatory materials are not subject to disclosure.

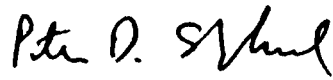
Neither your public records request nor your petition to our office listed investigatory materials among the records you sought. Nevertheless, the arguments you raise in numbered section 3 of your petition seem to concern such documents. Had you requested those records from the Commission and been denied, we would conclude that the denial was lawful. Per ORS 342.176(1), investigatory documents are confidential unless the Commission finds that a violation has occurred. The 2002 public records order you cite to suggest that disclosure may be required involved a circumstance where the Commission did make a finding of misconduct. As a result, ORS 342.176(1) did not protect the underlying materials in that case. *See*, Public Records Order, April 5, 2002, Meadowbrook and Mynton, p. 4. You also suggest that there are policy reasons to find that the confidentiality of ORS 42.176(1) should terminate if a settlement is reached. We do not address those policy arguments because our order must be based on the law as it is written. Under ORS 342.176(1), the records are “confidential and not subject to public inspection unless the commission makes a final determination”

that a violation has occurred. That condition is not satisfied here; therefore, the Commission could lawfully withhold investigatory materials.

4. Conclusion

In conclusion, we have determined that the settlement agreement between Mr. Kinney 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.

Sincerely,

A handwritten signature in black ink that reads "Peter D. Shepherd". The signature is written in a cursive style with a large initial "P".

PETER D. SHEPHERD
Deputy Attorney General

The Oregonian

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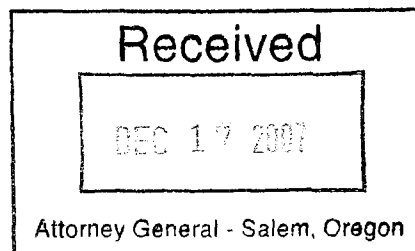
1320 S.W. BROADWAY PORTLAND, OREGON 97201-3499

29269

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

Dec. 12, 2007

Dear Attorney General Myers,

I, Amy Hsuan, a reporter for The Oregonian, respectfully request you to order the Teacher Standards and Practices Commission and its employees to make available for inspection any and all settlement agreements. I requested these records on behalf of The Oregonian on Nov. 30, 2007. Executive director Victoria Chamberlain denied the request on Dec. 7, 2007, despite an earlier ruling by your office to release such settlement agreements involving educators Richard Don Lorenzen and Curtis John Berger.

In my public records request to the Commission, I sought any and all settlement agreements in which the Commission :

- 1.) agrees not to subject an educator to discipline
- 2.) and/or agrees not to place an educator's name on its annual discipline list
- 3.) and/or agrees not to enter an educator into the NASDTEC national database

Ms. Chamberlain responded that one other such agreement exists but denied the requests based on ORS 342.176(4) and ORS 192.502(9). However, in his Nov. 23, 2007 response to my petition, Deputy Attorney General Peter D. Shepard ruled that the commission must make available for inspection such settlement agreements, stating that the agreements "as adopted by the commission, constitutes part of a final order in a contested case." Therefore, Attorney General Shepard concluded, they were not exempt under ORS 342.176(4) and ORS 192.502(9).

The Oregonian believes that the same reasoning applies in this case and to any and all other cases in which the commission enters a settlement agreement with an educator accused of misconduct. Because the documents I am requesting are identical in nature to those regarding Mr. Lorenzen and Mr. Berger, my support of their release rests on the same arguments outlined in my previous petition.

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. These particular settlement agreements between the executive director and educators are 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.

State law clearly states that if a charge against an educator is 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.” 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 misconduct. 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.

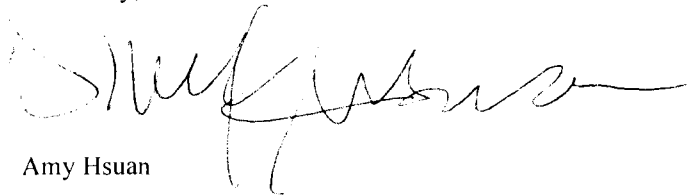
The Attorney General has found in previous public record petitions that documents related to settlements by the Commission were not exempt from disclosure, including the most recent decision to release the agreements belonging to Mr. Lorenzen and Mr. Berger. However, in previous petitions the Attorney General also ruled that settlements are 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. The question comes 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.

Settlement agreements by the only commission with the power to discipline teachers, in particular, shrouds potential misconduct from public view, putting children at risk and keeping parents in the dark. The Oregonian believes that any and all such settlements in which the commission agrees to keep potential misconduct confidential further exposes children to potentially harmful adults.

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

Sincerely,

A handwritten signature in black ink, appearing to read "Amy Hsuan", written over a horizontal line.

Amy Hsuan