

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