

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,

PETER D. SHEPHERD  
Deputy Attorney General

AGS20982  
c: Vickie Chamberlain