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April 5, 2002

Paul B. Meadowbrook
285 Liberty Street, NE
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Salem, OR 97301

David Myton
Executive Director
Teacher Standards and Practices Commission
465 Commercial St. NE
Salem, OR 97301

Re: Petition for Public Records Disclosure Order:
Teacher Standards and Practices Commission Records

Gentlemen:

This letter is the Attorney General's order on Mr. Meadowbrook's petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition, which we received on March 7, 2002,[1] asks the Attorney General to direct the Teacher Standards and Practices Commission (TSPC) to make available all "records and files concerning the investigation and ultimate November 15, 2001 order suspending Ms. [Peggy] Freed-Elefant's teaching certificate, including without limitation the order, stipulation, and correspondence between TSPC and Freed-Elefant, the school district and their attorneys." For the following reasons, we deny the petition in part and grant the petition in part.

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 public record contains exempt and nonexempt material, the public body must separate the materials and make the nonexempt material available for examination if it is "reasonably possible" to do so while preserving the confidentiality of the exempt material. *Turner v. Reed*, 22 Or App 177, 186 n 8, 538 P2d 373 (1975).

[1] We appreciate your extending the time within which the law would have otherwise obligated us to respond.

1. Background

a. TSPC Investigation

The records that are the subject of your petition relate to TSPC's investigation of professional misconduct by a teacher licensed by the agency, Peggy Freed-Elefant. When TSPC receives a complaint or other information that a teacher may have violated standards, TSPC must promptly undertake an investigation. ORS 342.176(1). TSPC may appoint an investigator and may issue subpoenas to carry out its investigation. ORS 342.176(2). After completion of the investigation, the executive director makes a report of his or her findings and recommendations to the TSPC commissioners in executive session, and provides a copy of the report to the teacher who is under investigation. ORS 342.176(3). If the TSPC commissioners determine that there is sufficient cause to hold a hearing, TSPC notifies the complainant and the teacher's employing school district, if any, and the teacher is provided a statement of the charges and notice of opportunity for hearing. ORS 342.176(5). After a hearing, TSPC issues a final order that the teacher did or did not violate professional standards. For a teacher found in violation, TSPC may impose sanctions ranging from a public reprimand, probation, suspension or revocation of the teaching license.

With regard to Ms. Freed-Elefant, who taught in the Corvallis School District, TSPC received a report from the school district on May 1, 2000, that she may have engaged in inappropriate conduct with a male high school student while on a school-sponsored trip to Japan in June 1998. In July 2001, TSPC completed its investigation and the executive director presented the TSPC commissioners with an investigation report and a recommendation that TSPC charge Ms. Freed-Elefant with professional misconduct. TSPC charged Ms. Freed-Elefant with professional misconduct on July 18, 2001. Ms. Freed-Elefant requested a hearing. TSPC and Ms. Freed-Elefant reached a settlement, and TSPC issued a stipulated order on November 16, 2001, with findings that Ms. Freed Elefant had given sexually suggestive gifts to the student, had made sexually suggestive comments to the student and had written a poem to the student that the student reasonably perceived to be a sexual advance. TSPC imposed a six-month suspension of Ms. Freed-Elefant's license and imposed other conditions for reinstatement of the license.

b. TSPC Response to Your Request

You originally requested that TSPC disclose the records at issue in November 2001, and filed a petition with the Attorney General on December 3, 2001. We denied your petition as premature in an order dated December 7, 2001, because TSPC had not denied your request. In your current petition you state that TSPC has not yet disclosed any records. However, TSPC disclosed records responsive to your request as enclosures to a December 17, 2001, letter to you from TSPC's contact attorney within this office, Assistant Attorney General (AAG) Joe McKeever. AAG McKeever's letter identified three categories of documents that TSPC refused to provide on the grounds that the documents are exempt from disclosure under the Public Records Law. AAG McKeever has confirmed with you that your current petition is for disclosure of the records withheld by TSPC in responding to your November 2001 request.

In response to your records request, TSPC provided you with its investigation report (captioned "Report of Preliminary Investigation"), with portions redacted that reference written statements made by three former students of Ms. Freed-Elefant who alleged misconduct on her part.[2] TSPC also disclosed to you records appended to the report, but withheld disclosure of the former students' written statements and additional documents submitted by one of the former students regarding his allegations.

TSPC has already disclosed to you all other records that it developed or received during its investigation of Ms. Freed-Elefant, with the exception of records received from the Corvallis School District and a settlement offer received from Ms. Freed-Elefant's attorney. The three categories of withheld records are addressed below.

2. TSPC Investigation Report and Appendices

a. Confidentiality Under TSPC Statutes

The statutes governing the TSPC's investigatory responsibilities provide for confidentiality of records used in its investigations as follows:

> The documents and materials used in the investigation and 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). The statute makes confidential records that are used in TSPC's investigation, unless TSPC makes a final determination of a violation. Thus, if TSPC determines that a violation occurred, the documents are public records subject to disclosure, unless another statutory exemption applies.

In the case of Ms. Freed-Elefant, the information submitted by the three former students was not factually related to the charges against her, and TSPC's final determination that she engaged in unprofessional conduct was not with regard to these allegations. Because of these factors, TSPC considered the information about the alleged prior misconduct to be exempt from disclosure under ORS 342.176(4). However, the TSPC investigative report referred to the records concerning these allegations and copies of the records were appended to the report. TSPC received the records during its investigation and apparently considered them of sufficient importance to include them in the report.[3] For this reason, we conclude that TSPC used the

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[2] TSPC also redacted the names of students because disclosure of personally identifiable student information is prohibited under the federal Family Educational Rights and Privacy Act (FERPA), 20 USC §1232g. ORS 192.502(8) exempts from disclosure records for which federal law prohibits disclosure. While it appears that TSPC may have inadvertently failed to redact some student names from the records it has already provided to you, the agency may continue to redact student names in records provided to you under this order, consistent with the requirements of FERPA.

[3] TSPC may have considered the allegations of earlier conduct to be significant in terms of whether Ms. Freed-Elefant's conduct was an isolated incident or a pattern of conduct. TSPC has published factors to be considered in

allegations of earlier misconduct in its investigation of Ms. Freed-Elefant. Because TSPC made a final determination of professional misconduct, the redacted portions of TSPC's investigative report and the appended records concerning allegations of earlier misconduct are not confidential under ORS 342.176[4] and must be disclosed unless they are confidential under a separate provision of the Public Records Law.

b. Personal Privacy Exemption

TSPC received the records pertaining to allegations made by two former students of Ms. Freed-Elefant from the Corvallis School District, and the status of those records is discussed below, in section 3 of this order. A third former student provided records about alleged misconduct by Ms. Freed-Elefant directly to TSPC. Some of the information contained in the records provided by the former student are of a highly personal nature. Under certain conditions, an ordinary reasonable person could deem disclosure of this information highly offensive, raising the question of whether it is exempt from disclosure on the basis of personal privacy. ORS 192.502(2). However, the TSPC investigator, Susan Nisbet, has told us that, prior to the time the records were submitted, she discussed with the former student the possibility that the records could be disclosed. She informed the former student that the records might have to be publicly disclosed in the course of TSPC's disciplinary process. In light of the fact that the former student was advised of the possibility of public disclosure, we do not believe that disclosure in this instance would be an unreasonable invasion of privacy under ORS 192.502(2). Therefore, this information is subject to disclosure.

3. School District Personnel Records

In response to the report made by the Corvallis School District in May 2000, TSPC began an investigation of Ms. Freed-Elefant and issued a subpoena to the school district for all records contained in her personnel file, all records contained in any "working files" and any other records relating to Ms. Freed-Elefant while she was employed with the school district. In addition to records of two of the three prior students' allegations of misconduct, referenced above, the records provided to TSPC by the district include correspondence between the district and Ms. Freed-Elefant and her representatives, interview notes, summaries of the district's investigation of Ms. Freed-Elefant, and a note that Ms. Freed-Elefant had written to the student in Japan.

Under ORS 342.850(8), personnel records of a teacher are open for inspection by the teacher or the teacher's designee and the district school board and its designees. The statute provides that "[d]istrict school boards shall adopt rules governing access to personnel files, including rules specifying whom school officials may designate to inspect personnel files." The Corvallis School District Board has adopted policies that, in addition to the persons identified in the statute, designate persons conducting auditing functions, the district superintendent, the superintendent's designee, the employee's supervisor, district human resource officers, courts and public agencies with the power of subpoena, and such other persons as the superintendent

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imposing discipline. Among these factors are whether the misconduct was part of a continuing pattern or one of a series of incidents. OAR 584-020-0045.

[4] ORS 192.402(9) exempts from disclosure records made confidential by statutes outside of the Public Records Law.

may designate as having access to district personnel files. We have no information that you have been designated by the superintendent to have access Ms. Freed-Elefant's personnel file. Accordingly, if records the district provided to TSPC were appropriately maintained in her personnel file, they are exempt from disclosure, at least when in the custody of the school district.

Joel DeVore, legal counsel to the Corvallis School District, has informed us that the district has maintained all of the documents concerning complaints against Ms. Freed-Elefant in her personnel file.[5] Mr. DeVore further advises us that the district's practice is to maintain all written complaints against teachers and all documents related to a teacher's work performance or fitness in the district's personnel files.

In *Oregonian Pub. Co. v. Portland School Dist. No. 1J*, 329 Or 393, 402, 987 P2d 480 (1999), the Supreme Court held that the exemption for personnel records under ORS 342.850(8) is based on the records' contents and not their location. The court held that the meaning of the term "personnel file" should be determined from the plain, natural and ordinary meaning of those words, and that personnel files "would usually include information about a teacher's education and qualifications for employment, job performance, evaluations, disciplinary matters or other information useful in making employment decisions. *Id.* at 401. In this case, we conclude that the records were properly characterized by the Corvallis School District as personnel records. They concerned complaints, investigations and potential disciplinary actions as to a specific teacher. Thus, the records are subject to the exemption under ORS 342.850(8) when they are maintained by the school district.

However, to determine whether the records remain exempt when in TSPC's custody, we must consider the exemption covering transferred records. The Public Records Law provides that when records subject to an exemption are transferred from one public agency to another in connection with the receiving agency's performance of its duties, those records retain their exempt or confidential status "if the considerations originally giving rise to the confidential or exempt nature of the public records or information remain applicable." ORS 192.502(10). Therefore, district personnel records continue to be exempt from disclosure when held by TSPC, unless the considerations giving rise to their confidentiality no longer apply.

Under ORS 342.850(8), the legislature has determined that access to teacher personnel files shall be limited to certain individuals, as delineated under policies established by the employing school district. The Corvallis School District established a policy that provides for confidentiality of a teacher's personnel records except for allowing access by limited categories of district officials who, presumably, require such access to carry out their official responsibilities. The policy also allows the courts and public agencies with the power of subpoena to access the records, along with persons designated by the superintendent. As well, the subject teacher or designee may access his or her personnel file. We construe this policy as protecting the personal privacy of those whose information is contained in personnel files. Mr. DeVore confirms that personal privacy is the primary consideration behind the district's policy.

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[5] Since providing records to TSPC, the district has been unable to locate one of the provided records in Ms. Freed-Elefant's personnel file or elsewhere within the district's files. However, Mr. DeVore told us that if the district had retained the missing record, it would have been placed in Ms. Freed-Elefant's personnel file.

TSPC entered a final order of suspension, containing findings of fact that Ms. Freed-Elefant had violated TSPC standards in her interactions with a student during a trip to Japan in 1998. Some information maintained in the district's personnel file concern subjects that TSPC disclosed in its order. Thus, the considerations giving rise to the confidentiality of personnel files no longer apply to this information, and it is not exempt under ORS 192.502(10). In addition, some records maintained in Ms. Freed-Elefant's personnel file contain information that is duplicative of what TSPC has already disclosed to you. This fact makes confidentiality considerations no longer applicable to these records as well. However, some of the records that TSPC received from the district have not been disclosed by TSPC, in its order or otherwise. With regard to those materials, including allegations from two of the three former students, the considerations giving rise to the records' confidentiality under ORS 342.850(8) and the district's policy continue to apply and, therefore, they are exempt from disclosure under ORS 192.502(10).

4. Settlement Offer

On October 21, 2001, Ms. Freed-Elefant's attorney made a written offer of settlement to AAG McKeever. The written offer was captioned "For Settlement Purposes Only – Confidential." TSPC refused to disclose the record on the basis that it was exempt under ORS 192.502(4), which provides for the confidentiality of records submitted to a public body in confidence. Five criteria must be met for the exemption to apply:

1. The information must have been submitted on the condition that it be kept confidential.
2. The informant must not have been required by law to provide the information.
3. The information must be of a nature that reasonably should be kept confidential.
4. The public body must show that it has obliged itself in *good faith* not to disclose the information.

5. Disclosure of the information must cause harm to the public interest.

AG'S MANUAL at 64.

If one of the criteria is not met, the exemption does not apply. With regard to the record at issue, a question is raised as to whether TSPC obliged itself in good faith not to disclose the record. While the document submitted to AAG McKeever by Ms. Freed-Elefant's attorney was marked confidential, there is no indication that TSPC, or AAG McKeever on the agency's behalf, obliged itself not to disclose the information. Following receipt of the record, AAG McKeever and Ms. Freed-Elefant's attorney entered into settlement negotiations and eventually settled the dispute, but AAG McKeever recalls no discussion about the confidentiality of their negotiations. In order for the exemption under ORS 192.502(4) to apply, it is not necessary that a public body oblige itself formally or in writing not to disclose a record. But, there is nothing evident in the facts surrounding the receipt or treatment of the record for us to conclude that silence on the part of the public body is a sufficient showing of a good faith obligation not to

disclose in this instance. Because ORS 192.502(4) does not apply, the settlement offer submitted by Ms. Freed-Elefant's attorney is not exempt from disclosure.

5. Conclusion

We deny your petition in part, and grant your petition in part, as follows.

Your petition is granted with respect to, and TSPC is ordered to disclose copies of, records that TSPC received directly from a former student of Ms. Freed-Elefant. TSPC is also ordered to disclose those portions of its investigation report that make reference to the former student.

Your petition is granted with respect to, and TSPC is ordered to disclose copies of, records that TSPC received from the Corvallis School District to the extent that (i) the information in those records is about allegations of professional misconduct by Ms. Freed-Elefant during a school sponsored trip to Japan in 1998 and (ii) TSPC has already disclosed the information, in its final order of suspension or otherwise.[6] Otherwise, your petition with respect to records received by TSPC from the school district is denied.

Your petition is granted with respect to, and TSPC is ordered to disclose a copy of, the letter from Ms. Freed-Elefant's attorney dated October 2, 2001, related to a settlement proposal.

TSPC has seven days from the date of this order in which to comply. ORS 192.450(2).

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

AGS09929
c: Joel S. DeVore, Corvallis School District

[6] This portion of the order affects nine records maintained by TSPC.