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September 24, 2001

Henry J. Kaplan
Attorney at Law
851 SW Sixth Avenue
Portland, OR 97204

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

Dear Mr. Kaplan:

This letter is the Attorney General's order on your petition, filed on behalf of your client, Larry Hart, for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition, which we received on September 5, 2001,[1] requests the Attorney General to direct the Teacher Standards and Practices Commission (TSPC) to produce a copy of the following records:

> All public records, correspondence, notes, recordings, and investigative reports involving any complaint filed with the [TSPC] regarding Mrs. Pat Sharp of the Beaverton School District in 1996 or thereafter, and any other materials described in Larry Hart's letter to TSPC on June 6, 2001 (copy enclosed). These materials include, but are not limited to, correspondence, chronologies, summaries or other materials presented to TSPC by attorneys or representatives of the Beaverton School District.

For the reasons that follow, we respectfully deny your petition.

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. The law requires generally that the custodian of public records furnish proper and reasonable opportunities for inspection and copying of the records in the office of the custodian.

[1] We appreciate you extending the time within which the law would have otherwise required us to respond to the petition.

ORS 192.430. Any person denied the right to inspect or to receive a copy of any public record of a state agency may petition the Attorney General to review the public record to determine if it may be withheld from public inspection. ORS 192.450(1).

Assistant Attorney General (AAG) Joe McKeever contacted you to clarify the scope of your request. You told AAG McKeever that you are seeking all TSPC records concerning any investigation involving a 1996 injury to your client's daughter, Christine Hart. Dr. Hart filed a complaint with the TSPC on September 27, 1996, in relation to his daughter's injury, alleging that Patricia Sharp, an elementary school principal licensed by the TSPC, had violated professional standards. The TSPC Executive Director, David Myton, informs us that Dr. Hart's is the only complaint about Mrs. Sharp filed with the TSPC during the time period set in your request, and is also the only complaint received by the TSPC involving the incident of Christine Hart's injury. Therefore, in considering your petition, we address TSPC records involving Dr. Hart's complaint about Mrs. Sharp.

ORS 342.176(4)

As part of its responsibility for licensing teachers and administrators, the TSPC is required to investigate complaints against those persons whom it has licensed. ORS 342.176(1). Following such an investigation, the executive director reports findings and recommendations to the TSPC. ORS 342.176(3). Meeting in executive session, the TSPC then determines whether to hold a hearing on the charges in the complaint or whether there is insufficient cause to hold a hearing. ORS 342.176(5) and (6). Under these statutory provisions, the TSPC staff investigated the allegations in Dr. Hart's complaint, and the TSPC determined on September 19, 1997, to take no action on the complaint, finding that there was insufficient cause to hold a hearing.

Your petition seeks all documents the TSPC may have involving Dr. Hart's complaint. ORS 342.176(4) applies to TSPC's investigative materials.

> 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.

Mr. Myton wrote to Dr. Hart on July 18, 2001, informing him that, under ORS 342.176(4), documents and materials used by the TSPC in its investigation of Mrs. Sharp were confidential and not subject to public inspection. Mr. Myton has confirmed to us that the only records the TSPC maintains involving Dr. Hart's complaint were used in its investigation of Mrs. Sharp. Because ORS 342.176(4) makes these documents confidential and not subject to public inspection, they are exempt from disclosure under the Public Records Law. ORS 192.502(9).[2]

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[2] ORS 192.502(9) exempts from disclosure "[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law." Your petition states that there is no reason for maintaining any exemption from disclosure of the requested records. ORS

Family Educational Rights and Privacy Act of 1974

You also assert in your petition that the TSPC must produce the records related to Dr. Hart's complaint because their production is required under the Family Educational Rights and Privacy Act of 1974 (FERPA), 20 USC § 1232g. FERPA requires an "educational agency or institution" receiving federal funds to disclose "education records" to students and their parents. Under the federal regulations implementing FERPA, the definition of "educational agency or institution" is limited to a public or private agency or institution that has funds made available to it under any program administered by the Secretary of the U.S. Department of Education and that either (i) "provides educational services or instruction, or both, to students," or (ii) "is authorized to direct or control public elementary or secondary, or postsecondary educational institutions." 34 CFR §§ 99.1(a) and 99.3.

Under the TSPC's statutory authority and duties, it licenses teachers and administrators, ORS 342.121, investigates complaints and imposes discipline against licensed persons, ORS 342.173 to 342.190, and approves teacher education programs that are offered by post-secondary institutions, ORS 342.147. To direct or control elementary, secondary or post-secondary educational institutions is not part of the TSPC's authority. Additionally, the TSPC does not provide educational services or instruction to students. Therefore, the TSPC is not an educational agency or institution under FERPA.[3]

The FERPA regulations define "education records" as records "directly related to a student" that are "maintained by the educational agency or institution or by a party acting for the agency or institution." 34 CFR 99.3. Thus, even though the TSPC is not an educational agency or institution, it could be obligated under FERPA to disclose records to Dr. Hart if it is a party that acts for an educational agency or institution. The TSPC, however, is not such a party. As explained above, the TSPC licenses teachers and administrators and acts with regard to requirements to acquire and maintain those licenses. In carrying out its statutory responsibilities, the TSPC does not act *for* an educational agency or institution. Therefore, we conclude that the TSPC is not subject to FERPA's disclosure requirements.

ORS 192.517

Your petition also states that the records are subject to disclosure under ORS 192.517. This statute gives agencies within the system designated under the

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342.176(4), however, does not limit the time period in which the records remain confidential. The TSPC does not have discretion under the statute to determine that confidentiality is not necessary.

[3] Mr. Myton informs us that the TSPC currently receives some federal funds through a sub-grant from the United States Department of Education to the Oregon University System and TSPC. Therefore, the TSPC receives funds under a program administered by the Secretary of Education. This fact standing alone, however, does not make the TSPC subject to FERPA's disclosure requirements.

Developmental Disabilities Assistance and Bill of Rights Act, 42 USC §6041 et seq., and the Protection and Advocacy for Individuals with Mental Illness Act, 42 USC § 10801 et seq., limited rights of access to certain records. ORS 192.517(1). Neither you nor Dr. Hart is part of the system to which records must be disclosed under the statute. Therefore, ORS 192.517 is inapplicable to your petition.[4]

For these reasons, we deny your petition.

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

AGS08598
c: David V. Myton, Executive Director
Teacher Standards and Practices Commission

[4] Because we find ORS 192.517 inapplicable to your petition, we do not consider whether records maintained by the TSPC constitute "records" as defined in ORS 192.515(4).