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November 22, 2005

Jim and Kelly Mannenbach
260 Highway 234
Eagle Point, OR 97524

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

Dear Mr. and Mrs. Mannenbach:

This letter is the Attorney General's Order on your petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition, which we received on October 31, 2005, asks the Attorney General to order the Teacher Standards and Practices Commission (TSPC) to produce a copy of and make available to you:

> The CD that contains all of the testimony from the February 2005 hearing of Bradley McBee vs. T.S.P.C.

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

The Public Records Law confers a right to inspect any public record of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. Any person denied the right to inspect or to receive a copy of a public record of a state agency may petition the Attorney General to review the record and determine if it may be withheld. ORS 192.450.

The TSPC recorded the February 2005 hearing of Bradley McBee v. TSPC onto a compact disc (CD). Your petition states that your request to TSPC for disclosure of the CD was denied on behalf of the TSPC by Assistant Attorney General Joe McKeever. We discussed your petition with AAG McKeever. He told us that the TSPC hearing was conducted pursuant to ORS 342.176 and 342.177.

In part, ORS 342.177(1) states:

> Hearings under ORS 342.176 shall be conducted by an administrative law judge assigned from the Office of Administrative Hearings established under ORS

> 183.605. The hearing shall be private unless the person against whom the charge is made requests a public hearing.

The Public Records Law, specifically ORS 192.502(9), provides that the following records are exempt from disclosure:

> Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law.

According to AAG McKeever, Mr. McBee did not request a public hearing. Therefore, TSPC may withhold the requested recording from disclosure if the quoted language from ORS 342.177(1) constitutes a law prohibiting, restricting or otherwise making the recorded contents of the hearing confidential or privileged under Oregon law. To know whether ORS 342.177(1) constitutes such a law, we consider the legislature's intent in providing for a private hearing. *See PGE v. Bureau of Labor and Industries* (*PGE*), 317 Or 606, 610-612, 859 P2d 1143 (1993) (interpreting statute requires examination of its text and context, and if necessary legislative history, to determine legislative intent).

Substantially the same "private" hearing language has been in continuous use in the laws describing teacher certification, and later licensure, hearings since 1961. Or Laws 1961, ch 677, § 1. Because no definition of "private" was enacted by the legislature, it is appropriate to consider the plain, natural and ordinary meaning of "private" in use at the time the language was initially enacted in statute. *PGE*, 317 Or at 611. The most apt meanings of "private" in view of the context provided by the statute are:

> Sequestered from company or observation; not open to the public; secret; secluded; solitary; - said of a place, thing or person; as, a *private* room; *private* prayer; I wish to be *private*.
>
> Not publicly known; not open; secret; as, a *private* negotiation, conversation, understanding. *cf.* CONFIDENTIAL.

WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (unabridged 1961) at 1969. For the antonym of "private," WEBSTER'S lists "public, common." *Id.* The first definition, in referring to a place, appears to contemplate restricted attendance at an event, such as a hearing. However, its reference to a private "thing" also connotes the contents of something being kept "secret," *e.g.*, "private prayer." The second definition plainly contemplates more than just a limitation on who may attend a conversation, negotiation, etc. It clearly implies that what occurs in "private" will not be publicly revealed but instead will be kept "confidential."

We consider this meaning of "private" specifically within the context of the remainder ORS 342.177 and related statutes to determine whether the legislature intended for the record of a "private" hearing to be withheld from the public. When the legislature initially provided for a private hearing in 1961, the Superintendent of Public Instruction was the public official most directly involved in the suspension and revocation of certificates issued to teachers and school administrators. The Superintendent was required to make a "preliminary investigation" in relation to possible suspension or revocation; if he or she found probable grounds for suspension

or revocation, a hearing would be held.[1] Or Laws 1961, ch 677, § 1. Prior to the hearing, the Superintendent could, or if the affected teacher or administrator requested it was required to, cause a further investigation to be completed by "a committee of professional educators." *Id.* The committee was required to report its findings and recommendations in writing to both the Superintendent and the affected teacher or administrator. *Id.*

The public records laws in effect in 1961 provided that "[e]very citizen of this state has a right to inspect any public writing of this state, except as otherwise expressly provided by statute." ORS 192.010. The term "public writing" was defined to mean: "a written act or record of an act of a sovereign authority, official body, tribunal or public officer of this state, whether legislative, judicial or executive." Or Laws 1961, ch 160, §2. Thus, it appears that, in the absence of a statute to the contrary, the report of the professional educators' committee, as well as the written notices sent to the teacher or administrator by the Superintendent concerning pending charges, the hearing, and the decision as to suspension or revocation, generally would have been open to inspection by citizens of Oregon.[2]

This is the context in which the "private" hearing provision was originally enacted. While disclosure of a report by the investigative committee would probably reduce the value to the affected teacher or administrator of keeping a hearing's transcript confidential, it is possible that witnesses and attorneys may have revealed things at the hearing that were not discussed in those other records.[3] Moreover, it was not certain that the committee would investigate and issue a report in relation to every hearing that was held. If the committee did not investigate, the public records created outside of the context of the hearing might be limited to those the Superintendent sent to the affected teacher or administrator, namely a statement of the charges, notice of the hearing, and notice of the Superintendent's decision. Or Laws 1961, ch 677, § 1.

Because analysis of text and context does not provide an unambiguous answer to the intended meaning of "private" hearing in ORS 342.177(1), we also reviewed the legislative history of the statute's enactment. However, the House and Senate hearing records regarding HB 1632, which became Oregon Laws 1961, chapter 677 and contained the relevant language, do not shed light on the question whether the legislature intended for the "private" hearing provision to require only exclusion of the public from attendance or to require continuing privacy as to the contents of the hearing.

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[1] In 1961, the Superintendent of Public Instruction made the initial post-hearing decision as to suspension or revocation, with the affected teacher or administrator having the right to appeal to the State Board of Education and, then to the state circuit court. Or Laws 1961, ch 677, §2.

[2] A 1959 Attorney General Opinion addressing disseminating information about the revocation of teachers' certificates to school authorities in other jurisdictions states: "At the outset it would appear that the records of teachers' certificates issued by the Superintendent of Public Instruction, and the revocation or suspension thereof, are 'public records' which are open for public inspection." 29 Op Atty Gen 149 (1959).

[3] Today, unlike in 1961, ORS 342.176(4) provides for disclosure of the executive director's report and the "documents and materials used in the investigation" if the TSPC "makes a final determination that the person charged has violated ORS 342.143 or 342.175." In other words, no investigatory records may be disclosed until after there has been a hearing and a final determination, and, if the TSPC does not make a determination that a statutory violation has occurred, the report, documents and materials "are confidential and not subject to public inspection." *Id.*

The plain, natural and ordinary meaning of "private" relevant to interpreting ORS 342.177(1) appears to encompass greater privacy than that temporarily provided by blocking public attendance at a hearing. It appears to contemplate that the substance of what occurs during a "private" event will not be publicly revealed. The context of the private hearing provision, at the time it was adopted in 1961, largely supports, and in any event does not contradict, this interpretation. The legislative history is unhelpful to the analysis.

Taking into consideration all of the above, we conclude that the requirement of a "private" hearing in ORS 342.177(1) makes the recording of the contents of the hearing confidential. Therefore, the record you requested is exempt from disclosure under ORS 192.502(9), and TSPC was within its authority in denying your request. On this basis, we deny your petition.

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

AGS16475
c: Victoria Chamberlain, Executive Director,
Teachers Standards and Practices Commission