ELLEN F. ROSENBLUM
ATTORNEY GENERAL

FREDERICK M. BOSS
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

Justice Building
1162 Court Street NE
Salem, Oregon 97301-4096
Telephone: (503) 378-6002

July 19, 2017

VIA EMAIL ONLY: BBarnes@oregonian.com and Trent.Danowski@oregon.gov

Bethany Barnes
Reporter
The Oregonian/OregonLive

Trent Danowski
Deputy Director
Oregon Teacher Standards & Practices Commission
250 Division Street NE
Salem, OR 97301

Re: Petition for Public Records Disclosure Order
Oregon Teacher Standards & Practices Commission
DOJ File No. 584001-GA0112-17

Dear Ms. Barnes and Mr. Danowski:

This letter is the Attorney General's order responding to Ms. Barnes's July 6, 2017, petition for disclosure under the Oregon Public Records Law, ORS 192.410 to 192.505.[1] The petition asks the Attorney General to order the Teacher Standards & Practices Commission (TSPC) to produce unredacted versions of records related to a TSPC investigation of Mitchell Whitehurst.

As discussed further below, we grant the petition. Although TSPC's investigations of teachers typically remain exempt from disclosure under ORS 342.176(4)(a) if no discipline is imposed, when such investigatory information is subsequently included in the reports of investigations that do result in discipline, the information is no longer exempt under that statute.

Public Records Law confers a right to inspect any public record of a public body in Oregon, subject to certain exemptions contained in ORS 192.501 to 192.505. ORS 192.420(1).

[1] We thank Ms. Barnes for agreeing to an extension on the deadline to issue an order.

In addition to the express exemptions contained in those sections, any other information that is confidential, privileged, or prohibited from being disclosed under other Oregon laws is also exempt from disclosure. ORS 192.502(9)(a). 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(1). The agency carries the burden to sustain any such denial. *Id.*

TSPC is responsible for licensing and disciplining teachers and administrators. ORS 342.121, 342.175. When TSPC investigates a complaint about a teacher, "the documents and the materials used in the investigation . . . and the report . . . are confidential and not subject to public inspection" unless, as relevant here, TSPC decides to revoke the license of the teacher under investigation. ORS 342.176(4)(a), (4)(a)(B).

In this case, Ms. Barnes seeks TSPC's investigatory reports on Mitchell Whitehurst, whose license was permanently revoked. While TSPC disclosed these reports to Ms. Barnes, it redacted portions that revealed information from previous investigations of Mr. Whitehurst that did not result in any discipline.[2] Because investigations that do not result in discipline are generally confidential and exempt from disclosure, TSPC contends that this information remains exempt from disclosure despite being included in the reports of investigations that *did* result in discipline. TSPC notes that the information from the prior investigations was included in the reports at issue only as background, and was not relied upon in the decision to revoke Mr. Whitehurst's license.

Public records exemptions are to be narrowly construed. *Guard Publ'g Co. v. Lane County Sch. Dist. No. 4J*, 310 Or 32, 37 (1990). This rule of narrow construction "means that, if there is a plausible construction of a statute favoring disclosure of public records that is the construction that prevails." *Colby v. Gunson*, 224 Or App 666, 676 (2008).

Here, this rule of narrow construction leads us to conclude that information from prior investigations that do not result in discipline is no longer exempt under ORS 342.176(4)(a) when included in the reports of investigations that do result in discipline.[3] In a previous order, we concluded that information from a TSPC report was not exempt under this statute despite not being factually related to the resulting discipline. *See* Public Records Order, Apr 5, 2002, Meadowbrook. We explained that TSPC obtained the information at issue during the investigation that resulted in discipline, and "apparently considered [the information] of sufficient importance to include [it] in the report." *Id.* at 3.

While our previous order dealt with information gathered during the investigation that resulted in discipline, not during prior investigations, we think the same general reasoning applies here. TSPC's decision to include the information from previous investigations in the recent reports suggests that the information is of some relevance to the investigations that resulted in discipline. And as Ms. Barnes

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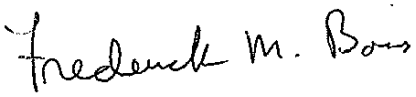
[2] We understand Ms. Barnes to be contesting only the redactions made to information from these previous investigations. Based on our review of the records at issue, the relevant redactions are to two paragraphs on page 2 of the report from case #2015-08-0008; the sentence on page 4 beginning "Whitehurst was reprimanded"; the sentence on page 4 beginning "Sloane continues"; and to two paragraphs on page 2 of the report from case #2014-11-0025.

[3] In addition, the redacted information from two sentences on page 4 of the report from 2015 comes not from TSPC's files on the earlier investigation, or from any records used in an earlier investigation, but from a memo written by a school administrator that was subpoenaed in the recent investigations at issue here. Therefore, this information is not exempt under ORS 342.176(4)(a).

points out, one of the reports refers several times to Mr. Whitehurt's past history of alleged misconduct. Although we accept TSPC's explanation that it did not in fact make use of the information, the statutory scheme does not distinguish between the types of information contained in a report that results in discipline. It simply provides that investigatory reports that result in discipline are no longer exempt under ORS 342.176(4)(a). We conclude that information in a report for a matter resulting in discipline cannot be withheld based on an exemption for information used in matters where discipline is not imposed.

Because the information at issue is not exempt from disclosure under ORS 342.176(4)(a), we grant Ms. Barnes's petition. TSPC must produce an unredacted version of the material at issue within seven days or issue a notice to the Attorney General and by certified mail to Ms. Barnes of its intent to institute proceedings for injunctive or declaratory relief. ORS 192.450(2).

Sincerely,



Frederick M. Boss
Deputy Attorney General

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