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) 378-4400

May 16, 2018

VIA EMAIL ONLY: shasta@PortlandTribune.com and Trent.Danowski@state.or.us

Shasta Kearns Moore (*Portland Tribune*)
6605 SE Lake Road
Portland, OR 97222

Trent Danowski
Teacher Standards and Practices Commission
250 Division Street NE
Salem, OR 97301

Re: Petition for Public Records Disclosure Order
Teacher Standards and Practices Commission
DOJ File No. 584001-GA0032-18

Dear Ms. Kearns Moore:

This letter is the Attorney General's order responding to Ms. Kearns Moore's petition for disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478.[1] The petition, which we received May 7, 2018, asks the Attorney General to order the Oregon Teacher Standards and Practices Commission (TSPC) to produce certain information redacted from the report of its investigation into complaints against elementary teacher Sam Leach.

Specifically, Ms. Kearns Moore requested TSPC disclose the investigatory file for Mr. Leach used to support the four-month suspension of his Oregon educator license. TSPC disclosed the report, indicating that it had redacted protected health information, certain personal information, and internal advisory communications. Ms. Kearns Moore's petition asks the Attorney General to order the disclosure of the report without redactions of protected health information or internal advisory communications. For the reasons discussed below, we grant the petition and order TSPC to disclose the information previously redacted as protected health information and as internal advisory communications.

[1] Thank you for granting an extension on the deadline to issue this order.

The Public Records Law confers the right to inspect public records in Oregon, unless such records are exempt under ORS 192.338, 192.345, or 192.355. ORS 192.314(1). The law is a disclosure law, and exemptions from disclosure must be express. Even express exemptions are to be narrowly construed, meaning 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). 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 192.411(1). The agency carries the burden to sustain any such denial. *Id.*

TSPC offered several statutory bases for redacting what it considers to be Mr. Leach's protected health information (PHI):

1. The Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule, found at 45 CFR Parts 160 and 164, which restricts the disclosure of PHI;

2. ORS 192.553 to 192.581, which prescribes rules for handling PHI in Oregon (the "Oregon PHI Rules"); and

3. ORS 192.398, which conditionally exempts from disclosure records less than 75 years old that contain information about the "physical or mental health or psychiatric care or treatment of a living person" if public disclosure would constitute an unreasonable invasion of privacy.[2]

We conclude that the HIPAA Privacy Rule does not apply in this case. That rule only applies to the disclosure of PHI possessed by a "covered entity," which is narrowly defined as a health plan, a health clearinghouse, and certain health care providers. 45 CFR 160.103. TSPC is not a covered entity, thus the HIPAA Privacy Rule does not apply to TSPC. Like HIPAA, the Oregon PHI Rules only apply to the disclosure of PHI by covered entities. A covered entity means a state health plan, a health insurer, certain health care providers, and a health care clearinghouse. ORS 192.566(2). Because TSPC is not a covered entity, the Oregon PHI Rules do not apply to TSPC.

Next we consider TSPC's conclusion that the report contains personal health information, the disclosure of which would be an unreasonable invasion of Mr. Leach's privacy. TSPC must make a threshold determination that disclosure would be an unreasonable invasion of privacy, then the burden of proof shifts to Ms. Kearns Moore to overcome that showing. *Jordan v. Motor Vehicles Division*, 308 Or 433, 443 (1989). If disclosure will constitute an unreasonable

---

[2] We believe ORS 192.355(2) – and not ORS 192.398(1) – is the appropriate basis for exempting personal health information the disclosure of which would be an unreasonable invasion of privacy. We regard ORS 192.398(1) as merely providing an exception to the general rule that otherwise exempt information is available for inspection once it is more than 25 years old. *See* ORS 192.390. The effect of ORS 192.398(1) is that health information relating to a living person and exempt under ORS 192.355(2) is not available for inspection for 75 years. Thus, we evaluate TSPC's determination in this case under ORS 192.355(2), which, as a practical matter, requires the same analysis as that required under ORS 192.398(1).

invasion of privacy, Ms. Kearns Moore must then show by clear and convincing evidence that the public interest requires disclosure in this particular instance. ORS 192.355(2).

After reviewing the report, we conclude the redacted information qualifies as personal health information. Thus, it is conditionally exempt if its disclosure would constitute an unreasonable invasion of privacy. In making that determination, the Oregon Supreme Court has explained that an invasion of privacy is "unreasonable" if "an ordinary reasonable person would deem [it] highly offensive." *Jordan*, 308 Or at 442-43. Normally, public disclosure of health or medical information would constitute an unreasonable invasion of privacy. *See* ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 78 (2014) (MANUAL). For that reason we conclude TSPC has satisfied the requirement to make a threshold determination. However, because we must conduct a particularized inquiry and construe the exemption narrowly, we must determine whether an ordinary reasonable person would find disclosure of the health information in this case highly offensive.

We conclude that disclosure of Mr. Leach's health information would not constitute an unreasonable invasion of privacy in this case for the following reasons. First, the information at issue is very limited and does not reveal any medical or mental health diagnoses, intimate or embarrassing medical details, prescription medications, or treatment plans.[3] Second, the report indicates Mr. Leach offered this information to demonstrate his continued suitability to be licensed as a public educator. In that regard, the information he provided is much like the limited personal health information publicly reported by the Oregon State Bar in in attorney discipline cases.

Finally, the report indicates Mr. Leach provided this personal health information voluntarily. Although TSPC's investigation reports are initially confidential, they are subject to public disclosure when TSPC makes a final determination to suspend or revoke a license. ORS 342.176(4)(a)(B). We presume that in disclosing this information, Mr. Leach and his attorney, who was present during the interview, were aware that the report might be disclosed to the public. Yet there is no indication he provided the information in confidence or that TSPC obliged itself to protect it. *See* ORS 192.355(4). We recognize that public employees do not necessarily waive their privacy interests when disclosing private information during confidential investigation. However, we believe they have a reduced expectation of privacy when they volunteer such information and the circumstances indicate the matter may become public in the future. For the foregoing reasons, we conclude that disclosing the limited health information contained in TSPC's report would not be an unreasonable invasion of Mr. Leach's privacy.

Even if the disclosure of this information would constitute an unreasonable invasion of privacy, we conclude the public interest requires disclosure in this case. Mr. Leach has publicly acknowledged emotionally neglecting and using unreasonable physical force against kindergarten and third grade students. During the investigation, Mr. Leach provided personal

---

[3] In this regard, we note that the health information in the report is not the sort of information that would qualify as privileged patient information because it was not communicated for the purpose of medical diagnosis or treatment. *See, e.g.*, ORS 40.230 (psychotherapist-patient privilege); ORS 40.240 (physician-patient privilege); and ORS 40.240 (nurse-patient privilege).

health information to demonstrate why he should retain his license. TSPC referenced this health information in its report and it may have influenced TSPC's final determination in Mr. Leach's case. As Ms. Kearns Moore explains, because TSPC's work in this case implicates student safety, the public has a strong interest in knowing whether the redacted health information would reveal cause for continued concern. Balancing this strong public interest against Mr. Leach's reduced privacy interests in this case, we conclude the public interest requires disclosure. Accordingly, we grant this aspect of the petition and order TSPC to disclose the redacted health information.

We now turn to TSPC's determination that some information in the report is exempt as internal advisory communications. *See* ORS 192.335(1). Advisory communications within a public body are exempt to the extent that they cover other than purely factual materials and are preliminary to any final agency determination of policy or action. The exemption shall not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication within public bodies clearly outweighs the public interest in disclosure. *Id.* Thus, for the exemption to apply, there must be a strong showing that frank communications will be chilled by disclosure in the particular case. MANUAL 70.

The information at issue consists of the Executive Director's recommendation at the end of the report. TSPC explains that such recommendations should remain confidential in all cases to enable the agency to function more efficiently. Specifically, TSPC is concerned that disclosing recommendations may lead to additional requests to explain any differences between recommendations and final determinations. TSPC is also concerned that licensees under investigation will use recommendations from prior cases against TSPC in future litigation.

We conclude that TSPC's concerns do not provide an appropriate basis for withholding the recommendation as an internal advisory communication in this case. First, a blanket policy of withholding such recommendations does not comply with the Public Records Law. *See* MANUAL 77 (citing *Guard Publishing Co. v. Lane County School Dist.,* 310 Or 32, 39-40 (1990)). Rather, TSPC must determine whether the internal advisory exemption applies to the Executive Director's recommendations on a case-by-case basis and it must segregate and disclose purely factual materials. ORS 192.355(1).

We have reviewed the redacted recommendation and conclude the first paragraph is not exempt because it contains purely factual information and is not advisory in nature. We conclude the remaining paragraphs do qualify as internal advisory communications because they express frank, nonfactual and advisory information preliminary to a final agency action. That said, TSPC has not made the required showing that disclosure in this case will chill candor within TSPC. And we do not believe disclosure in this case will have a chilling effect because the recommendation is largely clinical and detached and it does not contain any controversial opinions or conclusions. *See City of Portland v. Oregonian Publishing Co.,* 200 Or App 120, 127 (because supervisory assessments of employees should be clinical and detached, the court rejected arguments that disclosure would quell candor). Therefore, because we conclude the internal advisory communication exemption does not apply in this particular case, we order TSPC to disclose the Executive Director's recommendation.

We conclude that, under the particular circumstances of this case, disclosure of the limited health information in TSPC's report would not be an unreasonable invasion of Mr. Leach's privacy. To the extent disclosure would infringe upon Mr. Leach's privacy interests, we nonetheless conclude the strong public interest in student safety requires disclosure. We also conclude the internal advisory communication exemption does not apply to the Executive Director's recommendation in this case because disclosure is not likely to chill candor within TSPC. Consequently, we grant the petition and order TSPC to disclose the information previously redacted as protected health information and as internal advisory communications. TSPC must produce these records within seven days or issue a notice to the Attorney General and by certified mail to Ms. Kearns Moore of its intent to institute proceedings for injunctive or declaratory relief. ORS 192.411(2).

Sincerely,

Frederick M. Boss
Deputy Attorney General

FMB:pjn/DM8940384