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July 24, 2003

Dee Lane
Portland Editor
The Oregonian
1320 SW Broadway
Portland, OR 97201-3499

Jan V. V. Betz
Deputy City Attorney
Office of City Attorney
City Hall, Suite 430
1221 SW 4th Avenue
Portland, OR 97204

Re: Petition of Dee Lane for The Oregonian received July 14, 2003, to disclose certain records of the City of Portland

Dear Ms. Lane and Ms. Betz:

BACKGROUND

On this public records petition, ORS 192.410 et. seq., petitioner Dee Lane for The Oregonian requests the District Attorney to order the City's Bureau of Environmental Services (BES) and its employees to produce copies of the following records:

> **A letter from the U.S. Department of Justice to the City of Portland regarding the city's combined sewer overflow project, other efforts to control overflows, and other sewer-related issues.**

Oregonian reporter Henry Stern made a request for "communications from the federal Environmental Protection Agency and/or the Department of Justice that pertain to the city's efforts on combined sewer overflows" on July 10, 2003. Deputy City Attorney Jan Betz declined to provide the document, citing three exemptions: ORS 192.501(1), records pertaining to litigation, ORS 192.502(4), information submitted in confidence, and ORS 192.502(9), other Oregon statutes establishing specific exemptions. Ms. Betz cited no particular Oregon statute in her response to The Oregonian.

Dee Lane, Portland Editor for The Oregonian, rejected each claimed exemption in her petition to this office. Ms. Lane contended that the litigation exemption does not apply because the communication is between two government bodies, and no private party is involved. She also noted that the communication itself was from one of the parties to any prospective lawsuit. Ms. Lane objected to application of the confidential submissions exemption, as it "appears intended for whistle-blowers, not government correspondence." She then pointed out that the public interest would not be harmed by disclosure. "Portland ratepayers, subject to the nation's highest sewer rates for large cities, should know what the federal government has to say about city programs they are financing."

The City, through Ms. Betz, responded to the petition on July 17, and supplied this office with a confidential copy of the record in question, described as a "confidential settlement communication." The City continued to claim the document was exempt as a record pertaining to litigation. "Settlement discussions can be a precursor to litigation or may result in a compromise that precludes litigation." The City also maintained the document was exempt as information submitted in confidence, and asserted that the five requirements for the exemption had been met. Finally, Ms. Betz cited Oregon Evidence Code 408, Compromise and Offers to Compromise, as a prohibition or restriction under Oregon law.

DISCUSSION

I. Litigation Records

ORS 192.501)(1) exempts:

> Records of a public body pertaining to litigation to which the public body is a party if the complaint has been filed, or if the complaint has not been filed, if the public body shows that such litigation is reasonably likely to occur. This exemption does not apply to litigation which has been concluded, and nothing in this subsection shall limit any right or opportunity granted by discovery or deposition statutes to a party to litigation or potential litigation[.]

According to the Attorney General's Public Records Manual, 2001, p. 27, the purpose of this exemption is to "place governmental bodies on an even footing with private parties before and during *court* litigation." The exemption has been construed very narrowly and applies only to

records developed or compiled by the public body for use in the litigation and not records collected in the ordinary course of business. Lane County School Dist. v. Parks, 55 Or App 416, 419-20 (1981).

The document at issue, according to the City, is correspondence "regarding a potential consent decree that would be filed in federal court concurrent with a complaint naming the City of Portland as a party." By its very nature, however, the Department of Justice letter is not admissible in future litigation, as an offer of compromise under Rule 408. Furthermore, the letter was generated by the prospective party opponent and was not "compiled or acquired by the public body for use in" litigation. The exemption simply does not apply.

II. Compromise and Offers to Compromise

ORS 40.190 (Rule 408) provides in part:

> (1)(a) Evidence of furnishing or offering or promising to furnish, or accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.

Rule 408 is a rule of admissibility and indicates the circumstances under which evidence of compromise and offers to compromise may be admitted. See ORS 40.190(2). Exclusion may be based on either relevancy or policy considerations. As stated in Kirkpatrick Oregon Evidence Third Edition, 1996, p. 182:

> The evidence can be considered irrelevant on the ground that an offer of compromise may stem as much from a desire for peace as from a sense of weakness....A more consistent and weightier ground for exclusion is the promotion of the public policy favoring compromise and settlement of disputes.

The City seeks to bring Rule 408 under the umbrella of ORS 192.502(9), which exempts "Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law." There are two problems with this position. First, the wholesale insertion of such evidentiary rules into public records law would broaden the number and scope of exemptions beyond reasonable limits. Second, a rule of trial admissibility is not a rule of disclosure. Again, the exemption does not apply.

III. Confidential Submissions

ORS 192.502(4) exempts:

> Information submitted to a public body in confidence and not otherwise required by law to be submitted, where such information should reasonably be considered confidential, the public body has obliged itself in good faith not to disclose the information, and when the public interest would suffer by the disclosure.

According to the Attorney General's Public Records Manual, 2001, p. 64, the purpose of this exemption is to "encourage voluntary submission of relevant information to public bodies, with some reasonable assurance that the information will be kept confidential." The exemption requires that each of five tests must be satisfied in order for the exemption to apply:

- The informant must have submitted the information on the condition that the information would be kept confidential.
- The informant must not have been required by law to provide the information.
- The information itself must be of a nature that reasonably should be kept confidential.
- The public body must show that it has obliged itself in good faith not to disclose the information.
- Disclosure of the information must cause harm to the public interest.

With respect to the first requirement, the four-page document itself states at the top: **"CONFIDENTIAL SETTLEMENT COMUNICATION CONTENTS NOT ADMISSIBLE PURSUANT TO FRE 408."** Tom Swegle, Senior lawyer for the U.S. Department of Justice, stated in a July 22 letter to this office: "In our view, settlement communications should remain confidential in order to allow for the free and frank exchange of positions and information." Although the public records exemption envisions a "request" for confidentiality rather than a demand for secrecy, we will accept that Mr. Swegle sent his July 7 settlement correspondence with an expectation "that the information would be kept confidential."

The second and third requirements are clearly satisfied. There is no indication the DOJ was "required by law" to provide the information and both the DOJ and the City have strongly argued that disclosure and dissemination of the settlement letter would inhibit efforts at dispute resolution.

The fourth criterion has proved to be quite troublesome. The City maintains, "the parties to settlement discussions implicitly agree to maintain confidentiality to promote an open

discussion of the issues." The City provided us with a July 8 "confidential" email distributed by Dean Mariott, Director of Portland's BES, explaining the need for confidentiality in the review and discussion of the just received DOJ letter. The question, however, is whether the City or its employees "obliged itself in good faith not to disclose the information" before the settlement offer was sent.

In Jensen v. Schiffman, 24 Or App 11, 18 (1976), the county district attorney directed the sheriff's department to investigate the police department for allegations of misconduct. After the investigation, the sheriff's department submitted a written report to the district attorney. The trial court held the report was exempt as a confidential submission under then ORS 192.500(2)(c). The Court of Appeals reversed and noted:

> Defendant presented no evidence on this claim. Hs sole ORS 192.500(2)(c)-argument is: "Those portions of the report***submitted in confidence***speak for themselves." We have examined the report. There is no clear indication that it contains information submitted in confidence, or that there was a promise not to disclose. At a minimum, it seems the defendant should have called the authors of the report as witnesses to establish such things as a promise of confidentiality. *See, Turner v. Reed,* supra 538 P2d at 377.

In Lane County School Dist. v. Parks, 55 Or App at 420-21, the court considered the failure to disclose the substitute teacher roster and other records relating to underlying litigation between the parties. In rejecting the confidential submission exemption, the Court of Appeals concluded:

> We agree with the trial court's finding that the records sought did not contain information which plaintiff obliged itself not to disclose. Again, construing the exemption narrowly, we conclude that plaintiff has failed to sustain its burden of proof and that the trial court's conclusion that the records are not exempt from disclosure under ORS 192.500(2)(c) is therefore correct.

Two attached decisions of the Attorney General's Office provide insight into the proper application of the exemption. In a July 1, 1991 order, Chief Counsel Donald D. Arnold reviewed the request to the Governor's Office and the Department of Insurance and Finance by The People's Legislature PAC for "the minutes of the meetings of the Management/Labor Advisory Committee, better known as the Mahonia Hall group." Mr. Arnold noted that the "individuals

participated only on the basis of specific assurances from the government that the contents of their discussions would be kept confidential." In upholding the claimed exemption, the Chief Counsel concluded, the "promises of confidentiality appear to have been made in good faith, in part to allow the compromise process to work in an atmosphere free from the pressures and inhibitions that public disclosure would entail."

In an April 5, 2002 order, Deputy Attorney General Peter D. Shepherd reviewed the refusal of the Teacher Standards and Practices Commission (TSPC) to disclose an October 21, 2001 written offer of settlement by the attorney for suspended teacher Peggy Freed-Elefant. The document was captioned "For Settlement Purposes only - Confidential." In rejecting the exemption, Mr. Shepherd noted:

> 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. (Emphasis added).

Petitioner provided this office with a September 24, 2002 three-page letter to BES Director Marriott from Michael A. Bussell, Acting Director, Office of Water, U.S. Environmental Protection Agency. The correspondence includes a thirteen-page technical memorandum detailing the alleged violations including combined sewer overflows, sanitary sewer overflows, dry weather overflows, underground injection wells, violations of the Clean Water Act and the need for a judicially enforceable consent decree. This EPA document, previously disclosed to petitioner by Director Marriott, does not differ remarkably from the subsequent correspondence from the DOJ. Consequently, we cannot give much weight to the City's contention that the parties "implicitly" agreed to the confidentiality of the settlement offer.

We conclude that the City has not met its burden to establish that the Department of Justice ever asked Director Marriott or the City's BSE employees to engage in confidential negotiations or that Director Marriott or his employees in any way obligated the City not to disclose the settlement offer to the public. Whether or not disclosure in this instance would cause harm to the public interest need not be decided, since the other requirements of ORS 192.502(4) have not been met.

ORDER

Accordingly, it is ordered that the City of Portland promptly disclose the records sought in the above petition. Disclosure of the documents ordered is subject to payment of the City of Portland's fee, if any, not exceeding the actual cost in making the information available, consistent with ORS 192.440 and this order.

Very truly yours,

MICHAEL D. SCHRUNK
District Attorney
Multnomah County, Oregon

NOTICE TO PUBLIC AGENCY

Pursuant to ORS 192.450(2), 192.460 and 192.490(3) your agency may become liable to pay petitioner's attorney fees in any court action arising from this public records petition (regardless whether petitioner prevails on the merits of disclosure in court) if you do not comply with this order and also fail to issue within 7 days formal notice of your intent to initiate court action to contest this order, or fail to file such a court action within 7 additional days thereafter.

July 1, 1991

Kristine M. Juul, Administrator
Workers' Compensation Management/Labor
Advisory Committee
Labor & Industries Building
Salem, OR 97310

Joel A. Mason, President/Director
The Peoples Legislature PAC
1156 Patterson, #6
Eugene, OR 97401

Re: Petition for Public Records Disclosure Order;
Department of Insurance and Finance Records

Dear Ms. Juul and Mr. Mason:

This letter is the Attorney General's order on Mr. Mason's petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. The petition, which we received on June 17, 1991,[1] asks the Attorney General to direct the Governor's office and the Department of Insurance and Finance to make available for inspection and copying "the minutes of the meetings of the Management/Labor Advisory Committee, better know as the Mahonia Hall group, January through April of 1990" and all supporting documents "which should be listed as exhibits."[2] For the reasons that follow we grant the petition in part and deny it in part.

The Public Records Law confers the right to inspect public records of a public body in Oregon, subject to certain exceptions. ORS 192.420. If a public record contains both exempt and nonexempt material, the public body must separate the material and make the nonexempt material available for examination if it is "reasonably possible" to do so while preserving the confidentiality of the exempt material. ORS 192.505; Turner v. Reed, 22 Or App 177, 186 n 8, 538 P2d 373 (1975).

We understand that the Governor's office has no documents that satisfy Mr. Mason's petition. Accordingly, we deny the petition as it relates to the Governor's office.

The Department of Insurance and Finance, however, does have records falling within the scope of the petition. The great majority of these records are reports generated by the Department of Insurance and Finance, legislative records, statistical surveys and studies. These documents are nonexempt public records, and must be made available for inspection and copying.

For the reasons that follow, however, we conclude that some parts of the informal minutes of the meetings of the Mahonia Hall group, and certain other documents reflecting the thought processes or positions taken by specific members on various issues, are exempt from disclosure pursuant to ORS 192.502(3). This statute exempts from disclosure:

> Information submitted to a public body in confidence and not other wise required by law to be submitted, where such information should reasonably be considered confidential, the public body has obliged itself in good faith not to disclose the information, and when the public interest would suffer by the disclosure.

The purpose of the exemption "is to encourage citizens to provide relevant information voluntarily to governmental agencies, with some reasonable assurance that the information will be kept confidential." Attorney General's Public Records and Meetings Manual 32 (1989) (Manual).

We believe that the elements of ORS 192.502(3) are satisfied here. The Mahonia Hall group comprised several private individuals representing labor and management, together with some government officials, who met to review Oregon's Workers' Compensation Law and to propose reform legislation. Private Mahonia Hall group members joined the group voluntarily. We have been informed that those individuals participated only on the basis of specific assurances from the government that the contents of their discussions would be kept confidential. It is apparent that such confidentiality was crucial in gathering people of disparate views together to develop a series of compromise reform proposals for legislative consideration. The promises of confidentiality appear to have been made in good faith, in part to allow the compromise process to work in an atmosphere free from the pressures and inhibitions that public disclosure would entail.

We also believe that portions of the minutes and supporting materials reasonably should be considered confidential. They reveal the give and take of sensitive negotiations which, if publicly revealed, could subject the participants to criticism for having sacrificed the interests of their supporters in the course of reaching a compromise.

Finally, we believe that the public interest would suffer by disclosure. The Mahonia Hall effort resulted in proposals for reform legislation in an area of the law beset with divisive issues long resistant to compromise among competing groups. Disclosure now, despite previous reliance on promises of confidentiality, would undermine future similar efforts and potentially could undermine the progress achieved to date. These potential injuries to the public interest outweigh any value in public disclosure of the limited number of documents we conclude are exempt. This is particularly true because most of the working documents used by the private parties are subject to disclosure, and the ultimate findings of the Mahonia Hall group have been made available to the public.

For these reasons, we conclude that the department may withhold from inspection portions of the minutes and related documents showing individual members' specific positions taken on the issues addressed by the group. An Assistant Attorney General will be available to work with the department in identifying and segregating the exempt material.

We direct the Department of Insurance and Finance to disclose the records identified above as subject to disclosure. The department has seven days from the date of this order in which to comply. ORS 192.450(2). The department may charge Mr. Mason for its reasonable actual expenses incurred in satisfying his request, including its photocopy costs and the time spent by agency personnel in reviewing the records. ORS 192.440(3); Manual at 6.

Sincerely,

Donald D. Arnold
Chief Counsel
General Counsel Division

DCA:DKC:RDW:ros/JGG00c1F

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[1] We appreciate Mr. Mason's courtesy in allowing us to exceed the seven-day deadline for issuing this order.

[2] The Department of Insurance and Finance maintains a file in support of the Workers' Compensation Management/Labor Advisory Committee (committee) created pursuant to Oregon Laws 1990, chapter 2, section 41. That law, now codified at ORS 656.790, took effect on May 8, 1990. Since that time, the committee has conducted its business as a public body, and the records of its operation generally are available for public inspection. Those records are not at issue here.

April 5, 2002

Paul B. Meadowbrook
285 Liberty Street, NE
Suite 360
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.