

May 26, 1998

Kathleen Haley, J.D.
Executive Director
Board of Medical Examiners
620 Crown Plaza
1500 S.W. First Avenue
Portland, OR 97201-5826

Re: Opinion Request OP-1998-2

Dear Ms. Haley:

You have asked us to review Oregon Laws 1997, chapter 131 (Senate Bill 99),⁽¹⁾ which amends ORS 742.400, and to advise you on its implementation. We pose and answer the following questions.

1. What are the roles of the Board of Medical Examiners (BME) and the Insurance Division (division) under the amended law? How does this differ from the agencies' roles under the previous law?

Under ORS 742.400, the BME receives reports from medical malpractice insurers in cases where a claim has been made against the insurer. The BME must provide copies of the reports to the licensed health care facility that employs or grants staff privileges to the person against whom the claim was filed. *Id.* The Director of the Department of Consumer and Business Services (DCBS) has authority to specify information that must be included in the report and, through the division, has developed a form of report for insurers to complete. If an insurer fails to complete the report or otherwise comply with the law, the division may sanction the insurer. ORS 731.988(3). In all these respects, the newly amended law remains the same as before the 1997 amendments.

The amendments provide that the BME need no longer provide copies of the reports to the director and the director need no longer maintain a permanent record of the reports nor provide an index of the reports. The BME should retain the reports in accordance with its public records retention schedule.

2. What medical malpractice report information must the BME keep confidential, and what information may it disclose?

Until the claim is "settled or closed," the BME must maintain the confidentiality of the reports. ORS 742.400(3). Once a claim is settled or closed, the BME should respond to a request to inspect a report in accordance with the Oregon Public Records Law and any applicable exemptions from disclosure.

Discussion

1. History of Legislation and Roles of Respective Agencies

Since 1975, Oregon law has required insurers to report claims of alleged professional negligence of physicians and podiatric physicians and surgeons to the BME. *See* Or Laws 1975, ch 796, § 10; ORS 677.435 (1977 Replacement Part),⁽²⁾ ORS 743.780 (1977 Replacement Part),⁽³⁾ ORS 742.400 (1995 Replacement Part). Since 1987, public bodies receiving a tort claim notice against physicians or podiatrists are also required to report such claims to the BME. ORS 30.278.⁽⁴⁾ As regards the BME, the purpose of this reporting requirement is to assist the BME in learning of instances of substandard care so that the BME can decide whether official action is warranted. *Patrick v. Burget*, 486 US 94, 103, n 7,

Upon receipt of the reports, the BME was historically required to provide copies to the Insurance Commissioner, who maintained a permanent record and index of the reports, and since 1987 to the licensed health care facility that employs or grants staff privileges to the person against whom the claim was filed. ORS 677.435(2), (3) (1977 Replacement Part), ORS 742.400(5) (1995 Replacement Part).

The 1997 Legislative Assembly amended ORS 742.400, as shown below with the new language in bold and deleted language in brackets and italicized:

(1) As used in this section, "claim" means:

(a) A written request for payment for injury alleged to have been caused by professional negligence that is made by or on behalf of the injured person to an insurer; or

(b) A written notification to an insurer by an insured that a person has requested payment from the insured for injury alleged to have been caused by professional negligence.

(2) Any insurer that issues or underwrites professional liability insurance in this state to any physician or podiatric physician and surgeon licensed by the Board of Medical Examiners for the State of Oregon, to any optometrist registered by the Oregon Board of Optometry, to any dentist or dental hygienist licensed by the Oregon Board of Dentistry or to any naturopath licensed by the Board of Naturopathic Examiners shall report any claim against the insured for alleged professional negligence to the appropriate licensing board within 30 days after receiving notice of the claim from the insured or any other person.

(3) The report required by subsection (2) of this section shall be kept confidential by all persons who make or receive it until the case is settled or closed and shall include:

(a) The name of the insured;

(b) The name of the person making the claim;

(c) The reason or reasons for which the claim is made; and

(d) Any additional information the Director **of the Department of Consumer and Business Services** considers necessary.

(4) Any insurer required to report to a board under this section shall also be required to advise the appropriate licensing board of any settlements, awards or judgments against a physician, optometrist, dentist or dental hygienist or naturopath within 30 days after the date of the settlement, award or judgment.

(5) The appropriate board shall provide copies of all reports required by subsections (2) and (4) of this section to[:]

[(a) *The director; and*]

[(b)] each health care facility licensed under ORS 441.015 to 441.087, 441.525 to 441.595,

441.815, 441.820, 441.990, 442.342, 442.344 and 442.400 to 442.450 [which] **that** employs or grants staff privileges to the person against whom the claim was filed.

[(6) *The director shall maintain a permanent record of reports provided to the director under this section and shall provide an index of such reports.*]

Or Laws 1997, ch 131, § 3.

The only significant change made by this legislation is that the director need no longer receive and maintain the reports in a permanent record, nor create an index of the reports. The director may still determine what information (beyond that required by statute) is necessary for the reports. ORS 742.400(3)(d). Since 1988, the director has done this by creating form 440-1962, which the division has adopted by rule. *See* OAR 836-054-0065.⁽⁵⁾

Because ORS 742.400 is a provision of the Insurance Code, the director may also sanction an insurer that fails to file a report required by the law. ORS 731.988(3), as amended by Or Laws 1997, ch 131, § 5. For purposes of these reports, this provision remains unchanged.

2. Confidentiality of Reports

ORS 742.400(5) requires the BME to provide copies of all reports received from an insurer of a claim for alleged professional negligence against an individual licensed by the BME to each health care facility that employs or grants staff privileges to the licensee. Except for the duty to provide a copy to such health care facilities, ORS 742.400(3) requires that each report filed with the BME be kept confidential "by all persons who make or receive the report until the case is settled or closed." Thus, the BME must not disclose the report (or the information contained therein) until settlement or closure of the case or claim, and that information is exempt from disclosure under the Public Records Law until that time.⁽⁶⁾ *See* ORS 192.502(9) (public records otherwise made confidential under Oregon law are exempt from disclosure).

If the matter (case or claim) is "settled or closed," the claim report is no longer confidential under ORS 742.400.⁽⁷⁾ However, other provisions of the Oregon Public Record Law may continue to exempt from disclosure certain information contained in the report.

ORS 192.502(2) exempts from disclosure information of a personal nature, if the disclosure would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure. For example, the identity of a person who makes a malpractice claim against a physician's insurer is information of a personal nature. *See Jordan v. MVD*, 308 Or 433, 441, 781 P2d 1203 (1989) ("personal" information is information "specific to one individual"). Similarly, the medical procedure giving rise to the report (e.g., surgery, cancer treatment) would be information of a personal nature if linked to the identity of the claimant. Whether or not this information may be withheld from disclosure depends, in part, upon whether disclosure would constitute an invasion of privacy that an ordinary persons would deem highly offensive. *See* ORS 192.502(2). If the report filed with the BME involved a case where the patient also filed a lawsuit against the physician, it could be argued that releasing the claimant's name or medical procedure would not likely constitute an unreasonable invasion of privacy since the identity and procedure would already be matters of public record.

Any decision under ORS 192.502(2) to withhold information contained in a public record requires an agency to consider each claim for application of the exemption on an individual, case-by-case basis.

Guard Publishing Co. v. Lane County School Dist., 310 Or 32, 39-40, 791 P2d 854 (1990). A blanket policy of non-disclosure of public records containing personal information does not comply with the Public Records Law. *Id.* You may wish to contact this office for advice when responding to requests for information that might come under this exemption.

The 1997 Legislative Assembly also enacted ORS 676.165 and 676.175, which made confidential certain records and reports of health professional regulatory boards, including the BME. Or Laws 1997, ch 791 (SB 235). Under these statutes, the board generally may not disclose "any information obtained by the board as part of an investigation of a licensee or applicant, including complaints" or "the report issued by the investigator" assigned by BME to investigate a complaint against a licensee or applicant. ORS 676.165(5), 676.175(1). Reports that the BME receives from insurers under ORS 742.400 are not "complaints" in that they are not protests or formal allegations against a licensee, *see* Webster's Third International Dictionary 464 (unabridged 1993), but rather neutral reports of the fact that a malpractice claim has been filed. Nor are these reports information obtained by the board as part of an investigation or reports issued by an investigator assigned by the BME to investigate a complaint. Accordingly, we conclude that the confidentiality provisions of ORS 676.165 and 676.175 do not apply to such reports.

Sincerely,

Donald C. Arnold
Chief Counsel
General Counsel Division

1. Senate Bill 99 was enacted by the 1997 Oregon Legislative Assembly and took effect on October 4, 1997, 90 days from the end of the 1997 legislative session. *See* Or Const, Art IV, § 28.

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2. ORS 677.435 was repealed in 1987. Or Laws 1987, ch 774, § 61.

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3. ORS 743.780 was renumbered twice; first as ORS 743.770 and later, in 1989, as ORS 742.400.

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4. ORS 30.278, which was added by Oregon Laws 1987, chapter 774, section 64, provides:

When notice is received under ORS 30.275 of a claim of professional negligence against a physician, optometrist, dentist, dental hygienist or naturopath who is acting within the scope of employment by a public

body or within the scope of duties as defined by ORS 30.267, the person receiving the notice shall report to the appropriate licensing board, in the same manner as required by ORS 742.400, the information required by ORS 742.400 to be reported by insurers and self-insured associations.

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5. OAR 836-54-065(1) provides for a form of report identified as form 440-1962 and Exhibit 1 to the rule. A copy of that form is attached to this letter.

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6. This office previously gave this advice to both the BME and the division regarding confidentiality of reports mandated by ORS 742.400. See Letter dated February 26, 1996, to Lewis Littlehales, Program Executive, Insurance Division, from Assistant Attorney General Kathleen Dahlin, and letter dated June 8, 1995, to Kathleen Haley, Executive Director, Board of Medical Examiners and Lewis Littlehales, Insurance Division, from Assistant Attorneys General Paul Sundermier and Kathleen Dahlin. The provisions of that statute governing confidentiality were not changed by the 1997 legislation.

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7. An insurer is required to report to the BME if a claim is settled, an award made or a judgment issued. ORS 742.400(4). The BME is required to provide copies of such reports to each health care facility that employs or grants staff privileges to the licensee. ORS 742.400(5).

The division's rule and form, OAR 836-054-0065 and referenced Exhibit 1, specifically require information on settlements, awards or judgments at the bottom of the form in the section captioned "Closure Data." Using this information provided by the insurers, the BME can determine whether a claim is "settled or closed" and whether the confidentiality requirement still pertains.

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