

October 23, 1998

Mr. Robert Goldman
5638 Springwood Ave. SE
Salem, Oregon 97306

Re: *Petition for Public Records Disclosure Order:
Oregon State Board of Nursing Records*

Dear Mr. Goldman:

This letter is the Attorney General's order on your petition for disclosure of records under the Public Records Law, ORS 192.410 to 192.505. Your petition, which we received on September 29, 1998,^{1/} asks the Attorney General to direct the Oregon State Board of Nursing (board) to produce "all records" pertaining to the case arising from your complaint concerning Dante Cipollone who is licensed by the board as a Certified Registered Nurse Anesthetist (licensee). For the reasons that follow, we respectfully deny your petition.

We are informed by Mary Amdall-Thompson, the board's Program Executive for Professional Services, that the board determined by a majority vote of its members not to initiate disciplinary action against the licensee. The board subsequently denied your request its records concerning the licensee.

As required by ORS 192.450(4), you sent to the board a copy of your petition for a public records disclosure order on or before filing it with this office, and the board notified the licensee of his right to file a response to your petition with our office. We have received a response from the licensee, a copy of which we sent to you on October 13, 1998. We have also received a further letter from you dated October 19, 1998.

The Public Records Law confers a right to inspect public records of a public body in

^{1/} We appreciate your courtesy in extending the time within which the law would otherwise have required us to respond.

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Oregon, subject to certain exemptions and limitations. See ORS 192.420. A person who is denied the right to inspect or receive a copy of a public record from a health professional regulatory board, such as OSBN,^{2/} may petition the Attorney General to review the record to determine if it may be withheld from public inspection. ORS 192.450(1).

Generally, under the Public Records Law, there is a presumption in favor of disclosure of public records. *Jordan v. MVD*, 308 Or 433, 438, 781 P2d 1203 (1989). The agency refusing to release records has the burden of establishing that the records sought falls under an exemption. ORS 192.450(1), 192.490(1). With respect to records of a health professional regulatory board, however, the burden is shifted to the petitioner. Specifically, the Public Records Law provides in pertinent part:

The person seeking disclosure of any public record of a health professional regulatory board, as defined in ORS 676.160, shall have the burden of demonstrating to the Attorney General by clear and convincing evidence that the public interest in disclosure outweighs other interests in nondisclosure, including but not limited to the public interest in nondisclosure. * * *

ORS 192.450(5).

In determining whether the records you seek may be withheld from disclosure, we must first review the relevant exemptions from disclosure in the Public Records Law. ORS 192.502(9) exempts from disclosure:

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

Because this exemption incorporates into the Public Records law any other Oregon laws that make the records confidential or that prohibit or restrict their disclosure, we next consider such other laws.

ORS 676.175 provides in relevant part:

(1) A health professional regulatory board shall keep confidential and not disclose to the public any information obtained by the board as part of an investigation of a licensee or applicant, including complaints concerning licensee or applicant conduct and information permitting the identification of complainants, licensees or applicants.

^{2/} The term "health professional regulatory board" is defined as including the Oregon State Board of Nursing. ORS 676.160(11).

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(2) Notwithstanding subsection (1) of this section, if a health professional regulatory board determines by a majority vote of the board that no notice of intent to impose a disciplinary sanction shall be issued, the board shall disclose information obtained as part of an investigation of an applicant or licensee if the person requesting the information demonstrates by clear and convincing evidence that the public interest in disclosure outweighs other interests in nondisclosure, including but not limited to the public interest in nondisclosure.

Under this statute, the board must keep confidential and not disclose any information that it obtains as part of an investigation of a licensee. There is an exception to this prohibition on disclosure, however, when two conditions are met: (1) the board determines by majority vote not to impose a disciplinary sanction,^{3/} and (2) the person requesting the information demonstrates by clear and convincing evidence that the public interest in disclosure outweighs other interests in nondisclosure. ORS 676.175(2).

With respect to the records you seek, the first condition has been met. The board determined by majority vote not to impose a disciplinary sanction against the licensee.

As for the second condition, you make two separate points in support of your claim that the public interest requires disclosure. First, you state:

If [the licensee] has performed 400 successful procedures and two unsuccessful ones, all of that information should be available to the public. To keep the details of actions taken in a professional capacity hidden from the public is to treat the public as children, incapable of weighing pros and cons and making interpretations appropriate for the guidance of their own lives.

In essence, you are arguing that the public has an interest in knowing about the success rate and performance of practitioners so as to make informed decisions with respect to health care choices.

ORS 676.160 to 676.180 establishes the public policy that investigative information pertaining to health profession licensees should be confidential and not subject to public disclosure. These statutes demonstrate a legislative determination that, absent a clear and convincing demonstration to the contrary, the public interest in knowing the track record of a

^{3/} A health professional regulatory board may make a determination not to impose a disciplinary sanction against a licensee if the board finds that the allegations about a licensee are not within the board's jurisdiction, are not supported by any evidence, cannot be proven by a preponderance of the evidence, or are true but do not merit the imposition of a sanction.

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nurse (or other individual licensed by one of the health professional regulatory boards) does not arise unless and until the regulatory board takes some type of disciplinary action against the nurse's license to practice. Although the statutes require disclosure of notices and final orders of an action against a licensee, even then, the statutes do not permit disclosure of the information obtained by the board in the course of an investigation except to the extent the final order summarizes the factual basis for the board's disposition of the matter. ORS 676.175.

The interest you articulate, in knowing about a licensee's performance or success rate, is one that would be present in all cases in which the board has obtained information as part of an investigation of a licensee. Yet, in enacting ORS 676.175, the legislature provided a clear policy directive that the public interest in favor of nondisclosure of investigatory information overrides any general interest in knowing "the details of actions taken in a professional capacity" by licensees. When a board determines by majority vote not to impose a disciplinary sanction, that public interest in favor of nondisclosure can only be overcome if there is clear and convincing evidence that the public interest in disclosure outweighs this public interest in nondisclosure. Because the general public interest in licensee performance has already been determined by the legislature as secondary to the confidentiality of investigatory information, we find that this general interest alone is insufficient to outweigh the public interest in nondisclosure.

Secondly, you state that release of this information would help "to bring a difficult period of time in my and my family's life to a conclusion." This personal interest does not amount to a public interest in the information sought. As stated by the Oregon Court of Appeals, in the Public Records Law context, the term "public" means that the "focus is on the effect of the disclosure in general, not disclosure to a particular person at a particular time." *Morrison v. School District No. 48*, 53 Or App 148, 156, 631 P2d 784 (1981).

Thus, we find that you have not demonstrated by clear and convincing evidence that the public interest in disclosure of the records you seek outweighs the public interest in nondisclosure.^{4/} Absent such a showing, the records you seek are confidential under ORS 676.175 and may not be disclosed. Because the disclosure of these records is prohibited by ORS 676.175, we conclude that these records are exempt from disclosure under ORS 192.502(9).

The standard for review by this office of a denial of a request for records of a health professional regulatory board is, in this case, the same as the statutory standard for the board's disclosure of records, i.e., the person seeking disclosure must demonstrate "by clear and convincing evidence that the public interest in disclosure outweighs other interests in

^{4/} Given the above analysis, we do not reach the merits of the licensee's response to your petition for disclosure of records as you have not demonstrated an overriding public interest in disclosure such as would require a discussion of any countervailing public interests in nondisclosure brought forth by the licensee.

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nondisclosure, including but not limited to the public interest in nondisclosure." ORS 192.450(5), 676.175(2). Because these standards are the same, our analysis for purposes of this order requires no additional analysis beyond determining whether the restrictions on disclosure contained in ORS 676.175, as incorporated into the Public Records Law exemption in ORS 192.502(9), applies to the records. Accordingly, we respectfully deny your petition.

Sincerely,

DAVID SCHUMAN
Deputy Attorney General

AGS00890

c: Mary Amdall-Thompson, Program Executive for Professional Services,
Oregon State Board of Nursing