

April 27, 2000

Joe Rojas-Burke
Reporter
THE OREGONIAN
1320 SW Broadway
Portland, OR 97201

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

Dear Mr. Rojas-Burke:

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 April 12, 2000, asks the Attorney General to direct the Oregon State Board of Nursing (board) to produce all records pertaining to information gathered by the board in its investigation of Michael Coons, a board licensee, in connection with allegations of misconduct at the Sheridan Care Center in 1997 and 1998, including any findings of fact, any recommendations to the Board for disciplinary action, and the quarterly reports that the Board required Mr. Coons and his employer to submit during the probation imposed by the Board in 1993. For the reasons that follow, we respectfully deny your petition.

We are informed by Mary Amdall-Thompson, Program Executive, Professional Services, Oregon State Board of Nursing, that the records you seek were obtained by the board as part of an investigation of the licensee. As you know from records already supplied to you by the board, the board voted to issue a notice of intent to impose a disciplinary sanction against the licensee; however, the underlying license expired before the notice was issued thus depriving the board of jurisdiction over the matter. The board subsequently denied your request for its investigatory records concerning this matter.

The Public Records Law confers a right to inspect public records of a public body in 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 the Board of Nursing,^{1/} 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 first review the relevant exemptions from disclosure in the Public Records law. ORS 192.502(9) exempts from disclosure:

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 676.160 to 676.180 concern the investigation of complaints received by a health professional regulatory board against a licensee or applicant and the confidentiality of information obtained as part of the investigation. ORS 676.165 provides in relevant part:

(5) Investigatory information obtained by an investigator and the report issued by the investigator shall be exempt from public disclosure.

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

^{1/} The term "health professional regulatory board" is defined as including the Oregon State Board of Nursing. ORS 676.160(11).

complainants, licensees or applicants. * * *

(2) Notwithstanding subsection (1) of this section, if a health professional regulatory board votes *not* to issue a notice of intent to impose a disciplinary sanction:

(a) 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 interest in nondisclosure, including but not limited to the public interest in nondisclosure.

* * * * *

(3)(a) A health professional regulatory board shall disclose:

(A) A notice of intent to impose a disciplinary sanction against a licensee or applicant *that has been issued* by vote of the board;

(B) A final order that results from the board's notice to impose a disciplinary sanction;

(C) An emergency suspension order;

(D) A consent order or stipulated agreement that involves licensee or applicant conduct; and

(E) Information to further an investigation into board conduct under ORS 192.685.

(Emphasis added.)

Under ORS 676.175(1), the board must keep confidential and not disclose any information that it obtains as part of an investigation of a licensee except as authorized by ORS 676.175(2) and (3). ORS 676.175(2) authorizes disclosure of investigatory information when a health professional regulatory board votes *not* to impose a disciplinary sanction. This provision does not authorize disclosure of investigatory information as to Mr. Coons because in his case the board voted to impose a disciplinary sanction. ORS 676.175(3)(a) requires disclosure of those documents listed in that provision. The records you seek are not listed.^{2/}

Turning to the specific records requested, the findings of fact that you seek consist of information obtained by the board as part of its investigation into the conduct of the licensee. This information is within the prohibition against disclosure in ORS 676.175(1).

You also requested any recommendation to the board for disciplinary action against the licensee. We are informed by Ms. Amdall-Thompson that the only such recommendation is part of the investigator's report to the board. This report is exempt from public disclosure by ORS 676.165(5).

^{2/} When a board issues a notice of intent to impose a disciplinary sanction, ORS 676.175(3)(a)(A) requires disclosure of that notice, although all investigatory information not contained in the notice itself remains confidential. In the case of Mr. Coons, a notice of intent to impose a disciplinary sanction was not actually issued because the board lost jurisdiction when the license expired. Because the disclosure mandate contained in ORS 676.175(3)(a)(A) applies only to notices "issued" by the board, that mandate is not applicable here.

Lastly, you requested the quarterly reports submitted by the licensee and his employer as required by the terms of probation placed on the licensee by board order in 1993. These quarterly reports are required only for licensees who are under a disciplinary sanction; they are a specific condition of probation. We are informed by Ms. Amdall-Thompson that these reports are part of a continuing investigation of the licensee's conduct in the work place.

Although many investigations are concluded by the issuance of a notice to impose a disciplinary sanction, that is not the case when a licensee is placed on probation. For a licensee, probation is a period during which the licensee may objectively demonstrate to the board that he or she can practice safely and competently. For the board, however, the probationary period constitutes an on-going investigation of the licensee's conduct and performance at work.^{3/} Among other avenues of investigation used by the board during probation are the periodic reports that the licensee and his or her employer required to submit to the board. As information obtained by the Board as part of its continuing investigation of the licensee, the quarterly reports you seek are within the prohibition against disclosure in ORS 676.175(1).^{4/}

We find that the records you seek are either prohibited from being disclosed under ORS 676.175 or exempt from disclosure under ORS 676.165. Accordingly, we conclude that these records are exempt from disclosure under the Public Records Law, ORS 192.502(9).

As noted above, the standard for review by this office of a denial of a request for records that are confidential or exempt from disclosure under ORS 676.165 or 676.175 is whether there is "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). The person seeking disclosure has the burden of demonstrating that this test is met. *Id.* Your petition does not articulate any public interest in disclosure and we are not aware of any specific public interest in disclosure of the particular records you seek. To the extent that your petition merely evidences a general public interest in knowing the details of the board's investigation, we have previously determined that such a general public interest is insufficient to satisfy the requirements of ORS 192.450(5). *See* Public Records Order, October 23, 1998, Goldman ("[I]n 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 information regarding the professional actions of licensees. "Because the general public interest in license 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.")

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 that public interest in

^{3/} "Probation" is defined as "the action of critically testing and evaluating: critical investigation or examination." WEBSTER'S THIRD NEW INTERNATIONAL Dictionary 1806 (unabridged 1993).

^{4/} Because ORS 676.175(1) prohibits disclosure of the reports, we do not consider whether they are also exempt from disclosure under ORS 192.502(2) as information of a personal nature.

Joe Rojas-Burke

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nondisclosure. Absent such a showing, we respectfully deny your petition.

Very truly yours,

DAVID SCHUMAN
Deputy Attorney General

KRC:ALV/AGS04692

c: Mary Amdall-Thompson, Program Executive, Professional Services