

June 15, 2001

Mr. Jeff Sierzega
13395 Lower Island Road
Dayton, OR 97114

Re: Petition for Public Records Disclosure Order:
Board of Licensed Professional Counselors and Therapists Records

Dear Mr. Sierzega:

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 May 31, 2001, asks the Attorney General to direct the Board of Licensed Professional Counselors and Therapists (board) to produce "the record of the proceedings in the meeting of April 28, 2001 of the [board] in the matter of the conduct of LaDonna Macomber, L.P.C. in her custody study regarding my son." For the reasons that follow, we respectfully deny your petition.

We are informed by Carol Fleming, the board's administrator, that the "record of the proceedings" consists of your complaint concerning Ms. Macomber who is licensed by the board as a licensed professional counselor (licensee), the records from the board's investigation of that complaint and the board's deliberations and decision on the matter. Ms. Fleming informs us that the board voted not to issue a notice of intent to impose a disciplinary sanction against the licensee. The board subsequently denied your request for its records concerning this matter on the basis that they are confidential under ORS 676.175(1).^{1/}

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 Licensed Professional Counselors and Therapists,^{2/} may

^{1/} Ms. Fleming informs us that the board would be willing to disclose to you a copy of your complaint, but that the board has not understood you to be seeking that particular record.

^{2/} The term "health professional regulatory board" is defined as including the Board of Licensed

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

(b) The board may disclose to a complainant a written summary of information obtained as part of an investigation of an applicant or licensee resulting from the complaint to the extent the board determines necessary to explain the reasons for the board's decision. * * *

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 the board votes not to impose a disciplinary sanction.^{3/} In that situation, the investigatory information must be disclosed *if* 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)(a). If this standard is not met, however, the board cannot disclose the investigatory information. Whether or not the person requesting the information meets this standard, the board is authorized, but is not required, to disclose to the complainant a written summary of the investigatory information to the extent the board determines necessary to explain the reasons for the board's actions.^{4/} ORS 676.175(2)(b).

ORS 676.160 to 676.180 establish the public policy that information concerning an investigation of 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 information the board obtained during its investigation and the board's consideration of that information does not arise unless and until the regulatory board takes some type of disciplinary action. 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. Where the regulatory board does not propose to take disciplinary action against the licensee, there must be an overriding public interest in disclosure. *Id.*

Because the records you seek consist of information obtained as part of the investigation of a licensee, and the board voted not to impose a disciplinary sanction against the licensee, those records are confidential and may not be disclosed unless you demonstrate by clear and convincing evidence that the public interest in disclosure outweighs other interests in nondisclosure. Your petition states five "reasons" for "the need for disclosure" of the "record of the proceedings" concerning the investigation of a complaint filed against licensee. Four of these reasons refer to a report written by the licensee which you describe as written in revenge,

^{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.

^{4/} In a letter from Ms. Fleming dated April 30, 2001, the board provided to you an explanation of its action in deciding not to propose a disciplinary sanction for licensee.

biased, the basis of a restraining order against you, and a disputed “diagnosis” of mental disorders. The fifth reason relates to the process by which the court appoints custody evaluators and an opinion that the board is “neither independent nor required to explain their recommendations.” These reasons all describe the facts and circumstances of your complaint against the licensee and your personal interest in disclosure of the records. The Oregon Court of Appeals has explained that, 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). You have not stated any public interest in disclosure.

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 interests in nondisclosure that are embodied in ORS 676.160 to 676.180. 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 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.^{5/} Accordingly, we respectfully deny your petition.

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

AGS07951

c: Carol Fleming, Administrator,
Board of Licensed Professional Counselors and Therapists

^{5/} 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 a public interest in disclosure such as would require a discussion of any countervailing interests in nondisclosure brought forth by the licensee.