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No. 8257

This opinion is issued in response to questions from the health professional regulatory boards that are subject to Oregon Laws 1997, chapter 791 (Senate Bill 235).[(1)] Among other provisions, this legislation adopted new statutes concerning the investigation of complaints against licensees and applicants, ORS 676.165,[(2)] and the confidentiality of information obtained as part of such investigations, ORS 676.175.[(3)]

FIRST QUESTION PRESENTED

Are all persons who hold a form of "license" as defined in ORS 183.310(4) from a "health professional regulatory board" covered by the term "licensee" in ORS 676.165 and 676.175?

ANSWER GIVEN

Yes.

SECOND QUESTION PRESENTED

What information must be kept confidential pursuant to ORS 676.175(1) regarding:

A. An "applicant"?

B. A routine inspection of a licensee, such as a pharmacy or mortuary?

C. Notices that cause the board to initiate an investigation, such as a Drug Enforcement Administration (DEA) notice that a licensee has a high prescription rate for controlled substances, or a notice from an insurer pursuant to ORS 742.400?

ANSWER GIVEN

A. Information submitted or required to be submitted by an applicant in or with the application is not confidential under ORS 676.175(1), but any further information developed by a background investigation or other follow-up investigation by the board is subject to the confidentiality provisions of that statute.

B. All information obtained by a board from an inspection of a licensee is confidential under ORS 676.175(1).

C. Notices such as those from the DEA, or from insurers pursuant to ORS 742.400 are not confidential under ORS 676.175(1), although information obtained as part of an investigation initiated as a result of the notice would be confidential under that statute.

THIRD QUESTION PRESENTED

What is the significance of the fact that the legislature enacted confidentiality provisions in ORS 676.165 and 676.175, but did not repeal existing provisions regarding confidentiality and public disclosure for several of the affected boards?

ANSWER GIVEN

No single answer is possible. The answer depends on the specific language contained in the organic act of each of the affected boards.

FOURTH QUESTION PRESENTED

ORS 676.175(2), (3) and (4) reference "a majority vote of the board" on decisions whether or not to issue a "notice of intent to impose a disciplinary sanction".

A. Does this mean that ORS 676.175 requires action by a vote of the board to issue a notice of proposed disciplinary action on a licensee, to take no action at the conclusion of an investigation of alleged licensee misconduct, to issue a notice of intent to deny an

application for licensure or to grant a license? If so, does ORS 676.175 also replace quorum requirements in the boards' organic acts and require board action by an affirmative vote of a majority of the board rather than a majority of the quorum?

B. If these decisions can be made by less than a majority vote of the whole board, what information and records must be held confidential and what records must be disclosed under ORS 676.175(2) and 676.175(3)?

C. If these decisions can be made by less than a majority vote of the whole board, under what circumstances must the final order, consent order or stipulated agreement in cases involving licensee or applicant conduct summarize the factual basis for the board's disposition of the matter under ORS 676.175(4)?

ANSWER GIVEN

A. ORS 676.175 does not itself require that decisions whether or not "to issue a notice of intent to impose a disciplinary sanction" be made by vote of the board. Nor does ORS 676.175 change the quorum requirements of the boards.

B. ORS 676.175(2) requires disclosure of information obtained as part of an investigation of an applicant or licensee if two conditions are met: (1) a majority of the board voted *not* to issue a notice of intent to impose discipline, and (2) the public interest in disclosure outweighs other interests in nondisclosure by clear and convincing evidence. Thus, if the board votes by a majority of the whole board not to issue a notice of intent to impose discipline, then the first contingency for disclosure is met, and the board should proceed to the public interest balancing test to determine whether disclosure is required. Absent a majority vote of the whole board, the investigatory information remains confidential under ORS 676.175(1) and may not be disclosed.

ORS 676.175(3) requires the board to disclose a notice of intent to impose a disciplinary sanction against a licensee or to deny an application only if that notice has been issued by a majority vote of the whole board. Absent a majority vote of the whole board, the notice remains confidential under ORS 676.175(1) and may not be disclosed. ORS 676.175(3) also requires the board to disclose all final orders that result from a notice of intent to impose a disciplinary sanction against a licensee, regardless of whether the notice of intent to impose a disciplinary sanction was issued by a majority vote of the whole board. ORS 676.175(3) also requires the board to disclose all consent orders and stipulated agreements involving licensee or applicant conduct, regardless of whether a notice of proposed action was issued or whether such a notice was issued by a majority vote of the whole board. Information requested by the Government Standards and Practices Commission as part of an investigation of board compliance with the executive session provisions of the Public Meetings Law must be disclosed irrespective of board votes.

The board may disclose the caption and order portion of emergency suspension orders so long as the board deletes any remaining information obtained as part of an investigation or complaint. If a majority of the board votes to issue a notice of intent to impose a disciplinary sanction on the same basis as the emergency suspension order, the notice of intent must be disclosed under ORS 676.175(3), including all supporting allegations, although that same information in the emergency suspension order would remain confidential.

C. ORS 183.470 requires a final order other than one incorporating an informal disposition to be accompanied by findings of fact and conclusions of law. Compliance with this statute would satisfy the requirement for a summary contained in ORS 676.175(4). Final orders incorporating an informal disposition must contain a summary of the factual basis for the board's disposition only if that final order results from a notice of intent to impose discipline that was issued by a majority vote of the whole board. All consent orders and stipulated agreements that involve licensee or applicant conduct must contain a summary, whether or not they result from a notice of intent that was issued by a majority vote of the whole board.

FIFTH QUESTION PRESENTED

Do the confidentiality provisions of ORS 676.165(5) and 676.175 apply to information received or records created before October 4, 1997, the effective date of that statute, or only to information received or records created after October 4?

ANSWER GIVEN

The confidentiality and disclosure provisions in ORS 676.165(5) and 676.175 apply to all information and records of the boards, whether received or created before or after October 4. To the extent that ORS 676.175(2) and (3) mandate disclosure of certain information if a notice of intent to impose a disciplinary sanction was issued by a majority vote of the whole board, that condition must have been met before disclosure is permitted.

SIXTH QUESTION PRESENTED

What does the phrase "and information to further an investigation into board conduct under ORS 192.685" mean in ORS 676.175(3)?

ANSWER GIVEN

ORS 192.685 relates to the role of the Government Standards and Practices Commission (GSPC) in investigating allegations of the improper use of executive session by boards under the Public Meetings Law, ORS 192.610 to 192.710. ORS 676.175(3) requires the boards to disclose information to the GSPC to further an investigation conducted pursuant to ORS 192.685, including information that would otherwise not be disclosed by virtue of ORS 676.175(1).

SEVENTH QUESTION PRESENTED

Do ORS 676.165 and 676.175 prohibit the boards from disclosing information obtained as part of an investigation of a licensee or applicant:

A. To sister agencies within or without the state, to law enforcement agencies (including the district attorney and the Attorney General's office) or to the federal DEA?

B. To witnesses in the course of investigation?

C. To a licensee in the course of a contested case proceeding?

ANSWER GIVEN

A. The boards may not disclose investigatory information or the report of an investigator to sister agencies, law enforcement agencies or to the federal DEA unless a board's statutes expressly so authorizes.

B. The boards may disclose information to witnesses only to the extent necessary to conduct a complete and competent investigation.

C. The boards may disclose information to a licensee only to the extent necessary to conduct a complete and competent investigation and, if a notice of intent to impose discipline is issued, to satisfy due process requirements.

EIGHTH QUESTION PRESENTED

ORS 676.165 concerns investigations of complaints and the reports of investigators.

A. What is a "complaint by any person" for purposes of the timelines and other requirements of ORS 676.165?

1) Must the board accept and investigate oral complaints?

2) Do the requirements of ORS 676.165 apply to investigations of applicants when there is no "complaint"?

3) Would the requirements of ORS 676.165 apply to investigations opened as a result of notice received by the board of potential problems with a licensee, such as a DEA notice that a licensee has a high prescription rate for controlled substances, a notice from an insurer pursuant to ORS 742.400, a news article that causes the board to initiate an investigation of a licensee, or a board's routine inspection of a pharmacy or mortuary that generates an investigation?

B. Do the requirements of ORS 676.165 apply to complaints received before October 4, 1997?

C. If a board's practice is to review complaints at a board meeting to determine if they allege matters that could result in a disciplinary sanction of a licensee, does the 120-day period specified in ORS 676.165(4) for the investigator to make a report start when the complaint is received by board staff or when the members of the board review the complaint and assign it to the investigator at its meeting?

D. Does ORS 676.165 require the investigation to be completed within 120 days from the time that period starts or merely require the investigator to file a status report within the 120 days?

E. What qualifies as "just cause" to extend the time period in which to file a report? How should the existence of "just cause" be documented?

F. Does the whole board have to vote in each instance to grant a 30-day extension, or can this decision be delegated to a subcommittee of the board or to the board's executive director?

G. What are the consequences of not filing a report within the required time (the initial 120-day period or the 30-day extension period)?

ANSWER GIVEN

A. For purposes of ORS 676.165, a complaint by any person is an expression of resentment, protest or formal allegation about a licensee or applicant that is made by any individual, partnership, corporation, association, governmental subdivision or public or private organization of any character other than a state agency.

1) The board must accept and investigate oral complaints.

2) The requirements of ORS 676.165 do not apply to investigations of applicants when there is no "complaint."

3) "Notices," such as those from the DEA, an insurer pursuant to ORS 742.400, a news article, or a board's routine inspection, that cause a board to investigate a licensee are not "complaints," but rather inquiries, reports or alerts. ORS 676.165 would be inapplicable.

B. The requirements of ORS 676.165 do not apply to complaints received before October 4, 1997.

C. The 120-day period starts from the receipt of a complaint in the board's office.

D. Although the investigator need not necessarily complete the investigation within 120 days (due to the extension clause in ORS 676.165(4)), the investigator's report due within 120 days or the extended period must be more than a mere status report.

E. See discussion.

F. The board may delegate the decision to grant a 30-day extension for just cause to a subcommittee of the board or to a person or persons within the agency.

G. The legislature provided no consequences if the investigation report is not made in a timely manner, and we cannot read one into the statute.

NINTH QUESTION PRESENTED

Must the "investigator" be a member of the health professional regulatory board, or can it be a staff person or contract investigator? May a person who is not the "assigned" investigator conduct any part of the investigation and make the report to the board?

ANSWER GIVEN

ORS 676.165 does not identify or limit who can be assigned as an investigator of the complaint, although ORS 676.165 does provide for the possibility that more than one investigator could be assigned to the same complaint. Only the assigned investigator may make the report to the board.

TENTH QUESTION PRESENTED

Does ORS 676.165(5), which exempts from public disclosure investigatory information obtained by the investigator, conflict with the disclosure requirement in ORS 676.175(2) and (3)? If so, which prevails?

ANSWER GIVEN

ORS 676.165(5) was intended to exempt from public disclosure the investigator's report and other records containing investigatory information obtained by the investigator. Such an "exemption" from disclosure does not vitiate the mandate that the board "shall disclose" the information specified in ORS 676.175(2) and (3).

ELEVENTH QUESTION PRESENTED

When a hearing on a notice of intent to impose a disciplinary sanction on a licensee or a notice to deny an application for licensure is held before a hearings officer, do the confidentiality provisions of ORS 676.165 and 676.175 require the public (and the news media) to be excluded?

ANSWER GIVEN

When a hearing on a notice of intent to impose a disciplinary sanction on a licensee or a notice to deny an application for licensure is held before a hearings officer, the public and the news media must be excluded.

TWELFTH QUESTION PRESENTED

When a hearing on a notice of intent to impose a disciplinary sanction on a licensee or a notice to deny an application for licensure is held before a quorum of the board, do the confidentiality provisions of ORS 676.165 and 676.175 require the hearing to be conducted in executive session? If so, does a representative of the news media have the right to attend the hearing conducted in executive session?

ANSWER GIVEN

When such hearing is held before a quorum of the board, the hearing must be conducted in executive session. Representatives of the news media must be permitted to attend a hearing conducted in executive session.

THIRTEENTH QUESTION PRESENTED

When the board deliberates in a contested case proceeding, may a member of the public or a representative of the media be present?

ANSWER GIVEN

Neither a member of the public nor a representative of the media may be present when the board deliberates in a contested case proceeding.

FOURTEENTH QUESTION PRESENTED

ORS 192.660, the executive session provisions in the Oregon Public Meetings Law, was amended by SB 235. In light of those amendments and the enactment of ORS 676.165 and 676.175:

A. Does ORS 192.660 now permit the board to take a final vote in executive session?

B. If the board is required to take a final vote in open session, how do the confidentiality provisions of ORS 676.165 and 676.175 require that this be done?

C. How do ORS 676.175 affect the content and disclosure of board meeting minutes for executive sessions and open sessions?

ANSWER GIVEN

A. ORS 192.660(1)(k) does not permit the board to take a final vote in executive session.

B. See discussion.

C. ORS 192.660(1)(k) requires the board to keep confidential and not disclose any part of its executive session meeting minutes that contain confidential information under the terms of ORS 676.175.

DISCUSSION

In interpreting statutes, our goal is to discern the intent of the legislature. ORS 174.020; *PGE v. Bureau of Labor and Industries* (*PGE*), 317 Or 606, 610, 859 P2d 1143 (1993). We first look at the text and context of the statute, which includes other provisions of the same statute and related statutes. In so doing, we consider statutory and judicially developed rules of construction that bear directly on how to read the text, such as "words of common usage typically should be given their plain, natural, and ordinary meaning." *Id.* at 611. If the legislative intent is clear from the text and context, the search ends there. Only if the legislative intent is not clear from the text and context of the statute will we look to the legislative history to attempt to discern that intent. *Id.* at 611-612. If, after considering text, context and legislative history, the intent of the legislature remains unclear, we may resort to general maxims of statutory construction to resolve any remaining uncertainty as to the meaning of the statute. *Id.* at 612.

With these principles in mind, we turn to the questions we have been asked concerning the interpretation of ORS 676.165 and 676.175.

1. Meaning of "Licensee"

ORS 676.175(1) requires the boards to keep confidential and not disclose to the public any information obtained by the board as part of an investigation "of a licensee or applicant." We are asked whether all persons or entities holding a form of "license" as defined in ORS 183.310(4) from a "health professional regulatory board" are covered by the term "licensee."

ORS 676.175 does not define the term licensee. In the organic acts of the boards to which ORS 676.175 applies, the names used to identify the form of permission required to pursue an occupation or profession varies widely. Two examples illustrate the point.

The first example involves the practice of nursing. ORS 678.021 provides that one must be "licensed" by the Oregon Board of Nursing to practice registered nursing. ORS 678.375 provides that a licensed registered nurse may only practice as a nurse practitioner if the person has received a "certificate of special competency" from the Board of Nursing. ORS 678.010(4) defines nurse practitioner as "a registered nurse who has been certified by the board as qualified to practice in an expanded specialty role within the practice of nursing."

The second example involves the practice of pharmacy. ORS 689.225 provides that one must be "licensed" by the Board of Pharmacy to practice pharmacy. ORS 689.335 provides that no drug outlet (pharmacy) shall be operated until a "certificate of registration" has been issued by the Board of Pharmacy.

In both illustrations, terms other than "license" are used as labels for a form of permission required by law to pursue the profession of nurse practitioner and the commercial activity of a drug outlet. Regardless of appellation, each is a license within the meaning of ORS 183.310(4). That statute provides:

> **"License" includes the whole or part of any agency permit, certificate, approval, registration or similar form of permission required by law to pursue any commercial activity, trade, occupation or profession.**

ORS 676.175 was intended to create uniform standards of confidentiality and public disclosure regarding investigations of licensees of the boards and investigations of applicants for licensure. There is nothing in the language of this statute or in its history to suggest that by using the term "licensee" the legislature intended to

distinguish between cases involving the permission to pursue a profession or occupation depending upon the label used in the organic act of the particular board. Rather, we conclude that ORS 676.175 applies to all cases in which a person or entity seeks or holds a license (as that term is defined by ORS 183.310(4)) from the board and that the term "licensee" applies generically to any person or entity that holds any form of permission from a "health professional regulatory board" regardless of the name used in the organic act of the board.

2. Confidentiality of Certain Information

We are next asked what information must be kept confidential pursuant to ORS 676.175(1) regarding: (a) an "applicant," (b) routine inspections, and (c) notices received by a board that cause the board to open an investigation.

A. Applicants

ORS 676.175(1) provides that "[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[n] * * * applicant, including complaints concerning * * * applicant conduct and information permitting the identification of complainants * * * or applicants."

In providing for professional licensure, the legislature has included in the organic act of each board qualifications for licensure including standards relating to education, examination and fitness. Typically, an applicant for licensure makes application on a form provided by the board, and the applicant includes information to demonstrate that the applicant meets all of the qualifications for licensure. Upon receipt of an application, some boards review the application and authorize the applicant to sit for the examination if the application is complete on its face and the applicant appears qualified. At such time as the applicant passes the examination, a license is issued.

We conclude that the submission of an application by an applicant does not qualify as an "investigation" within the meaning of ORS 676.175(1). We further conclude that the mere review of the application by the board to determine whether the applicant is qualified does not fall within the meaning of the term "investigation." The reason for these conclusions is two-fold. First, the plain meaning of the word "investigation" indicates greater activity than that of submitting or reviewing an application. *See* Websters Third International Dictionary (Websters) 1189 (unabridged 1993) ("detailed examination * * * a searching inquiry * * * an official probe"). Second, a contrary interpretation could lead to the result of a board being unable to disclose the names and other identifying information of applicants to whom it grants licenses pursuant to a review of their applications. Such an interpretation would not logically embody the intent of the legislature. Thus, we conclude that the information submitted by an applicant as part of the application process is not subject to the confidentiality provisions of the Act.[(4)]

ORS 676.165(1) requires a board to investigate "[u]pon receipt of a complaint * * * against a licensee or applicant." Boards may also conduct investigations in the absence of a complaint. For example, some boards, such as the Mortuary and Cemetery Board, conduct routine background investigations of all applicants. ORS 676.175 requires the boards to keep confidential information obtained "as part of an investigation of a licensee or applicant," without regard to whether the investigation was initiated upon receipt of a complaint or otherwise. We conclude that information developed by a board when conducting a background investigation of an applicant qualifies as "information obtained by the board as part of an investigation" and is subject to the confidentiality provisions of ORS 676.175.

In some instances, either as a result of disclosures made by the applicant or as a result of information coming to the board from other sources, the board may conduct an investigation of the applicant. This frequently happens when an applicant discloses a criminal history, discloses disciplinary action by a board in another jurisdiction or discloses some other facts that bear on the applicant's fitness. As noted above, the information disclosed by the applicant on the application or required to be submitted with the application is not confidential under ORS 676.175(1), but any further information developed by the board's investigation is subject to the confidentiality provisions of that statute.

B. Routine Inspections

ORS 676.175(1) prohibits a board from disclosing "any information obtained by the board as part of an investigation of a licensee." Some boards, such as the Board of Pharmacy or the Mortuary and Cemetery board,

conduct routine inspections of the premises of licensees. Because the purpose of such an inspection is to investigate whether the licensee is in compliance with the applicable statutes and rules, any information obtained by a board from an inspection is confidential under ORS 676.175(1).

C. Notices that Result in an Investigation

A board may receive a notice or other information that causes the board to initiate an investigation. For example, the Drug Enforcement Administration (DEA) notifies the Board of Medical Examiners when a physician has a high prescription rate for controlled substances. Insurers are required by ORS 742.400 to report to the appropriate licensing board any claim for alleged professional negligence against a physician, podiatric physician, optometrist, dentist or dental hygienist, or naturopath that the insurer received against one of its insureds.

Although such notices are generated sua sponte by the DEA or insurer and are not obtained "as part of an investigation," ORS 676.175(1) also prohibits disclosure of "complaints." Consequently, we must consider whether such notices are complaints.

Websters defines "complaint," as, among other things:

1 c : the act or action of expressing protest, censure or resentment : expression of injustice

d : formal allegation or charge against a party

***Id.* at 464. Thus, a complaint is an expression of resentment, protest or formal allegation about a licensee or applicant. The notices described above are neutral factual notices about a licensee's prescription rate for controlled substances or a malpractice claim filed against a licensee; they are not complaints to the board expressing some protest, resentment, sense of injustice or formal allegation against a licensee or applicant.**

Because such notices are not "complaints" and were not obtained "as part of an investigation," the notices themselves are not confidential under ORS 676.175, even if the board begins an investigation of the licensee as a result of such a notice.

3. Effect of Other Confidentiality Statutes That Have Not Been Repealed

We are next asked about the significance of the fact that when the confidentiality provisions of ORS 676.165 and 676.175 were enacted, the legislature did not repeal existing provisions regarding confidentiality and public disclosure for several of the affected boards. No single answer can be given to this question because the answer depends on the specific language contained in the organic act of each of the affected boards. Consequently, each board must review its organic act and consult with its assigned assistant attorney general to address this issue. By way of example, we note the organic statutes of the Oregon Board of Dentistry.

ORS 679.320(1) states that any information provided to the Board of Dentistry as the basis of a complaint or in the investigation of a complaint "shall not be subject to public disclosure during the period of investigation." This statute was not amended or repealed when ORS 676.165 and 676.175 were enacted. There is no conflict between ORS 679.320(1) and ORS 676.165 or 676.175. ORS 679.320(1) prohibits public disclosure of information submitted to the Board of Dentistry as a result of a complaint until the investigation is complete. ORS 676.165(5) makes "[i]nvestigatory information obtained by an investigator * * * exempt from disclosure"; and ORS 676.175(1) prohibits disclosure of "any information obtained by the board as part of an investigation * * * including complaints." The extent of the confidentiality for complaints and information obtained as part of an investigation that is provided by ORS 676.165 and 676.175 is both consistent with and substantially greater than the confidentiality provided by ORS 679.320(1).

ORS 679.250(5) provides that the Board of Dentistry's "proceedings shall be open to public inspection *in all matters affecting public interest.*" (Emphasis added.) This statute was not amended or repealed. We conclude that there is no conflict between this statute and ORS 676.165 or 676.175 . In enacting ORS 676.165 and 676.175 , the legislature has defined the parameters of "matters affecting public interest" by striking a new balance between confidentiality and public disclosure for information obtained by the Board of Dentistry as part of an investigation of a licensee or applicant. Information the disclosure of which is prohibited by ORS 676.165 or 676.175 is not a matter affecting the public interest.

4. Majority Votes

The fourth question concerns quorum and voting requirements in light of the references in ORS 676.175(2), (3) and (4) to "a majority vote of the board" on decisions whether or not to issue a "notice of intent to impose a disciplinary sanction," and the effects of decisions made by less than a majority vote. ORS 676.175(2) and (3) require disclosure of investigatory and other information under specified conditions. ORS 676.175(4) requires certain disclosable orders and agreements to summarize the factual basis for the board's disposition.

Interpreting the confidentiality requirements of ORS 676.175 with respect to applications for licensure is complicated by the legislature's choice of terminology. The term "disciplinary sanction" repeatedly appears in ORS 676.175 with respect to both licensees and applicants. Generally, boards do not consider the denial of an application for licensure to constitute a disciplinary sanction against an applicant. No other negative action, however, is taken by a professional licensing board against an applicant in the normal course of events that could give meaning to the phrase "a notice of intent to impose a disciplinary sanction against a[n] * * * applicant" that appears in ORS 676.175(3). Conversely, when a board determines that an applicant qualifies for licensure, the application is approved and a license is issued. This would not normally be viewed as a board determining that "no notice of intent to impose a disciplinary sanction shall be issued" as referenced in ORS 675.175(2) with respect to applicants. Nevertheless, to give meaning to the legislature's inclusion of "applicants" as well as "licensees" in ORS 676.175, the approving and disapproving of applications for licensure must be viewed in this light. Therefore, we conclude that the legislature intended the reference to a "disciplinary sanction" in ORS 676.175 to apply to a decision:

(i) to issue a notice of proposed disciplinary action regarding a licensee;

(ii) not to issue a notice of intent to impose disciplinary action following an investigation of a licensee;

(iii) to issue a notice of intent to deny an application for licensure; and

(iv) to approve an application and grant a license.

We answer question four within the analytical framework provided by these conclusions.

A. Voting and Quorum Requirements

We are asked first whether ORS 676.175 requires action by a vote of the board to issue a notice of proposed disciplinary action on a licensee, to take no action at the conclusion of an investigation of alleged licensee misconduct, to issue a notice of intent to deny an application for licensure or to grant a license. If these decisions must be made by vote of the board, we are then asked whether these provisions also replace quorum requirements in the boards' organic acts and require board action by an affirmative vote of a majority of the whole board rather than a majority of the quorum.

ORS 676.175(2) mandates disclosure of information obtained as part of an investigation of an applicant or licensee if two conditions are met, one of which is "if a health professional regulatory board determines by a majority vote of the board that no notice of intent to impose a disciplinary sanction be issued." ORS 676.175(3) requires the board to disclose a notice of intent to impose a disciplinary sanction against a licensee or applicant "that has been issued by a majority vote of the board." ORS 676.175(4) provides that "[i]f a notice of intent to impose a disciplinary sanction has been issued by a majority vote of the board," a final order resulting from the board's notice of intent must summarize the factual basis for the board's disposition. The plain meaning of the language of ORS 676.175(2), (3) and (4) does not require that any of the contemplated actions be passed by a majority vote of the board. The confidentiality of information concerning these activities, however, will be affected by whether the actions are taken by a majority vote of the whole board.

We are informed that some boards affected by ORS 676.175 vote on each disciplinary case at the conclusion of the investigation either to issue a notice of intent to impose a disciplinary sanction or to close the matter. In cases decided by boards that do not have a quorum requirement in their organic act, the board's action must be made by a majority vote of the whole board. ORS 174.130. However, in cases decided by boards that have a quorum provision in their organic act, when the board votes to close a matter, e.g., to not issue a notice of intent to impose a disciplinary sanction, the decision may be made by a vote of less than a majority of the whole board. For example, the Board of Dentistry consists of nine members. ORS 679.230. A majority vote of the whole Board of Dentistry is five. However, ORS 679.250(5) provides that a majority of the Board of Dentistry constitutes a quorum and a majority vote of the quorum "shall be a decision of the board." Thus, if only five members of the Board of Dentistry attend a board meeting, the board may take action on the affirmative vote of three members which, of

course, is two votes less than a majority vote of the board.

Based on the plain meaning of ORS 676.175, and the fact that the legislature did not repeal or modify any of the quorum requirements contained in the organic acts of the affected boards, we conclude that the legislature did not intend to change the law relating to quorum requirements. Consequently, the actions contemplated by ORS 676.175, such as issuing a notice of intent to impose a disciplinary sanction, may be taken on less than a majority vote of the whole board if a particular board's organic act so provides. Whether certain actions addressed in ORS 676.175(2), (3) or (4) must be disclosed to the public, however, will remain dependent on whether the decision was made by a majority vote of the whole board. This is the case because these statutory provisions plainly and specifically tie the disclosure of certain information to "a majority vote of the board." Under ORS 174.010, it is impermissible, when analyzing a statute, "to insert what has been omitted, or to omit what has been inserted." Because the legislature could have adopted other language recognizing a board's ability to take action by a quorum vote and chose not to do so, we must give meaning to the specific words that appear in ORS 676.175.[(5)]

B. Confidentiality and Mandatory Disclosure under ORS 676.175(2) and (3)

Given our conclusion that these decisions can be made by less than a majority vote of the whole board, we are asked what information and records must be held confidential and what records must be disclosed under ORS 676.175(2) and (3).

1) ORS 676.175(2) - Disclosure of Investigatory Information

ORS 676.175(2) provides that notwithstanding the confidentiality requirements of ORS 676.175(1),

> ***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.**

(Emphasis added.) Thus, information obtained as part of an investigation of an applicant or licensee may be disclosed under ORS 676.175(2) only if two conditions are met: (1) *if* a majority of the board voted *not* to issue a notice of intent to impose discipline, and (2) *if* the public interest in disclosure outweighs by clear and convincing evidence other interests, including the public interest, in nondisclosure.

In the absence of a motion and vote by the board to issue a notice of intent to impose a disciplinary sanction against a licensee, no disciplinary action will be initiated (unless that authority has been subdelegated to staff).[(6)] Consequently, there may be cases in which an investigation has been conducted and no disciplinary action was initiated against a licensee despite the fact that there was no board vote on the matter. In such cases, the information that is made confidential by ORS 676.175(1) is not subject to public disclosure under ORS 676.175(2), because the condition precedent of a majority vote of the board has not been met. Similarly, if the motion to not issue a notice of intent to impose a disciplinary sanction is passed by a majority of the quorum, but by less than a majority of the whole board, the contingency for disclosure under ORS 676.175(2) is not met and the confidential investigatory information under ORS 676.175(1) is not subject to disclosure under ORS 676.175(2).

In cases involving the decision to grant a license, if the motion to approve a license application is passed by a majority of the quorum, but by less than a majority of the whole board, the first contingency for disclosure under ORS 676.175(2) is not met and the confidential investigatory information under ORS 676.175(1) is not subject to disclosure under ORS 676.175(2).

If a majority of the whole board votes to grant a license or not to issue a notice of intent to impose a disciplinary sanction, however, then the first contingency for disclosure of investigatory information under ORS 676.175(2) is met, and the board should proceed to the balancing test set forth in that section to determine whether disclosure is required.

We have not been informed whether any of the affected boards have subdelegated to staff the decision to approve a license application and issue a license, and we decline in this opinion to address the lawfulness of such a practice. We note merely that the disclosure provision in ORS 676.175(2) in cases where license applications have been approved is contingent on a majority vote of the board. In the absence of a board vote, the investigatory

information that is confidential pursuant to ORS 676.175(1) is not subject to public disclosure under ORS 676.175(2).

2) ORS 676.175(3) - Disclosure of Notices, Orders, etc.

a) Notice of Proposed Disciplinary Sanction Against Licensee

ORS 676.175(3) provides that a "board shall disclose a notice of intent to impose a disciplinary sanction against a licensee * * * that has been issued by a majority vote of the board."

Based on the above analysis, we conclude that the board must disclose a notice of intent to impose a disciplinary sanction against a licensee that has been issued by a majority vote of the whole board. We further conclude that a notice of intent to impose a disciplinary sanction against a licensee that has been issued by a vote of less than a majority of the whole board or that has been issued by board staff is not required to be disclosed by ORS 676.175(3) and must instead be held confidential pursuant to ORS 676.175(1).

b) Notice of Intent to Deny an Application

ORS 676.175(3) provides that a "board shall disclose a notice of intent to impose a disciplinary sanction against [an] applicant * * * that has been issued by a majority vote of the board." Based on the above analysis, we conclude that the board must disclose a notice of intent to deny an application that has been issued by a majority vote of the whole board. We further conclude that a notice of intent to deny an application that has been issued by a vote of less than a majority of the whole board or that has been issued by board staff is not required to be disclosed by ORS 676.175(3) and must instead be held confidential pursuant to ORS 676.175(1).

c) Final Order Resulting from Notice of Intent to Impose Disciplinary Sanction

ORS 676.175(3) provides that a "health professional regulatory board shall disclose * * * a final order that results from the board's notice of intent to impose a disciplinary sanction." Unlike the notice of intent to impose a disciplinary sanction, discussed above, which must have been issued by a majority vote of the board to trigger the requirement to disclose, a final order must merely result "from the board's notice of intent to impose a disciplinary sanction" to trigger this requirement. The issuance of notice is an action by "the board" listed in ORS 676.160, whether that action is taken by a majority of the whole board or a majority of the quorum or is delegated to staff. The plain language of ORS 676.175(3) does not require that the notice from which the final order results must be a notice issued by a majority vote of the board.

We conclude therefore that all final orders that result from a notice of intent to impose a disciplinary sanction against a licensee must be disclosed regardless of whether the notice of intent to impose a disciplinary sanction was issued by a majority vote of whole board, a majority vote of a quorum or by board staff. We reach the same conclusion with respect to all final orders that result from a notice of intent to deny an application.

d) Consent Order or Stipulated Agreement

ORS 676.175(3) provides that a "health professional regulatory board shall disclose * * * a consent order or stipulated agreement that involves licensee or applicant conduct." ORS 183.415(5) provides for informal disposition of contested cases by stipulation, agreed settlement or consent order. Although consent orders or stipulated agreements often follow the initiation of a contested case proceeding, contested cases may be resolved without the board having first issued a notice of proposed action. This fact, coupled with the plain meaning of the language used in ORS 676.175(3), leads us to conclude that consent orders and stipulated agreements involving licensee or applicant conduct must be disclosed regardless of how a notice of proposed action was issued or whether such a notice was issued at all.

e) Information to Further an Investigation under ORS 192.685

ORS 676.175(3) provides that a "health professional regulatory board shall disclose * * * information to further an investigation into board conduct under ORS 192.685." This disclosure requirement to the Government Standards and Practices Commission (GSPC) in response to a request for relevant information as part of an investigation of

board compliance with the executive session provisions of the Public Meetings Law is not contingent on board votes or quorum requirements.

f) Emergency Suspension Orders

ORS 676.175 does not expressly address the disclosure of emergency suspension orders. Such orders may be issued pursuant to ORS 183.430(2), which provides in relevant part:

> **In any case where the agency finds a serious danger to the public health or safety and sets forth specific reasons for such findings, the agency may suspend or refuse to renew a license without hearing, but if the licensee demands a hearing within 90 days after the date of notice to the licensee of such suspension or refusal to renew, then a hearing must be granted to the licensee as soon as practicable after such demand, and the agency shall issue an order pursuant to such hearing as required by ORS 183.310 to 183.550 confirming, altering or revoking its earlier order. * * ***

An emergency suspension order is not a notice of intent to impose a disciplinary sanction; it is a licensing action. Nor is an emergency suspension order a final order that results from a notice of intent to impose a disciplinary sanction.[(7)] Thus, disclosure of emergency suspension orders are not mandated by ORS 676.175(3).

676.175(1) prohibits disclosure of "information obtained by the board as part of an investigation * * * including complaints * * * and information permitting the identification of * * * licensees." This provision would prohibit disclosure of investigatory information about an identified licensee, including, presumably, the findings and reasons set forth in the emergency suspension order. Nevertheless, ORS 676.175(1) does not, by its terms, make information about the status of an individual's license confidential. Thus, the board would not appear to be prohibited from disclosing the fact that an individual's license has been suspended. This raises the question whether the board may disclose the caption and order portions of an emergency suspension order so long as the board deletes from that order any remaining information obtained as part of an investigation. *See Southwood Homeowners v. City Council of Philomath,* 106 Or App 21, 24, 806 P2d 162 (1991) (context of statutory scheme can reveal ambiguity when statutory provision, standing alone, appears to have clear meaning).

Neither the text and context of ORS 676.175 nor its legislative history answer this question. Therefore, we resort to the general maxims of statutory construction. *See PGE,* at 612. As between two plausible interpretations, a court will "refuse to adopt [that which] would lead to an absurd result that is inconsistent with the apparent policy of the legislation as a whole." *See State v. Vasquez-Rubio,* 323 Or 275, 283, 917 P2d 494 (1996). ORS 676.175 is apparently intended to protect the reputation of licensees by prohibiting disclosure of investigatory information that a majority of the board concluded was not sufficient to warrant issuance of a notice of intent to impose a disciplinary sanction nor included in a final order as a summary of the factual basis for the board's disposition. Nevertheless, even when a majority of the board votes not to issue a notice of intent to impose a disciplinary sanction, ORS 676.175(2) requires disclosure of the investigatory information if the public interest in disclosure outweighs other interests in nondisclosure by clear and convincing evidence.

When a board issues an emergency suspension order after making the requisite findings that a licensee poses a serious danger to the public health or safety, we believe that the public interest in disclosure of the fact that the licensee has been suspended outweighs by clear and convincing evidence any interests in nondisclosure. It would be "absurd" if the board were prohibited from disclosing to the licensee's employer or health care facilities in which the licensee practices, or to the patients of a licensee, the fact that his or her license to practice has been suspended. Accordingly, we conclude that ORS 676.175 does not prohibit a board from disclosing the fact that a licensee is subject to an emergency suspension order. The board may disclose the caption and order portions of an emergency suspension order so long as the board redacts the underlying information obtained as part of an investigation or contained in a complaint.

The investigatory information underlying the emergency suspension order is disclosable if a notice of intent to impose a disciplinary sanction that has been issued by a majority vote of the whole board recites such information. In such a case, the notice of intent would be disclosed under ORS 676.175(3), including all supporting allegations. *See* ORS 183.414(3)(d) (notice of proposed action must include statement of matters asserted or charged). Even if identical to the allegations in the notice of intent, that portion of the emergency suspension order containing the findings would remain confidential unless the emergency suspension order was incorporated by reference into the notice of intent.

C. Summary of Factual Basis for Board's Disposition

Finally, we are asked under what circumstances the final order, consent order or stipulated agreement in cases involving licensee or applicant conduct must summarize the factual basis for the board's disposition of the matter under ORS 676.175(4).

ORS 676.175(4) provides that "[i]f a notice of intent to impose a disciplinary sanction has been issued by a majority vote of a health professional regulatory board, a final order that results from the board's notice of intent to impose a disciplinary sanction or a consent order or stipulated agreement that involves licensee or applicant conduct shall summarize the factual basis for the board's disposition of the matter."

ORS 183.470 requires that a final order in a contested case, other than one incorporating an informal disposition, must be accompanied by findings of fact and conclusions of law and that the findings of fact must consist of a concise statement of the underlying facts supporting the findings as to each contested issue of fact and as to each ultimate fact required to support the board's order. This requirement applies to all final orders, irrespective of whether the order results from a notice of intent to impose a disciplinary sanction that was issued by a majority vote of the whole board; final orders that meet this requirement would also satisfy the requirement for a summary contained in ORS 676.175(4).

Final orders incorporating an informal disposition are not subject to ORS 183.470. ORS 183.415(5). Such final orders are also not subject to ORS 676.175(4)'s requirement for a summary unless the final order results from a notice of intent to impose discipline that was issued by a majority vote of the board.

ORS 676.175(4) requires all consent orders and stipulated agreements that involve licensee or applicant conduct to summarize the factual basis for the board's disposition, whether or not the consent order or stipulated agreement resulted from a notice of intent to impose a disciplinary sanction that was issued by a majority vote of the whole board.

We recommend that board staff contact their assigned legal counsel to assist in the preparation of findings of fact as required by ORS 183.470 and the summary of the factual basis for the board's disposition of the case as required by ORS 676.175(4). Board staff should also seek the advice of assigned legal counsel in assessing whether such findings or summary would be appropriate in final orders incorporating an informal disposition not subject to either ORS 183.470 or ORS 676.175(4).

5. Records Created Before Effective Date of the Act

ORS 676.165 and 676.175 became effective on October 4, 1997. Or Laws 1997, ch 791. We are asked whether the confidentiality provisions of ORS 676.165 and 676.175 apply to information received or records created before October 4, 1997, or only to information received or records created after October 4?

A. Investigator's Report and Information Obtained as Part of an Investigation

ORS 676.165(5) exempts from public disclosure investigatory information and "the report" issued by the investigator. This provision makes no distinction between reports issued before or after the effective date of this statute.

ORS 676.175(1) provides that the "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." The plain meaning of the term "obtained" includes both information previously obtained by the board (whether or not such information is contained in a record) and any information obtained by the board after the effective date of ORS 676.175. Had the legislature intended the confidentiality provisions to apply only to information obtained after the effective date of this statute, it could have expressly so provided.

In the absence of an explicit limitation on ORS 676.165(5) and 676.175, we conclude that these statutes apply to all investigatory information and investigator reports held by the board on the effective date of those statutes and to all such information and reports obtained in the future.

ORS 676.175(2) provides for the disclosure of information obtained as part of an investigation of an applicant or licensee under certain circumstances. For the reasons stated above, we conclude that this provision applies to information obtained by the board before the effective date of ORS 676.175 and to information obtained thereafter.

We note, however, that one of the conditions precedent to the board's duty to disclose under ORS 676.175(2) is a determination by a majority vote of the board that no notice of intent to impose a disciplinary sanction be issued regarding the licensee or applicant. As more fully explained above, in the absence of such a vote in a particular case, there is no obligation to disclose and the information must remain confidential.

We are informed that in the past the Board of Nursing has not voted to close cases following an investigation of a complaint of alleged licensee misconduct, but has delegated this function to staff. In such cases, since no board vote was taken regarding the initiation of disciplinary action, the condition precedent to disclosure is not satisfied, and the information obtained as part of an investigation in these closed cases must remain confidential under ORS 676.175(1).

We have no information regarding whether in the past any board has chosen not to vote on the issuance of licenses to applicants whose conduct has been the subject of an investigation, but has delegated the authority to staff to issue licenses. If there are any cases in which a majority vote of the whole board was not taken to approve the application, a condition precedent to disclosure would not be satisfied, and any information obtained by the board as part of an investigation in these cases in which the license has been granted must remain confidential under ORS 676.175(1).

B. Notice of Intent to Impose a Disciplinary Sanction

ORS 676.175(3) provides that the board shall disclose a notice of intent to impose a disciplinary sanction against a licensee or applicant that has been issued by a majority vote of the board. For the reasons stated above, we conclude that this provision applies to a notice of intent to impose a disciplinary sanction against a licensee and a notice of intent to deny an application issued by a majority vote of the whole board either before or after the effective date of ORS 676.175.

We are informed that in the past the Board of Nursing has generally not voted to issue either the notice of intent to impose a disciplinary sanction against a licensee or the notice of intent to deny an application and has instead delegated this function to staff. In such cases, since no board vote was taken regarding the initiation of disciplinary action or denial of a license, the condition precedent to disclosure of the notice is not satisfied and such notices issued by staff are not required to be disclosed. Rather, they must be held confidential under ORS 676.175(1).

Any notice issued by a majority vote of the quorum of the board but by less than a majority vote of the whole board is not required to be disclosed by ORS 676.175(3) and must be held confidential under ORS 676.175(1), whether issued before or after the effective date of the statute.

C. Final Orders, Consent Orders, Stipulated Agreements and Information to Further an Investigation under ORS 192.685

ORS 676.175(3) also provides that the board shall disclose a final order that results from the board's notice of intent to impose a disciplinary sanction, a consent order or stipulated agreement that involves licensee or applicant conduct,[(8)] and information to further an investigation into board conduct under ORS 192.685.

We conclude that final orders that result from a notice of intent to impose discipline must be disclosed (1) whether or not the notice was issued by a majority vote of the whole board and (2) whether or not the final order was issued before or after the effective date of the Act. We further conclude that consent orders and stipulated agreements that involve licensee or applicant conduct issued either before or after the effective date of ORS 676.175 must be disclosed.

We also conclude that when the GSPC seeks information from a board as part of an investigation conducted pursuant to ORS 192.685 regarding board compliance with ORS 192.660, the board shall disclose such information to the GSPC regardless of whether the events being investigated occurred before or after the effective date of ORS 676.175.

6. Information to Further an Investigation Under ORS 192.685

ORS 676.175(3) lists documents and information that the board must disclose despite the confidentiality granted to such information under ORS 676.175(1). Included in this list is "information to further an investigation into board conduct under ORS 192.685." We are asked what is meant by this phrase.

ORS 192.685 relates to the role of the Government Standards and Practices Commission (GSPC) in investigating allegations of the improper use of executive sessions by boards under the Public Meetings Law, ORS 192.610 to 192.710. Boards may meet in executive session, and thus exclude the public, only for the purposes listed in ORS 192.660. If an individual believes that a board improperly met in executive session or discussed items outside the authorized scope of an executive session, the individual may file a complaint with the GSPC. The GSPC is empowered to review and investigate such complaints. Specifically, ORS 192.685 permits the GSPC to interview witnesses and to review minutes and other records pertaining to the session, including those records that served as a basis for meeting in executive session. As a result, the GSPC becomes privy to information that is confidential and not subject to public disclosure. The GSPC needs access to such information to determine if the board that was the subject of the complaint has complied with the Public Meetings Law.

ORS 676.175(3) requires the boards to disclose information to further an investigation conducted pursuant to ORS 192.685. This would include information that would otherwise not be disclosed by virtue of ORS 676.175(1).[(9)]

7. Disclosure to Sister Agencies and Licensees

We are next asked whether ORS 676.165 and 676.175 prohibit the boards from disclosing information obtained as part of an investigation of a licensee or applicant: (a) to sister agencies within or without the state, to law enforcement agencies (including the district attorney, Attorney General and DEA), (b) to witnesses in the course of an investigation, and (c) to a licensee in the course of a contested case proceeding.

ORS 676.165(5) provides that investigatory information obtained by an investigator and the investigator's report "shall be exempt from public disclosure." ORS 676.175(1) provides that the boards "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." (Emphasis added.) The term "public" is not defined in ORS 676.165 or 676.175. Its common definitions includes "the people as a whole : populace, masses." Websters at 1836. From the entire context of ORS 676.165 and 676.175, we are confident that the legislature did not intend to prohibit disclosure to the populace as a whole while permitting disclosure to individual members of the public. The staff of state and federal agencies are individual members of the public as are witnesses and the licensee. Nevertheless, they each have a special relationship to the investigation of a licensee that might distinguish them from the public generally.

A. Disclosure to Sister Agencies and Law Enforcement Agencies

In reviewing other statutes that include confidentiality provisions that are "notwithstanding ORS 192.410 to 192.505 [the Oregon Public Records Law]," we have interpreted the prohibition on disclosure as applying only to disclosure to "the public" as mandated by the Public Records Law and not to disclosure to other state agencies. *See* 47 Op Atty Gen 1, 10 (1993) (interpreting ORS 279.359(3)). We find no basis for such a limited interpretation of the confidentiality provision in ORS 676.165 and 676.175. We conclude that ORS 676.165 and 676.175 prohibit the sharing of confidential information between agencies unless expressly authorized by statute.

Considering not only the text of ORS 676.165 and 676.175 but also their context, as required by *PGE*, 317 Or at 611, we note that in several instances where the existing organic statutes of several boards required or permitted disclosure of confidential information to other state agencies, those provisions were limited or deleted when ORS 676.165 and 676.175 were enacted. For example, until the passage of these statutes, the Board of Dentistry employees had been permitted to render assistance to the district attorney, and the Physical Therapist Licensing Board had been required to report all cases warranting criminal prosecution to the appropriate district attorney. Under ORS 679.180(1) and 688.220(1), as amended by SB 235, any cooperation with or reports to the district attorney are now subject to the non-disclosure requirements of ORS 676.175. Or Laws 1997, ch 791, §§ 26, 44. Thus, these two boards may not disclose any information they obtained as part of their own investigation of a licensee or applicant except as specifically permitted under ORS 676.175(2) and (3).

The Board of Medical Examiners (BME) is required to inform the district attorney of all facts that the BME believes could be a basis for criminal prosecution. ORS 677.320(1). Although that particular requirement was left intact, the legislature amended its companion statute, ORS 677.330, dealing with the use to which the information provided by BME could be used. Or Laws 1997, ch 791, § 20. Under ORS 677.330(1), as amended by SB 235, the district attorney may now bring to the attention of the grand jury only information that has been "independently developed" by the district attorney, the Attorney General or other law enforcement agencies and, thus, not the information provided by the BME.

Moreover, under ORS 677.425(3), the BME previously had authority to share confidential information with other state medical boards. That provision was deleted in its entirety by SB 235. Or Laws, 1997, ch 791, § 21.

We infer from these instances in which SB 235 amended or repealed previously existing statutes that required or permitted disclosure of information to the district attorney or to other boards, that the legislature intended the prohibition in ORS 676.165 and 676.175 on disclosure of investigatory information to the public to extend to such entities unless disclosure is expressly authorized by statute. Because this conclusion is not free from uncertainty, however, we look to the legislative history of ORS 676.165 and 6676.175.

As originally introduced, SB 235 specifically permitted state agencies to share confidential information obtained during the course of an investigation, stating in pertinent part:

> **(2)(b) Information that otherwise would be confidential under this section may be released to other health care profession or facility licensing authorities within or without the state, units of government responsible for licensing, franchising or providing emergency medical services to the extent the disclosed material could relate to those duties, a district attorney, the Attorney General and law enforcement agencies. * * ***

SB 235, § 2(2). The final version of SB 235, however, no longer contained this language.

When the legislature specifically rejects language in a proposed bill, an inference of negative intent may be drawn. *Southern Pacific Co. v. Heltzel,* 201 Or 1, 268 P2d 605 (1954). *Southern* dealt with the authority of the Public Utility Commissioner to establish minimum railroad rates under then existing law. The legislature considered and then rejected a bill that would have specifically permitted the Commissioner to do so. The Oregon Supreme Court found that by rejecting the proposed bill, the legislature expressed its intent that the Commissioner was not to be vested with that authority. Similarly, the deletion of the specific language in SB 235 permitting disclosure of confidential information to sister agencies may be viewed as a specific intent by the legislature to preclude disclosure to sister agencies as part of the Act's prohibition on disclosure of investigatory information. This conclusion is buttressed by the retention of language permitting the disclosure of information to the GSPC and the amendment or repeal of existing board statutes that had permitted sharing of confidential information.

As introduced, SB 235 permitted the disclosure of confidential information to the GSPC to further an investigation into board conduct. This section survived the legislative process and appears in ORS 676.175(3). It is significant that the portion of the original bill dealing with sister agencies was deleted while this section permitting disclosure of information to the GSPC was retained. If the legislature intended to permit the boards to release information to other state agencies, the legislature could have retained the original language permitting that, as it did with respect to disclosure to the GSPC.

Given the amendment or repeal of previously existing statutes that required or allowed interagency disclosure of confidential information and the deletion from the original bill of language specifically permitting such disclosure, we conclude that ORS 676.165(5) and 676.175 do not permit the sharing of confidential information among state agencies or with the district attorney or the Attorney General when functioning as a law enforcement agency, except as specifically authorized by statute.[(10)]

B. Disclosure to Witnesses

Generally, investigators talk to witnesses as part of the investigation into licensee or applicant conduct. Witnesses may include the complainant if the investigation was precipitated by a complaint. Witnesses are members of the public. Therefore, by their terms, ORS 676.165(5) and 676.175(1) would preclude the board from disclosing to witnesses any investigatory information or the investigator's report.

Often it will be necessary, however, for an investigator to provide certain information to witnesses in order for an interview to be productive. Such information may include the name of the applicant or licensee and the facts giving rise to the complaint being investigated. Because there is no explicit authorization in ORS 676.165 or 676.175 to disclose information to witnesses, the plain meaning of those statutes would require that all information obtained during the course of an investigation be withheld from witnesses. Taken to the extreme, such a conclusion could lead to the absurd result of the board being unable to conduct a complete and competent investigation. We do not believe that the legislature in enacting ORS 676.175 intended such a result. *Cf. State v. Vasquez-Rubio,* 323 Or at 283; *McKean-Coffman v. Employment Div.,* 312 Or 543, 549, 824 P2d 410 (1992) (courts must refuse to apply

language literally when to do so would produce an absurd result; instead, courts must interpret the statute "so that it is reasonable and workable and consistent with the legislature's general policy").

We interpret ORS 676.175, therefore, to allow a board and those conducting investigations on the board's behalf to disclose information to witnesses to the extent necessary to conduct a complete and competent investigation. For us to reach an alternative conclusion would imperil the boards' ability to adequately fulfill their licensure and disciplinary obligations as mandated by statute. This interpretation is not meant to imply that a board has carte blanche to disclose investigatory information to witnesses. For example, in questioning a patient about a particular licensee, an investigator need not, and may not, disclose the fact that a complaint has been filed against the licensee. Nor may the investigator disclose statements made by other witnesses about the licensee's conduct. The spirit of ORS 676.175 must be observed, and boards should instruct their investigators to ensure that only such information is disclosed to witnesses as is necessary for the investigator, on behalf of the board, to conduct an interview that will allow the witness to provide all information that he or she may possess relevant to the investigation.

C. Disclosure to Licensees

The licensee is also a member of the "public." Thus, by their terms, ORS 676.165(5) and 676.175(1) would not permit the board to disclose investigatory information or the investigator's report to a licensee. Moreover, because ORS 676.175(1) is also intended to protect from disclosure information "permitting the identification of complainants," we believe that a board is prohibited from disclosing to a licensee the name of the individual(s) who have filed complaint with the board about the licensee.

Notwithstanding the prohibition in ORS 676.175(1) against disclosure of information obtained as part of an investigation of a licensee or applicant, due process requires that in a contested case a licensee or applicant is entitled to be informed of the case against the licensee or applicant. *See* Or Const Art I, § 10; US Const Am XIV, § 1. This does not mean, however, that a board may turn over its entire investigative file to a licensee or applicant. Due process only requires that an individual be generally informed of the case against him or her, not given carte blanche to examine a board's confidential files. *Gregg v. Racing Commission*, 38 Or App 19, 588 P2d 1290 (1979); *Spray v. Board of Medical Examiners*, 50 Or App 311, 624 P2d 125 (1981). As the Court of Appeals stated in *Gregg*, "A party does not have a right to delve and pry into all the records of the agency, or to examine secret reports of the agency's investigators." 38 Or App at 26.

In practice, the due process requirement has been interpreted to mean that all reports, documents and information in the board's possession that the board intends to rely on during the contested case proceeding should be disclosed to the licensee or applicant during the contested case process. Confidential information contained in the board's files that will not be relied upon during the contested case proceeding need not be provided to the licensee or applicant. *Id.*

An individual who is the subject of a complaint but to whom a notice of intent to impose disciplinary action has not been issued should not be given confidential information on request. That should occur only after the notice has been issued as that is when the individual's due process rights come into play.

During the course of an investigation, it is often necessary to partially disclose some information in order to conduct an adequate investigation. For example, a licensee would necessarily need to understand what conduct is being called into question in order to answer questions posed by the investigator. We believe that ORS 676.175 was not intended to impede investigations and that in posing questions to a licensee the investigator may disclose to the licensee information obtained as part of the investigation to the extent that is necessary to conduct a complete investigation. We would caution, however, that any such use of confidential information must be as limited and circumspect as possible and may not identify the complainant(s).

8. Investigations and Report of Investigator

Question eight asks several questions about ORS 676.165, which relates to investigations and the report of the investigator. ORS 676.165 is triggered by the "receipt of a complaint by any person against a licensee or applicant." Upon receipt of such a complaint, ORS 676.165 requires the boards to assign an investigator, who must collect evidence and make a report to the board within 120 days after the board receives the complaint.

A. Complaint by Any Person

We are asked what is a "complaint by any person" for purposes of ORS 676.165 and whether it includes complaints from entities such as other boards. We first consider whether the reference to a "person" includes the board itself. If the board is a person, then an investigation that the board self-initiated would be subject to the strictures of ORS 676.165. Based on the text and context of ORS 676.165, we conclude that the board is not a person within the meaning of ORS 676.165.

The term "person" is not defined in ORS 676.165. Websters defines "person" as "an individual human being." *Id.* at 1686. Thus, based upon text alone, we would conclude that a board is not a person for purposes of ORS 676.165.

We also consider the context of ORS 676.165, which includes related statutes. Two related statutes are the Administrative Procedures Act (APA), ORS chapter 183, which governs agency administrative proceedings, and the Public Records Law, ORS 192.410 to 192.505, which governs the disclosure of public records and was amended by SB 235. The APA defines a "person" as

> **any individual, partnership, corporation, association, governmental subdivision or public or private organization of any character *other than an agency*.**

ORS 183.310(7) (emphasis added). We have interpreted the term "person" in the Public Records Law as excluding public bodies, as well. Letter of Advice dated June 26, 1987, to Wanda Clinton, Department of Revenue (OP-6049) at 8. Because these definitions are in statutes related to ORS 676.165, we believe they provide the context for interpreting that statute and that the term "person" should be construed consistent with its use in the APA and the Public Records Law. Accordingly, we conclude that for purposes of ORS 676.165, a "person" need not be a natural person and may be an entity as described in ORS 183.310(7), but that the board itself or any other state agency does not come within this term. Thus, cases initiated by the boards' own staff, investigators, board members, or investigated by another state agency that refers the case to one of the boards, would not be complaints by a "person," and the strictures of ORS 676.165 would not apply.[(11)]

We concluded above in response to question two that, for purposes of ORS 676.165, a "complaint" is an expression of resentment, protest or formal allegation about a licensee or applicant. Thus, a person's mere inquiry about a licensee or applicant would not trigger the 120-day requirement of ORS 676.165 even if the board begins an investigation of that licensee or applicant following the inquiry. To trigger ORS 676.165, a person must make a complaint to the board that expresses some protest, resentment, sense of injustice or formal allegation against a licensee or applicant.

1) Oral Complaints

We are asked whether the board must accept and investigate oral complaints. There is no requirement in ORS 676.165 that a complaint be in writing to trigger the requirements of ORS 676.165. If the legislature had wanted to require a complaint to be in writing, it could have easily added the word "written" in front of the word "complaint" in ORS 676.165(1). We may not add to the law that which the legislature left out, nor delete that which the legislature has put into the law. ORS 174.010.

The boards might wish to have written accounts of complaints about their licensees or applicants, and there is nothing wrong with asking for that to be done. A board may not refuse to conduct an investigation, however, merely because the complaint was made orally.

Some boards have specific statutes that require a written complaint or charges to be filed with the board. For instance, ORS 677.200(1) requires a written complaint in order for the BME to institute disciplinary action, and ORS 683.155(1) requires written charges to be filed with the Board of Optometry sufficient to warrant a hearing before imposing discipline. These statutes relate to the formal charges to be filed against a licensee and do not pertain to initial complaints by a patient, a consumer, another professional or anyone else against a licensee. In the absence of a statutory requirement, a written complaint is not a prerequisite to the board's duty to institute an investigation under ORS 676.165.

2) Investigations of Applicants When There Is No "Complaint"

We are next asked whether the 120-day requirement applies to investigations of applicants when there is no "complaint." As discussed above, ORS 676.165 applies only when the board receives a complaint from a person about an applicant or licensee. If the board institutes a routine investigation on an applicant for a license, the

timelines in ORS 676.165 would not apply.

ORS 676.165 could apply during the course of an application investigation if a person made a complaint to the board about, for example, the applicant's unfitness to be licensed. In that case, the "complaint" would trigger the requirements of ORS 676.165 for an investigation of the applicant.(12)

3) Notices of Potential Problems with a Licensee

We are also asked whether the 120-day requirement applies to investigations opened as a result of notice received by the board of potential problems with a licensee, such as a DEA notice that a licensee has a high prescription rate for controlled substances, a notice from an insurer pursuant to ORS 742.400, a news article that causes the board to initiate an investigation of a licensee, or a board's routine inspection of a pharmacy or mortuary that generates an investigation.

As discussed above, a complaint connotes some dissatisfaction or allegation of wrongdoing. The various types of "notice" described in this question do not appear to be complaints, but rather inquiries, reports or alerts, and the requirements of ORS 676.165(1)-(4) would not apply.(13)

Inquiries are commonly made by persons who have interests in professional licensing or in related areas, such as the DEA's tracking of controlled substances or an insurer's inquiry concerning the efficacy of a certain procedure or standard of care. Similarly, insurers are required to "report" medical malpractice claims and the resulting histories. Such inquiries and reports generally would not come within the meaning of the term "complaint," although it is possible for a complaint to accompany an inquiry or report.

When the board itself initiates an investigation because of a newspaper article or the board's routine practices, and no complaint by a person has been received, then ORS 676.165 is inapplicable by its terms.

B. Complaints Received before October 4, 1997

We are asked whether the requirements of ORS 676.165 apply to complaints received before October 4, 1997. ORS 676.165 took effect on October 4, 1997. Or Laws 1997, ch 791. There was no retroactivity clause in SB 235, and retroactive application of the 120-day requirement would make compliance impossible for complaints received more than 120 days before the effective date of ORS 676.165. Therefore, we conclude that the requirements of ORS 676.165 do not apply to complaints received before October 4, 1997.

C. Beginning of 120-day Period

We are next asked if the 120-day period starts when the complaint is received by board staff or when the members of the board review the complaint and assign it to the investigator at the board's next meeting. The 120-day period starts from the receipt of a complaint in the board's office. The "board" is both the agency itself and the composite of the individual members who sit on the "board." In ORS 676.160, the legislature defined "health professional regulatory board" as one of the listed state agencies. For purposes of ORS 676.160 to 676.180, the legislature did not distinguish the composite board members except in those provisions of ORS 676.175 that require a majority vote of the board. Therefore, we conclude that a complaint received by the agency staff has been received by the "board" whether or not an investigator is assigned.

The question implies that the board members review each complaint. We understand that many boards do not function in this manner but evaluate complaints as described below.

The staff reviews the complaint to determine if the allegations could constitute a violation of the statutes the board is charged with enforcing. Sometimes complaints are received concerning matters that are not subject to potential board action, e.g., a disputed bill for services that is not alleged to be fraudulent or misrepresented. In those instances, the complaint might be closed administratively by the staff. Because of the mandate in ORS 676.165 that, upon receipt of a complaint, the board "shall assign" an investigator, it would be prudent for the board to delegate to the administrator or other staff the authority to assign one or more staff persons to act as investigator of the complaint. There is no dispensation in ORS 676.165 for complaints that are not within the board's purview. Thus, an investigator must make a report to the board on all complaints even if the investigation is very limited.(14)

When the complaint appears to state allegations that do fall within the board's jurisdiction, we are informed that

boards generally assign either a staff member, a contractor, a member of the board, or some combination of those persons to be the investigator. In any case, the conditions of ORS 676.165 apply, and the investigator is charged with the duty to collect evidence, to interview witnesses and to make a report to the board within 120 days unless the investigation time is extended by the board.

D. Completion of Investigation and Investigator's Report

We are also asked whether the investigation must be complete within 120 days from the receipt of a complaint or whether the investigator may merely file a status report on the investigation within that time period. The text and context of the statute clearly suggest that the legislature intended the investigation to be completed as soon as reasonably possible. Although the investigator need not necessarily complete the investigation within 120 days (due to the extension clause in ORS 676.165(4)), we conclude that the investigator's report must be more than a mere status report.

The required report "shall describe the evidence gathered, the results of witness interviews and any other information considered in preparing the report" and must include any disciplinary history of the applicant or licensee. The report is intended to be a final report of the effort of the investigator and not a status report. If the investigator has not completed the investigation, the board may grant 30-day extensions for "just cause." Such a just cause provision would be virtually unnecessary had the legislature intended the 120-day requirement to be satisfied by a status report.

We look to the legislative history of ORS 676.165 to confirm this interpretation. *See Nolan v. Mt. Bachelor, Inc.*, 317 Or 328, 335, 856 P2d 305 (1993) (citing *State ex rel Juv. Dept. v. Smith*, 316 Or 646, 651, 853 P2d 282 (1993) ("where text of statute suggested a particular interpretation, court looked to legislative history of statute for confirmation"). The provisions of ORS 676.165 were not in SB 235 as introduced. In the first Proposed Amendments to Senate Bill 235, Sections 5 and 6 pertained to the creation and functions of an Office of Health Professional Regulatory Board Ombudsman within the Department of Human Resources. The proposed amendments directed that office to investigate cases in which a health professional regulatory board failed to take timely action on a complaint or failed to completely perform any duty imposed by law or by board rule.

Following the public hearings and work sessions, all references to the Ombudsman were dropped but the bill was amended to include the "timeliness" requirement for investigations in Section 5. SB 235 A-Eng, June 4, 1997. The bill was eventually passed by the legislature and signed by the Governor without further amendment to Section 5 or inclusion of the Ombudsman provisions. By all appearances, the conditions in Section 5, which was codified as ORS 676.165, ameliorated the perceived need for an oversight board or "watch-dog", and the legislature was satisfied that the public's "complaints" would be handled in a timely fashion if the investigations were completed within that statutory timeline.

E. "Just Cause"

We are asked what qualifies as "just cause" to extend the time period in which to file a report, and how the existence of "just cause" should be documented. "Just cause" is a legal term that means "[l]egitimate cause; legal or lawful ground for action; such reasons as will suffice in law to justify the action taken." Black's Law Dictionary at 775 (5th ed 1979). The reasons that would suffice in law for a board to justify extending the time for receipt of the investigator's report would likely include the following:

1) Complexity of the case (number of allegations, transactions, witnesses and documents),

2) Location of evidence (geographic distribution),

3) Unavailability of witnesses until a later time,

4) Pendency of other actions involving the licensee that could affect the investigator's ability to obtain evidence, and

5) Ability of the investigator to accomplish the task due to work load, health, vacation and similar factors.

If an investigator is unable to make the report in 120 days because of just cause, those reasons should be documented in the investigative file. That information should also be provided to the board for its consideration of a 30-day extension under ORS 676.165(4).

F. Authority to Grant a 30-day Extension

Next, we are asked whether the whole board must vote to grant a 30-day extension, or whether this decision can be delegated to a subcommittee of the board or to the board's executive director. ORS 676.165(4) states that the investigator shall make a report "to the board." This language could mean that the investigator must file a written report in the board's office within 120 days, or it could mean that the investigator must make a written or oral report to the board en banc no later than 120 days after the complaint was received in the board's office. As discussed above, we conclude from the text of ORS 676.160 to 676.180 that the legislature's use of the term "board" without reference to its members, or majority votes, means the agency listed in ORS 676.160. Although ORS 676.165 is clearly a limitation on protracted investigations, we find no basis to conclude that the legislature intended SB 235 to reallocate responsibilities between the agency and the appointed board members or to preclude those members from utilizing the expertise and administrative talents of agency staff.

If the legislature had intended to require a quorum of the board to receive the investigator's report or a majority vote of the board in order to grant each 30-day extension, the legislature could have so stated. Absent such statutory language, we conclude that a report filed with agency staff within 120 days will meet the investigator's statutory obligations, assuming that the governing body of the agency (usually a majority of the board members) delegates to a person or persons within the agency the authority to receive the investigator's report. Likewise, the board may delegate the decision to grant a 30-day extension for just cause to a person or persons within the agency.

G. Consequences for Not Filing Report Within Required Time

Finally, we are asked what the consequences are for not filing a report within the required time (within the initial 120-day period or within a 30-day extension period). The legislature provided no consequences if the investigation report is not made in a timely manner, and we cannot read one into the statute. ORS 174.010.

9. Assigned Investigator

Question nine asks whether the "investigator" must be a member of the health professional regulatory board, and whether a person who is not the "assigned" investigator may conduct any part of the investigation and make the report to the board. ORS 676.165 does not identify or limit who can be assigned as an investigator of the complaint, although that statute does provide for the possibility that more than one investigator could be assigned to the same complaint. ORS 676.165(1).

It is "the investigator" who must make the report to the board. ORS 676.165(4). Given the possibility that a board's investigative staff might change after beginning the investigation but before its conclusion, it would make sense for the board to delegate to a manager in the agency the authority to "assign" all investigators to the complaint, with one primary investigator. Then, if the primary investigator was unavailable at the time that the report is completed, one of the other assigned investigators could fulfill the obligation of making the report to the board. If the primary investigator is a board member, the other contingent investigator(s) could be other board members, staff or contract investigators, assuming that such assignments were made by the board itself or delegated to agency staff.

If a person has not been assigned as the investigator or as one of the investigators, then that person may not have the full investigatory powers given in ORS 676.165(2) and the resulting report may not be exempt from public disclosure under ORS 676.165(5). Any investigatory information contained in the report, however, would remain subject to the confidentiality requirements of ORS 676.175 so long as the person obtaining the information was doing so on behalf of the board. This should not be an issue if the investigator is a board or staff member. If the investigator is performing investigatory services under contract, the contractual language should make clear that any information obtained by the investigator while performing work pursuant to the contract will be considered to be information obtained directly by the board for purposes of ORS 676.165 and 676.175 and treated accordingly.

10. Exemption from Disclosure of Investigatory Information Under ORS 676.165

We are next asked whether ORS 676.165(5) conflicts with the disclosure requirements in ORS 676.175(2) and (3) and, if so, which prevails. ORS 676.165(5) states:

> **Investigatory information obtained by an investigator and the report issued by the investigator shall be exempt from public disclosure.**

Although ORS 676.175(1) requires the boards to "keep confidential and not disclose" to the public any

investigation information obtained by the boards, ORS 676.175(2) and (3) require disclosure of some of that information in certain circumstances, including disclosure of notices of intent to impose disciplinary action and final orders, which are required by ORS 676.175(4) to contain a summary of the factual basis for the board's disposition.

We conclude that the mandate in ORS 676.175(2) and (3) that the board "shall disclose" the information specified therein was intended to supersede the restrictions on disclosure in ORS 676.165(5). The entire statutory scheme of ORS 676.160 to 676.180 and the boards' own organic acts presume that the boards need to conduct investigations in order to determine if licensees or applicants are safe to practice in Oregon. It would be an absurd result to conclude that the board must assign one or more investigators to look into complaints but that whatever information was reported back to the board could not be included in a notice of intent to impose a disciplinary sanction, a final order, a consent order or a stipulated agreement because at some point some of that investigatory information would be subject to public disclosure under ORS 676.175(2) and (3).

We interpret ORS 676.165(5) to mean that, although the actual records of the investigator and the investigative report itself are not subject to disclosure, the investigator's work product may be used by the board to create a notice, order, agreement or fact summary contained therein that would be subject to public disclosure. Any other conclusion would mean that the board would have to investigate complaints but could not use the results of an investigation because it could lead to public disclosure of the "investigatory information" in violation of ORS 676.165(5). We decline to find that the legislature intended such a result.[(15)]

11. Hearings Before a Hearings Officer

We are asked whether the confidentiality provisions of ORS 676.165(5) and 676.175 require the public (and the news media) to be excluded if a hearing on a notice of intent to impose a disciplinary sanction on a licensee or a hearing on a notice to deny an application for licensure is held before a hearings officer. For the purposes of this question, we assume that the evidence and other testimony offered into evidence at the hearing was obtained by the board through an investigation and that the contested case involves licensee or applicant conduct.

ORS 676.165(5) exempts from disclosure investigatory information and the investigator's report. ORS 676.175(1) provides that the board must keep confidential and not disclose to the public any information obtained by the board in the investigation of a licensee or applicant, including complaints concerning licensee or applicant conduct and information permitting the identification of complainants, licensees or applicants. It is possible that evidence and other testimony offered at a hearing involving licensee or applicant conduct was not previously obtained during the investigation of the case. In regard to each of the boards covered by SB 235, that Act either expressly or by necessary implication provides that information the board obtains as part of a contested case proceeding is confidential as provided under ORS 676.165 and 676.175. *See, e.g.*, Or Laws 1997, ch 791, § 25 (express) and § 10 (implied). Any other interpretation would not only defeat the confidentiality obviously intended by the Act but also require a painstaking comparison of hearing testimony against statements obtained by the investigator(s) in order to determine whether the testimony provided any new information. Thus, we conclude that all of the testimony and other evidence offered in a hearing in a contested case is confidential and is not subject to public disclosure.

A contested case hearing before a hearing officer is not a public meeting of a governing body of a public body under the Public Meetings Law, ORS 192.610 to 192.710. Consequently, neither the public nor the press are legally entitled to attend. To permit either a member of the public or a representative of the media to attend a hearing before a hearing officer would be a violation of the confidentiality requirements of ORS 676.165 and 676.175.[(16)] We conclude therefore that the public and the media must be excluded from hearings before a hearing officer.

12. Hearings Before a Quorum of the Board and Deliberations

Question 12 asks about the attendance of the public and the press when hearings are held before a quorum of the board.

A. Executive Sessions

We are first asked whether the confidentiality provisions of ORS 676.165 and 676.175 require an executive session when a hearing on a notice of intent to impose a disciplinary sanction on a licensee or a hearing on a notice to deny an application for licensure is held before a quorum of the board. ORS 676.165(5) exempts from public disclosure investigatory information and the investigator's report. ORS 676.175(1) requires the board to 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. As noted above, we conclude that all testimony and other evidence offered in a hearing in a contested case is confidential and is not subject to public disclosure.

A contested case hearing held before a quorum of the board is a public meeting of a governing body of a public body under the Public Meetings Law.[(17)] Pursuant to ORS 192.630, all public meetings must be open to the public unless an executive session is authorized by law. ORS 192.660 was amended by SB 235 and now provides that an executive session may be held by the board "to consider information obtained as part of an investigation of licensee or applicant conduct." Or Laws 1997, ch 791, § 9. We conclude that this basis for an executive session includes consideration of testimony and other evidence obtained during the hearing in the contested case proceeding even if the information had not previously been obtained during the investigation of the case.

We further conclude that because of the confidentiality provisions in ORS 676.165(5) and 676.175, the board *must* hold the contested case hearing in executive session. There is no law authorizing the public to attend an executive session, and to permit a member of the public to attend a hearing before a quorum of the board would be a violation of the confidentiality requirements of ORS 676.165 and 676.175. Therefore, the public must be excluded from hearings before a quorum of the board.

B. Attendance by News Media

Given our answer to the above question, we are also asked whether a representative of the news media has the right to attend such a hearing conducted in executive session. SB 235 did not amend ORS 192.660(3), which authorizes representatives of the news media to attend executive sessions. Consequently, representatives of the news media are entitled to attend the hearing portion of a contested case proceeding held before a quorum of the board in executive session.[(18)] To conclude otherwise would require us to read into the Public Meetings Law a prohibition for media attendance at all executive sessions authorized by ORS 192.660(1)(f) to consider records that are exempt by law from public inspection under the Public Records Law because their disclosure is prohibited by other Oregon law. Such an interpretation would conflict with the express exclusion of the news media from only specified executive sessions. *See* ORS 192.660(3) and (4).

13. Board Deliberations

We are also asked whether a member of the public or a representative of the news media may be present when the board deliberates in a contested case proceeding. Following receipt of the testimony and other evidence at the hearing in a contested case, the hearing concludes and the members of the board proceed to deliberate the case. Meetings of board members to deliberate in a contested case are not covered by the Public Meetings Law or any of its requirements. ORS 192.690. Consequently, when the board meets to deliberate in a contested case, the board is free of the requirements to provide notice to the public, to meet in public, to keep meeting minutes and to permit the press to attend. We conclude that in contested cases involving information made confidential by ORS 676.175, the board must conduct its deliberations in private and it must exclude the press.

14. Board Meetings

The last set of questions concerns ORS 192.660 and the requirements for final action and minutes of board meetings.

A. Final Board Action

We are first asked whether ORS 192.660 permits the board to take a final vote in executive session. SB 235 amended the Public Meetings Law, ORS 192.610 to 192.710, to authorize the board to meet in executive session "to consider information obtained as part of an investigation of licensee or applicant conduct." ORS 192.660(1)(k). This new provision for an executive session leaves unaffected the provision of ORS 192.660(4) that "[n]o executive session may be held for the purpose of taking any final action or making any final decision."

ORS 192.660(1)(k) further provides that "the public disclosure of minutes, transcripts or recordings related to the substance and disposition of the matter investigated are governed by ORS 676.175," notwithstanding ORS 192.660(1)(b), 192.660(1)(c), 192.660(5) or 192.650. ORS 192.660(1)(b) authorizes an executive session when a board considers disciplinary matters regarding a board employee. This provision has no application to the board's actions

when considering applications for licensure or disciplinary action regarding a licensee of the board. ORS 192.660(1)(c) authorizes an executive session by the governing body of a public hospital. This statute has no application to any of the boards covered by SB 235. ORS 192.660(5) prohibits the holding of an executive session for the purpose of taking final action or making a final decision. This provision has no application to the issue of public disclosure of meeting minutes, transcripts or recordings of public meetings, whether the meeting is held in executive session or open session. ORS 192.650 concerns minutes of meetings, and we discuss this statute below.

None of the listed provisions provide any support for the conclusion that final action or final decisionmaking may be undertaken in executive session. The requirement to take final board action in open session does not conflict with making minutes, transcripts or recordings of such sessions subject to the confidentiality provisions of ORS 676.165 and 676.175, although those confidentiality provisions will likely alter the manner in which the board takes certain final votes, as discussed below. We conclude therefore that neither ORS 676.165 or 676.175 nor the amendments to ORS 192.660 altered the Public Meeting Law's prohibition against holding an executive session to take final action and that the boards may not take final action or make final decisions during an executive session of a public meeting.

B. Votes in Open Session and Preserving Confidentiality

In light of our conclusion that the board must take final action in open sessions, we are asked how the confidentiality provisions of ORS 676.165 and 676.175 require this to be done.

1) Decisions Whether to Issue Notice of Intent to Impose Discipline, Deny or Grant an Application

When the board convenes in open session for purposes of deciding whether or not to issue a notice of intent to impose a disciplinary sanction on a licensee, or for the purpose of deciding whether to issue a notice of intent to deny an application for licensure or to approve the application, the board may not openly discuss any investigatory information that is confidential under ORS 676.175. Moreover, we recommend that during the open session the board refer to the case by number only, and not disclose the name of the licensee or applicant or any other information that would permit the identification of the licensee or applicant. We make this recommendation for the following reasons.

First, if the motion to issue a notice of intent to impose disciplinary action or to deny an application fails, the confidentiality provisions of ORS 676.175(1) prohibit the disclosure of the name of the licensee or applicant. This information may be disclosed only under the provisions of ORS 676.175(2).

Second, if the motion passes and a notice is issued, the notice (including the name of the licensee or applicant) will only be disclosed under ORS 676.175(3) if the notice was issued by a majority vote of the whole board. If the vote was by majority of the quorum, but less than a majority of the whole board, it may not be disclosed.

Third, if the motion is to approve an application for licensure following an investigation of applicant conduct the board violates the confidentiality provisions of ORS 676.175(1) by naming the applicant in the motion. Such information is only subject to disclosure under ORS 676.175(2).

2) Decisions to Issue Final Orders

In our response to question four, we concluded that *all* final orders that result from a notice of intent to impose a disciplinary sanction on a licensee or from a notice of intent to deny an application for licensure must be disclosed under ORS 676.175(3). Because the final order, at the time it is issued, will include the name of the licensee, we conclude that disclosing the name of the licensee or applicant in the motion will not violate the confidentiality provisions of ORS 676.175. [(19)]

3) Decisions to Issue Consent Orders and Stipulated Agreements

We also concluded in our response to question four that all consent orders and stipulated agreements that involve licensee or applicant conduct must be disclosed under ORS 676.175(3). However, until a proposed consent order or proposed stipulated agreement has been approved by the board, it is not subject to disclosure under ORS 676.175(3). If a proposed consent order or proposed stipulated agreement is rejected by the board, the proposed consent order or proposed stipulated agreement remains confidential. Disclosure of the name of the licensee or

applicant in a motion to approve a proposed consent order or proposed stipulated agreement that is not passed would violate the confidentiality provisions of ORS 676.175. Of course, if the motion carries and the consent order or stipulated agreement is approved, disclosure of the name of the licensee or applicant by disclosing the consent order or stipulated agreement would not violate the confidentiality provisions of ORS 676.175. Because of the possibility that a proposed consent order or proposed stipulated agreement might be rejected by the board, we recommend that when voting in open session on a proposed consent order or proposed stipulated agreement, the board refer to the matter by case number, rather than by the name of the licensee or applicant.

C. Meeting Minutes

Finally, we are asked how ORS 676.175 affects the content and disclosure of board meeting minutes for executive sessions and open sessions. ORS 192.650(1) requires the board to provide for the taking of written minutes of all board meetings, which may be in the form of minutes, a recording or a transcript of the meeting. Minutes are required for meetings held in open session and for meetings held in executive session. ORS 192.650(1) also provides that all minutes shall be available to the public within a reasonable time after the meeting. However, ORS 192.650(2) provides that the board need not disclose executive session meeting minutes if their disclosure is inconsistent with the purpose for which the executive session was held.

ORS 192.660(1)(k) provides that "the public disclosure of minutes, transcripts or recordings relating to the substance and disposition of the matter investigated" under SB 235 "are governed by ORS 676.175." We conclude that this provision is consistent with ORS 192.650 and that the board is required to keep confidential and not disclose any part of its executive session meeting minutes that contain confidential information unless required to do so under the terms of ORS 676.175(2)or (3).

HARDY MYERS
Attorney General

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1. The health professional regulatory boards affected by Senate Bill 235 are: the Board of Examiners for Speech-Language Pathology and Audiology, Board of Chiropractic Examiners, Board of Clinical Social Workers, Board of Licensed Professional Counselors and Therapists, Board of Dentistry, Board of Denture Technology (and Health Division to extent it regulates the practice of denture technology), Board of Examiners of Licensed Dietitians, Board of Massage Technicians, Mortuary and Cemetery Board, Board of Naturopathic Examiners, Board of Nursing, Board of Examiners of Nursing Home Administrators, Board of Optometry, Board of Pharmacy, Board of Medical Examiners, Occupational Therapy Licensing Board, Physical Therapist Licensing Board, Board of Psychologist Examiners, Board of Radiologic Technology, Veterinary Medical Examining Board, and the Health Division to the extent that it certifies emergency medical technicians. ORS 676.160.

For ease of reference, we do not distinguish between the boards and the Health Division but refer to each of them as a "board," or collectively as "the boards," throughout this opinion.

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2. ORS 676.165 provides:

> *(1) Upon receipt of a complaint by any person against a licensee or applicant, a health professional regulatory board shall assign one or more persons to act as investigator of the complaint.*
>
> *(2) The investigator shall collect evidence and interview witnesses and shall make a report to the board. The investigator shall have all investigatory powers possessed by the board.*

(3) The report to the board shall describe the evidence gathered, the results of witness interviews and any other information considered in preparing the report of the investigator. The investigator shall consider, and include in the report, any disciplinary history of the licensee or applicant with the board.

(4) The investigator shall make the report to the board not later than 120 days after the board receives the complaint. However, the board may extend the time for making the report by up to 30 days for just cause. The board may grant more than one extension of time.

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

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3. 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 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.

(3) A health professional regulatory board shall disclose a notice of intent to impose a disciplinary sanction against a licensee or applicant that has been issued by a majority vote of the board, a final order that results from the board's notice of intent to impose a disciplinary sanction, a consent order or stipulated agreement that involves licensee or applicant conduct, and information to further an investigation into board conduct under ORS 192.685.

(4) If a notice of intent to impose a disciplinary sanction has been issued by a majority vote of a health professional regulatory board, a final order that results from the board's notice of intent to impose a disciplinary sanction or a consent order or stipulated agreement that involves licensee or applicant conduct shall summarize the factual basis for the board's disposition of the matter.

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4. Some kinds of information submitted by an applicant may be confidential under other applicable law. Examples of such confidential information includes medical, mental health or chemical dependency information. See, e.g., ORS 179.505, 430.399(5); 42 USC § 290dd-2. This kind of confidential information may be withheld from public disclosure under one or more of the exemptions of the Public

Records Law. See, e.g., ORS 192.502(2), personal privacy exemption; ORS 192.502(8), information the disclosure of which is prohibited by federal law; ORS 192.502(9), information made confidential or privileged under Oregon law.

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5. The minutes of the board's meeting should show the results of all votes and the vote of each member by name. ORS 192.650(1)(c).

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6. We understand that at least one board may have subdelegated to staff the authority to close files upon completion of an investigation, to issue a notice initiating disciplinary action against a licensee or to issue a notice initiating a proceeding to deny an application for licensure. Such subdelegation is not prohibited by SB 235. Whether such subdelegation is nevertheless permissible is beyond the scope of this opinion.

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7. If the licensee requested a hearing on the emergency suspension order, the resulting board order "confirming, altering or revoking" the suspension order would be a final order.

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8. Section 2(4) of SB 235 provides that if a notice of intent to impose a disciplinary sanction has been issued by a majority vote of the board, a final order that results from the board's notice of intent to impose a disciplinary sanction or a consent order or stipulated agreement that involves licensee or applicant conduct shall summarize the factual basis for the board's disposition of the matter. This requirement for a summary applies to all such final orders, consent orders and stipulated agreements issued after the effective date of the Act; it has no application to any final orders, consent orders or stipulated agreements issued before the effective date of the Act.

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9. Such information would remain confidential in the hands of the GSPC. ORS 192.502(10).

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*10. Disclosure is expressly authorized to GSPC by ORS 676.175(3) and to the district attorney under certain board statutes. See, e.g., ORS 686.260 (Veterinary Medical Examining Board "shall lay the facts [of the investigation] before the district attorney); ORS 687.890 (Board of Massage Technicians "shall report to the proper district attorney all cases that * * * warrant criminal prosecution"). A board that believes its statutes require disclosure to the district attorney may*

wish to confirm that interpretation with its assigned counsel.

Our conclusion that ORS 676.165(5) and 676.175(1) generally prohibit the disclosure of confidential information to sister agencies, law enforcement agencies and to the DEA does not mean that the boards may not use agents, such as contract investigators, and disclose information to those agents. In this regard, disclosure of confidential information to an assistant attorney general in the Department of Justice as legal counsel for the board in order to obtain legal advice would also be permissible. The boards must also comply with any relevant federal law requiring disclosure, e.g., to the National Practitioner Data Bank, 42 USC § 11132; 45 CFR § 60.8.

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11. Of course, any of the boards subject to SB 235 could make a complaint to another of the boards. Since the boards are agencies and therefore are not "persons" under ORS 676.165, however, a complaint by another board would not trigger the timelines and conditions found in that statute.

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12. Some boards have a practice of soliciting information about applicants and extending promises of confidentiality to such informants. Boards could assure the informant that the board will keep the information solicited as part of the investigation confidential under ORS 676.165(5) and 676.175(1), with the understanding that the information may necessarily be disclosed to the applicant, as a matter of due process, in the case of a license denial. Board of Medical Examiners v. Buck, 192 Or 66, 232 P2d 791 (1951), 200 Or 488, 258 P2d 124 (1953), appeal dismissed 346 US 919 (1954); Campbell v. Board of Medical Examiners, 16 Or App 381, 386-8, 518 P2d 1042 (1974).

In response to such a solicitation, the board may come into "receipt of a complaint" about the applicant from one of those persons. Consequently, boards may wish to evaluate their ability to conclude an investigation in a timely manner under ORS 676.165 if they have agreed to maintain the confidentiality of information provided by an informant and not to use such information in a subsequent contested case.

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13. As discussed above, information obtained as part of an investigation opened as a result of such notices would be subject to the nondisclosure requirements of ORS 676.165(5) and 676.175(1).

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14. In cases in which the board lacks jurisdiction over the complaint, the investigator's report generally would consist of a statement that a certain complaint had been received on a certain date and that it was closed administratively due to lack of jurisdiction over the subject matter.

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15. Nor are we willing to conclude that the notice of intent to impose a disciplinary sanction sent to a licensee should not fully comply with the requirements of ORS 182.415(2) or fail to contain any additional information that may be required by due process.

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16. Pursuant to ORS 192.660(3), representatives of the news media are entitled to attend an executive session of a public body. A hearing before a hearing officer is not an executive session of a public body, however, and ORS 192.660(3) does not apply.

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17. Although the Health Division is a public body, it is headed by a single agency administrator rather than a "governing body." Therefore, it is not subject to the Public Meetings Law.

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18. ORS 192.660(3) provides that the governing body may specify that information subject of the executive session not be disclosed by representatives of the news media. We recommend that such a directive be given to representatives of the news media who attend any of these executive sessions.

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19. We understand that the boards take a "straw vote" on a final order during executive session so that there is little possibility that a final order might be rejected by the board. If such a rejection were possible, we would recommend that when voting in open session on a final order, the board refer to the matter by case number, rather than by the name of the licensee or applicant. If the board votes to adopt the final order, the name of the licensee or applicant should then be disclosed.

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