HARDY MYERS
ATTORNEY GENERAL

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July 8, 2004

David P. Meyer
David P. Meyer, PC
621 SW Morrison Street, Suite 1300
Portland, OR 97205-3816

Re: *Petition for Public Records Disclosure Order*:
Board of Accountancy Records

Dear Mr. Meyer:

This letter is the Attorney General's order on your petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition, which we received on June 25, 2004,[1] asks the Attorney General to direct the Board of Accountancy ("Board") to make available "all public records relating to Harry H. Kyllo." For the reasons that follow, we respectfully deny your petition.

The Public Records Law confers a right to inspect any public record of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. Any person denied the right to inspect or to receive a copy of a public record of a state agency may petition the Attorney General to review the record and determine if it may be withheld. ORS 192.450. If a public record contains exempt and nonexempt material, the public body must separate the materials and make the nonexempt material available for examination if it is "reasonably possible" to do so while preserving the confidentiality of the exempt material. *Turner v. Reed*, 22 Or App 177, 186 n 8, 538 P2d 373 (1975).

We spoke to Carol Rives, Director of the Oregon Board of Accountancy, about your petition. Ms. Rives told us that the records subject to your petition may be divided between those that the Board has turned over to the Portland Police Bureau (PPB) and those that have not been disclosed to the PPB. We consider each group in turn.

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[1] We appreciate your extending the time within which the law would have otherwise obligated us to respond to July 8, 2004.

Your petition states that the Board denied your request on the basis of the records being exempt under ORS 192.501(3), which exempts from disclosure "[i]nvestigatory information compiled for criminal law purposes." Your petition also states that this exemption is inapplicable to the records you requested because the Board compiled them "in its regulatory capacity, during 2003 and early 2004, prior to any criminal investigation." However, this office has stated that the scope of the criminal investigatory exemption "extends to prevent disclosure of documents not originally created for, but later gathered for, criminal law enforcement purposes." ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 35 (2004) (AG'S MANUAL). Records compiled by a non-law enforcement agency, such as the Board, may be exempt from disclosure under ORS 192.501(3) if a law enforcement agency conducting a criminal investigation represents that public disclosure of the records would interfere with a pending or contemplated criminal prosecution. AG'S MANUAL 35.

According to Board Investigator Noela Kitterman, the Board contacted the PPB during its investigation of the first complaint it received against Mr. Kyllo and sent the PPB a copy of its investigative report.[2] Subsequently, the Board notified the PPB of additional complaints that it received against Mr. Kyllo, and the PPB asked the Board to provide it with information gathered on the new complaints. The Board sent this information and later sent PPB a copy of records related to a second administrative action that the Board initiated against Mr. Kyllo. Also, at the PPB's request, the Board recently forwarded additional information it had received from the firm that purchased Mr. Kyllo's business.

In relation to the Board's response to your request for records, Detective Sukimoto of the PPB informed the Board on June 22, 2004, that the PPB "has an ongoing investigation involving a Harry Nels Kyllo as the primary suspect in the theft of approx. $762K (so far), from multiple elderly victims." Detective Sukimoto has also informed the Board that, with one exception, disclosure of records by the Board could impede the PPB's investigation, or adversely affect its outcome."[3] Therefore, the records the Board has disclosed to the PPB in relation to its criminal investigations are exempt under ORS 192.501(3) "unless the public interest requires disclosure in the particular instance."

Your petition does not identify a public interest in the disclosure of these records, and, in this particular instance, we do not have a basis to conclude that the public interest requires disclosing information that is being used in an ongoing criminal investigation. Therefore, we deny your petition due to the requested records being exempt under ORS 192.501(3).

Among the records that the Board has not shared with the PPB are records that the Board is required to keep confidential under ORS 673.415(2).[4] Because the confidentiality of these records is protected by statute, they are exempt from disclosure under ORS 192.502(9).

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[2] This report formed the basis for the Board's initial administrative action against Mr. Kyllo.

[3] Detective Sukimoto informed the Board that the PPB does not object to the Board disclosing its initial notice of proposed civil penalty to take administrative action against Mr. Kyllo. The Board has agreed to disclose this record to you.

[4] ORS 673.415(2) authorizes the Oregon Department of Revenue to furnish the Board with a copy of the signature block of a tax return or report prepared by any person for another when the Board has reasonable grounds to believe the person preparing the return or report violated ORS 673.010 to 673.457 or a rule adopted thereunder.

Therefore, we deny your petition as it relates to these records. The remaining records in the Board's custody include Mr. Kyllo's licensing file records, Mr. Kyllo's firm licensing file records, and various communications. To the extent that these records contain information disclosed to the PPB, or provided by the Oregon Department of Revenue under ORS 673.415(2), they are exempt from disclosure for the reasons already specified. The Board has agreed to disclose to you the remainder of the records, with exempt information redacted as necessary, as well as the notice of proposed civil penalty identified in footnote 2 of this Order. Therefore, with respect to the nonredacted portions of the records, which the Board has agreed to disclose to you, we deny your petition as moot.

For these reasons, we deny your petition to compel disclosure.

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

AGS14274
c: Carol Rives, Director, Board of Accountancy