HARDY MYERS
ATTORNEY GENERAL

PETER D. SHEPHERD
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
1162 Court Street NE
Justice Building
Salem, Oregon 97301-4096
Telephone: (503) 378-4400
TTY: (503) 378-5938

January 3, 2001

Bert Teamey, D.D.S.
3605 Seutter Place
Klamath Falls, OR 97603-9455

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

Dear Dr. Teamey:

This letter is the Attorney General's order on your petition for disclosure of records under the Public Records Law, ORS 192.410 to 192.505. Your petition, which we received on December 21, 2000, asks the Attorney General to direct the Oregon Board of Dentistry (board) to produce:

1. All public records with the Oregon Board of Dentistry pertaining to case No. 1990-0100.
2. All public records requested by me in a letter to the Oregon Board of Dentistry, dated November 6, 2000.

The first item in your petition seeks all of the board's public records pertaining to case No. 1990-0100. We note that your letter to the board dated November 6, 2000, seeking the disclosure of public records, contains no such request. Because you have not requested these records from the board and the board has had no opportunity to consider your request, we deny this portion of your petition as premature.

The second item in your petition seeks all public records requested by you in a letter to the board dated November 6, 2000. In that letter you sought the disclosure of the following five categories of records:

1. Copy of the original complaint against me, dated May 10, 1988.
2. Copies of all written notes plus tapes of telephone conversations between Ron Short, and both or either, Paul Kleinstub, and Jane Edwards.

3. Copy of the note by Paul Kleinstub, dated July 23, 1990, where Ron Short states: 'He also stated Dr. Teamey threatened him by warning "Don't sleep too close to the wall."'

4. Copy of the tape recording dated April 5, 1991, where the Oregon Board of Dentistry passed judgement on my dental license.

5. All documents, notes, telephone conversations, tapes with persons known and unknown to me, previously kept confidential under an executive privilege, concerning, Jane Edwards.

For the reasons that follow, we respectfully deny your petition.

As required by ORS 192.450(4), you sent to the board a copy of your petition for a public records disclosure order on or before filing it with this office, and the board notified the licensee of his right to file a response to your petition with our office. We have received no response from the licensee.

The Public Records Law confers a right to inspect public records of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. A person who is denied the right to inspect or receive a copy of a public record from a health professional regulatory board, such as the board,[1] may petition the Attorney General to review the record to determine if it may be withheld from public inspection. ORS 192.450(1).

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

> The person seeking disclosure of any public record of a health professional regulatory board, as defined in ORS 676.160, that is confidential or exempt from disclosure under ORS 676.165 or 676.175, shall have the burden of demonstrating to the Attorney General by clear and convincing evidence that the public interest in disclosure outweighs other interests in nondisclosure, including but not limited to the public interest in nondisclosure. * * *

ORS 192.450(5).

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

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[1] The term "health professional regulatory board" is defined as including the Oregon Board of Dentistry. ORS 676.160(5).

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

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

ORS 676.175 provides in relevant part:

> (1) A health professional regulatory board shall keep confidential and not disclose to the public any information obtained by the board as part of an investigation of a licensee or applicant, including complaints concerning licensee or applicant conduct and information permitting the identification of complainants, licensees or applicants.
>
> (2) Notwithstanding subsection (1) of this section, if a health professional regulatory board votes not to issue a notice of intent to impose a disciplinary sanction:
>
> (a) The board shall disclose information obtained as part of an investigation of an applicant or licensee if the person requesting the information demonstrates by clear and convincing evidence that the public interest in disclosure outweighs other interests in nondisclosure, including but not limited to the public interest in nondisclosure.
>
> (b) The board may disclose to a complainant a written summary of information obtained as part of an investigation of an applicant or licensee resulting from the complaint to the extent the board determines necessary to explain the reasons for the board's decision. An applicant or licensee may review and obtain a copy of any written summary of information disclosed to a complainant by the board after the board has deleted any information that could reasonably be used to identify the complainant.

Under this statute, the board must keep confidential and not disclose any information that it obtains as part of an investigation of a licensee. There is an exception to this prohibition on disclosure, however, when the board determines by majority vote *not* to impose a disciplinary sanction.[2] In that case, the board must disclose such information if the person requesting the information demonstrates by clear and convincing evidence that the public interest in disclosure outweighs other interests in nondisclosure, and the board may disclose a written summary of the investigation information to the complainant, and provide a copy (with certain information redacted) to the licensee. ORS 676.175(2).

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

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

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With respect to the first record you seek, a copy of the complaint concerning your conduct as a licensee, that document is expressly made confidential by ORS 676.175(1). The exception in ORS 676.175(2) that would permit disclosure has not been met because the board voted to issue a notice of intent to impose a disciplinary sanction against you. Thus, the complaint that resulted in disciplinary action is confidential. Even though you are the licensee who is the subject of the complaint, there is no exception that would permit disclosure to you of records made confidential by ORS 676.175(1) when the board has voted to issue a notice of intent to impose a disciplinary sanction.

With respect to the second category of records you seek, we assume that you are seeking only notes or tapes of telephone conversations that might have concerned you or the investigation of the complaint concerning your conduct. We are advised by Jo Ann Bones, Executive Director of the board, that no tapes exist as described in your request. This office cannot order the board to disclose records that do not exist. Because the board voted to issue a notice of intent to impose a disciplinary sanction, any other records within this category are confidential under ORS 676.175(1).

With respect to the third category of records you seek, because the board determined by majority vote to issue a notice of intent to impose a disciplinary sanction, the record is confidential under ORS 676.175(1).

With respect to the fourth category of records you seek, we are advised by Ms. Bones that no tape exists as described in your request. This office cannot order the board to disclose records that do not exist.

We have discussed with Ms. Bones the fifth category of records you seek and have been advised that the board is unable to understand your request and is, therefore, unable to identify any records to which your request pertains.[3] Moreover, Ms. Bones states that the board has no systematic means of determining whether records concerning Ms. Edwards were "previously kept confidential under an executive privilege," and, if so, what those records might have been. In light of the board's inability to identify any records to which your request applies, this office cannot issue an order requiring disclosure. We note, in this regard, that nothing in this order precludes you from making a further request of the board with any necessary and appropriate clarification.

We therefore find that to the extent the records you seek in categories #1, 2 and 3 exist, they are confidential under ORS 676.175 and exempt from disclosure under ORS 192.502(9). To the extent the records you seek do not exist or cannot be identified, this office has no authority to order disclosure. Accordingly, we respectfully deny your petition.

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[3] Although the Oregon Public Records Law has exemptions from public disclosure for numerous type of records or information, this office is not aware of any "executive privilege" that would permit records to be kept confidential.

You conclude your petition by requesting that you be provided with a written explanation regarding certain matters from a member of the Oregon Board of Dentistry. Your request is for the creation of a public record and not for the disclosure of a currently existing record. The Public Records Law does not impose a duty on public bodies to create public records, and this office cannot order an agency to do so. *See* ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (1999) at 5.

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

AGS06244
c: Jo Ann Bones, Executive Director, Oregon Board of Dentistry