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May 19, 2009

George A. Miller
61873 Fall Creek Loop
Bend, OR 97702

Re: Petition for Public Records Disclosure Order:
*Veterinary Medical Examining Board Records*

Dear Mr. Miller:

This letter is the Attorney General's order on your petition for disclosure of records under the Public Records Law, ORS 192.410 to 192.505. Your petition, which we received on May 6, 2009, asks the Attorney General to direct the Veterinary Medical Examining Board ("Board") to produce "all documentation relating to their investigation of the death of [your] companion animal." For the reasons that follow, we respectfully deny your petition.

Your August 12, 2008 letter to Lori Makinen, the Board's Executive Director, specifically requests "any and all documents that discuss or in any way pertain to" the Board's investigation of Deborah LePaugh, DMV ("licensee"). Your request specified a number of items within its intended scope:

1. All mailed documents.
2. All notes taken by examiners, investigators and all involved in the investigative review process.
3. All examining board minutes since [your] complaint [about licensee] was filed.
4. All records of telephone and cellular phone conversations.
5. All email records.
6. All instant message records.
7. All guidelines and manuals used in the investigative and review process.

8. All records of Oregon Veterinary Medical Examining Board membership since [your] complaint was received on October 23, 2007.

Letter of August 12, 2008 at 1.

Ms. Makinen, the Board's Executive Director, informs us that the investigation file consists of your complaint concerning licensee and the records from the Board's investigation of that complaint. Ms. Makinen informs us that the Board voted not to issue a notice of intent to impose a disciplinary sanction against the licensee. Ms. Makinen responded to your request for records on September 26, 2008, providing you with a copy of the Board membership roster, the guideline used for the investigative process, which is ORS chapter 676, and information about the Board's investigator. She has also agreed to provide you with a copy of all Board minutes subsequent to October 23, 2007 and public documents issued subsequent to October 23, 2007 for disciplinary cases.[1] Ms. Makinen denied your request for the other documents concerning this matter on the basis that they are confidential under ORS 676.175(1).

The Public Records Law confers a right to inspect public records of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. A person who is denied the right to inspect or receive a copy of a public record from a health professional regulatory board, such as the Veterinary Medical Examining Board,[2] may petition the Attorney General to review the record to determine if it may be withheld from public inspection. ORS 192.450.[3]

Generally, the Public Records Law imposes 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 fall under an exemption. ORS 192.450(1), 192.490(1). With respect to certain records of a health professional regulatory board, however, the burden is shifted to the petitioner:

> The person seeking disclosure of a 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

[1] The Board will charge you the standard fees for providing the public records.

[2] The term "health professional regulatory board" is defined as including the Veterinary Medical Examining Board. ORS 676.160(19).

[3] By law, a person petitioning for a Public Records Order requiring disclosure of records in the custody of a "health professional regulatory board" that "contain[] information concerning a licensee or applicant" is required to provide a copy of the petition to the affected board. ORS 192.450(4). The board is then required to pass the petition along to the affected licensee or applicant, and that individual may provide the Attorney General with a statement of reasons why the record should not be disclosed. *Id.* In this case, it does not appear that you complied with ORS 192.450(4), and consequently licensee has not had the opportunity to provide a statement of reasons why the records should not be disclosed. In light of our conclusion that you have failed to provide "clear and convincing evidence that the public interest in disclosure outweighs other interests in nondisclosure," licensee has not been prejudiced, and we therefore proceed as though the statutory procedures were properly followed.

> in disclosure outweighs other interests in nondisclosure, including but not limited to the public interest in nondisclosure.

ORS 192.450(5). The information that you have requested is confidential under ORS 676.175, as we explain below. Consequently, ORS 192.450(5) governs your petition.

ORS 676.175 generally obligates the board to treat information it obtains during the course of an investigation as confidential:

> (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. * * *

Insofar as your request has been denied, the records you have requested were obtained pursuant to the Board's investigation of a licensee, and therefore fall squarely within the ambit of ORS 676.175.

That statute provides an exception to its general confidentiality requirement in circumstances where the Board votes not to impose a disciplinary sanction. In that event, investigatory information must be disclosed *if* the person requesting the information demonstrates by clear and convincing evidence that the public interest in disclosure outweighs interests in nondisclosure. If the requester fails to make that showing, however, the Board cannot disclose the investigatory information. Whether or not the person requesting the information makes the required showing, the Board is authorized, but is not required, to disclose to the complainant a written summary of the investigatory information to the extent the Board determines necessary to explain the reasons for the Board's actions.[4]

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[4] In a letter from Ms. Makinen dated July 14, 2008, the Board explained to you its decision not to issue a notice of discipline in the case.

Because the records you seek consist of information obtained as part of the investigation of a licensee and the Board voted not to impose a disciplinary sanction against the licensee, the records are confidential and may not be disclosed unless you demonstrate by clear and convincing evidence that the public interest in disclosure outweighs other interests in nondisclosure. Your request to the Board makes five arguments concerning the public interest in disclosure of the investigatory file:

1. "Disclosure better assures the public that complaints are fairly administered and the rights and interests of the public are protected."
2. "The loss and tragedy of [your] companion animal's death as property of an Oregon citizen demands adequate evidence of a comprehensive investigation."
3. "[Your] family's rights as Oregon citizens require that [your] request for information * * * be given superior standing to a clearly procedural nondisclosure practice * * *."
4. "[P]olicy objectives of guaranteeing citizens reasonable expectations of fair treatment and justice are not met by procedural nondisclosure."
5. "If extensions of investigative time [beyond the statutorily-prescribed 120-day period] were given the public deserves to know the nature of that just cause."

Letter of August 12, 2008 at 2.

Your first, third and fourth arguments are general policy arguments. They support the position that the public interest in disclosure of records protected by ORS 676.165 and 676.175 will usually outweigh any interests in nondisclosure. You do not explain, and we do not perceive, any way in which these arguments apply uniquely to the present circumstances. Whatever we might think of the merit of these arguments, the legislature has made the contrary policy determination by requiring that petitioners demonstrate "by clear and convincing evidence that the public interest in disclosure outweighs other interests in nondisclosure," ORS 192.450(5), and by making such information generally confidential, ORS 676.165(5) and 676.175(1). These statutory provisions demonstrate the legislature's view that interests in nondisclosure should generally prevail over interests in disclosure with respect to records that are confidential under ORS 676.165 and 676.175. In view of the legislature's binding resolution of this policy question, we cannot accept your policy arguments.

Your second argument describes your family's loss of the companion animal, which you describe as "property" of an Oregon citizen. Although the documents you are seeking might shed some light on your family's loss of the companion animal, that possibility represents a personal interest in disclosure of the records and not a public interest. The Oregon Court of Appeals has explained that, in the Public Records Law context, the term "public" means that the "focus is on the effect of the disclosure in general, not disclosure to a particular person at a

particular time." ***Morrison v. School District No. 48***, 53 Or App 148, 156, 631 P2d 784 (1981). We understand that this personal interest is very important to you. But because the law requires you to demonstrate *public* interest in disclosure, we are unable to consider it in reaching our decision.

Finally, you claim that the public interest in disclosure outweighs the interests in nondisclosure because the Board's inquiry took longer than the 120 days you believe ORS 676.165 permits. That statute allows 120 days for the Board's investigator to provide an investigative report to the Board, and permits the Board to extend that time "for just cause." ORS 676.165(4). However, the statute does not require that the Board make its decision within any fixed time, and we have been unable to discern any other statutory timeframe by which we could conclude that the overall process was unduly – or even unusually – slow. Even if we assume that the investigator's report was not delivered within 120 days, the statute clearly contemplates the possibility that the timeframe may be repeatedly extended. We cannot think that the Board loses the ability to protect otherwise confidential information it gathers about licensees and applicants simply by making use of this statutorily-authorized procedure.

In sum, we find that you have not demonstrated by clear and convincing evidence that the public interest in disclosure of the records you seek outweighs interests in nondisclosure. Absent such a showing, the records you seek are confidential under ORS 676.175 and may not be disclosed. We must respectfully deny your petition.

Sincerely,

MARY H. WILLIAMS
Deputy Attorney General

DM1400883
Enclosure
c: Lori Makinen, Veterinary Medical Examining Board