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November 7, 2008

Frank T. Mussell, P.C.
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Re: Petition for an Order Requiring Disclosure of a Public Record/Work Plan:
Oregon State Board of Nursing

Dear Mr. Mussell:

This letter is the Attorney General's order on your petition for a review of the denial by the Oregon State Board of Nursing (the board) of your request for a "work plan prepared by Ms. [Carolyn] Reuteler's former employer, Regency Hermiston, during the time of her employment." The board denied your request based on ORS 676.175. We received your petition for review of the board's determination on October 24, 2008. In your petition, you argue that ORS 676.175 does not apply to your request for the record on behalf of Ms. Reuteler: "Because Ms. Reuteler is a licensee subject to the complaint in question, she is not a member of the public to which confidentiality provisions of ORS 676.175 apply." As support for that argument, you cite ***Shank v. Board of Nursing***, 220 Or App 228, 185 P3d 532 (2008). You also argue that "the work plan cannot be considered confidential as to Ms. Reuteler since her former employer presented it to her for review and signature." For the reasons that follow, we respectfully deny your petition.

First, we reject your suggestion that the rule announced in ***Shank*** applies to Ms. Reuteler. The ***Shank*** court indicated that its ruling applied to licensees or applicants involved in ongoing contested case proceedings:

> [T]he information that is subject to the statute can be properly communicated to *a limited class of persons who are involved in the proceeding* * * *. [I]t appears that the words 'the public' do not include a licensee or applicant *who has received a notice of intent to impose a disciplinary sanction.*

220 Or App at 242 (original emphasis removed; emphasis added). The narrow scope of this holding is emphasized by the court's repetition of it. For example, the court states that "'the public' [in ORS 676.175(1)] does not include an applicant or licensee *in a contested case proceeding*." 220 Or App at 243 (emphasis added). And its ultimate conclusion is likewise explicitly limited:

> [W]e conclude that the legislature did not intend the requirements that the board "keep confidential" and "not disclose to the public" any information obtained in the course of its investigation of an applicant or licensee to limit the board's disclosure of that information to the applicant or licensee *in the course of a contested case hearing*. * * * [A]n applicant or licensee *who is facing a disciplinary sanction in a contested case hearing* is not, for the purposes of that statute, a member of the public.

220 Or App at 244-245 (emphasis added). Although an investigation of Ms. Reuteler commenced in August of 2008, the investigation has not progressed to the Board for a decision regarding the issuance of a notice of intent to impose disciplinary sanctions; there is no ongoing contested case proceeding. As a result, the holding in ***Shank*** does not, by its terms, apply to Ms. Reuteler.

We must therefore determine whether a licensee under investigation, such as Ms. Reuteler, is entitled to inspect documents from the board's investigative file. In addressing this question, we are mindful of ***Shank***. But because that case does not directly speak to this issue, our task is primarily one of statutory interpretation. Statutory interpretation in Oregon is governed by the methodology announced in ***Portland General Electric Co. v. Bureau of Labor and Industries***, 317 Or 606, 859 P2d 1143 (1993). The objective is to give effect to the intent of the legislature. Our analysis begins with text and context, which provide the best evidence of intent. In considering the text, we give words of ordinary usage their plain meaning. Context includes other sections of the same statute. *See* ***PGE***, 317 Or at 610-612. Considering the text and context of ORS 676.175, we conclude that the contents of the board's investigative file are exempt from disclosure to Ms. Reuteler at this time.

We acknowledge that the text of ORS 676.175(1) considered in isolation may be ambiguous. In construing that section, the ***Shank*** court noted that

> The fact that the statute employs separate terms to describe various groups of persons--without any indication that the public is intended to encompass the other separately identified individuals (applicants, licensees, and complainants)--suggests that those separately identified groups are distinct from the public for purposes of the statute.

220 Or App at 242. These statements are grounded in the text of ORS 676.175(1), which has not changed. Although this reasoning could extend to a licensee under investigation (or, indeed, to any licensee whatsoever), the holding in ***Shank*** does not compel that extension. And much of the reasoning in ***Shank*** focused on the need to have access to records within the context of a

contested case proceeding that could result in the imposition of sanctions. See 220 Or App at 243-244. That concern is not present until the board decides to pursue disciplinary action.

In any event, text is not properly considered in a vacuum, but in context. In our view, the context provided by ORS 676.175(2) and (3)[1] make it clear that a licensee under investigation is not entitled to inspect the contents of the board's investigatory file.

In its current form, ORS 676.175 contains three relevant provisions: a general rule of confidentiality in subsection (1); conditional rules of disclosure in subsection (2); and a mandatory rule of disclosure in subsection (3). The conditional rules of disclosure apply if the board decides not to pursue disciplinary action. The mandatory rule of disclosure applies if the board issues a notice of intent to impose a disciplinary sanction. In other words, an applicant or licensee will have some degree of potential access to the investigatory records following the board's decision, with the extent of that access dependant on which decision has been made. This context indicates that a licensee or applicant under investigation is not entitled to inspect the investigatory file.

There is no reason to think that the legislature intended the odd result that would flow from a contrary conclusion. Under your proposed interpretation of the statutory scheme, an applicant or licensee would have apparently unfettered access to the investigatory file before the board decided whether to issue a notice of intent was issued, but only restricted access following that decision. *Compare*, ***Shank*** 220 Or App at 245-246 (suggesting that plaintiff in that case could have access to information identifying complainants), with ORS 676.175(2)(b) (licensee or applicant may obtain some documents "after the board has deleted any information that could reasonably be used to identify the complainant") and ORS 676.175(3)(b) (prohibiting disclosure of information identifying complainants in the context of contested case proceedings). We can neither discern nor imagine that the legislature intended to decrease the level of access to the investigatory file once the board decided either to pursue or to forego disciplinary action.

Such strange asymmetry would be inconsistent with the reasoning in ***Shank***. The court noted that adopting an interpretation contrary to the one the court settled on would "produce a bizarre result" in that an applicant or licensee could potentially have more information if the board decided not to pursue disciplinary action than would be available to defend against disciplinary action actually prosecuted by the board. 220 Or App at 244. As we have seen,

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[1] *Current* ORS 676.175(3) was enacted in 2005. 2005 Or Laws ch 801 § 1. Because the ***Shank*** court was construing ORS 676.175 as it existed in 2003, the court did not consider *current* ORS 676.175(3) as context. *See* 220 Or App at 232, footnote 2. However, the court was aware of the 2005 amendments. Its discussion of the amendments comes in a footnote to the court's description of the "bizarre result" that would follow from permitting some access to investigative files when disciplinary action was not pursued by the board, but allowing no access "to defend against allegations made in a contested case proceeding." 220 Or App at 244. Specifically, the court says, "We note that, in 2005, the legislature specifically addressed the disclosures that [must be made] to a licensee or applicant after issuing a notice of intent to impose a disciplinary sanction." 220 Or App at 244, footnote 12. As that note suggests, the amendment specifying particular disclosures to applicants and licensees after the issuance of a notice of intent is consistent with the court's determination that licensees and applicants in that situation are not members of the public for purposes of the confidentiality statute. Our discussion shows that the 2005 amendment indicates the opposite conclusion with respect to licensees and applicants such as Ms. Reuteler who are not in that situation.

excluding licensees and applicants under investigation from the general confidentiality provision of ORS 676.175(1) would produce a very similar result.

We therefore conclude that licensees or applicants who are under investigation, such as Ms. Reuteler, fall within the confidentiality rule of ORS 676.175(1). We turn to your contention that the work plan you have requested cannot be confidential as to Ms. Reuteler because she signed the document in question after her former employer presented it to her. By its terms, ORS 676.175(1) applies to "information obtained by the board as part of an investigation of a licensee or applicant." It does not provide an exception for documents that the requesting individual may have access to through other means, and we are not permitted to insert what the legislature has omitted. ORS 174.010. We note that such an exception would seem difficult to apply; individuals could always assert alternative access, and those assertions might not be readily provable or disprovable. Instead, the statutory rule establishes a generally applicable rule of confidentiality, subject to statutory qualifications. We think this structure contemplates that documents not otherwise confidential become confidential insofar as they are part of the board's investigative file.

For the reasons above, we conclude that documents contained in the board's investigative file are confidential under ORS 676.175(1), even as to Ms. Reuteler, until the board either issues a notice of intent to impose discipline on Ms. Reuteler or else votes not to issue such a notice. After that decision has been made by the board, the materials in the investigative file will be governed either by ORS 676.175(2) or by ORS 676.175(3), as appropriate. In light of these conclusions, we respectfully deny your petition.

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

DM1103358-v3
c: Linda Fisher-Lewis, Oregon State Board of Nursing