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February 28, 1996

Dr. Matthew Gruber
Organization for Fairness in Medical Practice
P.O. Box 1004
Salem, OR 97308

Re: ***Petition for Public Records Disclosure Order: Board of Medical Examiners Records***

Dear Dr. Gruber:

This letter is the Attorney General's order on your petition for disclosure of records under the Oregon Public Records Law, ORS 677.192.410 to 192.505. Your letter, which we received on February 21, 1996, states that you are making a "formal complaint" about violations by the Board of Medical Examiners (board) of both the meetings and records laws. Although this office has no jurisdiction over the Public Meetings Law, the Attorney General has the authority under the Public Records Law to order state agencies to disclose nonexempt public records. Accordingly, to the extent your letter alleges a denial by the board of a request for specific records, we believe it is appropriate for us to treat those portions of your letter as a petition to the Attorney General for disclosure of records under the Public Records Law. In items numbered 3, 6, 7 and 12, you allege a refusal by the board to provide certain records:

3. Refusal by BME staff to supply meeting agenda on date of meeting because the agenda is part of the Board's "working" material and not available for the media or the public (meeting of 1/19/96).

6. Copies of minutes of October 1995 quarterly meeting not made available to press or public when read and approved at January 1996 meeting.

7. The report of the Board's Administrative Affairs Committee was refused to the press or public when requested. No discussion of items was carried on except by reference to item number.

12. The Board established a "Task Force" (see enclosed BME report). This reporter received no notice of the meeting (an apparent advisory committee meeting) and the Executive Director has refused access to the minutes, names of attendees or other information contrary to both the meetings law and public records law.

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

With respect to item 3, we understand that you received a copy of the public agenda for the board's January 19 meeting, but not a copy of the agenda used by the board members. We have compared the two documents and conclude that the board members' agenda contains certain information that is exempt from disclosure under the Oregon Public Records Law.

ORS 192.502(8) exempts from disclosure:

> Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law.

ORS 677.425(1) makes confidential certain records and information of the board. This statute provides:

> Any information provided to the Board of Medical Examiners for the State of Oregon pursuant to ORS 677.200 [disciplinary procedures], 677.205 [grounds for discipline] or 677.410 to 677.425 [competency to practice medicine] is confidential and shall not be subject to public disclosure * * * .

Thus, information on the board members' agenda that was provided to the board concerning the discipline or competency of a physician is confidential under ORS 677.425(1) and, therefore, exempt from disclosure under ORS 192.502(8).

ORS 192.502(2) exempts from disclosure:

> Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if the public disclosure thereof would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance.

> The party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy.

Accordingly, those portions of the board members' agenda that contain personal private information concerning a physician (or a patient of the physician), such as medical or family information, are exempt from disclosure under ORS 192.502(2).

Nevertheless, some of the information on the board members' agenda does not come within ORS 192.502(8), ORS 192.502(2) or any other exemption in the Public Records Law. Kathleen Haley, Executive Director of the board, informs us that the board has agreed to provide you with a copy of the agenda used by the board members at the January 19 meeting. This document is attached hereto, with the information redacted that we have identified as exempt under ORS 192.502(8) or ORS 192.502(2).[1/] Because the nonexempt information in this document is being disclosed to you, we deny your petition as to item 3 as moot.

With respect to item 6, Ms. Haley informs us that the board has not received a request from you for such records. The Attorney General has authority to order disclosure of public records under the Public Records Law only when the records have first been requested from, and denied by, a state agency. *See* ORS 192.450. Accordingly, we deny your petition as to this item.[2/]

With respect to item 7, Ms. Haley informs us that there is no report of the Administrative Affairs Committee. The recommendations of the Administrative Affairs Committee are reported to the board by including those recommendations on the board's regular meeting agenda. Thus, the board did disclose what would have been a "report" of the Administrative Affairs Committee by providing you with the "public" agenda of the board's meeting in January. The Attorney General cannot order an agency to produce records that do not exist. Because the existing "report" of the Administrative Affairs Committee has been disclosed to you, we deny your petition as to item 7.

[1/] Irrespective of their right under the Public Meetings Law to ***attend*** executive sessions of the board, representatives of the media have no greater rights under the Public Records Law to inspect or receive copies of public records than any other members of the public. *See* ORS 192.420, 192.410(2). This is true even though the particular records may be discussed in an executive session attended by the media representative.

[2/] In order to avoid the necessity of your making a request for item 6, Ms. Haley informs us that the board will provide you with a copy of the board minutes from its October meeting. This document will be sent to you directly by the board.

With respect to item 12, we note that you made a request for those documents in a letter to the board dated January 12, 1996. With its letter to you on January 31, 1996, the board provided copies of the minutes of the task force meetings. Those minutes included a list of attendees. You also requested a copy of the letter of advice to the board supporting the assertion that the meeting was held in compliance with the meetings law. This letter of advice was a confidential communication between a lawyer and the lawyer's client, which is subject to the lawyer-client privilege. ORS 40.225. Because this communication is made privileged under Oregon law, it is exempt from disclosure under the Public Records Law. ORS 1921.502(8). Thus, the board has disclosed to you each of the nonexempt records identified in item 12. Accordingly, we deny your petition as to item 12 as moot.

For the above reasons, we deny your petition to compel disclosure. The other issues you raise in your February 8 letter will be addressed under separate cover since they do not relate to a public records petition.

Sincerely,

Elizabeth S. Harchenko

ELIZABETH S. HARCHENKO
Special Counsel to the Attorney General

ESH:AV:jpl/25527665.W51
Enclosure
c: Kathleen Haley, Executive Director, Board of Medical Examiners