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February 13, 2013

Donja Bunnell
18563 S. Somewhere Lane
Mulino, OR 97042

Re: Petition for Public Records Disclosure Order:
Oregon Board of Licensed Social Workers Records
DOJ File No. 124001-GA0012-13

Dear Ms. Bunnell:

This letter is the Attorney General's order in response to your petition asking our office to direct the Oregon Board of Licensed Social Workers (BLSW) to disclose certain records to you. Specifically you are seeking BLSW's records pertaining to an investigation of licensee Billie Bell prompted by your complaint about Ms. Bell. In response to your request, BLSW provided you with materials that you provided to BLSW and publicly available materials such as court orders, totaling over a hundred pages. BLSW waived the fees it might have charged in connection with this request. However, BLSW withheld other materials generated or obtained through its investigation. You ask that we order BLSW to disclose the remaining records to you. For the reasons that follow, we respectfully deny your petition.

The Oregon Public Records Law, ORS 192.410 to 192.505, provides that "[e]very person has a right to inspect any public record of a public body in this state, except as otherwise expressly provided by ORS 192.501 to 192.505." ORS 192.420(1). In general, a public body withholding public records from inspection carries the burden of sustaining its action by demonstrating that the withheld material falls within an exemption. ORS 192.450(1); ORS 192.490(1). But ORS 192.450(5) establishes a partial exception to this general rule:

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

Thus, once a health professional regulatory board establishes that withheld records are exempt from disclosure pursuant to ORS 676.165 or 676.175, the person seeking access to the records must demonstrate "by clear and convincing evidence" that the public interest in disclosure outweighs interests in nondisclosure.

We have no difficulty determining that the records you requested fall within the scope of confidentiality provided by ORS 676.165 and 676.175. The former statute provides, in relevant part, that "[i]nvestigatory information obtained by an investigator and the report issued by the investigator shall be exempt from public disclosure." ORS 676.165(5). The latter provides that "[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." ORS 676.175(1). As noted above, your request specifically seeks records pertaining to BLSW's handling of your complaint. Thus, the records responsive to your request are covered by ORS 676.165 and 676.175.

The confidentiality statutes applicable to your request are subject to some exceptions, but the only exception arguably relevant to your case requires disclosure "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." ORS 676.175(2)(a). Consequently, we can order BLSW to disclose the records it withheld only if we conclude that you have "demonstrate[d] by clear and convincing evidence that the public interest in disclosure" should trump interests in nondisclosure.

Neither your request to BLSW nor your petition to our office addresses the question of the public interest directly. You do, however, make an argument that suggests a possible public interest in the disclosure of these materials. Essentially, you suggest that disclosure of information about complaints concerning licensed professionals, even when a regulatory board ultimately concludes that those complaints do not merit disciplinary action, serves the public interest because disclosure permits potential clients to decide whether to engage a particular professional based on the experiences of prior clients. We agree that disclosure of information relating to complaints and board investigations would serve the public interest in that manner. Even if a regulatory board ultimately sides with the licensed professional, it is difficult to dispute that potential clients of that professional would regard the complaint and the materials turned up in the investigation as at least relevant to making an informed decision whether to see that professional. For example, if a potential client were to discover that a particular licensed professional had a number of complaints from people alleging lack of sensitivity to a particular

issue, and that issue was important to the potential client, the client might reasonably decide that it is best to avoid that professional even though the licensing board never found sufficient basis to take disciplinary action.[1]

Although we agree that the public interest suggested by your petition does exist, we cannot conclude that it is sufficient to overcome the legislatively-enacted confidentiality rules of ORS 676.165 and 676.175. The interest your petition suggests is a general interest that will be present in each case, particularly from the perspective of the complainant whose report did not lead to action. If we were to conclude that potential future clients' interest in knowing about such complaints constitutes "clear and convincing evidence that the public interest in disclosure outweighs other interests in nondisclosure," we would essentially be eliminating the legislatively enacted confidentiality provisions. We cannot do that.

Apart from this general suggestion that the public would be better-served if such information were available, your petition gives us no basis to conclude that the public interest requires disclosure in this particular case.[2] As a consequence, we must respectfully deny your petition.

Sincerely,

MARY H. WILLIAMS
Deputy Attorney General

MHW:nog/JUSTICE-#4001910
c: Martin Pittioni, BLSW

[1] The nature of investigations by many regulatory boards is such that they will often involve highly personal and sensitive materials. Of course, it would be possible to address such materials more narrowly than the current confidentiality laws do.

[2] BLSW also withheld some records on the basis of the lawyer-client privilege, ORS 40.225. We have reviewed those documents and we agree that they are privileged, as they are communications between BLSW and its counsel at DOJ for the purposes of facilitating professional legal services.