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SENT VIA EMAIL ONLY

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Re: Petition for Public Records Disclosure Order
Oregon Board of Dentistry
DOJ File Nos. 834001-GA0099-14 & 834001-GA0102-14

Dear Mr. Braatz and Mr. Budnick:

This letter is the Attorney General's order in response to two petitions filed by Mr. Budnick asking our office to order the Oregon Board of Dentistry ("Board") to disclose certain records under the Oregon Public Records Law, ORS 192.410 to 192.505. The records in question consist of a complaint received by the Board and an audio recording of a Board discussion inspired by that complaint that took place in executive session. For the reasons explained below, we grant Mr. Budnick's petition in part and deny it in part.

The Oregon Public Records Law 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). The law is a disclosure law, and exemptions from its public disclosure requirement must be express. Even express exemptions are construed narrowly to further the public purposes served by disclosure. The narrow construction rule means that "if there is a plausible construction of a statute favoring disclosure of public records, that is the construction that prevails." *Colby v. Gunson*, 224 Or App 666, 676 (2008). A public body that asserts a statutory exemption from disclosure has the burden of demonstrating that the law permits the material in question to be withheld from public disclosure. ORS 192.450(1); ORS 192.490(1).

The Board of Dentistry asserts that the complaint is exempt from public disclosure pursuant to ORS 676.175, incorporated into the Public Records Law by virtue of ORS 192.502(9)(a), and that the executive session recording is exempt from disclosure pursuant to ORS 192.650, 192.660 and ORS 676.175. In relevant part, ORS 676.175 provides:

> (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. However, the board may disclose information obtained in the course of an investigation of a licensee or applicant to the extent necessary to conduct a full and proper investigation.
> (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.

ORS 192.650 (2), meanwhile, provides that "If the disclosure of certain [executive session] material is inconsistent with the purpose for which a meeting under ORS 192.660 is authorized to be held, that material may be excluded from disclosure." And ORS 192.660(9) provides:

> Notwithstanding subsections (2) and (6) of this section and ORS 192.650:
> (a) ORS 676.175 governs the public disclosure of minutes, transcripts or recordings relating to the substance and disposition of licensee or applicant conduct investigated by a health professional regulatory board.

Mr. Budnick argues that the information withheld from disclosure does not fall within the scope of ORS 676.175 and that, in any event, the public interest clearly requires disclosure of the requested information under the circumstances. To the extent that information in the material is governed by ORS 676.175, ORS 192.450(5) imposes on Mr. Budnick "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." With respect to the small amount of information in the records that fall within the express scope of ORS 676.175, we uphold the Board's claim of exemption. For the most part, however, the information in the records does not implicate the interests in confidentiality that ORS 676.175 is designed to protect.

The Complaint

In general, complaints to the Board about "licensee or applicant conduct" are confidential under ORS 676.175. We have reviewed the complaint requested by Mr. Budnick. For the most part, it does not concern "licensee or applicant conduct", but instead deals with the business practices of a managed care organization. We have previously identified the interests that the confidentiality rule of ORS 676.175 is generally intended to serve:

> 1. The interest of licensees in being protected from embarrassment, particularly with respect to complaints that do not have merit.
> 2. The interest of complainants and witnesses in avoiding retaliation or unwanted attention, particularly with respect to matters concerning medical treatment.
> 3. Public interest in encouraging complaints and disclosures to the board.

Public Records Order, October 19, 2010, Van der Voo and Braatz. In this case, we conclude that the complaint could be redacted in a manner that would protect the identity of the complainant, the identity of the dentists who are named in the complaint, and the few portions of the complaint that actually complain about licensee conduct. Redacted in that way, the complaint would not contain any of the kinds of information that ORS 676.175 expressly seeks to protect. Such redactions should completely serve the first two identified interests. And given that the complaint largely concerns the business practices of a managed care organization – a matter not within the scope of the board's authority – we think that disclosing a complaint redacted to protect the complainant's identity is unlikely to adversely affect the third interest. Consequently, it is difficult to see how nondisclosure of the entire complaint would meaningfully serve the various interests protected by the confidentiality statute.

Conversely, Mr. Budnick has convincingly explained how disclosure would serve the public interest:

> [R]ecent changes in * * * some delivery of dental care have resulted in trends and real-life developments that put the public's health and savings at risk. * * * [T]hese changes continue to spread. Thanks to the expansion of Medicaid, enrollees in OHP now number a full million people, or one in four Oregonians, where previously it was one in six. And with few exceptions, Oregonians now must be enrolled in Coordinated Care Organizations who in turn are now required to contract with the Dental Care Organizations * * *. State officials have said they eventually seek to spread these managed-care style changes to all private insurers. * * * * While changes in physical health delivery have received plenty of attention, the dental side has not. The document requested would play an important role in raising public awareness.

We agree with this articulation of the public interest. And given our conclusion that disclosure of a redacted version of the complaint would not implicate any of the information explicitly made confidential by ORS 676.175, we conclude that this public interest clearly outweighs any

confidentiality interests that are present in this case. Pursuant to ORS 676.175(2)(a), we consequently order disclosure of the complaint in a redacted form. With respect to the information we are authorizing the Board to redact, we cannot conclude on this record that the public interest clearly requires disclosure. The public interest articulated by Mr. Budnick goes directly to the effects of a managed care model on the practice of dentistry. We believe that the information we are authorizing the Board to redact would add little, if anything, to public discussion of that issue. But disclosure would implicate the various interests that underlie ORS 676.175.

The Audio Recording

The disclosure of executive session minutes and recordings is generally governed by ORS 192.650(2). But, as noted above, ORS 192.660(9)(a) provides that "ORS 676.175 governs the public disclosure of minutes, transcripts or recordings relating to the substance and disposition of licensee or applicant conduct investigated by a health professional regulatory board." We have opined that, under this provision, "the board is required to keep confidential and not disclose any part of its executive session meeting [materials] that contain confidential information unless required to do so under the terms of ORS 676.175(2) or (3)." 49 Or Op Atty Gen 32 (1998) at 76. Consequently, the considerations and analysis we applied to the complaint similarly apply to the executive session discussion. We conclude that the public interest weighs in favor of disclosure of those portions of the discussion that address concerns about the business practices of managed care organizations. To the extent that any of the discussion implicates information expressly protected by ORS 676.175, i.e., the identities of the complainant and licensees or descriptions of particular licensee conduct, however, we deny the petition. The Board may redact any such portions of the discussion, subject to Mr. Budnick's right to petition our office to review those redactions.

Conclusion

For the reasons set forth above, we grant Mr. Budnick's petitions with regard to those portions of the complaint and of the discussion in executive session that address concerns about the business practices of managed care organizations. We deny the petitions with regard to information which would reveal the identities of the complainant and licensees, or which describes particular licensee conduct. On the seventh day following this order, the Board will provide Mr. Budnick with a copy of the complaint and of a recording or transcript of the executive session discussion, with such redactions as the Board believes are appropriate in accordance with this order. ORS 192.450(1) and (5). As noted above, Mr. Budnick may petition our office with regard to any such redactions.

Sincerely,

FREDRICK M. BOSS
Deputy Attorney General