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DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

January 29, 2014

Charles Schulz, Director
Oregon State Board of Bar Examiners
PO Box 231935
Tigard, OR 97281-1935

Robert MacKay
6505 SE Scott Drive
Portland, OR 97215

Re: Petition for Public Records Disclosure Order
Oregon State Board of Bar Examiners
DOJ File No. 993001- GA0012-14

Dear Mr. Schulz and Mr. MacKay:

This letter is the Attorney General's order in response to Mr. MacKay's petition asking our office to direct the Oregon State Board of Bar Examiners (Board) to disclose certain records to him under the Oregon Public Records Law, ORS 192.410 to 192.505.

Mr. MacKay asked the Board for copies of its minutes from board meetings on October 19, 2012; December 7, 2012; January 18, 2013; March 29, 2013; May 24, 2013; June 21, 2013; July 19, 2013; August 20, 2013; and October 4, 2013. The Board denied his request on the ground that Oregon Supreme Court Rule for Admission of Attorneys 2.15 (RFA 2.15) exempts the requested records from public disclosure. Mr. MacKay then filed this petition. For the reasons that follow, we reject the Board's blanket assertion that RFA 2.15 justifies withholding all information in its minutes when disclosure is requested under the Public Records Law. We therefore grant Mr. MacKay's petition, with the caveat that the Board may redact its minutes in complying with our order.

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). ORS 192.410(3) defines "public bodies" to include "state agencies" and ORS 192.420 defines "state agencies" to include state boards that are created by statute. The Board is created by ORS 9.210 to examine applicants for admission to the Oregon bar and to make admissions recommendations to the Oregon Supreme Court. Hence it is a state agency for purposes of the Public Records Law and must disclose its public records unless the Public Records Law expressly provides an exemption. A public body that asserts an exemption has the burden of demonstrating that the Public Records Law permits the material in question to be withheld from public disclosure. ORS 192.450(1); ORS 192.490(1).

The Board asserts that all of its records are exempt from disclosure under ORS 192.502(9)(a), which exempts public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law. The Board relies on RFA 2.15. Subsection (1) of that rule provides that "[u]nless expressly authorized by the Court or by these rules, the Board shall not disclose any of its records, work product or proceedings in carrying out its duties." Subsection (2) provides for exceptions, but those allow disclosure only of an applicant's admission file, or portions of it, to listed persons and do not apply to Mr. MacKay's request for board minutes. The Board contends that because the Oregon Supreme Court has not expressly authorized disclosure, RFA 2.15(1) prohibits it from disclosing any of the requested records.

We conclude that ORS 192.502(9)(a) does not exempt the records from disclosure. We interpret the exemption in ORS 192.502(9)(a) to incorporate only exemptions provided in Oregon *statutes* outside of the Public Records Law. ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2011) at 80. The Board does not point to any statute outside the Public Records Law that provides an exemption, but relies, instead, on the Oregon Supreme Court's rule. In addition, while not expressly addressing the issue, the Oregon Supreme Court has held that the Oregon State Bar was required to disclose records under the Public Records Law when an Oregon Supreme Court Rule for Attorney Discipline made those records confidential. *Sadler v. Oregon State Bar,* 275 Or 279, 295 (1976); *see also State ex rel. Frohnmayer v. OSB,* 307 Or 304 (1989) (requiring bar to disclose disciplinary records).

Although the Board does not expressly raise the issue, we also address whether Article VII (amended), section 1, of the Oregon Constitution, provides a basis for denying disclosure under RFA 2.15 even if the Public Records Law requires disclosure. Article VII (amended), section 1 provides that "[t]he judicial power of the state shall be vested in one supreme court [.]" In *Sadler v. Oregon State Bar*, the bar contended that that provision required an Oregon Supreme Court rule conferring confidentiality on bar

disciplinary records to take precedence over a conflicting provision of the Public Records Law. 275 Or at 285.

The court rejected that argument, stating that the Public Records Law "does not affect the rules for admission, suspension or disbarment * * * [but] affects the disciplinary procedure only by opening up the files of the Bar to the public on request. The question * * * is whether that is an unreasonable encroachment on the judicial function of disciplining attorneys." *Id.* at 293.

The court declared that "'the legislature may act authoritatively with respect to some matters which affect the judicial process. * * * [but t]he limits of legislative authority are reached * * * when legislative action unduly burdens or substantially interferes with the judicial department in the exercise of its functions.'" *Id.* at 291. The court held that "the Public Records Law does not unreasonably encroach upon the judicial function of disciplining lawyers." *Id.* at 295.

In *State ex rel. Frohnmayer v. OSB,* 307 Or 304 (1989), the bar argued that the Public Records Law unconstitutionally encroached on the judicial lawyer discipline function by requiring disclosure of open bar disciplinary records to the person who was the subject of the disciplinary action. The bar claimed that application of the Public Records Law would cause delay in the process. The court rejected the bar's argument, holding that general institutional inconvenience was "not enough to render legislation constitutionally defective. Only an outright hindrance of a court's ability to adjudicate a case * * * or the substantial destruction of the exercise of a power essential to the adjudicatory function'" unreasonably encroaches on a judicial function. *Id.* at 309 (quoting *Circuit Court v. AFSCME*, 295 Or 542, 551 (1983).

In the present case we are unable to conclude that the release of *any* information in board minutes would outright hinder the court's ability to adjudicate a case or substantially destroy the court's power to control admissions to the Oregon bar. The Board has not provided its minutes, claiming that, in the absence of court order, RFA 2.15 absolutely bars disclosure of any information in them. Therefore we can't tell whether the minutes contain information that typically appears in board minutes, such as scheduling details and other housekeeping information. But it is likely that they do and unlikely that releasing such information would destroy the court's power to control bar admissions. And, while the bar informs us that the minutes contain highly confidential information the release of which would compromise applicant confidentiality, the administration of the bar exam, and agreements with the National Conference of Bar Examiners, we cannot conclude that potentially applicable exemptions in the Public Records Law, such as the exemption for tests and examination materials, ORS 192.501(4), for example, would be inadequate to protect those concerns.

Accordingly, we order the Board to disclose the minutes responsive to Mr. MacKay's request. In complying with this order, the Board may redact information that it concludes (1) falls within a statutory exemption from the disclosure requirements of the Public Records Law, or (2) would, if required to be disclosed, unduly burden or substantially intrude on the judiciary's power to control admissions to the Oregon State Bar. If Mr. MacKay believes particular redactions are unwarranted, he may petition our office to review them. The Board has seven days within which to comply with this order or to announce its intention to institute court proceedings. ORS 192.450(2).

Sincerely,

FREDERICK M. BOSS
Deputy District Attorney