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February 17, 2010

Michael Gorodetzer
PO Box 68084
Portland, OR 97268

Re: Petition for Public Records Disclosure Order:
Oregon State Board of Nursing Records

Dear Mr. Gorodetzer:

On February 2, 2010, we received correspondence from you in the form of three "petitions." As our office explained in a letter you received on February 4, only one of your complaints appears to implicate a matter within the authority of the Attorney General. Specifically, the first of your three petitions, entitled "Petition to Review Denial to Inspect Public Record Under ORS 192.450," includes a request that the Attorney General require the Oregon State Board of Nursing ("Board") to provide you with certain investigation files pertaining to certain licensees of the Board. This letter is the Attorney General's order in response to that petition.

In response to your request to the Board, you were provided a written summary of information relating to the investigation. That summary was provided to you on March 31, 2008. The Board denied your request for the other documents concerning this matter on the basis that they are confidential under ORS 676.175. In April 2008, you sent additional emails and letters to the Board and the Board reiterated its denial of your request for the contents of the investigatory files.

The Public Records Law confers a right to inspect public records of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. A person who is denied the right to inspect or receive a copy of a public record from a "health professional regulatory board," such as the Oregon State Board of Nursing,[1] may petition the Attorney

[1] The term "health professional regulatory board" is defined as including the Oregon State Board of Nursing. ORS 676.160(10).

General to review the record to determine if it may be withheld from public inspection. ORS 192.450.

Generally, a public body refusing to disclose public records has the burden of establishing that the records sought are exempt from disclosure. ORS 192.450(1), 192.490(1). With respect to certain records of a health professional regulatory board, however, the burden is shifted to the person seeking the records:

> 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.

ORS 192.450(5). The information that you have requested is confidential under ORS 676.175, as we explain below. Consequently, ORS 192.450(5) governs your petition.

ORS 192.450(4) also governs your petition. That statute applies when a person files a petition asking for records of a health professional regulatory board that contain information about a licensee or applicant. The statute requires the petitioner to send a copy of the petition to the board from which records are sought by first class mail, on or before the date the petition is filed with the Attorney General. The board is then required to pass the petition along to the affected licensee or applicant. The licensee or applicant may provide the Attorney General with a statement of reasons why the record should not be disclosed.

We are informed that you have not sent your petitions to the Board. As a result, the licensees have not had the opportunity to provide a statement of reasons why the records should not be disclosed. Since we conclude below that you have not provided "clear and convincing evidence that the public interest in disclosure outweighs other interests in nondisclosure," the licensees have not been prejudiced, and we proceed as though the statutory procedures were properly followed.

Turning to the substance of your petition, we note that ORS 676.175 generally obligates the board to treat information it obtains during the course of an investigation as confidential:

> (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.
>
> (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.
>
> (b) The board may disclose to a complainant a written summary of information obtained as part of an investigation of an applicant or licensee resulting from the complaint to the extent the board determines necessary to explain the reasons for the board's decision. * * *

The records the Board has declined to provide to you were obtained pursuant to the Board's investigation of a licensee. They fall squarely within ORS 676.175.

That statute's confidentiality requirement is subject to an exception if the Board votes not to impose discipline. In that event, investigatory information must be disclosed *if* the person requesting the information demonstrates by clear and convincing evidence that the public interest in disclosure outweighs interests in nondisclosure. ORS 676.175(2)(a). If the requester fails to make that showing, however, the Board cannot disclose the investigatory information. Whether or not the person requesting the information makes the required showing, the Board is authorized, but is not required, to provide the complainant with a written summary of the investigatory information to the extent the Board determines necessary to explain the reasons for the Board's actions. ORS 676.175(2)(b).

On the present record, we cannot find that you have provided the Board with a basis to conclude that the public interest clearly and convincingly requires disclosure. Instead, you have repeatedly stated that you want the information and that you disagree with the Board's decision. For example, your March 17, 2008 email to Holly Mercer, Executive Director of the Board, indicates that you need the records because you have questions regarding the Board's investigation and decision and cannot address them without all of the Board's investigatory records. Though you did not specify your particular questions, it is clear that your basic question goes to the correctness of the Board's resolution of your complaints.

Your petition to our office elaborates on that theme. You assert that the Board failed to seek out evidence from various doctors, apparently relied only on evidence from sources you deem unreliable, and may have misconstrued or ignored some evidence before it. You allege that the licensees in question present a danger to the public.

You support your arguments to our office by enclosing various records. Even if those records persuaded us that a reasonable person could disagree with the Board's decision in this particular case, it would not be clear that the public interest would therefore favor disclosure of the investigative file. But in fact, you do not even explain why you believe that the records cast doubt on the correctness of the Board's determination that there was no deviation from the standard of nursing. We are not able to glean anything from the records that clearly contradicts

the determination of the Board. And in any event, we believe that the standard of ORS 676.175(2)(b) likely requires something more than a showing that the Board's decision in a single case is debatable or even incorrect.

On the record before us, we cannot find that you made the showing to the Board that is required by ORS 676.175(2)(b). Nor does your petition persuade us that the public interest favors disclosure under the standard imposed by ORS 192.450(5). We must respectfully deny your petition.

Sincerely,

MARY H. WILLIAMS
Deputy Attorney General

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c: Holly Mercer, Executive Director, Oregon State Board of Nursing