ELLEN F. ROSENBLUM
ATTORNEY GENERAL

FREDERICK M. BOSS
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

Justice Building
1162 Court Street NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4400

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VIA EMAIL ONLY: les@malheurenterprise.com and juliet.britton@state.or.us

Les Zaitz
Malheur Enterprise
289 A Street W
Vale OR 97918

Juliet Britton
Psychiatric Security Review Board
610 SW Alder, Suite 420
Portland, OR 97205

Re: Petition for Public Records Disclosure Order
Psychiatric Security Review Board
DOJ File No.: 399001-GA0062-17

Dear Mr. Zaitz and Ms. Britton:

This letter supplements the Attorney General's order of March 15, 2017, ordering the disclosure to Mr. Zaitz of numerous records he had requested from the Psychiatric Security Review Board (PSRB) under the Oregon Public Records Law. In that order, we promised to follow up with a more thorough explanation of our reasoning, consistent with the longstanding practice of our office to explain its decisions under ORS 192.450. As our order noted, Mr. Zaitz's petition concerned various exhibits from a public hearing held in December 2016 that resulted in the discharge of Anthony Montwheeler from PSRB's jurisdiction. Most of the exhibits were created by staff of the Oregon State Hospital (OSH) while Mr. Montwheeler was committed to its custody under PSRB's jurisdiction.

Mr. Montwheeler had been under the state's jurisdiction since 1997, when he was found guilty except for insanity of charges including kidnapping. At the December 2016 hearing that resulted in his discharge from this jurisdiction, both Montwheeler and OSH staff testified that he did not suffer from a mental disease or defect. Montwheeler also testified that he had never suffered from mental disease and had feigned symptoms in order to avoid prison and to enjoy other perceived benefits of being under PSRB's jurisdiction. OSH staff similarly testified that it was likely he had never had a mental disease or defect. Although OSH staff expressed the view

that he may well be dangerous, because that danger was unrelated to mental disease or defect he should not be under PSRB's jurisdiction. On January 12, 2017, approximately three weeks after his discharge by PSRB, Montwheeler was charged with the murders of a former spouse and another person, along with other crimes.

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). There is no dispute that the records Mr. Zaitz seeks are "public records" within the meaning of this statute. His petition therefore requires us to determine whether those records are "expressly" exempted from public disclosure. In making that determination, we are mindful that "[d]isclosure of public records is the rule and exemptions from disclosure are to be narrowly construed." *Mail Tribune, Inc. v. Winters*, 236 Or App 91, 94 (2010) (citing *Guard Publ'g Co. v. Lane County School Dist.*, 310 Or 32, 39 (1990)). This requirement reflects "the strong and enduring policy that public records and governmental activities be open to the public." *Jordan v. Motor Vehicles Division*, 308 Or 433, 438 (1989).

The Court of Appeals has explained that 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). The Court of Appeals has also explained the significance of the requirement of ORS 192.420(1) that public records exemptions must be "expressly" stated in law:

> ORS 192.420(1) forbids giving effect to any implicit and broader meaning of a statutory exemption from disclosure under ORS 192.501 to 192.505 than what the statute "expressly" allows. That is no less true when the statutory exemption incorporates other statutes, as is the case with ORS 192.502(9).

Id. PSRB offered three statutory grounds for its decision to withhold the documents:

1. ORS 179.505, which PSRB asserts prohibits the disclosure of most of the records;
2. ORS 192.502(10), which PSRB asserts exempts the records from disclosure in its hands because ORS 179.505 makes the records confidential in the hands of OSH, which originally created most of the documents; and
3. ORS 192.502(2), which PSRB asserts exempts all of the withheld records, because they contain information of a personal and medical nature, disclosure would constitute an unreasonable invasion of privacy, and there is not clear and convincing evidence that the public interest requires disclosure.

As our order stated, we find all of these assertions largely unconvincing. In this supplement, we explain why. First, however, we explain why we likewise reject Mr. Zaitz's blanket assertion that these records' introduction as evidence at a PSRB hearing waived any possible claim of exemption.

I. The records at issue do not necessarily lose any exempt status by being introduced as exhibits at a public hearing.

Mr. Zaitz argues that because the records at issue were received as exhibits at a public hearing, they cannot be exempt from disclosure under Public Records Law. However, the Oregon Supreme Court has rejected a similar argument that the Open Courts provision of the Oregon Constitution[1] requires public access to trial exhibits. *Jack Doe 1 v. Corp. of Presiding Bishop*, 352 Or 77, 86 (2012). The court explained that while "[t]he principle of open justice entitles the public to attend and to view the other aspects of the administration of justice in a court * * * to ensure that the court and the parties comply with the law, and appear to do so, in an accountable manner," this does not "entitle the public to inspect every trial exhibit at the end of a trial." *Id.* at 100.

The same principles are at play here. The public is permitted to attend PSRB hearings, and the order explaining PSRB's decision is publicly accessible. That does not necessarily mean, however, that the public has the right to examine the evidence that played a role in the decision. In fact, ORS 161.390(5) specifically indicates that "The confidentiality of records maintained by the board shall be determined pursuant to ORS 192.501 to 192.505." There is no statutory exception for records introduced as evidence at a hearing. Therefore, we conclude that the exhibits' introduction into the record at a public hearing does not necessarily mean that they are subject to public inspection.

II. ORS 179.505(14) does not prohibit PSRB from redisclosing the OSH reports.

PSRB, joined by OSH, argues that ORS 179.505(2) prohibits PSRB from disclosing the majority of the records. Both agencies acknowledge that the prohibition of the statute generally applies to "health care services provider[s]" and that PSRB is not, in fact, a "health care services provider" as that term is defined. But the agencies rely on ORS 179.505(14), which creates a prohibition against redisclosure:

> Persons other than the individual or the personal representative of the individual who are *granted access under this section* to the contents of a written account referred to in subsection (2) of this section may not disclose the contents of the written account to any other person except in accordance with the provisions of this section.

(Emphasis added.)

We conclude that this provision does not apply to PSRB either. By its terms, it applies only to "[p]ersons * * * *granted access under this section* to the contents of a written account." The "section" in question is ORS 179.505 itself. PSRB's access to the documents is not granted by any part of that statute. Instead, it is PSRB's own organic statutes that grant PSRB access to

[1] The Open Courts provision states that "No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation." Or Const, Art I, § 10.

OSH health records. PSRB is statutorily required to "maintain and keep current the medical, social and criminal history of all persons committed to [its] jurisdiction." ORS 161.390(5). And it is authorized to acquire and use, as evidence in its public hearings, "information concerning the person's mental condition and the entire psychiatric and criminal history of the person," limited only by the restriction that the evidence should be the sort "commonly relied upon by reasonably prudent persons in the conduct of their serious affairs." ORS 161.346(4).

The agencies suggest that, notwithstanding these provisions of ORS chapter 161, perhaps PSRB's access is granted by subsection (11) of ORS 179.505. But that provision only allows disclosure after a person whom a record concerns "voluntarily produces evidence regarding an issue to which a written account referred to in subsection (2) of this section would be relevant." This is wholly inconsistent with ORS 161.346(4), which gives PSRB wide authority to use such evidence in its hearings.

PSRB and OSH also argue that PSRB is "granted access under [ORS 179.505]" because ORS 179.505(2) contemplates that there may be disclosures "otherwise permitted or required by state or federal law or by order of the court." On its face, this provision merely acknowledges that sources of law *other than* ORS 179.505 may grant access to these types of records. By itself, it does not grant access to any entities. This is consistent with the language of the redisclosure prohibition limiting the prohibition to those "granted access under [ORS 179.505]," and of course with the rule to narrowly construe public records exemptions.

In point of fact, we understand that PSRB had access to these types of records pursuant to its own statutes for more than a quarter of a century before this language was even added to ORS 179.505. PSRB's statutes requiring it to maintain the history of those under its jurisdiction, and authorizing it to use those records in deciding whether individuals ought to remain in custody or under its jurisdiction were enacted in 1977. Or Laws 1977, ch 380 §§ 11(10), 15(3). The "otherwise permitted or required by state or federal law or by order of the court" language was not added to ORS 179.505(2) until 2003. That enactment history, combined with the fact that the language does not actually purport to affirmatively grant any access to anyone, requires us to reject the agencies' contention.[2]

That result means that ORS 179.505 governs the use of records specifically contemplated by that statute, while other statutes (or court orders) establish their own rules governing the redisclosure of records. In the case of PSRB, the relevant rules are established by the provisions of ORS chapter 161 already discussed, along with the explicit statement in ORS 161.390(5) that "[t]he confidentiality of records maintained by the board shall be determined pursuant to ORS 192.501 to 192.505."

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[2] We note that, although both Mr. Montwheeler's attorney, David Falls, and Thomas Stenson, an attorney with Disability Rights Oregon, contacted our office opposing Mr. Zaitz's petition, neither of them suggested that ORS 179.505 prohibits PSRB from disclosing these records. As explained above, that is consistent with the relevant statutory text and context.

III. The OSH reports are not exempt as transferred records under ORS 192.502(10).

PSRB next argues that because these reports are exempt in OSH's custody under ORS 179.505(2), they remain exempt when transferred to PSRB under ORS 192.502(10): that provision of Public Records Law applies to already exempt records when they are transferred to another public body in connection with the receiving body's duties, "if the considerations originally giving rise to the confidential or exempt nature * * * remain applicable." We find that the overall considerations that favor keeping confidential records in the hands of OSH do not remain the same when the records are used by PSRB.

We note that OSH is fundamentally a health care provider. ORS 179.505(2) establishes a clear state policy that health care providers should not grant anyone access to records like those at issue unless there is lawful authority for it. This serves a very real and very important interest in personal medical privacy that is also reflected in other sources of law. But when the records are used by PSRB in its work, other interests become highly relevant. Fundamentally, PSRB is charged with determining whether a patient should remain committed to OSH, be conditionally released into the community (and under what conditions), or be permanently discharged from PSRB's jurisdiction. *See* ORS 161.336–161.348, 161.351 (explaining authority of PSRB and process). In this role it does work traditionally performed by courts. *See* Governor's Task Force on Corrections, *Mental Disease & Defect*, June 30, 1976, at 2 (explaining that PSRB would replace the courts in monitoring defendants found guilty except for insanity). That work implicates significant concerns about public safety—can this person with a history of mental health problems and dangerousness live safely in the community?—and personal liberty—does the state have a lawful basis to continue to deprive this person of his or her freedom? *See* ORS 161.351 (PSRB "shall have as [its] primary concern the protection of society."). Those considerations, though not necessarily relevant to the treatment work of OSH, are important considerations in the work of PSRB that tend to favor transparency.

As our overall decision demonstrates, health privacy considerations do not entirely vanish when PSRB uses these kinds of records. But we think that the considerations giving rise to the disclosure prohibition applicable to OSH are too different from the considerations relevant to the work of PSRB to support the application of ORS 192.502(10). The contrast between the statutes directly applicable to the two agencies suggests that the legislature is of a similar opinion. While it made records in OSH's hands subject to the fairly strict nondisclosure requirements of ORS 179.505, it provided that "[t]he confidentiality of records maintained by [PSRB] shall be determined pursuant to [the exemptions from public disclosure contained in the Oregon Public Records Law]." ORS 161.390(5). This statement was clearly contemplating records of precisely the sort Mr. Zaitz requested, coming immediately after the command—in the same subsection—that PSRB "maintain and keep current the medical, social and criminal history of all persons committed to [its] jurisdiction."

IV. Most of this information is not exempt under ORS 192.502(2).

PSRB finally asserts that all the records at issue are exempt under ORS 192.502(2): this exemption applies to information of a personal or medical nature if disclosure "would constitute

an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance." After reviewing these records, we readily conclude that they contain information of a personal or medical nature: they consist of mental health reports about Mr. Montwheeler, including details about his life.

Therefore, PSRB must make a threshold showing that disclosure would constitute an unreasonable invasion of privacy; the burden of proof then shifts to Mr. Zaitz to overcome that showing. *Jordan*, 308 Or at 443 n 9 ("[A]gency must be given a sufficient basis for finding that both parts of the threshold for entitlement are met."). If disclosing the record would constitute an unreasonable invasion of privacy, Mr. Zaitz must then show by clear and convincing evidence that the public interest requires disclosure in this particular instance.

A. Disclosing most of this information is not an unreasonable invasion of privacy.

With respect to the majority of the exhibits at issue, we find that PSRB has not made a threshold showing that disclosure would constitute an unreasonable invasion of privacy. While ordinarily disclosing mental health records would qualify as such an invasion, this is a unique case. All of the following factors weigh against the conclusion that disclosing the records in this case would unreasonably invade Montwheeler's privacy:

- Mr. Montwheeler testified at the public PSRB hearing that he had never had a mental disease but had feigned one for 20 years.
- OSH staff testimony agreed that Montwheeler was not mentally ill, and likely had never been.
- In testimony explaining the belief that Montwheeler was not mentally ill, OSH staff discussed the content of many of the specific exhibits Mr. Zaitz requested.
- This testimony and the underlying exhibits were used to convince PSRB that Montwheeler did not suffer from a mental disease, and thus must be released. The use of otherwise private materials to benefit the person whose privacy is implicated is generally held to waive otherwise applicable confidentiality protections. *See* ORS 40.280 (evidentiary privileges are waived "as to psychotherapists in the case of a mental or emotional condition * * * upon the holder's offering of any person as a witness who testifies as to the condition"); ORS 179.505(11) (prohibition against disclosure of written accounts does not apply when the subject of the record "voluntarily produces evidence regarding an issue to which a written account referred to in subsection (2) of this section would be relevant").

These factors, largely particular to this case of an individual who testified that he had feigned mental illness in order to avoid prison and enjoy perceived benefits of being under PSRB's jurisdiction, all lead to the conclusion that disclosing most of these records would not be an unreasonable invasion of Montwheeler's privacy.

B. Even if disclosure would constitute an unreasonable invasion of privacy, the public interest requires disclosure of most of this information.

In addition, we find that even if disclosure would constitute an unreasonable invasion of privacy, Mr. Zaitz has shown by clear and convincing evidence that the public interest requires disclosure. As noted above, PSRB's work implicates important public safety and personal liberty issues that are a legitimate subject of public interest. Given what is at stake in general, there is certainly a public interest in monitoring the decision making of public bodies such as PSRB, OSH, and the courts that are charged with adjudicating the mental health of dangerous individuals. PSRB in particular wields significant power in deciding whether patients such as Montwheeler should be committed to OSH, conditionally released into the community, or discharged from PSRB's jurisdiction. *See ACLU of Or., Inc. v. City of Eugene*, 360 Or 269, 298 (2016) (public interest in the transparency of police operations is particularly significant due to police's power).

That general public interest is magnified enormously by the specific facts of this case. Mr. Montwheeler is accused of committing serious crimes—including killing two people, and seriously injuring a third person—a few short weeks after his discharge. Under the circumstances, there is a strong public interest in understanding and evaluating the bases for PSRB's release decision.

Similarly, Montwheeler's testimony that he was under PSRB's jurisdiction for nearly 20 years, despite never suffering from actual mental disease, in order to enjoy perceived benefits of that status, raises an issue of significant public interest. One of the PSRB board members raised a similar concern at the hearing: "I'm assuming somebody in the system might do a forensic look at this and figure out what the hell happened." The public likewise may legitimately wonder how this occurred.

The records here shed light on these issues: they document both Montwheeler's mental health status and his risk for future violence. They include reports from 1997, when he was initially diagnosed with a mental disease; and details of the key 2014 to 2016 period during which he stated that he had been feigning his mental illness and his OSH psychiatrist concurred that Mr. Montwheeler did not have, and likely never had, a mental disease.

These public interests in disclosure contend with competing confidentiality concerns. The primary purpose of the exemption is to protect privacy from unreasonable invasion. But that interest is significantly diminished here, for reasons already discussed. *See ACLU*, 360 Or at 295–96 (diminished interest in privacy of police officers where their names and conduct had been discussed at public hearing); *cf. Hood Technology Corp. v. Or. Occupational Safety & Health Division*, 168 Or App 293, 306 (2000) (diminished public interest in protecting identities of complainants if they intentionally made false complaints).

OSH also suggests that respecting health privacy serves two other related purposes: encouraging candidness between current and future OSH patients and OSH staff, and encouraging OSH staff to write candid, thorough reports. In a letter to our office, OSH

Superintendent Greg Roberts indicated that if these types of records might be subject to disclosure, OSH staff may start providing PSRB with less complete information, either by declining to give certain records to PSRB or by creating less complete documentation in the first place. Mr. Roberts elaborated:

> This may result in a less complete picture of an individual being presented to [the public bodies responsible for deciding whether individuals with a history of dangerousness and mental illness should be released] and, consequently a less informed decision made by those public bodies impacting the individual and the public at large. This result would most certainly not be in the best interests of either the public or the patient who is the subject of the records.

We acknowledge the importance of confidentiality between patients and mental health providers. But both PSRB and OSH already accept that the content of some otherwise-confidential records of mental health treatment are sometimes disclosed at PSRB hearings. Indeed, as noted above, OSH staff testified about the content of these documents during the PSRB hearing pertaining to Montwheeler. Our conclusion that the Oregon Public Records Law will sometimes require the documents themselves to be disclosed does not strike us as creating a significantly different treatment relationship. *See also City of Portland v. Oregonian Publ'g Co.*, 200 Or App 120, 127 (2005) (the argument that disclosure of supervisors' judgments made pursuant to supervisory duties would discourage future candor "is an insult to the supervisors themselves").

Finally, we acknowledge a public interest in ensuring that Montwheeler receives a fair trial in the pending criminal case against him, a right that is protected by both the Oregon and federal constitutions.[3] However, we believe the most potentially inflammatory information already came out at the hearing. Both the likelihood that Montwheeler never had a mental illness and his alleged propensity for violence were central themes of the hearing. In any event, this sort of risk is hardly novel, and courts have various means to address pretrial publicity issues. Indeed, the charges against Montwheeler are already well publicized in Malheur County, along with his history. The *Idaho Statesman* and *Malheur Enterprise* have both written a number of stories on those subjects. We do not think that disclosure of the requested documents will make pretrial publicity problems any more likely to arise in the case, or make such issues any more difficult to deal with if they do arise.

Based on these competing interests, we conclude that Mr. Zaitz has shown by clear and convincing evidence that the public interest, on balance, clearly requires disclosure of most of the requested information. The requested exhibits will assist the public in understanding what happened in this case, and under the particular circumstances, the usual public interest in protecting a patient's mental health records is significantly diminished.

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[3] Such an interest carries little weight in evaluating the competing interests under ORS 192.502(2), an exemption focused on personal privacy issues. *See ACLU*, 360 Or at 287 ("A statute or its context may indicate that a party's interest is more or less weighty in the relevant circumstances * * * ."). The text of the exemption at issue here indicates an intent to protect an individual's personal or medical information in order to shield the individual's privacy, and does not suggest any connection with the right to receive a fair trial.

C. With respect to some information in these records, disclosure would constitute an unreasonable invasion of privacy that would not serve an overriding public interest.

However, we do find that disclosing certain information in these exhibits would constitute an unreasonable invasion of privacy that is not outweighed by the public's interest. For example, Exhibit 10 is the psychiatric report used by Mr. Montwheeler in 1997 as evidence that he should be found guilty except for insanity. Portions of this exhibit contain not only intimate details about Montwheeler, but also intimate details about his life with two of his former spouses. These details were not openly discussed at the hearing, and would unreasonably invade the privacy of the former spouses and other family members. In addition, other exhibits contain summary information about Montwheeler's physical condition; that physical condition was not discussed at the hearing and does not appear to relate in any way to PSRB's or OSH's decisionmaking. There is not clear and convincing evidence that the public interest requires disclosure of information of a personal nature with no apparent relationship to PSRB's decision.

Therefore, as provided in our order dated March 15, we conclude that the majority of the exhibits are not exempt from disclosure, but that certain portions are exempt under ORS 192.502(2).

Sincerely,

Frederick M. Boss
Deputy Attorney General

FMB:nog/pjn/DM8058272
c via email only: Lynne Saxton, OHA