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

November 3, 2017

VIA EMAIL ONLY: ianmcelroy2010@gmail.com>

Ian McElroy
PO Box 1277
Lake Oswego, OR 97035

Re: Petition for Public Records Disclosure Order
Oregon State Bar
DOJ File No.: 993001-GA0137-17

Dear Mr. McElroy:

This letter is the Attorney General's order responding to your October 13, 2017, petition for disclosure under the Oregon Public Records Law, ORS 192.410 to 192.505.[1] Your petition asks the Attorney General to order the Oregon State Bar to produce two referral memos sent from the Bar's Client Assistance Office to the Disciplinary Counsel.

As discussed below, we respectfully deny your petition because these records are exempt from disclosure under ORS 192.501(1). The memos contain analyses of pending disciplinary matters, and were prepared at a point in time when disciplinary proceedings against the involved attorneys were reasonably likely to occur. And revealing these analyses while the disciplinary matters are still pending would likely impede the Bar's ability to effectively investigate and prosecute alleged misconduct.

Public Records Law confers a right to inspect any public record of a public body in Oregon, subject to certain exemptions contained in ORS 192.501 to 192.505. ORS 192.420(1). Any person denied the right to inspect or to receive a copy of a public record of a state agency may petition the Attorney General to review the record and determine if it may be withheld. ORS 192.450(1). The agency carries the burden to sustain any such denial. *Id.*

Among its duties, the Bar reviews the conduct of attorneys and institutes disciplinary proceedings. ORS 9.532(2) (giving this authority to the State Professional

[1] Thank you for granting an extension on the deadline to issue an order.

Responsibility Board). When the Bar does institute such proceedings against an attorney, a disciplinary board appointed by the Oregon Supreme Court rules on the charges after conducting a hearing at which the attorney has the opportunity to present a defense. ORS 9.534(1).

The Bar's Client Assistance Office is responsible for the initial intake and review of complaints about attorneys' conduct, and for determining whether there is sufficient evidence to support a reasonable belief that misconduct may have been occurred. BR 2.5. If that office determines that there is sufficient evidence, it refers the complaint to the Disciplinary Counsel. BR 2.5(b)(2). If the Disciplinary Counsel does not dismiss the complaint for lack of probable cause, the State Professional Responsibility Board is responsible for deciding whether or not the Bar will file a formal complaint with the Disciplinary Board against the attorney (or will resolve the matter through an admonition or diversion agreement). BR 2.6(c)(1).

You have requested two referral memos from the Client Assistance Office to the Disciplinary Counsel in disciplinary matters that are still pending.[2] The Bar asserts that these memos are exempt from disclosure under the attorney-client privilege found in ORS 40.225, as internal advisory communications under ORS 192.502(1), and as litigation records under ORS 192.501(1). The Bar explains that keeping referral memos about pending matters confidential allows its staff "to communicate frankly and freely . . . about the strengths and weaknesses of [these] matters, to identify crucial evidence and existing evidentiary gaps, and to opine on the credibility of potential witnesses, complainants and attorney members."

ORS 192.501(1) exempts from disclosure, as relevant here, "[r]ecords of a public body pertaining to litigation . . . if the public body shows that such litigation is reasonably likely to occur," unless the public interest requires disclosure or the litigation has concluded. "Reasonably likely" means "more likely than not." *Attorney General's Public Records & Meetings Manual* 37 (2014).

The Bar contends that the referral memos at issue contain strategic analyses of why the Client Assistance Office determined that the initial complaints presented sufficient evidence of misconduct to justify further investigation. The Bar further explains that out of the approximately 2,000 initial complaints received in 2016, only approximately 283 were referred to the Disciplinary Counsel for prosecution. Based on this information, and after reviewing the withheld records at issue here, we agree with the Bar that the Client Assistance Office's referral to the Disciplinary Counsel indicates both that formal charges against the attorney are reasonably likely to occur, and that these memos were compiled for use in preparing for that potential disciplinary proceeding.

---

[2] The Bar explains that both matters are currently with the Disciplinary Counsel's Office, and remain under consideration for prosecution.

In addition, we find that these disciplinary proceedings qualify as "litigation" for purposes of ORS 192.501(1). Similar to the trial court in a civil suit, the Disciplinary Board's decision on a proceeding is final, unless the accused attorney seeks review. ORS 9.536(1). And the Disciplinary Board's authority derives from the Supreme Court's authority to discipline attorneys. *See* ORS 9.527 (giving that authority to the Supreme Court); ORS 9.529 (explaining that disciplinary proceedings are "within the inherent power of the Supreme Court to control").[3]

Turning to whether the public interest requires disclosure, we find compelling the Bar's argument that protecting its analyses of pending matters serves the public interest of allowing the Bar to more effectively investigate and prosecute alleged misconduct. Permitting the Bar to withhold these analyses will also better serve the exemption's purpose of putting governmental bodies on an even footing with private parties. *Attorney General's Manual* 37. You have not asserted a public interest in disclosure, and as the initial complainant in both of these matters your interest appears to be private in nature. *See id.* at 38 (a private interest in litigation does not qualify as a public interest requiring disclosure). Therefore, we conclude that in this instance the public interest does not require disclosure.

Because the records at issue are exempt from disclosure under ORS 192.501(1), we respectfully deny your petition.

Sincerely,

FREDERICK M. BOSS
Deputy Attorney General

FMB:pjn/DM8598968
c via e-mail only: Amber Hollister, ahollister@osbar.org

[3] These factors distinguish Bar disciplinary proceedings from contested case hearings, which do not qualify as "litigation" for purposes of ORS 192.501(1). *See Attorney General's Manual* 38. The administrative law judges presiding over contested cases are executive branch officials; they do not serve under the authority of the court, and their role is generally to assist executive branch agencies with making decisions. *See* ORS 183.464(1) (but allowing agencies to delegate final-order authority to administrative law judges).