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April 16, 2019

VIA EMAIL ONLY: sllvolin@gmail.com

Stephanie Volin
29 South Valley Road
West Orange, NJ 07052

Re: Petition for Public Records Disclosure Order
Oregon State Bar
DOJ File No.: 993001-GA00033-19

Dear Ms. Volin:

This letter is the Attorney General's response to your petition for disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478. Your petition, which we received April 9, 2019, asks the Attorney General to order the Oregon State Bar (OSB) to disclose certain records. For the reasons that follow, we respectfully deny your petition.

The Public Records Law confers the right to inspect public records in Oregon, unless such records are exempt under ORS 192.338, 192.345, or 192.355. ORS 192.314(1). The law is a disclosure law, and exemptions from disclosure must be express. 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 192.411(1). The agency carries the burden to sustain any such denial. *Id.* An agency may also establish fees reasonably calculated to recover actual costs in making public records available, and its obligation to process a request is suspended until the fee has been paid or waived. *See* ORS 192.324(4) and 192.329(3)(a). If the requester fails to pay the fee or to obtain a fee waiver within 60 days of receiving the fee estimate, the agency shall close the request. ORS 192.329(3)(b).

Your petition stems from three separate records requests you submitted to OSB, which we address in turn. The first request, dated October 10, 2018, sought "all emails, letters and other communications" forwarding the State Professional Responsibility Board's (SPBR) "complaint summaries describing criminal conduct by now-disbarred attorney Megan M. Perry." Your request specifically referenced the OSB's obligation under Bar Rule of Procedure 3.3

(Rule 3.3) to report certain alleged criminal conduct by Oregon attorneys to an appropriate investigative authority.[1] Your petition explains that on October 29, 2018, OSB provided you a fee estimate of $361.92 to process the request, but that in mid-November you received a letter indicating that the OSB did not prepare or submit any reports under Rule 3.3 in Ms. Perry's case. On April 11, 2019, you clarified to our office that you doubt these reports ever existed, in which case you contend OSB improperly sought to charge you for non-existent records.

We contacted Amber Hollister, OSB General Counsel, regarding your petition. With respect to your October 10, 2018 request, she confirmed that OSB did not prepare or submit any formal reports under Rule 3.3 in Ms. Perry's case. Ms. Hollister also explained that OSB understood your request for "all emails, letters and other communications" to include correspondence beyond any formal reports submitted under Rule 3.3. She indicated that OSB's fee estimate was based upon this broader understanding of your request.

To the extent your October 20, 2018 request only sought formal reports prepared under Rule 3.3, we deny your petition because we cannot order OSB to disclose records that do not exist. Insofar as your request sought additional correspondence beyond any formal reports, we deny your petition because OSB did not deny that aspect of your request. Rather, OSB provided you with a fee estimate on October 29, 2018 and was later required to close the request because the fee had not been paid or waived within 60 days. *See* ORS 192.329(3)(b).

Your second records request, dated October 11, 2018, sought phone records, call logs, or other notes documenting complaints submitted by Scott and Shyla Stewart. According to your petition, OSB informed you that any responsive records were destroyed in accordance with OSB guidelines for closing files. Your petition explains your belief that records still exist and that OSB is improperly withholding them from you. You also suggest that OSB's guidelines did not permit or require the destruction of these records. In response to your petition, Ms. Hollister confirmed that OSB does not have any records responsive to your October 22, 2018 request because they were destroyed when the relevant files were closed.

On the record before us, we must deny the second part of your petition because we cannot order OSB to disclose records that do not exist. We have no reason to second-guess Ms. Hollister's representation that the responsive records were destroyed. And assessing whether the OSB properly destroyed the records is beyond the scope of a public records disclosure order.[2]

The final aspect of your petition relates to your March 6, 2019 request for documentation regarding Mx. Mark Johnson-Roberts' OSB membership status change from "active" to "pro

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[1] Rule 3.3 states, in relevant part, that "If the SPRB directs the filing of a formal complaint that alleges acts involving the possible commission of a crime that do not appear to have been the subject of a criminal prosecution, Disciplinary Counsel shall report the possible crime to the appropriate investigatory authority."

[2] The Attorney General's authority in the public records petition context is generally limited to matters associated with the handling of public records requests by state agencies. *See* ORS 192.407 and 192.411. It does not extend to the enforcement of agency record retention policies.

bono." In response to your request, OSB provided you with a copy of Mx. Johnson-Roberts' retirement notice and paperwork documenting his approved retirement. Your petition explains your belief that under its Bylaws, the OSB should also be able to provide you with a copy of Mx. Johnson-Roberts' application for pro bono status, as well as documentation reflecting OSB's final eligibility determination.[3]

In its response to your initial request, OSB explained that membership status change requests are processed through an online application form. The form allows applicants to select a status change effective date and requires them to make several certifications. Members in good standing who make the appropriate certifications are automatically approved for pro bono membership status. OSB explained to you that because the process was recently automated, it has no way to re-create Mx. Johnson-Roberts' online application form. We understand that the OSB provided you with the effective date of his status change and offered to provide you with a blank copy of the online form. According to Ms. Hollister, OSB has otherwise disclosed to you all records responsive to your March 6, 2019 request and it has not denied any aspect of that request. Again, because we have no reason to second-guess Ms. Hollister's representation, we must deny the final part of your petition.

The available record indicates that the OSB has not denied any aspect of your various requests. And it appears to us that, except for the records for which the OSB provided a fee estimate, it has disclosed all of the responsive records in its custody. We must therefore respectfully deny your petition.

Sincerely,

Frederick M. Boss
Deputy Attorney General

FMB:pjn/DM9539105
c via email only: Amber Hollister (OSB)

[3] Article 6.1, Subsection 6.101, of the OSB Bylaws – which governs the procedure for applying for pro bono membership status – indicates that the OSB will provide interested members with an application form, and that the Chief Executive Officer or designee will make the final eligibility determination.