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

July 1, 2019

VIA EMAIL ONLY: kally.goodwin-ratzloff@kitch.com

Kally Goodwin-Ratzloff
One Woodward Ave, Ste 2400
Detroit, MI 48226

Re: Petition for Public Records Disclosure Order
Oregon Health Authority Health Licensing Office
DOJ File No.: 443301-GA0053-19

Dear Ms. Goodwin-Ratzloff:

This letter is the Attorney General's order responding to your petition for disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478. Your petition, received by this office on June 19, 2019,[1] asks the Attorney General to order the Oregon Health Authority's (OHA) Health Licensing Office (HLO) to disclose complaints against hearing aid specialists that involve tinnitus and that were received between 2013 and 2018. For reasons that follow, we respectfully deny your request.

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 its actions. ORS 192.411(1).

Your petition explains that you requested these complaints on January 14, 2019. On April 11, 2019, HLO informed you that it would evaluate your request under ORS 676.590(2), which requires HLO to disclose such information when a requester can demonstrate "by clear and convincing evidence that the public interest in disclosure outweighs other interests in nondisclosure, including the public interest in nondisclosure." Consistent with that provision,

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

HLO asked you provide clear and convincing evidence that the public interest in disclosure outweighs other interests in nondisclosure.

The record shows that on April 25, 2019 you provided HLO with a letter outlining why you believe the public interest requires disclosure in this instance. The letter notes that HLO recently amended rules that restrict the ability of hearing aid specialists to adapt the hearing aids of patients suffering from tinnitus. The letter explains that the rules were the result of a lengthy notice and comment period, as well as discussions between HLO and the Advisory Council on Hearing Aids (the "Advisory Council").[2] Your letter also indicates that before drafting the proposed rules, the Advisory Council "took into consideration complaints made" to HLO, as evidenced by a regulatory report presented to the Advisory Council at its October 26, 2018 meeting. The letter argues that, in general, there is great public interest in the information policy makers consider when enacting new rules. And regarding the complaints you seek, your letter asserts the public interest requires disclosure in this instance because, without this information, the public will be unable to assess whether the complaints improperly influenced the Advisory Council or introduced bias into its deliberations.

HLO denied your request on May 29, 2019, after concluding that you did not provide clear and convincing evidence that the public interest in disclosure outweighs other interests in nondisclosure in this instance. Your petition now asks the Attorney General to order HLO to disclose any responsive complaints.

We contacted Robert Bothwell, HLO's Public Health Regulatory Operations Manager, regarding your petition. He explained HLO's position that the complaints are exempt from disclosure under ORS 676.590(2) and that you failed to provide clear and convincing evidence that the public interest in disclosure outweighs other interest in nondisclosure. In particular, he indicated that the premise of your public interest argument was incorrect because the Advisory Council did not consider any complaints against hearing aid specialists during the rule making process. He explained that the only complaint-related information the Advisory Council received during this period was the single-page regulatory report referenced by you in your April 25, 2018 letter. Mr. Bothwell emphasized that the regulatory report depicts only the total number of complaints HLO received against hearing aid specialists over the last three biennia. The report does not identify the complainants or the subjects of the complaints, or specify how many complaints were related to tinnitus. According to Mr. Bothwell, the substantive complaints were never provided to the Advisory Council, nor were the details of any complaints discussed during any of the Advisory Council's public meetings or executive sessions.

Mr. Bothwell also described HLO's position that the public interest in nondisclosure outweighs the public interest in disclosure in this instance. First, HLO asserts that ORS 676.590(2) gives HLO discretion to withhold complaints and investigatory information, and that it is generally appropriate to do so in cases that are not substantiated or that do not result in disciplinary action. In such cases, HLO asserts that nondisclosure helps to avoid embarrassment of licensees. Nondisclosure also protects the identities of any witnesses or consumers mentioned in unsubstantiated complaints. Second, Mr. Bothwell argued that the

[2] The Advisory Council on Hearing Aids oversees the practice of hearing aid specialists in Oregon.

public has an interest in encouraging complaints and that routine disclosure could harm that interest by having a chilling effect on future complainants.[3]

Regarding your specific request, Mr. Bothwell indicated that HLO received only three complaints that related to tinnitus. Each of those complaints was investigated and found to be unsubstantiated. And after reviewing the particulars of each complaint, HLO found nothing suggesting that there may be heightened public interest in their disclosure. Finally, Mr. Bothwell observed that your firm represents the International Hearing Society and that some of its members were likely affected by HLO's new rules. This suggests to HLO that disclosure to you will primarily benefit your client and not the general public.

On the record before us, we conclude that HLO is not required to disclose the complaints to you. ORS 676.590 requires HLO to disclose such information only when the requester "demonstrates by clear and convincing evidence that the public interest in disclosure outweighs other interests in nondisclosure, including the public interest in nondisclosure." The evidence you offered is premised upon your belief that the Advisory Council considered the substantive complaints. From that, you argue that the public has a right to know whether the complaints improperly influenced the development of HLO's new rules. But Mr. Bothwell informs us that the Advisory Council never considered the complaints, and we have no reason to doubt his claim. We also conducted our own review of the complaints and could not identify any information that, if disclosed to the public, would meaningfully advance any of the potential public interests you have identified. Mr. Bothwell also identified several interests in nondisclosure that appear plausible in this instance. Although those interests may, to varying extents, reflect private interests rather than public interests, the statutory scheme governing your request specifically requires us to consider private interests as well as public interests. Given that we have been unable to identify a clear public interest that would be served by disclosing these complaints to you under the circumstances, we must respectfully deny your petition.

Sincerely,

FREDERICK M. BOSS
Deputy Attorney General

FMB:pjn/DM9691833
c via email only: Robert Bothwell (HLO)

[3] We note that ORS 676.590 was recently amended to provide that complaints such as the ones you requested are not exempt from public disclosure. Senate Bill (SB) 29, Section 17 (2019). However, the amendment only applies to complaints received by HLO on or after January 1, 2020. *See* SB 29, Sections 23-24 (2019). The inclusion of a future effective date in the amendment appears designed to preserve HLO's discretion to withhold complaints filed before January 1, 2020. This provides some lasting protection for prior complainants who, under the current statute, may have reasonably expected HLO to withhold their complaints from routine public disclosure. By making clear that future complaints will not be exempt from public disclosure, the amendment removes any expectation of confidentiality.