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) 378-6002

June 2, 2020

Arlen P. Smith
SID #3738655
3405 Deer Park Drive, S.E.
Salem, OR 97310

Re: Petition for Public Records Disclosure Order
Oregon Board of Psychology
DOJ File No.: 108002-GA0050-20

Dear Mr. Smith:

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 asks the Attorney General to order the Oregon Board of Psychology (the "Board") to disclose any records relating to its investigation of a complaint filed by you against one of the Board's licensees. 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 192.401 and 192.411(1). In general, an agency that withholds public records from inspection carries the burden of demonstrating that the material it withheld falls within an exemption. ORS 192.411(1). However, ORS 192.401(2)(a) establishes a partial exception to this general rule in the context of certain appeals to the Attorney General:

> 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.

We begin by noting that ORS 192.401(2)(a) applies to the records you requested because the Board is a health professional regulatory board. *See* ORS 676.160(15). Thus, if the records at issue are exempt from disclosure pursuant to ORS 656.165 or 676.175, you have the burden of demonstrating to us by clear and convincing evidence that the public interest in disclosure outweighs other interests in nondisclosure. *Id*. We have no difficulty concluding that the records you requested fall within the scope of confidentiality provisions of ORS 676.165 and 676.175. The former statute provides, in relevant part, that "[i]nvestigatory information obtained by an investigator and the report issued by the investigator shall be exempt from public disclosure." ORS 676.165(5). The latter provision provides that "[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." ORS 676.175(1). As noted above, you specifically requested records pertaining to the Board's investigation of a licensee. Thus, the records responsive to your request are exempt from disclosure pursuant to ORS 676.165 and 676.175.

The confidentiality provision in ORS 676.175 contains several exceptions, but only one appears relevant to your request. That exception, which mirrors ORS 192.401(2)(a), requires the Board to disclose investigatory information only if the requester "demonstrates by clear and convincing evidence that the public interest in disclosure outweighs other interests in nondisclosure ***." ORS 676. l75(2)(a). In this instance, we observe that your request to the Board was silent in regard to the public interest in the disclosure of these records. We therefore conclude that the Board was not required, by operation of this exception, to disclose the otherwise confidential investigative records to you.

Similarly, we observe that your petition to our office does not address the public interest in the disclosure of this information. You have the burden of demonstrating to us by clear and convincing evidence that the public interest in the disclosure of these otherwise confidential records outweighs other interests in nondisclosure. ORS 192.401(2)(a). Because your petition gives us no basis for reaching such a conclusion in this instance, we must respectfully deny your petition.[1]

Sincerely,



Frederick M. Boss
Deputy Attorney General

FMB:pjn/DM10261305
c via email only: Allison McGonagle (Board of Psychology)

[1] Although there may exist a general public interest in the disclosure of the Board's investigatory records in every case, we have previously concluded that this generalized interest is not sufficient to overcome the legislatively enacted confidentiality provisions contained in ORS 676.165 and 676.175. *See* Public Records Order, Feb 13, 2013, Bunnell.