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Re: Petition for Public Records Disclosure Order
Oregon Board of Medicine
DOJ File No.: 847001-GA0110-20

Dear Mr. D'Amore and Ms. Krishnaswami:

This letter is the Attorney General's response to Mr. D'Amore's petition for disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478. His petition asks the Attorney General to order the Oregon Board of Medicine (the "Board") to disclose records relating to its investigation against David Farley, MD, that led to the revocation of his Oregon medical license. For the reasons that follow, we respectfully deny the petition in part and grant it in part.

Background

Mr. Farley was a board-certified family practice physician who formerly maintained a private practice in West Linn, Oregon. In October 2020, he stipulated to the revocation of his medical license after the Board found that he violated multiple provisions of the Medical Practice Act, violated multiple standards of medical ethics, and engaged in sexual misconduct as defined in OAR 847-010-0073(3)(b)(G) (non-diagnostic and non-therapeutic behavior that exploits the licensee-patient relationship in a sexual way). Most of the Board's findings relate to his performing unnecessary Pap smears and pelvic and breast exams upon at least three female patients under the age of 18, as well as photographing the genitalia of five minor patients purportedly for educational purposes. Mr. Farley's misconduct and the Board's findings are documented in some detail in the Board's Sep 3, 2020 "Complaint and Notice of Proposed Disciplinary Action" (the "Board Complaint") and an Oct 2, 2020 "Stipulated Order," both of which were provided to Mr. D'Amore and which are available to the public. *See* ORS 676.175(6). Finally, we observe that Mr. Farley's actions are the subject of a pending

criminal investigation and Mr. D'Amore's firm represents at least four of Mr. Farley's former patients in a civil suit against him.

According to the petition, on Oct 27, 2020, Mr. D'Amore asked the Board to disclose all materials related to Mr. Farley's licensing, and all information relating to the suspension and subsequent revocation of his medical license. The Board responded on Oct 28, 2020 by disclosing Mr. Farley's malpractice history, licensing and renewal applications, and the public orders that resulted from the Board's investigation into the conduct described above. The Board withheld several licensing records, asserting that they were exempt from disclosure under ORS 192.355(4) (submitted in confidence). The Board also withheld all other investigatory information, claiming it is confidential and exempt from disclosure under ORS 675.165, 676.175, and 677.425. This petition followed.

Analysis

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.

Id.

As a preliminary matter, the Board has informed us that it no longer considers the licensing records it withheld under ORS 192.355(4) to be exempt and they have agreed to disclose them to Mr. D'Amore. We therefore dismiss this aspect of the petition as moot.

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We now turn to the investigative records withheld by the Board. We begin by noting that the special appeal provisions of ORS 192.401(2)(a) apply to the records because the Board is a health professional regulatory board. *See* ORS 676.160(15).[1] Thus, if the records at issue are confidential under ORS 656.165 or 676.175, Mr. D'Amore has the burden of demonstrating to us by clear and convincing evidence that the public interest in disclosure outweighs other interests in nondisclosure. *Id*.

We conclude, and the petition acknowledges, that the records at issue are confidential under 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, these records specifically relate to the Board's investigation of a licensee. They are therefore confidential and exempt from disclosure unless Mr. D'Amore demonstrates by clear and convincing evidence that the public interest in disclosure outweighs other interests in nondisclosure, including the public interest in nondisclosure.

Mr. D'Amore acknowledges that Board investigations such as this should normally be free from public scrutiny. However, he argues that this is an unusual circumstance and that the public interest in disclosure should prevail in this instance for several reasons. First, by granting a public interest fee waiver for the non-investigatory records that the Board did disclose to him, he contends that the Board has admitted that the public has an interest in reviewing the confidential investigatory records. We are not persuaded by this argument. A public body may waive its fee to disclose *non-exempt* records if doing so "is in the public interest because making the record available primarily benefits the general public," rather than the requester. ORS 192.324(5). The public interest balancing test we must apply here is quite different – both in terms of who bears the burden and the quantum of evidence required – and its purpose is to determine whether the Board must disclose otherwise *exempt* records. We therefore conclude that the Board's decision to grant a fee waiver for the production of non-exempt records has little bearing on our determination of whether the Board's confidential investigative records should be disclosed in this instance.

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[1] In two prior orders applying the special appeal provisions of ORS 192.401(2)(a) to circumstances where a licensing board took disciplinary action, this office failed to address the public interest balancing test established by that statute. *See* Public Records Order, Nov 28, 2008, Durkee; *see also* Public Records Order, Jan 3, 2001, Teamey. But in other cases, we have applied the balancing test of ORS 192.401 in such circumstances. *See* Public Records Order, April 27, 2000, Rojas-Burke. In neither of the cases failing to apply the public interest balancing test of ORS 192.401 did the order explain that choice. Because the plain terms of ORS 192.401 require us to impose a public interest balancing test on records that are confidential or exempt under ORS 676.165 and 676.175, we believe the failure to do so was error.

Next, Mr. D'Amore asserts that Mr. Farley admitted to destroying much of the material relevant to the Board's investigation and he suggests that failure to disclose the Board's investigatory records could lead to the destruction of additional material. We believe this assertion overstates Mr. Farley's admission. According to the Board's Complaint, Mr. Farley admitted deleting the pictures he took of the genitalia of minor patients and to shredding the consent forms purportedly signed by their parents before the pictures were taken. The Board's Complaint does not indicate whether he destroyed this information before or after the Board's investigation commenced, nor does it indicate whether he destroyed any other material. More importantly, we cannot discern how the nondisclosure of the Board's investigative records would make it more likely that Mr. Farley would destroy additional material or, conversely, how the public disclosure of the Board's investigatory records would ensure the preservation of other material. Accordingly, we cannot accept this argument as clear and convincing evidence that the public interest in disclosing the Board's investigative records outweighs other interests in their nondisclosure.

Finally, given the nature of the Board's findings, Mr. D'Amore argues that the public has a right to know the nature and scope of Mr. Farley's misconduct. The Board's findings are serious. And it has been reported that after Mr. Farley's license was revoked, several dozen of his former patients have now come forward with similar accounts of maltreatment. Given the special position of trust vested in him by virtue of his Oregon medical license, we recognize that the public has a legitimate and significant interest in the disclosure of public records that may shed light on the nature and scope of his misconduct. It is this public interest in disclosure that we must weigh against other interests in nondisclosure, including the public interest in nondisclosure.

After reviewing the investigative records withheld by the Board, they can be generally categorized as follows:

(a) The initial complaint;
(b) Internal administrative Board records relating to the conduct of the investigation;
(c) Scheduling notices and other administrative correspondence with Mr. Farley, witnesses and consultants;
(d) Subpoenas and requests for records;
(e) Medical records of Mr. Farley's patients;
(f) Consultant reviews of patient medical records;
(g) The Investigative Case Report;
(h) Mr. Farley's testimony and other information submitted by him.

We conclude that the public interests identified by Mr. D'Amore will not be meaningfully advanced by the disclosure of the initial complaint. The allegations contained in the complaint were substantially described in the publicly available Board Complaint and were ultimately founded by the Board. Because the substance of the complaint is effectively public, and given the need for clear and convincing evidence, we conclude that disclosing the complaint itself would not meaningfully contribute to the public's understanding. In contrast, we have long recognized that complainants and witnesses have a strong interest in the confidentiality of these

matters and that the public has a strong interest in encouraging the reporting of such abuse. *See* Public Records Order, Oct 19, 2010, Van der Voo. Under the circumstances, we conclude that these interests in nondisclosure outweigh the diminished public interest in the disclosure of the initial complaint.

The records falling within categories (b) – (d) are generally administrative and we find that their disclosure would not meaningfully inform the public about the nature and scope Mr. Farley's conduct. Although there may exist a general public interest in the disclosure of such 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; Public Records Order, Oct 19, 2010, Van der Voo (by enacting ORS 676.165 and 676.175, the legislature "has generally determined that the various interests favoring nondisclosure of such records generally outweigh the public interest in disclosure"). Because these administrative records do not relate directly to the specific allegations against Mr. Farley or to the Board's findings, we are not persuaded that there is a public interest that requires us to depart from the ordinary rule of confidentiality in this instance.

Regarding the medical records and the consultant's record reviews, we do not find sufficient evidence to conclude that the public interest in disclosure outweighs the particularly strong public and private interests in the confidentiality of such information. *See* Public Records Order, Aug 4, 2015, Davis. In addition to being conditionally exempt under ORS 676.165 and 676.175, these records consist of information that is subject to overlapping state and federal laws designed to protect against the public disclosure of personal health information. *See, e.g.,* Health Insurance Portability and Accountability Act of 1996 (HIPAA); ORS 192.553 to 192.581 (Oregon's Protected Health Information); and ORS 192.355(2) (personal information the disclosure of which would constitute an unreasonable invasion of privacy). We have consistently found that the public disclosure of personal medical information would ordinarily constitute an unreasonable invasion of privacy. *See* Public Records Order, Aug 4, 2015, Davis; Public Records Order, Apr 3, 1989, Harrison. And the privacy interests are particularly strong in this case because the medical records relate to the treatment of minor female patients and, in most cases, contain substantial treatment information unrelated to matters investigated by the Board. Moreover, we observe that comprehensive and de-identified summaries of the relevant treatment information were included in the publicly available Board Complaint, as were the consultant's findings. Thus, we conclude that the public interest in the medical records themselves is significantly diminished and does not outweigh the strong interests in their nondisclosure.

Turning to the Board's Investigative Case Report, our review disclosed that, in general, the publicly available Board Complaint substantially encompasses all portions of the case report that would contribute to the public's understanding of Mr. Farley's conduct. This includes a summary of the complaint, summaries of the consultant medical record reviews, an interview summary with one of Mr. Farley's former patients, and the investigator's findings. The remaining material in the case report generally consists of administrative information and personal information about Mr. Farley and his former patients. As discussed above, we do not

believe that the disclosure of such administrative and personal information would meaningfully contribute to the public interest identified by Mr. D'Amore. On balance, we discern only modest public interest in the case report itself because it contains little information of value that is not already available in the Board Complaint. We also conclude that this modest pubic interest is not sufficient for us to deviate from the ordinary rule that such investigative records are exempt under ORS 676.165 and 676.175.

Finally, we consider the information provided by Mr. Farley as part of the Board's investigation, which consists of three letters and a transcript of his investigative interview. Unlike most of the other information discussed above, the Board Complaint contains only a few express references to information provided by Mr. Farley's during the investigation. After reviewing his submissions, we find that their disclosure would provide additional context that would substantially contribute to the public's understanding of this matter of significant public interest. To the extent Mr. Farley may retain some expectation of privacy in these submissions, we note that details surrounding the revocation of his medical license – to include his admission to photographing the genitalia of minors – have already been disclosed, as have the allegations contained in the civil suit filed against him. Under the circumstances, we find his privacy interests to be greatly diminished.

The Board argues that the public interest in withholding this information outweighs the public interest in disclosure. Specifically, the Board asserts that the public has an interest in encouraging licensees to cooperate during such investigations, and that disclosing Mr. Farley's responses could have a chilling effect upon cooperation and licensee candor in the future. This, in turn, could slow future investigations, make them more litigious, and potentially impact patients' access to care. We acknowledge the Board's concerns but note that such general concerns are present in every case. We cannot conclude that this concern, in itself, is dispositive in every case because doing so in cases of intense public interest would effectively override the legislature's determination that confidentiality can be overcome when the public interest dictates. Moreover, given the extraordinary nature of this case, the content of Mr. Farley's responses, and the amount of information that has already been disclosed by the Board (including some of Mr. Farley's most incriminating admissions), we believe that any potential chilling effect on future cooperation with the Board should be limited. We therefore conclude that, on balance, the public interest in disclosing these materials outweighs the interest in their nondisclosure. We do note, however, that Mr. Farley's submissions contain significant information implicating the privacy interests of third persons, including his former patients. This information can be safeguarded by redacting third party privacy information – redactions that Mr. D'Amore has indicated he is willing to accept.

Conclusion

For the reasons discussed above, we deny Mr. D'Amore's petition with respect to the records falling within categories (a) – (g) because we conclude the public interest in their disclosure does not outweigh the interests in their nondisclosure. We grant the petition with respect to the letters submitted by Mr. Farley to the Board, as well as the transcript of his

investigative interview. We order the Board to provide Mr. D'Amore with these records, with appropriate redactions of otherwise exempt material. *See* ORS 192.338.

The Board is required by law not to disclose those records to Mr. D'Amore prior to seven days after service of this order upon Mr. Farley. ORS 192.402(2)(a). The Board also has seven days within which to announce its intention to seek judicial review. ORS 192.401(3)(a) and 192.411(2).[2]

Sincerely,

Frederick M. Boss
Deputy Attorney General

FMB:pjn
c: David Farley c/o Karen O'Kasey

[2] We also note Mr. Farley's right to seek judicial review of this order. *See* ORS 192.401(3)(a).