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May 25, 2023

John Tierney
KGW News
1501 SW Jefferson St
Portland, OR 97201

Nicole Krishnaswami
Oregon Medical Board
1500 SW 1st Ave, Ste 620
Portland, OR 97201

Re: Petition for Public Records Disclosure Order
Oregon Medical Board
DOJ File No.: 847001-GA0049-23

Dear Mr. Tierney and Ms. Krishnaswami:

This letter is the Attorney General's response to Mr. Tierney's petition for disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478. His petition, which we received May 2, 2023,[1] asks the Attorney General to order the Oregon Medical Board (the "Board") to disclose a Letter of Concern it issued to Dr. Christopher Baldwin, as well as any records related to the Board's investigation that led to the issuance of that letter. According to Mr. Tierney's petition, the Board denied his request after determining that he had not demonstrated by clear and convincing evidence that the public interest in disclosure outweighs other interests in nondisclosure. *See* ORS 676.175(2)(a). For the reasons that follow, we grant Mr. Tierney's petition in part and deny it in part.

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. If a responsive record contains both exempt and nonexempt material, the agency shall separate and disclose the nonexempt material. ORS 192.338. 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).

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[1] We thank Mr. Tierney for granting an extension of time in which to respond.

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 an 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.

This special appeal provision applies to the records Mr. Tierney seeks because the Board is a health professional regulatory board. *See* ORS 676.160(12). Thus, if the records at issue are confidential or exempt from disclosure under ORS 676.165 or 676.175, Mr. Tierney has the burden of demonstrating by clear and convincing evidence that the public interest in disclosure outweighs other interests in nondisclosure. ORS 192.401(2)(a). ORS 676.165 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 676.175 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."

We begin by considering the Letter of Concern the Board issued to Dr. Baldwin. The Board acknowledges that the letter itself was not "obtained" as part of its investigation. However, the Board asserts that the letter is exempt in its entirety because it includes information it obtained during its investigation that is confidential and exempt from disclosure under ORS 676.165 and 676.175.

We have reviewed the one-page Letter of Concern, which also includes a one-page attachment addressed to Dr. Baldwin. We find that the letter contains information obtained by the Board during its investigation. That information is confidential and exempt from disclosure under ORS 676.165 and 676.175 unless we find clear and convincing evidence that the public interest in disclosure outweighs other interests in nondisclosure. In this instance, we conclude that the public interest in the disclosure of the letter prevails.

In general terms, the information from the investigation that is relayed in the letter is simply that a third party conducted a review in connection with this matter and based on that review made three specific recommendations. We find it unlikely that disclosure of that limited information concerning the Board's investigation will chill third parties from objectively performing similar reviews in the future, or from making such recommendations as they find appropriate. Conversely, disclosure of the information will serve to demonstrate how seriously the Board took the matter by disclosing one of the steps that it took, without disclosing so much of the substance of the Board's investigation as to substantially undermine the general rule of

confidentiality adopted by the legislative assembly in this context.[2] We also observe that the attachment to the letter was not obtained by the Board in the course of its investigation, nor does it appear to contain any information obtained by the Board during the investigation. It follows that it is not confidential or exempt under ORS 676.165 or 676.175. For the foregoing reasons, we grant Mr. Tierney's petition with respect to the Board's Letter of Concern and its attachment.[3]

We now consider the Board's investigative records, which generally consist of the initial notices to the Board that prompted the investigation, the investigator's report, interview summaries, patient medical records, and an independent fitness assessment. We have no trouble concluding that the Board's investigative records are covered by ORS 676.165 and 676.175. We also observe that these records consist of a significant amount 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 such personal health information would ordinarily constitute an unreasonable invasion of privacy. *See* ORS 192.355(2); Public Records Order, Dec 4, 2020, D'Amore and Krishnaswami; Public Records Order, Aug 4, 2015, Davis; and Public Records Order, Apr 3, 1989, Harrison.

Mr. Tierney acknowledges that the Board's investigative records are covered by ORS 676.165 and 676.175. However, he argues that the public interest in disclosure outweighs the other interests in nondisclosure in this instance. As support for his position, he notes that Dr. Baldwin was sued in 2020 by eight patients who accused him of sexual misconduct; specifically, allegedly touching them in ways that were inappropriate and not medically necessary, and allegedly looking at their breasts in ways that were not medically necessary. Mr. Tierney's petition indicates that the civil suit was settled in 2022 and that a nondisclosure agreement prevents all parties from speaking about the case. Mr. Tierney also notes that during this period, Dr. Baldwin's Oregon Medical License became inactive and he moved to Arizona where he now practices medicine. He asserts that there is clear and convincing public interest in these records because of the serious nature of the allegations against Dr. Baldwin, coupled with the fact that he is still practicing medicine in another state. Without this information, he argues, current or future patients will have no easy way to learn about the allegations and use that information to make an informed decision about seeking medical care from Dr. Baldwin.

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[2] Even if we were to conclude that the public interest favored nondisclosure, that would not have been an appropriate basis for withholding the letter in its entirety, given the duty to separate and disclose nonexempt material. ORS 192.338.

[3] We acknowledge that disclosing the letter will necessarily result in the disclosure of the identity of a licensee, which is information made confidential under ORS 676.175. However, Mr. Tierney's request to the Board demonstrates that he had prior knowledge of the licensee's identity, the Board's investigation, and the Board's Letter of Concern. And in denying Mr. Tierney's records request, the Board tacitly acknowledged the existence of investigative records pertaining to Dr. Baldwin. Moreover, in response to Mr. Tierney's petition, Dr. Baldwin acknowledged, through counsel, the fact of the investigation. Under the circumstances, we cannot discern any interest in the nondisclosure of this identifying information at this stage.

Finally, Mr. Tierney indicates that he does not object to the Board's redaction of any patient or protected health information that may be necessary to comply with applicable privacy laws.

In response to Mr. Tierney's petition, the Board asserts that the public interests addressed by Mr. Tierney are present in every instance where, similar to this case, the Board votes not to discipline a provider. Citing prior orders from this office, the Board asserts that such generic public interests are not sufficient to overcome the nondisclosure provisions in ORS 676.165 and 676.175. *See, e.g.,* Public Records Order, Feb 13, 2013, Bunnell; and Public Records Order, Oct 19, 2010, Van der Voo and Braatz. The Board also asserts that the interests in nondisclosure long recognized by this office should prevail in this instance. Those interests in nondisclosure include:

1. The interest of licensees in being protected from embarrassment, particularly with respect to complaints that do not have merit.
2. The interest of complainants and witnesses in avoiding retaliation or unwanted attention, particularly with respect to matters concerning medical treatment.
3. The public interest in encouraging complaints and frank disclosures to the Board.

See Public Records Order, Nov 12, 2014, Budnick and Braatz; and Public Records Order, Oct 19, 2010, Van der Voo and Braatz.

Regarding Dr. Baldwin's privacy interests in this instance, the Board states that there have been no criminal charges or other publicity surrounding this matter that would tend to diminish his privacy interests. The Board argues that this situation is distinct from other instances in which we ordered disclosure after concluding, in part, that the subject of a disciplinary investigation had a reduced expectation of privacy due to the extent of information that was already publicly available. *See, e.g.,* Public Records Order, Jun 22, 2017, Brosseau and Hale (minimal privacy interest in withheld disciplinary records where substantially all of the information they contained was publicly available); Public Records Order, Aug 25, 2017, Brosseau and Hale (law enforcement officers' privacy interest diminished where the fact of their discipline and alleged misconduct was already publicly disclosed); and Public Records Order, Oct 19, 2010, Van der Voo and Braatz (privacy interests of dentist, complainants, and witnesses diminished where requested information was already aired in a civil suit and was available from other public sources).

Dr. Baldwin also responded, through counsel, to Mr. Tierney's petition. Dr. Baldwin urges us to deny the petition because, he asserts, the existence of a civil action that was settled is not a sufficient basis for the public disclosure of otherwise confidential records. He argues that the filing of a civil complaint does not create a presumption that the allegations are accurate or that the defendant is liable. He argues that the interests in nondisclosure in this instance – the same interests in nondisclosure detailed by the Board – far outweigh the public's curiosity about what may be contained in the Board's records. For example, he argues that disclosure in this instance may have a significant chilling effect upon licensee cooperation in future Board investigations because "any OMB request to licensees for highly confidential medical information, examinations, or assessments, will be met with complete resistance." Consequently, he argues, "licensees will be forced to demand formal means of discovery,

additional confidentiality orders, depositions and interrogatories which will do nothing but lengthen the time for investigations," which "in turn will affect the Board's ability to complete investigations and ensure good patient care."

In our view, multiple consistent allegations that a licensed physician has committed sexual misconduct with patients implicate a significant public interest. The question on this record is whether, and to what extent, Mr. Tierney has demonstrated by clear and convincing evidence that this public interest in the disclosure of the Board's investigative records outweighs the interests that underlie the confidentiality rules. ORS 192.401(2)(a). Ultimately, we conclude that the public interest here requires disclosure of the mandatory initial reports to the Board that prompted this investigation. On balance, we conclude that the public interest does not require disclosure of the remaining records of the investigation, which largely consist of personal health information pertaining to Dr. Baldwin and the patients who alleged misconduct.

In reaching this determination, we observe that under the Public Records Law, the "public interest" in disclosure is the interest that the public has in knowing how public business is conducted and what state officials are doing on the job. *See In Defense of Animals v. OHSU*, 199 Or App 160, 175-76 (2005) (citations omitted). And we have determined that, all things being equal, even this generic public interest in understanding how the Board conducts business cannot be sufficient, on its own, to overcome the presumption of confidentiality that attaches to the information made confidential or exempt from disclosure under ORS 676.165 and 676.175. *See* Public Records Order, Oct 19, 2010, Van der Voo and Braatz.

In this instance, Mr. Tierney's suggests that even though the Board concluded that disciplinary action against Dr. Baldwin was not warranted, disclosing the Board's investigative records will serve the public interest by allowing prospective patients to make informed decisions about whether to seek care from him. We have considered similar arguments in the past and found that disclosing Board investigative records would in fact serve the public interest in that manner. *See* Public Records Order, Feb 13, 2013, Bunnell. However, we have also noted that this general interest will be present in most cases. Relying on that interest to overcome the legislatively-enacted confidentiality provisions contained in ORS 676.165 and 676.175 could essentially nullify the legislature's determination that these matters ordinarily should be confidential. *See id*. (if we were to conclude that potential future clients' interests in knowing about such complaints always constitutes clear and convincing evidence requiring disclosure, we would essentially be eliminating the legislatively enacted confidentiality provisions); and 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").

As noted above, however, we agree that these particular allegations against Dr. Baldwin trigger a heightened public interest. But nearly all of the records we might order to be disclosed on that basis are largely comprised of personal health information – accounts of, and reports generated in connection with, the provision of medical services. We must also recognize a

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significant public interest in the privacy of individual health information.[4] Protecting that information from compelled disclosure by the Board in this case has the effect of allowing the affected individuals to decide for themselves whether they wish to disclose such information about themselves, in service of the public interest that Mr. Tierney identifies. Mr. Tierney observes that the settlement of this case included nondisclosure provisions that prevent the complainants from discussing the matter publicly. But the choice to agree to those provisions was made by the parties to the lawsuit. Given that, and recognizing that the law creates a strong presumption of confidentiality around the Board's investigations, we conclude that Mr. Tierney has not provided clear and convincing evidence sufficient to overcome the presumption favoring nondisclosure of the Board's investigative records.

With respect to the reports to the Board that initiated this matter, however, we reach a different conclusion. The Board's investigation was prompted by mandatory reports that Dr. Baldwin and his previous employer submitted to the Board pursuant to ORS 677.415. Under ORS 677.425, each of those reports is "confidential as provided under ORS 676.175." After reviewing the reports, one of which includes a copy of the civil complaint against Dr. Baldwin, we are satisfied that the public interest requires their disclosure. Unlike the bulk of the investigatory records, those mandatory reports do not contain any individually identifiable health information that goes beyond what was voluntarily disclosed by the plaintiffs who filed suit against Dr. Baldwin. Nor can we conclude that withholding them will meaningfully advance any of the other interests in nondisclosure identified above; i.e., protecting Dr. Baldwin from embarrassment; avoiding retaliation against complainants and witnesses; or encouraging complaints and frank disclosures. *See, e.g.,* Public Records Order, Jun 22, 2017, Brosseau and Hale; Public Records Order, Aug 25, 2017, Brosseau and Hale; and Public Records Order, Oct 19, 2010, Van der Voo and Braatz. In the absence of meaningful interests in nondisclosure, we readily conclude that the public interest we identified above requires disclosure. We therefore grant Mr. Tierney's petition with respect to the mandatory reports.

In conclusion, we order the Board to provide Mr. Tierney with a copy of the Letter of Concern and its attachment. We also order the Board to disclose copies of the mandatory reports submitted to the Board under ORS 677.415. We deny Mr. Tierney's petition with respect to the Board's remaining investigatory materials, concluding that he has not demonstrated by clear and convincing evidence a public interest in their disclosure that is sufficient to overcome the personal privacy interests and other interests served by confidentiality.

As for the records subject to disclosure under this order, the Board may not, by law, furnish any records to Mr. Tierney prior to seven days after service of this order upon Dr. Baldwin. ORS 192.402(2)(a). For those portions of this order granting Mr. Tierney's

[4] We have considered whether redacting information that would protect the identity of individuals would satisfy the public interest here. In the case of Dr. Baldwin's personal health information, we easily conclude that would be impossible. With respect to the personal health information of the complainants, we observe that some information about their identities is available from their anonymous civil complaint. Moreover, their civil complaint indicates that complainants have experienced shame and have expressed other concerns about coming forward in this matter. On balance we believe it is likely that the complainants made conscientious decisions about how much information to include in their complaint. In the context of the relevant confidentiality statutes, we do not see clear and convincing evidence that we should require the disclosure of more information, even with redactions to protect complainants' identities.

petition and ordering disclosure, 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). Dr. Baldwin is also permitted to institute proceedings for injunctive or declaratory relief with respect to those parts of this order granting Mr. Tierney's petition. ORS 192.401(3)(a). Finally, we note that Mr. Tierney may also institute such proceedings with respect to those parts of this order denying his petition. *Id*. In any such proceedings, Mr. Tierney shall have the burden of demonstrating by clear and convincing evidence "that the public interest in disclosure outweighs other interest in nondisclosure, including but not limited to the public interest in nondisclosure." *Id*.

Sincerely,



Lisa M. Udland
Deputy Attorney General

ACF:pjn
c: Dr. Christopher Baldwin c/o Karen O'Kasey