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Re: **Petition for Public Records Disclosure Order; Oregon State Bar Records**

Dear Mr. Mullmann and Mr. Sapiro:

This letter is the Attorney General's order on Mr. Mullmann's petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. The petition, which we received on September 5, 1990, asks the Attorney General to direct the Oregon State Bar (OSB) to make available for inspection and copying a transcript of deposition of Rob Wolf in the disciplinary proceeding now pending before the Oregon State Bar. On July 31, 1990, we denied Mr. Mullmann's prior petition for disclosure of the deposition. We based that ruling on two points. First, at that time the OSB did not have custody of the deposition and, therefore, had no duty under the Public Records Law to disclose it. Second, we concluded that the OSB had not yet denied Mr. Mullmann's records request. We found that the OSB's delay in responding to that request was reasonable, because it was awaiting the trial panel's ruling on Mr. Wolf's motion for a protective order. Since the issuance of our prior order, circumstances have changed somewhat. Nonetheless, for the reasons that follow we conclude that Mr. Mullmann's latest petition is still premature, and deny the petition on that basis. As explained below, however, we

believe that it is now incumbent upon the Oregon State Bar to decide, under the Public Records Law, whether to grant Mr. Mullmann's records request. We will deem any unreasonable delay, from the date of this order, in acting on the request to be a denial from which Mr. Mullmann could petition the Attorney General under ORS 192.450(1).

1. Bar as Custodian

From documents attached to Mr. Mullmann's petition, we understand that a copy of Mr. Wolf's deposition is now in the possession of Jeff Kilmer, the OSB's counsel in the current disciplinary proceedings. As Mr. Kilmer's client, the OSB plainly has the right to acquire that document on demand. The deposition, therefore, is a "public record" within the meaning of ORS 192.410(4), and is effectively within the OSB's custody for purposes of the Public Records Law. See AA Ambulance Co., Inc. v. Multnomah County, 102 Or App 398, ___ P2d ___ (1990) (records in custody of a private consultant were "public records" because the county had a contractual right of access).

2. Delay as Denial

As already noted, we previously concluded that the OSB's delay in responding to Mr. Mullmann's records request was not unreasonable and, therefore, did not constitute a denial. We found it reasonable for the OSB to await the trial panel's ruling on Mr. Wolf's motion for a protective order before acting on Mr. Mullmann's request. Since our July 31 order, and presumably in reliance on that order, the OSB has continued to await the trial panel's ruling. For essentially the same reasons as we stated in our earlier order, we conclude that, up to this time, the OSB has not denied Mr. Mullmann's records request. The current petition, therefore, is still premature.

Facts that we have learned since July 31, however, compel us to conclude that any further substantial delay by the OSB in acting on Mr. Mullmann's request would constitute a denial of that request. We understand that Mr. Wolf has challenged the makeup of the previously appointed trial panel. We also understand that, even after this challenge is resolved, additional challenges by Mr. Wolf, if any, could delay even further the OSB's ability to form a trial panel to rule on Mr. Wolf's motion for a protective order. See OSB Rules of Procedure 2.4(g).

The OSB has suggested that it wishes to await the trial panel's decision in order to avoid being subject to contradictory directives concerning the deposition: i.e., an order from the trial panel forbidding release of the deposition, and an order from the Attorney General mandating release. If, however, the OSB acts on Mr. Mullmann's request now, it runs no risk of being placed in that untenable position. The mere filing of the motion for a protective order does not appear to prevent the OSB from acting on the records request.

Under these circumstances, we conclude that for the OSB to continue to delay acting on the records request pending the trial panel's decision on the motion for a protective order would be unreasonable. Such indeterminate delay would unjustifiably frustrate the Public Records Law's disclosure provisions. Accordingly, we believe that it is now incumbent upon the OSB to decide, under the principles established in the Public Records Law, whether to grant Mr. Mullmann's records request. We would deem any unreasonable delay, from the date of this order, in acting on that request to constitute a denial from which Mr. Mullmann could petition the Attorney General under ORS 192.450(1).

In sum, we respectfully deny the petition as premature, pending action by the OSB on Mr. Mullmann's records request.

Sincerely,

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