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August 17, 1987

Chris L. Mullmann
Attorney for Rockwood Physical
Therapy Clinic
Ragen, Tremaine, Krieger, Schmeer
& Neill
Attorneys at Law
2300 First Interstate Tower
Portland, Oregon 97201

Re: Petition for Public Records Disclosure Order to Physical Therapist Licensing Board

Dear Mr. Mullmann:

This letter responds to your August 6, 1987 petition for a public records disclosure order. You extended us the courtesy of an extension of time within which to act on your petition. Specifically, you ask the Attorney General to order the Executive Secretary of the Physical Therapy Licensing Board to make available for your inspection the following records:

> " . . . All file material regarding the Rockwood Physical Therapy Clinic, including but not limited to, any on-going investigation conducted by the Physical Therapy Licensing Board pertaining to said Clinic."

At the outset, we note that the board maintains no file on the Rockwood Physical Therapy Clinic itself. We understand, however, that you represent the clinic's owner and operator, Mr. John Bonica, on whom the board maintains file material. We therefore treat your petition, as did the board in evaluating your original public records inspection request, as seeking

disclosure of file material relating to Mr. Bonica, a physical therapist licensed by the board. For the reasons discussed below, we deny your petition for a public records disclosure order in substantial part, and allow the petition with regard to relatively few file materials.

The Physical Therapy Licensing Board maintains two files regarding John Bonica: a "licensing" file and an "investigation" file. The licensing file contains documents relating to Mr. Bonica's application for, and maintenance of, a physical therapist license. This file is available for public inspection, and the board has not denied you access to this file. Your public records disclosure petition, however, focuses on records of the type found in the investigation file which the board has withheld from your inspection.

The board's investigation file on Mr. Bonica contains the following documents:

a) Written complaints with attached documents, and documents following up another complaint.

b) A private investigator's report on interviews with complainants and potential witnesses, which report contains exhibits, witness information reports and written "voluntary statements."

c) Copies of other witness information reports of the private investigator and a written witness statement.

d) Separate "special reports" by the investigator on witness interviews.

e) Signed and unsigned witness release forms authorizing the Physical Therapy Licensing Board to share information obtained from witnesses with other government agencies with an investigative interest.

f) Authorization from the private investigator to share information with other investigating government agencies.

g) A letter, dated December 12, 1986, from Assistant Attorney General Len Pearlman to Lynne Chase, Executive Secretary to Physical Therapy Licensing Board, regarding investigation (letter marked "CONFIDENTIAL: Attorney/Client").

h) Two letters, dated April 16, 1987, from Board Executive Secretary Chase to Assistant Attorney General Pearlman regarding the investigation.

i) Six phone message memos: two memos of phone discussions with complainants; one memo of phone conversation with other government investigative body; one memo of phone call from Rockwood Physical Therapy representative; one memo of phone call from John Bonica; one phone memo regarding call from Chris Mullmann.

j) Copy of page from phone book submitted with regard to potential complaint.

k) Cover letter, dated August 10, 1987, from Board Executive Secretary Chase to Assistant Attorney General Pearlman, and enclosed copies of correspondence relating to public records request of Chris Mullmann.

Most of these documents fall into one of three categories:

(1) Complaints and supporting documents submitted with complaints.

(2) Witness interview information.

(3) Communications between a state agency and its assigned legal counsel in the Attorney General's office.

The documents in these categories are exempt from the mandatory disclosure requirements of the Public Records Disclosure Law, ORS 192.410 to 192.500.

The Complaints and Supporting Documentation

Oregon law comprehensively regulates physical therapists, such as Mr. Bonica, and their activities. The Physical Therapist Law, ORS 688.010 through 688.230, requires the licensing of physical therapists; outlines prohibitions, practice restrictions and grounds for discipline; creates the regulatory Physical Therapist Licensing Board; and outlines the board's enforcement authority. The Physical Therapist Law specifically requires that "[t]he board shall investigate every alleged violation of ORS 688.010 to 688.220. . . ."

This legislative directive to investigate alleged violations of the Physical Therapist Law is augmented by ORS 688.230. That statute requires certain professional persons, and encourages others, to "report suspected violations of ORS 688.010 to 688.220 to the board." ORS 688.230(1). The statute attempts to foster reporting of suspected violations by granting reporters qualified, good faith immunity, ORS 688.230(2), and by protecting their reports with a seal of confidentiality: " . . . . such reports are confidential and shall not be subject to public disclosure." ORS 688.230(1)[1]

The written complaints in the board's investigation file on Mr. Bonica, the attached supporting documents, the documents supporting a prior oral complaint, the copy of a page of the telephone book, and notes on phone message forms relating to complainants' phone calls fall within the rule of confidentiality of ORS 688.230(1). The materials constitute reports of suspected violations of the Physical Therapist Law, and thus are "not subject to public disclosure."

This rule applies even though ORS 688.230 is not incorporated in ORS 192.500(2)(h) as an exception to the Public Records Disclosure Law. Notwithstanding ORS 192.420 (1973) ("Every person has a right to inspect any public record of a public body, except as otherwise expressly provided by ORS 192.500"), ORS 668.230 must be treated as an unconditional exception to the general disclosure requirements of the Public Records Law. As noted in the Attorney General's Public Records and Meetings Manual, at I-3, I-12 (1985), the Public Records Disclosure Law does not list every statute, outside the Public Records Law itself, that provides for confidentiality of records. Confidentiality statutes enacted after the 1973 passage of the Public Records Disclosure Law create valid exceptions to that law because they constitute later expressions of specific legislative intent. The statute at issue here, ORS 688.230, was adopted in 1985 Oregon Laws, chapter 41, section 7. We therefore decline to order the Physical Therapist Licensing Board to make available for your inspection the complaints and supporting documentation tendered therewith.

Witness Interview Information

Relying on Pace Consultants v. Roberts, 297 Or 590 (1984), you argued in your July 28, 1987 letter to the board, that for purposes of public records disclosure, a distinction should be drawn between complaints or reports of suspected violations and

materials compiled by an agency in investigating initial complaints. In Pace Consultants, the Oregon Supreme Court concluded that where an agency's enabling legislation separated a complaint process from an investigation process, an exemption from the Public Records Disclosure Law cast in terms of "investigatory information" did not include complaint information contained in file documents, to the extent that information was not discovered through investigation. 297 Or at 597. You evidently would argue that the converse applies here: Where statutes speak to the confidentiality of complaints or reports, investigatory information is available for public inspection. Pace Consultants, however, does not require the Physical Therapist Licensing Board's representative to reverse her decision to maintain the confidentiality of witness interview information.

To the extent the private investigator's reports, witness interview reports, and witness statements contain information discovered through a complaint itself rather than a separate investigation, such information in those reports and statements is confidential under ORS 688.230, discussed above. The Pace Consultants decision applies in this regard. To the extent these reports and statements contain information separate from complaints themselves, another exemption from public records disclosure requirements -- not discussed in Pace Consultants -- renders the information confidential.

ORS 192.500(2)(c) provides that " . . . [t]he following public records are exempt from disclosure under ORS 192.410 to 192.500:

> " . . . .
>
> " . . . Information submitted to a public body in confidence and not otherwise required by law to be submitted, where such information should reasonably be considered confidential, the public body has obliged itself in good faith not to disclose the information, and when the public interest would suffer by disclosure."

Our review of the board's investigation file on Mr. Bonica indicates that witness statements were submitted orally and in writing to the board's investigator under assurances that the identity of the witnesses and their statements would be treated as confidential. No law required these witnesses to provide such information to the board.

Moreover, it is reasonable to consider this information to be confidential. Indeed, the legislature has recognized the reasonableness of confidentiality in investigative processes. For example, the legislature has cloaked investigatory information, compiled for criminal law purposes, with the protection of confidentiality in another specific exemption from public records disclosure, ORS 192.500(1)(c). The considerations that prompted the legislature to adopt this rule are particularly apt here because ORS 688.220 requires the board not only to investigate alleged violations of the Physical Therapists Law, but also to " . . . report to the proper district attorney all cases that in the judgment of the board warrant prosecution." Even when the board compiles investigatory information for civil regulatory purposes, it reasonably may conclude that witness information should be treated as confidential to encourage persons to volunteer information relevant to the board's administration of the Physical Therapist Law.

We also conclude that the board's representative reasonably determined that the public interest would suffer if the witness statements and investigator's reports summarizing those statements were disclosed. The board's representative based her assurances of confidentiality on concerns about potential intimidation of witnesses and destruction of business records. Witnesses asked for confidentiality and waived confidentiality only insofar as their identity and statements would be provided to other government agencies. See, ORS 192.500(2)(i) (confidential records compiled by one public agency remain confidential when received by another public agency if considerations giving rise to the confidential nature of records remain applicable).

In sum, witness reports and statements, investigator reports, and information release forms (insofar as those forms identify the witnesses) are exempt from mandatory disclosure under ORS 192.500(2)(c). Board staff notes of a phone conversation with another governmental investigative agency also are exempt from disclosure under this provision.

Communications Between Board Representative and Board Attorney Regarding Investigation

The board investigation file contains correspondence, regarding the investigation of Mr. Bonica, between the board's executive secretary and the board's attorney, an assistant attorney general. Review of the letters indicates that the

letters are communications furthering the attorney's rendition of professional services to the client. These communications are subject to the attorney-client privilege, ORS 40.225.

ORS 192.500(2)(h) exempts from disclosure under the Public Records Law "[p]ublic records or information the disclosure of which is . . . made . . . privileged under ORS . . . 40.225 [attorney client privilege]. . . ." Consequently, the board may invoke this specific exemption under the Public Records Law to withhold disclosure of the communications with counsel in regard to an on-going investigation of Mr. Bonica.

The board's investigation file also includes a cover letter to the board's attorney and enclosed documents relating to your request to inspect the board's files. One sentence of the cover letter is subject to the attorney-client privilege because it relates to the rendition of legal services by that attorney. The enclosed documents may be disclosed to you, but you probably have copies of those documents in your file because they are originals and copies of your correspondence with the board and the Attorney General's office.

Document Ordered to be Released

As explained above, the public records disclosure exemptions for records of suspected violations, for information submitted in confidence, and for records subject to the attorney-client privilege together cover almost all of the information in the board's investigation file on Mr. Bonica. The Public Records Disclosure Law, however, requires public bodies to "separate the exempt and nonexempt material and make the exempt material available for examination." ORS 192.500(3). After reviewing the board's investigation file, we conclude that the following file documents or parts of documents are not exempt from disclosure and should be made available for inspection:

1) Copy of witness release form, after deleting date, name of witness and date of signature.

2) Phone message memo, dated 5/11, regarding phone conversation with "Connie Geullie" of "Rockford PT," after deleting exempt information (i.e. names of complainants).

3) Phone message memo, dated 8/11, regarding phone conversation with John Bonica.

4) Phone message memo, dated 7/7/87, regarding phone conversation with Chris Mullmann.

5) Cover letter, dated August 10, 1987, from board executive secretary to Assistant Attorney General Pearlman, after deleting single line relating to attorney-client communication.

6) Correspondence, regarding public records request, between Chris Mullmann and the board's executive secretary and between Chris Mullmann and the Attorney General's office.

To assist in the separation of exempt and nonexempt materials, we have made copies of the above file documents, with the exempt material blanked out where appropriate. See Attorney General's Manual, supra, at I-2. Because the board's executive secretary has no objection to our releasing these copies to you, we are submitting the copies with this letter. To the extent your petition seeks disclosure of other materials in the board's investigation file, your petition is denied.

Thank you for your professional courtesy, and again be advised that the board's separate "licensing file" is available for your inspection when a mutually convenient time can be arranged.

Respectfully submitted,

James E. Mountain Jr.

JAMES E. MOUNTAIN, JR.
Special Counsel to the
Attorney General

JEM:cm
cc: Lynne Chase, Executive Director, Physical Therapy Licensing Board
Leonard Pearlman, Assistant Attorney General
Enclosures
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"(1) Any licensed health facility, licensed physical therapist, licensed physical therapist assistant, the Oregon Physical Therapy Association or physician licensed under ORS

chapter 677, podiatrist or dentist shall, and any other person may, report suspected violations of ORS 688.010 to 688.220 to the board. Such reports are confidential and shall not be subject to public disclosure.

"(2) Any person who reports or provides information to the board under subsection (1) of this section and who provides information in good faith shall not be subject to an action for civil damages as a result thereof."