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No 8282

This opinion responds to questions posed by the health professional regulatory boards that are subject to ORS 676.175(3), as amended by Oregon Laws 2005, chapter 801 (House Bill 2285).[1/] House Bill 2285 amended ORS 676.175(3) to impose a new duty on boards to disclose investigatory information to licensees or applicants.

FIRST QUESTION PRESENTED

A. When does the duty to disclose to licensees or applicants under ORS 676.175(3) begin?

B. When does it end?

C. Does a "disciplinary sanction" for this purpose include:

1. The denial of a license application?
2. An emergency suspension order?
3. An order to obtain a medical evaluation?

SHORT ANSWER

The duty to disclose begins when a board has both voted to issue a notice of intent to impose a disciplinary sanction and received a written request for disclosure from a licensee or applicant.

Boards must disclose to licensees or applicants all information obtained in the investigation of the allegations in the notice up to the time of the contested case hearing.

The denial of a license application is a disciplinary sanction for purposes of ORS 676.175(3) if the denial is based on the applicant's failure to meet the standards of professional conduct. The vote to issue such a denial triggers the duty to disclose.

An order of emergency suspension is neither a notice of intent to impose a disciplinary sanction nor issued pursuant to a notice of intent to impose a disciplinary sanction. Orders of emergency suspension do not, therefore, trigger the duty to disclose under ORS 676.175(3).

An order to obtain a medical evaluation is not a disciplinary sanction for purposes of ORS 676.175(3) and does not trigger a duty to disclose under that provision.

SECOND QUESTION PRESENTED

Is the duty to disclose investigative information triggered if a board delegates to staff the decision to issue a notice of intent to impose a disciplinary sanction?

SHORT ANSWER

No. The duty to disclose is triggered when a board votes to issue a notice of intent to impose a disciplinary sanction. A staff decision to issue a notice is not a board vote and does not trigger the duty to disclose.

THIRD QUESTION PRESENTED

Must boards disclose:

A. Investigators' reports?

B. An investigator's raw notes that have been reduced to a typed report?

C. A complainant's tape-recorded statement?

D. Transcripts of tape-recorded statements?

E. An investigator's letters to witnesses and the witnesses' responses?

SHORT ANSWERS

A. Reports. Boards must disclose "information" from investigators' reports that was obtained in the investigation of the allegations in the notice if no exception applies. Boards have no duty to disclose an investigator's analysis and recommendations because, although they may be based on the information obtained in the investigation, they are not themselves "information obtained in the investigation."

B. Raw Notes. If a board has disclosed a typed report containing the results of witness interviews, the board has no duty to disclose raw notes that contain the same information.

C. Taped Statements. ORS 676.175(3)(b) exempts from disclosure information that would permit the identification of a person who provided information that led to the filing of the notice and who will not testify at a hearing. The voice of a complainant who is not going to testify at a hearing could permit the identification of the complainant and, thus, be exempt from discovery under subsection (3)(b). Boards can provide the licensee or applicant with a written transcript of the tape-recorded statement rather than the tape-recorded statement of a complainant who will not testify at a hearing.

ORS 676.175(3)(c) also exempts from disclosure information that would identify the complainant as a person who made a complaint to the board about a licensee. That exception applies to complainants who will testify at a hearing as well as to those who will not. Boards may provide a licensee or applicant with a written transcript of the complainant's tape-recorded statement with the exempted information redacted instead of providing the tape-recorded statement.

D. Transcripts. Nothing in ORS 676.175(3) requires boards to transcribe tape-recorded statements. If a board has transcribed a tape-recorded statement, it may disclose either the written transcript or the tape-recorded statement.

E. Correspondence. Investigators' letters are not information "obtained by the board" and need not be disclosed. Witnesses' responses are information obtained by the board and must be disclosed if they are obtained in the investigation of the allegations in the notice and if no exception applies. If a witness's response cannot be understood without knowing the question to which it responds, and the witness' response is not exempted from mandatory disclosure, the board must disclose the question as well.

FOURTH QUESTION PRESENTED

Must boards disclose investigative information that they receive from police agencies?

SHORT ANSWER

Investigative information that a board receives from a police agency is not "privileged" or "confidential" under ORS 676.175(3) and boards must disclose that information if it was obtained in the investigation of the allegations in the notice and if no other exception applies.

FIFTH QUESTION PRESENTED

A. Does ORS 676.175(3) apply to all disciplinary actions pending on January 1, 2006, the effective date of the statute, or only to actions that a board votes to initiate on or after January 1, 2006?

B. If ORS 676.175(3) applies only to actions that a board initiates on or after the effective date of the statute, can boards limit disclosure to information that it obtains and considers on or after that date?

SHORT ANSWERS

A. ORS 676.175(3) applies only to cases in which a board "votes" on or after January 1, 2006 to issue a notice of intent to impose a disciplinary sanction.

B. If the vote to issue a notice of intent to impose a disciplinary sanction occurs on or after January 1, 2006, the board must disclose all information that it has obtained in the investigation of the allegations in the notice regardless of when the information was obtained.

SIXTH QUESTION PRESENTED

A. Is information obtained in an investigation that is conducted at the direction of an Assistant Attorney General subject to the attorney-client privilege and, therefore, exempt from disclosure?

B. Does it matter whether a Department of Justice investigator or a board investigator gathers the information?

SHORT ANSWERS

No. An investigation into a complaint about a licensee or applicant is conducted to carry out the board's statutorily-mandated duty to investigate complaints and not "for the purpose of facilitating the rendition of legal services." Therefore, the attorney-client privilege does not exempt from disclosure information obtained in an investigation.

No. Employing an investigator from the Department of Justice to carry out an investigation does not alter the statutory purpose of the investigation or render it to be "for the purpose of facilitating the rendition of legal services."

SEVENTH QUESTION PRESENTED

May a licensee who is a defendant in a malpractice suit disclose information that he or she obtained under ORS 676.175(3) to a plaintiff who seeks discovery from the licensee?

SHORT ANSWER

No. ORS 676.175(4) allows a licensee or applicant who has received information under section (3) to further disclose the information "only to the extent necessary to prepare for a hearing on the notice of intent to impose a disciplinary sanction."

DISCUSSION

You ask several questions that require us to interpret ORS 676.175(3) as amended by Oregon Laws 2005, chapter 801. When interpreting a statutory provision our task is to determine the legislature's intent, and to do so we follow the methodology prescribed by the Oregon Supreme Court in ***PGE v. Bureau of Labor and Industries***, 317 Or 606, 610, 859 P2d 1143 (1993). We begin by reading the text, applying statutory and judicially developed rules of construction that bear directly on how to read text, such as to give words of common usage "their plain, natural, and ordinary meaning" and "simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted." *Id.* at 611; ORS 174.010. We do not read text in isolation, but in context, which includes other provisions of the same statute, related statutes and prior versions of the same statute. ***PGE*** at 611. If the legislature's intent is clear from the text and context of the statute, we inquire no further. If the legislature's intent remains unclear, we examine the legislative history. *Id.* at 611-12. As a last resort, if the legislature's intent still remains inscrutable after examining the text, context, and history, we consult maxims of statutory construction, such as to assume that the legislature did not intend an absurd result. *Id.* at 612.

We now turn to your questions.

I. When the Duty to Disclose Begins

You first ask when the duty to disclose investigatory information under ORS 676.175(3) begins. ORS 676.175(3) provides:

> (3) If a health professional regulatory board votes to issue a notice of intent to impose a disciplinary sanction, upon written request by the licensee or applicant, the board shall disclose to the licensee or applicant all information obtained by the board in the investigation of the allegations in the notice except:
>
> (a) Information that is privileged or confidential under a law other than this section.
>
> (b) Information that would permit the identification of any person who provided information that led to the filing of the notice and who will not provide testimony at a hearing arising out of the investigation.
>
> (c) Information that would permit the identification of any person as a person who made a complaint to the board about a licensee or applicant.
>
> (d) Reports of expert witnesses.

According to the plain language of ORS 676.175(3), a board's duty to disclose begins when it: (1) "votes to issue a notice of intent to impose a disciplinary sanction"; and, (2) receives a "written request by the licensee or applicant" to disclose. That language is unambiguous and nothing in the context of the statute casts any doubt on its meaning. We conclude that as soon as

a board votes to issue a notice of intent to impose a disciplinary sanction and receives a written request for disclosure, it must disclose the required information, even if it has not yet issued the notice.

II. When the Duty to Disclose Ends

There is no similarly explicit language in ORS 676.175(3) specifying when the duty to disclose ends. The provision simply states that, once a board's duty to disclose is triggered, it must disclose "all information obtained by the board in the investigation of the allegations in the notice" unless the information is exempt from disclosure under one of the listed exceptions. That language clearly requires a board to disclose all information that it has obtained in its investigation of the allegations in the notice up to the time that it receives a written request for disclosure. What is less clear is whether a board has a continuing obligation under ORS 676.175(3) to disclose investigatory information that it subsequently obtains.

One possible interpretation of the statutory language is that, because the legislature used the word "obtained," which is the past tense of the verb "obtain," it meant boards only must disclose information obtained before receiving the written request for disclosure. *See* ***Martin v. City of Albany,*** 320 Or App 175, 181, 880 P2d 926 (1994) (court held that it could best effectuate legislative intent by giving effect to the plain, natural, and ordinary meaning of the verb tense chosen by the legislature). The problem with that conclusion is that, in the phrase "all information obtained by the board," "obtained" is the passive voice of the verb "obtain." Verb tense in the passive voice is an unreliable indicator of intent, because the passive voice *always* is stated in the past tense whether referring to past or future action. *See* GARNER'S MODERN AMERICAN USAGE at 592 (2003) ("[t]he unfailing test for passive voice is this: you must have * * * a past participle (usually a verb ending in *–ed*.)"). For that reason the legislature's choice of verb tense, in this context, is not helpful to discern its intent.

Other provisions of ORS 676.175, specifically sections (1) and (2), also relate to a board's duty to disclose or withhold from disclosure "information obtained" in its investigation of a licensee or applicant. We look to those related provisions for contextual clues as to legislative intent. From our examination of those provisions, it appears that the duration of a board's duty to disclose or withhold investigatory information depends on the context. For example, 676.175(1) provides that boards "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," but may disclose information "to the extent necessary to conduct a full and proper investigation." The evident purpose of that section is to keep confidential from the public all information that boards obtain in their investigations of licensees or applicants. In that context, boards have an ongoing duty to keep information that they obtain in their investigations confidential from the public.

ORS 676.175(2) and (3) contain exceptions to the general rule of confidentiality in section (1). Section (2) provides for disclosure in two circumstances when a board votes *not* to issue a notice of intent to impose a disciplinary sanction.[2/] First, boards must disclose "information obtained as part of an investigation of an applicant or licensee" if the person requesting the information demonstrates that the public interest in disclosure outweighs the

interest in confidentiality. Second, boards may disclose to a complainant "a written summary of information obtained as part of an investigation of an applicant or licensee resulting from the complaint to the extent the board determines necessary to explain the reasons for the board's decision." The apparent purpose of those provisions is to authorize disclosure of information that a board relied on in determining not to pursue a disciplinary action against a licensee or applicant. To effectuate that purpose, a board must disclose information that it obtained before voting not to issue a notice of intent to impose disciplinary sanction.

ORS 676.175(3), by contrast, requires disclosure when a board has voted *to* issue a notice of intent to impose a disciplinary sanction. In that circumstance, the board is proceeding with a disciplinary action and may also be continuing its investigation of a licensee or applicant. Disclosure under section (3) serves the purpose not only to inform an applicant or licensee of the basis for the board's decision against him or her, but also to provide him or her with information necessary to prepare for a hearing on the notice. ORS 676.175(4) makes clear that the latter was among the legislature's reasons for enacting HB 2285, as it allows a licensee or applicant who has received information under section (3) to further disclose the information "to the extent necessary to prepare for a hearing on the notice of intent to impose a disciplinary sanction." To effectuate the purpose for disclosure under section (3), boards must disclose to licensees or applicants all information obtained in the investigation of the allegations in the notice up to the time of the contested case hearing.

III. Disciplinary Sanctions

To trigger the board's duty to disclose investigative information under ORS 676.175(3), a board must vote to issue a notice of intent to impose a "disciplinary sanction." You ask whether three specific board actions are "disciplinary sanctions" under the statute. To answer those specific questions, we must determine what the legislature meant by "disciplinary sanction."

The legislature did not define "disciplinary sanction" for the purpose of ORS 676.175, so we begin by giving the words in the phrase their plain, natural, and ordinary meanings.[3/] The relevant definition of "disciplinary" is "**2:** * * * designed to correct or punish breaches of discipline <took [disciplinary] action against three inspectors charged with taking bribes> <set up a committee to consider [disciplinary] measures against the senator." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 644 (unabridged 2002). The pertinent definition of "discipline" is "**6:** a rule or system of rules governing conduct or action: system of regulation." WEBSTER'S at 645. Last, the applicable definition of "sanction" is:

> **3:** the detriment, loss of reward, or other coercive intervention that is annexed to a violation of a law as a means of enforcing the law and may consist in the direct infliction of injury or inconvenience (as in the punishments of crime) or in mere coercion, restitution, or undoing of what was wrongly accomplished (as in the judgments in civil actions) or may take the form of a reward which is withheld for failure to comply with the law.

WEBSTER'S at 2008-09. Read as a whole, the phrase "disciplinary sanction" means a detriment, loss of reward, or other coercive intervention imposed to correct or punish violations of the laws governing conduct.

Reading "disciplinary sanctions" in context, the "laws governing conduct" for purposes of ORS 676.175(3) are the boards' statutes and administrative rules governing the conduct of their health professionals.

A. Denial of License Application

Turning to your specific questions, we first address whether a license denial is a "disciplinary sanction" within the meaning in ORS 676.175(3). A license denial is a detriment or loss of reward to an applicant and thus fits within the definition of "disciplinary sanction" if it is imposed to correct or punish violations of the rules of professional conduct prescribed by a licensing board.

Individual regulatory schemes are inconsistent in whether they deem license denials to be "disciplinary" in nature. Some schemes treat only actions related to licensees as disciplinary actions. *See, e.g.,* ORS 677.205 (authorizing Board of Medical Examiners to "discipline" any person "licensed, registered or certified)[4/]; ORS 679.140 (Oregon Board of Dentistry may discipline "any person licensed to practice dentistry in this state"). At least one board's statutes refer to license denials as "disciplinary actions." *See* ORS 678.111 (authorizing the Oregon State Board of Nursing to deny, revoke, or suspend a license or place on probation); ORS 678.112 (referring to acts in ORS 678.111 as "disciplinary actions."). Many regulatory statutes do not distinguish between license denials to applicants and methods of discipline applicable to licensees. *See, e.g.,* ORS 676.070 (authorizing the State Board of Psychologist Examiners to impose "sanctions" including denying a license to an applicant); ORS 675.540 (authorizing the State Board of Clinical Social Workers to impose "sanctions" including denying a license); ORS 681.350 (State Board of Examiners for Speech-Language Pathology and Audiology may deny, suspend or revoke license for violation of its laws governing conduct).

We do not believe that the legislature intended the duty to disclose imposed by ORS 676.175(3) to depend on whether a particular board's statutes characterize license denials as "disciplinary" in nature. This office previously has concluded that ORS 676.175 "was intended to create uniform standards of confidentiality and public disclosure regarding investigations of licensees of the boards and investigations of applicants for licensure." 49 Op Atty Gen 32, 42 (1998). Nothing in amendments to ORS 676.175 since that opinion alters that conclusion.

Regardless of how a particular license denial is characterized, all licensing statutes generally require that applicants seeking licensure satisfy the relevant standards of professional conduct. Insofar as a board denies a license on the ground that an applicant falls short, the denial is a "disciplinary sanction" for purposes of ORS 676.175(3). If, on the other hand, a board denies a license on the basis of a procedural deficiency or other ground, that denial would not be a "disciplinary sanction" under the statute. *See* ORS 183.435 (providing that an applicant has no right to a hearing when an agency denies a license on the basis of test results or an inspection).

The context of ORS 676.175(3) bolsters that conclusion. ORS 676.175(3) authorizes an "applicant" as well as a "licensee" to request investigative information when a board votes to issue a notice of intent to impose a disciplinary sanction. Boards do not take any negative action related to applicants other than license denials. If we interpreted "disciplinary sanctions" to exclude license denials, we would effectively omit the word "applicant" from ORS 656.175(3). ORS 174.010 prohibits "omit[ting] what has been inserted" in a statute. *See* 49 Op Atty Gen at 46 (1998) (concluding that "disciplinary sanction" under prior version of ORS 676.175 included license denials, because to conclude otherwise would effectively omit the word "applicant" from the statute).

B. Orders of Emergency Suspension

We next consider whether an order of emergency suspension is a disciplinary sanction for purposes of ORS 676.175(3). There is no question that a license suspension is a "disciplinary sanction." A license suspension is imposed after issuing a notice of intent to impose a disciplinary sanction, falls within the definition of "disciplinary sanction," and is recognized as a method of discipline by all of the boards' statutes. But that is a separate issue from whether an order of *emergency* suspension, which a board obtains pursuant to different authority and procedures and for a different purpose than a regular license suspension, triggers the provisions of ORS 676.175(3).

ORS 183.430(2) authorizes an agency to issue an order to suspend a license without a prior hearing if "the agency finds a serious danger to the public health or safety and sets forth specific reasons for such findings."[5/] An order of emergency suspension is "not a substitute for a proceeding permanently revoking or suspending a license. It is an interim proceeding intended to allow the agency to respond quickly to abate a dangerous, emergency situation." OREGON ATTORNEY GENERAL'S ADMINISTRATIVE LAW MANUAL AND UNIFORM AND MODEL RULES OF PROCEDURE UNDER THE ADMINISTRATIVE PROCEDURES ACT (2006) at 116. In other words, an order of emergency suspension is not equivalent to a disciplinary action initiated in the usual way by issuing a notice of intent to impose a disciplinary sanction. Instead, it is an expedited, interim measure to prevent harm while an investigation proceeds or a disciplinary action is pending.

This office previously has concluded that an emergency suspension order is neither a notice of intent to impose a disciplinary sanction itself nor a final order imposing a disciplinary sanction. 49 Op Atty Gen at 51. That conclusion is consistent with the language of ORS 676.175(5)(a), which distinguishes emergency suspension orders from notices of intent to impose a disciplinary sanction and orders resulting from a notice of intent to impose a disciplinary sanction. *See* ORS 676.175(5)(a)(A) (requiring boards to disclose a "notice of intent to impose a disciplinary sanction against a licensee or applicant that has been issued by vote of the board); ORS 676.175(5)(a)(B)(requiring boards to disclose a "final order that results from the board's notice of intent to impose a disciplinary sanction."); ORS 676.175(5)(a)(C) (requiring boards to disclose emergency suspension orders). The duty to disclose information under ORS 676.175(3) is triggered only when a board votes to issue a notice of intent to impose a disciplinary sanction. Because an order of emergency suspension is neither a notice of intent to

impose a disciplinary sanction nor issued pursuant to a notice of intent to impose a disciplinary sanction, an order of emergency suspension does not trigger a board's duty to disclose information under ORS 676.175(3).

We observe that, in almost all circumstances, when a board issues an emergency suspension order, it also will be pursuing a disciplinary action:

> [A]n agency usually should not use its authority under ORS 183.430(2) except when it is prepared to proceed to revoke or refuse to renew the license under its usual licensing procedures or to impose other sanctions on the licensee.

OREGON ATTORNEY GENERAL'S ADMINISTRATIVE LAW MANUAL AND UNIFORM AND MODEL RULES OF PROCEDURE UNDER THE ADMINISTRATIVE PROCEDURES ACT (2006) at 116. A board's disciplinary proceeding, rather than the order of emergency suspension, will trigger the board's duty to disclose.

C. Order to Obtain a Medical Evaluation

Next, you ask whether an order to obtain a medical evaluation is a disciplinary sanction. Boards issue those orders for the purpose of gathering information about a health professional's fitness to carry out his or her professional duties, not to impose a sanction to correct or punish violations of its laws governing conduct. Consequently, board statutes do not identify those orders as methods of discipline and boards do not vote to issue notices of intent to impose disciplinary sanctions when they issue orders to obtain medical evaluations. Because an order to obtain a medical evaluation is not a "disciplinary sanction" and is not issued pursuant to a notice of intent to impose a disciplinary sanction, such an order does not trigger the duty to disclose investigative information under ORS 676.175(3).

IV. Delegated Decisions

You next ask whether the duty to disclose investigative information is triggered if a board delegates the decision to issue a notice of intent to its staff. A necessary prerequisite to the duty to disclose under ORS 676.175(3) is "a health professional regulatory board vote[] to issue a notice of intent to impose a disciplinary sanction." The answer to your question depends on whether the legislature's intended meaning of a "board vote" is broad enough to encompass a staff decision.

We first address the meaning of "health professional regulatory board." ORS 676.160 defines "health professional regulatory board" for purposes of ORS 676.165 to 676.180 to mean the listed Oregon health professional regulatory boards and the "Department of Human Services to the extent that the department certifies emergency medical technicians." A complete list of those boards is contained in footnote 1 of this opinion. The listed boards are established by statutes which provide that the boards shall consist of a specified number of members who are appointed by the Governor. *See, e.g.,* ORS 675.775 (so providing for Oregon Board of Licensed Professional Counselors and Therapists); ORS 677.235 (so providing for Board of Medical Examiners for the State of Oregon); ORS 678.140 (so providing for Oregon State Board of

Nursing). Separate statutes authorize boards to hire employees. *See, e.g.,* ORS 675.785(2) (so providing for Oregon Board of Licensed Professional Counselors and Therapists); ORS 677.280 (so providing for Board of Medical Examiners for the State of Oregon); ORS 678.150(5) (so providing for Oregon State Board of Nursing).

Based on those statutes, it is plausible that the legislature intended "health professional regulatory board" to mean only the appointed members of the board and not employees of the board. The legislature's inclusion of the Department of Human Services "to the extent that the department certifies emergency medical technicians" in the definition of a "health professional regulatory board" casts doubt on that conclusion, however. The Department of Human Services is a government agency consisting of staff, not a "board" for purposes other than ORS 676.165 to 676.180. The legislature's inclusion of the department "to the extent that the department certifies emergency medical technicians" suggests that it took a functional view of the definition of "health professional regulatory board," which could include staff of the department and other boards who are involved in the licensing or certification process.

Even if we assume that board employees are encompassed in the definition of "health professional regulatory boards," the question remains whether an individual staff member can "vote" to issue a notice of intent to impose a disciplinary sanction. The relevant plain, natural and ordinary meanings of the verb "votes" in this context are "**1b:** to decide the disposition of by vote * * * **1d:** to authorize by vote." WEBSTER'S at 2565. Both of those definitions refer to "vote" in its noun sense, the relevant definitions of which are: "**1a:** a usu. formal expression of opinion or will in response to a proposed decision * * * **2:** the collective opinion or verdict of a body of persons expressed by voting." *Id.* The second definition of vote in its noun sense requires a "collective opinion" or "verdict of a body." That definition is the most natural construction of a "board vote," because a board (with the exception of the Department of Human Services) is a body which expresses its collective opinion or verdict by voting. That definition would exclude decisions of individual board staff. It also would exclude decisions of the Department of Human Services, because those decisions are not issued by the collective opinion or verdict of a body, but by individual department personnel.[6/]

The other possible definition of "vote" is a usually formal expression of opinion or will in response to a proposed decision. That definition is not synonymous with a "decision." It describes a more formal process where individuals formally express their opinions or "vote" in response to proposed decisions. A staff decision would not appear to be encompassed within that definition. Nor can the issuance of a notice of intent be the "formal expression of opinion," because that interpretation would effectively write the word "vote" out of the statute. *See* ORS 174.010 (directing courts not to omit what has been inserted in a statute). Based solely on the plain language, the most plausible meaning of the language "if a health professional regulatory board votes to issue a notice of intent to impose a disciplinary sanction" is the collective verdict of the board to issue a notice of intent to impose a disciplinary sanction.

We still must read the phrase in context, however, which includes prior versions of the statute. ORS 676.175(2) (since amended by Or Laws 1999, ch 751 § 3) mandated disclosure of information obtained as part of an investigation "if a health professional regulatory board determines by a *majority vote of the board* that no notice of intent to impose a disciplinary

sanction be issued." (Emphasis added.) ORS 676.175(3) (since amended by Or Laws 1999, ch 751, § 3 and Or Laws 2005, ch 801) required a board to disclose a notice of intent to impose a disciplinary sanction "that has been issued by a *majority vote of the board*." (Emphasis added). ORS 676.175(4) (since amended by Or Laws 1999, ch 751 § 3 and Or Laws 2005, ch 801) provided that "[i]f a notice of intent to impose a disciplinary sanction has been issued by a *majority vote of the board*," (emphasis added), a final order resulting from the notice has to summarize the factual basis for the board's disposition. This office concluded that a vote of less than a majority of the whole board or a decision of board staff was not "a majority vote of the board." 49 Op Atty Gen at 50.[7/] We reached that conclusion even though we pointed out that some boards' statutes allowed them to make decisions by a majority vote of a quorum of their members, rather than by a majority vote of the board. 49 Op Atty Gen at 46-48. We also reached that conclusion even though the Health Division (of the Department of Human Services) also was included at that time in the definition of a health professional regulatory board to the extent that it certified emergency medical technicians. We did not point out any anomaly between requiring a majority vote of the board and the fact that no collective body in the department votes to issue a notice of intent to impose a disciplinary sanction.

The legislature subsequently amended ORS 676.175 to remove the requirement that a notice be issued by majority vote, but retained the requirement of a board vote. Or Laws 1999, ch 751, § 3. Prior to that amendment, the statute clearly meant "vote of the board" in the sense of a collective vote of the board as a whole, because without a collective vote, there could be no majority vote. By retaining the requirement of a board vote and deleting only the requirement that that vote be by a majority, the most plausible conclusion is that the legislature likely did not intend to change the requirement of a collective vote, but merely intended to harmonize that requirement with board statutes allowing them to vote by a majority of a quorum of their members. That conclusion accords with our conclusion based on the plain language that a board vote means the collective verdict of a board to issue a notice of intent to impose a disciplinary sanction. We conclude on the basis of the plain language and context that, for purposes of ORS 676.175(3), "a health professional regulatory board votes" means a collective verdict of the board to issue a notice of intent to impose a disciplinary sanction.[8/] Therefore, the duty to disclose investigative information is not triggered if a board lawfully delegates the decision to issue a notice of intent to its staff, and does not apply to DHS actions against emergency medical technicians.

V. Records Subject to Disclosure to Licensees or Applicants

You next ask whether boards must disclose several specific records to licensees or applicants. The answer to those questions depends on the meaning of the requirement that boards disclose "all information obtained by the board in the investigation of the allegations in the notice * * *." The pertinent plain, natural, and ordinary definition of "information" is: "**2:** something received or obtained through information: as **a :** knowledge communicated by others or obtained from investigation, study, or instruction **b :** knowledge of a particular event or situation: INTELLIGENCE, NEWS, ADVICES * * *." WEBSTER'S at 1160. The relevant definitions of "knowledge" are: **b** (1) **:** the fact or condition of being cognizant, conscious, or aware of something * * * (2) **:** the particular existent range of one's information or acquaintance with facts * * * **c :** the fact or condition of apprehending truth, fact, or reality immediately with the mind or

senses." WEBSTER'S at 1252. That general definition of "information" is limited by ORS 676.175(3) to include only information "*obtained in the investigation of the allegations in the notice.*" ORS 676.175(3) does not require boards to disclose inferences, opinions, recommendations and conclusions that the boards may *draw from* the information obtained, but limits the required disclosure to the information itself. With that in mind, we turn to your questions about the disclosure of specific records.

A. Investigators' Reports

You first ask whether boards must disclose investigators' reports. ORS 676.165(3) provides that an investigator's report must contain a description of the evidence that the investigator gathered, the results of witness interviews, any disciplinary history of the licensee or applicant with the board and any other information that the investigator considered in preparing the report. All of those things are "information" under the statute and must be disclosed if they were obtained in the investigation of the allegations in the notice and no exception applies.[9/] A board is not required to disclose any information in an investigator's report that was not obtained in the investigation of the allegations in the notice.

You also ask whether a board must disclose an investigator's written analysis of information which he or she has obtained and his or her recommendations about how the board should proceed. As discussed above, an investigator's analysis and recommendations, while they may be based on the information obtained in the investigation, are not themselves "information obtained in the investigation." Accordingly, boards are not required to disclose an investigator's analysis and recommendations.

B. An Investigator's Raw Notes

You next ask whether a board must disclose an investigator's raw notes that have been reduced to a typed report. In other words, if a board discloses all of the information contained in the raw notes by disclosing the typed report must it still disclose the raw notes? The answer to that question depends on whether the legislature intended "all information" to mean all substantive information or all documents or records containing information.

The best evidence of legislative intent is the text of the statute. ***PGE*** at 610. ORS 676.175(3) requires boards to disclose all "information," the plain meaning of which is all facts obtained in the investigation of the allegations in the complaint. The statute does not require boards to disclose all documents or records obtained in their investigations and we cannot read those terms into the statute. *See* WEBSTER'S at 1898 (defining "record" as "an account in writing or print (as in a document) or in some other permanent form (as on a monument) intended to perpetuate a knowledge of acts or events."); ORS 174.010 (directing us to "ascertain and declare what is, in terms or substance, contained" in the statute and not to "insert what has been omitted"); ***PGE*** at 610 (same).

Moreover, the legislature, in a related statute, ORS 676.165(5), distinguishes between, and provides independent protection from, public disclosure for "investigatory information obtained by an investigator" and "the report issued by the investigator." That language

demonstrates that the legislature understood the difference between "information" and documents and intended "information" to mean something different from documents. *See* ***State v. Guzek***, 322 Or 245, 265, 906 P2d 171 (1995) (holding that when the legislature uses different terms in related statutes, the court presumes that the legislature intended different meanings).

Therefore, if a board has disclosed a typed report, a board need not disclose raw notes that contain the same information. Of course, if the raw notes contain additional information that is not included in the typed report, then boards must disclose that information as well if it meets the other statutory requirements for disclosure.

C. Complainants' Tape-Recorded Statements

You next ask whether boards must disclose complainants' tape-recorded statements. A complainant's statement is "information" and must be disclosed if it was obtained in the investigation of the allegations in the notice and if no exception applies.

Two exceptions potentially are applicable. The first is ORS 676.175(3)(b), which exempts from discovery:

> (b) Information that would permit the identification of any person who provided information that led to the filing of the notice and who will not provide testimony at a hearing arising out of the investigation.

That exception encompasses complainants who will not testify at a hearing. It allows boards to withhold information *that would permit the identification of a person who will not testify at a hearing*, but does not exempt from disclosure any other information obtained from the person. Nothing in the context or legislative history of this provision expressly addresses whether a person's voice could be considered "information that would permit the identification" of the person. However, a complainant's voice could disclose their identity and thus "permit the[ir] identification." We conclude that the voice of a complainant can be identifying information under ORS 676.175(3)(b) and, thus, be exempt from the duty to disclose. Boards can provide licensees or applicants with the complainant's statement in the form of a written transcript of the recorded statement with any identifying information redacted.

The second relevant exception exempts from disclosure:

> (c) Information that would permit the identification of any person as a person who made a complaint to the board about a licensee or applicant.

ORS 676.175(3)(c). That provision protects from disclosure information that would identify the complainant *as a person who made a complaint to the board about a licensee or applicant*. In other words, a licensee or applicant has the right to know the facts provided by the complainant, but does not have the right to know the identity of the complainant. The legislature did not limit the exemption in subsection (3)(c) to complainants who would not testify at a hearing, so even if a complainant is going to testify, a board may redact information that identifies the complainant as a person who made a complaint. Any portion of a complainant's tape-recorded statement that

identifies the person as a complainant is, thus, exempt from disclosure. For that reason, boards may provide a transcript of the tape-recorded statement with that information redacted instead of providing the tape-recorded statement.[10/]

D. Transcript of a Tape-Recorded Statement

Nothing in ORS 676.175(3) requires boards to transcribe tape-recorded statements. If a board has transcribed a tape-recorded statement, it may provide an applicant or licensee with either the transcript or the tape-recorded statement.

E. Investigators' Letters to Witnesses and Witnesses' Responses

An investigator's letter to a witness is not information "obtained by the board." Instead, an investigator's letter is created by the board in order to elicit or "obtain" information. A witness's response to an investigator's letter is information obtained by the board which a board must disclose if it was obtained in the investigation of the allegations in the notice and if no exception applies.

There may be situations in which a witness's response cannot be understood without knowing the question to which it responds. In that circumstance, the investigator's question provides context, and therefore meaning, for the witness's answer, and, for that reason, conveys information. In such a situation, a board must disclose the question as well as the response.

VI. Investigative Information Received from a Police Agency

Your next question is whether boards must disclose investigative information that they receive from police agencies. Assuming that a board has voted to issue a notice of intent to impose a disciplinary sanction and that the information is "obtained in the investigation of allegations in the complaint," the board must disclose that information unless it falls within the exception in (3)(a) for "[i]nformation that is privileged or confidential under a law other than this section." We have found no statutes or rules expressly making information that relates to a criminal investigation "privileged" or "confidential" for that reason alone. Particular kinds of criminal investigatory information may be rendered confidential or privileged by more specific laws, however.[11/]

The only Oregon law that we have identified that bears on the disclosure of that type of information is a provision of the Oregon Public Records Law (PRL), ORS 192.501(3).[12/] That provision "exempt[s] from disclosure under ORS 192.410 to 192.505 [the PRL]" certain investigatory information compiled for criminal law purposes unless the public interest requires disclosure. That exemption, by its own terms, is expressly limited to disclosures under the PRL. This office has concluded that PRL "[*e*]*xemptions do not prohibit disclosure;* they merely exempt the public body from the Public Record Law's mandate to disclose public records." OREGON ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2005) at 23 (emphasis in original). The Court of Appeals similarly concluded that merely because a given record is exempt from disclosure under the PRL does not necessarily mean that the record is not subject to disclosure under another statute. *See, e.g.,* ***Oregonians For Sound Economic Policy,***

Inc. v. State Accident Ins. Fund Corp, 187 Or App 621, 629 n 3, 69 P3d 742, *rev den* 336 Or 60, 77 P3d 635 (2003) (documents exempt from disclosure under PRL were not exempt from disclosure when request was brought under other statute). We conclude that investigatory information conditionally exempt from disclosure under ORS 192.501(3) is not information that is "confidential" or "privileged" for purposes of ORS 676.175(3). Therefore, information is not exempt from disclosure under subsection 3(a) simply because it concerns a criminal investigation or because it was obtained from a law enforcement agency, and boards must disclose information of that nature unless the law has made it confidential or privileged for some other reason.

VII. Retroactive Application

ORS 676.175(3) took effect on January 1, 2006. Or Laws 2005, ch 801. You ask whether ORS 676.175(3) applies to all disciplinary actions pending on January 1, 2006, or only to actions that a Board votes to initiate on or after that date. If ORS 676.175(3) applies only to actions that boards initiate on or after January 1, 2006, you ask whether boards can limit disclosure to evidence obtained and considered on or after January 1, 2006.

Like other questions of statutory interpretation, whether a legislative provision applies "retroactively" or "prospectively" is a question of legislative intent, which we attempt to discern in the usual manner, beginning with the language of the provision itself. ***Vloedman v. Cornell***, 161 Or App 396, 400, 984 P2d 906 (1999); ***Whipple v. Howser***, 291 Or 475, 479, 632 P2d 782 (1981).

The legislature did not include an express provision in the 2005 amendments to ORS 676.175 stating that it intended those amendments to apply retroactively. In the absence of express language addressing retroactivity, we look for other indicia of legislative intent in the text. One common textual indicator of legislative intent is the tense in which the statutory language is written. *See* ***Newell v. Weston,*** 150 Or App 562, 570, 946 P2d 691 (1997) (reasoning that the legislature meant the statute to apply retroactively because the relevant provision was written in the past tense, and "if the legislature intended the statute to apply prospectively only, it presumably would have used the present * * * or future conditional * * * tense."); ***State ex rel Dwight v. Justice,*** 16 Or App 336, 338-39, 518 P2d 668 (1974) (applying statute retroactively, in part because the legislature used the pertinent verb in the past tense and "had the legislature intended that these amendments should apply only prospectively, it would have used the present tense of the verb * * *.")

We turn to the language that the legislature used in ORS 676.175(3). When that provision took effect on January 1, 2006, the duty to disclose is triggered only "if [a Board] *votes* to issue a notice of intent to impose a disciplinary sanction." (Emphasis added.) In ***Martin v. City of Albany,*** 320 Or at 181, the Oregon Supreme Court reasoned that we should "not lightly disregard the legislature's choice of verb tense, because we assume that the legislature's choice is purposeful. In most cases, we best effectuate the legislative intention by giving effect to the plain, natural, and ordinary meaning of the verb tense chosen by the legislature." Based on the plain, natural, and ordinary meaning of the verb tense chosen by the legislature in ORS 676.175(3), that provision applies only to cases in which the board's vote occurs on or after January 1, 2006. The language of ORS 676.175(3) cannot be interpreted to apply to cases where

a board *voted* to issue a notice before January 1, 2006. If the legislature had intended ORS 676.175(3) to apply retroactively, it could have stated that the duty to disclose is triggered "if a board *has voted* to issue a notice of intent to impose a disciplinary sanction." Nothing in the context of the provision suggests a different interpretation. We, therefore, apply the plain, natural and ordinary meaning of the statutory language and conclude that ORS 676.175(3) applies only to cases in which a board votes on or after January 1, 2006 to issue a notice of intent to impose a disciplinary sanction.

Having concluded that the duty to disclose is prospective only, we consider whether that duty applies only to evidence obtained and considered by boards on or after January 1, 2006. Once a board has voted to issue a notice and received a written request for disclosure, ORS 676.175(3) provides that the board "shall disclose to the licensee or applicant all information obtained by the board in the investigation of the allegations in the notice" unless the information falls within a listed exception. Nothing in that language limits the information which boards must disclose to information gathered after the provision's effective date. Nor does anything in the context of the provision suggest that boards may withhold information obtained before January 1, 2006. We conclude that, if the vote to issue a notice of intent to impose a disciplinary sanction occurs on or after January 1, 2006, the board must disclose all information that it has obtained in the investigation of the allegations in the notice, including information that the board obtained before January 1, 2006.

VIII. Availability of Attorney-Client Privilege

Your next question is whether "evidence gathered during the course of an investigation that is conducted at the direction of an Assistant Attorney General is subject to the attorney-client privilege and, therefore, exempt from disclosure." You further ask whether it makes a difference whether a Department of Justice investigator or a board investigator gathers the evidence.

ORS 676.175(3)(a) exempts from disclosure "[i]nformation that is privileged or confidential under a law other than this section." The attorney-client privilege is contained in OEC 503 and codified in ORS 40.225 and there is no question that it is "a law" that makes certain information "privileged" and that it is encompassed within the exception in ORS 676.175(3)(a).

OEC 503 provides, in part:

> (2) A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
>
> (a) Between the client or the client's representative and the client's lawyer or a representative of the lawyer;
>
> (b) Between the client's lawyer and the lawyer's representative;

* * * * *

> (d) Between representatives of the client or between the client and a representative of a client. * * *

The fundamental barrier to applying that privilege to information obtained in board investigations is that board investigations are not conducted "for the purpose of facilitating the rendition of professional legal services to the client." ORS 676.165 provides, in relevant part:

> (1) Upon receipt of a complaint by any person against a licensee or applicant, a health professional regulatory board shall assign one or more persons to act as investigator of the complaint.
>
> (2) The investigator shall collect evidence and interview witnesses and shall make a report to the board. The investigator shall have all investigatory powers possessed by the board.
>
> (3) The report to the board shall describe the evidence gathered, the results of witness interviews and any other information considered in preparing the report of the investigator. The investigator shall consider, and include in the report, any disciplinary history of the licensee or applicant with the board.

That statute vests authority to direct investigations into complaints about licensees or applicants in boards, not the attorney general's office. It also clarifies that board investigations are not conducted "for the purpose of facilitating the rendition of professional legal services," but to carry out the boards' statutorily-mandated duty to investigate the complaints it receives. Nor do we believe that substituting an investigator from the Department of Justice for an investigator employed by the board to carry out the investigation would alter the statutory purpose of such investigations and render them to be "for the purpose of facilitating the rendition of professional legal services."

It may be that, either during the course of the investigation, or after the investigation is completed and a case is proceeding to hearing, an investigator discusses the investigation with an Assistant Attorney General in order to obtain legal advice. Those conversations, depending on the circumstances, could qualify as confidential under the attorney-client privilege. Or, if an Assistant Attorney General advises an investigator to take some action or to ask witnesses certain questions those communications, too, would be "confidential communications" between an attorney and a representative of the client and thus fall within the attorney-client privilege. The information gathered pursuant to those conversations would not be exempt from discovery on the basis of the attorney-client privilege, however.

The attorney-client privilege protects "confidential communications," not evidence, unless the evidence itself is a "confidential communication." OEC 503 provides that a:

> (b) "Confidential communication" means a communication not intended to be disclosed to third persons other than those to whom disclosure is in furtherance

of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

The Oregon Supreme Court furthered defined "communication," for purposes of OEC 503 as "an interchange of thoughts or opinions." ***State v. Riddle***, 330 Or 471, 477, 8 P3d 980 (2000). Even assuming the attorney-client privilege were applicable and would apply to communications about the information gathered, it could not be used to shield the facts themselves from discovery.

IX. Redisclosure by Licensee

You ask if a licensee who is a defendant in a malpractice suit may redisclose investigative information to a plaintiff who seeks discovery from the licensee. ORS 676.175(4) states that "[i]nformation disclosed to a licensee or applicant under subsection (3) of this section may be further disclosed by the licensee or applicant only to the extent necessary to prepare for a hearing on the notice of intent to impose a disciplinary sanction." That section unambiguously limits a licensee's ability to disclose information that he or she received under section (3) to circumstances where it is necessary to prepare for the disciplinary sanction hearing. A licensee may not disclose that information in any other circumstance, including to a plaintiff in a malpractice suit who seeks discovery from the licensee.

HARDY MYERS
Attorney General

HM:DNH:AEA:clr/GEN251201

[1/] The health professional regulatory boards affected by House Bill 2285 are: the State Board of Examiners for Speech-Language Pathology and Audiology, State Board of Chiropractic Examiners, State Board of Clinical Social Workers, Oregon Board of Licensed Professional Counselors and Therapists, Oregon Board of Dentistry, Board of Examiners of Licensed Dietitians, State Board of Massage Therapists, State Mortuary and Cemetery Board, Board of Naturopathic Examiners, Oregon State Board of Nursing, Board of Examiners of Nursing Home Administrators, Oregon Board of Optometry, State Board of Pharmacy, Board of Medical Examiners, Occupational Therapy Licensing Board, Physical Therapist Licensing Board, State Board of Psychologist Examiners, Board of Radiologic Technology, the Oregon State Veterinary Medical Examining Board, and the Department of Human Services to the extent that the department certifies emergency medical technicians. ORS 676.160.

For ease of reference, we refer to the boards and the Department of Human Services collectively as "boards" throughout this opinion.

[2/] This opinion does not address the possibility that another source of law might impose a duty to disclose on individual board members.

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[3] We may give a phrase its "well-established legal meaning" if one exists. *See* ***McIntire v. Forbes***, 322 Or 426, 431, 909 P2d 846 (1996) (analysis of text includes reference to well-established legal meanings for terms legislature used). We find no well-established legal meaning of the phrase "disciplinary sanction" in case law. Nor do the organic statutes of the health professional regulatory boards or other related statutes use the phrase "disciplinary sanctions."

[4] ORS 677.190 authorizes the Board of Medical Examiners to suspend, revoke or refuse to grant a license.

[5] ORS 183.430(2) provides in full:

> In any case where the agency finds a serious danger to the public health or safety and sets forth specific reasons for such findings, the agency may suspend or refuse to renew a license without hearing, but if the licensee demands a hearing within 90 days after the date of notice to the licensee of such suspension or refusal to renew, then a hearing must be granted to the licensee as soon as practicable after such a demand, and the agency shall issue an order pursuant to such hearing as required by this chapter confirming, altering, or revoking its earlier order. Such a hearing need not be held where the order of suspension or refusal to renew is accompanied by or is pursuant to, a citation for violation which is subject to judicial determination in any court of this state, and the order by its terms will terminate in case of final judgment in favor of the licensee.

[6] The Department of Human Services appoints a State Emergency Medical Services Committee, and the chairperson of that committee appoints "a subcommittee on EMT certification and discipline" which advises Department personnel about disciplinary matters. Department personnel, however, not the committee, make the decisions to issue notices of intent to impose disciplinary sanctions. ORS 682.039(5).

[7] We noted in that opinion that whether such delegations were permissible was beyond the scope of the opinion. 49 Op Atty Gen at 48-49 n 6. We make that same observation in this opinion.

[8] Because that conclusion was not entirely free from doubt, we consulted legislative history, but found no discussion of the issue.

[9] ORS 676.165(1) provides that, upon receipt of a complaint against a licensee or applicant, a health professional regulatory board must assign an investigator. ORS 676.165(2) provides that the investigator shall have all the investigatory powers possessed by the board. Because the investigator acts pursuant to the authority of the board to investigate claims, information obtained by the investigator is information obtained by the board for purposes of ORS 676.175(3).

[10] Our answer to this question also answers the boards' question concerning how they must treat information obtained from complainants, as opposed to witnesses. Therefore, we provide no separate answer to that question.

[11] Examples of statutes that may make particular kinds of criminal investigatory information confidential or privileged include: (1) ORS 180.075 (making confidential testimony and materials obtained pursuant to a subpoena issued by the Attorney General except in listed circumstances); (2) ORS 132.420 (making facts concerning grand jury indictment confidential while indictment is not subject to public inspection); and (3) ORS 135.855 (exempting certain information, such as the identity of a

confidential informant and transcripts of grand jury proceedings, from mandatory disclosure to criminal defendants).

[12/] ORS 192.501 provides, in part:

> The following public records are exempt from disclosure under ORS 192.410 to 192.505 unless the public interest requires disclosure in the particular instance:
>
> * * * * *
>
> (3) Investigatory information compiled for criminal law purposes. The record of an arrest or the report of a crime shall be disclosed unless and only for so long as there is a clear need to delay disclosure in the course of a specific investigation, including the need to protect the complaining party or the victim. Nothing in this subsection shall limit any right constitutionally guaranteed, or granted by statute, to disclosure or discovery in criminal cases. For purposes of this subsection, the record of an arrest or the report of a crime includes, but is not limited to:
>
> (a) The arrested person's name, age, residence, employment, marital status and similar biographical information;
>
> (b) The offense with which the arrested person is charged;
>
> (c) The conditions of release pursuant to ORS 135.230 to 135.290;
>
> (d) The identity of and biographical information concerning both complaining party and victim;
>
> (e) The identity of the investigating and arresting agency and the length of the investigation;
>
> (f) The circumstances of arrest, including time, place, resistance, pursuit and weapons used; and
>
> (g) Such information as may be necessary to enlist public assistance in apprehending fugitives from justice [.]