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In 2005, the legislature amended ORS 676.175(3) to impose a new duty on health professional regulatory boards (boards) to disclose investigatory information to licensees and applicants who are facing disciplinary action. Or Laws 2005, chapter 801. On April 20, 2006, we issued an opinion responding to the boards' questions about that amendment. 50 Op Atty Gen _ (No. 8282, April 20, 2006). The Boards of Medical Examiners, Dentistry, Nursing, and Pharmacy now request additional advice about ORS 676.175 (3)(d), which exempts the "reports of expert witnesses" from the mandatory disclosure requirement. This opinion responds to that request.

QUESTION PRESENTED

To what extent, if at all, would a report by someone acting both as a board investigator and as an expert witness be exempt from disclosure under ORS 676.175(3)(d)?

SHORT ANSWER

It depends on the nature of the report. ORS 676.165(2) requires that an investigator make a report to the board, and ORS 676.165(3) lists the information that the report must contain. We conclude that the legislature did not intend for ORS 676.175(3) to exempt that information from disclosure. On the other hand, if someone acting as an investigator also makes a report in the capacity of an expert witness that is separate from the investigator report, the former would be exempt as the report of an expert witness. If a single report is comprised of both kinds of information, i.e., combines the investigator's report required under ORS 676.165 and an expert witness's report under ORS 676.175(3)(d) in one document, the board may withhold only the portion of the report resulting from the author's expert witness role and must disclose the portion of the report made pursuant to the requirements of ORS 676.165 (assuming no other exception applies).

Notwithstanding the exemption in ORS 676.175(3)(d), to comply with federal due process requirements, a board must disclose expert witness reports that it intends to enter into the record during a contested case proceeding.

DISCUSSION

When a board receives a complaint against a licensee or applicant, it must “assign one or more persons to act as investigator of the complaint.” ORS 676.165(1). The investigator is directed to “collect evidence and interview witnesses and * * * make a report to the board.” ORS 676.165(2). The report must describe the evidence gathered, the results of witness interviews and all other information considered in preparing the report, including any disciplinary history of the licensee or applicant with the board. ORS 676.165(3). ORS 676.165(5) exempts from public disclosure “[i]nvestigatory information obtained by an investigator and the report issued by the investigator.” ORS 676.175(1) similarly directs boards to “keep confidential and not disclose to the public any information obtained by the board as part of an investigation of a licensee or applicant * * *.” However, ORS 676.175(3) requires boards to disclose investigatory information to a licensee or applicant who is facing disciplinary action:

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:

* * * * *

(d) Reports of expert witnesses.

You inform us that it is not uncommon for someone to act as the board’s investigator and as its expert witness in the same case. You ask whether a report by a person serving those dual roles is a report of an expert witness for purposes of ORS 676.175(3)(d) and, therefore, exempt from disclosure.

For the purpose of your question, we assume that the person making the report qualifies as an “expert witness” under ORS 676.175(3)(d). The first question we address is whether the legislature intended the exemption for expert witness reports set out in ORS 676.175(3)(d) to encompass the reports that investigators must provide to boards pursuant to ORS 676.165(2) and (3). The function of a board investigator, according to ORS 676.165(2), is to “collect evidence and interview witnesses and [] make a report to the board.” The report must “describe the evidence gathered, the results of witness interviews and any other information considered in preparing the report of the investigator * * * [including] any disciplinary history of the licensee or applicant with the board.” ORS 676.165(3). The type of information prescribed by ORS 676.165 makes clear that the purpose of those reports is to recount historical information, not express expert opinions. We conclude that the legislature did not intend the exemption for the reports of expert witnesses to encompass investigators’ reports.

Moreover, reading the statute as a whole, it does not appear that the legislature intended to exempt the ORS 676.165 information in investigators’ reports from disclosure to a licensee or

applicant who is facing disciplinary sanction. ORS 676.165(5) expressly prohibits a board from disclosing investigative information and “the report issued by the investigator” to the public. On the other hand, ORS 676.175(3) provides that a board “*shall* disclose *all* information obtained by the board in the investigation of the allegations in the notice” to a licensee or applicant when it has voted to issue a notice of intent to impose a disciplinary sanction and the licensee or applicant has requested the information. (Emphasis added.) The term “shall” expresses that which is mandatory, *Preble v. Dep’t of Revenue*, 331 Or 320, 324, 14 P3d 613 (2000), and the meaning of “all” is self-evident. ORS 676.175(3)(a) through (d) specify certain exemptions from mandatory disclosure, and investigator’s reports are not among them. In construing statutes, we may not insert what has been omitted. ORS 174.010. Therefore, the legislature appears to have intended for boards to disclose the ORS 676.165 information in investigative reports to licensees or applicants facing disciplinary sanction. We conclude that the exemption in ORS 676.175(3)(d) does not encompass information in reports that investigators must provide to boards pursuant to ORS 676.165(2) and (3).

On the other hand, reports made by investigators for purposes other than to recount the evidence gathered pursuant to ORS 676.165(3) could qualify as expert witness’s reports if they are made in the person’s capacity as an expert witness. For example, a Board of Nursing investigator who is a registered nurse might investigate complaints against a registered nurse licensee that include “[g]ross incompetence or gross negligence of the licensee in the practice of nursing at the level for which the licensee is licensed.” ORS 678.111(1)(b). The investigator then files two separate reports: the first describes the evidence gathered pursuant to ORS 676.165(3); and the second focuses solely on, and expresses an opinion about, whether the licensee exercised the requisite standard of care. The latter would be exempt because it was made in the investigator’s capacity as an expert witness. The fact that the person who made the report is a board investigator would not change that conclusion.

Alternatively, the investigator could file one report serving both purposes: (1) to fulfill the investigator’s obligations under ORS 676.165(2) and (3) by describing the evidence gathered; and (2) to express an opinion about whether the licensee exercised the requisite standard of care. In that event, only the statements or accounts made in the author’s capacity as an expert witness would qualify for exemption because only those statements would be the “reports of expert witnesses.” Boards would have to disclose information in the report that was provided in the person’s capacity as an investigator (assuming no other exception applied).

DUE PROCESS

Finally, notwithstanding the disclosure exemptions provided by ORS 676.175(3)(d), constitutional due process requires that, in a contested case, a licensee or applicant is entitled to be generally informed of the case against them. *See* US Const Am XIV, § 1; *Spray v. Board of Medical Examiners*, 50 Or App 311, 624 P2d 125, *modified by* 51 Or App 773, 627 P2d 25 (1981); *Gregg v. Racing Commission*, 38 Or App 19, 26, 588 P2d 1290, *rev den* 286 Or 637 (1979). In practice, the due process requirement has been interpreted to mean that all reports, documents, and information in a board's possession that it intends to rely on during a contested case proceeding must be disclosed to the licensee or applicant during the contested case process. *See* 49 Op Atty Gen 32, 61 (1998) (so stating); *Spray*, 50 Or App at 330 n14 (stating that “if any of the Board’s investigatory files were introduced as evidence, petitioner was entitled to discover

that evidence.”). Therefore, notwithstanding the exemption in ORS 676.175(3)(d), a board must disclose reports that it intends to rely on during a contested case proceeding in order to comply with federal due process requirements.

CONCLUSION

We summarize our conclusions as follows. “Reports of expert witnesses” for purposes of ORS 676.175(3)(d) do not include investigator’s reports required by ORS 676.165(2) and (3), but can encompass reports made for the purpose of providing expert opinions on a particular matter in the case by investigators who qualify as expert witnesses. If an investigator’s report contains the information required by ORS 676.165(3) and also contains statements that meet the criteria for an expert witness’s report, only the latter are exempt from disclosure under ORS 676.175(3)(d). Notwithstanding the exemption in ORS 676.175(3)(d), a board must disclose reports that it intends to rely on during a contested case proceeding in order to comply with federal due process requirements.

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