



# Oregon

Kate Brown, Governor

## Psychiatric Security Review Board

610 SW Alder Street, Suite 420

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August 24, 2018

Jayne Fraser  
Malheur Enterprise  
289 A Street W  
Vale, OR 97918

RE: Record Request for Timothy Ashmus

Dear Ms. Fraser,

In accordance with ORS 192.329(2), the Psychiatric Security Review Board (Board) is providing the following response to your public records request for the Board's exhibit files for Timothy Ashmus. You have also requested the exhibit files and exhibit lists for multiple other individuals under the Board's jurisdiction, and expressed your desire to understand the scope and limitations of future public record requests to the Board.

As you know, the Montwheeler Public Records Order (PRO)<sup>1</sup> in 2017 fundamentally altered the way that the Board approaches public records requests. In the past, the Board generally disclosed its orders, any existing recordings of the public hearings, correspondence related to the hearing, and other non-medical records. Based on the Board's understanding of the law at the time, the Board did not disclose the patient's psychiatric evaluations, medical records, substance abuse treatment records, and other documents that were specifically exempt under state or federal law (*e.g.*, information from the Law Enforcement Data System). Prior to the Montwheeler PRO, the analysis for public record purposes was a straight-forward review and happened relatively quickly.

In contrast, the Board's post-Montwheeler analysis of a public records request for a patient's personal, medical or similar records requires an individualized analysis to determine whether the disclosure of information in a personal, medical or similar file would constitute an unreasonable invasion of privacy and, if so, whether the public interest by clear and convincing evidence requires disclosure. Since the Montwheeler PRO determined that there was a reduced privacy interest in the specific personal information discussed at the public hearing, the Board may only be able to identify that type of information by reviewing available hearing recordings, considering any information or exhibits referenced in the Board's orders, or rely on the statutory scope of these hearings.<sup>2</sup> Although there may be a reduced privacy interest in the information discussed in the hearing, the Montwheeler PRO determined that the mere fact that information or an exhibit was introduced or discussed in a public hearing did not make the underlying document in its entirety disclosable under the Public Records Law.<sup>3</sup> Under ORS 192.338, the agency must separate the exempt and nonexempt material

<sup>1</sup> Supplemental Public Records Order, Les Zaitz & Juliet Britton (March 21, 2017) (regarding the disclosure of mental health records of Anthony Montwheeler by the Psychiatric Security Review Board) (hereafter referred to as "Montwheeler PRO").

<sup>2</sup> See Montwheeler PRO at 6.

<sup>3</sup> See *id.* at 3, 6.

in each public record and make the nonexempt material available. As a result, the Board's review of its exhibits can be a slow and resource-intensive process.

Since this is a significant departure from past practice, we are providing a more thorough and detailed explanation of the reasoning in the response to this case, which may be helpful in making future public records requests for mental health, medical and similar records contained in the Board's files. Additionally, this lengthier response is also provided in this case to explain some factors that might drive the fees associated with this type of review. While the current request has been processed at no expense to you as the Board attempts to modify its analysis and process in light of the Montwheeler PRO, the Board may not be able to waive or reduce fees in the future for similar requests as this has proven to take quite a bit of time and resources to process, which can be particularly burdensome for a relatively small agency with limited staff and resources.

## DISCUSSION

### I. Background

The current public records request is for the exhibits in Mr. Ashmus' file maintained by the Board. Mr. Ashmus plead guilty except for insanity (GEI) for burglary and misdemeanor assault in 2010. This plea was supported by a defense expert's evaluation that determined that Mr. Ashmus had a qualifying mental disorder, Post Traumatic Stress Disorder (PTSD), that affected him at the time of engaging in criminal conduct and, as a result, he lacked substantial capacity either to appreciate the criminality of the conduct or to conform his conduct to the requirements of law.<sup>4</sup> The criminal court committed him to the jurisdiction of the Board for an indeterminate period of time not to exceed 21 years. However, upon admission, Mr. Ashmus maintained that he did not have a mental disorder, did not understand the consequences of his plea, and did not want to be in a psychiatric hospital and would prefer a traditional prison sentence. OSH providers determined that he did not have a qualifying mental disorder; although he might have non-qualifying mental disorders (personality disorders) and substance abuse disorders. The OSH records support the idea that Mr. Ashmus did not intentionally misrepresent his mental condition but may not have been appropriately placed under the Board's jurisdiction in the first place. At the Board's initial hearing, it determined, based on the medical evidence, that Mr. Ashmus did not have a qualifying mental disorder and was entitled to discharge under its statutes.<sup>5</sup> Subsequent to his discharge, Ashmus pled guilty (not GEI) to the following violent offenses: felony criminal mistreatment committed more than seven months after discharge and in which he only received probation; and several violent offenses against an adult victim (rape, sex abuse, strangulation, and assault) several years later.

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<sup>4</sup> See ORS 161.295 (definition of guilty except for insanity).

<sup>5</sup> See ORS 161.346(1)(a) provides that: "If the board finds that a person under the jurisdiction of the board: \* \* \* [i]s no longer affected by a qualifying mental disorder, or, if so affected, no longer presents a substantial danger to others, the board shall order the person discharged from commitment and conditional release." (Emphasis added).



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The public interest statement submitted to the Board indicates that Mr. Ashmus' personal records are being requested to understand "how the PSRB conducted its business" and how it made its decision to discharge him. Your request also indicates a desire to understand recidivism rates for persons who have been discharged from the Board's jurisdiction, and to understand if there is a flaw in the legal standard or the Board's decision-making. The public interest statement also acknowledged that some personal information, such as the identities of victims, may be redacted to protect those individuals' personal privacy.

## II. Requested Records

### A. Categorically Exempt or Non-Exempt Information or Exhibits

Consistent with historical practice, the Board hereby determines that there are several records that are categorically subject to disclosure under the Public Records Law, including the Board's administrative orders, time-served reports, and correspondence by the attorneys related to the Board's hearings. Those exhibits are disclosed without redaction and enclosed with this letter.

Two items that are categorically exempt from disclosure under state and federal law: (1) Exhibit 4 (the Law Enforcement Data System (LEDS) report) as that information can only be accessed by authorized agencies; and the information cannot be used or disclosed for any other purpose pursuant to ORS 192.355(8)-(9)(a), 28 CFR 20.33(7)(d), and OAR 257-010-0025; and (2) references to the receipt of public assistance including but not limited to: ORS 192.355(8), (9)(a); ORS 411.320, ORS 411.990, ORS 412.074, ORS 412.991, 7 USC 2020(e)(8), 42 USC 602(a)(1)(A)(iv), and 7 CFR 272.1(c). The LEDS report is not included in the disclosed materials; and any reference to public assistance has been redacted from the records provided.

### B. Personal Privacy Exemption

Pursuant to ORS 192.355(2), information of a personal nature that may be kept in a personal, medical or similar file may be exempt from public disclosure, if it would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance. Consistent with the Montwheeler PRO, the Board "readily conclude[s] that [the requested exhibits] contain information of a personal or medical nature" contained in medical, mental health or confidential law enforcement reports.<sup>6</sup> Therefore, the Board next considers if the disclosure is an unreasonable invasion of a person's privacy and, if so, whether disclosure is nevertheless warranted by the public interest in this case.

As to the personal information of third parties discussed in Mr. Ashmus' records, they do not have a reduced personal privacy interest as there is no evidence that the information was discussed at the public hearing, that they disclosed their information in a public hearing, or that any of that information would be relevant to the Board's determination of Mr. Ashmus' discharge. These third parties may find that the disclosure of their identity and their personal information in connection

<sup>6</sup> See Montwheeler PRO at 6.

with Mr. Ashmus' criminal acts to be an unreasonable invasion of their privacy. And, there is no apparent relationship between their information and the Board's decision-making or jurisdiction over Mr. Ashmus. The Montwheeler PRO protected the personal information of Montwheeler's former spouses, family members and victims<sup>7</sup>; and, likewise, the requestor has also acknowledged that some redactions would be expected for this reason. Consequently, the personal information of victims, witnesses, complainants (individuals who called the police), family members, and other third parties are redacted in the exhibits, including but not limited to: names, addresses, personal phone numbers, employers, date of births and ages, names of children, pictures of the victim and the outside of her residence, information identifying the domestic violence shelter or services that a particular victim accessed, placement of minor victim, or physical conditions or diagnoses. Mr. Ashmus' address was also redacted for the purpose of protecting the address of a victim and family member.

“While ordinarily disclosing mental health records would qualify as such an invasion [of privacy],”<sup>8</sup> the Montwheeler PRO emphasized the unique facts in that case that would reasonably reduce Montwheeler's expectation of privacy, such as: his admission that he intentionally feigned a qualifying mental condition for 20 years to avoid a standard conviction and sentence, his OSH providers testified that he had never had a qualifying mental disorder, and much of his personal information had been discussed in the public hearing for his benefit. In addition, the public interest in that case was magnified because: Montwheeler committed fraud on the criminal justice system; the Board expressed its own frustration at the hearing; he originally came under the Board's jurisdiction for serious offenses against persons; he then allegedly committed several serious violent crimes (two murders and serious injury to a third person) within weeks of his discharge, and he was reportedly raising his mental condition in his current criminal proceedings.

In Mr. Ashmus' case, the Board's order indicates that it considered the testimony of the defense expert from his criminal trial and the testimony and reports from OSH regarding his current diagnosis. Since that information was presumably discussed in the public hearing, Mr. Ashmus may have a reduced expectation of privacy regarding that information. However, Mr. Ashmus' case lacks most of the “unique facts” that the Montwheeler PRO relied on, such as: a blatant admission of malingering and fraud on the criminal justice system, his initial offenses and subsequent offenses were significant but not as serious as Montwheeler, his subsequent offenses did not occur immediately after discharge and the associated proceedings have long since concluded, and he pled guilty (not GEI) in those subsequent offenses. Consequently, the disclosure of his mental health and similar records to the public may still be considered an unreasonable invasion of his privacy.

However, the Board is persuaded by clear and convincing evidence that the public's interest in disclosure in this case outweighs Mr. Ashmus' personal privacy in maintaining the confidentiality of the information related to whether he was appropriately placed under the Board's jurisdiction initially and discharged from its jurisdiction based on the diagnoses from his mental health evaluators and providers. Also, the mental health records in this case after his admission to OSH

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<sup>7</sup> See *id.* at 9.

<sup>8</sup> *Id.* at 6.



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focused on the inappropriateness of his commitment and did not contain the level of medical detail that is typical of these types of records. Therefore, the Board is disclosing any information in his mental health records reasonably related to the existence of a qualifying mental disorder and information regarding the appropriateness of his initial or ongoing jurisdiction.

However, the Board was not persuaded that the stated public interest outweighed Mr. Ashmus' privacy regarding the disclosure of intimate details and physical medical information that appeared to have "no apparent relationship to PSRB's decision"<sup>9</sup>. In these exhibits, the following information is redacted: Mr. Ashmus's social security number and driver's license number, social and behavioral history unrelated to Mr. Ashmus' psychiatric diagnosis in his original GEI proceedings or subsequent Board hearing, physical medical information unrelated to his psychiatric diagnoses, and any treatment recommendations unrelated to his psychiatric diagnoses. The Board understands that the requestor may have accessed some of these documents from other sources without redactions. However, to the extent that the Board is providing access to Mr. Ashmus' mental health, medical or similar records, the Board will attempt to ensure that it is not unreasonably disclosing personal information about Mr. Ashmus that is not relevant to the stated public interest.

Except for the LEDS report, all of Mr. Ashmus' exhibits are included with this letter with the redactions described above.

### CONCLUSION

In conclusion, the Board believes it has struck the appropriate balance between providing the public with information that will aid the public in understanding the GEI process and the Board's decision-making, while still providing some protection to the privacy interests of third parties and PSRB patients. If you disagree with this analysis or the types of redactions, the Board requests that you contact it to explain your concerns so that the Board may consider them. You may also seek review of this decision pursuant to ORS 192.401, 192.411, 192.415, 192.418, 192.422, 192.427 and 192.431. Our position is that you may seek review by submitting a petition to the Attorney General's Office.

Sincerely,

Alison Bort, J.D., Ph.D.  
PSRB Executive Director

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<sup>9</sup> See *id.* at 9.

