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May 29, 2003

Mark A. Bonanno
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Re: *Petition for Public Records Disclosure Order*:
Department of Human Services Records

Dear Mr. Bonanno:

This letter is the Attorney General's order on your petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petitions on behalf of your clients, John and Mary Ann Wish, which we received on May 22, 2003, ask the Attorney General to order the Department of Human Services (DHS) to disclose the following records:

1. Final disciplinary actions against licensed emergency medical technicians (EMTs) since (and including) the year 2000.

2. Biennial Report of the "Oregon Trauma System" for 1999-2000 [perhaps labeled as covering 1999-2001]; and

3. A final report pursuant to ORS 431.627(5) regarding the review, findings, and recommendations made by the Oregon Department of Human Services, STAB, State EMS Committee, and any applicable ATABs regarding the death of Jean Anderson in March 2001 [and, in the event the petition for this record is denied:]

   a. All documents related to the review, findings, and recommendations made by the Oregon Department of Human Services, STAB, State EMS Committee, and any applicable ATABs regarding the death of Jean Anderson in March 2001;

   b. All documents that indicate how multiple reviews of the Jean Anderson case by the Oregon Department of Human Services, STAB, State EMS

Committee, and any applicable ATABs are making a difference in emergency medical responses to rural accidents here in Oregon; and

c. All documents that indicate what the Oregon Department of Human Services, STAB, State EMS Committee, and any applicable ATABs have done to improve the coordination and response time of the air ambulance system here in Oregon.

For the following reasons, we respectfully deny your petition.

The Public Records Law confers a right to inspect any public record of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. Any person who is denied the right to inspect or to receive a copy of any public record of a state agency may petition the Attorney General to review the record and determine if it may be withheld from disclosure. ORS 192.450(1). The Attorney General may order a state agency to disclose records only when the agency has denied a request for the records. *See* ORS 192.450(1).

We spoke with Jonathan Chin, Director of the EMS and Trauma Systems Office within DHS about your petitions. In addition, we consulted with Assistant Attorney General (AAG) Rhea Kessler, who is the contact counsel for the EMS and Trauma Systems Office and to whom DHS has referred you in relation to your requests and those of your clients. We address each category of records specified above.

1. EMT Disciplinary Records

Your petition for these records shows that Mr. Wish made a written request on December 2, 2002 for (1) "Summaries of disciplinary actions of certified EMTs by category of 'offense,'" and (2) "Names of EMTs who have been disciplined for 'gross or repeated negligence' along with the penalty assessed by your office." On behalf of DHS, AAG Kessler provided the requested records to you under cover of a letter dated February 13, 2003. The records disclosed appear to meet the parameters stated in Mr. Wish's December request. However, in a March 21, 2003, letter to AAG Kessler, you state that the disclosure was not sufficient because it "does not comply with the disclosures required by ORS 676.175(3) because it lacks specificity about the individual involved." While we do not find a basis for concluding that DHS denied your client's request, Mr. Chin has told us that DHS has agreed to provide to you a copy of the released records that includes the names of the individual EMT professionals cited in the summaries, which appears to be the additional information you want disclosed. Therefore, we deny your petition for these records.

2. Biennial Report

Your petition for the Biennial Report states that you sent a written request for this report to AAG Kessler on March 21 and have not yet received a response. In addition, the petition states that Mr. Wish made an oral request for the report to Ms. Susan Werner at the State EMS Committee office and was told by Ms. Werner that the report would not be provided "until review of the federal privacy law had been completed." Subsequent to receipt of your petition,

AAG Kessler contacted you on May 27, 2003, to explain that DHS had not yet finalized the report. In response, you agreed to modify your petition to permit DHS to redact those portions of the draft report that require further review for compliance with the federal Health Insurance Portability and Accountability Act, so long as DHS also discloses a statement of the department policy requiring that review. Mr. Chin has told us that DHS will disclose the redacted draft report and policy statement to you. Therefore, we deny your petition for the Biennial Report.

3. Final Report under ORS 431.627(5)

Your petition for a final report about the death of Jean Anderson, promulgated under ORS 431.627(5), shows that your clients have made numerous requests for this report beginning as early as July 2001, but have not yet received a copy of the report. We spoke with Mr. Chin about their requests, and he told us that no report about the death of Jean Anderson as described in ORS 431.627(5) was promulgated. While we understand from the materials included with your petition that you and your clients question whether DHS is required to produce a report as described by this statute, the Attorney General cannot order an agency to disclose a record that does not exist. Therefore, we deny your petition for this record.

It does not appear that the three remaining categories of records that are the subject of your petition were requested by you or your clients prior to the requests made in your March 21, 2003, letter to DHS through AAG Kessler. It has been approximately nine weeks since AAG Kessler received your request and forwarded a copy to Mr. Chin, and you have not yet received a response. A state agency has a "reasonable" time within which to respond to a records request before the lack of a response will be construed as a constructive denial of the request. ATTORNEY GENERAL'S PUBLIC RECORDS AND PUBLIC MEETINGS MANUAL (2001) 9. What constitutes a "reasonable" time period depends on the context of the particular request, for which we consider items such as the volume of records requested, the difficulty in determining whether records are exempt from disclosure, and the agency's need to consult with legal counsel. *Id.* AAG Kessler was working on a response to your request at the time we received your petition. In subparagraphs a-c below, we address the substance of your petition for the final three categories of records. Because the records are either exempt or will be disclosed, we do not find it necessary to address in this order the reasonableness of the time spent to date preparing a response to your petition.

a. Records about the death of Jean Anderson

In lieu of a final report under ORS 431.627(5), you appear to have requested that DHS provide you with records that could have been relevant to creating such a report. However, sections (3) and (4) of ORS 431.627 impose strict confidentiality limitations on the treatment of any such records. ORS 431.627(3) states that "findings, conclusions, interviews, reports, studies, communications and statements" received by DHS or a related body and connected with obtaining data needed to perform patient care quality assurance functions is confidential under the Public Records Law, and ORS 431.627(4) states that "data received or compiled" by the State Trauma Advisory Board or an area board in conjunction with DHS monitoring and quality assurance are "confidential and privileged [and] nondiscoverable." Therefore, the records

addressed by these statutes are exempt from disclosure under the Public Records Law, ORS 192.502(9).[1] ORS 431.672(4) also states that "the monitoring and quality assurance activities of the State Trauma Advisory Board, area trauma advisory boards and the department [DHS]" are covered by the confidentiality provisions of ORS 41.675 and 41.685. ORS 41.685 states that data "are not public records as defined in ORS 192.410." Thus, the records reflecting the monitoring and quality assurance activities of these entities are not even subject to disclosure under the Public Records Law.

Having consulted with AAG Kessler about your request, Mr. Chin has told us that, because of the nature of the records you have requested, all records DHS maintains that would be responsive to your request fall under one or more of the confidentiality provisions stated in ORS 431.627(3) and (4). Because ORS 431.627 is the statute under which DHS and related entities assess situations such as the one in which Ms. Anderson died, we agree with Mr. Chin's conclusion. Because records responsive to your request are either exempt from disclosure under ORS 192.502(9) or do not qualify as "public records" available for inspection under the Public Records Law, we deny your petition.

b. Records about multiple reviews of Ms. Anderson's case

You requested DHS to disclose records that indicate how multiple reviews of Ms. Anderson's case are making a difference in emergency medical responses to rural accidents in Oregon. DHS has identified a record that is potentially responsive to your request. However, because the record is the result of activities performed under ORS 431.627(4), it is not subject to disclosure for the reasons discussed in the preceding paragraphs. Therefore, we deny your petition for the record.

c. Records about improvements in the air ambulance system

DHS has identified four records responsive to your request. They are: (1) draft minutes of December 6, 2002, State Emergency Medical Services Advisory Board meeting; (2) February 14, 2003, letter from Mr. Chin to Oregon Aeromedical Providers and Aeromedical Workgroup Volunteers Re: March 4, 2003, meeting of Aeromedical Workgroup; (3) agenda for March 4, 2003, meeting of Airmedical Workgroup; and (4) minutes of March 4, 2003, meeting of Aeromedical Workgroup. Mr. Chin told us that DHS has agreed to disclose each of these records to you.[2] Because DHS is releasing the records, we deny your petition.

4. Conclusion

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[1] ORS 192.502(9) exempts from disclosure records "the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law."

[2] Mr. Chin's February 14, 2003, letter describes the proposed Aeromedical Workgroup as addressing "quality improvement" issues. As discussed in the text of this order, records related to quality assurance functions are covered by the confidentiality provisions of ORS 431.627(3) and/or 431.627(4) and therefore are either exempt from, or not subject to, disclosure under the Public Records Law. However, in reviewing the records about the Aeromedical Workgroup that DHS has agreed to release and discussing the subjects of the March 4 meeting with Mr. Chin, we found nothing in the records that address quality assurance issues so as to make ORS 431.627(3) or 431.627(4) relevant to their disclosure.

DHS has agreed to disclose to you the requested records about EMT disciplinary actions, a redacted copy of the draft Biennial Report along with a copy of the DHS policy statement about the need to review the draft for compliance with federal privacy laws, and the four records identified by DHS as responsive to your request concerning improvements in the air ambulance system. Mr. Chin has told us that DHS will send these records to you during the first week of June. Because DHS has agreed to disclose these records, we deny your petitions for them.

We deny your petition for a final report on Jean Anderson's death issued under ORS 431.627(5) based on Mr. Chin's statement that DHS did not create and does not maintain such a record.

We deny your petition for records relating to the review, findings and recommendations about Ms. Anderson's death or addressing the relation between multiple reviews of Ms. Anderson's death and differences in emergency medical response because such records are covered by ORS 431.627(3) and/or 431.627(4) and therefore are either exempt from disclosure under ORS 192.502(9) or are not subject to disclosure under the Public Records Law by virtue of not being "public records."

Sincerely,

Peter D. Shepherd

PETER D. SHEPHERD
Deputy Attorney General

PDS/AGS12442

c: Jonathan Chin, DHS, EMS and Trauma Systems Office