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Steve Suo
Staff Writer
The Oregonian
1320 S.W. Broadway
Portland, OR 97201-3499

Re: *Petition for Public Records Disclosure Order*:
Department of Human Services Records

Dear Mr. Suo:

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 petition, which we received on January 2, 2003,[1] asks the Attorney General to direct the Department of Human Services (DHS) to make available "selected pieces of information about people treated for drug and alcohol abuse by publicly funded facilities in Oregon." For the following reasons, we respectfully deny your petition.

The Public Records Law confers a right to inspect any public records of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. If a public record contains exempt and nonexempt material, the public body must separate the materials and make the nonexempt material available for inspection if it is "reasonably possible" to do so while preserving the confidentiality of the exempt material. *Turner v. Reed*, 22 Or App 177, 186 n8, 538 P2d 373 (1975).

In your December 3, 2002, request to Gwen Grams, Manager of the Planning Evaluation Research and Technology Unit of the DHS Office of Mental Health and Addiction Services, you asked DHS to provide to you "an electronic copy of all records in the Client Process Monitoring System (CPMS) from clients admitted calendar years 1991 through 2001." You specifically

[1] We appreciate your extending the time within which the law would have otherwise obligated us to respond.

excluded from your request "any record component that would allow me to identify individuals." DHS denied your request for records on the basis of federal law prohibiting disclosure of CPMS data DHS receives from substance abuse treatment programs for purposes of its audit and evaluation responsibilities.[2] The Public Records Law exempts from disclosure "[a]ny public records or information the disclosure of which is prohibited by federal law or regulations." ORS 192.502(8).

DHS' receipt, use and disclosure of CPMS data is governed by federal law. Specifically, uses and disclosures of patient records by substance abuse treatment programs and other entities such as DHS are governed by 42 USC § 290dd-2, which states as follows:

> (a) **Requirement.** Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e) of this section, be *confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.*
>
> (b) **Permitted disclosure.**
> (1) ***
> (2) Method for disclosure
> Whether or not the patient, with respect to whom any given record referred to in subsection (a) of this section is maintained, gives written consent, the content of such record may be disclosed as follows:
> ***
> (B) To qualified personnel *for the purpose of conducting* scientific research, management audits, financial audits, or *program evaluation, but such personnel may not identify, directly or indirectly, any individual patient in any report of such research, audit, or evaluation, or otherwise disclose such patient identities in any manner.* [Emphasis supplied].

The U.S. Department of Health and Human Services is required to adopt regulations to implement these statutory restrictions. 42 USC 290dd-2(g). Those regulations are found in 42 CFR Part 2. There are criminal penalties for violating the statute or the regulations. 42 USC 290dd-2(f); 42 CFR § 2.4.

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[2] You made a second request to DHS, described as "a smaller CPMS run," in a December 6 letter to Ms. Grams. Your petition does not specify whether it is for DHS' denial of your December 3 or December 6 request. While DHS denied both requests in a single letter dated December 20, your petition refers to only a single request. Because the description in the petition conforms most closely to the December 3 request, and it appears that the December 6 request was for a subset of the earlier requested information, this order addresses DHS' denial of your December 3 request.

DHS obtains patient records from substance abuse treatment programs for the CPMS under regulations that permit such disclosure for purposes of audit and evaluation. The regulation applicable to audit and evaluation uses of patient records, 42 CFR § 2.53, restricts DHS' use or disclosure of those records as follows:

> (d) *Limitations on disclosure and use.* Except as provided in paragraph (c) of this section [related to Medicare or Medicaid audit or evaluation], patient identifying information disclosed under this section may be disclosed only back to the program from which it was obtained and used only to carry out an audit or evaluation purpose or to investigate or prosecute criminal or other activities, as authorized by a court order entered under § 2.66 of these regulations.

Both "disclosure" and "patient identifying information" are defined in 42 CFR § 2.11. "Disclosure" means "a communication of patient identifying information, the affirmative verification of another person's communications of patient identifying information, or the communication of any information from the record of a patient who has been identified." "Patient identifying information" is defined as follows:

> *Patient identifying information* means the name, address, social security number, fingerprints, photograph, or similar information by which the identity of a patient can be determined with reasonable accuracy and speed either directly or by reference to other publicly available information. The term does not include a number assigned to a patient by a program, if that number does not consist of, or contain numbers (such as a social security, or driver's license number) which could be used to identify a patient with reasonable accuracy and speed from sources external to the program.

While the data in the CPMS includes "patient identifying information," you have excluded such information from your request for records. According to Ms. Grams, the CPMS data that you requested can be sorted in a manner that would permit the agency to delete fields of data so as to preclude disclosing patient identifying information. Because providing you with a copy of the requested data from which such deletions have been made does not constitute a disclosure prohibited by federal law, Ms. Grams has agreed to provide that record to you.

Because DHS has agreed to provide the requested record to you, we deny your petition as moot.

Sincerely,

Peter D. Shepherd

PETER D. SHEPHERD
Deputy Attorney General

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Gwen Grams, Manager, Planning Evaluation Research and Technology Unit,
DHS Office of Mental Health and Addiction Services