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March 1, 2002

Lynn Davenport
P.O. Box 2216
Portland, OR 97208

Re: Petition for Public Records Disclosure Order: Department of Human Services
DOJ No. 412511-GA001-02

Dear Ms. Davenport:

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 February 22, 2002, asks the Attorney General to order the Oregon Department of Human Services to produce copies of:

1. The 1998 report by Richard Varvel on the SOSCF investigation of public record falsifications at the East Multnomah branch of (then) SOSCF; and

2. Records of the distribution of this report in 1998.

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 materials available for examination if it is "reasonably possible" to do so while preserving the confidentiality of the exempt material. *Turner v. Reed*, 22 Or App 177, 186 n 8, 538 P2d 373 (1975).

This office has reviewed a copy of the report you requested. For the reasons that follow, we respectfully deny your petition.

1. The 1998 report.

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

exemption incorporates into the Public Records Law other state statutes that make records confidential. Because the report you have requested consists of information about individual recipients of services, it is confidential under ORS 409.225, which provides:

> (1) In the interest of family privacy and for the protection of children, families and other recipients of services, *the Department of Human Services shall not disclose or use the contents of any child welfare records, files, papers or communications that contain any information about an individual child, family or other recipient of services* for purposes other than those directly connected with the administration of child welfare laws or unless required or authorized by ORS 419A.255 or 419B.035. *The records, files, papers and communications are confidential and are not available for public inspection.* General information, policy statements, statistical reports or similar compilations of data are not confidential *unless such information is identified with an individual child, family or other recipient of services* or protected by other provision of law.
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> (2) Notwithstanding subsection (1) of this section, unless exempt from disclosure under ORS chapter 192, the department shall disclose child welfare records:
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> (a) About a recipient of services, *to the recipient* if the recipient is 18 years of age or older or is legally emancipated, unless prohibited by court order;
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> (b) Regarding *a specific individual if the individual gives written authorization* to release confidential information;
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> (c) Concerning a child receiving services on a voluntary basis, *to the child's parent or legal guardian;*
>
> (d) To *the juvenile court* in proceedings regarding the child; and
>
> (e) Concerning a child who is or has been in the custody of the department *to the child's parent or legal guardian* except:
>
> (A) When the child objects; or
>
> (B) If disclosure would be contrary to the best interests of any child or could be harmful to the person caring for the child.
>
> (3) Notwithstanding subsection (1) of this section, unless exempt from disclosure under ORS chapter 192, department shall disclose child welfare records, if in the best interests of the child, to:

(a) Treatment providers, foster parents, adoptive parents, school officials or other *persons providing services to the child or family* to the extent that such disclosure is necessary to provide services to the child or family; or

(b) A person designated as *a member of a sensitive review committee convened by the Director of Human Services* when the purpose of the committee is to determine whether the department acted appropriately and to make recommendations to the department regarding policy and practice.

(4) Any record disclosed under subsection (1), (2) or (3) of this section shall be kept confidential by the person or entity to whom the record is disclosed and shall be used only for the purpose for which disclosure was made.

(5) Unless exempt from disclosure under ORS chapter 192, when an adult who is the subject of information made confidential by subsection (1) of this section publicly reveals or causes to be revealed any significant part of the confidential matter or information, the protections afforded by subsection (1) of this section are presumed voluntarily waived and confidential information about the person making or causing the public disclosure, not already disclosed but related to the information made public, may be disclosed if disclosure is in the best interests of the child or necessary to the administration of the child welfare laws.

(6) Notwithstanding subsection (1) of this section, unless exempt from disclosure under ORS chapter 192, the department shall disclose information related to the department's activities and responsibilities in a case where child abuse or neglect has resulted in a child fatality or near fatality or where an adult has been charged with a crime related to child abuse or neglect.

(7) Notwithstanding subsections (2), (3), (5) and (6) of this section, ORS 192.501 (3) shall apply to investigatory information compiled for criminal law purposes that may be in the possession of the department.

* * * * *

(Emphasis added).

The Court of Appeals has held that "[t]he text of ORS 409.225 plainly and unambiguously provides that SCF records containing 'information about an individual child, family, or other recipient of services' are 'confidential and not subject to public inspection.'" *Kahn v. Pony Express Courier Corp.*, 173 Or App 127, 138, 20 P3d 837 (2001).[1] You are not a

[1] ORS 192.505 requires a public body to "separate exempt and nonexempt material and make the nonexempt material available for examination." But the effect of ORS 409.225 is to make the complete record "that contain[s] information about an individual child, family or other recipient of services" confidential and therefore exempt from disclosure.

person to whom DHS must disclose child welfare records under ORS 409A.225(2), (3), and (6).[2] Nor have you provided information suggesting or establishing that there has been a waiver of confidentiality under subsection (5).

ORS 409.225 also permits disclosure to the extent "required or authorized by ORS 419A.255 or 419B.035." For the following reasons we conclude that neither of those statutes requires disclosure in this instance. ORS 419A.255 makes confidential certain materials concerning children who are within the jurisdiction of the juvenile court. It permits disclosure of these materials only to certain specified persons.[3] You have not contended that you are a person

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[2] ORS 409.225(4) limits a recipient's authority to redisclose child welfare records. Subsection (5) prescribes DHS' authority to disclose child welfare records after a recipient of services has waived his or her confidential interest within the meaning of the subsection.. Subsection (7) states that notwithstanding subsections (2), (3), (5) and (6), ORS 192.501 (3) shall apply and DHS shall not disclose investigatory information compiled for criminal law purposes that DHS possesses.

[3] ORS 419A.255 provides, in pertinent part:

> (1) The clerk of the court shall keep a record of each case, including therein the summons and other process, the petition and all other papers in the nature of pleadings, motions, orders of the court and other papers filed with the court, but excluding reports and other material relating to the child's or youth's history and prognosis. *The record of the case shall be withheld from public inspection* but shall be open to inspection by the child or youth, parent, guardian, court appointed special advocate, surrogate or a person allowed to intervene in a proceeding involving the child or youth under ORS 109.119 (1), and their attorneys. The attorneys are entitled to copies of the record of the case.
>
> (2) Reports and other material relating to the child's or youth's history and prognosis *are privileged and, except at the request of the child or youth, shall not be disclosed directly or indirectly to anyone* other than the judge of the juvenile court, those acting under the judge's direction, service providers in the case and the attorneys of record for the child or youth or the child's or youth's parent, guardian, court appointed special advocate, surrogate or person allowed to intervene in a proceeding involving the child or youth under ORS 109.119 (1). Reports and other material relating to a youth offender's history and prognosis in cases under ORS 419C.005 may be disclosed to the superintendent of the school district in which the youth offender resides. The service providers in the case, school superintendents and attorneys are entitled to examine and obtain copies of any reports or other material relating to the child's or youth's history and prognosis. Any service provider in the case, school superintendent or attorney who examines or obtains copies of such reports or materials is responsible for preserving their confidentiality A service provider or school superintendent who obtains copies of such reports or materials shall return the copies to the court upon the conclusion of the service provider's superintendent's involvement in the case.
>
> (3) Except as otherwise provided in subsection (7) of this section, *no information appearing in the record of the case or in reports or other material relating to the child's or youth's history or prognosis may be disclosed to any person not described in subsection (2) of this section without the consent of the court*, except for purposes of evaluating the child's or youth's eligibility for special education as provided in ORS chapter 343, and no such information may be used in evidence in any proceeding to establish criminal or civil liability against the child or youth, * * *
>
> (6) * * *
>
> (c) Nothing in this subsection affects the provisions of ORS * * *

within one of the listed categories, and so you are not entitled to disclosure under ORS 419A.255.

ORS 419B.035(1) provides that "reports and records compiled under the provisions of ORS 419B.010 to 419B.050[4] are confidential and are not accessible for public inspection." It requires disclosure to certain entities and persons, but, again, you are not among the persons or entities listed.[5] Thus, any disclosure of such records to you could be only as permitted by ORS 419B.035(2), which provides:

> (2) The State Office for Services to Children and Families *may* make reports and records available to any person, administrative hearings officer, court, agency, organization or other entity when the office determines that such disclosure is necessary to administer its child welfare services and is in the best interests of the affected child, or that such disclosure is necessary to investigate, prevent or treat child abuse and neglect, to protect children from abuse and neglect or for research when the assistant director gives prior written approval. The office shall adopt rules setting forth the procedures by which it will make the disclosures authorized under this subsection and subsection (1) of this section. The names, addresses or other identifying information about the person who made the report shall not be disclosed pursuant to this subsection and subsection (1) of this section.

419B.035.

(Emphasis added.)

[4] ORS 419B.010 to 419B.050 generally govern reports of allegations of child abuse.

[5] ORS 419B.035(1) provides that "the State Office for Services to Children and Families shall make records available to:"

> (a) Any law enforcement agency or a child abuse registry in any other state for the purpose of subsequent investigation of child abuse;
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> (b) Any physician, at the request of the physician, regarding any child brought to the physician or coming before the physician for examination, care or treatment;
>
> (c) Attorneys of record for the child or child's parent or guardian in any juvenile court proceeding;
>
> (d) Citizen review boards established by the Judicial Department for the purpose of periodically reviewing the status of children, youths and youth offenders under the jurisdiction of the juvenile court under ORS 419B.100 and 419C.005. Citizen review boards may make such records available to participants in case reviews;
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> (e) A court appointed special advocate in any juvenile court proceeding in which it is alleged that a child has been subjected to child abuse or neglect; and

(f) The Child Care Division for certifying, registering or otherwise regulating child care facilities.

ORS 419B.035(2) permits, but does not require, DHS to disclose child abuse reports and records when DHS determines that disclosure is necessary to its administration of child welfare services and in the best interests of the child, or when DHS determines that disclosure is necessary to investigate, prevent or treat child abuse and neglect, to protect children from abuse and neglect or for research. The statute places the decision to disclose the records in the discretion of DHS and, absent a decision by DHS to disclose the records, their disclosure is prohibited by ORS 419B.035(1). Nevertheless, because the records are public records, the denial of a request for those records is subject to this office's review.

When a statute prohibits disclosure of records except in the discretion of a state agency, this office reviews a decision to deny a request for those records to determine if that decision was an abuse of discretion. *See* Public Records Order, March 2, 1993 (McMinimee). To find an abuse of discretion under ORS 419B.035(2), we would need to find that DHS determined that disclosure was "necessary" to its administration of child welfare services *and* in the best interests of the child, or that disclosure was "necessary" to investigate, prevent or treat child abuse and neglect, or to protect children from abuse and neglect,[6] but that DHS intentionally chose not to make this necessary disclosure. We have no basis to conclude in this instance that DHS has abused its discretion in refusing to disclose the records you seek.

2. *Records of distribution of the report.*

Your second request is for records of the distribution of this report in 1998. Richard Martinez, Human Resource Generalist at the Department of Human Services, has informed us that no record matching this description exists.

In sum, the report you request is exempt from disclosure under ORS 192.502(8), the provision of the Public Records Law that exempts from disclosure "records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law." The report is "made confidential" by ORS 409.225, and you are not entitled to disclosure under any of that statutes exceptions or under exceptions to confidentiality contained in ORS 419B.035 or 419A.255. There is no record "of the distribution of this report in 1998." For these reasons, we respectfully deny your petition to compel disclosure.

Sincerely,

Peter D. Shepherd

PETER D. SHEPHERD
Deputy Attorney General

AGS09708
c: Debbie Fussell, Human Resource Generalist, Department of Human Services

[6] 419B.035(2) also permits disclosure when "necessary" for "research," we have no information to suggest that your request was predicated on any legitimate research within the purview of this statute.