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October 20, 2000

Brent Walth
Kim Christensen
THE OREGONIAN
1920 SW Broadway
Portland, OR 97201-3499

Re: *Public Records Disclosure Order*
Office of Medical Assistance Programs Records

Dear Mr. Walth and Mr. Christensen:

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 October 6, 2000,[1] asks the Attorney General to direct the Department of Human Services (DHS) Office of Medical Assistance Programs (OMAP) to make available the records regarding OMAP audits of the University Medical Group that were requested by The Oregonian's letter dated June 7, 2000, but withheld by OMAP in a letter dated September 6, 2000.[2] For the reasons that follow, 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 n 8, 538 P2d 373 (1975).

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[1] We appreciate you extending the time within which the law would have otherwise required us to respond to the petition.

[2] In response to your June 7, 2000, request for records, OMAP released nearly 900 pages of records on July 17, 2000, and released additional records in conjunction with its September 7 letter. We understand that your petition is limited to the records and information that continue to be withheld by OMAP.

We have carefully reviewed all the records withheld by OMAP, including those previously disclosed to you by OMAP with certain portions redacted. In the course of this review, OMAP has agreed to disclose additional records to you. Kathy Loretz, Manager of the OMAP Analysis and Evaluation Unit, informs us that OMAP will be sending these records to you by October 27, 2000. Because OMAP has agreed to this disclosure, your petition is moot as to these records. Below, we address the exemptions that apply to the remaining records.

a. Criminal Investigatory Material, ORS 192.501(3)

ORS 192.501(3) conditionally exempts "Investigatory material compiled for criminal law purposes." Information compiled in investigations connected with pending or contemplated prosecutions ordinarily will remain confidential because disclosure likely would interfere with law enforcement proceedings. *Jensen v. Schiffman*, 24 Or App 11, 16, 544 P2d 1048 (1976). The Medicaid Fraud Unit of the Department of Justice (MFU) is authorized to investigate and criminally prosecute (or refer for prosecution) violations of all applicable state laws pertaining to fraud in the administration of the Medicaid program, the provision of medical assistance, or the activities of providers of medical assistance under the State Medicaid plan. 42 CFR § 1007.11(a). We are advised by Assistant Attorney General Ellyn Sternfield, Attorney-in-Charge of the MFU, that certain factual information contained in the OMAP records is information compiled by the MFU in an investigation connected with a contemplated prosecution and that its disclosure would be likely to interfere with a pending or contemplated criminal case. Because we find no overriding public interest in their disclosure, these records are exempt from disclosure under ORS 192.501(3).

b. Internal Advisory Communications, ORS 192.502(1)

ORS 192.502(1) exempts from disclosure:

> Communications within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to any final agency determination of policy or action. This exemption shall not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure.

The purpose of this exemption is to encourage frankness and candor in communications within and between governmental agencies and to protect the free flow of observations and advice that the public body needs for its efficient operation. Under this exemption, a public record is exempt from disclosure if it meets all of the following criteria:

- It is a communication within a public body or between public bodies;
- It is of an advisory nature preliminary to any final agency action;
- It covers other than purely factual materials and

- In the particular instance, the public interest in encouraging frank communication clearly outweighs the public interest in disclosure.

The exemption's central thrust is to protect the confidentiality of frank and uninhibited advice and observations a public employee gives to a superior or associate. To justify an exemption under ORS 192.502(1), there must be a strong showing of a "chilling effect."

The first and second criteria require the communications to occur within a public body or between public bodies, and that the communications be advisory in nature preliminary to any final agency action. The OMAP records withheld under this exemption fall into two categories. First, there are communications between OMAP/DHS auditors, supervisors or managers occurring in the context of making decisions preliminary to finalizing the audit and pursuing the agency's contested case proceeding. Second, there are communications between OMAP and MFU occurring in the context of each entity's statutory obligations to carry out their separate missions in relation to Medicaid providers. AAG Sternfield informs us that MFU has not concluded its separate actions in connection with this matter. In each case, the OMAP records are communications within a public body or between public bodies. The communications were preliminary to final agency determination of policy or action.

To be applicable, the third criterion of the exemption requires the record to contain other than purely factual materials. If the communication contains factual material together with the advisory recommendations, then the agency is under a duty to segregate the factual material and make it available for inspection. The OMAP records withheld consist of observations, assessments, analysis, advice and recommendations preliminary to issuing the preliminary audit report to UMG. In some cases, the advisory information is mixed with factual information, and OMAP is providing the factual portions of those documents.

Finally, in the particular instance, the public interest in encouraging frank communication must clearly outweigh the public interest in disclosure. Medicaid audits serve dual functions of measuring claim payment accuracy in order to establish potential overpayment and underpayment liabilities of providers, as well as identifying and implementing Medicaid policy and procedures. Necessarily, much of the work of an audit is strictly factual, and those factual materials that are not otherwise confidential (such as patient-identifying information) are subject to disclosure.

A Medicaid audit also involves a substantial analytical process of evaluating medical and billing records in conjunction with federal and state Medicaid statutes and rules, as well as other federal statutes and regulations. When developing the audit findings and audit report, OMAP relies heavily on the expertise of its auditors in conjunction with input from supervisors and OMAP policy staff to critique their analysis. It is critical that these employees communicate in writing their individual opinions and recommendations as they develop during the process of making audit findings and assessing additional information submitted by a provider. If such communications were public, obtaining candid input from agency staff on the audits would be more difficult and might even be discouraged. OMAP's Director, Herschel Crawford, has advised us that failure to protect this information from disclosure would interfere with the free

flow of information and ideas that the agency needs because agency staff would be reluctant to put in writing their opinions about perceived deficiencies in the audit findings, or concerns about the analysis contained in audit reports. One obvious consequence would be audits that are inadequate or incorrect and thus more likely either to impose unnecessary additional requirements on providers or to face legal challenge, or both.

In addition, OMAP is required to cooperate with the MFU by referring cases, providing information, and on referral from MFU, initiating available administrative action to recover improper payments from providers. 42 CFR § 455.21. As noted above, the MFU has a separate legal responsibility for investigations related to Medicaid fraud. As distinct public entities with separate, but interdependent, responsibilities related to the administration of the Medicaid program, OMAP and MFU frequently exchange written communications containing analysis and opinions concerning particular matters or issues of common concern. In order to fully assess the strengths and weaknesses of the evidence gathered during the audit and investigation processes and to ensure appropriate decision making by each agency, there must be open and forthright communications between the staff of the two agencies. Both OMAP and MFU staff may be reluctant to engage in frank and candid written communications with the other agency if those communications were made public. Such a result would negatively impact the ability of both agencies to fulfill with their statutory missions.

Accordingly, we find that disclosure of the communications at issue here would have a substantial chilling effect on agency staff and that the public interest in encouraging frank communications within OMAP and between OMAP and the MFU clearly outweighs the interest in disclosure.

Because we find that each of the elements of ORS 192.502(1) is met with respect to the nonfactual portions of the withheld OMAP records, we conclude that these portions of the records are exempt from disclosure under ORS 192.502(1). OMAP will be disclosing to you all of the purely factual materials contained in those records. We therefore deny your petition as to such records.

c. Exempt Under Other State Law, ORS 192.502(9)

The remaining material was withheld by OMAP on the basis that it was protected by the attorney-client privilege. ORS 192.502(9) exempts:

> Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law.

Records or information made confidential or privileged by a statute outside of the Public Records Law are exempt from disclosure under ORS 195.502(9). ORS 40.225 establishes the attorney-client privilege for "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client" when those communications are between the persons specified in ORS 40.225(2). Records or information that come within ORS 40.225 are exempt from disclosure. For example, we concluded that specified records in an Oregon

State Bar disciplinary proceeding were covered under ORS 40.225, the attorney-client privilege and, therefore, were exempt from disclosure under ORS 192.502(9). Public Records Order, March 30, 1989, Howser. We reached the same conclusion concerning a request for memoranda sent by the Public Utility Commission staff to its legal counsel, and vice-versa, containing confidential communications made for the purpose of facilitating counsel's rendition of professional services to staff in a pending contested case. Public Records Order, October 21, 1988, Best.

In this instance, the withheld records are confidential communications between persons described in ORS 40.225(2) for the purpose of facilitating the rendition of professional legal services to OMAP. OMAP has been involved in contested case proceedings involving University Medical Group, its predecessor University Medical Associates, and several individual physicians. OMAP consulted confidentially with its legal counsel within the Department of Justice to obtain legal advice concerning the proceedings and related OMAP rights and responsibilities. The communications covered by the privilege are not confined to those that occur when an attorney is representing a party in litigation and go beyond simply giving legal advice. *See, e.g., State ex rel. Oregon Health Sciences University v. Haas,* 325 Or 492, 942 P2d 261 (1997). The privilege will apply when the general purpose of hiring a lawyer concerns legal rights and responsibilities. *United States v. Chen*, 99 F3d 1495, 1501-1502 (9th Cir 1996); *see also United State v. Roe*, 96 F3d 1294 (9th Cir 1996) (investigation in fact-finding by attorney falls within attorney-client privilege).

The privilege in ORS 40.225 extends beyond just the direct attorney-client communications, but also includes communications: (a) between the client or the client's representative and the client's lawyer or representative of the lawyer; (b) between the client's lawyer and the lawyer's representative; (c) by the client or the client's lawyer to a lawyer representing another in a matter of common interest; (d) between representatives of the client or between the client and a representative of the client; or (e) between lawyers representing the client. ORS 40.225(2) (a)-(e).

We have reviewed each of the records as to which the attorney-client privilege might apply. In some instances, OMAP was able to segregate the privileged information by redacting confidential communications and providing a redacted record to you -- this occurred in a few instances in the narrative materials previously provided to you. In other records, the communications were not reasonably capable of segregation and those records have been withheld in their entirety.

The Public Records Law does not require OMAP, or any state agency, to waive its attorney-client privilege, and we are not aware of OMAP having waived its privilege with respect to any of the withheld materials. Although your petition suggests that the records might contain evidence of criminal conduct or official misconduct that would defeat a claim of attorney-client privilege, we do not find that to be the case with respect to the records at issue.

We find that the withheld information and records are within the scope of the attorney-client privilege. Therefore, we conclude that they are exempt from disclosure under ORS 192.502(9), and we deny your petition as to them.

In summary, we deny your petition as moot with respect to those records that OMAP has agreed to disclose to you. As to the remaining records, we deny your petition because we find that they are exempt from disclosure under ORS 192.501(3), 192.502(1), or 192.502(9).

Sincerely,

DAVID SCHUMAN
Deputy Attorney General

AGS05628
c: Kathy Loretz, OMAP