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DEPARTMENT OF JUSTICE

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December 4, 2009

Lorraine Welch
PO Box 363
West Fir, OR 97492

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

Dear Ms. Welch,

We are in receipt of your petition dated November 20, 2009, seeking an order from the Attorney General compelling the Department of Human Services DIVISION (DHS) to disclose certain records to you under Oregon's Public Records Law.[1] Specifically, your petition relates to the following records:

1. All reports and notes in SCS files on Lorraine Welch
2. All reports, notes and files #s 2279, 2471, 2509.
3. All reports, notes and files on Lorraine Welch by caseworker Nicole Sims.
4. All reports, notes and files on Lorraine Welch by manager Rolonda Garcia
5. All reports, notes and files on Lorraine Welch by certifier Mark Stern
6. All reports, notes and files on Lorraine Welch by supervisor Carla Crane
7. All reports, notes and files on Lorraine Welch by supervisor Lois Day
8. All reports, notes and files on Lorraine Welch by caseworker Hans Dassen
9. All reports, notes and files on Lorraine Welch by Toni Latson
10. All reports, notes and files on Lorraine Welch by certifier Shannon Austin
11. All reports, notes and files on Lorraine Welch by adoption worker Kathleen McClay
12. All reports, notes and files on Lorraine Welch in case # P 44656

DHS disclosed a number of documents to you, but declined to disclose others.

[1] You allowed us until December 4, 2009 to issue our order, and we appreciate that courtesy.

Background

The Public Records Law confers a right to inspect any public records of a public body in Oregon, subject to certain express 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. ORS 192.450(1).

The documents not disclosed to you were forwarded to our office by DHS, pursuant to ORS 192.470(2), and received in our office on December 1, 2009. The documents not disclosed to you comprise 280 pages of materials. Many of these pages are printouts from DHS data files pertaining to the various files you have requested. Others include hand- and type-written reports of various kinds, emails within DHS and other internal DHS documents, references given by individuals about you, and a feedback form you filed with DHS concerning a case worker.

With respect to many of the records previously withheld, we deny your petition because DHS has determined that it will disclose the records to you. With regard to the other records previously withheld, we conclude that they are exempt from disclosure, and deny your petition on that basis.

Analysis

1. Decisions that DHS will reconsider

As noted above, DHS has now determined that it can provide you with many records previously withheld.

We begin with the data printouts. Upon review, DHS agrees that a number of data printouts previously withheld relate solely to you and contain no information that cannot be disclosed to you. DHS has agreed to make those printouts available to you, and we therefore deny your petition for an order seeking their disclosure.

However, some data printouts withheld by DHS are the records of children receiving DHS services. DHS will not disclose those printouts to you. We conclude that, under ORS 409.225, such records are "confidential and are not available for public inspection." You are not among the recipients to whom disclosure is allowed by subsection (b) of the statute or by ORS 419A.255 or 419B.035. Nor will DHS disclose data printouts that list recipients of public services (other than you). The identities of such recipients generally may not be disclosed under ORS 412.074; again, you are not among the recipients to whom such disclosures may be authorized. These statutory restrictions on disclosure are incorporated into the public records law by virtue of ORS 192.502(9)(a), which exempts from disclosure "records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law." Your petition is denied with respect to data printouts that are the records of children receiving DHS services or that list other recipients of DHS services.

DHS is also willing to revisit its decision with respect to a number of reports of assessments of you that relate to one of your children, and a "Founded Abuse Exception" that also relates to abuse allegations involving your child. DHS has recently adopted a policy under which it discloses many such reports to the parent who is the subject of the assessment, unless it is determined that disclosure would cause harm to the child who is the subject of the assessment. Your request was processed prior to the adoption of this new policy. DHS is willing to review the assessments pertaining to your own children; under the new policy, DHS believes that it may well be able to disclose at least some of the information previously withheld. In making any such disclosures, DHS will redact information that it regards as protected health information of individuals other than you, and may redact other information that DHS believes is confidential. If DHS concludes that it cannot disclose the records to you under its new policy, or if you disagree with any redactions made by DHS, you may petition this office for further review. For now, however, your petition is respectfully denied with regard to these assessment reports, because DHS is generally willing to review its decisions with respect to their disclosure under its new policy and we do not know precisely what information DHS will disclose or whether you will object to its nondisclosures.

In addition, DHS has identified a number of records that pertain primarily to you, and not to any foster children placed with you or other recipients of DHS services. Records in this category include a "Closing Narrative," a number of foster home study reports, a Foster Family Feedback form you filed with DHS in 2005, and reports detailing internal DHS searches regarding services provided to you. DHS will disclose these records to you. Again, DHS may redact information that it regards as protected health information or other information that DHS believes is confidential. And if you disagree with any redactions made by DHS, you are free to petition this office for further review. For now, however, your petition is respectfully denied because DHS is generally willing to disclose the information to you. We are unable to predict precisely what information DHS may redact and whether you may object to those redactions.

2. Records that are exempt from disclosure

We have also reviewed the other records that DHS not provide to you. We are satisfied that those remaining records are exempt from disclosure under Oregon's Public Records Law. We therefore deny your petition with respect to the remaining records.

There are several reasons for concluding that most of the remaining records are exempt from disclosure. The most straightforward basis is that the documents are child welfare records that are contained within a child welfare file and that concern a particular child and family. They are therefore confidential under ORS 409.225, and exempt from disclosure by virtue of ORS 192.502(9)(a). Many of the records also contain health information that is protected by HIPAA and thus exempt from disclosure under ORS 192.502(8). Some of the records are child welfare assessments, which are confidential under ORS 419B.035. DHS is unable to determine that discretionary disclosure is appropriate under subsection (3). For all of those reasons, most of the remaining records are exempt from disclosure by virtue of ORS 192.502(9)(a).

There are some remaining records that are not exempt under the provisions just described. For example, the records we reviewed included some internal DHS correspondence relating to concerns raised about placement, or possible placement, of children within your home. The records within this category are an email dated February 21, 2007, an email chain dated between September 22, 2008 and September 25, 2008, an email dated October 10, 2008, and notes of a staffing meeting dated September 30, 2008. Except for the February 21, 2007 email, all of these documents pertain to DHS "Sensitive Case Staffing" in response to a particular issue that arose concerning a child in your home.

DHS asserts that these records are exempt from disclosure by virtue of the internal advisory communication exemption, codified at ORS 192.502(1). That exemption applies to frank communications within a public body that are of an advisory nature and that cover other than purely factual materials. For the exemption to apply, the public interest in encouraging frank communication must clearly outweigh the public interest in disclosure of any given record. We agree with DHS that these communications are exempt.

All of the communications are preliminary to final agency action. All cover non-factual matters, and we think that each contains "frank" communications. They relate to extremely sensitive matters, namely the placement and safety of children. We think it is likely that disclosure of such communications would have a chilling effect on communications within DHS pertaining to these important matters. Furthermore, we are not aware of any particular way in which disclosure to you would serve the public interest.

There is also a report stating the results of a fingerprint check performed by DHS through Oregon State Police and the Federal Bureau of Investigation. ORS 181.537(9) provides that "[r]ecords maintained [by DHS] under this subsection are confidential and may not be disseminated except for the purposes of [ORS 181.537] and in accordance with the rules of the Department of Human Services and the Department of State Police." ORS 181.537 is designed to facilitate fitness determinations by DHS with regard to individuals seeking employment, licensure, certification, or similar benefits from DHS. Disclosing this record to you would not further those purposes. Consequently, the results of the fingerprint check are exempt from disclosure under ORS 192.502(9)(a).

Finally, there are references given by a number of individuals in 2003 concerning you. The reference forms state that the information provided "will not be redisclosed for any other purpose." DHS asserts that these references are exempt from disclosure by virtue of ORS 192.502(4). That provision exempts information that is submitted in confidence to public bodies. According to the ATTORNEY GENERAL'S PUBLIC RECORDS & MEETINGS MANUAL (2008) ("MANUAL"), five conditions must be present in order for this exemption to apply:

- The informant must have submitted the information on the condition that it would be kept confidential.
- The informant must not have been required by law to provide the information.
- The information itself must be of a nature that reasonably should be kept confidential.

- The public body must show that it has obliged itself in *good faith* not to disclose the information.
- Disclosure of the information must cause harm to the public interest.

MANUAL at 74-75. We have no trouble concluding that the people providing references were not obligated by law to provide those references, that the information is of a nature that reasonably should be kept confidential, or that DHS obligated itself in good faith not to disclose the information. Two requirements remain. First, the information must have been submitted on the condition that it would be kept confidential. Second, disclosure of the information must harm the public interest. As noted, the reference form indicates that the information will not be redisclosed. Moreover, we must acknowledge the strong public interest in assuring that references respecting foster parents and prospective foster parents are candid and forthright. We conclude that confidentiality is necessary to assure that references offer candid assessment of foster parents and potential foster parents. If providers were aware that their references might be disclosed to the subject of the reference, their willingness to offer frank assessments may well be compromised. Consequently, we conclude that the references are exempt from disclosure under ORS 192.502(4).

Conclusion

For the reasons described above, your petition is respectfully denied. For many of the responsive records, the basis for the denial is that DHS is willing to provide you with documents previously withheld. For the remaining documents, we conclude that DHS is not required to provide them to you because they are exempt from disclosure under Oregon's Public Records Law.

Sincerely,

DAVID E. LEITH
Associate Attorney General

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