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February 20, 2009

Anne Saker
Oregonian
1320 SW Broadway
Portland, OR 97201

Patty Wentz, Administrator
DHS/Office of Public Affairs
500 Summer St. NE, E25
Salem, OR 97301

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

Dear Ms. Saker and Ms. Wentz,

This letter is the Attorney General's Public Records Order responding to Ms. Saker's February 11, 2009 email. In that email, Ms. Saker appeals the decision of the Department of Human Services (DHS) to withhold from disclosure the names of individuals whose burials or cremations were funded through Oregon's indigent burial program, ORS 97.170. For the reasons described below, we generally grant Ms. Saker's petition and order DHS to make the materials available to her within seven days.

Oregon's Public Records Law, ORS 192.410 to 192.505, confers upon "any person" the "right to inspect any public record of a public body in this state, except as otherwise expressly provided by ORS 192.501 to 192.505." ORS 192.420(1). The Public Records Law reflects a "strong and enduring policy that public records and governmental activities be open to the public," ***Jordan v. MVD***, 308 Ore. 433, 438, 781 P.2d 1203 (1989). As a consequence, exemptions from disclosure not only must be "express," ORS 192.420(1), but express exemptions "are to be narrowly construed." ***City of Portland v. Oregonian Publishing Co.***, 200 Or App 120, 124, 112 P3d 457 (2005).

In denying Ms. Saker's request, DHS considered itself bound by a Public Records Order issued to Ms. Saker by this office in 2007, relating to precisely the same information. Public Records Order, September 13, 2007, Saker. In that Order, we reasoned that DHS was precluded from disclosing the information Ms. Saker was seeking, because that information was a "public assistance record" made confidential by ORS 411.320(1). We relied on the fact that the definition of "public assistance" in ORS 411.010(3) includes the phrase "Any other functions that may be delegated to the Director of Human Services by or in accordance with federal and state laws" and the fact that DHS is directed to make payments to funeral service providers under ORS 97.170. Public Records Order, September 13, 2007, Saker at 2 (quoting ORS 411.010(3)(f)).

We have reviewed the assumptions and reasoning in our 2007 Order to Ms. Saker in connection with the current petition. For the reasons that follow, we conclude that the 2007 Order was incorrectly decided. ORS 97.170 does not describe a "public assistance" program, and related records therefore are not "public assistance records" that are confidential under ORS 411.320.

The primary basis for our decision to revisit our 2007 Order is that the Order overlooked ***Huxford v. Adult & Family Services Division***, 174 Or App 1, 23 P3d 390 (2001). In that case, DHS took the position that certain funds it provided to a participant in the Temporary Aid to Needy Families program ("TANF") did not qualify as "public assistance," and the Oregon Court of Appeals agreed with the position taken by DHS. We believe that ***Huxford*** is at odds with indications in our 2007 Order that any authorized DHS function or expenditure constitutes "public assistance."

In addition, we are not completely satisfied with the way in which the 2007 Order treats the definition of "public assistance," set forth at ORS 411.010. In full, that definition reads:

> As used in this chapter and in other statutes providing for ***assistance and services to needy persons***, unless the context or a specially applicable statutory definition requires otherwise:
>
> * * *
>
> (3) "Public assistance" means the following ***types of assistance***:
>
> (a) Temporary assistance for needy families granted under ORS 412.001 to 412.069 and 418.647;
> (b) General assistance granted under ORS 411.710 to 411.730;
> (c) Medical assistance;
> (d) Assistance provided by the Oregon Supplemental Income Program;
> (e) General assistance other than general assistance granted under ORS 411.710 to 411.730; and

> (f) Any other functions that may be delegated to the Director of Human Services by or in accordance with federal and state laws.

(Emphasis added.) Our 2007 Order to Ms. Saker focused exclusively on paragraph (f) of this definition. We did not consider the phrases preceding the enumerated list (emphasized above), which clarify that the list only encompasses "types of assistance" and "services to needy persons." We also neglected to address the application of the interpretive principle that, when a list is followed by a broad "catchall," that "catchall" should usually be understood to reach things similar to the other items in the list. That principle is known as *ejusdem generis*. *See* ***Vannatta v. Keisling***, 324 Or 514, 533, 931 P2d 770 (1997).

As a result of the above, Ms. Saker's petition raises a number of difficult questions. Is the program "assistance," a term that WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (Unabridged Edition, 2002) defines to mean, pertinently, "help supplied" or "aid * * * to the needy"? Similarly, does the program benefit "needy persons" within the meaning of ORS 411.010? Is the program akin to, or different from, the types of assistance described in paragraphs (a) through (e) of ORS 411.010(3)? And is the indigent burial program "public assistance" under the analysis the Oregon Court of Appeals employed in ***Huxford***?

We begin and end with the last of these questions, because we find it to be decisive. In determining that certain "support services" are not "public assistance" within the meaning of ORS 411.010(3), ***Huxford*** discusses three features that, in the court's view, separate "public assistance" from other programs DHS may operate that provide funds to a needy person. Two of those features are relevant to our analysis.[1]

First, the court states that "the [TANF] statute refers to 'assistance' while the rules concerning [other programs] refer to payments for 'support services.' Those terms reflect significant differences in purpose in the context of the statutes and rules." 174 Or App at 9. Notably, the term "assistance" does not appear in ORS 97.170; nor do any similar terms.

The ***Huxford*** court goes on to observe that "TANF provides assistance with the basic needs of living. The related self-sufficiency programs are requirements for receiving that assistance. That is, they are not the assistance itself but requirements that recipients must meet in order to be eligible for assistance." 174 Or App at 9-10. It would be difficult to find that ORS 97.170 "provides assistance with the basic needs of living" when the payments it authorizes are not available until after death and burial or cremation. On the other hand, the program does not consist of "requirements that recipients must meet" to be eligible for some other statutory

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[1] In addition to the two characteristics we analyze, the ***Huxford*** court accepts DHS's position that "'grant of public assistance' refers to an ***entitlement*** such as the basic needs of living." 174 Or App at 10 (emphasis added). How the court's discussion of entitlements applies to ORS 97.170 is not apparent; we find nothing in that discussion that we think would make the indigent burial program "public assistance" under the ***Huxford*** analysis.

program. We think that our inability to confidently tie the indigent burial program to the characteristics the court associates with "public assistance" is of greater significance than the fact that the program is not a "self-sufficiency program." After all, the question we are addressing is whether the indigent burial program constitutes "public assistance."

Overall, we cannot conclude that the indigent burial program of ORS 97.170 is "public assistance" under the court's analysis in ***Huxford***. As a result, we conclude that records related to that program are not, for that reason alone, "public assistance records" rendered confidential by ORS 411.320.[2] To the extent that it is inconsistent with this order, we overrule Public Records Order, September 13, 2007, Saker, which formed the basis of DHS's determination that it could not disclose the records in question. Subject to such other exemptions as DHS reasonably believes apply to the information, we hereby order DHS to provide Ms. Saker with the records she has requested within seven days.

Sincerely,

MARY H. WILLIAMS
Deputy Attorney General

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[2] ORS 97.170 imposes additional duties on DHS for bodies of children "over whom the Department of Human Services held guardianship at the time of death." ORS 97.170(4). DHS does not believe that the indigent burial fund has been used to pay for burial or cremation in such instances. If any records responsive to your request *do* involve such children, DHS may want to explore whether those records are "child welfare records" made confidential by ORS 409.225. We express no opinion on that question. On the other hand, to the extent that the records you seek include death certificates, we affirm that those are statutorily exempt from disclosure by virtue of ORS 432.121.