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February 5, 1996

Kristine L. Wright
5328 N. Willamette, Apt. 4
Portland, OR 97203-5756

Re: ***Petition for Public Records Disclosure Order: Oregon State Hospital Medical Records***

Dear Ms. Wright:

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 29, 1996, asks the Attorney General to direct Oregon State Hospital (OSH) to make available to you your deceased mother's medical records from OSH.[1/]

We recognize the effort and expense you will incur in seeking appointment as the personal representative of your mother's estate and have discussed this matter with officials at OSH. The hospital officials advise us that OSH routinely requires the consent of the personal representative prior to releasing the medical records of a deceased patient. While sympathetic to your concerns, OSH officials believe that a practice of evaluating requests for a deceased patient's records on a case-by-case basis would be administratively unworkable and would significantly increase the hospital's risk of liability for the unauthorized release of patient medical information. As discussed below, we find that the hospital's current practice of requiring the personal representative's consent prior to release of a deceased patient's medical records is consistent with Oregon law. Accordingly, we respectfully deny your petition.

[1/] Although it is not phrased as such, we are treating your letter as a petition under ORS 192.450 which authorizes the Attorney General to order a state agency to disclose a non-exempt public record.

The medical records of patients at OSH, including the records of your deceased mother, cover the entire course of a patient's treatment at the hospital and the information received by the hospital staff in furtherance of that treatment. These records include summary documents concerning intake and a series of assessment and evaluation documents developed for treatment planning. These may include social service histories, psychology, neuropsychology and neurology reports, physical exams, laboratory reports, rehabilitation/activity assessments, consultation reports from specialists outside the facility, X-rays, EKGs and other similar documents.

The records also contain a treatment plan(s) based on original evaluations and ongoing re-evaluations. Treatment plans may cover behavioral interventions, medication regimens, other medical treatments and therapies, nursing care plans and other indicated forms of treatment. The records also contain ongoing logs and summaries, including daily logs, where all staff observations are recorded, and weekly or other periodic summaries, such as summaries of ongoing consults and re-evaluations. If patients have been discharged, the records also contain discharge summaries, which reiterate the course of treatment in summary form.

The Public Records Law makes any public record of a public body in Oregon available for inspection, subject to certain exemptions and limitations. *See* ORS 192.420. This law applies to OSH records. Because your deceased mother's medical records come within the scope of the psychotherapist-patient privilege (ORS 40.230) and the physician-patient privilege (ORS 40.235), however, they are exempt from disclosure pursuant to ORS 192.502(8).

ORS 192.502(8) exempts from disclosure "records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law." ORS 40.230, the psychotherapist-patient privilege, and ORS 40.235, the physician-patient privilege, are incorporated in the public records law by ORS 192.502(8).[2/] The general rule of ORS 40.230 states:

[2/] Several other privileges are also incorporated by ORS 192.502(8), including ORS 40.240, the nurse-patient privilege, ORS 40.250, the clinical social worker-client privilege, and ORS 40.262, the counselor-client privilege. Because in the case of OSH records these practitioners are operating under the direction and control of a physician who is also a psychotherapist, we do not discuss these privileges in detail. We note, however, that in some cases these privileges may afford additional confidentiality for the material contained in patient records.

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purposes of diagnosis or treatment of the patient's mental or emotional condition among the patient, the patient's psychotherapist or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

ORS 40.230(2). The general rule of ORS 40.235 is essentially the same but applies to confidential communications made for the purpose of diagnosis or treatment of a physical condition. The reference to "members of the patient's family" in ORS 430.230 (and ORS 430.235) simply defines the scope of the privilege. It does not grant a patient's family members a right of access to any "confidential communications" of the patient that come within the scope of the privilege.

There are three elements that must be met for these privileges to apply. First, the privilege applies only to "confidential communications," which are defined as communications "not intended to be disclosed to third persons," except, among others, persons who are participating in the diagnosis and treatment under the direction of the psychotherapist (or physician). ORS 40.230(1), 40.235(1). The communications written in the medical records by OSH staff or received by the staff from other medical professionals were not intended to be disclosed to persons other than those participating in the diagnosis and treatment of the patient. Some of these written communications were based upon observations of the patient's verbal and nonverbal behavior. Even if the patient's communications were made originally in the presence of third persons, however, the notes made in the medical records by OSH staff describing those communications are confidential because the staff's written account is not a verbatim record, but one filtered through the observation, interpretation and recording process.

Second, the communication must be made for purposes of diagnosis or treatment of the patient's mental or emotional condition (psychotherapist-patient privilege) or physical condition (physician-patient privilege). Each of the records or documents in your mother's medical records were made for such purposes. That is the very reason the medical records are created and maintained.

Third, communication must be among the patient, the patient's psychotherapist (or physician) or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist (or physician). The term "psychotherapist" is defined to mean a person who is:

> Licensed, registered, certified or otherwise authorized under the laws of any state to engage in the diagnosis or treatment of a mental or emotional condition.

ORS 40.230(1)(c)(A). All of the physicians at OSH are psychotherapists. Many other members of the clinical treatment team, such as licensed psychologists or social workers who are involved in the diagnosis and treatment of patients in the institution, are also psychotherapists. However, the privilege is not limited to communications to or from psychotherapists (or physicians), but include communications among anyone who is "participating in the diagnosis and treatment under the direction of the psychotherapist" (or physician). Your mother's entire medical record consists solely of such communications.

Because each of the documents in your mother's medical records meet the elements of the psychotherapist-patient privilege, ORS 40.230, or the physician-patient privilege, ORS 40.235, these records are privileged under Oregon law.

However, the medical records you seek are the records of a deceased patient. Therefore, we must consider whether these privileges survive death.

The privilege created by ORS 40.230 and ORS 40.235 may be claimed by the patient or "[t]he personal representative of a deceased patient." ORS 40.230(3)(c), 40.235(3)(c).[3/] By including the personal representative as one of the individuals able to claim the privilege on behalf of the patient, the legislature made clear that it intended these privileges to survive the death of the patient. Unless the privileges contained in ORS 40.230 and 40.235 are waived by a personal representative, they remain in effect after a patient's death. *See State ex rel Calley v. Olsen*, 271 Or 369, 376, 532 P2d 230 (1975) (noting that doctor-patient privilege is not terminated upon patient's death); *see also* Legislative Commentary to ORS 40.230 ("physician (psychiatrist) patient privilege is not terminated by death of patient").

In summary, because the medical records that OSH has concerning your deceased mother are "confidential communications," they are "privileged under Oregon law." This privilege survived your mother's death. Therefore, we conclude that those records are

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[3/] In addition to the patient and a personal representative, ORS 40.230 and 40.235 permit the privilege to be claimed by a guardian or conservator of the patient and by the person who was the psychotherapist or physician, on behalf of the patient.

exempt from disclosure under ORS 192.502(8), unless the privilege is waived by the personal representative.[4/] Accordingly, we respectfully deny your petition.

Sincerely,

Elizabeth S. Harchenko

ELIZABETH S. HARCHENKO
Special Counsel to the
Attorney General

ESH:DJE:AV/JAA01C0FW
c: Marcia Bell

[4/] The psychotherapist-patient privilege is an evidentiary privilege limiting the admissibility of evidence in any criminal or civil judicial proceedings, with a few enumerated exceptions not relevant here. The physician-patient privilege is limited to civil proceedings. We note that for a privilege to have meaning in any judicial setting, the prohibitions it contains must be observed outside of that setting as well. For example, if a psychotherapist were free to disclose patient communications considered confidential under the privilege outside of court, the purpose of the privilege, the protection of the patient's confidentiality, would be negated.

ORS 192.502(8) does not require an analysis of the scope or effect of an evidentiary privilege outside of the judicial context, however. Instead, it exempts from disclosure "information the disclosure of which is * * * otherwise * * * privileged under Oregon law." Simply stated, if information is otherwise privileged under Oregon law, it is exempt from disclosure under ORS 192.502(8).