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May 26, 2006

Charles F. Hinkle, Esq.
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Re: *Petition for Public Records Disclosure Order*:
Department of Human Services, Office of Investigations and Training, Records

Dear Mr. Hinkle:

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, filed on behalf of your clients, the Oregonian Publishing Company and *Oregonian* reporter Michelle Roberts. Your petition, which we received on April 28, 2006,[1] asks the Attorney General to order the Office of Investigations and Training (OIT) of the Department of Human Services (DHS) to disclose a copy of its computer database of investigations in the state's developmentally disabled care system, unredacted except for the names of alleged victims of abuse. 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 192.410. The Public Records Law provides that a person denied the right to inspect or receive a copy of a public record by a state agency or official may petition the Attorney General to order the release of the public record. ORS 192.450(1).

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

In responding to Ms. Roberts' request for records, Clyde Saiki, the Deputy Director of DHS, explained that OIT's computer database contains 87 fields.[2] DHS Letter to Michelle Roberts dated December 8, 2005. DHS released – fully or partially – 68 fields from the OIT database. Of the 68 fields, 42 were provided in full, 21 were provided partially, and 5 were provided as alternate codes with unique identifiers. All the information from 19 fields was withheld. December 8th Letter. The December 8th letter also explains that, by virtue of OIT's responsibility to investigate serious unexplained injuries and allegations of abuse and neglect, the information in the requested database "generally focuses on the alleged victim." December 8th Letter at page 2. We talked to Deputy Director Saiki about your petition, and he told us that the information redacted from the OIT database provided to Ms. Roberts is either (1) about an alleged victim, in that it directly discusses an alleged victim or makes it possible for someone reviewing the database to identify him or her in conjunction with review of other easily accessible data, (2) identifies an abuse reporter, or (3) names a witness of alleged abuse. The December 8th letter also outlines several federal and state laws to explain why DHS did not provide the redacted information. Your petition contends that those laws do not prohibit disclosure. We must determine whether DHS correctly withheld the requested information.

We reviewed the redacted portions of the record withheld by DHS and considered the statutes cited by the agency as the basis of its partial denial of your client's request.

1. Oregon State Law Exemption

ORS 192.502(9) exempts from disclosure:

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

ORS 192.502(9) incorporates into the Public Records Law the confidentiality provisions of other Oregon statutes. The nature and scope of the exemption is determined by the terms of the incorporated statute. DHS' December 8th letter to Ms. Roberts cites to several Oregon statutes in support of the agency's partial denial of her request. Deputy Director Saiki told us that all of the information redacted from the OIT database disclosed to your client is subject to one or more of these statutes primarily by virtue of being information about an alleged victim, although one statute also specifically protects the identity of reporters and witnesses of alleged abuse.

a. Information about Applicants for and Recipients of DHS Services

In partially denying Ms. Roberts' request, DHS relied upon ORS 410.150, which provides:

> For the protection of applicants for and recipients of services, the Department of Human Services shall not disclose or use the contents of *any* records, files, papers

[2] We note that your petition attached Deputy Director Saiki's December 6th letter to Ms. Roberts. That letter – which was labeled "Attorney-Client Privileged" – was retracted and replaced by the Deputy Director on December 8th.

> or communications for purposes other than those directly connected with the administration of the laws of Oregon, and these records, files, papers and communications are considered confidential subject to the rules of the Department of Human Services, except as otherwise provided in ORS 411.320. In any judicial proceedings, except proceedings directly connected with the administration of public assistance laws, their contents are considered privileged communications. [emphasis added]

The statute protects "applicants for and recipients of services" and is directed toward DHS generally. The statute does not explicitly identify the universe of services for which application or receipt brings an individual within the statute's protection. It also does not contain a possessive explicitly identifying the records, files, papers and communications made confidential. However, the fact that the statute's mandate is directed toward DHS – "the Department shall not disclose" – clearly points to the "records, files, papers, [and] communications" being those for which DHS is the custodian.

Eva Kutas told us that, generally, DHS provides programs and services to individuals primarily through the funding of community programs, facilities and other direct-service providers. In other words, DHS typically provides programs and services indirectly through funding and contracting with local governments and private service providers.[3] ORS 409.010(2) makes DHS responsible for delivery and administration of programs and services relating to, among other things, developmental disabilities and disabled persons. DHS – through OIT – provides adult protective services, including investigations of abuse allegations, to developmentally disabled adults pursuant to ORS 430.735 to 430.765.[4] For purposes of those statutes, an "adult" is defined as a "person who is mentally ill or developmentally disabled, who is 18 years of age or older *and* receives services from a community program or facility."[5] ORS 430.735(2) (emphasis added). Eva Kutas, Director of OIT, told us that all of the community programs and facilities, such as adult foster care homes, referenced in ORS 430.735 receive funding from DHS. With this understanding of how DHS provides services, including protective services, to developmentally disabled adults, we believe that ORS 410.150 makes DHS records confidential for the protection of those developmentally disabled adults discussed in the requested OIT database.

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[3] ORS 409.010(3) identifies DHS as "the recipient of all federal funds paid or to be paid to the state to enable the state to provide the programs and services assigned to the department."

[4] According to Deputy Director Saiki's December 8th letter, a very limited amount of information in the requested OIT database pertains to victims of alleged abuse who are under 18 years of age. December 8th Letter at page 5. We address that information beginning on page 6 of this order.

[5] "Community program" and "community facility" are defined in ORS 430.735(5) and (7) and OAR 410-009-0060(7) and (8).

In reaching this conclusion, we note that prior versions of ORS 410.150 were not directed broadly to DHS but were instead directed toward specific divisions of the agency, first the "Senior Services Division" and later the "Senior and Disabled Services Division." Or Laws 1981, ch 784, § 28; Or Laws 1989, ch 787, §1(1). The amendment to broadly reference all of the "Department of Human Services" was made in 2001 in relation to the reorganization of the agency, which included the legislative abolishment of many divisions and offices, including the Senior and Disabled Services Division. Or Laws 2001, ch 900, §§ 1, 4. Clyde Saiki told us that in 2001, former DHS Director Gary Weeks created a new organizational unit – "Seniors and People with Disabilities" – within DHS to take over the work of the former Senior and Disabled Services Division.[6]

While this organizational unit has been functioning since 2001, and the legislature has held two regular biennial sessions since that time, the legislature has not amended ORS 410.150 to narrow the scope of the statute from the records and other means of communications of DHS to those of Seniors and People with Disabilities. Redacted entries in the requested OIT computer database pertaining to alleged adult abuse victims qualify as "any record" of DHS under the plain language of the statute. Unlike some confidentiality statutes, ORS 410.150 does not require DHS to balance public interests in confidentiality and disclosure in order to withhold information from disclosure.

Because ORS 410.150 applies to the redacted portions of the OIT database requested by your client, the redacted information is exempt from disclosure under ORS 192.502(9).[7]

In partially denying your client's request, DHS also cited to ORS 411.320(1), which is the confidentiality statute applicable to persons applying for or receiving public assistance:

> For the protection of applicants for and recipients of public assistance, except as otherwise provided in this section, the Department of Human Services shall not disclose or use the contents of any public assistance records, files, papers or communications for purposes other than those directly connected with the administration of the public assistance laws of Oregon or as necessary to assist public assistance applicants and recipients in accessing and receiving other governmental or private nonprofit services, and these records, files, papers and communications are considered confidential subject to the rules and regulations of the Department of Human Services. * * * *

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[6] Unlike the former Seniors and Disabled Services Division, Seniors and People with Disabilities is responsible not only for services to the elderly and persons with certain physical disabilities, but is also specifically responsible for services to the developmentally disabled.

[7] The fact that DHS partially disclosed the OIT database in response to Ms. Roberts' request is not determinative of whether the redacted information is exempt from disclosure.

The redacted portions of the OIT database are made confidential by ORS 411.320 if they constitute a "public assistance record." To determine whether this is the case, we analyzed whether the adult protective services provided by DHS to developmentally disabled adults qualify as "public assistance" as that term is defined for purposes of ORS 411.320.

The definition of "public assistance" applicable to the records statute lists five types of assistance, including "general assistance other than [that] granted under ORS 411.710 to 411.730.[8] ORS 411.010(3)(e). "General assistance," as used in ORS 411.010(3), is also a defined term:

> "General assistance" means assistance or service *of any character* provided to needy persons not otherwise provided for to the extent of such need and the availability of funds, including medical, surgical and hospital or other remedial care.

ORS 411.010(2) (emphasis added). The "adult protective services" that DHS provides for developmentally disabled adults include "necessary actions taken to prevent abuse or exploitation of an adult * * * and to safeguard an adult's person, property and funds." ORS 430.735(3). "Thorough and unbiased" investigations into alleged abuse against developmentally disabled adults is one of the necessary actions taken by DHS in its provision of adult protective services. ORS 430.737; ORS 430.745 (DHS or designee shall promptly investigate any report of alleged abuse). OIT is the part of DHS responsible for these investigations.

Considering the adult protective services provided to developmentally disabled adults, including the abuse investigations conducted by OIT, against the definition of "general assistance" in ORS 411.010(2), the services would appear to fall within the plain meaning of "assistance or service of any character provided to needy persons." However, the phrase "not otherwise provided for" in the statutory definition is somewhat ambiguous. This language has been in ORS 411.010(2) since the statute was originally enacted as part of the law creating the state public welfare commission and department. Or Laws 1939, ch 241, § 1. The relating clause of the 1939 Act begins:

> To provide for assistance and service of any and every character to needy persons, *not otherwise provided for by law*, and for the administration of all types of assistance, and for which purpose creating the state public welfare commission * * * the state public welfare department, the county public welfare commission and the county public welfare department * * * [emphasis added].

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[8] Also included within the definition of "public assistance" is "[a]ny other functions that may be delegated to the Director of Human Services by or in accordance with federal and state laws." ORS 411.010(3)(f). We note that under ORS 409.010(2)(e), DHS is responsible for the delivery and administration of programs and services relating to developmental disabilities. The Director of DHS is "responsible for providing for programs for the delivery to the public of the services assigned to the department by ORS 409.010 or otherwise." ORS 409.100(1).

We believe that the scope of the 1939 legislation supports interpreting "not otherwise provided for" in the statutory text as suggested by the relating clause. With the legislation establishing a new bureaucracy by which the state would serve needy persons, the legislature sought to delineate the assistance provided by the new public welfare commission and department from that already provided through existing legislation. Consistent with this interpretation, "not otherwise provided for" in the current ORS 411.010(2) would *not* refer to assistance and services provided by DHS under statutes in, *e.g.*, ORS chapter 410 or 430.

Under the foregoing analysis, we conclude that the redacted portions of the requested OIT database are confidential under ORS 411.320 and therefore are exempt from disclosure under ORS 192.502(9).

b. Adult Abuse Investigation Information

ORS 430.763 provides that abuse investigation information about mentally ill or developmentally disabled adults is confidential as follows:

> Notwithstanding the provisions of ORS 192.410 to 192.505, the names of persons who made reports of abuse, witnesses of alleged abuse and the affected adults and materials under ORS 430.747[9] maintained under the provisions of ORS 430.757 are confidential and are not accessible for public inspection.

ORS 430.753(2) provides that "[t]he identity of the person making [an abuse] report shall be treated as confidential information and shall be disclosed only with the consent of that person, by judicial order or as otherwise permitted by ORS 430.763." To summarize, the names of witnesses, victims and abuse reporters are confidential under ORS 430.763, and the "identity" of abuse reporters is confidential under ORS 430.753(2).[10]

None of the exceptions to ORS 430.763 and ORS 753(2) requiring disclosure apply to your client's request. Therefore, these statutes make the names of abuse victims, witnesses and reporters, and the identity of abuse reporters, redacted from the OIT database exempt from disclosure under ORS 192.502(9).

c. Child Abuse Investigation Information

According to Deputy Director Saiki's December 8th letter, DHS redacted from the OIT database all information about allegations of abuse of victims under the age of 18, excepting information about five investigations into allegations of "financial abuse." December 8th Letter

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[9] The "materials" referenced in ORS 430.747 are photographs of an alleged victim of abuse.

[10] "Identity" means "[t]he collective aspect of the set of characteristics by which a thing is definitely recognizable or known." *The Second College Edition of the American Heritage Dictionary at 639* (1991). Thus, a reporter's identity is more than the reporter's name. If, for example, the reporter's identity would be recognizable by his or her relationship to the victim, that identifier would be confidential under ORS 430.753(2).

at page 6. DHS cites to ORS 419B.035 and ORS 409.225 as authority for redacting information pertaining to allegations of nonfinancial abuse of children.

ORS 419B.035 makes "reports and records compiled under the provisions of ORS 419B.010 to 419B.050" confidential. ORS 419B.010 to 419B.050 outlines how child abuse reports should be reported and investigated. While DHS is required to release the documents compiled as the result of a child abuse report and investigation to the persons listed in ORS 419B.035(1), neither the Oregonian Publishing Company nor Ms. Roberts qualifies as such a person.[11] Thus, any disclosure of such records to the newspaper could be only as permitted by ORS 419B.035(3).

ORS 419B.035(3) 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. Deputy Director Saiki's December 8th letter to Ms. Roberts states that her request for disclosure "does not fall within any of the statutory exceptions" to the confidentiality required by ORS 419B.035(1). December 8th Letter at page 6. 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(3), 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, or for research, but nonetheless chose not to make this necessary disclosure. We have no basis upon which to conclude that disclosing the information concerning child victims which DHS redacted from the OIT database would in any way come within any of the "necessity" standards established in ORS 419B.035(3). Accordingly, we do not believe that DHS has abused its discretion in this instance. The information redacted from the OIT database that pertains to alleged child victims is confidential under ORS 419B.035 and therefore exempt from disclosure under ORS 192.502(9).

Because all redacted information pertaining to allegations of abuse of children is exempt from disclosure pursuant to ORS 419B.035, we do not discuss the applicability of ORS 409.225 to the same information.

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[11] ORS 419B.035(1)(h) provides for disclosure to any person of records regarding an incident in which a child died or suffered serious physical injury as a result of abuse. Ms. Kutas told us that none of the allegations included in the requested OIT database concern such an incident.

2. Other Statutes

In addition to the Oregon statutes already discussed, Deputy Director Saiki's December 8th letter also cites to ORS 192.502(8) (personal privacy exemption) and the federal Health Insurance Portability and Accountability Act and implementing "privacy rules" as bases for redactions. Because we find that ORS 410.150, 430.753(2), 430.763, and 419B.035 provide for the confidentiality of the information DHS redacted from the disclosed OIT database, making the redacted information exempt from disclosure under ORS 192.50(9), we do not discuss the applicability of these additional statutes.

Based on the above analysis, we respectfully deny your petition for disclosure.

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

PDS/gvk:AGS17395
c: Clyde Saiki, DHS
Eva Kutas, DHS