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September 2, 2005

VIA Facsimile and U.S. Mail

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333 Market Street, Suite 3200
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Re: Petition for Public Records Disclosure Order:
Oregon Department of Human Services Records

Dear Ms. Matteo-Boehm:

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. The petition, which we received on August 18, 2005,[1] asks the Attorney General to direct the Department of Human Services (DHS) to disclose "records relating to DHS activities and responsibilities regarding the case of Lydia Smart." Your petition, filed on behalf of *The World* newspaper, further specifies:

> The newspaper's request includes, but is not limited to, any documents reflecting or referring to requests for DHS to intervene in the Smart case; any documents reflecting DHS's determination of whether to intervene in the Smart case; and/or records of any activities of DHS in connection with the Smart case.

For the following reasons, 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

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

materials and make the nonexempt material available for examination if it is "reasonably possible" to do so while preserving the confidentiality of the exempt material. *Turner v. Reed*, 22 Or App 177, 186 n8, 538 P2d 373 (1975).

We have reviewed your petition and the attached denial of *The World*'s request by DHS Tort Liability & Legislative Coordinator Caroline Burnell. Ms. Burnell denied *The World*'s request in its entirety by citing several statutory exemptions from disclosure, including: ORS 192.501(3) (exempting investigatory information compiled for criminal law purposes); ORS 192.502(2) (exempting personal information the disclosure of which would constitute an unreasonable invasion of privacy); ORS 192.502(8) (exempting public records made confidential under federal law); and ORS 192.502(9) (exempting public records made privileged or confidential under state law).

You have stated in your petition that "none of these exemptions trumps the affirmative requirement in ORS 409.225(6) that records pertaining to DHS activities and responsibilities must be released in those cases where an adult is charged with a crime related to child abuse or neglect." ORS 409.225(6) provides:

> Notwithstanding subsection (1) of this section, *unless exempt from disclosure under ORS chapter 192*, the department [DHS] shall disclose information related to the department's activities and responsibilities in a case where child abuse or neglect has resulted in a child fatality or near fatality or where an adult has been charged with a crime related to child abuse or neglect.

(Emphasis added). The text of this statutory provision clearly incorporates by reference all of the exemptions contained in ORS chapter 192. Thus, applicable exemptions may be cited as a basis for withholding records responsive to your petition that would otherwise be subject to disclosure under ORS 409.225(6).

Your petition repeatedly notes that *The World* is seeking "only administrative information regarding the agency's activities and responsibilities with regard to Lydia Smart," as opposed to information that "implicate[s] personal privacy." Pet at 4. Thus, in reviewing the records provided by DHS, we have judged records that pertain to the case regarding Lydia Smart but do not relate to DHS' activities and responsibilities as not responsive to your petition, and they are not addressed further in this order.

Pursuant to our discussions with DHS staff about the records responsive to your petition, the agency has agreed to disclose approximately 120 records to you. Some records are wholly subject to disclosure and will thus be disclosed in their entirety. Others contain both exempt and nonexempt information, so that DHS will disclose redacted copies of the records to you. Approximately 100 records are exempt from disclosure in their entirety. The applicable exemptions are ORS 192.502(8), exempting records or information the disclosure of which is "prohibited by federal law or regulations," and ORS 192.502(9), exempting records or information the disclosure of

which is "prohibited or restricted or otherwise made confidential or privileged under Oregon law."

As to the records or portions thereof that DHS has agreed to disclose to you, your petition is denied as moot. The remainder of this order pertains to the records that are being partially or entirely withheld from disclosure. First, we identify and discuss the underlying federal statutes and regulations that prohibit disclosure of responsive records, either in part or in their entirety, under ORS 192.502(8). We then undertake the same analysis in relation to state statutes supporting the exemption of records under ORS 192.502(9).

1. Federal law

Several records responsive to your petition contain information which one or both of the following federal laws require be withheld from disclosure.

a. HIPAA

Your petition states that DHS does not appear to qualify as a "covered entity" for purposes of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). Pet at 5. However, DHS is in fact a covered entity due, among other reasons, to its role as the state Medicaid agency. Because DHS is a covered entity, it is prohibited from disclosing "protected health information" except as permitted or required under federal law. 45 CFR § 164.502(a). Generally, "protected health information" is "individually identifiable health information."[2] 45 CFR § 160.103.

DHS has been appointed as Lydia's guardian under ORS 419B.370 and thus is authorized to make medical and health care decisions on her behalf. Under federal HIPAA regulations, as Lydia's guardian, DHS may consent to disclosure of her protected health information.[3] 45 CFR § 164.502(g)(3). DHS has consented and agrees to disclose to you several records which contain Lydia's protected health information, to the extent that they relate to DHS' activities and responsibilities in her case. Your petition states that DHS may redact Lydia's protected health information from such records, Pet. at 5, and it has done so.

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[2] "Individually identifiable health information" is information that (i) is created or received by a covered entity; (ii) "[r]elates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual," and (iii) either identifies the individual or for which "there is a reasonable basis to believe the information can be used to identify the individual." 45 CFR § 301.

[3] This authority is also recognized under state law. *See* ORS 192.519(10) ("personal representative" includes guardian appointed under ORS 419B.370) and ORS 192.520 (health care provider or state health plan may disclose protected health information consistent with personal representative's authorization).

DHS does not have authority to disclose records that contain protected health information of individuals other than Lydia. HIPAA regulations provide that such records may be disclosed if they can be redacted so as to "de-identify" the information. 45 CFR § 164.514(b)(2). However, de-identification is not sufficient to permit disclosure if the covered entity has "actual knowledge that the information could be used alone or in combination with other information to identify an individual who is a subject of the information." *Id.* Due to the small number of persons involved in the Lydia Smart case, there is sufficient reason to believe that redactions will not result in the de-identification required by federal law. Therefore, responsive records which contain protected health information about persons other than or in addition to Lydia Smart are prohibited from disclosure by HIPAA and are being withheld under ORS 192.502(8).

b. Title IV-E of the Social Security Act

Disclosure of DHS records regarding applicants or recipients of foster care payments is restricted by 42 USC § 671 (Title IV-E of the Social Security Act). This statute requires states to provide safeguards that restrict the use or disclosure of information concerning applicants or recipients to "purposes directly related to the administration" of the program. The state has taken those steps through ORS 411.320 and 418.130.[4] The federal implementing regulations, located at 45 CFR § 1355.21(a) and 1355.30 and incorporating by reference 45 CFR § 205.50, safeguard information such as names, address, social and economic conditions, and medical information. *The World*'s records request is not directly related to the administration of the state's foster care program. Thus, your petition is denied to the extent responsive records are made confidential under federal law.

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[4] ORS 411.320(1) provides that:

> For the protection of applicants for and recipients of public assistance, except as otherwise provided in this section, [DHS] shall not disclose or use the contents of any records, files, papers or communications for the 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 [DHS]. In any judicial or administrative proceedings, except proceedings directly connected with the administration of public assistance or child support enforcement laws, their contents are considered privileged communications.

ORS 418.130 provides that:

> Except as otherwise provided in this section and except for purposes directly connected with the administration of temporary assistance for needy families program, delivery or administration of programs and services [DHS] is authorized to deliver and administer pursuant to ORS 409.010 or as necessary to assist public assistance applicants and recipients in accessing and receiving other governmental or private nonprofit services and in accordance with the rules of [DHS], a person may not solicit, disclose, receive, make use of, or authorize, knowingly permit, participate in, or acquiesce in the use of, any list of or names of, or any information concerning, persons applying for or receiving such aid, directly or indirectly derived from the records, papers, files or communications of [DHS] or acquired in the performance of official duties.

2. State law

Several records responsive to your petition contain information which one or more of the following state laws make confidential.

a. Child welfare records, files, papers and communications – ORS 409.225

Subsection (1) of ORS 409.225 makes confidential child welfare records maintained by DHS:

> In the interest of family privacy and for the protection of children, families and other recipients of services, the Department of Human Services *shall not disclose or use the contents of any child welfare records, files, papers or communications that contain any information about an individual child, family or other recipient of services* for purposes other than those directly connected with the administration of child welfare laws or unless required or authorized by ORS 419A.255 or 419B.035. *The records, files, papers and communications are confidential and are not available for public inspection.* General information, policy statements, statistical reports or similar compilations of data are not confidential unless such information is identified with an individual child, family or other recipient of services or protected by other provision of law.

(Emphasis added.) The consequence of ORS 409.225(6), reprinted on page 2 above, is that responsive records which would otherwise be exempt due only to the terms of ORS 409.225(1) must be disclosed, *to the extent that the information they contain relates to DHS' activities and responsibilities.* DHS has agreed to disclose this information to you. However, to the extent that DHS' child welfare records in the Lydia Smart case also contain information about a child, family or other recipient of services which does not reflect upon DHS' activities and responsibilities, they remain confidential under ORS 409.225(1) and are exempt under ORS 192.502(9).[5]

ORS 409.225(2) and (3) require DHS to disclose child welfare records in specified contexts, but none of them include responding to media requests for records. Also, we have no reason to believe that the waiver of confidentiality identified in subsection (5) of the statute exists in relation to the records responsive to your request. Thus, we deny your petition with respect to responsive child welfare records to the extent that they are not related to DHS' activities and responsibilities.

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[5] By way of example, under ORS 409.225(6), DHS is disclosing forms authorizing the release of medical information to or from DHS because such records show the actions taken by the agency. However, it is not disclosing the substance of the medical information in the records received or disclosed pursuant to the authorization form.

b. Child abuse reports – ORS 419B.035

ORS 419B.035(1) makes "confidential" the reports and investigations of child abuse made pursuant to ORS 419B.010 to 419B.030.[6] *The World*'s request and your petition do not come within the limited situations stated in ORS 419B.035(1) and (2) in which DHS either must or may disclose such records.[7]

When a state statute, such as ORS 419B.035(2),[8] provides a state agency with limited discretion to disclose records that otherwise must be withheld, this office reviews the agency's decision to withhold records to determine if it was an abuse of discretion. *See* Public Records Orders, Sept. 24, 2001 (Nielson) and March 2, 1993 (McMinimee). As stated in the Nielson PRO:

> To find an abuse of discretion under ORS 419B.035(2), 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, but that DHS intentionally chose not to make this necessary disclosure.

We have no basis to conclude in this instance that DHS has abused its discretion in refusing to disclose the records you seek.[9]

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[6] Child abuse reports and investigatory records regarding Lydia Smart may constitute criminal investigatory material under ORS 192.501(3). Because these records are exempt under ORS 192.502(9), we do not address the potential applicability of ORS 192.501(3) or exemptions stated in ORS 192.501 and 192.502.

[7] ORS 419B.035 was amended by Oregon Laws 2005, chapter 659. However, the amendments are not germane to your petition.

[8] ORS 419B.035(2) reads:

> The Department of Human Services may make reports and records available to any person, administrative hearings officer, court, agency, organization or other entity when the department determines that such disclosure is necessary to administer its child welfare services and is in the best interests of the affected child, or that such disclosure is necessary to investigate, prevent or treat child abuse and neglect, to protect children from abuse and neglect or for research when the Director of Human Services gives prior written approval. The Department of Human Services shall adopt rules setting forth the procedures by which it will make the disclosures authorized under this subsection and subsection (1) of this section. The name, address and other identifying information about the person who made the report may not be disclosed pursuant to this subsection and subsection (1) of this section.

[9] ORS 419B.035(2) also permits DHS to disclose records when "necessary * * * for research." Pursuant to OAR 410-014-0000(40), DHS defines "research" to mean "[a] systematic investigation, including research development, testing, and evaluation, designed to develop or contribute to generalizable knowledge." We have no basis to believe that your client's request is related to such efforts.

c. Juvenile court records – ORS 419A.255

To the extent that responsive records constitute "juvenile court records," they are also confidential under ORS 419A.255.[10] Your petition states that this statutory mandate of confidentiality is irrelevant because *The World* is seeking disclosure of only "administrative information regarding the agency's activities and responsibilities with regard to Lydia Smart." Pet at 4. However, not only records created by the juvenile court, such as its orders and judgments, are affected by ORS 419A.255. Any records submitted to the court by the parties are likewise prohibited from disclosure.

ORS 419A.255(1) provides that juvenile court "legal" records are available only to specified categories of individuals. ORS 419A.255(2), (3), and (6) provide that information in the juvenile court "social file" relating to a child's history and prognosis is privileged and may be disclosed only to specified categories of individuals. You are not included in the category of individuals that may have access to either type of record maintained by DHS. Disclosure of such information to persons other than those specifically listed in the statute requires the juvenile court's consent, which you have not provided to DHS. *See* ORS 419A.255(3). Thus, such records are exempt under ORS 192.502(9) and ORS 419A.255.

d. Written accounts by health care services providers – ORS 179.505

Some responsive records consists wholly or partially of "written accounts" of individuals served by a "health care services provider," as those terms are defined in ORS 179.505(1). In addition to other applicable exemptions, these accounts are confidential under ORS 179.505(2), which provides:

> Except as provided in subsections (3), (4), (6), (7), (8), (9), (11), (14), (15), (16), and (17) of this section or unless otherwise permitted or required by state or federal law or by order of the court, written accounts of the individuals served by any health care services provider * * * are not subject to access and may not be disclosed."

ORS 179.505(3) provides: "If the individual or a personal representative of the individual provides an authorization, the content of any written account referred to in subsection (2) of this section must be disclosed accordingly[.]" As Lydia Smart's appointed guardian, DHS is Lydia's personal representative for purposes of ORS 179.505. 179.505(1)(d).

DHS has consented to the disclosure of several affected records that reflect upon DHS' activities and responsibilities in the case of Lydia Smart and will redact substantive medical information about Lydia, as discussed under our analysis of the HIPAA restrictions. DHS does not have authority to disclose written accounts of individuals served by a health care services provider that pertain to other individuals, and none of the

[10] *See also* Or Laws 2005, ch 451.

other exceptions contained in ORS 179.505 allow disclosure of this information to you. For these reasons, we deny your petition for records protected by ORS 179.505 except to the extent that they relate to DHS' activities and responsibilities.

e. Foster parent information – ORS 418.642

In addition to the restrictions stated in 42 USC § 671 with regard to foster care payments, state law makes confidential records that contain information about foster parents. ORS 418.642(1) provides:

> Notwithstanding ORS 192.410 to 192.505, the name, address and other identifying information about a person who maintains a foster home are confidential and not accessible for public inspection.

Because DHS may not disclose the names, addresses, and other identifying information regarding foster parents, it will redact such information from records it is disclosing to you. Accordingly, your petition is denied with respect to this information.

f. Privileges – ORS 40.225 & 40.230

Some of the records responsive to your request contain information that is privileged pursuant to ORS 40.225 (lawyer-client privilege)[11] and ORS 40.230 (psychotherapist-patient privilege).[12] To the extent that records contain information

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[11] ORS 40.225 (OEC 503) provides:

(2) A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
(a) Between the client or the client's representative and the client's lawyer or a 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.

[12] ORS 40.230 (OEC 504) provides:

(2) 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.
(3) The privilege created by this section may be claimed by:
(a) The patient.
(b) A guardian or conservator of the patient.
(c) The personal representative of a deceased patient.
(d) The person who was the psychotherapist, but only on behalf of the patient. The psychotherapist's authority so to do is presumed in the absence of evidence to the contrary.

subject to these privileges, they are exempt from disclosure and your petition for them is denied.

3. Conclusion

DHS has agreed to provide responsive records to you to the extent that they are not exempt from disclosure due to the terms of ORS 409.225(6). Included within these records is information related to DHS' activities and responsibilities in the Lydia Smart case otherwise made confidential under HIPAA to the extent that DHS has authority to waive confidentiality on behalf of the child to whom it acts as guardian. For the reasons discussed in the order, all remaining records, or portions of disclosed records, are exempt from disclosure under either, and in some instances both, ORS 192.502(8) or 192.502(9). For these reasons, we deny your petition.

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

AGS16207

c: Nancylee Stewart, DHS, Coos Bay