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SENT VIA EMAIL ONLY

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Re: Request for Public Records Disclosure Order
Oregon Health Authority, Public Health Division
DOJ File No. 443470-GA0101-14

Dear Ms. Terry,

This letter is the Attorney General's order in response to your petition asking our office to direct the Oregon Health Authority, Public Health Division (OHA) to disclose certain records to you under the Oregon Public Records Law, ORS 192.410 to 192.505. You are seeking records pertaining to outbreaks of salmonella associated with a Foster Farms chicken processing plant in Kelso, Washington. For the reasons that follow, we respectfully deny your petition.[1]

The Oregon Public Records Law provides that "[e]very person has a 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 law is a disclosure law, and exemptions from its public disclosure requirement must be express. Even express exemptions are construed narrowly to further the public purposes served by disclosure. The narrow construction rule means that "if there is a plausible construction of a statute favoring disclosure of public records, that is the

[1] The materials we reviewed do include some information that was not obtained by OHA in the investigation, such as a form of a survey prepared by OHA to *solicit* information about the outbreaks. (The responses would constitute information received in the investigation.) From the eight categories of records described in your initial petition, it does not appear that you are interested in this kind of information. If you are interested, however, you are entitled to obtain it, and OHA has indicated that it is willing to provide it to you.

construction that prevails." *Colby v. Gunson*, 224 Or App 666, 676 (2008). A public body that asserts a statutory exemption from disclosure has the burden of demonstrating that the law permits the material in question to be withheld from public disclosure. ORS 192.450(1); ORS 192.490(1).

Initially your petition focused on eight categories of documents:

1. Email communications between the Public Health Division and representatives of the U.S. Department of Agriculture's FSIS regarding Foster Farms-related salmonella outbreaks in 2004-05, 2009-10 and 2012-13.
2. Email communications between the Public Health Division and representatives of the U.S. Centers for Disease Control regarding Foster Farms-related salmonella outbreaks in 2004-05, 2009-10 and 2012-13.
3. Email communications between the Public Health Division and Washington state Department of Health regarding Foster Farms-related salmonella outbreaks in 2004-05, 2009-10 and 2012-13.
4. The record in the form of minutes or notes of any telephone conference involving Oregon Public Health Division and USDA or CDC or Washington state Department of Health, separately or together, regarding Foster Farms-related salmonella outbreaks in 2004-05, 2009-10 and 2012-13.
5. Any summary report of actions taken or recommended by the Public Health Division relating to the three outbreaks linked to Foster Farms.
6. Any report prepared by the Public Health Division reviewing, summarizing or analyzing actions taken by USDA or CDC or the Washington state Department of Health relating to the three outbreaks linked to Foster Farms.
7. Any communication between the Public Health Division and Foster Farms or its agents regarding the three outbreaks linked to Foster Farm's Kelso plant.
8. Any notes or reports on meetings between the Public Health Division and Foster Farms or its agents.

To facilitate our consideration of the legal issues raised by your petition, you agreed that we could, for purposes of our analysis, treat your petition as instead seeking the materials contained on a disc of salmonella investigation documents that was already prepared by OHA.

OHA denied your request citing ORS 433.008. That statute, which is incorporated into the Oregon Public Records Law by ORS 192.502(9)(a), provides that, with specific exemptions that do not apply to your request, "information obtained by the Oregon Health Authority or a local public health administrator in the course of an investigation of a reportable disease or disease outbreak is confidential and is exempt from disclosure under ORS 192.410 to 192.505." In your petition, you argue that this statute should be interpreted narrowly to protect the confidentiality of information about individuals: "the secrecy was to benefit the VICTIMS, to protect THEIR privacy and their very substantial interest in maintaining the confidentiality of sensitive medical information." (Emphasis in original.) You offer legislative history and statutory context in support of this argument.

With regard to legislative history, you note that the staff measure summary prepared for the Senate Committee on Health Care and Veteran's Affairs when the current confidentiality rule was enacted in 2009 explains that the bill protects information about individuals: "Protecting the confidentiality and privacy of people who are subjects of a public health investigation, including the identity of a person with a reportable communicable disease, is the focus of this bill." You also note that the prior version of the statute specifically protected information about individuals. We have reviewed the legislative history of current ORS 433.008, including audio of the committee hearings. Dr. Paul Cieslak, manager of the Communicable Diseases Section of the Public Health Division, presented written and oral testimony to both the Senate Committee on Health Care and Veteran's Affairs and the House Committee on Health Care. In that testimony, Dr. Cieslak emphasized the need to protect sensitive information about individuals, whether they be individuals who have contracted diseases that are the subject of an OHA investigation, or individuals in control groups who may provide OHA with information useful in isolating causes of disease. Dr. Cieslak noted that the existing language, by its terms, only protected information about individuals who were sick with reportable diseases. He noted that this limitation could make it difficult to obtain information about nearby patients, as the lack of confidentiality could make medical providers reluctant to provide information about their patients. And he observed that their control studies often entail the collection of information that could include things such as eating habits or health habits along with personally identifiable information.

None of the materials we reviewed in connection with your petition implicate the concern that OHA presented to the legislature in support of its proposed amendments to the existing confidentiality statute. Although we noted a small amount of personally identifiable information, that information concerns individuals who actually contracted salmonella – and who therefore would have been protected under the prior version of ORS 433.008. Most of the materials we reviewed document OHA communications with federal public health agencies and the public health agencies of other states. Some of it relates to communications with other parties. It seems unlikely that either Dr. Cieslak or the legislators who were aware of Dr. Cieslak's testimony had this kind of information in mind when ORS 433.008 was amended to make investigatory information confidential.

With regard to context, you point first to ORS 433.008(2)(f), which authorizes disclosure of information obtained in an investigation to "[t]he individual who is the subject of the information or the legal representative of that individual." You reason that this provision implicitly supports the idea that confidential information is information about an individual – that every piece of information covered by the confidentiality rule will be about some individual. Similarly, you observe that ORS 433.008(6)(a) authorizes OHA to release "statistical compilations and reports" so long as those do not "identify individual cases or sources of information." You argue that this provision illustrates that the statute contemplates disclosure of the type of information you are seeking.

The counterargument – as your petition acknowledges – is a straightforward textual argument: the express terms of the statute extend confidentiality to "information obtained by the

Oregon Health Authority or a local public health administrator in the course of an investigation of a reportable disease or disease outbreak, without regard to the character of that information. As you say, "[a]t first blush, the statute appears to provide global secrecy." Our task, then, is to determine whether this context and legislative history, taken together, compel a conclusion that notwithstanding the more expansive plain text of the statute, ORS 433.008 should be understood to protect only information about individuals.

Ultimately, we do not think that your arguments are sufficient to overcome the plain implications of the text. With respect to legislative history, the record establishes at most that the legislature probably did not have anything like a complete understanding of the kinds of information that an OHA investigation is likely to gather. If the materials that we reviewed are in any way representative of these investigations, very little investigatory information is of the kind that was described to legislators. Nevertheless, the text clearly indicates that legislators intended to make confidential "information obtained * * * in the course of an investigation." Legislators' possible misunderstanding about the scope of information obtained during an investigation does not change the fact that the materials at issue were, with very few exceptions, obtained by OHA in the course of its investigation.

As for your contextual arguments, we do not think it is plausible to say that, because individuals are entitled to receive otherwise-confidential information about them collected in the course of an OHA investigation, *only* information about individuals can be considered "information obtained * * * in the course of an investigation." We think it is far more plausible to understand that provision to refer to a subset of information collected in an investigation. In other words, of all the information collected in an investigation, an individual is entitled to obtain the information that pertains to him or her. Similarly, OHA's fairly broad authority to issue reports – so long as the reports do not identify individual cases or sources of information – does not remove or reduce the confidentiality protections applicable to information that OHA chooses not to report. Indeed, the disclosure of these documents would inevitably reveal the sources of the information in them.

Because we are not persuaded that the context or legislative history of ORS 433.008 compel a reading that is at odds with the plain meaning of the text, we must respectfully deny your petition. It is entirely possible that a legislature with a more complete picture of the contents of OHA investigation files would make a different judgment about the appropriate scope of confidentiality for such investigations. But such a determination must be made by the legislature, not by this office.

Sincerely,

FREDERICK M. BOSS
Deputy Attorney General

cc via email only: Jonathan Modie, OHA