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August 5, 2015

SENT VIA EMAIL ONLY
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Rob Davis, Reporter
The Oregonian
1500 SW 1st Avenue
Portland OR 97201-5815

Re: Petition for Public Records Disclosure Order
Oregon Military Department
DOJ File No. 248001-GA0108-15

Dear Mr. Davis:

This letter is the Attorney General's order on your petitions for public records disclosure and for review of denial of a fee waiver request under the Oregon Public Records Law, ORS 192.410 to 192.505. Your first petition, which we received on July 13, 2015, challenges the decision of the Oregon Military Department (OMD) not to waive or reduce fees associated with your public records request for copies of contracts for rental of OMD facilities. Your second petition, which we received on July 20, 2015, asks the Attorney General to order OMD to provide you with the following records:

- Any email sent from Roy Swafford, Amanda Haney or Jerry Elliott to Occupational Health Nurse Naomi Shantz from 1/1/2012 to present.
- Any email received by Roy Swafford, Amanda Haney or Jerry Elliott from Occupational Health Nurse Naomi Shantz from 1/1/2012 to present.
- "[M]edical monitoring program data for its employees tracking blood lead levels * * *."

Your second petition also asks the Attorney General to ensure that OMD is following the records retention schedule promulgated by the Oregon Secretary of State. You agreed to extend the deadline for issuance of both of these orders to August 4, 2015, and we appreciate your cooperation in that regard. For the reasons explained below, we respectfully deny your first petition because OMD's fees were not designed to constructively deny your request, and we

cannot conclude that OMD's decision not to waive or further reduce its fee was unreasonable in light of all the circumstances. And we respectfully deny your second petition (1) as to the emails involving Naomi Shantz, because OMD either does not have or has provided you with the records and (2) as to the medical information you seek, because it is exempt from disclosure. Finally, as to your request that we order OMD to comply with records retention requirements, we take no action, because doing so would be outside the authority of the Attorney General.

The Public Records Law confers a right to inspect or copy any public record of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420; ORS 192.430. Any person denied the right to inspect or copy any public record of a state agency may petition the Attorney General to review the public record to determine if it may be withheld from public inspection. ORS 192.450(1). The Public Records Law is primarily a disclosure law, not a confidentiality law. The public body has the burden of demonstrating that withholding a requested public record from inspection is permitted by the Public Records Law. ORS 192.450(1). Any person denied waiver or reduction of fees assessed in connection with a public records request may also petition the Attorney General to review that denial. ORS 192.440(6).

Moreover, while there is no provision in the Public Records Law that authorizes a person to petition the Attorney General to review an agency's fees established under ORS 192.440(4), the Attorney General's authority in connection with the inspection provisions of the Public Records Law may require the Attorney General to evaluate an agency's fees where the amount of the fee in comparison to the nature of the request suggests that the true purpose of the fee is to constructively deny the request, rather than to recoup the agency's actual costs. OREGON ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 18-19 (2014) (MANUAL).

1. First Petition

Your first petition raises issues regarding the $576.25 fee that OMD charged in connection with making records available in response to your request for rental contract information for six of its armories. OMD calculated that fee as follows: $475 for 25 staff hours to compile the records at an hourly rate of $19 per hour ("reduced from $22 per hour") and $202.50 for 1,350 pages of photocopying at the rate of 15 cents per page ("reduced from 25 cents per page"). The resulting total of $677.50 was later reduced to $576.25 when you advised OMD that you required only the first two pages of each contract and not any additional pages. In the end, OMD spent 27.75 hours fulfilling this request. By our calculations, OMD effectively reduced its fee for these records by approximately 25%.[1]

According to your petition, OMD informed you that an estimated 25 hours would be required "to open these contracts, stored as PDFs, print them, redact them and re-scan them." Based on that understanding of OMD's estimate, you contend that the work could have been accomplished far more easily using electronic, rather than by printed, copies of the contracts.

[1] Applying OMD's normal rates to the actual time expended and materials provided would yield a fee of $773: 27.75 hours of staff time at $22 per hour ($610.50), plus 654 copied pages at $0.25 per page ($163.50).

You also express some skepticism that there any reason for OMD to review the contracts for possible redaction, based on the fact that some contracts you already had in your possession contained no private information and in fact it appears that the contract forms discourage renters from including their Social Security numbers.

Those contentions go to the reasonableness of the fee assessed. As noted, to the extent that the Attorney General may have authority to review the reasonableness of a fee, that authority is limited to determining whether the amount of the fee in comparison to the nature of the request suggests that the true purpose of the fee is to constructively deny the request, rather than to recoup the agency's actual costs. Had OMD in fact charged you for 25 hours' worth of staff time simply to print, review and possibly redact the approximately 650 pages of material you requested, we might well have concluded that the fee was intended to deny your access rather than recoup costs. But for the following reasons, we conclude that the true purpose of the fee was to recoup the agency's actual costs.

We have conferred with Roy Swafford, OMD's Director of Installations. During our review of your petition, OMD asked its staff to account in detail for the time it took them to perform the tasks necessary to respond to your request, separate from the time that was spent to compile a list that OMD used to notify renters of the possibility of lead exposure in the armories.[2] According to Mr. Swafford, while some of the tasks for both projects overlapped, the detailed accounting revealed that the work that was done specifically to respond to your request took 27.75 hours. Mr. Swafford explained that, although OMD had to locate the contracts to extract the information it needed to do its mailing to the renters, staff had to take additional steps to accommodate your request.

Mr. Swafford told us that both projects required that the contracts be gathered and that, while some of the rental contracts were available as PDFs, not all of them were; older contracts were not scanned as they arrived in Salem from armories around Oregon. For OMD's purposes, the name and address of the renters were copied from the contracts and added to the list. However, to respond to your request, OMD staff had to take additional actions. According to Mr. Swafford, OMD could not use Dropbox, an online file-sharing service, which was your preferred method of delivery, because of Department of Defense federal network security measures. Therefore, staff checked to see if they had gathered all contracts for the period of time that you had requested; tracked down additional contracts responsive to your request; printed copies of over 300 contracts; removed the first two pages that contained the information you sought (which was more than the name and address that OMD needed for its purposes); reviewed the pages to see whether any information needed to be redacted (for example, Social Security numbers or banking information) and made redactions as needed; and sent the resulting documents to you via UPS. Most of the time that you were charged for was not spent printing, reviewing and redacting records, but in compiling the records that you requested. Mr. Swafford also told us that, if the time spent for any given task appeared to him to have been done primarily

[2] Mr. Swafford has advised us you subsequently requested that list and that OMD provided it to you at no charge, along with a copy of OMD's notification mailing to the renters.

for OMD's purposes or if it appeared to duplicate another staffer's work, he deleted it from the accounting. As to the time OMD took to review the contracts for information that needed to be redacted, the fact that some contracts did not contain that information did not guarantee that all would not contain it.

We are persuaded that the purpose behind OMD's fees was not to constructively deny your request.

You alternatively contend that it was unreasonable for OMD to decline to waive or reduce this fee. As noted above, OMD effectively reduced the fee for providing these records to you by approximately 25%. We consequently treat your petition as contending that OMD acted unreasonably in refusing to waive or further reduce its fees. Under the Oregon Public Records Law, a public body may reduce or waive fees "if the custodian [of the record] determines that the waiver or reduction is in the public interest because making the record available primarily benefits the general public." ORS 192.440(5). Public bodies considering a request for fee reduction or waiver must first determine whether making the record available primarily benefits the general public. *In Defense of Animals v. OHSU*, 199 Or App 160, 188-89, 112 P3d 336 (2005). If it does primarily benefit the public, the public body is not necessarily required to grant fee reduction or waiver. Rather, the public body has discretion whether to grant the fee reduction or waiver. A public body must exercise this discretion reasonably under all the circumstances, acting within the range of lawful options available to it under the relevant law. *Id.* at 189-90. In reviewing state agency decisions under this standard, we do not ask whether the Attorney General would have made the same decision under the circumstances, but rather whether the public body's decision was inconsistent with its range of lawful options.

We begin with the straightforward conclusion that OMD had authority to waive or reduce its fees because making the requested information available will primarily benefit the general public. We note that you are a reporter for a major news organization that clearly has the ability to disseminate the information. We gather that you intend to use the information to contact individuals who may have been exposed to lead in OMD's armories for purposes of reporting on their exposure. That is certainly a matter of public concern. Such information does not appear to have already been in the public domain. Accordingly, we readily conclude that your request met the "public interest" threshold permitting fee waiver or reduction.

As noted, however, once the public interest test is met, the public body is not necessarily required to grant a fee reduction or waiver, but must exercise its discretion reasonably under all the circumstances. *In Defense of Animals*, 199 Or App at 190. We have determined that the appropriate inquiry when reviewing a public body's exercise of discretion is "whether the public body's decision impedes the policies favoring disclosure of public records to the extent that the decision cannot be said to reflect a lawful option under the Public Records Law." Public Records Order, September 10, 2009 (*Rogers/Fletcher*). We have determined that, in exercising its discretion, a public body usually should consider (1) the character of the public interest in the particular disclosure, (2) the extent to which the fee impedes the public interest, and (3) the extent to which waiver or reduction would burden the public body. MANUAL at 23.

Here, there is a legitimate public interest in knowing about OMD rentals of facilities that may have been tested as having elevated lead levels. Lead can cause significant health problems, especially for children, and information about rentals of these facilities for events that included children would be of broad interest to the public.

In considering the extent to which the fee impedes the public interest, the requester's ability to pay is relevant. Public Records Order, September 10, 2009 (*Rogers/Fletcher*). We observe that you are a reporter for the Oregonian, a major news outlet with some (but not unlimited) resources to pay the reasonable fees incurred by public bodies in responding to its public records requests.

As to the extent to which waiver or reduction would burden the public body, we are aware that "a waiver imposes on the public body whatever expense would otherwise be the requester's obligation." Public Records Order, September 10, 2009 (*Rogers/Fletcher*); *see also* Public Records Order, April 24, 2009 (*Harbaugh*) (noting that public body resources must be diverted from other tasks to respond to public records requests). In assessing the burden on the public body, we consider, among other things, the extent of time, expense, and interference with the business of the public body, and the necessity of segregating exempt from nonexempt materials. MANUAL at 23. A public body may consider the aggregate effect of numerous public records requests from the same requester in assessing its burden. *Id.*

We understand that you believe that OMD could have performed the work related to your request more efficiently. But, as explained above, the efficiencies that you have suggested would not have made a significant difference with respect to the overall fee, because most of the time expended was not spent on reviewing and redacting records but on compiling them so that they could be reviewed and redacted. That work would have been necessary even if OMD had been comfortable with performing electronic redactions on PDF versions of the contract.[3] And, as we concluded above, the fee imposed did not reflect work undertaken with the purpose of impeding your access to the records. On the other hand, we understand that you have now made six public records requests to OMD regarding this matter. Most requests have comprised multiple parts, ranging from three to ten items. In light of the aggregate effect of these requests, the burden on OMD from your request is more substantial than the burden from the instant request. We also note that OMD has waived fees in connection with several of those other requests. Moreover, OMD effectively reduced its fees for these records by approximately 25%.

In light of the totality of the circumstances here—including the character of the public interest in disclosure, your ability to pay, the burden on the public body, the total number of related requests, OMD's waiver of fees in connection with some of those requests, and OMD's approximately 25% reduction of the instant fee—we conclude that OMD's decision to decline to waive or further reduce fees does not impede the policies favoring disclosure of public records to

[3] Had OMD explained to you the extent of its planned efforts to ensure that it was providing every contract you require, you could well have asked them that they forgo those efforts and instead provide you with the contracts that

the extent that it is not a lawful option under the Public Records Law. *See* Public Records Order, March 27, 2002 (*Zaitz*) (observing that the Attorney General may not "overturn an agency decision about fee waiver or reduction that comports with a reasoned assessment of the relevant factors"). Accordingly, we deny your first petition.

2. Second Petition

a. Emails Involving Naomi Shantz

In your second petition, you ask the Attorney General to order OMD to disclose emails and health records. We address the emails first, which you requested in your June 25, 2015 email; your request is quoted verbatim above.[4]

We have discussed these emails with David Stuckey, OMD's Deputy Director. He explained that the emails that you seek involve a federal employee (Shantz), two state employees (Swafford and Haney), and one retired state employee (Elliott). Mr. Stuckey advises us that the email accounts for those four personnel reside on the federal National Guard Bureau's email server and that OMD does not have authority to independently conduct a global search of that computer system.[5] However, Mr. Stuckey advises that OMD has taken the following steps to accommodate your request. First, Mr. Stuckey has directed Mr. Swafford and Ms. Haney to search their own records for any emails that meet your request. We understand that OMD provided you with the emails revealed by that search on July 29, 2015. Second, OMD has advised us that it conducted a search of Mr. Elliott's archived emails, but none were found from him to Naomi Shantz or to him from Naomi Shantz. Finally, we understand that OMD has submitted a FOIA request seeking the same emails that your public records request sought to obtain emails that OMD cannot directly access. As to these emails, because OMD either has provided you with the records that you seek or does not have the records that you seek, we respectfully deny your petition.

b. Health Records

You also ask the Attorney General to order disclosure of certain health records, namely "medical monitoring program data for its employees tracking blood lead levels." As an example of the record you seek, you provided a blank form entitled "chronological record of medical care" that would include the following information, among other things: "symptoms, diagnoses, treatment, [and] treating organization" and "patient identification," including name and date of birth. You advise that you are now seeking only a limited subset of information: as to only

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[4] We understand that you have made three other requests for emails. Because your petitions do not raise any concerns about those requests, we do not discuss them in this order.

[5] We also conferred with Lt. Col. Bryan Libel, Staff Judge Advocate for the Oregon National Guard, who confirmed that OMD does not have authority to independently conduct a global search of the NGB's computer system, because the National Guard Bureau is a federal agency, separate from the Oregon Military Department.

those employees whose tests have revealed elevated blood lead levels, "the worker's identity, date and blood lead testing results * * * ." OMD has declined to disclose the records that you seek, citing ORS 192.496(1) (exempting from disclosure medical records less than 75 years old if disclosure would lead to an unreasonable invasion of privacy)[6] and ORS 192.502(2) (exempting from disclosure certain information of a personal nature). You acknowledge that medical information may legally be kept private in many circumstances, but contend that, in this instance, the public interest requires disclosure. For the reasons that follow, we conclude that the records that you seek are exempt from disclosure.[7]

ORS 192.502(2) exempts from disclosure "[i]nformation of a personal nature such as but not limited to that kept in a personal, medical or similar file, if public disclosure would constitute an unreasonable invasion of privacy[.]" Records that fall within the scope of the exemption are nevertheless subject to disclosure if clear and convincing evidence establishes that the public interest requires disclosure in the particular instance. We readily conclude that these health records contain ""[i]nformation of a personal nature such as but not limited to that kept in a * * * medical or similar file." We further conclude that disclosure of these health records "would constitute an unreasonable invasion of privacy." As the Supreme Court has explained, an invasion of privacy is "unreasonable" if "an ordinary reasonable person would deem [it] highly offensive." *Id.* at 442. Ordinarily, public disclosure of personal medical information would constitute an unreasonable invasion of privacy, and you do not assert otherwise. *See* MANUAL AT 78; Public Records Order, March 31, 1989 (Harrison/Bower).[8]

It follows that the individually identifiable health records you seek are exempt from disclosure "unless the public interest by clear and convincing evidence requires disclosure in the particular instance." Determining whether the public interest requires disclosure requires us to balance the public's interest in disclosure against confidentiality interests and the public's interest in nondisclosure, with the presumption in favor of disclosure. *E.g.*, *American Civil Liberties Union v. City of Eugene*, 271 Or App 276, 288, 350 P3d 507 (2015); MANUAL at 31. Public interest means the interest to the public at large, not a particular person at a particular time. MANUAL at 30. The "public interest" in disclosure is the interest that the public has in

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[6] OMD cited ORS 192.496(2) (sealed medical records) in its denial of these records. We have confirmed that OMD intended to cite ORS 192.496(1).

[7] Because we conclude that the records that you seek are exempt from disclosure under other provisions, we need not address whether they are also exempt from disclosure under ORS 192.502(8) (when disclosure of records is prohibited by federal law or regulation, records are exempt from disclosure under Public Records Law). We observe, however, that the Health Insurance Portability and Accountability Act of 1996 (HIPAA) may prohibit the disclosure of these records in response to your request. *See* Public Records Order, September 2, 2005 (Matteo-Boehm) (noting limitations on disclosure of individually identifiable health information under HIPAA); Public Records Order, March 17, 2005 (Cain) (permissible disclosures of individually identifiable health information do not include disclosures to members of the press).

[8] You assert that an ordinary reasonable person would deem it highly offensive if a state employee suffered needlessly on the job. Be that as it may, the relevant inquiry is whether an ordinary person would deem highly offensive the disclosure of information or the results of that disclosure.

knowing how public business is conducted and what state officials are doing on the job. *Guard Publishing Co. v. Lane County School Dist.*, 96 Or App 463, 469, 774 P2d 494 (1988), *rev'd on other grounds*, 310 Or 32, 791 P2d 854 (1990); *Jensen v. Schiffman*, 24 Or App 11, 17, 544 P2d 1048 (1976).

The interest in nondisclosure here is the confidentiality interest that individuals have in their medical records. An individual's interest in keeping medical records confidential is significant. People rightly consider medical test results to be intimate information. Moreover, people reasonably want to make their own decisions about whether to share medical test results. Medical test results can be used to deny insurance and can lead to social ostracism. Those effects can be exacerbated when medical information is revealed piecemeal and without context. The importance of protecting medical information and patient autonomy over their own information is widely recognized. By enacting the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Congress recognized that individuals have the right to control how their health information is used. Put simply, the confidentiality interest here is particularly strong.

You argue that clear and convincing evidence nonetheless establishes that the public interest requires disclosure of these medical records in this instance. You cite reports that high levels of lead have been found at OMD facilities, including armories and firing ranges. You further assert that OMD allowed employees to use one facility while knowing that it was contaminated with lead. We accept those facts for sake of argument. You contend that "[i]t is in the public interest to know whether OMD's inattention to range maintenance and lead hazards has had any deleterious impact on state employees there and elsewhere." You further contend that, "[i]n this instance, privacy benefits the state agency far more than its employees, allowing it to keep secret whether it contributed to any public workers being poisoned." Finally, you argue that "[t]he public has an important interest in knowing whether its state agencies are acting in a safe and mindful manner."

We agree with you that there is a public interest at stake in both the safety of OMD facilities and in knowing how OMD has monitored and responded to tests revealing lead contamination in its facilities. We also agree that that public interest extends to knowing *generally* if OMD employees' health has been affected by lead levels in the facilities and, if so, what steps OMD has taken to ameliorate further deleterious exposure. We do not agree that those valid public interests are served by disclosing *individually identifiable* medical information. To the extent that you argue that nondisclosure benefits OMD more than its employees, we disagree. The employees know the results of their tests. We are not aware that anything prevents them from revealing that information, including to you, if they so choose. Our conclusion that OMD may legally decide not to disclose their medical information permits the employees themselves to make that choice, rather than having the government make that decision for them. Accordingly, we deny your petition to order OMD to disclose these individually identifiable health records.

c. Records Retention

Finally, you "ask the AG to ensure the Oregon Military Department is rightfully adhering to the records retention schedule outlined here [internet link] by the Oregon Secretary of State." We lack authority to address that issue. Under the Public Records Law, the Attorney General has authority to review a state agency's denial of a public records request. ORS 192.450(1). The Attorney General also has authority to review a state agency's denial of a public records fee reduction or waiver. ORS 192.440(6). Thus, the Legislative Assembly has given the Attorney General authority to review only those specified state agency actions under the access provisions of the Public Records Law. The Attorney General has no authority to review state agency actions under the retention provisions of the Public Records Law. *See* ORS 192.001 to 192.192. Accordingly, we take no action on this part of your petition.

3. Conclusion

To summarize, we respectfully deny your first petition because OMD's fees were not designed to constructively deny your request. Nor was OMD's decision not to waive or further reduce that fee an unreasonable choice in light of all the circumstances. We respectfully deny your second petition (1) as to the emails involving Naomi Shantz, because OMD either does not have or has provided you with the records and (2) as to the medical information you seek, because it consists of health records that are exempt from disclosure. Finally, as to your request that we order OMD to comply with records retention requirements, we take no action, because doing so would be outside the authority of the Attorney General.

Sincerely,

FREDERICK M. BOSS
Deputy Attorney General

LEK:tmt/6695711
cc via email only:
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