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April 21, 2015

SENT VIA EMAIL ONLY

Lee van der Voo
PO Box 9574
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Re: Petition for Public Records Disclosure Order
Oregon Housing & Community Services Department
DOJ File No. 914200-GA0003-15

Dear Ms. van der Voo,

This letter is the Attorney General's order in response to your petition asking that we order the Oregon Housing and Community Services Department (OHCS) to provide certain information to you under the Oregon Public Records Law, ORS 192.410 to 92.505. Specifically, OHCS previously provided you with data about phone calls received by the OHCS "Manufactured Community Resource Center" operated by OHCS; in addition to the data already provided to you by OHCS, you ask that we direct OHCS to inform you of the zip code in which the calls to the program originated.

We respectfully deny your petition for the reasons that follow.

The Oregon Public Records Law was originally enacted in 1973. In 1989, it was amended in ways pertinent to electronically-stored information. Specifically, 1989 Oregon Laws c. 546 sec. 1 added the following emphasized language to ORS 192.430(1):

> The custodian of any public records, *including public records maintained in machine readable or electronic form*, unless otherwise expressly provided by statute, shall furnish proper and reasonable opportunities for inspection and examination of the records in the office of the custodian and reasonable facilities for making memoranda or abstracts therefrom, during the usual business hours, to all persons having occasion to make examination of them. *If the public record is*

> *maintained in machine readable or electronic form, the custodian shall furnish proper and reasonable opportunity to assure access.*
>
> The same bill similarly added what is currently subsection (3) of ORS 192.440:
>
> If the public record is maintained in a machine readable or electronic form, the custodian *shall provide a copy of the public record* in the form requested, if available. If the public record is not available in the form requested, the custodian shall make the public record available in the form in which the custodian maintains the public record.

(Emphasis ours.)

Finally, the same 1989 bill added provisions to the statute governing fees for public records authorizing public bodies to charge for "costs for summarizing, compiling or tailoring the public records, either in organization or media." Apart from these changes, which are now more than 25 years old, the 1973 law has not been updated to address the realities of digital information.

This office has long opined that the Oregon Public Records Law does not require the creation of new records:

> The Public Records Law does not require public bodies to create new public records. Nor does it require public bodies to disclose the "reasoning" behind their actions, or other "knowledge" their staff might have. And it does not require public bodies to explain or to answer questions about their records, analyze their records, or perform legal research or opinions.

The distinction between disclosing an existing record and creating a record is especially important in relation to computer-stored data. Public bodies at every level of government use computers extensively. Computer data and printouts generated for use by the public body are public records. But this office has long stated that a public body is not required to create new information using its computer programs nor to create a new program to extract data in a manner requested by the public.

> Attorney General's Public Records and Meetings Manual (2014) at 7.

In this case, OHCS states that it does not have an existing record correlating these phone calls to the zip codes in which the calls originate. Those pieces of information are stored in wholly separate electronic records.[1] OHCS does have the ability to cross reference its call data

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[1] It is common for a single database to contain numerous records that are, in some sense, distinct from one another, much like a rolodex might contain numerous individual cards concerning various contacts. The ability to manage separate pieces of data within a coherent dataset is the chief advantage of a database. Nothing in this order is meant to suggest that individual records within a database should each be considered separate records for purposes of the public records law. We think that the law draws

with its records showing the location in which the relevant landlords are located. OHCS appears to be concerned that doing so could effectively disclose the identity of some of the parks that have been the subject of complaints. (Your petition agrees that ORS 90.771 makes confidential the identities of the manufactured communities who are the subject of tenant calls to the Manufactured Community Resource Center.)

The process of doing as you request would entail: (1) exporting data from the complaint database; (2) exporting data from a separate database correlating manufactured communities with the zip codes in which they are located; and (3) replacing the names of the manufactured communities that appear in the first dataset with the associated zip codes derived from the second data set. Your petition and subsequent correspondence essentially argues that this could be accomplished easily using technology. OHCS responds that it is not required to do so under the Oregon Public Records Law.

The question presented by your petition is whether the ability to use technology to combine data from two separate sources means that OHCS is obligated to do that under the law. We think it is clear that the law would not require OHCS to do as you ask if it had to be accomplished manually. If the log were maintained in paper form, OHCS would presumably be obligated to make copies available to you with the exempt information redacted. But it would not be obligated to write in other information – zip codes – in the place of redacted information. Your petition suggests that electronically stored information may not be bounded in a way that is analogous to paper records. That may be so, at least in some cases, but the law does not reflect that view. In our view, 1989 amendments addressing electronically stored information do not contemplate any different outcome with respect to this question. The adopted provisions concern the "form" in which "records" are stored, and require only "access" to those records. They allow requesters to seek a *copy* of electronically-stored information in a particular "form." We think the meaning of these provisions is that members of the public are entitled to have information reproduced from electronic records in their preferred format, if it is available. As our MANUAL has long suggested, that would include using existing programs "to retrieve data requested under the Public Records Law" even if the public body otherwise would not retrieve the particular requested data. MANUAL at 8. Similarly electronic data systems may be appropriately used to effectively segregate exempt and nonexempt materials pursuant to ORS 192.505. Both of these things entail selectively producing some information from an electronic record while excluding other data. It appears that this is essentially what OHCS did in providing you with call information without information about the particular manufactured community to which the calls relate. We do not think that what you are requesting now, however, can be characterized as "provid[ing] a copy of" an electronic public record. That is because the zip codes do not exist in the electronic record containing the other information. They consequently cannot be reproduced out of that record.

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the line around the larger database. Returning to our analogy, the entire rolodex is a single public record, and it is subject to the public records law either in its entirety or as to particular pieces of information within it.

Whether it still makes sense to legally conceptualize electronic records as distinct from one another in the same way as paper records is a question for the legislature. Given how long it has been since the legislature amended the Oregon Public Records Law to address electronically stored information, existing legal standards clearly do not reflect current technologies. But we do not believe that these provisions from 1973 and 1989 can be interpreted to require OHCS to meld information from one dataset with information from a second, wholly separate dataset in the manner you requested. For that reason, we respectfully deny your petition.

Sincerely,

FREDERICK M. BOSS
Deputy Attorney General

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cc via email only:
Sandy McDonnall, OHCS