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SENT VIA EMAIL ONLY

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Re: Petition for Public Records Disclosure Order
Oregon Health Authority, Public Health Division
DOJ File No. 443720-GA0050-15

Dear Mr. Marler and Dr. Young:

This letter is the Attorney General's order in response to Mr. Marler's petition asking that we order the Oregon Health Authority, Public Health Division (OHA), to disclose certain information under the Oregon Public Records Law. Mr. Marler's petition relates to a five-part request to OHA for public records relating to Serena Profitt. Serena tragically died after contracting E. Coli at the age of four. Mr. Marler, who represents Serena's family, requested that OHA provide him with records related to her death:

> (1) copies of all laboratory test results of environmental samples that were collected as part of the investigation into Serena's infection that were positive for Shiga toxin E. coli (STEC);
> (2) a line list showing molecular test results (PFGE, MLVA, and/or genome) conducted on environmental samples collected during the investigation that were positive for STEC;
> (3) a line list showing molecular test results (PFGE, MLVA and/or genome) conducted on human isolates that were positive for E. Coli O157 in July through October 2014 that are a genetic match to Serena's strain ;
> (4) any documents that identify the source of our client's illness; and
> (5) any document that identifies our client as being part of a foodborne or waterborne outbreak.

Mr. Marler has obtained a release from Serena Profitt's family authorizing disclosure of relevant OHA records to his office.

We have spoken to OHA about Mr. Marler's petition. OHA informs us that it does not have records responsive to his last request. Likewise, OHA states that it does not have records responsive to his third request, as explained more thoroughly below. OHA does, however, have a report showing positive results (including gel patterns) that would be responsive to his first, second and fourth requests. (OHA also sent to Serena Profitt's family a letter identifying the likely source of her illness, but OHA has not withheld that record from Mr. Marler.) For the reasons that follow, we order disclosure to Mr. Marler of the report of environmental samples showing positive STEC results.

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 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).

In partially denying Mr. Marler's request, OHA relies on ORS 433.008(1). In general, that statute provides that "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." This confidentiality provision is incorporated into the Oregon Public Records Law by virtue of ORS 192.502(9)(a). However, an exception to this confidentiality rule provides that investigatory information may be provided to "[t]he individual who is the subject of the information or the legal representative of that individual." ORS 433.008(2)(f). Mr. Marler asserts that the information he seeks should be disclosed to him under this provision.

To the extent that the information exists, OHA argues that Serena Profitt is not "the subject of the information" and that consequently Mr. Marler is not entitled to receive it. Largely, however, OHA explains that the information Mr. Marler is seeking does not exist. Specifically, OHA explains that it does not have any documents generated by comparing the "gel pattern" generated by testing samples taken from Serena with "human isolates" from other cases. Instead, the gel pattern results from Serena's sample are entered into a database maintained by the federal Center for Disease Control (CDC). Though the database can identify similar patterns, in this case that process did not result in the generation of a record maintained by OHA. Consequently, the nearest thing to a document responsive to that portion of Mr. Marler's request would be the entire CDC database. Even if we were to assume that OHA is the custodian of the entire CDC database for purposes of the Oregon Public Records Law, we would readily conclude that Serena Profitt is not "the subject of" that database. We do not understand

Mr. Marler to be asking us to order OHA to disclose the CDC database; to the extent that he were, we would deny the petition for that reason.

We turn to the document that OHA does possess that is responsive to Mr. Marler's request, and thus at issue in this petition. The document presents gel pattern results for a number of samples collected around Serena's parent's property which tested positive for STEC. The question we must answer is whether Serena is "the subject of the information" on this report. In assessing that question we are mindful of the appellate courts' direction to construe exemptions narrowly to favor disclosure of public records. We think it can be convincingly argued that Serena is "the subject of" the report given the confluence of several factors. First, the report would not have been generated but for Serena's illness. Relatedly, the purpose of the sampling documented in the report was to identify the source of Serena's infection, if possible. OHA points out that identifying the source serves a broader function in that it facilitates the protection of the public health. We agree with that, of course, but do not think this larger purpose is inconsistent with the conclusion that Serena is "the subject of" this particular report. Finally, the samples described on the report are samples taken from the Profitt family property; the objects and animals from which the samples were obtained are very personally connected to Serena. Indeed, there is no other individual, apart from members of the Serena's family, who could plausibly be described as "the subject of" the report. We conclude that Serena Profitt is "the subject of" the report documenting the gel patterns from samples obtained at the property of Serena's family. Pursuant to the release authorizing OHA to release information concerning Serena to Mr. Marler, and consistent with ORS 433.008(2)(f), we conclude that he is entitled to a copy of the report.[1]

For the foregoing reasons, Mr. Marler's petition is granted. OHA is ordered to disclose to Mr. Marler the report showing positive STEC test results.

Sincerely,

Frederick M. Boss

FREDERICK M. BOSS
Deputy Attorney General

[1] The report is stamped as trade secret and proprietary information by the company which generated the report. However, in discussions with company representatives, the company explained that use and disclosure of the report is up to the clients to whom the reports are provided – in this case, OHA. Consequently we need not assess whether the report is exempt from disclosure under ORS 192.501(2), which makes trade secrets conditionally exempt from disclosure.