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July 16, 2010

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Re: Petition for Review of Denial of Fee Waiver:
Department of Human Services, Division of Medical Assistance Programs

Dear Mr. Shepherd:

This letter is the Attorney General's order on your petition for review of the denial by the Department of Human Services (DHS), Division of Medical Assistance Programs (Division), of FamilyCare, Inc. (FamilyCare)'s request for a waiver of fees under the Public Records Law, ORS 192.410 to 192.505. Your petition, which was received on July 2, 2010, asserts that DHS abused its discretion by denying your request for a complete fee waiver. You and another lawyer from your firm made the underlying request, and filed the present petition, on behalf of FamilyCare. FamilyCare is a managed care organization (MCO) with a fairly new contractual relationship to Children's Health Alliance, Inc. (CHA). For the reasons that follow, we respectfully deny your petition.

Fee Waiver or Reduction Test

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. The law also authorizes a public body to establish fees "reasonably calculated to reimburse it for its actual cost" in making records available. ORS 192.440(4). "The custodian of any public record may furnish copies without charge or at a substantially reduced fee if the custodian determines that the waiver or reduction of fees is in the public interest because making the record available primarily benefits the general public." ORS 192.440(5). However, even if a public body determines that waiving fees is in the public interest, "the decision to waive or reduce fees is discretionary with the public body, although it must act reasonably." ATTORNEY GENERAL'S

PUBLIC RECORDS AND PUBLIC MEETINGS MANUAL 20 (DOJ 2008) (MANUAL), citing ***In Defense of Animals v. Oregon Health Sciences University***, 199 Or App 160, 189-90, 112 P3d 336 (2005). Under ORS 192.440(6), "a person who believes that there has been an unreasonable denial of a fee waiver or fee reduction may petition the Attorney General * * * in the same manner as a person petitions when inspection of a public record is denied."

Your petition argues that DHS has promulgated a rule that requires DHS to grant a waiver or reduction if the public interest standard is satisfied. The rule you cite is OAR 407-003-0010(6),[1] which provides that "The Director or designee *may* reduce or waive fees when a determination is made that the waiver or reduction of fees is in the public interest because making the records available primarily benefits the general public." (Emphasis added). The word "may" also appears in the statute permitting fee waivers. In fact, the Court of Appeals has identified that word as the source of a public body's statutory discretion:

> [E]ven if the public body determines that the requestor meets [the public interest] test, the public body is not required to grant the fee waiver or reduction. Rather, it *"may"* do so; *that is*, the public body has discretion whether or not to grant a fee waiver or reduction.

In Defense of Animals, 199 Or App at 189 (emphasis added). We fail to see how DHS's rule can be construed to constrain DHS's discretion when it includes the very word that is the statutory source of that discretion. Accordingly, the general fee waiver or reduction analysis applies in this case.

Analysis

Under the applicable statute and rule, the threshold question is whether there is a public interest in making the records available because they "primarily benefit[] the general public." *See* ORS 192.440(5). The Court of Appeals has explained the meaning of this provision:

> [A] matter or action "primarily benefits the general public," as provided in ORS 192.440(4), when its most important or significant utility or advantage accrues to the public. * * * * Thus, a waiver or reduction of fees for the furnishing of a public record is "in the public interest because making the record available primarily benefits the general public" as provided in ORS 192.440(4) when the furnishing of the record has utility – ***indeed, its greatest utility*** – to the community or society as a whole.

In Defense of Animals, 199 Or App at 189 (emphasis added). Although DHS's initial denial of your waiver request was couched as an exercise of discretion under ORS 192.440(5), DHS asserts that your request does not meet this requirement.

We begin our evaluation of DHS's position by examining the nature and context of the underlying public records request. FamilyCare seeks twelve categories of public

[1] Based on the cited language in your letter, I believe you mean OAR 407-003-0010(6) not OAR 407-003-0000(6).

records, including "[a]ll public records" in ten categories, and a single example of public records in the remaining two categories. Letter from Riherd & Shepherd to Goldberg date June 17, 2010 (Petition Attachment A) at 4-5. Each category of records relates to the transition of CHA from its former contractual partner to FamilyCare. Petition Attachment A at 1 & 4-5.

FamilyCare's initial request notes that "[t]he fair and effective administration of the [Oregon Health Plan] is a subject infused with the public interest." Your petition elaborates that FamilyCare will "use the requested information for purposes * * * including suppression of costs through competition on fair terms and maintaining the continuity of care and choice for patients." At least some of the requested documents will, in your view, "enlarge by example the public's understanding of the procedures, processes and methods by which DHS assess and responds to various important elements of the transition of any care provider from any MCO to any other MCO." Petition at 2. You further explain that FamilyCare intends to share the information with "interested legislators" and other "policymakers." Petition at 2-3. You argue that this sharing will help create improvements for managing similar transitions in the future. You also argue that at least half of the requests are not limited to records concerning FamilyCare alone. And you assert that the timeframe for responding to the request – which DHS estimates could extend into September – means that FamilyCare's private interests in the information will be significantly diminished by the time disclosure is complete. You explain that "FamilyCare's immediate parochial interest" arises from the decision by affected patients whether to elect FamilyCare or one of its competitors. For all of these reasons, you claim that a waiver of fees "is in the public interest because making the record available primarily benefits the general public."

We accept the premise that the public has a significant interest in the efficient functioning of CHA and in smooth transitions from one MCO to another, both now and in the future. But overall we cannot agree that the disclosure requested by FamilyCare would "primarily benefit the general public." The context provided by your petition and its supporting materials amply demonstrates that the request is primarily designed to further FamilyCare's private interests.

In your petition, you acknowledge FamilyCare's "concerns about the fairness and legality of the process" to which your requests relate. Petition at 1. Petition Attachment A, which is a copy of FamilyCare's original request to DHS, frames the issue more frankly. The request opens by noting that FamilyCare has retained an attorney in light of its concerns about "unfair and potentially unlawful errors" in the transition process. Petition Attachment A at 2. Specifically, FamilyCare complains that:

- "substantive interactions about the possible transition * * * began as long ago as April, 2010 between the staff of the Division and CareOregon, and continued without full engagement of FamilyCare on an equal footing";

- "the Division has not disseminated information about the transition in an even-handed fashion as between FamilyCare and CareOregon * * * FamilyCare does not agree that it has been treated similarly";
- "FamilyCare never agreed to the transition plan now being executed by the Division";

- "FamilyCare doubts the accuracy and independence of the Division's assessment of CareOregon's capacity to continue to provide care to as many children as it served before CHA terminated its contract with CareOregon";
- FamilyCare "disputes the Division's public characterization of the number of family members of affected children who may have to change providers if the families left CareOregon's network and joined FamilyCare's network"; and
- FamilyCare "objects to the partiality of certain communications [between the Division and] households served by CHA."

Petition Attachment A at 2-3. The request makes it clear that the information sought will help FamilyCare (as well as others) "determine whether these concerns are well-founded." The request directs that responsive materials be sent to you in your capacity as FamilyCare's attorney.

Overall, we believe the request is designed to provide FamilyCare, and specifically its attorney, with information that will be useful in evaluating FamilyCare's options for addressing the concerns that motivated FamilyCare to seek counsel in the first place. The fact that those options include approaching policy makers to encourage forward-looking changes that FamilyCare believes would benefit the public as a whole does not change our view of the primary purpose of the request.[2]

Your other arguments similarly fail to persuade us that the public would be the primary beneficiary of the requested disclosure. With respect to the argument that at least half of the requests are not limited to documents concerning FamilyCare, we note that all of FamilyCare's requests relate to the transition of CHA, a transition which involves FamilyCare. Thus, though responsive records may relate to other entities, they also relate to a matter in which FamilyCare has a direct private interest. With respect to the argument concerning the estimated timeframe provided by DHS, you do not suggest any principle that would prevent FamilyCare from attempting in September to pursue a private remedy based on some or all of its numerous articulated concerns. We note also that DHS's estimated timeframe sets September as an outside estimate of the time that *might be* required.

Because it does not appear to us that the disclosure requested by FamilyCare would primarily benefit the public, we must respectfully deny your petition.

Even if we were to conclude that disclosure would primarily benefit the public, DHS's refusal to waive its public records fee in this instance would not be unreasonable. In general, we think that a public body's fee-waiver decision should consider (1) the character of the public interest in the particular disclosure, (2) the extent to which the fee impedes that public interest, and (3) the extent to which a waiver would burden the agency.[3] *See, for example*, Public Records Order, September 10, 2009, Rogers at 3. Our role in such a case is to review the totality

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[2] As for the claim that the disclosure will further the public interest in competition on fair terms, the request appears primarily designed to improve the terms on which FamilyCare competes, rather than to serve some general interest in fair competition.

[3] Of course, we do not foreclose the possibility that other considerations may be appropriate in any given case.

of the circumstances to determine whether an agency's decision exceeds the lawful options available to it under the Public Records Law.

Had we determined that DHS was wrong to conclude that the request appears to primarily further FamilyCare's private interests, we would still consider those private interests relevant to evaluating the character of the public interest served by disclosure. They would be even more relevant to assessing the extent to which the fee impedes any public interest served by disclosure, as the private interest in disclosure appears to be a significant inducement for FamilyCare to pay the fee associated with the request. Although it does not appear that waiver would be an unmanageable burden on the public body, DHS disagrees with your claims that the request (1) likely reaches less than 250 pages of documents and (2) can be fulfilled by staff within the Office of Communication whose regular job duties include responding to public records requests. We accept DHS's representations in this regard. Overall, even if we felt that fee waiver would be permissible under ORS 192.440(5) because disclosure to FamilyCare would primarily benefit the public, we would nevertheless uphold as reasonable DHS's denial of FamilyCare's waiver request.

Conclusion

For the reasons described above, we respectfully deny your petition.

Sincerely,

MARY H. WILLIAMS
Deputy Attorney General

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c: Jon Pelkey, DMAP
Tom Vanderveen, DMAP
Keely West, DMAP