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June 15, 2016

VIA EMAIL ONLY: tali.leinwand@nytimes.com and ssstrom@nytimes.com

Stephanie Strom
The New York Times Company
620 8th Avenue, 18th floor
New York, NY 10018

Re: Petition for Public Records Disclosure Order
Oregon Health Authority Records
DOJ File No.: 443720-GA0080-16

Dear Ms. Strom:

This letter is the Attorney General's order responding to your June 1, 2016, petition for disclosure under the Oregon Public Records Law, ORS 192.410 to 192.505. Thank you for agreeing to extend the deadline to issue an order to June 15. Your petition asks the Attorney General to order the Oregon Health Authority (OHA) to produce all correspondence "from January 2015 through May 2016 pertaining to people being sickened by E. coli 0103 after eating in a Chipotle Mexican Grill Restaurant."

We respectfully deny your petition because OHA is no longer denying your request; rather, it is preparing to send you an estimated cost to gather and review the requested records, and to produce any records containing nonexempt information.

The Public Records Law confers a right to inspect any public record of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420(1); ORS 192.501, 192.502 (listing information exempt from disclosure). Public bodies may charge requesters for the fees incurred in making the records available, including the cost to review the records for exempt information. ORS 192.440(4)(a). Any person denied the right to inspect or to receive a copy of a public record of a state agency may petition the Attorney General to review the record to determine if it may be withheld. ORS 192.450(1). The Attorney General may order a state agency to disclose records only when the agency has denied a request for records. *See id.*

We spoke with Keely West, OHA's Policy, Records, Rules and Internal Litigation Coordinator. She explained that although OHA had initially denied your request on the grounds that the requested records are exempt from disclosure, OHA has now attempted to contact you to discuss the cost to review its records for any information not exempt from disclosure. She added that OHA is preparing a report on the outbreak, which will be publicly available.

OHA states that most of its records will likely be exempt from disclosure because they consist of "information obtained . . . in the course of an investigation of a reportable disease or disease outbreak." *See* ORS 433.008(1)(a). OHA is correct that such information "is confidential and exempt from disclosure [under Oregon's public records law]." *Id.*; ORS 192.502(9)(a) (stating that, in addition to the exemptions listed in ORS 192.501 and 192.502, any public records that are confidential under Oregon law are exempt from disclosure).

As we have explained in a prior Public Records Order, ORS 433.008(1)(a)'s legislative history indicates that the legislature's intent was to exempt only individual health information, so that OHA could assure hospitals providing information of confidentiality; however, we concluded that the plain language of the exemption applies to any information obtained in the course of an investigation, regardless of that information's nature. Public Records Order, November 14, 2014, Terry.

But this exemption still must be given as narrow a construction as is plausible in light of its language. *Colby v. Gunson*, 224 Or App 666, 676 (2008) ("[I]f there is a plausible construction of a statute favoring disclosure of public records, that is the construction that prevails."). A narrow construction of ORS 433.008(1)(a) is one that focuses on the source of information appearing in OHA records. Only information that OHA "*obtained*" through OHA's investigatory efforts is exempt under such a construction, not every document that may be related to the investigation. For example, information about an investigation strategy is not information obtained in the course of the investigation itself; nor is information that OHA obtained by non-investigatory means after an investigation was underway.

Because OHA might possess responsive records such as these, or that are otherwise not exempt from disclosure, it has agreed to provide you with an estimated cost to produce these nonexempt records. As OHA is no longer denying your request, we respectfully deny your petition. If, after OHA produces records, you wish to contest OHA's determination of which records are exempt from disclosure, you may submit a new petition for review of those records.

Sincerely,

Frederick M. Boss
Deputy Attorney General

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