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May 2, 2018

VIA EMAIL ONLY: brad.daniels@stoel.com

Molly Young (*The Oregonian*)
c/o Brad Daniels
Stoel Rives LLP
760 SW Ninth Ave, Suite 3000
Portland, OR 97205

Re: Petition for Public Records Disclosure Order
Oregon Department of Human Services
DOJ File No. 100101-GA0028-18

Dear Ms. Young:

This letter is the Attorney General's order responding to your petition for disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478. Your petition, which we received on April 25, 2018, asks the Attorney General to order the Oregon Department of Human Services (DHS) to produce complete and unredacted records involving Jennifer and Sarah Hart. For the reasons discussed below, we respectfully deny your petition.

This is your second petition related to this matter. Your first petition was one of several submitted by various media outlets appealing DHS' decision to withhold its records regarding the Hart family. While those petitions were under review by this office, DHS agreed to release its Hart family records pursuant to its discretionary authority under ORS 419B.035(3). That provision states, in relevant part, that DHS may disclose child abuse records in various circumstances, including when the department determines that "disclosure is necessary to investigate, prevent or treat child abuse and neglect, [or] to protect children from abuse and neglect." In light of DHS' agreement to release the records, we denied your first petition as moot. See Public Records Order, Bob Heye et al., April 18, 2018.

DHS subsequently released its records – to the extent it had identified them – on April 23, 2018. DHS redacted personal telephone numbers, as well as the names of government employees, third persons, and physicians from those documents. In a cover letter accompanying those materials, DHS explained that it had redacted personal information, as well as information

DHS believes is generally exempt under state law pursuant to ORS 192.355(9), such as criminal offender information made confidential by ORS 181A.220 and child abuse records made confidential by ORS 419B.035(1). Your new petition disputes the redactions and also explains why you believe the released records are incomplete. You ask the Attorney General order DHS to disclose all responsive records without redaction.

We begin with your contention that DHS did not, in fact, disclose all of its records. We discussed the issues that you raised with DHS, which had previously informed us that its initial disclosure was complete. However, while your petition was pending, DHS discovered that it did, in fact, possess additional records relating to the facts contained in the already-disclosed DHS reports. DHS has now located and disclosed those records. We consequently deny this aspect of your petition as moot. In disclosing the records, DHS made redactions consistent with the redactions it made to the previously-disclosed records. We now turn to your contention that the records should be disclosed without redaction.

The records at issue are records DHS compiled under the provisions of ORS 419B.010 to 419B.050[1] after a report of suspected child abuse. The disclosure of child abuse records is governed by ORS 419B.035, which provides in relevant part, "reports and records compiled under the provisions of ORS 419B.010 to 419B.050 are confidential and may not be disclosed *except as provided in this section*" (emphasis added). ORS 419B.035(1). Thus, the records you requested are confidential and expressly exempt from disclosure under ORS 192.355(9) "except as provided in" ORS 419B.035. *Id.* The records are also child welfare records within the meaning of ORS 409.225. That statute similarly states that "the Department of Human Services shall not disclose or use the contents of any child welfare records" with exceptions that are specifically enumerated.

Your petition suggests four reasons why you believe disclosure is nevertheless required. First, you argue that disclosure is required by ORS 419B.035(1)(i). This subsection requires DHS to disclose child abuse records to "any person … if the reports or records requested regard an incident in which a child, as the result of abuse, died or suffered serious physical injury as defined in ORS 161.015." Second, you argue that disclosure is required by ORS 409.225(6), which provides in relevant part that "unless exempt from disclosure under ORS chapter 192, [DHS] shall disclose information related to the department's activities and responsibilities in a case where child abuse or neglect has resulted in a child fatality or near fatality." Third, you argue that the protections of the child abuse reporting statute and the child welfare statute should not apply in this case given the likelihood that all of the individuals who are the focus of the records are now deceased. Finally, you argue that the public interest counsels in favor of disclosure here. We address these arguments in turn.[2]

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[1] ORS 419B.010 to 419B.050 detail Oregon's requirements for mandatory reporting and investigation of child abuse.

[2] You also assert that DHS failed to provide written findings when redacting certain personal information from the records disclosed to you, as required by ORS 419B.035(2)(a). But that provision only applies to disclosures under ORS 419B.035(1)(i) and the records in this case were not disclosed to you under that provision.

We begin with your argument that disclosure is required by ORS 419B.035(1)(i). We conclude that provision not apply to these records because the records do not "regard an incident in which a child, as the result of abuse, died or suffered serious injury." The records relate to a report DHS received five years ago alleging abuse by the Hart parents. None of the Hart children died as a result of that incident five years ago, and there is nothing in the record – which has, in substance, been fully disclosed – to suggest that any child suffered a serious injury at that time. We conclude that the records that DHS disclosed in redacted form are not subject to mandatory disclosure under ORS 419B.035(1)(i).

We turn to ORS 409.225(6). That statute provides a broader trigger for disclosure than ORS 419B.035(1)(i), making disclosure mandatory when "child abuse or neglect has resulted in a child fatality or near fatality." That trigger certainly appears to be met here. However, the disclosure requirements of this provision only apply "unless [the records] are exempt from disclosure under ORS chapter 192." Because we have concluded above that the records at issue need not be disclosed pursuant to ORS 419B.035(1)(i), they are exempt from disclosure under chapter 192 – specifically ORS 192.355(9). Consequently, ORS 409.225(6) does not require their disclosure either.

You also assert that the confidentiality provisions of ORS 419B.035 and 409.225 should no longer apply because the individuals to whom the records relate are deceased. Your point that these statutes are meant to protect the privacy of those involved seems correct, as is your point that common law privacy protections are generally held to terminate on death. But in this case we are construing statutory provisions, not applying common law privacy principles. As noted above, these particular provisions describe how they apply specifically when abuse results in death of a child. Although there may be good policy reasons to substitute the common law rule for the statutory provisions in cases like this, we believe that would require legislative change. We must apply the existing statutory provisions as they relate to the deaths of children. For the reasons explained in this order, we find that those provisions do not require disclosure of these records.

Finally, you argue that the public interest rationale underpinning the disclosure by DHS favors disclosure of the records in unredacted form. In connection with this argument, you point out that information about how government employees and contractors perform their responsibilities is generally not protected from disclosure. Even assuming that disclosure would be in the public interest, however, the confidentiality provisions of ORS 419B.035 and ORS 409.225 do not turn on the public interest. As a result, this argument does not affect our determination that these records were not subject to mandatory public disclosure. However, you raise these arguments specifically in connection with DHS's discretionary decision to disclose the records in redacted form under ORS 419B.035(3). As a result, we have considered whether the redactions made by DHS constitute an abuse of its discretion. The statutory provision authorizing DHS to disclose these records explains the purposes disclosure may serve. Again, the relevant part of the provision authorizes disclosures necessary "to investigate, prevent or treat child abuse and neglect, [or] to protect children from abuse and neglect." We think that DHS could reasonably conclude that disclosure of the information it redacted – including names,

personal telephone numbers, and information unrelated to the Hart family – was not necessary to serve these statutory purposes.

DHS assures us that it has now identified and disclosed all of its records responsive to your request. Additionally, we have concluded that DHS was not required to disclose the redacted information, and that DHS's decision to redact that information was not an abuse of its discretion. As a result, your petition is respectfully denied.

Sincerely,

Frederick M. Boss
Deputy Attorney General

FMB:pjn/DM8920338
c via email only: Christine Stone (DHS)