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March 10, 2019

**VIA EMAIL ONLY:** david@kramerlaw.us

David Kramer
3265 Liberty Road South
Salem, OR 97302

Re: Petition for Public Records Disclosure Order
*Department of Human Services*
DOJ File No.: 100101-GA0027-20

Dear Mr. Kramer:

This letter is the Attorney General's response to your petition, on behalf of a client, for disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478. Your petition asks the Attorney General to order the Department of Human Services (DHS) to disclose certain child welfare records. For the reasons that follow, we respectfully deny your petition.

The Public Records Law confers the right to inspect public records in Oregon, unless such records are exempt under ORS 192.338, 192.345, or 192.355. ORS 192.314(1). The law is a disclosure law, and exemptions from disclosure must be express. 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 and determine if it may be withheld. ORS 192.411(1). The agency carries the burden to sustain its actions. ORS 192.411(1).

The record indicates that your client submitted two records requests to DHS in February 2020. Her first request sought all DHS child welfare records and investigations related to Case ID 1324910 (which relates to her family). Her second request sought all of her DHS child welfare records and records related to a 2019 investigation. DHS responded to both requests on February 19, 2020, indicating that if your client was a minor on any child welfare cases, DHS would not be able to process her requests unless she provides a signed release from the parents or foster parents in those cases. Your petition followed.

Your petition explains that your client has some memory of being abused by a foster care provider when she was a child and you believe it is essential for her recovery for her to know about the details of that abuse. Your petition also indicates that, for purposes of our review, your client is narrowing and amending her request to the following four categories of DHS records:

1. All screening reports of alleged child abuse and neglect relating to her;

2. All Child Protective Services assessments, DHS Forms 307, relating to her;

3. All screening reports and DHS Forms 307 relating to alleged abuse and neglect committed by her former foster parents during or after the time she was in foster care; and

4. All foster parent certification or licensing actions, regardless of date, for the foster parents who cared for her.

We contacted Kimberly Colkitt-Hallman, DHS Public Records Officer, regarding your petition. She explained that the first two categories of information you seek consist of records compiled under Oregon's Child Abuse Reporting statutes ("child abuse records"), which DHS asserts are confidential under ORS 419B.035(1). That provision states in relevant part:

> Notwithstanding the provisions of ORS 192.001 to 192.170, 192.210 to 192.478 and 192.610 to 192.810 relating to confidentiality and accessibility for public inspection of public records and public documents, 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). And records made confidential under state law are expressly exempt from disclosure under the Public Records Law. *See* ORS 192.355(9)(a). Although ORS 419B.035(1) contains several exceptions that require DHS to disclose confidential child abuse records in limited circumstances,[1] Ms. Colkitt-Hallman explained DHS' position that none of those exceptions apply to your client's request. She also explained that, although DHS has limited discretion to release child abuse records when necessary to promote certain specified purposes,[2] DHS has determined that it is unable to exercise that discretion in this instance because disclosing the child abuse records to your client is not necessary to advance those purposes.

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[1] Regarding the exceptions to the general rule of confidentiality, ORS 419B.035(1) requires DHS to disclose child abuse records – in limited circumstances and for limited purposes – to: law enforcement agencies; certain medical providers; attorneys or other parties in juvenile court proceedings; certain citizen review boards; court appointed special advocates in certain proceedings; the Office of Child Care; the Office of Children's Advocate; the Teacher Standards and Practices Commission for certain investigations; Disability Rights Oregon, and to any person in cases where a child, as the result of abuse, died or suffered serious physical injury.

[2] ORS 419B.035(3) gives DHS discretion to make records compiled under Oregon's Child Abuse Reporting Statutes available to any person "when the department determines that such disclosure is necessary to administer its child welfare services and is in the best interests of the affected child, or that such disclosure is necessary to investigate, prevent or treat child abuse and neglect, [and] to protect children from abuse and neglect ***."

In response to DHS' position, you assert that DHS has not offered any sound policy reasons for its pattern of withholding child abuse records from the victims of such abuse. You also argue that DHS has a strong, self-serving interest in withholding such information in a case like this in which you have alleged that DHS may be liable for some aspect of your client's abuse.[3] Next, you contend that the text of ORS 419B.035 permits disclosure in this instance. Specifically, you interpret ORS 419.035(1) to mean that, although "it is not *mandatory* that DHS disclose" child abuse records to victims, DHS is not prohibited from such disclosures (emphasis in original). As support for this interpretation, you cite ORS 419B.035(1)(c) (requiring disclosure to the attorneys of child victims) and OAR 413-010-045 (requiring disclosure of a client's child welfare records if the client is 18 years or older). You also assert that even if disclosure is not permitted under ORS 419B.035(1), DHS should exercise its discretion under ORS 419B.035(3) because disclosure is necessary to investigate and treat child abuse and neglect. In particular, you claim that without these records, your client will not be able to investigate whether she was abused in foster care, and her health care providers will not be able to tailor her treatment unless they know what actually happened to her.[4]

After discussing the records with Ms. Colkitt-Hallman, we find that they were compiled under Oregon's Child Abuse Reporting statutes. They are therefore confidential under ORS 419B.035(1) and exempt from disclosure under ORS 192.355(9)(a). We cannot agree with your contention that ORS 419B.035(1) permits disclosure in this instance. That provision states that DHS "may not disclose" child abuse records, meaning that disclosure is prohibited unless expressly permitted by that section.[5] And it does not appear that any of the exceptions in ORS 419B.035(1) expressly permit DHS to disclose these records to your client in this instance.[6] In this regard, we have consistently concluded that ORS 419B.035(1) does not expressly permit DHS to disclose child abuse records to the victims of such abuse, even after they become adults.[7] You raise several arguments as to why disclosing additional information to victims of child abuse would be a better policy, for both victims and the state. But such arguments are more

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[3] We note that our order does not determine what information your client might be entitled to obtain in discovery, should the question of DHS liability be litigated.

[4] Your petition also indicates that your client would agree to some form of protective order to preclude further dissemination of these records. However, we are not a court and we do not have the authority to issue protective orders.

[5] *See Attorney General's Public Records and Meetings Manual* at 29, note 153 (2019). We also observe that the unauthorized disclosure of child abuse records is a Class A violation. ORS 419B.035(9).

[6] In particular, we conclude that ORS 419B.035(1)(c), which requires DHS to disclose child abuse records to the attorney of record for the child, does not apply in this instance because it only applies in the context of juvenile court proceedings. We similarly conclude that the mandatory disclosure provisions of OAR 413-010-045 do not apply in this case because they do not apply to client records that are "exempt from disclosure under the Public Records Law." *Id.* As discussed above, the child abuse records you seek are expressly exempt from disclosure even though they may be regarded as a subset of a client's records. *See also* OAR 413-010-035(2) (DHS may not disclose client information compiled under Oregon's Child Abuse Reporting statutes when disclosure is not required or authorized by ORS 419B.035).

[7] *See, e.g.,* Public Records Order, Feb 11, 2020, Fischer; Public Records Order, Jan 16, 2020, Gormley; and Public Records Order, Jun 26, 2019, Chapman.

appropriate for the legislature than for our office. Even if we were to agree with your policy arguments, our task here is to apply the statutory exemption as enacted.

Because ORS 419B.035(1) does not expressly permit DHS to disclose your client's child abuse records to her, any disclosure in this instance would have to be under DHS' discretionary authority found in ORS 419B.035(3). That provision permits, but does not require, DHS to make child abuse records available when it "determines that such disclosure is *necessary* to administer its child welfare services and is in the best interests of the affected child, or that such disclosure is necessary to investigate, prevent or treat child abuse and neglect, [and] to protect children from abuse and neglect ***" (emphasis added). The threshold determination of whether disclosure is *necessary* to promote the purposes listed in that subsection is statutorily entrusted to DHS. In this instance, DHS determined that disclosure to your client was not necessary to advance those limited purposes. As already mentioned, you argue that disclosure is necessary for your client to investigate what happened to her and to obtain appropriate treatment. We do not feel, however, that we can second-guess DHS' determination in this instance.

With respect to the third and fourth categories of records your client has requested, we must deny your petition as premature. As neither of your client's original requests encompassed those records, DHS has not denied a request for such records. *See* ORS 192.407 and 192.411(1) (Attorney General may order disclosure only when a request has been denied or when a records request has not been processed in accordance with ORS 192.329). Your client may, of course, submit a new request to DHS for those records.

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

Sincerely,

Frederick M. Boss
Deputy Attorney General

FMB:pjn/DM10141135
c via email only: Kimberly Colkitt-Hallman (DHS)