ELLEN F. ROSENBLUM
ATTORNEY GENERAL

FREDERICK M. BOSS
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

Justice Building
1162 Court Street NE
Salem, Oregon 97301-4096
Telephone: (503) 378-6002

March 24, 2020

VIA EMAIL ONLY: bschmidt@oregonian.com

Brad Schmidt
The Oregonian
1500 SW First Ave, Suite 500
Portland, OR 97201

Re: Petition for Public Records Disclosure Order
Oregon Health Authority
DOJ File No.: 443727-GA0031-20

Dear Mr. Schmidt:

This letter is the Attorney General's response to your petition for disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478. Your petition asks the Attorney General to order the Oregon Health Authority (OHA) to disclose certain data related to the current outbreak of Coronavirus (COVID-19) in Oregon.

We begin by acknowledging the extraordinary public interest in the ongoing COVID-19 pandemic. We observe that OHA is publishing information about the outbreak each day and we believe the agency should be as transparent as it responsibly can be.[1] But we must also acknowledge that transparency is just one of a number of important considerations.

First, we conclude that the law makes the data you seek confidential. You correctly point out that OHA is not prevented from publishing the data to the extent that it is statistical information that can be disclosed without identifying an individual case or a data source. However, the law gives OHA discretion in this matter and does not permit us to override OHA's decision to not disclose the data. We therefore respectfully deny your petition.

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[1] OHA is currently issuing a daily press release with the total of number of confirmed cases, number of cases by county, and the number of deaths. *See* https://www.oregon.gov/OHA/ERD/Pages/News-Releases.aspx (accessed March 23. 2020). OHA is also publishing, on a daily basis, the following COVID-19 statistics: cases from the Oregon State Public Health Laboratory; cases from commercial and out-of-state laboratories; cases, deaths and negative test results by county; cases by age group; and number of hospitalizations (if available). *See* https://govstatus.egov.com/OR-OHA-COVID-19 (accessed March 23, 2020).

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. 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). 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).

You seek the disclosure of two sets of data maintained by OHA:

1. Number of individuals, over time, who are symptomatic and have an epidemiological link to a COVID-19 case (but are not close contacts of the case) and who have not been approved for testing; and

2. Number of individuals, over time, who are or were monitored for COVID-19, broken down by those deemed to be high risk, medium risk and low risk.

OHA denied your request on March 12, 2020, asserting that the data is exempt from disclosure under ORS 433.008(1)(a). That provision provides that "[e]xcept as provided in subsection (2) of this section, 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 192.311 to 192.478."[2] OHA's response also asserted that none of the exceptions to the confidentiality rule, found in ORS 433.008(2),[3] expressly permit OHA to disclose the confidential data to you.

Your petition argues that the relevant statutes do not prohibit OHA from releasing this data because disclosure will not reveal information about individual cases or the sources of information about those cases. As support for your position, you cite ORS 433.008(6)(a), which states that "[n]othing in this section ... [p]revents the authority or a local public health administrator from publishing statistical compilations and reports relating to reportable disease

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[2] ORS 192.355(9)(a) exempts from disclosure under the Oregon Public Records law "Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law."

[3] ORS 433.008(2) permits OHA to disclose information otherwise made confidential under ORS 433.088(1)(a) to:

1. State, local or federal agencies authorized to receive the information under state or federal law;
2. Health care providers if necessary for the evaluation or treatment of a reportable disease;
3. Law enforcement officials to the extent necessary to carry out the authority granted to the Public Health Director and local public health administrators under ORS 433.121, 433.128, 433.131, 433.138 and 433.142;
4. A person who may have been exposed to a communicable disease;
5. A person with information necessary to assist the authority or local public health administrator in identifying an individual who may have been exposed to a communicable disease; and
6. The individual who is the subject of the information or the legal representative of that individual.

investigations if the compilations and reports do not identify individual cases or sources of information." You also assert that the public interest requires disclosure in this instance.

We conclude that OHA obtained the data you requested "in the course of an investigation of a reportable disease or disease outbreak." Specifically, the data that you requested is reported to OHA by various sources. ORS 433.004(3)(b)(B) explicitly states that an investigation includes "[r]equiring a health care provider, any public or private entity, or an individual who has information necessary for the investigation to ... [r]elease the information to the authority or local public health administrator." OHA has required various entities to provide to OHA the data you are requesting.

ORS 433.008 explicitly states that information obtained in the course of investigating a disease outbreak "is confidential and is exempt from disclosure" under the Oregon Public Records Law. In previous orders we have concluded that even when construed narrowly, the statute by its plain terms applies to "*any* information obtained in the course of an investigation, regardless of that information's nature." Public Records Order, Jun 15, 2016, Strom at 2 (*citing* Public Records Order, Nov 14, 2014, Terry) (emphasis added). And, indeed, the statute does not specify particular types of information for confidential treatment or identify other types of information obtained in an investigation as subject to mandatory disclosure. It provides a single, unequivocal confidentiality rule. Thus, the application of the confidentiality rule does not depend upon whether disclosure will identify individual cases or sources of information.

We have also previously concluded that OHA's authority to publish de-identified statistical compilations and reports does not affect the confidential nature of information that OHA decides to not publish. *See* Public Records Order, Nov 14, 2014, Terry at 4. We continue to believe that conclusion is compelled by the statute. First, ORS 433.008(1) does not identify subsection (6) as an exception to its confidentiality and nondisclosure rule. Second, the fact that the statute does not *prevent* the publication of de-identified statistical reports cannot plausibly be understood to mean that the statute *requires* such publications. Although ORS 433.008(6) likely means that disclosure of this information is not *prohibited*, at least in the form of a statistical report, it does not change the fact that the information is "otherwise made confidential," within the meaning of ORS 192.455(9)(a), by ORS 433.008(1).

Finally, we cannot order disclosure on the basis of the public interest because ORS 433.008(1) does not condition its application on the balancing of the public interest. In other words, ORS 433.008(1) creates an unconditional exemption, meaning that the legislature has effectively balanced the public interest. *See Attorney General's Public Records and Meetings Manual* at 31 (2019).

In this particular case, ORS 433.008(6), which allows OHA to publish de-identified statistical data, effectively means that the agency is responsible for determining, on balance, whether particular statistical data concerning a disease outbreak should be published. The statute does not authorize DOJ to override OHA's decision.

In conclusion, the legislature entrusted this decision to OHA and OHA has decided not to publish this data. Although we acknowledge the strong public interest in information about the current outbreak, we have no legal authority to override OHA's decision to withhold the data. OHA is the public health agency in charge and is in the best position to evaluate the wisdom of publishing any particular information. Your petition is respectfully denied.

Sincerely,

Frederick M. Boss
Deputy Attorney General

FMB:pjn/DM10165814
c via email only: Jeanne Windham (OHA)