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August 26, 2020

VIA EMAIL ONLY: drcool@msn.com

Chris Carvalho
17717 SW Washington Dr.
Aloha, OR 97078

Re: Petition for Public Records Disclosure Order
Oregon Health Authority
DOJ File No.: 443727-GA0081-20

Dear Mr. Carvahlo:

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 workplace data related to the ongoing Coronavirus (COVID-19) pandemic. For the reasons discussed below, 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. 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).

According to your petition, you requested OHA disclose the aggregate number of COVID-19 cases in workplaces that have had fewer than five confirmed cases and for

workplaces that employ fewer than 30 workers. You note that due to privacy concerns expressed by OHA, the agency is currently reporting outbreaks only in workplaces with five or more cases and at least 30 workers.[1] Your petition explains that OHA denied your request citing ORS 433.008(1), which provides in relevant part that "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 the Oregon Public Records Law, ORS 192.311 to 192.478. OHA's response also asserted that none of the exceptions to the confidentiality rule, found in ORS 433.008(2),[2] expressly permit OHA to disclose the confidential data to you.

In response to OHA's denial, you assert that the public has a compelling interest in knowing how many employees at small businesses have been affected by COVID-19. Regarding OHA's privacy concerns, you emphasize that you are only seeking aggregate numbers, without attribution to any particular business or individual. Finally, you assert that OHA's current reporting policy is inconsistent with the OHA's public statements about reporting COVID-19 cases in workplaces.[3]

We recently considered the application of ORS 433.008 to a similar request to OHA for certain COVID-19 data. *See* Public Records Order, Mar 24, 2020, Schmidt. In that instance, we concluded that where OHA requires various entities to provide data to OHA in the course of its investigation into the COVID-19 outbreak, ORS 433.008(1) makes the data confidential and expressly exempt from public disclosure. We observed that the statute provides an unequivocal confidentiality rule that "does not depend upon whether disclosure will identify individual cases or sources of information." *Id*. at 3. We also noted that if the information is confidential under the statute, we cannot order disclosure on the basis of the public interest because the application of ORS 433.008 is not conditioned upon the balancing of the public interest. *Id*. Finally, we

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[1] *See* OHA COVID-19 Weekly Report, *available at* https://govstatus.egov.com/OR-OHA-COVID-19 (accessed Aug 23, 2020).

[2] 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.

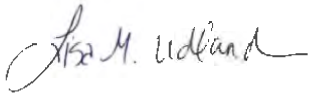
[3] Specifically, you reference a statement by OHA Director Pat Allen that "OHA believes a consistent, transparent statewide approach to reporting COVID-19 cases in workplaces will give Oregonians more information to help people avoid the risks of COVID-19 infection. We want to ensure employers, workers and customers know the same criteria will apply, no matter where they work or what businesses they support, everywhere in Oregon." OHA to Take on Role of Reporting of Large COVID-19 Workplace Outbreaks (May 28, 2020) (quoting OHA Director Pat Allen) *available at* https://www.oregon.gov/oha/ERD/Pages/OHA-reporting-large-COVID-19-workplace-outbreaks.aspx (accessed Aug 23, 2020).

observed that in enacting ORS 433.008(6), which permits OHA to publish de-identified statistical data, the legislature gave OHA sole responsibility for determining whether to publish any particular statistical data. *Id*. In other words, DOJ has no authority to order OHA to publish de-identified statistical data under ORS 433.008(6) in response to a public records request.

Applying the same analysis to your petition, we conclude that OHA was permitted to withhold the data from you. OHA informs us that this data was gathered primarily by local public health agencies and labs that were, in turn, required to report the data to OHA. The data was therefore obtained by OHA in the course of its investigation of the COVID-19 outbreak. *See* ORS 433.004(3)(b)(B) ("investigation" includes requiring various entities to report information necessary for the investigation to OHA or a local public health administrator). Consequently, the data is confidential and expressly exempt from disclosure under the Oregon Public Records Law. ORS 433.008(1). None of the exceptions listed in ORS 433.008(2) expressly permit OHA to disclose the confidential data to you.

We observe that OHA has been publishing a significant amount of COVID-19 statistical data on a daily and weekly basis. *See* https://govstatus.egov.com/OR-OHA-COVID-19 (accessed Aug 23, 2020). And we recognize that, under ORS 433.008(6), OHA is permitted to publish the de-identified statistical data that you have requested. But it is not required to do so and, in this instance, OHA has not decided to publish that particular data. As discussed above, we have no legal authority override OHA's decision, notwithstanding the public interest in this data. We therefore respectfully deny your petition.

Sincerely,



for

Frederick M. Boss
Deputy Attorney General

FMB:nog/DM10401893
c via email only: Jeanne Windham (OHA)