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December 2, 2020

VIA EMAIL ONLY: hangarr09@gmail.com

Re: Petition for Public Records Disclosure Order
Oregon Health Authority
DOJ File No.: 443727-GA0111-20

Dear Mr. Hangartner:

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 Coronavirus (COVID-19) testing data. 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 to be construed narrowly, meaning 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 determine if it may be withheld. ORS 192.411(1). The state agency carries the burden to sustain its actions. ORS 192.411(1).

Your petition explains that you requested OHA disclose the daily number of COVID-19 tests performed in Oregon, broken down by (a) the type of test (either by manufacturer name or by biological category) and (b) the number of positive and negative tests by type of test. 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

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also asserted that none of the exceptions to the confidentiality rule, found in ORS 433.008(2),[1] permit OHA to disclose the confidential data to you.

We recently considered the application of ORS 433.008 to similar requests to OHA for information about the COVID-19 outbreak. *See* Public Records Order, Aug 26, 2020, Carvahlo, and Public Records Order, Mar 24, 2020, Schmidt. In those instances, we concluded that where OHA requires various entities to provide data to OHA in the course of its investigation into the outbreak, ORS 433.008(1) makes the data confidential and expressly exempt from public disclosure. *Id*., *see also* 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).

You assert that that ORS 433.008(1) is so "excessively broad and impermissibly vague" that the testing data you requested is not legitimately exempt from disclosure. Indeed, the statute does apply broadly. We have consistently read the statute to apply expansively to *any* information, regardless of its nature, obtained by OHA in the course of an investigation into a disease outbreak. *See* Public Records Order, Nov 14, 2014, Terry. As we explained in a prior order, this reading is compelled by the plain text of the statute, which is neither vague nor ambiguous. *Id.*, *see also* Public Records Order, Mar 24, 2020, Schmidt (even construed narrowly, the statute provides a single, unequivocal confidentiality rule that does not specify particular types of information for confidential treatment). We have also observed 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. *See* Public Records Order, Mar 24, 2020, Schmidt.

Applying our longstanding interpretation of the scope of ORS 433.008 to your petition, we conclude that OHA is permitted to withhold the testing data from you. OHA informs us that daily testing information is being gathered from various facilities that are required to report the data to OHA in the course of its investigation of the COVID-19 outbreak. Because the testing data is being obtained by OHA in the course of its investigation, we conclude that it is confidential and expressly exempt from disclosure under the Oregon Public Records Law. ORS 433.008(1).

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[1] 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.

And because none of the exceptions listed in ORS 433.008(2) expressly permit OHA to disclose the confidential testing data to you,[2] we must respectfully deny your petition.

Sincerely,

Frederick M. Boss
Deputy Attorney General

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

[2] We note that ORS 433.008(6) permits OHA to publish de-identified statistical data, such as the testing data you requested. However, DOJ has no authority to order OHA to publish such data in response to a public records request because the legislature gave OHA sole responsibility for determining whether to publish any particular statistical data. *See* Public Records Order, Aug 6, 2020, Carvahlo. In this instance, we observe that OHA is publishing a wide array of COVID-19 statistical data on its website, including the total number of COVID-19 tests performed, and the total number of positive and negative test results. *See* https://govstatus.egov.com/OR-OHA-COVID-19 (accessed Nov 30, 2020). But OHA has decided not to publish the particular testing data that you have requested, and we have no authority to override OHA's decision.