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February 11, 2021

VIA E-MAIL ONLY: awilson@blackchapman.com

Andrew R. Wilson
221 Stewart Ave, Ste 209
Medford, OR 97501

Re: Petition for Public Records Disclosure Order
Department of Human Services
DOJ File No.: 100301-GA0011-21

Dear Mr. Wilson:

This letter is the Attorney General's response to your petition, on behalf of the personal representative of client's estate, 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 all records relating to a particular Adult Protective Services (APS) investigation. 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).

According to your petition, on January 12, 2021, you requested DHS disclose all records relating to a certain APS investigation, including unredacted copies of all reports; investigative notes; communication documents related to the investigation; any documentation received during the investigation; and any notes reflecting the investigator's impressions or opinions. In response to DHS' request for additional documentation, on January 13, 2021 you provided Letters Testamentary and other documentation demonstrating that your firm represents the estate of the alleged victim named in the APS investigation. You also explained to DHS that you need

these records for purposes of prosecuting a personal injury and wrongful death claim against the assisted living facility where the alleged victim resided at the time of her death.

Based upon the documentation you provided, DHS disclosed three records to you consisting of the final investigative report, a DHS Notice of Proposed Civil Penalty against the facility, and the DHS Letter of Determination in which DHS substantiated abuse by the facility. The names of the alleged victim, alleged perpetrators, and all witnesses are anonymized in these documents with placeholders such as "Alleged Perpetrator 1 [AP1]." DHS redacted two pages from the final report that associate the anonymous placeholders with individual names. DHS withheld all other documentation related to the investigation. Your petition followed. You explain that you have permission from the personal representative of the alleged victim's estate to obtain these records in unredacted form. You also argue that, at a minimum, the identities of the individuals mentioned in the report should be made known to you to facilitate your lawsuit against the facility.

In light of your petition we contacted Kimberly Colkitt-Hallman in the DHS Public Records Unit. She explained DHS' position that ORS 124.090 generally makes the records you seek confidential and exempt from disclosure because they were compiled under Oregon's Elder Abuse Reporting Statutes, ORS 124.050 to 124.095. Specifically, ORS 124.090(1) states:

> Notwithstanding the provisions of ORS 192.311 to 192.478, the names of the public or private official or any other person who made the complaint, the witnesses and the elderly persons, and the reports and records compiled under the provisions of ORS 124.050 to 124.095, are confidential and are not accessible for public inspection.

And, she noted, records made confidential under state law are expressly exempt from disclosure under the Public Records Law. *See* ORS 192.355(9)(a). Although ORS 124.090 contains several exceptions that permit DHS to disclose otherwise confidential elder abuse records in limited circumstances, Ms. Colkitt-Hallman explained DHS' position that none of those exceptions apply to your request.[1] Finally, she explained that because the investigation involved a facility licensed by the Aging and People with Disabilities (APD) program, DHS elected to

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[1] The exceptions to the general rule of confidentiality, ORS 124.090(2)(a)-(g), permit DHS to disclose elder abuse records only to: law enforcement agencies; agencies that license or certify residential facilities or their employees; public and private nonprofit agencies providing protective services to the elderly person; the Long Term Care Ombudsman; the agency that licensed or certified the person alleged to have abused an elderly person; a court pursuant to a court order; and to an administrative law judge in proceedings relating to protective services or when necessary to investigate, prevent or treat elder abuse. Confidential information made available to any of these agencies or individuals remains subject to the confidentiality provisions of ORS 124.090(1). ORS 124.090(3).

disclose certain redacted records to you pursuant to OAR 411-020-0030(3), which states in relevant part:

> (3) If an investigation involves a regulated provider, the following provisions apply:
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> ***
>
> (c) Redacted copies of investigations involving APD-licensed facilities may be made available to the general public upon request or by operational procedures.
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> (d) Any disclosures of APS information and reports involving regulated providers must comply with applicable State and Federal confidentiality and privacy laws.

After discussing the particulars of the investigative records with Ms. Colkitt-Hallman, we find that they were compiled under Oregon's Elder Abuse Reporting Statutes. They are therefore confidential under ORS 124.090 and expressly exempt from disclosure under the Public Records Law. *See* ORS 192.355(9)(a). Notwithstanding this general restriction on the disclosure of elder abuse records, DHS exercised its discretion under OAR 411-020-0030(3) to disclose certain records to you. Under that rule, we find that DHS was permitted to redact the two pages of identifying information from the final investigative report. With regard to the remaining investigative records withheld by DHS, it does not appear to us that any of the exceptions to ORS 124.090 permit or require DHS to disclose them to you. We therefore respectfully deny your petition.[2]

Sincerely,

Frederick M. Boss
Deputy Attorney General

FMB:pjn/
c via e-mail only: Kimberly Colkitt-Hallman (DHS)

[2] This order only addresses your rights to the APS investigative records under the Public Records Law. It does not address what rights your or your client may have to such records under rules of civil discovery insofar as you are seeking this information for purposes of private litigation.