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

April 21, 2021

VIA EMAIL ONLY: robertcl@jacksoncounty.org

Colleen Roberts
10 S. Oakdale
Medford, OR 97501

Re: Petition for Public Records Disclosure Order
Oregon Health Authority
DOJ File No.: 443727-GA0042-21

Dear Ms. Roberts:

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 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 cycle threshold (Ct) values for all real-time polymerase chain reaction (RT-PCR) tests for Jackson County since June 1, 2020 that resulted in a positive COVID-19 result, broken down to by test date. 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),[1] require OHA to disclose the confidential data to you.

We have recently considered the application of ORS 433.008 to similar requests to OHA for information about the COVID-19 pandemic. *See* Public Records Order, Dec 2, 2020, Hangartner; Public Records Order, Aug 26, 2020, Carvahlo, and Public Records Order, Mar 24, 2020, Schmidt. In each case, 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*.

Your petition explains that you are seeking de-identified data and that you are not requesting any information that would compromise the privacy of any patient. However, 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, Mar 24, 2020, Schmidt (citing Public Records Order, Nov 14, 2014, Terry). Thus, we have concluded that the application of the confidentiality rule does not depend upon whether disclosure will reveal the identities of individuals or sources of information. *Id*.

Consistent with our previous interpretation of the scope of ORS 433.008, we conclude that OHA was permitted to withhold the test data from you. OHA informs us that the data you seek was gathered from testing facilities that were required to report the data to OHA in the course of its investigation of the COVID-19 pandemic. Because the test data was obtained by OHA in the course of its investigation, we conclude that it is confidential and expressly exempt from disclosure under the Public Records Law. And because none of the exceptions listed in ORS 433.008(2) expressly require OHA to disclose the confidential test data to you, we must respectfully deny your petition.

Sincerely,

Frederick M. Boss
Deputy Attorney General

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

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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.