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June 20, 2023

VIA E-MAIL ONLY: mheiken@justicelawyers.com

Marilyn A. Heiken
975 Oak St., Ste 1050
Eugene, OR 97401

Re: Petition for Public Records Disclosure Order
Oregon Health Authority
DOJ File No.: 443720-GA0100-23

Dear Ms. Heiken:

This letter is the Attorney General's response to your petition, on behalf of several clients, 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 records relating to OHA's investigation into a reportable disease. 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 any such denial. *Id*.

Your petition stems from a July 7, 2022, records request seeking all investigative materials and determinations stemming from OHA's investigation into a reportable disease at Southern Oregon Orthopedics. OHA denied your request on July 8, 2022, claiming the investigative records are exempt from disclosure under ORS 433.008(1). That provision makes information obtained by OHA in the course of an investigation of a reportable disease or disease outbreak confidential and exempt from public disclosure. *Id*.

Your petition does not challenge OHA's determination that the records are confidential. Rather, you assert that an exception to the confidentiality rule applies in this instance that would allow OHA to disclose these materials to you on behalf of your clients. Specifically, you note

that ORS 433.008(2)(f) permits OHA to disclose otherwise confidential information to "[t]he individual who is the subject of the information or the legal representative of that individual." You state that that you represent four named clients who were allegedly harmed during treatment at Southern Oregon Orthopedics. As their legal representative, you assert that OHA is permitted to disclose this otherwise confidential material to you under this exception. You also assert that the public interest requires disclosure in this instance.

In response to your petition, we contacted Jeanne Windham, OHA's Public Records and Internal Litigation Process Coordinator. She provided us with a copy of your July 7, 2022, records request, which states:

> Our office represents several clients who received MRSA after treatment at Southern Oregon Orthopedics on January 25, 2022. Please provide us with copies of all investigation reports, communications and determinations for the investigation into Southern Oregon Orthopedics.

Ms. Windham explained OHA's position that the investigative materials you requested are confidential and exempt from disclosure under ORS 433.008(1) because they were obtained by OHA in the course of an investigation into a reportable disease. She noted that your original request did not seek records on behalf of specific clients, nor did it include any client authorizations to release information to you. Under the circumstances, she explained, OHA had no reason at that time to conclude that it was permitted to disclose the otherwise confidential investigative records to you under ORS 433.008(2)(f). She also explained that in its response, OHA informed you that "[i]f you are seeking client specific records, you will need to submit a release of information from each of your clients along with your requests." She informed us that OHA has not received any requests from you for client-specific records.

After reviewing your initial request and OHA's response, we conclude that OHA was permitted to withhold the investigative records from you. Your petition does not dispute the confidentiality of OHA's investigative records, and we have no reason to second guess Ms. Windham's representation that OHA obtained them in the course of its investigation of a reportable disease. We therefore conclude that ORS 433.008(1) makes them confidential and exempt from public disclosure. Although you assert that the public interest requires disclosure in this instance, the application of ORS 433.008(1) is not conditioned upon the public's interest in disclosure.

Regarding your argument that OHA is permitted to disclose these otherwise confidential materials to you under ORS 433.008(2)(f), we observe that your initial request to OHA did not reference the exception or provide any other basis upon which OHA could reasonably conclude that the exception applied at that time. OHA's response to you also described how you may request client-specific records, but Ms. Windham reports that OHA has not received a proper request from you for such records. Because OHA has not received a request for client-specific records under ORS 433.008(2)(f), or otherwise denied a request for such materials, we must deny this aspect of your petition as premature. *See* ORS 192.411(1) (the Attorney General's

authority to order disclosure is generally limited to instances in which a state agency has denied a request). You may, of course, submit a new request to OHA for such client-specific records.

For the foregoing reasons, we respectfully deny your petition.

Sincerely,

Lisa M. Udland

LISA M. UDLAND
Deputy Attorney General

ACF/pjn
c via e-mail only: Jeanne Windham (OHA)