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June 5, 2024

VIA E-MAIL ONLY: tsickinger@oregonian.com

Ted Sickinger
The Oregonian/OregonLive
1500 SW 1st Ave
Portland, OR 97201

Re: Petition for Public Records Disclosure Order
Oregon Department of Corrections
DOJ File No.: 291200-GA0052-24

Dear Mr. Sickinger:

This letter is the Attorney General's response to your petition, on behalf of *The Oregonian/OregonLive*, for disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478. Your petition, which we received on May 16, 2024,[1] asks the Attorney General to order the Oregon Department of Corrections (ODOC) to disclose all Adult in Custody (AIC) Therapeutic Level of Care forms (ODOC Form P&P P-A-02.1) ("TLC forms") completed since January 1, 2023. 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. If a record contains both exempt and nonexempt information, the agency must separate and disclose the nonexempt information unless separating the nonexempt information is not reasonably possible or where disclosing the nonexempt information would not genuinely preserve the confidentiality of the exempt information. ORS 192.338; and *Attorney General's Public Records and Meetings Manual* at 34 (2019) (citation omitted). 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 five-part records request that sought, among other things, the completed TLC forms and other records showing how ODOC calculates and tracks a key

[1] We thank you for granting an extension of time to respond to your petition.

performance measure (KPM) that seeks to keep AIC offsite health care encounters below 1%. We understand that ODOC provided you with the KPM data and that you are not appealing ODOC's response to that aspect of your initial request. ODOC denied your request for the TLC forms under various authorities discussed below that protect or restrict the public disclosure of protected health information. Your petition explains that you seek the completed TLC forms to understand how frequently requests by Adults in Custody (AIC) for outside medical care are being approved or denied, data that ODOC informed you that it does not separately aggregate or track. Your petition also explains that the only fields in the completed TLC forms you are seeking are the initial date, the date of review, the institution name, and the comments and recommendations. You state that you are not seeking any AIC personally identifying information or protected health information.

We spoke with Annola DeJong, ODOC Legal Information Officer, about your petition. As background, she explained that the completed TLC forms are included in AIC medical records and are used by ODOC health care providers to refer individual AIC treatment recommendations for clinical review by various TLC committees. These committees then complete the forms by making recommendations to ODOC's Medical or Dental Director regarding the provision of care to individual AICs. *See* OAR 291-124-0041 and OAR 291-124-0042. As additional context, Ms. DeJong also explained ODOC's position that the completed TLC forms themselves would not enable you to determine how frequently requests by AICs for offsite medical or dental care are ultimately being denied. She noted that there is nothing on the forms denoting whether an AIC requested the treatment or whether the care sought would entail treatment offsite. She also noted that in cases where the treatment requested was initially denied by a TLC committee, it is not uncommon for providers to resubmit TLC forms and have the treatment approved upon reconsideration. And, she explained, TLC forms are not used for certain types of offsite treatment, such as emergency room visits, although such offsite encounters are captured in the KPM data. In short, she explained, even if the de-identified information you seek from the TLC forms were aggregated, it would not be possible to glean from the data how often AIC requests for offsite care are denied.

Ms. DeJong also explained ODOC's position that ORS 179.505(2) prohibits ODOC from disclosing the completed TLC forms in their entirety. And, she noted, records the disclosure of which is prohibited under Oregon law, are expressly exempt from public disclosure under ORS 192.355(9)(a). ORS 179.505(2) states, with certain exceptions that do not apply here, that:

> *[W]ritten accounts* of the individuals served by any health care services provider *maintained in or by the health care services provider* by the officers or employees thereof who are authorized to maintain written accounts within the official scope of their duties *are not subject to access and may not be disclosed*. This subsection applies to written accounts maintained in or by facilities of the Department of Corrections only to the extent that the written accounts concern the medical, dental or psychiatric *treatment as patients* of those under the jurisdiction of the Department of Corrections. (Emphases added.)[2]

[2] The relevant definitions for this provision are found in ORS 179.505(1).

A "written account" means "records containing only individually identifiable health information." ORS 179.505(1)(h).

ODOC asserts that the completed TLC forms constitute "written accounts" because they are created and maintained by ODOC health care providers, and they contain individually identifiable health information, including AIC patient names and state identification numbers; medical provider and institution names; medical diagnoses; proposed medical treatment(s) for review; and TLC committee comments and recommendations for treatment.

After reviewing examples of the completed TLC forms, we conclude that they are "written accounts" within the meaning of ORS 179.505(2). They are part of AIC medical records; they contain individually identifiable health information; they are created and maintained by ODOC health care service providers; and they exclusively concern the medical, dental, and psychiatric treatment as patients of AICs under the jurisdiction of ODOC. Because ORS 179-505(2) directs that such written accounts "may not be disclosed," the completed TLC forms are expressly exempt from public disclosure under ORS 192.355(9)(a). And whether the forms are exempt in their entirety or only in part, we cannot conclude that disclosing the specific categories of information that you requested will adequately protect the confidentiality interests implicated by ORS 179.505(2).[3] This is not to suggest that the de-identified aggregate data you seek would be confidential if compiled and maintained outside of a written account. But ODOC informs us that it does not maintain or track the data in this manner and the Public Records Law does not require agencies to create new records in response to public records requests. We therefore respectfully deny your petition.[4]

Sincerely,

Lisa M. Udland

LISA M. UDLAND
Deputy Attorney General

ACF:pjn
c via e-mail: Annola DeJong (DOC)

"Individually identifiable health information" encompasses "any health information" that is "created or received by a health care services provider" and "[i]dentifiable to an individual" to the extent that it relates to a person's "physical or mental health or condition" or "the provision of health care to an individual * * * ." ORS 179.505(1)(c).

A "health care services provider" means "medical personnel or other staff [of a public provider who] provide health care or maintain written accounts of health care provided to individuals," or of "units, programs or services" of a public provider that perform the same functions. ORS 179.505(1)(b).

A "public provider" includes "Department of Corrections institutions * * * ." ORS 179.505(1)(g)(B).

[3] Also see ORS 179.495(1), which more broadly prohibits ODOC, as an agency, from disclosing written accounts and makes unauthorized disclosures a Class B violation. In contrast, ORS 179.505(2) more narrowly proscribes unauthorized disclosures of written accounts by health care service providers. We have previously concluded that because it is more specific, ORS 179.505(2) governs the disclosure of AIC written accounts maintained by ODOC health care service providers. *See* Public Records Order, Dec 20, 2019, Woodworth and Dodson.

[4] ODOC has also asserted that the completed TLC forms contain information that may be subject to other, overlapping, restrictions on the public disclosure of personal health information, such as ORS 41.675 (peer review privilege) and ORS 192.553 to 192.581. *See OHSU v. Oregonian* Publishing Co., 362 Or 68, 87 (2017) (ORS 192.553 to 192.581 make "'protected health information' confidential"). However, because we conclude ORS 179.505(2) prohibits ODOC from publicly disclosing the information you seek, we need not evaluate the application of those other authorities in this instance.