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October 17, 2025

VIA E-MAIL ONLY: ben@lookoutlocal.com

Ben Botkin
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Eugene, OR 97401

Re: Petition for Public Records Disclosure Order
Oregon Health Authority
DOJ File No.: 443001-GA0135-25

Dear Mr. Botkin:

This letter is the Attorney General's response to your petition for the disclosure of records 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 fully disclose certain emails that were redacted in response to a records request. For the reasons discussed below, we respectfully dismiss your petition in part, and we deny your petition in part.

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. *Id*.

Your petition stems from a request to OHA for specific emails sent or received by OHA's Executive Director in early April 2025. Your petition explains that in March 2025 the Oregon State Hospital (OSH)[1] reported the death of a patient associated with the use of restraint or seclusion to the federal Centers for Medicare and Medicaid Services (the Centers). After that death, surveyors with the Centers placed OSH in immediate jeopardy and submitted a statement

[1] OHA operates and manages OSH. ORS 179.321 ("The Oregon Health Authority shall operate, control, manage and supervise the Oregon State Hospital campuses.")

of deficiencies. Your petition states that these regulatory actions forced OSH and OHA to work on plans to end the hospital's immediate jeopardy status. Your petition explains that the emails you seek would provide more details about the work of OSH and OHA in formulating a response and would shed more light on how OSH works to prevent future patient deaths.

OHA responded to your requests by producing the emails you requested with redactions for material OHA believes is protected by the Health Insurance Portability and Accountability Act (HIPAA) and ORS 40.225 (the attorney-client privilege). Your petition followed, challenging OHA's application of these two exemptions.

In considering your petition, we reviewed unredacted copies of the records at issue. We also discussed your petition with Shannon O'Fallon, OHA's assigned Attorney General contact counsel. She stated that after receiving your petition, OHA reconsidered its position concerning one of the redacted emails. Specifically, OHA has elected to disclose to you all previously redacted portions of an April 1, 2025, email string attaching a draft email and draft press release, except for a response from OHA's attorney providing legal analysis. For this reason, we respectfully dismiss as moot the portion of your petition challenging those redactions.

We first address OHA's position that portions of the records contain information made confidential by HIPAA. For purposes of its management and operation of OSH, OHA is a "covered entity" subject to the requirements of HIPAA. 42 USCS § 1320D *et seq*.; 45 CFR § 160.103; ORS 192.556(2); OAR 943-014-0015. A covered entity may only release "individually identifiable health information" as permitted by state and federal law. 45 CFR § 164.502(a); ORS 192.558(2)(b). "Health information" includes "any information * * * created or received by a health care provider" that relates to "the past present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or * * * payment for the provision of health care to an individual." 42 USCS § 1320D(4); ORS 192.556(6).

Having reviewed the records at issue, we find that the information redacted by OHA constitutes "health information" because it contains information created or received by OHA that relates to the physical or mental health of an individual within OHA's care. 42 USCS § 1320D(4); ORS 192.556(6). If this health information is individually identifiable, OHA is prohibited from releasing it to you. 45 CFR § 164.502(a).

Your petition argues that HIPAA does not apply because the redacted portions of the records do not disclose any specific patient identifiers such as the patient's name. But a covered entity may only disclose de-identified patient information under 45 CFR § 164.514(a), if "there is no reasonable basis to believe that the information can be used to identify an individual." Thus, even if the patient's name or other express identifiers are not provided, it is still unlawful to disclose a patient's health information if the "covered entity [has] actual knowledge that the information could be used alone or in combination with other information to identify an individual who is a subject of the information." 45 CFR 164.514(b)(2)(ii). Guidance on HIPAA de-identification published by the U.S. Department of Health and Human Services explains that when a covered entity is "aware that the data would provide sufficient context for the"

anticipated recipient to recognize the patient, release of the data would not meet HIPAA's de-identification standards.[2]

Your petition explains that you previously published the identity of the patient at issue because the family of the patient confirmed the name of the patient to you. Your petition and articles published by you contain specific references to details of that patient's care while at OSH. Because OHA is aware that you, the anticipated recipient of the data, could associate the health information in OHA's records with a specific patient, OHA cannot release the information to you. 45 CFR 164.514(b)(2)(ii). This is true even if the information proposed to be disclosed will or has already been made public by another entity that is not a covered entity. HIPAA protects against disclosures by a covered entity, and not other entities. The obligations to protect patient health information lie with the covered entity, here OHA. 45 CFR 164.502(a) (setting out the general privacy rule); 45 CFR 164.508 (uses and disclosures requiring authorization); 45 CFR 164.164.502, 164.506, and 164.512 (permitted uses and disclosures).

Oregon law also precludes disclosure of health information protected by HIPAA. ORS 192.558(1). Because disclosure is prohibited by HIPAA and Oregon law, the records are exempt from public records disclosure. *See* ORS 192.355(9)(a); *OHSU v. Oregonian Publishing Co., LLC*, 362 Or 68, 93 (2017) (explaining that protected health information under HIPAA is also confidential under Oregon law making it exempt from public records disclosure). For these reasons, we respectfully deny the portion of your petition seeking records OHA redacted as confidential under HIPAA.

We next address the portions of the emails redacted by OHA pursuant to the attorney-client privilege. ORS 192.355(9)(a) expressly exempts from disclosure "[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential or *privileged* under Oregon law." (Emphasis added.) ORS 40.225 is one such law because it provides that clients have "a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client." Accordingly, ORS 192.355(9)(a) permits public bodies to withhold public records that are protected by the attorney-client privilege. *See, e.g., Port of Portland v. Ore. Center for Environ. Health*, 238 Or App 404, 409 (2011) (ORS 192.355(9)(a), then codified at ORS 192.502(9)(a), encompasses attorney-client privilege).

The Oregon Supreme Court has held that application of the attorney-client privilege is contingent upon three findings. *See State ex rel. OHSU v. Haas*, 325 Or 492, 501 (1997). First, the communication must be "confidential" within the meaning of ORS 40.225(l)(b) (a communication "not intended to be disclosed to third persons" other than to those necessary to facilitate the rendition of legal services). Second, the communication must have been made for the purpose of facilitating the rendition of professional legal services. A communication is made for the purpose of facilitating the rendition of legal services "if it makes it easier for an entity to make use of legal advice or services." *Port of Portland*, 238 Or App at 411 (citing *OHSU*, 325

[2] *See* US Department of Health and Human Services, *Guidance Regarding Methods for De-identification of Protected Health Information in Accordance with the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule* available at Methods for De-identification of PHI | HHS.gov (accessed Oct 14, 2025).

Or at 502). And third, the communication must have been between the parties described in one of the paragraphs of ORS 40.225(2)(a)-(f). *Id*. The court in *Haas* held that employees of a client entity can be "representatives of the client" within the meaning of ORS 40.225(2)(d) and that communications facilitating the rendition of legal services between only these employees—without an attorney—does not waive the attorney-client privilege. 325 Or at 509. If all three of these elements are met, the attorney-client privilege applies unless it has been waived. *Klamath County School Dist. v. Teamey*, 207 Or App 250, 261-62 (2006); *see* ORS 40.280 (waiver of privilege by voluntary disclosure).

We have reviewed the March 31, 2025, email chain that OHA redacted based on ORS 192.355(9)(a) and ORS 40.225. We conclude that OHA was permitted to redact it as an attorney-client privileged communication. First, the email was addressed exclusively to parties described in ORS 40.225(2)(a)-(f); specifically, the email was between OHA employees and two DOJ attorneys assigned to represent OHA. Next, the messages themselves solicit responses to legal issues. We therefore find that the communications were made to facilitate an attorney's rendition of legal services to OHA. The emails were intended to be confidential, and there is no evidence in the available record to suggest that the privilege has been waived by OHA.

We also reviewed the April 1, 2025, email chain partially redacted by OHA pursuant to the attorney-client privilege. The disclosed portion of the emails shows that OHA's communications director sent a draft email and press release to (1) a small group of high-level OHA employees, (2) the communication's director for the Office of the Governor, and (3) a DOJ attorney. After disclosing additional records to you, the only portion of the email chain that OHA has redacted is the response provided by the attorney. We conclude that OHA was permitted to redact that portion of the email chain as an attorney-client privileged communication. The email was addressed exclusively to parties described in ORS 40.225(2)(a)-(f).[3] In the email, OHA's communications director sought comments on draft documents, and OHA's attorney responded with her legal analysis. We therefore find that the portion of the communication specifically made by the attorney was made to facilitate her rendition of legal services to OHA. This portion of the communication was intended to be confidential, and no information suggests the privilege has been waived.

Because portions of the March 31, 2025, and April 1, 2025, emails qualify as attorney-client privileged communications under ORS 40.225, we conclude that OHA was permitted to redact them from you under ORS 192.355(9)(a).

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[3] Pursuant to ORS Chapter 180, state agencies and the Office of the Governor share common legal counsel: the Attorney General. *See* ORS 180.060(6) ("The Attorney General shall, when requested, perform all legal services for the state or any department or officer of the state.").

Finally, your petition also explains your belief that the public interest requires disclosure of these records. When incorporating HIPAA and the attorney-client privilege, the application of ORS 192.355(9)(a) does not depend upon the public interest in disclosure. *See* Attorney General's Public Records and Meetings Manual at 73 (2024) (exemptions in ORS 192.355 are "not dependent upon whether 'the public interest requires disclosure in the particular instance.'"). We thus conclude that OHA is permitted to withhold these records notwithstanding any public interest in their disclosure and therefore respectfully deny your petition.

Sincerely,

BENJAMIN GUTMAN
Interim Deputy Attorney General

DP9/pjn
c via e-mail only: Jeanne Windham, Oregon Health Authority
Shannon O'Fallon, Senior Assistant Attorney General, Department of Justice