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March 2, 1993

Marcie McMinimee
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Salem, Oregon 97308

Re: Petition for Public Records Disclosure Order:
Long-Term Care Ombudsman Records
DOJ File No. 114-001-0093

Dear Ms. McMinimee:

This letter is the Attorney General's order on your petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition, which we received on February 9, 1992,[1/] asks the Attorney General to direct the Long-Term Care Ombudsman to make available the findings and report of Ms. Marcelle Robinson regarding her investigation on September 3 and 4, 1992, of the adult foster care facility, Riverdale House III, operated by Ruth Steel. For the reasons that follow, we respectfully deny your petition.

The Public Records Law confers a right to inspect any public records of a public body in Oregon, subject to certain exemptions and limitations. See ORS 192.420. If a public record contains exempt and nonexempt material, the public body must separate the materials and make the nonexempt material available if it is "reasonable possible" to do so while preserving the confidentiality of the exempt material. Turner v. Reed, 22 Or App 177, 186 n 8, 538 P2d 373 (1975).

[1/] We appreciate your extending the time within which the law would have otherwise obligated us to respond.

Federal Law Exemption

ORS 192.502(7) exempts from disclosure under the Public Records Law:

> Any public records or information the disclosure of which is prohibited by federal law or regulations.

The federal Older Americans Act of 1965 (Act) required states, as a condition of receiving federal funds under the Act, to establish and operate a State Long-Term Care Ombudsman Program to investigate and resolve complaints made by or on behalf of older individuals who are residents of long-term care facilities. 42 USC § 3027(a)(12), 3058g(a)(1). If the state's administration of this program fails to substantially comply with the Act's requirements, the state risks losing its funds under the Act. 42 USC § 3027(d). We have concluded that a federal law or regulation which expresses a clearly prohibitory policy is deemed to be a prohibition even if the means of enforcing the federal policy -- loss of federal funds -- is only indirectly prohibitory. Oregon Attorney General's Public Records and Meetings Manual 36 (1989).

a. Elder Abuse Investigations and Reports

Title VII of the Older Americans Act Amendments of 1992 substantially expanded upon the State Long-Term Care Ombudsman program requirements, including more detailed confidentiality restrictions. Pub L 102-375, 106 Stat 1195, 1271-1285 (to be codified at 42 USC §§ 3058 et seq.[2/] 42 USC § 3058g contains confidentiality requirements specific to elder abuse complaints. This statute requires the state to provide an assurance that, with respect to programs for the prevention of elder abuse, neglect, and exploitation, "all information gathered in the course of receiving reports and making referrals shall remain confidential", except with consent of all parties to the complaint, for release of the information to an authorized law enforcement or protective services agency, or upon court order. 42 USC § 3058d(a)(6)(C). This confidentiality requirement is reiterated in 42 USC § 3058i(e)(2), which mandates that the state shall:

[2/] For purposes of simplicity, we will cite to specific provisions of the Older Americans Act Amendments of 1992 only by their new codification. Former 42 USC § 3027(a)(12), which contained essentially the same operative language relevant to this discussion, has been amended to incorporate by reference the new provisions governing the State Long-Term Care Ombudsman Program under Title VII of the 1992 Amendments, codified at 42 USC §§ 3058f and 3058g.

(2) Require that all information gathered in the course of receiving a report described in subsection (b)(8)(B)(i), and making a referral described in subsection (b)(8)(B)(ii), shall remain confidential except --

(A) if all parties to such complaint or report consent in writing to the release of such information;

(B) if the release of such information is to a law enforcement agency, public protective service agency, licensing or certification agency, ombudsman program, or protection or advocacy system; or

(C) upon court order; and

(3) make all reasonable efforts to resolve any conflicts with other public agencies with respect to confidentiality of the information described in paragraph (2) by entering into memoranda of understanding that narrowly limit disclosure of information, consistent with the requirement described in paragraph (2).

Emphasis added.

The record requested in the petition is an investigation report into alleged elder abuse and exploitation. See 42 USC § 3002(13) and (26). Thus, we conclude that federal law prohibits disclosure of this investigation report to the extent it contains information gathered in the course of receiving a report of elder abuse and making any appropriate referral.

b. Discretionary Disclosure of Ombudsman Records

There is an additional basis for the denial of the request for disclosure. Under the Older Americans Act Amendments of 1992, state agencies are directed to "develop the policies and procedures in accordance with all provisions of this subtitle regarding confidentiality." 42 USC §3058g(a)(5)(D)(iii). One of these provisions requires the state to establish procedures for the disclosure by the Ombudsman of files maintained by the program, including facility and resident records and records in the statewide uniform reporting system of complaints and conditions at facilities. 42 USC § 3058g(d)(1). These procedures must:

(A) provide that, subject to subparagraph (B), the files and records described in paragraph (1) may be disclosed only at the discretion of the

> Ombudsman (or the person designated by the Ombudsman to disclose the files and records); and
>
> (B) prohibit the disclosure of the identity of any complainant or resident with respect to whom the Office maintains such files and records unless --
>
> (i) the complainant or resident, or the legal representative of the complainant or resident, consents to the disclosure and the consent is given in writing;
>
> (ii) (I) the complainant or resident gives consent orally; and
>
> (II) the consent is documented contemporaneously in a writing made by a representative of the Office in accordance with such requirements as the State agency shall establish; or
>
> (iii) the disclosure is required by court order.

42 USC § 3058g(d)(2) (emphasis added). Thus, the broad directive under the 1992 Amendments is to grant discretion to the state long-term care Ombudsman to establish the conditions for the release of the different kinds of records obtained or used by the Ombudsman, with stringent requirements to protect the identities of complainants and residents of long-term care facilities.

Here, the Ombudsman has exercised her discretion to deny your client's request for a copy of a complaint investigation report. That denial is within the Ombudsman's authority under 42 USC § 3058g(d)(2)(A). The requested record, however, is a "public record" under state law. See ORS 192.410(4). Therefore, the Ombudsman's denial is subject to our review to determine whether the report falls within the federal law exemption to disclosure under the Public Records Law.

The federal mandate is that files and records maintained by the Ombudsman may be disclosed only at the discretion of the Ombudsman, consistent with the procedures the Ombudsman has established for the disclosure of such records. 42 USC § 3058g(d)(1) and (2)(A). Thus, we review the Ombudsman's denial of your client's request for a copy of the investigation report to determine if that decision was an abuse of discretion. Our guide for determining whether there has been an abuse of discretion must be the procedures the Ombudsman has established for the disclosure of records.

ORS 411.113 authorizes the Long Term Care Ombudsman to "establish procedures to maintain the confidentiality of the records and files of residents of long term care facilities." We interpret this statute as a broad grant of authority to the Ombudsman to adopt whatever procedures the Ombudsman considers reasonable to maintain the confidentiality of resident records, with the specific directive that, at a minimum, the Ombudsman shall ensure absolute confidentiality of the identity of certain individuals. Thus, we conclude that ORS 441.113 authorizes the Ombudsman "to maintain the confidentiality" of all resident records, including investigation reports.[3/]

The Ombudsman has adopted procedures implementing this requirement as applied to investigation reports in OAR 114-05-020, as follows:

> Upon completion of an investigation, the Ombudsman or designee shall report, either verbally or in writing, opinions or recommendations to the administrator or other staff in charge, his/her designated representative, and affected parties. Findings and conclusions from the investigation may be reported, verbally or in writing, provided the report complies with all confidentiality requirements and does not jeopardize the integrity of the investigation.

[3/] A "resident record" refers to the information maintained by the Ombudsman's office. A Program Instruction from the federal Administration on Aging to State Ombudsman Programs, Log No. AoA-PI-81-8 at pages 31-32 (January 19, 1981) explains that the kinds of resident records to be safeguarded "include but are not limited to:

- notes of interviews with or affidavits by complainants;
- all copies of residents' medical records or diagnoses;
- all state long-term care ombudsman program or other Agency office memorandum which are developed in the process of evaluating and resolving residents' complaints;
- all photographs, videotapes, tape recordings, etc of complainants/individuals;
- information containing unverified complaints about long-term care facilities, long-term care facility owners, administrators, staff or other professionals involved in the long-term care system; and
- investigative materials and other information which are drafted and organized in the process of monitoring the development and implementation of laws, regulations and policies affecting long-term care.

Emphasis added. Accord ORS 441.121. A distinction is made between a mandatory obligation to report "opinions or recommendations" and discretion to report "findings or conclusions." Such discretion is consistent with the federal law discussed above.

This rule requires that the Ombudsman report opinions or recommendations to the administrator or staff in charge of the facility following an investigation. It does not, however, mandate disclosure of this, or any particular, investigation report. We conclude that OAR 114-05-020 authorizes the Ombudsman to determine the manner in which to report to the provider the opinions and recommendations of that office after completion of the investigation. The Ombudsman has not abused her discretion under OAR 114-05-020 by denying your request for disclosure of the investigation report as the means for reporting her opinion or recommendation in this investigation.

Finally, the petition cites ORS 443.767(5)(a) as authority for requiring a copy of the investigation report to be given to the adult foster home provider. ORS 443.767 applies to investigations by the Senior and Disabled Services Division (SDSD), not the Long Term Care Ombudsman. The Long Term Care Ombudsman is a separate and independent state agency with a different mandate from SDSD. See ORS 441.103 and 441.109. Accordingly, that statute is not controlling and cannot operate to limit the discretion of the Ombudsman.

Conclusion

We conclude that federal law prohibits disclosure of the requested report to the extent it contains information gathered in the course of receiving a report of elder abuse and making any appropriate referral. In addition, with respect to the entire report, we conclude that the Ombudsman has not abused the discretion granted to her under federal law when she denied the request for disclosure. Therefore, ORS 192.502(7) exempts the investigation report from disclosure under the Oregon Public Records Law. For these reasons, we deny your petition to compel disclosure.

Sincerely,

Thomas C. Balmer

THOMAS A. BALMER
Deputy Attorney General

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c: Meredith Cote, Long-Term Care Ombudsman