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December 22, 1993

Bruce Smith, Esquire
975 Oak Street
Eighth Floor
Eugene, OR 97401-3156

Re: Petition for Public Records Disclosure Order; Mental Health and Developmental Disability Services Division Records

Dear Mr. Smith:

This letter is the Attorney General's order on your December 10, 1993, petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505.[1/] Your petition asks the Attorney General to direct the Mental Health and Developmental Disability Services Division (division) to make available:

> Any and all records, letters, memos, E-Mail, and reports regarding all deaths of patients at Dammasch State Hospital since July 1, 1992. These records include, but are not limited to, all reviews, investigations, internal communications and studies of patient deaths.

For the reasons discussed below, your petition is respectfully denied.

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 for examination if it is "reasonably

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[1/] On December 10, we received an original petition for disclosure of records from Brent Walth on behalf of The Register-Guard. On December 15, we received a supplemental petition from you on behalf of your client, The Register-Guard, and you agreed to extend the time within which the law would otherwise require us to respond to Mr. Walth's original petition. For ease of reference, we are treating these documents together as one petition.

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. Agency Denial of Records Request

The petition states that the denial of Mr. Walth's records request "came during a telephone conversation between George Bachik, superintendent of Dammasch State Hospital, and myself on December 3. Denial has also come from the Division's failure to formally respond to this request in a reasonable period of time."

Mr. Bachik indicates that he did not deny Mr. Walth's request in its entirety in the December 3, 1993 phone conversation. He informs us that he stated he considered some of the documents covered by the records request to be quality assurance documents that he could not release, that he provided statutory cites for other exemptions that might apply to other records, and that he would be consulting with counsel to determine how to respond further to your request.

The public records law imposes no specific deadline for the release of requested records. Instead, it requires that the custodian of public records shall furnish "reasonable" opportunities for inspection. Given the extreme breadth of this records request in terms of the types of documents it encompasses, and the legal complexity surrounding some of these types of documents, careful review of the documents and consultation with legal counsel before making a decision to release records is reasonable. By doing so, the division has not actively or constructively denied Mr. Walth's request. See Public Records Order, May 9, 1989, Hribernick.

The agency's delay in responding to Mr. Walth's wide-sweeping records request is also reasonable in light of the events that gave rise to his request for records. As you are aware, an unusual number of deaths have occurred at the division's Dammasch State Hospital in a relatively short period of time. The division's first duty has been to investigate those deaths and to take any necessary actions in response. A great deal of staff time has been devoted to this process in recent months. Under the circumstances, the agency's inability to respond more rapidly to your records request is reasonable. See ORS 192.430(2).

With the exception of patient medical records, the Division informs us that it now has reviewed the records in its custody and is completing its determination of which records it can release under the Public Records Law. Mr. Bachik, on behalf of the division, informs us that Dammasch State Hospital staff should be able to have copies of those records in the hospital's custody prepared for mailing to you no later than December 27, 1993. Because, as you recognize, the question of whether any part of deceased patient records held by a state

institution can be released to the public is unsettled in Oregon law, that decision is still under consideration by the agency.

The Attorney General may order a state agency to disclose records only where the agency has first denied a request for public records inspection. See ORS 192.450(1). Except for quality assurance documents, the division has not yet denied Mr. Walth's records request.[2/] Because Mr. Walth has not yet been denied access to these records, the Attorney General lacks authority to order disclosure. Morse Bros., Inc. v. ODED, 103 Or App 619, 622 (1990). Consequently, your petition is denied as premature with respect to all records requested other than quality assurance documents.

2. Other State Law Exemption

ORS 192.502(8) exempts from disclosure "records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law."

ORS 41.675 makes privileged certain information prepared or compiled by a licensed health care facility, such as Dammasch State Hospital, for internal quality assurance purposes.[3/] In pertinent parts, ORS 41.675 provides:

> (1) As used in subsection (2) of this section "data" means written reports, notes or records of * * * committees of a health care facility licensed under ORS chapter 441, medical staff committees * * * in connection with training, supervision or discipline of physicians * * *. The term also includes

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[2/] As discussed above, the division intends to mail to you no later than December 27 all documents that are not exempt from disclosure under the Public Records Law. We understand that the division also will inform you at that time if there are any documents that are not being disclosed and the reason(s) the division believes such documents are exempt from disclosure. If you are not satisfied with the division's decision, you may file a further petition for review by the Attorney General. We will give any such petition our immediate attention.

[3/] ORS 41.675 creates an evidentiary privilege for certain health care facility and training data, limiting its admissibility in judicial proceedings. However, the creation of a privilege for certain records also has consequences outside of the judicial setting. Because the data is "privileged under Oregon law," it also is exempt from disclosure as a public record under ORS 192.502(8).

> the written reports, notes or records of utilization review and peer review organizations.
>
> (2) All data shall be privileged * * *.

The majority of the documents requested by Mr. Walth that are exempted from disclosure by this provision are the hospital's morbidity and mortality studies (death reviews). These reports are written by the death review committee, which is convened by the Chief Medical Officer when a patient dies. The committee always includes a physician; other treatment professionals participate as indicated. The Chief Medical Officer directs the review process and the preparation of the report.

These reports cover all aspects of a patient's medical condition and treatment relevant to that patient's death. Because a patient's medical treatment is ultimately under the supervision and control of the facility's physicians, the death review reports necessarily include a review of the physicians' role in the patient's care and the need for training, supervision or discipline.

The privilege for the kinds of data addressed in ORS 41.675 permits facilities to operate rigorous treatment review and quality assurance programs. Absent such protections, frank communication and self-critical analysis about treatment systems would likely be impeded, ultimately jeopardizing the quality of patient care.

We conclude that the death reviews are "written reports" of a "committee of a health care facility licensed under ORS chapter 441" and are "in connection with supervision, training or discipline of physicians." Thus, they fall within the terms of ORS 41.675 and are exempt from disclosure under ORS 192.502(8).

The other documents requested by Mr. Walth that are privileged under ORS 41.675 are two memoranda and one letter establishing and describing the operation of specialized medical study committees. A specific purpose for these committees is to address medical care issues raised by the patient deaths, including making recommendations concerning training, supervision, equipment or new technologies needed by physicians and other medical staff at the facility. The identity of the committee members set out in these documents, the medical issues to be considered by the committees and the manner in which the committees will operate are an essential part of the records of those committees. The functioning of the committees is dependent upon the confidentiality of such information, as well as the free and frank communication with and among committee members.

Because these documents are written records of a committee of a health care facility licensed under ORS chapter 441 in connection with supervision and training of physicians, they are privileged under ORS 41.675. Accordingly, they are also exempt from disclosure under ORS 192.502(8).

For the reasons discussed above, your petition is respectfully denied.

Sincerely,

Elizabeth S. Harchenko

ELIZABETH S. HARCHENKO
Special Counsel to the
Attorney General

CGG:AV:cws/JGG08865
c: Richard C. Lippincott
George Bachik