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October 22, 1990

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Re: **Petition for Public Records Disclosure Order; Oregon Health Division Records**

Dear Dr. Fleming and Mr. Taylor:

This letter is the Attorney General's order on Mr. Taylor's petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. The petition, which we received on October 8,[1] asks the Attorney General to order the Health Division to disclose specified records and other information. First, Mr. Taylor seeks:

> "[t]he Oregon Health Division's records regarding Eosinophilia Myalgia Syndrome (EMS) and [Mr. Taylor's] client Joann Hudson. Specifically, was Joann Hudson the person described in the July 11, 1990 Journal of the American Medical Association article in Figure 2 at page 216 as 'Goldline (87G9423)?'"

Second, Mr. Taylor wishes to know whether the Health Division has in its possession records for any individuals who consumed L-Tryptophan from Showa Denko lot numbers 54146210 and 54146202.[2] Third, Mr. Taylor asks whether, according to Health Division records, Showa Denko lot numbers 54146210 and 54146202 were manufactured between January 1, 1989, and May 31, 1989.[3]

For the following reasons, we respectfully deny the first and third parts of the petition. The second part does not raise issues under the Public Records Law and, therefore, is beyond the Attorney General's authority. We understand, however, that the Health Division is willing to supply that information to Mr. Taylor.

The Public Records Law confers a right to inspect public records of a public body in Oregon, subject to certain exceptions. Here ORS 432.060, as incorporated into the Public Records Law by ORS 192.502(8), prohibits disclosure of the information requested in the first and third parts of the petition.

ORS 432.060 provides:

> "(1) All records of interviews, reports, studies, and statements procured by or furnished to the Health Division, any federal agency or any nonprofit health agency that is exempt from taxation under the laws of this state or procured by any agency, organization or person, acting jointly with or at the request of the division or health agency, in connection with special morbidity and mortality studies, are confidential insofar as the identity of an individual patient is concerned. Such records may be used solely for the purpose of the studies.
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> "(2) The furnishing of morbidity and mortality information to the division or health agency, to its authorized representatives or to any agency, organization or persons cooperating in a special study, does not subject any hospital, sanitarium, rest home, nursing home or other organization or person furnishing such information to an action for damages.
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> (3) Subsection (1) of this section does not prevent the division or a health agency from publishing:

"(a) Statistical compilations and reports relating to special morbidity and mortality studies, if such compilations and reports do not identify individual cases and sources of information.

"(b) General morbidity and mortality studies customarily and continuously conducted by the division or health agency that do not involve patient identification.

"(4) Nothing in this section prevents disposition of records described in subsection (1) of this section pursuant to ORS 192.105." (Emphasis added.)

We analyzed this statute in a prior public records order. See Public Records Order, November 27, 1985, Pope. In that order we concluded that, despite a release from the patient, the statute compelled the Health Division to withhold from the patient all materials within the patient's file developed as part of a special morbidity study. We noted that ORS 432.060 embodies two distinct policies. The first policy is to protect

"the privacy of individual patients who may be the subject of these studies * * *. This policy, standing alone, would not justify withholding information concerning an individual patient from that patient, given a proper release.

"The second policy consideration, however, goes to the heart of the purpose of this statute, and overrides any right an individual patient ordinarily would have to review records concerning him or herself. This second and overriding purpose is to assure the confidentiality of any information provided to the Health Division or the federal Center for Disease Control 'in connection with special morbidity and mortality studies,' to ensure the ability of these agencies to obtain the information required to conduct these special health studies. It is necessary to ensure the confidentiality of information provided to the Health Division and the CDC so that individuals and institutions will be willing to provide complete and accurate information to the Health Division and the CDC for purposes of these studies.

> "This second purpose of the confidentiality statute is implemented by the directive that records compiled 'in connection with' those studies 'may be used solely for the purpose of the studies.' As noted above, the statute then goes on to create two specific exceptions, in subsection (3), from the general nondisclosure requirement. Neither of these exceptions contemplate[s] disclosure of any material obtained in connection with these studies except in the form of general, non-case-specific statistical or other reports on morbidity and mortality, prepared by the Health Division as part of its regular course of business."

Order at 3-4.

The present petition is one of two currently before this office, and one of several we expect to receive, concerning information compiled by the Health Division pursuant to a study of deaths and illnesses linked to the ingestion of L-Tryptophan. In light of the significant public interest implicated by this and related public records requests, we have taken this opportunity to reconsider our statutory analysis in the Pope public records order.

Upon this reconsideration, we reaffirm our previous position. The Health Division's success in conducting its special morbidity and mortality studies plainly depends upon the full cooperation and accuracy of reporting by various individuals and institutions. Revealing information supplied by these sources, contrary to the statutory promise of confidentiality, could severely impede the Health Division's work.

One might argue that there is significant public interest in aiding recovery against drug manufacturers and others by persons injured from taking L-Tryptophan. In ORS 432.060, however, the Legislative Assembly struck the policy balance to favor confidentiality of information compiled pursuant to special mortality and morbidity studies. It is for the legislature, not this office, to alter that policy decision.

Both the first and third parts of the petition involve information obtained by the Health Division in the course of a study covered by ORS 432.060. Although Mr. Taylor has not asked to inspect or copy public records, he has asked the

agency to reveal the specific contents of those records. Accordingly, we conclude that the Public Records Law and the exemptions incorporated into that law by ORS 192.502(8) apply. To conclude otherwise would allow the evasion of statutory exemptions by merely shaping a request in a subtly different form: a result that would frustrate the legislature's intent in crafting those exemptions.

The information sought in the first and third parts of the petition falls squarely within the prohibition of ORS 432.060. Accordingly, for the reasons stated above we must deny those parts of the petition.

The second part of the petition merely seeks to know whether the Health Division has records pertaining to a specific subject; it does not seek disclosure of the contents of those records. This part of the petition does not raise any issue under the Public Records Law and, therefore, is beyond the Attorney General's authority under that law. We understand, however, that the Health Division is willing to supply Mr. Taylor with the requested information.

In sum, we respectfully deny the first and third parts of Mr. Taylor's petition. The second part is outside the scope of this office's authority under the Public Records Law.

Sincerely,

James E. Mountain Jr

for PAMELA L. ABERNETHY
Special Counsel to the
Attorney General

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[1] We acknowledge Mr. Taylor's courtesy in permitting us to exceed the statutory seven-day deadline for issuance of this order.

[2] In Mr. Taylor's original petition, he asked the Attorney General to order the Health Division to disclose any reports regarding EMS victims who consumed L-Tryptophan from

Showa Denko lot numbers 54146210 and 54146202. On October 11, 1990, in a telephone conversation with Rhea Kessler, Assistant Attorney General, he amended his petition to ask whether the Health Division has in its possession any reports regarding such individuals.

[3] In Mr. Taylor's original petition, he requested copies of records showing whether Showa Denko lot number 54146210 and 54146202 were manufactured between January 1, 1989, and May 31, 1989. In the October 11, 1990 telephone conversation with Ms. Kessler, he amended the petition to ask whether the Health Division had in its possession records indicating that those lot numbers were manufactured between January 1, 1989, and May 31, 1989.