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November 24, 1992

Stephen F. English
Bullivant, Houser, Bailey,
Pendergrass & Hoffman
300 Pioneer Tower
888 SW Fifth Avenue
Portland, OR 97204-2089

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

Dear Mr. English:

This letter is the Attorney General's order on your petition on behalf of Showa Denko, K.K., for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition, which we received on October 27, 1992[1/], asks the Attorney General to direct the Oregon Health Division (division) to make available specified documents and other information. Showa Denko seeks "documents underlying the study conducted by the Oregon Health Division and published in the Journal of the American Medical Association entitled "Eosinophilia-Myalgia Syndrome Associated with Exposure to Tryptophan from a Single Manufacturer (JAMA Study)." Showa Denko has requested the following documents:

1. All protocols or other documents relating to the design and approval of the JAMA Study.

2. Any communications to health care professionals that requested the reporting of cases of unexplained eosinophilia.

3. The texts of all media announcements, all responses to such announcements and all related documents.

4. All completed interview questionnaires used for the JAMA Study and any related instructions or training material for the interviewers.

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

5. All documents relating to the conduct of the JAMA Study.

6. All records relating to the identification, selection, inclusion and exclusion of the 46 cases and 41 controls included in the product tracing study described in the JAMA Study.

7. All records relating to the tracing of brands and lot numbers through the distribution chain.[2/]

8. All documents relating to the various statistical analyses that were performed.

9. All drafts of the JAMA Study, all correspondence or other communications to or from any journal to which the JAMA Study may have been submitted for publication and all comments received from reviewers who evaluated the JAMA Study.[3/]

10. All databases established by the division in connection with the JAMA Study (downloaded into an ASCII file, with a listing of the fields and field definitions provided).

11. All other documents relating to the JAMA Study.

For the reasons that follow, we respectfully deny your petition.

[2/] At a meeting with Karen Art, Assistant Attorney General, on November 16, 1992, Mr. English, through Mr. Mark Friedman and Mr. Paul Thalhofer, agreed to hold in abeyance the request for records relating to "the confirmation of the tracing of brands and lot numbers by the Food and Drug Administration and the Centers for Disease Control," until he determines whether he can obtain these documents from the Centers for Disease Control. Therefore, for purposes of this petition, the request seeks only those records that were created by the Oregon Health Division or are in the possession of the Oregon Health Division.

[3/] Dr. Fleming, State Epidemiologist of the Oregon Health Division, informs us that the Health Division does not have these documents. Mr. English, through Mr. Mark Friedman and Mr. Paul Thalhofer, has agreed to hold this request in abeyance until he determines whether he can obtain these documents from the Centers for Disease Control.

1. Items 1, 2, 3, 5, 6, 7, 8 & 11

Dr. David Fleming, State Epidemiologist of the Oregon Health Division, informs us that he has either provided all documents requested in items 1, 2, 3, 5, 6, 7, 8 and 11 or the documents do not exist.[4/] Because the division either has no records that satisfy your request at items 1, 2, 3, 5, 6, 7, 8 and 11, or has already provided the records to you, there is no basis upon which the Attorney General can order the agency to disclose such records. Accordingly, we deny your petition with respect to those items.

2. Items 4 and 10

Item 4 requests the interview questionnaires used for the JAMA Study and related instructions or training materials; item 10 requests databases established by the division in connection with the study.

As you indicated in your petition at p. 2, Dr. Fleming has provided you with data on diskettes on the control group in the study. Dr. Fleming informs us that the original control forms no longer exist and that he has no other data for the control group. In addition, Dr. Fleming states that no documents containing instructions or training materials for the interviewers were ever prepared. Therefore, because the division has no records that satisfy that portion of your request, or has already provided you with records, there is no basis upon which the Attorney General can order the agency to disclose such records.

The remaining records requested in items 4 and 10 are the interview questionnaires for the noncontrol group (item 4) and the information transferred from those questionnaires onto a computer database (item 10). For the following reasons we respectfully deny this portion of the 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 for

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[4/] Specifically, with regard to the portion of the request for records in item 7 that is not being held in abeyance, Dr. Fleming indicated that the records generated by the Health Division relating to the tracing of brand and lot numbers through the distribution chain were discarded when they were no longer useful to the study.

examination if it is "reasonably 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).

ORS 192.502(8) 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." This exemption incorporates into the Public Records Law the provisions of other statutes that restrict disclosure of records or make such records confidential.

ORS 432.060 curtails the public's right to inspect records of special morbidity and mortality studies. 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.
>
> (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.)

a. Protecting Personally Identifiable Information

We analyzed ORS 432.060 in three prior public records orders. See Public Records Order, October 23, 1990, Fleming/Troutwine; Public Records Order, October 22, 1990, Fleming/Taylor; and Public Records Order, November 27, 1985, Pope. In those orders we noted that this statute clearly seeks to protect "the privacy of individual patients who may be the subject of these studies * * *." Fleming/Troutwine Order at 2-3; Fleming/Taylor Order at 3-4; Pope Order at 3-4.

The questionnaires and database contain information specific to identifiable individuals. You note that Showa Denko is not interested in the identity of any of the subjects of the JAMA Study and that you "would gladly accept production of the case and control report forms and other documents with subjects' and doctors' names, addresses and telephone numbers redacted." In some circumstances, it is possible to release information without revealing the source of information, thereby preserving the source's confidentiality.

Here, however, we conclude that such a procedure would not preserve confidentiality. As you noted in your request, you have in your possession "most, if not all of the medical records for all of the cases filed in Oregon, pursuant to various requests for discovery." The interview forms contain medical and other patient-specific information, including symptoms and dates of onset, medical history, history of L-Tryptophan use, and laboratory reports. Given the limited number of noncontrol group interviewees and the medical information you already have for these people, disclosure of these interview forms, even in an unattributed form, could unreasonably risk the disclosure of the interviewees' identities and thus breach the statutory policy of confidentiality. Cf. Public Records Order, July 14, 1989, Rhoten at 3; Public Records Order, September 12, 1988, Hansen at 5.

b. Protecting Confidentiality of Sources

In our previous orders analyzing ORS 432.060, we noted that the statute not only seeks to protect the privacy of individual patients but also serves a second purpose of assuring the confidentiality of any information provided to the division or the federal Centers for Disease Control (CDC) in connection with special morbidity and mortality studies. Specifically we stated:

> 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, noncase-specific statistical or other reports on morbidity and mortality, prepared by the Health Division as part of its regular course of business.

The 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 division's work.

Accordingly, we conclude that ORS 432.060 does not authorize disclosure to you of the information obtained by the division through the interview questionnaires. Because disclosure is restricted by ORS 432.060, these records are exempt from disclosure under the Public Records Law. ORS 192.502(8).

Conclusion

For the reasons stated above, we deny your petition to compel disclosure.

Sincerely,

Amy Veranth
Opinions Coordinator
General Counsel Division

ALV:alv/JGG050DD

cc: David W. Fleming, M.D.
State Epidemiologist