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December 11, 1998

Gary McLean
P.O. Box 1183
Sandy, OR 97055

Re: *Public Records Disclosure Order: Health Division Records*

Dear Mr. McLean:

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. The petition, which we received on December 4, 1998, asks the Attorney General to direct the Health Division to provide you with an opportunity to review various records relating to an investigation of American Medical Response, an ambulance service provider.

As noted in your petition and confirmed by Ed Opitz, Acting Director of Emergency Medical Services and Systems, the Health Division has not denied your request. The Health Division has contacted Assistant Attorney General Rhea Kessler for advice regarding legal issues raised by your records request.

We have stated under similar circumstances that when a public body consults with legal counsel regarding its duties under the Public Records Law, the public body does not thereby actually or constructively deny the request. Nor does the public body deny a request merely because it fails to comply with a deadline the requestor seeks to impose. *See* ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 16 (1997).

Given the pending request by Mr. Opitz for legal advice, we conclude that your request for records has not been constructively denied. Absent a denial by the agency, this office has no authority to order the agency to disclose records. *See* ORS 192.450(1); *see also Morse Bros., Inc. v. ODED,* 103 Or App 619, 798 P2d 719 (1990) ("The Public Records Law clearly contemplates that agencies have the opportunity to review the requested records and to act on the request before the Attorney General or the courts can review the matter.") Accordingly, we deny your petition as premature.

We have been advised by Mr. Opitz that the records requested are under active review, and the agency should have a response to your request in the near future. While we do not know what the response will be at this time, should you decide that the response is such that you wish to petition the Attorney General again under the Public Records Law, you need to know that last year the Legislature enacted a law setting forth a new procedure for petitions relating to disclosure of health professional regulatory board records. The Health Division is defined to be a health professional regulatory board to the extent that it certifies emergency medical technicians (EMTs). ORS 676.160. Assuming that the investigation may have included information as to the actions of individual EMTs, it is likely that this new procedure would apply to your request.

If a health professional regulatory board denies a request for disclosure of any of its records, the requestor may petition the Attorney General for review of the board's denial. *See* ORS 192.450(1). Either on or before the date the petition is filed with the Attorney General, the requestor must also send a copy of the petition to the board. ORS 192.450(4). Within 48 hours, the board must send a copy of the petition to the licensee who is the subject of any record for which disclosure is sought and a notice stating that the licensee has the right to file a written response to the petition to the Attorney General. The licensee then has seven days in which to file a written response. If the licensee files a response, the Attorney General must send a copy of the response to the original petitioner. *Id.*

After this procedure has been followed, the Attorney General must issue an order granting or denying the petition within 15 days after receipt of the petition. The Attorney General may grant the petition only if the petitioner demonstrates, by clear and convincing evidence, that the public interest in disclosure outweighs other interests in nondisclosure, including but not limited to the public interest in nondisclosure. ORS 192.450(5).

We enclose for your information and convenience copies of ORS 192.450, 676.175 and 686.135.[1/] If you wish to petition the Attorney General for review of the Division's determination after you have received it, and the Division has asserted that the law relating to health

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[1/] Health professional regulatory boards, including the Health Division to the extent that the Division certifies emergency medical technicians, generally are prohibited by law from disclosing information they obtain as part of an investigation of any licensee. ORS 676.175(1), 686.135(3). Under certain circumstances, however, disclosure of this information is required. ORS 676.175(2) requires disclosure when two conditions are met: 1) the division decides not to issue a notice of intent to impose a disciplinary sanction; and 2) the person requesting the information "demonstrates by clear and convincing evidence that the public interest in disclosure outweighs other interest in nondisclosure, including but not limited to the public interest in nondisclosure." ORS 676.175(2).

professional regulatory boards is applicable, you may do so by following the procedures described in ORS 192.450(4). In order to prevail, you also must demonstrate by clear and convincing evidence that the public interest in disclosing this information outweighs any other interest in nondisclosure. ORS 192.450(5).

Sincerely,

DAVID SCHUMAN
Deputy Attorney General

c: Ed Opitz, Acting Director
Emergency Medical Services & Systems