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April 10, 1995

Marilyn Deutsch, Reporter
Patty Howe, Assistant Editor
KPTV 12
P.O. Box 3401
Portland, Oregon 97208

Re: ***Petition for Public Records Disclosure Order: Children's Services Division***

Dear Ms. Deutsch and Ms. Howe:

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 April 3, 1995, asks the Attorney General to order the Children's Services Division (CSD) to disclose "the internal investigation CSD conducted concerning the death of 4 month old Joshua Cowlishaw in March 1994." The petition also seeks "any other information pertaining to any child that died in 1994 and 1995 and was or had been a CSD case." For the reasons stated below, we respectfully deny your petition in part as moot, in part because the records are exempt from disclosure and in part as premature.

The Public Records Law confers a right to inspect any public record 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 nonexempt material available for 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).

1. **Internal Investigation Reports**

Two documents are responsive to your request for "the internal investigation CSD conducted concerning the death" of the child. One document is a seven-page report, entitled

"Cowlishaw Fatality Review: Marion County Children's Services Division July 12, 1994." The second document is a two-page summary of the seven-page report.

a. **Two-Page Summary**

The two-page summary is a public record that does not contain any confidential information that would prevent its disclosure to you. CSD has agreed to provide a copy of the two-page summary to you. Therefore, we deny your petition as to that report as moot.

b. **Seven-Page Fatality Review Report**

The full seven-page report contains information obtained from reports and records of child abuse investigations, temporary custody orders and petitions and records describing the history and prognosis of the children in the family. This information is exempt from disclosure.

ORS 192.502(8) exempts from disclosure:

> Public 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 any other state statute that restricts the disclosure of records or makes the records confidential.

With respect to the information obtained from reports and records of child abuse investigations, ORS 419B.035(1) provides that reports and records compiled under the provisions of the child abuse reporting statute "are confidential and are not accessible for public inspection." ORS 419B.035(2) permits CSD to make such reports and records available

> when the division determines that such disclosure is necessary to administer its child welfare services and is in the best interests of the affected child, or that such disclosure is necessary to investigate, prevent or treat child abuse and neglect, to protect children from abuse and neglect or for research when the assistant director gives prior written approval.

Your request for this information does not meet any of the above criteria. Paul Drews, CSD Deputy Administrator, informs us that CSD has determined that disclosure of this information is ***neither*** necessary to administer child welfare services ***nor*** in the best

interests of the Cowlishaw children. *See* OAR 412-01-145(5), 412-01-155. We conclude that this determination is not an abuse of CSD's authority such as would permit us to over rule that agency's judgment in an area committed to its discretion. *Cf.* Public Records Order dated March 2, 1993 (McMinimee) (Ombudsman has not abused discretion under her rules in denying request for investigation report on complaint). Moreover, disclosure to you of the case-specific information in the report is not necessary to investigate, prevent or treat child abuse or neglect or to protect children from abuse or neglect. Finally, we understand that you have not made any claim to CSD that you seek this information for research purposes. *See* OAR 412-01-150.

With respect to the information obtained from temporary custody orders and petitions, ORS 419A.255(1) states:

> The clerk of the court shall keep a record of each case, including therein the summons and other process, the ***petition*** and all other papers in the nature of pleadings, motions, ***orders of the court*** and other papers filed with the court, but excluding reports and other material relating to the child's history and prognosis. ***The record of the case shall be withheld from public inspection*** but shall be open to inspection by the child, parent, guardian, court appointed special advocate or surrogate and their attorneys. The attorneys are entitled to copies of the record of the case.

(Emphasis added). This statute requires that the petition and orders of the court must be withheld from public inspection. We have interpreted a previous version of this statute to protect not only the court records, but also the information derived from those documents when it is incorporated into CSD records. *See* Public Records Order dated August 17, 1987 (Zaitz) ("It is illogical to contend that ORS 419.567 applies only to the records and reports filed with the court and not to the information contained therein[.]"). We now apply that same analysis to find that ORS 419A.255(1) restricts the disclosure of information in CSD records that was obtained from temporary custody orders and petitions.

With respect to information obtained from records describing the history and prognosis of the children in the family, ORS 419A.255(2) provides, in relevant part:

> Reports and other material relating to the child's history and prognosis are privileged and, except at the request of the child, shall not be disclosed directly or indirectly to anyone other than the judge of the juvenile court, those acting under the judge's direction and to the attorneys of record for the child or the child's parent, guardian, court appointed special advocate or surrogate.

ORS 419A.255(3) provides that, except for situations not relevant here,[1/] "no information appearing in the record of the case or in reports or other material relating to the child's history and prognosis may be disclosed to any person not described in subsection (2) of this section without the consent of the court, * * * ."

Pages two through four of the seven-page report consist entirely of information the disclosure of which is prohibited, restricted or otherwise made confidential, i.e., information obtained from reports and records of child abuse investigations that is made confidential under ORS 419B.035(4), information about temporary custody orders and petitions that must be withheld from public inspection under ORS 419A.255(1), and information concerning the history and prognosis of the children in the family the disclosure of which is restricted by ORS 419A.255(2) and (3). Accordingly, we find that these pages of the report are exempt from disclosure under ORS 192.502(8).

Pages five and six of the report contain two statements that must be redacted because they contain information rendered confidential pursuant to ORS 419B.035(1), discussed above. Other than the two confidential statements that must be redacted, pages one, five, six and seven are not exempt from disclosure. Floyd Smith, CSD Acting Executive Assistant for Communications, informs us that CSD has agreed to provide to you a copy of the seven-page report without pages two through four and with the two statements redacted.

Therefore, we conclude that pages two through four of the seven-page fatality review report and the two additional statements on pages five and six of the report are exempt from disclosure under the Public Records Law. ORS 192.502(8). Accordingly, we respectfully deny your petition with regard to those pages and statements. Because CSD has agreed to provide the remainder of the seven-page report to you, we deny your petition as to those portions of the report as moot.

2. **Other Fatality Information**

Floyd Smith informs us that CSD has not received a request for "any other information pertaining to any child that died in 1994 and 1995 and was or had been a CSD case" and has not denied such a request. Moreover, in your petition you do not state that a

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[1/] Limited disclosure may be permitted in certain specific situations for purposes of evaluating the child's eligibility for special education, in connection with criminal or juvenile court proceedings, or under circumstances in which the information discloses a child is a clear and immediate danger to another person or to society. ORS 419A.255(3), (6).

request for these records was denied by the agency, as required by ORS 192.470(1). Absent a request for records and a denial by the agency, the Attorney General has no jurisdiction to order disclosure. *See* ORS 192.450. We deny your petition as to these records as premature.

Sincerely,

Elizabeth S. Harchenko

ELIZABETH S. HARCHENKO
Special Counsel to the Attorney General

ESH:jpl/JAA017BB.W51

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APRIL 3, 1995

TO: MARLA RAY
ATTORNEY GENERAL'S OFFICE
STATE OF OREGON

WE ARE REQUESTING UNDER OREGON'S PUBLIC RECORDS LAW, THE INTERNAL INVESTIGATION CSD CONDUCTED CONCERNING THE DEATH OF 4 MONTH OLD JOSHUA COWLISHAW IN MARCH OF 1994.

IN ADDITION, WE WOULD LIKE ANY OTHER INFORMATION PERTAINING TO ANY CHILD THAT DIED IN 1994 AND 1995 AND WAS OR HAD BEEN A CSD CASE. AGAIN, WE ARE REQUESTING THIS UNDER OREGON'S PUBLIC RECORDS LAW.

THANK YOU FOR YOUR PROMPT ATTENTION TO THIS MATTER.

CORDIALLY,

Marilyn Deutsch

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