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Richard C. Ladd, Administrator
Senior Services Division
Department of Human Resources
313 Public Service Building
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Dear Mr. Harrison and Mr. Ladd:

This constitutes the order of the Attorney General in response to a petition filed by Mr. Harrison, received in this office on June 18, 1984, in which he requests an order requiring the Senior Services Division to make available for inspection or to produce a copy of the following records:

> "Any and all documents, notes, reports, memorandums, correspondence or other information relating to or in any way connected with complaints made by Kaiser Hospital against Barbara McCabe concerning the care of . . . ."

(Since this order is itself a public record, the name of the elderly person is deleted.) A memorandum of law accompanying the petition makes it clear that disclosure of the name of the individual complainant is not requested.

In the particular case, the allegations of abuse were not substantiated. Disclosure is sought on behalf of Patricia Carmichael, operator of the adult foster home in which the elderly person resides. Barbara McCabe is described as a "partner" in the foster home.

ORS 410.660, 410.680 and 410.690 protect the identity of a person making a report of abuse or possible abuse of an elderly person. No issue arises as to that identity. We note that ORS 410.660(1) grants immunity from civil liability to any person making such a report having reasonable grounds therefor.

ORS 410.680 deals with such abuse reports and provides as follows:

> "A proper record of reports made under ORS 410.630 and 410.640 shall be maintained by the Adult and Family Services Division.[1] The division shall prepare reports in writing when investigation has shown that the condition of the elderly person was the result of abuse even if the cause remains unknown. The reports shall be catalogued under the name of the victim but shall be treated as confidential information, and shall be disclosed only with the consent of that person or by judicial process."

The "reports" referred to in the first sentence are in fact the complaints of abuse or possible abuse made to Senior Services Division, or to a law enforcement officer and forwarded to the division. The second sentence refers to different reports, those which the division is required to prepare concerning its investigations when they show that abuse has occurred. The third sentence makes the "reports" confidential, but which reports? We conclude that both types of reports are meant, and thus "complaint" reports are confidential even though no "investigation" report has ensued. Certainly "complaint" reports would be confidential if an investigation report concludes that abuse has occurred, or else confidentiality of the investigation report, which would to a great extent duplicate a reliable complaint, would be meaningless.

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1 The Senior Services Division has succeeded to the responsibilities of the Adult & Family Services Division under this statute. Oregon Laws 1981, ch. 784.

ORS 410.690 goes on to provide:

> "(1) Notwithstanding the provisions of ORS 192.410 to 192.500, the names of the public or private official who made the report and the elderly persons compiled under the provisions of ORS 410.610 to 410.990 are confidential and are not accessible for public inspection. However, the division shall make the information available to any law enforcement agency, to any public agency which licenses or certifies residential facilities or licenses or certifies the persons practicing therein, to any public agency providing protective services for the elderly person, to the Mental Health Division, and to the Long Term Care Ombudsman, if appropriate. The division shall also make the information available to any private nonprofit agency providing protective services for the elderly person. When this information is made available to the private agency, ORS 410.610 to 410.990 relating to confidentiality apply to the private agency.
>
> "(2) Except as provided in subsection (1) of this section, the provisions of ORS 192.410 to 192.500 apply to all records and reports compiled under ORS 410.610 to 410.990."

(We presume that the foster home does not qualify as a "private" non-profit agency providing protective services for the elderly person.)

The first sentence of ORS 410.690(1) relates only to the names of informants and elderly persons and does not have any bearing upon other information in the reports. It hardly seems necessary in light of the provisions of ORS 410.660(2) and 410.680, but it in no way weakens the confidentiality provisions of ORS 410.680. But ORS 410.690(2), if it controls, destroys those confidentiality provisions for all except names. However, exemptions from disclosure under ORS 192.500(2)(b) and (c) could still apply.

ORS 410.680 and 410.690, read together, create an ambiguity. Are reports confidential, or are they subject to disclosure with names deleted? We accordingly examine the process of enactment of the statutes.

These statutes were enacted by Oregon Laws 1981, chapter 183, introduced as HB 2865. (A 1983 amendment to ORS 410.690 is irrelevant to the question before us.)

Amendments to the original measure by the House Committee on Aging & Minority Affairs dated April 14, 1981, made changes reflected in the final measure. Those amendments added subsection (2) to section 6, now ORS 410.660, "(2) The identity of the person making the report shall be treated as confidential . . ." Section 8, now ORS 410.680 was also amended by adding to the last sentence, which originally read: "The reports shall be catalogued under the name of the victim." The additional language added was:

> " . . . but shall be treated as confidential information and shall be disclosed only with the consent of that person or by judicial persons."

Section 9, now ORS 410.690, originally read:

> "(1) Notwithstanding the provisions of [the public records law] . . . reports and records compiled under . . . this Act are confidential and are not accessible for public inspection. However, the Adult and Family Services Division shall make records available to any law enforcement agency . . . and to any physician [treating the person] . . .
>
> " . . .
>
> "(3) No officer or employe of the division, any social service agency, any law enforcement agency or any physican shall release any information not authorized to be released by subsection (1) of this section."

Thus, section 8 originally did not speak to disclosure or confidentiality at all, and section 9 contained a clear prohibition on any disclosure except to law enforcement agencies and treating physicians. The indicated language was added to section 8, and section 9 was entirely replaced by new language providing that "names of complainants and patients . . . are confidential," but that otherwise all records and reports are subject to disclosure or exemption as provided generally by the public records law.

The only explanation we can find for the contradiction is that perhaps the confidentiality created by the amendment to section 8, ORS 410.680, was intended to apply only to the name of the victim. Thus adding the underlined language as follows:

> "The reports shall be catalogued under the name of the victim but shall be treated as confidential information [etc.] . . ."

could have been intended to mean

> " . . . under the name of the victim but the name shall be treated as confidential . . ."

Testimony before the House Committee concerning the amendments, and other testimony concerning the measure, focused on the confidentiality of names, and thus strengthens (but only slightly) this possibility. We find nothing to contradict it.

Ultimately, we conclude that the complete rewriting of section 9 with its clearly intended change in result from complete confidentiality of reports, to confidentiality only of names, should be given effect in preference to a less drastic amendment to section 8, especially when that amendment can (rather unsatisfactorily) be given a meaning which does not contradict section 9.

We also turn to ORS 441.630 to 441.680, an entirely separate sequence of statutes relating to reporting and investigation of abuse to elderly persons in long-term care facilities. ORS 441.671, enacted by Oregon Laws 1981, ch. 470 §2 to replace the original confidentiality provisions of the long-term care facility elderly abuse law, is virtually identical in language

and identical in effect to ORS 410.690. No contradicting or complicating language equivalent to the last phrase of ORS 410.680 exists in this sequence of statutes.

Adoption by the legislature in the same year of two separate acts relating to reporting of abuse to elderly persons, each containing a section providing in the same language for confidentiality of names but disclosure under the public records law of the balance of reports, leads convincingly to the conclusion that the same result was intended. We can think of no policy reason for a different result.

We accordingly conclude that abuse reports under ORS 410.610 to 410.700 are subject to disclosure, after deletion of names of informants and of persons allegedly abused, and deletion as well of any information which would be exempt from disclosure under ORS 192.500.

Senior Services Division rules and policies provide for disclosure of abuse reports under ORS 441.630 to 441.680, but for their confidentiality under ORS 410.610 to 410.700. See OAR 411-21-025; SSD Policy VII-VII-C(5); SSD Policy VII-VII-D(5). Of course, these rules and policies, adopted in accordance with an understandable misreading of the statutes, cannot justify nondisclosure where no statute permits it. This order is effective despite any contrary rules or policies.

A further question remains. Although the statutes clearly intend protection of the privacy of an elderly victim of alleged abuse, this petition identifies the patient by name. Thus, disclosure of the report, even with the name deleted pursuant to statute would disclose identifiable personal information concerning the patient.

Accordingly, we conclude that a request for a report of an investigation concerning alleged abuse to a named elderly person may be declined, if disclosure would reveal personal information concerning the person resulting in an unreasonable invasion of privacy. The particular report contains medical and other information about the patient. We conclude that public disclosure would be an unreasonable invasion of privacy.

In the particular case, the petition is filed on behalf of the person responsible for care of the elderly person.

Petitioner necessarily knows personal information concerning the patient. The patient's health and condition are of immediate concern to her. Disclosure of that personal information to petitioner is therefore not an unreasonable invasion of privacy.

These circumstances justify and require disclosure to petitioner, and we so order.

We note that the division's reports are on its forms SSD 723 and 723A, designed for use under ORS 441.630 to 441.680. Division policy VII-VII-D(5), Confidentiality, provides:

> "C. The lower part of the [form] 723 and all of the 723A is public information. . . ."

The upper part of the form 723 contains the name of the complainant and victim, but it also contains additional information which is not protected from disclosure by ORS 410.680, 410.690 or 441.671. The protected information is all on the left side of the upper part of form 723.

We order disclosure in accordance with the petition of form 772 relating to this matter, subject to deletion of the left side of the upper portion (above the legend "information in this section is not confidential), and we further order disclosure of the three page Complaint Investigation Report, form 723A, which does not include names.

The division must comply with this order within seven days from this date, unless within that period it gives notice of its intention to challenge this order pursuant to ORS 192.450. Such notice must be given to this office, and by certified mail to the petitioner. Thereafter (if it has so decided), the division must file suit in Marion County Circuit Court to challenge this order within seven days of its notice, and may retain private counsel for that purpose.

Yours very truly,

WILLIAM F. GARY
Deputy Attorney General

WFG:cm
cc: Leonard Pearlman
Dexter Henderson, Contracts Officer, Senior Services Division
Aileen Kaye, Program Operations, Senior Services Division