



ROD UNDERHILL, District Attorney for Multnomah County

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February 21, 2019

Kristen Tranetzki
Angeli Law Group LLC
121 S.W. Morrison Street, Suite 400
Portland, Oregon 97204

Jason Davis
OHSU Legal Department
3181 S.W. Sam Jackson Park Road
Portland, Oregon 97239

Re: Petition of People for the Ethical Treatment of Animals (PETA) requesting access to multiple categories of records relating to primate research at Oregon Health and Science University (OHSU)

Dear Ms. Tranetzki and Mr. Davis:

In their public records petition, dated February 5, 2019, petitioner PETA asks this office to order OHSU to disclose, in summary:

1. Five years of videographic records related to experiments conducted by Dr. Elinor Sullivan or other identified researchers and funded by National Institute of Health (NIH) grant R01MH107508 (the '508 grant) or NIH grant R24OD011180 (the '180 grant), and
2. Three years of veterinary records and medical care records pertaining to Japanese macaques who exhibited self-injurious behavior or have required care outside the scope of an approved protocol.

OHSU is home to one of seven National Primate Research Centers, which is funded through grants from the NIH. Dr. Sullivan is a member of the OHSU faculty and conducts primate research, currently focusing on the effects of maternal diet on the subsequent behavior of juvenile primates.

The underlying public records requests were made at different times, but have been consolidated here by PETA for the purposes of appeal.

In response to PETA's appeal, OHSU asserts 1) analysis of videos prepared under the '508 grant have not been published and are thus exempted from disclosure by ORS 192.345(14) (the faculty research exemption); 2) that it possesses no records as to the '180 grant because all such records were provided to an outside researcher and the originals destroyed; and 3) that it possesses no responsive veterinary records because no Japanese macaques exhibited self-injurious behavior or required abnormal care during the relevant period.

DISCUSSION

A. Records Custodian – ORS 192.324(1)

ORS 192.324(1) provides that,

A public body that is the custodian of any public record that a person has a right to inspect shall give the person, upon receipt of a written request: (a) A copy of the public record if the public record is of a nature permitting copying; or (b) A reasonable opportunity to inspect or copy the public record.

Here OHSU states that under the '180 grant 14 videos were created to document experiments it conducted at the direction of Dr. Melinda Novak, a researcher working with the Harvard Medical School. After conducting and recording the experiments, the videos were transferred to Dr. Novak's laboratory and deleted. PETA argues that videos prepared under this grant are nonetheless "subject to disclosure under Oregon law regardless of whether or not they are currently in OHSU's possession."

Although PETA is correct that the definition of a "public record" includes any record "prepared, owned, used or retained by a public body," and these videos were indeed prepared by OHSU, that is not the totality of the analysis to compel disclosure. A public body must presently be the actual or constructive custodian of a record in order to be required to produce that record for review. *Petition of Apanel*, MCDA PRO 17-57 (2017) ("the public records law does not require agencies to produce records they do not possess.") See also, *Petition of Shepherd*, MCDA PRO 98-21 (1998) ("To the extent that they exist and are subject to the actual or constructive control of the City, plaintiff is entitled to inspect and copy [...] the records he has requested. [...] If the City has no access to such materials, the Public Records Act gives the plaintiff no access to such materials.") (quoting *Hovies v. City of Portland*, Mult. Co. Cir. Ct 97-03-02222, Opinion and Order (Marcus, J.))

In short, regardless of whether or not these videos were, or in a technical sense still are, "public records," they are not public records that are subject to disclosure because OHSU does not have any right or ability to access them.

As to the medical and veterinary records, we reach the same conclusion for simpler reasons: OHSU has denied that it ever had any responsive records. OHSU has submitted a declaration from Dr. Kristine Coleman that no self-injurious behavior was reported during the relevant time period and additionally clarifies in its response that none of the macaques required treatment outside the scope of a planned, approved protocol. Absent some showing beyond mere suspicion, this is sufficient to establish that a public body is not the custodian of a particular record.

B. Faculty Research – ORS 192.345(14)

ORS 192.345(14) conditionally exempts from disclosure,

Writings prepared by or under the direction of faculty of public educational institutions, in connection with research, until publicly released, copyrighted or patented.¹

i. Applicability of the exemption

OHSU reports that it has approximately 250 videos responsive to this request. Pursuant to 192.422(2), this office has requested, and OHSU has provided, a representative sample of these videos. The majority of the videos are about 30 minutes long, although OHSU states that a few are continuous recordings that cover up to a week and could be over 150 hours long on their own. The videos in this case document behavior of rhesus monkeys at various developmental stages (4, 6, 11, 21, and 36 months) in response to specific stimuli (e.g. an unfamiliar person or an unfamiliar object). The purpose of the experiment was to determine if the diet of the primate's mother affected their behavior.

The video records here were unquestionably prepared under the direction of public university faculty in connection with this research. PETA does not appear to contest this point, but rather argues that the results of this research have been publicly released, which eliminates any ability to claim this exemption. In support, PETA cites five journal articles it asserts document this work.

One of the two principal investigators for the experiments under the '508 grant is Dr. Elinor Sullivan, who has submitted a declaration describing her research and the various publications cited by PETA in support of its petition. Dr. Sullivan is a co-author on each of these five articles. She declares that three of the five articles cited by PETA did not rely on video data at all while the other two, which do address video data, use video data not funded by one of the grants at issue. That is, the 250 videos funded by the '508 grant have not been addressed in any previously published work. Certainly the cited articles relate to the same general topic, the effect of a high-fat maternal diet on juvenile primate behavior, but the videos that provided data for those articles were funded from different sources and are, thus, not responsive to the records request at issue here.

PETA's confusion as to the source of data for the articles that used video data is understandable. By way of example, one of the articles directly references primate video studies and cites the '508 grant as one of its many funding sources.² OHSU has explained that the videos

¹ As used in this section "writings" includes videos. ORS 192.311(7).

² Thompson JR, Gustafsson HC, DeCapo M., Takahashi DL, Bagley JL, Dean, TA, Kievit P., Fair DA, Sullivan EL, *Maternal Diet, Metabolic State, and Inflammatory Response Exert Unique and Long-Lasting Influences on Offspring Behavior in Non-Human Primates*, *Front. Endocrinol.* (Lausanne). 2018;9:161, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5924963/>

used in this article were created prior to the award of the '508 grant. The '508 grant is listed in the article as a funding source because, after its award, funding from the grant was used to collect the cortisol and serotonin data discussed in the article. Dr. Sullivan's research is ongoing and she is working toward eventual publication of analysis of video data gathered under the '508 grant, but that has not yet occurred.

Because a full analysis (or indeed any analysis) of video data gathered under the '508 grant has not been publicly released they are subject to ORS 192.345(14).

ii. The public's interest in disclosure

PETA additionally argues that, as ORS 192.345(14) is a conditional exemption, even if it does apply the public interest nonetheless requires disclosure in this instance because 1) recent polling data shows that the public at large has a negative opinion of using live animals in experiments; 2) OHSU receives millions of public dollars for animal experiments; and 3) OHSU has a history of being cited for violations of the Animal Welfare Act.

Similar public interest arguments were thoroughly addressed by the Attorney General as to videos of OHSU primate research. *Petition of Speede*, Att'y Gen. PRO (June 19, 1995). As to the public oversight argument, *Speede* concluded that those interests were adequately served by the existing federal regulatory regime.

Similarly, we do not find heightened public interest or concern over the humane treatment of animals to be compelling under a circumstance where the research is subject to federal requirements and guidelines intended to look out after the interest of animals used in research. Nor are we persuaded that the asserted public interest in scrutinizing OHSU's compliance with federal guidelines for the care and protection of laboratory animals is compelling. The federal government has extensive requirements for research institutions to have animal care and use committees with qualified veterinarians and reporting mechanisms for seeing that its requirements are observed.

Id. at 5. We do not find that the animal welfare violations cited by PETA (one financial penalty and two warnings imposed in 2012, 2014, and 2016 respectively) alter this analysis. If anything, they show that the federal government is, in fact, rigorously conducting the regulatory review that *Speede* indicated satisfied the public's interest in oversight.

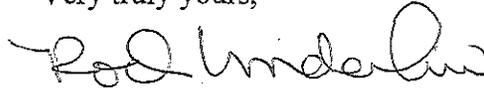
The fact that OHSU receives a substantial amount of public funding does not weigh heavily, if at all, in balancing the public's interest in this case. Much research at universities, both public and private, is publicly funded. This is no less true now than it was when the legislature chose to enact the faculty research exemption. Were we to conclude that public funding weighed heavily in this analysis, it would effectively write this exemption out of the public records law.

Although *Speede* was decided over almost 24 years ago it remains compelling persuasive authority, and we concur in its holding that the public interest does not require pre-publication disclosure of OHSU primate research videos.

ORDER

Accordingly, the petition is denied.

Very truly yours,

A handwritten signature in black ink, appearing to read "Rod Underhill". The signature is written in a cursive style with a large, looping initial "R".

ROD UNDERHILL

District Attorney

Multnomah County, Oregon