



MIKE SCHMIDT, District Attorney for Multnomah County

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April 7, 2023

VIA EMAIL ONLY

Ruth Kastner
ruthkastner@gmail.com

Robert Sinnott
Sr. Assistant County Attorney
robert.sinnott@multco.us

Re: Petition of Ruth Kastner seeking investigative records from Multnomah County Health Department

Dear Ms. Kastner and Mr. Sinnott:

On February 24, 2023, petitioner, Ruth Kastner, made a public records request to Multnomah County for: “records concerning any discussions and investigations undertaken in response to my complaint of October 18, 2022 (or thereabouts) concerning Dr. Mary Meadows' treatment of my daughter, [WH], at Mid-County Health Clinic during the summer of 2022.” The County denied this request on the basis that this was protected health information not subject to release under the public records law. The County cited multiple state and federal statutes in support of this claim. This petition ensued.

The County has provided us with the responsive records, which we have reviewed. For the reasons discussed below we agree with the County that these records are exempt from disclosure under Oregon’s Public Records Law.

DISCUSSION

A. Federal Law – ORS 192.355(8)

Health Insurance Portability and Accountability Act (HIPAA) of 1996, 42 USC § 1320d to 1320d-9, and its implementing regulations known as the Privacy Rule, 45 CFR Parts 160 and 164, prohibit disclosure of “protected health information.” ORS 192.355(8) incorporates federal confidentiality laws into the Oregon Public Records Law.

HIPAA’s implementing regulations define “protected health information” as health information, including demographic information, that:

- (1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and

(2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and

(i) That identifies the individual; or

(ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.

45 CFR § 160.103. *OHSU v. Oregonian*, 362 Or 68, 82 (2017).

In light of those provisions, we conclude that the requested record contains “protected health information” under HIPAA and the Privacy Rule. A patient may provide a written Release of Information (ROI) authorizing the release of HIPAA-covered material. The patient has not provided the County with an ROI that covers the records at issue in this petition.

Thus, HIPAA and ORS 192.355(8) provide sufficient basis to deny this petition in its entirety at this time. However, as petitioner has provided two ROIs from her adult daughter on related matters, and may well obtain an ROI that does satisfy HIPAA’s requirements in this matter, in the interest of efficiency we proceed to address the County’s other asserted claims of exemption.

B. Peer Review Privilege – ORS 41.675

ORS 41.675(2)-(3) creates a privilege protecting:

all oral communications or written reports to a peer review body, and all notes or records created by or at the direction of a peer review body, including the communications, reports, notes or records created in the course of an investigation undertaken at the direction of a peer review body.

ORS 41.675(1) defines “peer review body” to include any “medical group [...] in connection with [...] quality assurance, utilization review, credentialing, education, training, supervision or discipline of physicians or other health care providers

The purpose behind the Peer Review Privilege is to permit frank discussion and debriefing by a medical organization regarding the conduct of its staff to allow identification and resolution of problems. The Court of Appeals has characterized it as an “extensive privilege.” *Towner v. Bernardo*, 304 Or App 397, 419 (2020). Were such communications subject to public inspection or admissible as evidence in litigation, the utility of such introspection would be severely limited. As such, the legislature has created a privilege shielding such discussions.

Petitioner’s records request here specifically seeks “discussions and investigations under taken in response” to her complaint about Dr. Meadows’ professional work. These are precisely the communications that are covered by this privilege.

It is true that not all evidentiary privileges translate directly into exemptions under the public records law. See, e.g., *Petition of Schmidt*, MCDA PRO 16-27 (2016) (finding OEC 408 created a privilege but not an exemption). However, the Attorney General has considered this particular exemption and found that it does. *Petition of Joondeph*, Att’y Gen. PRO (Apr. 22, 1988). Guided by this decision and the Court of Appeals’ characterization of the privilege in *Towner*, we reach the same conclusion.

Having reviewed the records at issue, we conclude that they are privileged and exempt from disclosure. To the extent that any of the responsive communications stray from the core purpose of the Peer Review Privilege it is because they have overlapped into direct consultation with legal counsel, which is independently privileged. See ORS 40.225 (setting out the attorney-client privilege).

ORDER

Accordingly, the petition is denied.

Very truly yours,

A handwritten signature in black ink, appearing to read "Mike Schmidt", with a long horizontal stroke extending to the right.

MIKE SCHMIDT
District Attorney
Multnomah County, Oregon