



MICHAEL D. SCHRUNK, District Attorney for Multnomah County

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June 5, 2007

Anne Saker
Staff Writer
The Oregonian
1320 SW Broadway
Portland, OR 97201-3499

Janet Billups
Legal Counsel
Legal Department
Mail Code L585
OHSU
3181 SW Sam Jackson Park
Portland, OR 97239-3098

Re: Petition of Anne Saker on behalf of The Oregonian, received May 2, 2007 to disclose certain records of the Oregon Health & Science University.

Dear Ms. Saker and Ms. Billups:

BACKGROUND

On this public records petition, ORS 192.410 et. seq., petitioner Anne Saker for The Oregonian requests the District Attorney to order the Oregon Health & Science University (OHSU) and its employees or agents to produce a copy or copies of the following records:

- 1. a list of names of all the indigent persons whose bodies were donated to Oregon Health and Sciences University as required by Oregon Revised Statutes 97.170.**

Petitioner made her request in an April 3, 2007 letter to Janet Billups, Legal Counsel at OHSU. The request was denied in an April 6, 2007 letter in which Ms. Billups cited the Personal Privacy exemption and the protections of the Health Insurance Portability and Accountability Act (HIPAA) and the provisions of the State Vital Records Law. In her petition, Ms. Saker argued that “dead people have no legally protectible right of privacy for public disclosure of private facts” and that, in any case, disclosure would not constitute an unreasonable invasion of privacy. She rejected application of the federal HIPAA law on the basis that OHSU is not a covered entity. Finally, Ms. Saker contended that the State Registrar law “does not govern actions of OHSU and is not relevant to this debate.”

OHSU submitted a lengthy response to the petition explaining each claimed exemption and included an affidavit from the Demonstrator of Anatomy, Karmen L. Schmidt, Ph.D., a Professor of Medicine in charge of the OHSU Body Donation Program. Dr. Schmidt emphasized the considerations of confidentiality and privacy given to bodies received under the donation program, whether indigent or not. Ms. Billups argued that “respect, dignity, and privacy” should be afforded to the remains of all deceased and that disclosure of the names of indigent remains would be “highly offensive” to the loved ones of the deceased.

Ms. Billups provided a discourse on the statutes and regulations known collectively as HIPAA. Essentially, a covered entity may not disclose health information except as provided by the statutory or regulatory system. She asserted that OHSU is a covered entity “that must treat information about a person’s death as his or her past or present condition which, in turn, is health information. No information may be disclosed that identifies the individual.”

The Demonstrator of Anatomy noted in her affidavit that the “name of the decedent is provided to us and derived from the person’s death certificate.” OHSU argued that it is unlawful to permit inspection or disclose information from a death certificate. Ms. Billups asserted that ORS 432.121(2)(f) “only allows OHSU access to this information for the conduct of its official duties.”

Additional materials and arguments were submitted both by petitioner and Ms. Billups. We appreciate the patience and assistance of both parties to this petition. It has proved both complicated and difficult but we are comfortable in our conclusion that the names must be provided.

DISCUSSION

I. Personal Privacy Exemption

ORS 192.502(2) conditionally exempts:

Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if the public disclosure thereof would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance. The party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy.

“The purpose of this exemption is not to prevent disclosure of personal information, as such, but rather to protect privacy from unreasonable invasion.” Jordan v. MVD, 308 Or 433, 441 (1989). Only personal information that would constitute an unreasonable invasion of privacy if publicly disclosed is protected under this exemption. In Jordan, 308 Or at 442, the court noted that the trial court found that the affidavit filed in the trial court

...sufficiently established that disclosure to the requester would more likely than not unreasonably invade her privacy because providing the information would allow Jordan to harry her incessantly to the extent than an ordinary reasonable person would deem highly offensive.

In Guard Publishing Co. v. Lane School Dist., 310 Or 32 (1990), the Supreme Court commented on the Court of Appeal’s position that the test for whether information is personal under ORS 192.502(2) is “whether it normally would not be shared with strangers.” The Court of Appeals had applied that test in Guard Publishing Co. v. Lane School Dist., 96 Or App 463, 467 (1981) and held that one’s name is unquestionably information normally shared with strangers. In a footnote to its opinion, the Supreme Court noted:

In Jordan v. MVD, *supra*, we implicitly rejected this Court of Appeals test. The District Court did not seek review of the lower courts’ conclusion that it must disclose the replacement coaches’ names. However, because we hold that the District’s 1984 policy is not compatible with the disclosure statutes, we do not here decide whether a person’s name could ever be exempt from disclosure under ORS 192.502(2). 310 Or at 36, n4.

The Attorney General has taken the position that “[g]enerally, disclosure of a name itself would not constitute an unreasonable invasion of privacy.” Attorney General’s Public Records Manual, 2005, p. 63. However, the identities of candidates for university president were not disclosed in a 1988 Letter of Advice. “[A] person’s name may be exempt in certain contexts, due to a person’s desire for confidentiality to avoid stigmatizing or other undesired effect.” Attorney General’s Public Records Manual, 2005, E-6.¹

¹ “Release of the names would be contrary to the public interest since the potential for disclosure of such information may cause many or most qualified candidates to refuse to apply, making it more difficult for the state to recruit talented individuals to fill important offices.”

In a 1995 order, a CSD list of employees involved in a notorious case was found not exempt “because disclosure would not likely lead to harassment or physical harm of individuals named on the list.” Attorney General’s Public Records Manual, 2005, F-30. In a March 20, 2003 order, the Attorney General denied a petition for the names of individuals giving confidential information to DMV:

This office has concluded that normally, neither the name, home address nor telephone number of an individual is exempt on the basis of personal privacy because a person generally shares such information with other members of the public. However, we have also concluded that there are situations in which it can be established that such information is covered by this exemption.

This office agrees with the Attorney General that a name, no less than a home address or telephone number, is covered by the exemption. The first question then is whether petitioner has satisfied her burden that public disclosure of the names of the donated bodies would not constitute an unreasonable invasion of privacy.” ORS 192.502(2). We applaud OHSU’s position that remains in its possession “should have their privacy and dignity maintained.” In fact, Ms. Billups notes that the “Demonstrator teaches the students [to] respectfully honor *these people* from the first week of medical school” to the annual commemoration services.

Is it an unreasonable invasion of privacy to disclose that a particular person was donated to OHSU due to indigency or the inability of the State Medical Examiner to find family or friends? We conclude that it presumptively should be and is here. There may be circumstances where it is reasonable and even necessary to disclose information about any donated body to friends or relatives of the deceased. In fact, ORS 97.180 requires OHSU to retain a body for 30 days prior to use or dismemberment in order for any relative or friend to claim the deceased. It would also seem reasonable for OHSU to provide the location of the burial site of a donated body if inquiry is made by friends or family (ORS 97.200 requires OHSU to provide a decent burial of the remains after its educational use.)

The second requirement is that the public interest must require disclosure by clear and convincing evidence. Petitioner makes a strong and compelling case that the public interest favors disclosure to *The Oregonian*. There are historical problems in the medical and scientific field associated with the use of cadavers for dissection. Petitioner, an investigative reporter, seeks the information “to follow up on an earlier report regarding the remains of Robert Anheier, which was donated to OHSU under ORS 97.170.” Friends and family of the deceased were not identified by the Medical Examiner and the body was donated to OHSU.

It is the public system of body donation beginning with the medical examiner and ending with OHSU that is the focus of The Oregonian investigation. The Multnomah County Deputy Medical Examiners, pathology assistants and clerical staff are under the management jurisdiction of the District Attorney's Office. As such, this office is familiar with the incident reported by The Oregonian. Petitioner argues that an independent review of similar cases is necessary "to allow for a determination of what other problems may exist with the program at the state-sponsored university." Petitioner asserts that "The Oregonian is solely interested in examining whether the rights and interests of the individuals involved and their families were maintained." We agree that the public interest overrides the privacy interests of the donated bodies and that the exemption should not apply here.

II. Vital Records and Reports

ORS 192.502(9) exempts from disclosure any information that is confidential or privileged under any other Oregon law.

ORS 432.121, Disclosure and certification of records and reports, provides in part:

(1) To protect the integrity of vital records and vital reports, to ensure their proper use and to ensure the efficient and proper administration of the system of vital statistics, it shall be unlawful for any person to permit inspection of, or to disclose information from vital records or vital reports in the custody of the State Registrar of the Center for Health Statistics, county registrar or local registrar or to copy or issue a copy of all or part of any such record or report unless authorized by this chapter...

ORS 146.121 provides for the disposition of a body when the medical examiner investigates the death of a person whose body is not claimed by a friend or relative. The deceased is turned over to a funeral home which, in turn, contacts the Demonstrator of Anatomy pursuant to ORS 97.170. Ms. Billups explained that a tear-off second sheet carbon copy of the death certificate comes to OHSU from the funeral home. According to Ms. Billups, OHSU will not accept a body without the death certificate. The information from the death certificate is imported onto a database. The anonymity of the deceased is strictly maintained by the Demonstrator of Anatomy.

ORS 432.121 provides for disclosure by the State Registrar of vital records to local agencies such as OHSU (or the District Attorney's Office for that matter) upon request "solely for the conduct of official duties." It is an open question whether this provision would prevent a governmental agency from disclosing any of the contents of the vital record when deemed necessary. A resolution of that issue is not necessary.

ORS 432.307 outlines the role of the medical examiner and the funeral home in preparing the death certificate and filing it. Ms. Billups indicated that OHSU has been advised that the county registrar retains the death certificate for six months, after which time it is forwarded to the State Registrar. The statutory scheme for the disposal of a body under ORS 146.121 is independent of the maintenance of vital records.

It is clear that the copy of the death certificate received by OHSU is not one requested by OHSU under the provisions of ORS 146.121. The State Registrar is in no way involved in the transmittal of a copy of the death certificate by the funeral home to OHSU. The non-disclosure provisions of ORS 146.121 simply do not apply here.

III. HIPAA

ORS 192.502(8) exempts from disclosure any information that is exempt from disclosure under federal law. According to petitioner, the "Federal Health Insurance Portability and Accountability Act, 42 USC 1302(a), 42 USC 1320(d)-1320d8 prohibits OHSU from disclosing the decedent's protected health information."

The Demonstrator of Anatomy stated in her affidavit that they filed the appropriate HIPAA forms for every body received by their program. Ms. Billups explained in her May 15, 2007 follow-up letter that

HIPAA is not limited to information about health services that were *provided to* a person. Many people come to a covered entity without ever receiving health care services...information regarding the person's past, present or future condition is protected if it *relates to* the person, not just if the person is *provided with* health services.

We will accept the position of OHSU that it is a covered entity that provides health care. Further, the identification of an individual who is provided health care is protected health care information. And we will accept the notion that unless a health care institution is designated a "hybrid entity," the research, educational, and hospital services remain within the requirements of HIPAA. It does not follow, however, that the transmittal of a body to OHSU for purposes of educational study necessarily falls within the constraints of HIPAA.

It is not beyond the realm of possibility that a body reaches OHSU without ever having received recorded medical treatment, at least not in the United States. It is clear that the only "health" information OHSU receives from the death certificate is the cause of death. Placing the shroud of HIPAA over the name of a donated body seems not only unreasonable but nonsensical. The courts may see it differently.

ORDER

Accordingly, it is ordered that OHSU promptly disclose the records sought in the above petition. Disclosure of the documents ordered is subject to payment of the OHSU's fee, if any, not exceeding the actual cost in making the information available, consistent with ORS 192.440.

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael D. Schrunk", written over the typed name below.

MICHAEL D. SCHRUNK
District Attorney
Multnomah County, Oregon

NOTICE TO PUBLIC AGENCY

Pursuant to ORS 192.450(2), 192.460 and 192.490(3) your agency may become liable to pay petitioner's attorney fees in any court action arising from this public records petition (regardless whether petitioner prevails on the merits of disclosure in court) if you do not comply with this order and also fail to issue within 7 days formal notice of your intent to initiate court action to contest this order, or fail to file such a court action within 7 additional days thereafter.

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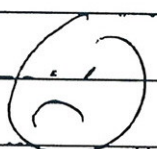
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FROM: J. Hoover

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