Brandon M. Thompson
Judge

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WASHINGTON COUNTY CIRCUIT COURT
150 North First Avenue
Hillsboro, OR 97124

December 1, 2023

OPINION AND ORDER

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Re: State v. Avery Bongiorno C160025CR

Findings and facts and conclusions of law:

This court finds itself in the unenviable position of having to have another hearing involving the Oregon Health Authority (OHA) and the actions of its employee Marisha L. Elkins. In this case, the court designated Alcohol and Drug Evaluation Screening Specialist (ADSS) of Washington County, Evaluation Services (ES), did not possess this defendant's screening file. OHA employees including Ms. Elkins were subpoenaed by the State of Oregon though the Washington County District Attorney's office to

determine how and why OHA came into possession of not only this defendant's individual ADSS file, but what this court has now learned are 178 boxes of files from Evaluation Services. A hearing on this issue was held on July 14, 2023. As with the last opinion, the For the Record (FTR) time stamp from the hearing is used to identify when statements were made.

Ms. Elkin's was the first witness called. She stated that the prior owner of Evaluation Services, Margaret Gorciak, sent the files to her at OHA because Ms. Gorciak stated she was moving out of state and was unable to maintain the records for the required retention period under OAR 415-054-0520(3). Ms. Elkins says the files first came to the Human Services Division where she works and then were transferred to archives. This happened at the end of 2021.

She was then asked about State's Exhibit #1 which is an email from Deanna Kemper, the current owner of Evaluation Services and one of the agency's ADSS's. Ms. Elkin's testified first she did not take this as a request for records either when she received it or while on the stand from OHA but a request to get records from Ms. Gorciak. FTR 1:16. She then stated that she understood this email as a question of whether OHA had agreed to take those files. She did not read this email as a specific request for records. FTR 1:17. Ms. Elkins went on to testify that she did not know how to identify what files were open without a list of names and she did not understand this email as a request to turn the records over to Ms. Kemper. *Id.* She understood this as a request of the records from Ms. Gorciak. *Id.* Ms. Elkins went on to testify that she did not take this as a request for specific files because there was no list of the files that were needed.

When asked how Ms. Kemper would know what files OHA possessed, Ms. Elkins testified that she assumed Ms. Kemper knew which files she was looking for and needed. FTR 1:18. When it was pointed out that Ms. Kemper requested all open files and files in warrant status Ms. Elkins again testified that her interpretation of this email was that Ms. Kemper was asking for files from Ms. Gorciak, not OHA. She then said she could have misunderstood the email but that it was not her interpretation that Ms. Kemper was asking her for files. *Id.*

When asked if she ever took steps to return files, her response was that she did not receive a list of the specific files that needed to be returned and if she had, she would have acted on that. FTR 1:19. When asked how Ms. Kemper could know what files OHA had or how many, Ms. Elkins continued to state she assumed that Ms. Kemper knew which files she was looking for. *Id.* When asked again about returning open or warrant files Ms. Elkins then testified that she did not believe she received anything but closed files. FTR 1:20. She then testified they have 178 boxes of files, and she did not know which files were open and which were closed. *Id.* She only thought OHA received closed files. FTR 1:21. When asked if a case in warrant status was open or closed, Ms. Elkins testified that would depend on whether it had been reported to the court whether the defendant completed treatment or not. *Id.*

Then the issue of Releases of Information (ROI) was discussed. Ms. Elkins testified that it was OHA's position that the files could not be returned to Evaluation Services unless the client signed an ROI for OHA to release these records. FTR 1:22-23. When asked about the deficiencies of the ROIs in the file, Ms. Elkins testified that the ROIs in the file did not provide OHA the ability to return the files to Evaluation Services. The ROIs allow for the treatment provider and the ADSS to share the records but not OHA. FTR 1:23. OHA is generally not named on any ROI. *Id.* When it was pointed out that OHA had no legal authority to possess these files, Ms. Elkins stated she "can't speak to this." FTR 1:23-24.

The court then asked questions about Ms. Kemper's emails that were a request for files. Again Ms. Elkins testified and confirmed that her answers were first: she did not see this as a request for files from OHA, but Ms. Gorciak and then, second, she did not see this as a request for files. When the court had Ms. Elkin's read her response into the record that described the process Ms. Kemper would have to go through to get the file back, Ms. Elkins still denied this email was a request for files because it was not a request for specific files. FTR 1:27-28. She then tried to clarify that her response was how to get records from OHA if and when they were needed. FTR 1:28. Then Ms. Elkin's testified that "I had not received any request for records prior to that email. So, when I read that, I... I read it as she had been requesting them from Margaret not from OHA." *Id.* (She being Ms. Kemper and Margaret being Ms. Gorciak).

Then questions were asked about the reference to OAR 415-054-0520(3) in her email, which is the retention requirement for an ADSS or a treatment provider to keep records. Ms. Elkin's says despite the title that says this applies to treatment providers, this OAR only applies to an ADSS. FTR 1:29. She goes on to explain that she believes the requirement for treatment providers is in another OAR. Ms. Elkins did agree that this OAR does not apply to OHA, it only applies to an ADSS. *Id.* When the court went on to point out in her email that the files are being held consistent with their policies and procedures but there were no OARs that allowed for this, Ms. Elkins responded this happened "in consultation with the Department of Justice." 1:30 FTR.

Ms. Elkins went on to describe a situation where another ADSS decided to literally throw away files, but after consulting DOJ, they laid out a plan for OHA to retain files for an ADSS who was not going to make their files available if the ADSS is unable or unwilling to maintain those records. FTR 1:30-1:31. When asked when did OHA make an offer to Ms. Gorciak, Ms. Elkins responded that OHA put together a "tool kit" for an ADSS who is discontinuing providing services which offers OHA taking control of files as an option. When asked how could OHA legally take control of these files, she responded "I can't speak to the legal authority, like I said it was in consultation with DOJ.. um.. but our intent was to ensure these records were accessible for the record retention period..."

Then Ms. Elkins is asked about 42 CFR claims in her email and the need for the client to sign a new ROI to return the records to ES, her only response was it was done in consultation with DOJ. FTR 1:33. When it was pointed out that OHA did not have a release to possess these records, but that there is already a release in the file that allows ES to have the records, Ms. Elkins was asked why couldn't OHA just give the files back, her response again was it was decided in consultation with DOJ.

On redirect, Ms. Elkins maintained the position that she did not understand that the email from Ms. Kemper was a request for the records from OHA. FTR 1:410-1:41. When asked who the attorney was at DOJ who advised Ms. Elkins, she claimed attorney client privilege. The state did not ask the court to order Ms. Elkins to disclose the name so this assistant attorney general's identity remains unknown to this court.

The next witness was Ms. Nicole Corbin Lawson. She was Ms. Elkins supervisor for at least four years, 2018-2023. She is aware OHA took possession of ES client files. Her understanding was that Ms. Elkins had requested recommendations from DOJ on what to do when an ADSS could not meet the record retention policy. She does not know what specific request was made to DOJ. She is not sure if Elkins or anyone else spoke to her before reaching out to DOJ. She believes these conversations occurred in 2019.

When the state asked her about her understanding of parameters of OHA having these files including who could access them, Ms. Corbin Lawson responded "[m]y understanding was that the DOJ attorney we spoke with recommended that OHA offer to take custody of files for a retiring ADSS who not able to maintain records for the retention policy." FTR 1:49. "And those files could then be accessed only by a request from the individual who was represented in the file. So, the individual who had a DUII with a HIPPA and 42 CFR compliant release of information." Id. The state then asked was it her understanding that ES could not access the files that came from ES once OHA had them. Ms. Corbin Lawson responded "correct, the records would be accessible, in my understanding, only as I just described" FTR 1:50. When asked why this roadblock existed, she responded she could not answer this question.

When asked if Ms. Elkins make her aware that ES was asking for some of these files back, Ms. Corbin Lawson testified she was not aware of this. She was asked if the reason a file could not be returned was because there was not a release of information in the file, she responded that was her understanding from DOJ. When asked if OHA attempted to get a release of information so they could legally possess these files, Ms. Corbin Lawson responded she was not aware of any attempt to do so.

The court then asked about Exhibit 2, which is an email from Ms. Gorciak that states she transferred the records to OHA per their policies and procedures. The specific question to Ms. Corbin Lawson was if there were written policies and procedures for this process, she stated that was a tool kit written by Ms. Elkins and Ms. Newton after consultation with DOJ.

On re-direct, the state asked about the email request Ms. Kemper made to get ES's files back. Ms. Corbin Lawson testified that the procedure outlined in the email was consistent with her understanding of the policy advice from DOJ. She was then asked the following "the policy that the original custodian of records would somehow need a second ROI more or less identical to the first one to get back files that they should rightfully have" Ms. Corbin Lawson responded, "that was her understanding." FTR 1:58.

The final witness was Keely West who is the custodian of records for OHA. There was a discussion of where the files are located and that she brought the specific file for this hearing. There was a long discussion about these files and how they were stored. What was important was the court asked her to open Mr. Bongorino's file and to read into the record the ROI. The title was read by the court, and it stated, "Authorization to Disclose, Receive and Use Protected information" and the entity that this authorization was given to was "Evaluation Services." FTR 2:10-211.

Applicable Law and Discussion:

The first place to start is with Ms. Elkins' email of December 23, 2021, which is Exhibit 1. It lays out most, but not all of the relevant law in this area, with which this court is very familiar. It first states that OHA is storing the files per the retention period "required in OAR 415-054-0520." OAR 415-054-0461 states that the purpose of this section of OHA's administrative rules is to be the "procedural rules [that] apply to Alcohol and other Drug Screening Specialists." This is consistent with the testimony of Ms. Elkins that these rules do not apply to OHA itself. The relevant section for records retention is in OAR 415-054-0520(3) and states "[i]ndividual records shall be kept for a minimum of seven years." Nowhere in this section is there a provision for anyone other than the ADSS who created the record for another entity to possess and store these records. OHS does not have the authority to possess or retain files under this subsection.

It is also of note that it would be impossible for the individual who signed a release with ES to know that their file was transferred to OHA without going through the entity who is supposed to have it, ES. Further, it is obvious that no burden should be on the individual whose file was transferred to OHA without their permission to have to track down who has their file in order to be able to access it.

Exhibit 1 then cites to 42 CFR Part 2 and states it "only allows records to be transferred to the new owner when the individual who is the subject of the record gives written consent to a transfer of the records." Now, assuming this was a correct statement of federal law, which, as noted below, it is not, then OHA cannot possess these records because the individual who is the subject of the record has not given consent to OHA to have these files. Even in this skewed world view, OHA is violating 42 CFR Part 2. Also, assuming this a correct statement of the law, the "tool kit" that OHA created, and that DOJ blessed must be illegal because again the subject of the record must give written consent and OHA does not have that for any of the files in the 178 boxes in their possession.

The actual law on this issue is in 42 CFR Part 2.19 and the relevant section reads as follows:

> § 2.19 Disposition of records by discontinued programs.
>
> (a) General. If a part 2 program discontinues operations or is taken over or acquired by another program, it must remove patient identifying information from its records or destroy its records, including sanitizing any associated hard copy or electronic media, to render the patient identifying information non-retrievable in a manner consistent with the policies and procedures established under § 2.16, unless:
>
> > (1) The patient who is the subject of the records gives written consent (meeting the requirements of § 2.31) to a transfer of the records to the acquiring program or to any other program designated in the consent (the manner of obtaining this consent must minimize the likelihood of a disclosure of patient identifying information to a third party); or
> >
> > (2) There is a legal requirement that the records be kept for a period specified by law which does not expire until after the discontinuation or acquisition of the part 2 program.

What is clear by the title of the section is that this only applies to records that were held by discontinued programs. In this case, Evaluation Services did not cease operations. The business, in its entirety, was sold to another individual and all the open files and the employees stayed with that existing business. This is not a discontinued program. Further, if you carefully read subsection (a) it says if a program is taken over or acquired by another program, so clearly, the way this is worded, it envisions a different company coming in and taking over or acquiring a program. It does not address a situation where a company is sold to another owner but continues to operate as the same business.

Even if the court is wrong about this section's application to ES, the fact remains that OHS still does not have any authority or standing to either take possession of these files or enforce this rule against ES. They cannot meet the requirements of Section (a)(1) and lawfully possess the 178 boxes of records they currently possess. For OHA to be able to possess these files, they would have to have a ROI in their name which would be impossible since it does not appear that any of the individuals whose files were transferred to OHA were ever made aware of this illegal transfer.

This brings us to perhaps the most absurd aspect of this situation that OHA has created by acting illegally. Ms. Elkins testified, and Ms. Corbin Lawson concurred, that they believe, based on advice from DOJ, the following absurdity: OHA cannot return the files they illegally possess because there is no release of information in the file from a person who does not know and did not consent to OHA taking possession of their protected health records from the former owner of ES despite there being a ROI from this person to ES allowing "Authorization to Disclose, Receive and Use Protected information" in their personal file.

As Ms. West read into the record, at least for Mr. Bongorino's file (and presumably all the rest) the release of information titled "Authorization to Disclose, Receive and Use Protected information" names Evaluation Services as the entity who is entitled to this information. At this moment in time, at least as far as this court is aware, the only entity who has a proper release for possession of Mr. Bongorino's file, or any other file in the 178 boxes that Ms. Gorciak gave to OHA is ES. OHA's position that ES cannot possess records where a release exists that says they are authorized to have the records is non-sensical.

Ms. Elkins' acknowledged in her testimony that ROIs in these instances allow treatment providers and ADSSs to share these records, but not OHA. She also said OHA is not normally named in an ROI. It is beyond question that OHA is violating both 42 CFR Part 2 and HIPPA by possessing these records. (Please refer to this court's opinion regarding OHA and Ms. Elkins' dated May 26, 2023, for a discussion on how HIPPA mirrors 42 CFR Part 2.)

Finally, we reach the other issue that this court must address. Ms. Elkins came into this court for a second time and lied under oath. It was clear from her shifting testimony that she knew what she had done was problematic. In relation to Exhibit 1, her testimony was first she thought this was a request to get files from Ms. Gorciak not OHA. Then she testified she did not see this as a request for files in general and finally that she did not see this a request for a specific file or files. Exhibit 1 speaks for itself. It outlines Ms. Kemper's efforts to get ES's files from Ms. Gorciak, who transferred them to OHA, describes the ones she is looking for (open and files in warrant status), asks under what authority is OHA keeping the files and asks how to get them back when they are needed as they should not have been removed in the first place. As it was pointed out to Ms. Elkins, how could Ms. Kemper send a list of the files she needs when 178 boxes were taken without her knowledge and no record of whose files were taken? Ms. Elkins cannot both claim she thought this was a request for files from Ms. Gorciak not OHA and then claim this was still not a request for specific files when the email is requesting how ES can obtain all open and warrant files and MS. Elkins responds with the process.

This court finds it troubling that a second hearing and a second opinion are necessary on this matter. Not only is this the second opinion this court has written ruling that OHA is violating the law and that Ms. Elkins' lied under oath, but there are also additional allegations in the media since this court's first opinion in May 2023, that a different division of OHA's Behavioral Health Division has violated Federal Law.

Order:

Due to OHA's continued inability to follow the law and tendency to make up their own rules as they go, the court orders the following:

1. OHA must go through all 178 boxes and determine which files are either open or are in warrant status. OHA will determine this file status by looking at the exterior label that includes the individuals name, date of birth and case number and then look the case numbers up in the court's computer system.
2. OHA **cannot** open the files to ascertain any information because they do not have a 42 CFR Part 2 or HIPPA ROI. If the court is apprised of an instance where any OHA employee opened a file to review information, it will result in a fine of $5,000 per instance.
3. All open and warrant files must be returned to Evaluation Services by February 1, 2024. Failure to do so will result in a fine of $5,000 per day.
4. OHA must return the remaining files to their proper custodian for the retention period described in OAR 415-054-0520(3). OHA has no legal authority to retain these files and failure to return them by November 15, 2023, will also result in a fine of $5,000 per day.

As in the previous cases, this court will have to open a new contempt case for this matter in order to monitor OHA's progress.

Sincerely,

Brandon M. Thompson
Circuit Court Judge
Washington County, Oregon