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October 28, 2008

SENT VIA E-MAIL AND REGULAR MAIL

William T. Harbaugh
University of Oregon
538 PLC
1285 University of Oregon
Eugene, OR 97403
(wtharbaugh@gmail.com)

Re: Petition for Public Records Disclosure Order:
Oregon University System Records ("OUS")

Dear Dr. Harbaugh:

This letter is the Attorney General's order on your petition for the disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. We received your petition on October 21, 2008. The underlying public records request was made on September 17, 2008. On that date, you asked Ryan Hagemann of the Oregon University System (OUS) to provide "copies of any public records, including but not limited to emails, memos, or letters which document [Mr. Hagemann's] efforts, as the OUS official responsible for public records requests" in responding to a public records request you had previously made. For reasons that follow, we respectfully deny your petition.

After some interim correspondence, Mr. Hagemann substantively responded to your September 17 request in correspondence dated October 20, 2008. The response stated that "copies of all the requested public records for which the Oregon University [System] does not claim an exemption are enclosed." Mr. Hagemann also explained that thirteen pages of email correspondence between him and the Oregon Department of Justice ("DOJ") attorneys had been withheld. Mr. Hagemann asserted that those emails are protected by the Lawyer-Client Privilege of ORS 40.225, which is incorporated as an exemption to the Public Records Law by virtue of ORS 192.502(9). See ATTORNEY GENERAL'S PUBLIC RECORDS MANUAL (2008) ("MANUAL") at 86.

Also on October 20, and just prior to Mr. Hagemann's response to your request, you had petitioned our office for an order requiring disclosure of all records responsive to your September 17, 2008 request. In light of Mr. Hagemann's October 20, 2008 response, you sent an email on October 20, 2008 stating, "I consider this request satisfied and I withdraw the petition for these documents I made earlier today."

The next day, however, you filed a petition for an order compelling Mr. Hagemann to disclose the records that were withheld on the basis of the Lawyer-Client privilege. In your petition, you expressed doubt that communications between Mr. Hagemann and DOJ could be protected by the Lawyer-Client privilege, in light of Mr. Hagemann's status as a Special Assistant Attorney General ("SAAG").

We have been provided with copies of the records in question. After reviewing them, we have determined that five of the pages are not responsive to your request – that is, they do not document efforts by Mr. Hagemann to respond to your earlier request for public records, or even refer to such efforts. Mr. Hagemann has concurred with this assessment. As a result, pages 3, 5, 8, 9 and 10 of the packet of documents Mr. Hagemann provided to us are not subject to an order directing their disclosure, regardless of whether they are protected by the Lawyer-Client privilege. We deny your petition as to those documents on the basis that the records are not, in fact, responsive to your public records request.

We turn to the remaining pages, numbered 1, 2, 4, 6, 7, 11, 12 and 13 in the packet we received from Mr. Hageman. Mr. Hagemann has informed us that he will provide you with redacted copies of those pages. Your petition with respect to the materials disclosed by Mr. Hagemann is denied as moot. The sole question remaining before us is whether the redacted material is exempt from disclosure under the public records law. We conclude that the material is exempt, and we consequently deny your petition as to the redacted material in those pages.

The Public Records Law confers a right to inspect any public records of a public body in Oregon, subject to certain exemptions and limitations. ORS 192.420. Among the statutory exemptions is ORS 192.502(9)(a), which applies to "records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law." In this case, the asserted basis for the redactions in the documents provided to you by Mr. Hagemann is the Lawyer-Client privilege. Although ORS 192.502(9)(b) establishes some circumstances in which the Lawyer-Client privilege does *not* operate to exempt disclosure, those circumstances are not present here; ORS 192.502(9)(a) thus fully incorporates the Lawyer-Client privilege for purposes of your petition. *See generally*, MANUAL at 86-87. As a result, the determinative issue is whether the redacted material is, in fact, protected by the Lawyer-Client privilege.

The Lawyer-Client privilege applies to "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client." ORS 40.225(2). Covered communications may be:

> (a) Between the client or the client's representative and the client's lawyer or a representative of the lawyer;

(b) Between the client's lawyer and the lawyer's representative;

(c) By the client or the client's lawyer to a lawyer representing another in a matter of common interest;

(d) Between representatives of the client or between the client and a representative of the client; or

(e) Between lawyers representing the client.

ORS 40.225(2). A communication is confidential when it is not intended to be disclosed to third persons. See Public Records Order, September 5, 2000, Riley, at pages 2-3.

We begin by disposing of your unfounded objection that Mr. Hagemann cannot enjoy the privilege because he is a SAAG. First, Mr. Hagemann may enjoy the privilege when he acts as Secretary for the State Board of Higher Education. Mr. Hagemann represents the client, OUS, when he acts in that capacity. Second, Mr. Hagemann may also participate in privileged communications when he acts as a SAAG. The privilege explicitly extends to communications "[b]etween lawyers representing the client." ORS 40.225(2)(e). We reject your suggestion that Mr. Hagemann's communications with DOJ attorneys cannot be protected by the Lawyer-Client privilege.

If the redacted materials are "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client," then the materials are protected by the Lawyer-Client privilege. By extension, they would also be exempt from disclosure under the Public Records Law. Mr. Hagemann confirmed that the redacted portions were not intended to be disclosed to any third party. He also indicated that the redacted portions contained communications made for the purpose of facilitating legal services, an assertion which our review confirms. The redacted portions of the documents: (a) directly request legal services; (b) directly perform legal services; or else (c) provide information useful as context to facilitate the provision of professional legal services. In short, all of the redacted portions of the documents appear to us to constitute "confidential communications made for the purpose of facilitating the rendition of professional legal services" for OUS. It follows that the redacted material falls within the scope of the Lawyer-Client privilege. That, in turn, means that the redacted materials are exempt by operation of ORS 192.502(9).

For the reasons described above, your petition is respectfully denied.

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

DM1095393
c: Ryan Hagemann