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April 24, 2013

Les Zaitz
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Re: Petition for Public Records Disclosure Order
Oregon Department of Corrections
DOJ File No. 291020-GA0036-13

Dear Mr. Zaitz,

This letter is the Attorney General's order in response to your petition asking our office to order the Oregon Department of Corrections (ODOC) to disclose a public record you requested. In particular, you seek a report authored by Assistant Attorney General Steven Krohn pertaining to Mitch Morrow, a high-level manager at the Oregon Department of Corrections. You note that an earlier criminal investigation developed information suggesting that Mr. Morrow may have used "improper" influence in securing employment for his son at Oregon Corrections Enterprises.

The Oregon Public Records Law, ORS 192.410 to 192.505, provides that "[e]very person has a right to inspect any public record of a public body in this state, except as otherwise expressly provided by ORS 192.501 to 192.505." ORS 192.420(1). Exemptions from disclosure are construed narrowly, meaning that "if there is a plausible construction of a statute favoring disclosure of public records, that is the construction that prevails." *Colby v. Gunson*, 224 Or 666, 676 (2008). A public body that asserts a statutory exemption from disclosure has the burden of demonstrating that the law permits the material in question to be withheld from public disclosure. ORS 192.450(1); ORS 192.490(1).

In denying your request, ODOC asserted two exemptions from disclosure. First, ODOC asserted that the report is exempt from disclosure pursuant to the exemption for "[r]ecords of a public body pertaining to litigation to which the public body is a party if the complaint has been filed, or if the complaint has not been filed, if the public body shows that such litigation is reasonably likely to occur." ORS 192.501(1). Second, ODOC asserted that the report is subject

to the lawyer-client privilege of ORS 40.225 and thus exempt from public disclosure pursuant to the statutory exemption for "[p]ublic records or information * * * otherwise made confidential or privileged under Oregon law." ORS 192.502(9)(a). We conclude that the report you requested is protected by the lawyer-client privilege and exempt from disclosure under ORS 192.502(9)(a). We further conclude that the statutory provision requiring disclosure of factual information from privileged documents is inapplicable in this case. Because we conclude that ORS 192.502(9)(a) exempts the report from disclosure, we do not address whether the document is also exempt pursuant to ORS 192.501(1).

The report is protected by the lawyer-client privilege.

The lawyer-client privilege of ORS 40.225 provides that "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client." The privilege applies to communications "between" individuals in four statutorily-specified circumstances and to communications "by the client or the client's lawyer to" another lawyer when legal interests are aligned. ORS 40.225(2).

As previously noted, the document you requested was created by Assistant Attorney General Steven Krohn. As your petition indicates, it was delivered to Michael Jordan, Director of the Department of Administrative Services (DAS), on April 8, 2013. Mr. Krohn is an attorney in the Labor & Employment Section of the General Counsel Division of the Department of Justice. Lawyers in that section routinely give advice to state agencies regarding personnel matters. They are not prosecutors in the Criminal Justice Division. Meanwhile, the Department of Administrative Services houses a Human Resources Office (DAS-HR) that provides statewide support to agencies on HR matters. The Oregon Department of Justice provides legal advice and other legal services to state agencies, including DAS-HR. ORS 180.060. In short, the relationship between Mr. Krohn and Mr. Jordan is a relationship between a lawyer and client. DOJ also acts as attorneys for ODOC with regard to personnel matters. Indeed, there is no meaningful separation between DAS-HR and ODOC in the context of this relationship. Both are arms of the state, and both are effectively the "clients" of the Attorney General and the Department of Justice. *See* ORS 180.060, 180.210 and 180.220.

We also readily conclude that the purpose of the communication was to facilitate the provision of professional legal services. The Director of DAS sought input from the state's labor and employment attorneys regarding a state employee about whom a criminal investigation had uncovered potentially concerning information. The report of the attorney in response to this request clearly constitutes a communication "for the purpose of facilitating the rendition of professional legal services." As a result, we conclude that the report is privileged.

Your petition does not generally dispute this conclusion. But we understand you to make two arguments in support of your contention that we should nonetheless order the document to be disclosed. First, in describing ODOC's statements related to the subject of the report, you appear to suggest that ODOC has waived the privilege. Second, you argue that ORS 192.502(9)(b) requires the disclosure of factual information in the report notwithstanding the fact that the report

is privileged.

The privilege has not been waived.

The lawyer-client privilege, like other evidentiary privileges, is waived if "A person upon whom ORS 40.225 to 40.295 confer a privilege * * * voluntarily discloses or consents to disclosure of any significant part of the matter or communication." Your petition indicates that, on behalf of ODOC, Elizabeth Craig made an official statement concerning the matter:

> This inquiry found no facts that would support a conclusion that DOC Deputy Director Mitch Morrow took any actions that were in violation of DOC/OCE policy with regard to his son's employment.

We conclude that this statement does not constitute a waiver of the privilege. We note that Ms. Craig's statement does not purport to report any finding communicated in the report. We assume for the sake of argument that if Ms. Craig's statement conveyed information about the content of the report it could constitute a waiver of the privilege. In our view, Ms. Craig's statement does not cross that threshold. Instead of conveying information about the content of the report, the statement seems to us to relate ODOC's opinion regarding the report. So far as we have been able to determine, ODOC's statements have consistently described the decisions of ODOC and DAS without communicating information about the substantive content of DOJ's report. We conclude that the privilege has not been waived.

The requirement to disclose factual information from privileged documents does not apply under the circumstances.

In addition to suggesting that the privilege has been waived, you explicitly argue that ORS 192.502(9)(b) requires ODOC to disclose factual information from the report regardless of privilege. That provision does create such a requirement under certain circumstances:

> Subject to ORS 192.423, [the disclosure exemption for privileged materials] does not apply to factual information compiled in a public record when:
>
> (A) The basis for the claim of exemption is ORS 40.225;
>
> (B) The factual information is not prohibited from disclosure under any applicable state or federal law, regulation or court order and is not otherwise exempt from disclosure under ORS 192.410 to 192.505;
>
> (C) The factual information was compiled by or at the direction of an attorney as part of an investigation on behalf of the public body in response to information of possible wrongdoing by the public body;
>
> (D) The factual information was not compiled in preparation for litigation, arbitration or an administrative proceeding that was reasonably likely to be initiated or that has been initiated by or against the public body; *and*
>
> (E) The holder of the privilege under ORS 40.225 has made or authorized a public statement characterizing or partially disclosing the factual information compiled by or at the attorney's direction.

(Emphasis added). If even one of the five listed circumstances is not present, the obligation to disclose factual information from privileged documents does not arise.

In this case, we conclude that subparagraph (D) is not present and therefore the obligation to disclose the factual information does notarise. We understand from ODOC and DAS that, at the time Mr. Jordan asked DOJ to conduct an additional inquiry and report to him on the results of that inquiry, DAS and ODOC believed that litigation, arbitration or administrative proceedings were "reasonably likely to be initiated" and that the information compiled by DOJ was compiled in preparation for such proceedings. Namely, given the information uncovered in the prior criminal investigation, DAS and ODOC anticipated that employment action, a referral to the ethics commission, or other action was a "reasonably likely" outcome. In light of the nature of the information uncovered by the criminal investigation and the position Mr. Morrow holds at ODOC, we think that expectation was a reasonable one. Because all five of the requirements of subparagraphs (A) through (E) must be present to trigger the requirement to disclose factual information from privileged communications, our conclusion that the requirement of subparagraph (D) is not present here means that ODOC is not required to disclose any part of the privileged communication.

Conclusion

We conclude that the report you have requested is a privileged communication between state officials and a DOJ attorney acting as their lawyer. So far as we are aware, state officials have not made any statements that would waive that privilege. And because the document *was* "compiled in preparation for litigation, arbitration or an administrative proceeding that was reasonably likely to be initiated," ORS 192.502(9)(b) does not require disclosure of significant facts from the report. As a consequence, your petition is respectfully denied.

Sincerely,

MARY H. WILLIAMS
Deputy Attorney General

MCK:bwl/4151002-v1

c: Colette Peters, DOC