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July 16, 2015

SENT VIA EMAIL ONLY
hborrud@eomediagroup.com

Hillary Borrud
1400 NE Broadway Street
Salem OR 97302

Re: Petition for Public Records Disclosure Order
Oregon Department of Energy
DOJ File No. 330020-GA0104-15

Dear Ms. Borrud:

This letter is the Attorney General's order on your petition for public records disclosure under the Oregon Public Records Law, ORS 192.410, *et seq.* Your petition, which we received on July 6, 2015, asks the Attorney General to order the Oregon Department of Energy (ODOE) to provide you with a copy of the Oregon Department of Justice opinion provided to ODOE regarding transfers and energy program credits (the DOJ advice memo). You agreed to extend the deadline for issuance of this order from July 13 to July 16, 2015, and we appreciate your cooperation in that regard. For the following reasons, we respectfully deny your petition.

The Public Records Law confers a right to inspect or copy any public record of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420; ORS 192.430. Any person denied the right to inspect or copy any public record of a state agency may petition the Attorney General to review the public record to determine if it may be withheld from public inspection. ORS 192.450(1). The Public Records Law is primarily a disclosure law, not a confidentiality law. The public body has the burden of demonstrating that withholding a requested public record from inspection is permitted by the Public Records Law. ORS 192.450(1).

On June 30, 2015, you requested that ODOE provide you with the DOJ advice memo. ODOE responded the same day, declining to provide you with the memo. We have conferred with Rachel Wray, Associate Director, Communications, of ODOE, who advises us that ODOE declined to provide the memo as a lawyer-client privileged communication.

You now ask the Attorney General to order ODOE to provide you with the DOJ advice memo. You do not dispute that the memo is a lawyer-client privileged communication, but you ask the Attorney General to order its disclosure "if [the Attorney General] determines that ODOE has waived privilege on this record by providing it to other parties." For the reasons that follow, we conclude that the DOJ advice memo is a lawyer-client privileged communication and that ODOE has not waived the privilege.

ORS 192.502(9)(a) exempts from disclosure "[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law." 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." Thus, a public body may decline to disclose communications subject to the lawyer-client privilege. *See also, e.g.*, *Port of Portland v. Ore. Center for Environ. Health*, 238 Or App 404, 409, 243 P3d 102 (2010), *rev den*, 350 Or 230 (2011) (ORS 192.502(9)(a) encompasses lawyer-client privileged communications); *Klamath County School Dist. v. Teamey*, 207 Or App 250, 259, 140 P3d 1152, *rev den*, 140 P3d 1152 (2006) (same). Under ORS 40.280, the holder of a privilege waives the privilege if the holder "voluntarily discloses or consents to disclosure of any significant part of the matter or communication."

To address your petition, we have reviewed the DOJ advice memo. The memo is a confidential communication from DOJ to ODOE responding to a request for legal advice. Accordingly, it is subject to the lawyer-client privilege.

We have also consulted with Assistant Attorney-in-Charge Melisse Cunningham, a DOJ contact counsel for ODOE; Ms. Wray; Anthony Buckley of ODOE; Deanna Mack of the Oregon Department of Revenue (DOR); and Derrick Gasperini of DOR. The DOJ advice memo has been treated as confidential legal advice within those agencies. The memo has not been circulated outside of those client agencies, nor has the substance of the legal advice contained in the memo been disclosed outside the client agencies. We conclude that ODOE has not disclosed the memo or a significant part in such a way as to waive the lawyer-client privilege.

Accordingly, the DOJ advice memo is exempt from disclosure under ORS 192.502(9)(a), and, for that reason, we respectfully deny your petition.

Sincerely,

FREDERICK M. BOSS
Deputy Attorney General

LEK:tmt/6651205
cc via email only:
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Anthony Buckley, ODOE