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July 15, 2015

SENT VIA EMAIL ONLY
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Jon Bial, Staff Attorney
Oregon Public Broadcasting
7140 SW Macadam Avenue
Portland, OR 97219

Re: Petition for Public Records Disclosure Order
Oregon Department of Corrections
DOJ File No. 291011-GA0101-15

Dear Mr. Bial:

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 June 26, 2015, asks the Attorney General to order the Oregon Department of Corrections (ODOC) to provide you with a copy of ODOC's report of its internal investigation into the death of Michael Hagen (the investigative report). Mr. Hagen died while in the custody of Snake River Correctional Institution. You agreed to extend the deadline for issuance of this order from July 6 to July 15, 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 generally 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 May 1, 2015, Amelia Templeton of Oregon Public Broadcasting requested the investigative report from ODOC. On May 11, 2015, Marica Ventura, Legal Coordinator for

ODOC, denied Ms. Templeton's request. Ms. Ventura explained the reason for the denial: "This internal investigative report is subject to the attorney-client privilege codified in ORS 40.225, and is therefore exempt from disclosure under ORS 192.502(9)."

You now ask the Attorney General to order ODOC to provide you with a copy of the investigative report. You contend that ODOC lacks legal justification for withholding disclosure. You contend that ODOC may not rely on lawyer-client privilege to exempt the investigative report from disclosure because (1) the report was not intended to be kept confidential, (2) ODOC's purpose in creating the report was to prevent future incidents, not to facilitate the provision of legal services, and (3) the report was not created for ongoing or likely litigation. Alternatively, you contend that, even if the investigative report was initially a privileged lawyer-client communication, ODOC has waived the privilege. Finally, you contend that ODOC should not withhold the report because the public interest in disclosure outweighs the public interest in nondisclosure. We respectfully reject those arguments, for the reasons that follow.

The report is a confidential communication made for the purpose of facilitating legal services.

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). In light of the strong policy favoring disclosure, exemptions from the Public Records Law generally are narrowly construed. *E.g.*, *Port of Portland*, 238 Or App at 409. On the other hand, the lawyer-client privilege promotes the full disclosure of information by clients to their lawyers by protecting that communication and advances the public interest in the observance of law and administration of justice. *Id.; see also Teamey*, 207 Or App at 261 (lawyer-client communication exemption is applied neither narrowly or broadly; if the requirements of ORS 40.225 are met, the exemption applies).

We have conferred with Senior Assistant Attorney General Jefry Van Valkenburgh, Oregon Department of Justice (DOJ) contact counsel for ODOC. He described the circumstances leading to the creation of the investigative report. Through communication addressed to ODOC Inspector General Leonard Williamson, Mr. Van Valkenburgh requested that Mr. Williamson's office conduct an internal investigation of the incident leading to Mr. Hagen's death and provide Mr. Van Valkenburgh with a written report. Mr. Van Valkenburgh was concerned that ODOC and ODOC officials might be exposed to potential suit and liability arising from the incident; he accordingly requested the report in anticipation of litigation and to assist him and other DOJ lawyers in providing legal advice and services. Mr. Van Valkenburgh advises us that ODOC prepared the report as he had requested, and that he and other DOJ

lawyers in fact used it to provide legal advice and services, including in connection with litigation that arose from this incident. We have also conferred with Mr. Williamson, who advises us that, once he received the report, on Mr. Van Valkenburgh's advice, he distributed it only to a very small group of top-level managers within ODOC, after receiving Mr. Van Valkenburgh's approval of those recipients. Finally, we have conferred with Betty Bernt, ODOC Communications Manager, who advises us that she has never had a copy of the report and has not seen it. In light of those circumstances, the investigative report appears to be a confidential lawyer-client communication within the meaning of ORS 40.225 and is therefore exempt from disclosure under ORS 192.502(9). *See Klamath County School Dist.*, 207 Or App at 261-62 (concluding that reports of investigation carried out at the direction of a lawyer in order to facilitate his rendition of legal advice were confidential communications to which the lawyer-client privilege applied).

You contend, however, that—for three reasons—the investigative report was not a confidential lawyer-client communication. First, you contend that ODOC did not intend that the report be kept confidential. In support of that contention, you rely on an email message from Ms. Bernt, to Ms. Templeton.[1] In your view, that email establishes that the investigative report was "created for multiple DOC parties." In addition, you contend that the email establishes that the investigative report was later shared "throughout" DOC and that facts from the report were shared to the public. In your view, that later sharing suggests that the investigative report was not initially intended to be kept confidential.

In the email, Ms. Bernt states that DOC "completed a comprehensive review" of the incident leading to Mr. Hagen's death. She also states that, as a result of the review, ODOC made changes in operations. Finally, she states that the review revealed no evidence of malicious intent on the part of ODOC staff. Thus, the email refers to a review process, but does not refer directly to the investigative report. Nor does the email establish that the investigative report was shared within ODOC beyond the extent necessary to facilitate the provision of legal services. As to the public, the email establishes that Ms. Templeton and Ms. Bernt discussed the review process, at least one conclusion that resulted from the process, and the kind of changes that were made after the review process (without specifying what the changes were). Even assuming for the sake of argument that Ms. Bernt mentioned the investigative report to Ms. Templeton, we disagree that the communication between Ms. Bernt and Ms. Templeton undermines the conclusion that the investigative report was not initially intended to be kept confidential.

Second, you contend that the Bernt email establishes that the investigative report was created "both as part of an internal investigation and to provide advice for avoiding future incidents." The email does not discuss the reason why the investigative report was created. To

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[1] You have also submitted an audio clip of material aired on OPB. The clip primarily consists of a conversation between Ms. Templeton and OPB staff member Kate Davidson. In the clip Ms. Templeton recounts information gleaned from lawsuits filed in connection with Mr. Hagen's death. Ms. Templeton also recounts statements of Ms. Bernt. The clip also includes a recording of a statement made by Ms. Bernt. The audio clip is consistent with the Bernt email and does not include any pertinent information that is not in the email. Accordingly, when we refer to "the Bernt email" in the remainder of this order, we refer to the information encompassed in both the email and the audio clip.

the extent that the email supports an inference that the investigative report led to changes in operations, that does not undermine the conclusion that the report was created to facilitate legal services.

Third, you contend that the investigative report was not commissioned at the request of an attorney for the purpose of ongoing or likely litigation and, for those reasons; it is not a privileged lawyer-client communication. As noted above, Mr. Van Valkenburgh requested the report in anticipation of litigation. (To the extent that you suggest that, in the context of a public records request, the lawyer-client privilege applies only to communications made in ongoing or likely litigation, the Court of Appeals has rejected that argument. *Klamath County School Dist.*, 207 Or App at 259.)[2]

In sum, the investigative report is a confidential lawyer-client communication and, consequently, exempt from disclosure under ORS 192.502(9).[3]

ODOC has not waived the lawyer-client privilege.

You alternatively contend that ODOC has waived the lawyer-client privilege by disclosing the investigative report inside and outside of ODOC. 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." For the following reasons, we conclude that ODOC has not waived the privilege.

Again relying on the Bernt email, you contend that multiple officials within ODOC received the report and that Ms. Templeton obtained knowledge of the report and its content. As noted, the email does not establish that the investigative report was shared within ODOC beyond the extent necessary to facilitate the provision of legal services. Assuming that Ms. Bernt mentioned the report to Ms. Templeton, there is no indication that Ms. Bernt disclosed its content to Ms. Templeton. Instead she mentioned the review process, a conclusion that was made after the review process, and the kinds of changes that were made after the review process. As noted above, Ms. Bernt has never had or seen a copy of the report. And the statements she made regarding the review process and subsequent events do not constitute a disclosure of the report or any part of it. *See State ex rel OHSU v. Haas*, 325 Or 492, 511, 942 P2d 261 (1997) (answering questions that do not call for revelation of the content of a report did not disclose privileged material in the report).

You also contend that ODOC waived the privilege by disclosing the investigative report to the Malheur County District Attorney's office. You believe that the District Attorney used the report in grand jury proceedings involving the prisoner involved in Mr. Hagen's death. We have conferred with Mr. Williamson, who advises us that ODOC did not share, or authorize sharing, the investigative report with the Malheur County District Attorney. Mr. Van Valkenburgh

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[2] To the extent that you suggest that the litigation exemption in ORS 192.501(1) would not apply here, we need not resolve that question, because we conclude that the investigative report is exempt under ORS 192.502(9).

[3] In some circumstances, ORS 192.502(9)(b) requires disclosure of factual information within lawyer-client privileged communications. We conclude, however, that those circumstances do not exist here.

confirms that he did not share the investigative report with the Malheur County District Attorney. We have also conferred with Malheur County Deputy District Attorney Erin Landis. Mr. Landis informed us of the following: He has no knowledge of the report in question, and he does not believe that he presented it as evidence in the grand jury proceeding. Moreover, while Mr. Landis generally does not disclose evidence presented to a grand jury (its proceedings being secret), anything that he did present to the grand jury in this matter would have been provided to the defense attorneys.

The lawyer-client privilege may be asserted against a public records request without public-interest balancing.

Finally, you contend that ODOC should not withhold the report because the public interest in disclosure outweighs the public interest in nondisclosure. As the Oregon Court of Appeals has observed:

> "Unlike other provisions in ORS 192.501 and ORS 192.502, which expressly require courts to balance confidentiality and public interest, the [lawyer-client privilege exemption] applies without regard to such considerations. * * * [T]he statute is clear on its face: if the requirements of [ORS 40.225] are satisfied, the [lawyer-]client privilege applies."

Klamath County School Dist., 207 Or App at 260-61, (footnotes omitted). Although ODOC could consider your public interest arguments in deciding whether to waive the privilege and disclose the investigative report to you, we are without authority to balance the competing interests in considering your petition.

For the reasons expressed above, we conclude that the investigative report is a confidential communication that was created for the purpose of facilitating legal service, that ODOC has not waived the lawyer-client privilege for that communication, and that the Public Records Law does not require balancing of competing interests in the context of a lawyer-client privileged communication. Therefore, ODOC lawfully relied on ORS 192.502(9) to deny your public records request, and we respectfully deny your petition.

Sincerely,

FREDERICK M. BOSS
Deputy Attorney General

LEK:tmt/6628823
cc via email only:
Leonard Williamson, Inspector General, ODOC