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April 4, 2011

Marc Abrams
President, OAJA
SENT VIA EMAIL ONLY to marc.abrams@doj.state.or.us

Re: Petition for Public Records Disclosure
Oregon Department of Justice Records
DOJ File No. 137048GG0004-11

Dear Mr. Abrams:

You have requested that the Attorney General direct Department of Justice (DOJ) staff to provide you with a copy of a particular investigative report, which you refer to as the "Second Sue Wilson Report." Ms. Wilson did prepare such a report relating to the Trial Division of the Department of Justice. You had requested the report from Rebecca Stutzman, and your request was denied. Your email of March 28, 2011 was "a formal appeal" of that denial under ORS 192.450. This letter constitutes the Attorney General's order with respect to your petition. For the reasons that follow, your petition is respectfully denied.

The Public Records Law confers a right to inspect records of Oregon public bodies, subject to certain exemptions and limitations. *See* ORS 192.420. Any person who is denied the right to inspect or receive a copy of any public record of a state agency may petition the Attorney General to review the record and determine if it may be withheld. ORS 192.450(1). The law favors disclosure, and agencies must show that there is a proper basis if records are withheld. *See, e.g.*, ORS 192.490(1).

We have reviewed the report that you requested, and the circumstances surrounding the preparation of that report have been reviewed by Attorney-in-Charge Denise Fjordbeck of DOJ's Appellate Division. Based on that review, we have determined that the report you have requested is protected by the attorney-client privilege. It is therefore exempt from disclosure under ORS 192.502(9)(a).

ORS 192.502(9)(a) establishes an exemption for "[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law." We have previously ruled that this exemption incorporates the various privileges contained in the Oregon Evidence Code, including the lawyer-client privilege, ORS 40.225. In a previous decision, we held that an investigative report prepared at the behest of a DOJ attorney was protected from disclosure by the lawyer-client privilege. The report was prepared as part of the legal services provided by DOJ, and the agency receiving the report had not waived the attorney-client privilege with respect to the subject matter of the report.[1]

The same reasoning applies in this case. The requested report was prepared by Susan Wilson, who was originally hired by DOJ to conduct a different investigation. The report was prepared at the request of Deputy Attorney General Mary Williams and Senior Assistant Attorney General Donna Bennett in anticipation of litigation regarding issues that were not known to DOJ at the time Ms. Wilson commenced her original investigation. Applying the analysis we have previously applied to investigation reports prepared for litigation at the behest of a DOJ attorney, the report you request is protected by the attorney-client privilege and is not subject to disclosure under the Public Records Law.

In reaching this conclusion, we have specifically considered ORS 192.502(9)(b).[2] Under that provision, factual information that would otherwise be covered by the attorney-client privilege is nonetheless subject to disclosure if each of five listed criteria is met. Among the criteria for disclosure is that "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." We have concluded that the factual

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1 Public Record Order, July 6, 1982, Zaitz.

2 That statute provides:

> [ORS 192.502(9)(a)] does not apply to factual information compiled in a public record when:
>
> (A) The basis for the claim of exemption is [the lawyer-client privilege];
>
> (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 [Oregon's Public Records laws];
>
> (C) The factual information was compiled by or at the direction of an attorney as part of an investigation on behalf of a 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 [client] has made or authorized a public statement characterizing or partially disclosing the factual information compiled by or at the attorney's direction.

information contained in Ms. Wilson's report was prepared for litigation that is reasonably likely to be initiated by or against DOJ. Further, no statement has been made by DOJ characterizing or partially disclosing the factual information, and DOJ has not waived its privilege. Thus, the exception created by ORS 192.502(9)(b) does not apply.

It follows that Ms. Wilson's report remains protected from mandatory public records disclosure by ORS 192.509(9)(a). The fact that DOJ has not made a public statement characterizing the facts in the investigative report compels the same conclusion. Therefore, we respectfully deny your petition.

Sincerely,

MARY H. WILLIAMS
Deputy Attorney General