ELLEN F. ROSENBLUM
ATTORNEY GENERAL

FREDERICK M. BOSS
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

Justice Building
1162 Court Street NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4400

March 24, 2017

VIA EMAIL ONLY: betsyhammond@oregonian.com and joan.stevens-schwenger@state.or.us

Besty Hammond
The Oregonian
1500 SW First Ave
Portland, OR 97215

Joanie Stevens-Schwenger
Oregon State Lottery
PO Box 12649
Salem OR 97309

Re: Petition for Public Records Disclosure Order
Oregon State Lottery
DOJ File No. 177001-GA0073-17

Dear Ms. Hammond:

This letter is the Attorney General's order responding to Ms. Hammond's March 16, 2017, petition for disclosure under the Oregon Public Records Law, ORS 192.410 to 192.505.[1] The petition asks the Attorney General to order the Oregon State Lottery to produce "[a]ll records . . . related to examining the conduct of former Lottery deputy director Roland Iparraguirre after allegations were made that [he] harassed and intimidated [Lottery] employees."[2]

We grant the petition and order the Lottery to either produce the investigative report or a condensation containing the significant facts. As explained more fully below, that report was compiled at the direction of the Department of Justice (DOJ) in order to provide confidential legal advice to the Lottery related to allegations against Mr. Iparraguirre. Therefore, it is an attorney-client privileged communication. However, Public Records Law contains an exception

---

[1] We thank Ms. Hammond for granting an extension on the deadline to issue an order.

[2] Although the scope of your petition is not limited to the investigative report prepared by the Special Assistant Attorney General (SAAG) hired by DOJ to investigate allegations against Mr. Iparraguirre, your records request dated January 5, 2017, asked the Lottery only for information on the investigator's findings. The Lottery's response the following day indicated it was treating your request as one for the "investigation summary." Therefore, this order addresses only the investigative report.

to the privilege for factual information gathered under certain circumstances. Because we find that those circumstances are present here, that factual information is subject to disclosure, either by disclosing the report (with any redactions allowed by law) or by preparing a condensation of its significant facts.

Public Records Law confers a right to inspect any public record of a public body in Oregon, subject to certain exemptions contained in ORS 192.501 to 192.505. ORS 192.420(1). In addition to the express exemptions contained in those sections, any other information that is confidential, privileged, or prohibited from being disclosed under other Oregon laws is also exempt from disclosure. ORS 192.502(9)(a). Any person denied the right to inspect or to receive a copy of a 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 agency carries the burden to sustain any such denial. *Id.*

In April 2016, then Lottery director Jack Roberts placed Mr. Iparraguirre on paid administrative leave. Several days later, Barry Pack was named acting Lottery director. He began receiving complaints from current and former employees about Mr. Iparraguirre. In response to all these allegations, Pack approached DOJ to obtain legal advice. And in order to provide this legal advice, DOJ hired an attorney in private practice, Kyle Abraham, to conduct a fact-finding investigation. Mr. Pack states that it was his intention that Mr. Abraham's communications to Lottery and to DOJ on this matter would remain confidential.

The first issue in this petition is whether the resulting investigative report prepared by Mr. Abraham is exempt from disclosure as a privileged attorney-client communication under ORS 40.225. That privilege, as relevant here, applies to "confidential communications made for the purpose of facilitating the rendition of professional legal services . . . [b]etween the client's lawyer and the lawyer's representative." ORS 40.225(2)(b).[3] The Court of Appeals has addressed the subject of whether factual, investigative reports can be subject to this privilege: in *Klamath County School District v. Teamey*, the school board hired an attorney for advice on how to respond to allegations of mismanagement and misconduct by district employees. 207 Or App 250, 254 (2006). In order to provide this legal advice, the attorney hired both an independent auditor and a private investigator, who submitted factual reports to the attorney and to the school board. *Id.* at 255. The Court of Appeals held that these reports were protected from disclosure under Public Records Law by the attorney-client privilege because the school board hired the attorney in order to seek legal advice, the resulting factual investigation was done to facilitate the rendition of that advice, and communications pertaining to the factual investigation were intended to be kept confidential. *Id.* at 261–62.

We find that the court's holding in *Teamey* applies here. Mr. Abraham was hired by DOJ in order to investigate various allegations of misconduct at the Lottery so that DOJ could provide legal advice and services. Therefore, he was a "representative of the lawyer" under ORS 40.225, and his communications with DOJ were made to facilitate the rendition of professional legal services. Finally, these communications were intended to be kept confidential. Therefore, we

[3] "Representative of the lawyer" means one employed to assist the lawyer in the rendition of professional legal services. ORS 40.225(1)(e).

conclude that Mr. Abraham's investigative report is an attorney-client privileged communication under ORS 40.225.

However, that does not end our analysis. In certain circumstances, factual information that is protected by the attorney-client privilege is not exempt from disclosure under Public Records Law. ORS 192.502(9)(b). If the elements of that paragraph are present, the public body must either produce the record(s) containing this factual information, or instead produce a condensation containing the "significant facts":

> (1) When a public record is subject to disclosure under ORS 192.502 (9)(b), in lieu of making the public record available for inspection by providing a copy of the record, the public body may prepare and release a condensation from the record of the significant facts that are not otherwise exempt from disclosure under ORS 192.410 to 192.505. The release of the condensation does not waive any privilege under ORS 40.225 to 40.295.
>
> (2) The person seeking to inspect or receive a copy of any public record for which a condensation of facts has been provided under this section may petition for review of the denial to inspect or receive a copy of the records under ORS 192.410 to 192.505. In such a review, the Attorney General, district attorney or court shall, in addition to reviewing the records to which access was denied, compare those records to the condensation to determine whether the condensation adequately describes the significant facts contained in the records.

ORS 192.423.

We conclude that the elements of ORS 192.502(9)(b) are present. The elements are: the public body's claim of exemption is based on ORS 40.225; no law or court order prohibits or otherwise exempts disclosure of the factual information; the factual information was compiled by or at the direction of the public body's attorney in response to information of possible wrongdoing by the public body; the factual information was not compiled to prepare for anticipated or actual legal proceedings; and the public body made or authorized a public statement characterizing or partially disclosing the factual information. Lottery does rely on the privilege to support its exemption claim. There is nothing prohibiting the disclosure of this information. The information was gathered by an attorney working on behalf of DOJ; no litigation resulted from this matter. And Lottery created a condensation of facts from the underlying report in October of 2016 and sent it to Mr. Iparraguirre's attorney with an explanation that Lottery intended to make facts from the report public.

Because the factual information in the investigative report is not exempt from disclosure as a result of ORS 192.502(9)(b), we order the Lottery to release the factual information in the report, either by segregating exempt and nonexempt information by redaction pursuant to ORS 192.505, or else by disclosing a condensation of significant facts as contemplated by ORS 192.423. The Lottery must produce either document within seven days or issue a notice to the Attorney General and by certified mail to Ms. Hammond of its intent to institute proceedings for injunctive or declaratory relief. ORS 192.450(2).

Sincerely,

Frederick M. Boss
Deputy Attorney General

FMB:pjn/DM8124569