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April 11, 2018

VIA EMAIL ONLY: les@malheurenterprise.com and mailee.aldred@state.or.us

Les Zaitz
Malheur Enterprise
293 Washington Street West
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Marilee Aldred
Malheur County Courthouse
251 B Street West
Vale, OR 97948

Re: Petition for Public Records Disclosure Order
Malheur County Trial Court Administrator
DOJ File No. 198040-GA0020-18

Dear Mr. Zaitz and Ms. Aldred:

This letter is the Attorney General's order responding to Mr. Zaitz' petition for disclosure of certain records under the Oregon Public Records Law, ORS 192.311 to 192.478. Mr. Zaitz' petition, which we received on April 4, 2018, relates to Ms. Aldred's partial denial of a public records request on the grounds that an undisclosed number of responsive records were exempt under the lawyer-client privilege. Mr. Zaitz requests the Attorney General review those records and order the disclosure of any information that is not exempt under the lawyer-client privilege. For reasons discussed below, we respectfully deny Mr. Zaitz' petition.

Public Records Law confers the right to inspect public records in Oregon, subject to certain exemptions contained in ORS 192.338, 192.345, or 192.355. ORS 192.314(1). ORS 192.355(9) expressly exempts records "the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law." Records protected by the lawyer-client privilege, codified at ORS 40.225, are one class of records exempt from disclosure under ORS 192.355(9). Where responsive records contain both exempt and nonexempt material, the public body must separate the material and disclose any nonexempt material. ORS 192.338.

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 192.411(1). The agency carries the burden to sustain any such denial. *Id.*

Mr. Zaitz' petition stems from the partial denial of his March 10, 2018 request for internal communications relating to an "Aid and Assist Consultation Report" filed with the court in a pending criminal prosecution. Ms. Aldred disclosed some responsive records on March 22, 2018, but withheld other responsive records because they were exempt under the lawyer-client privilege. On March 26, 2018, Mr. Zaitz asked Ms. Aldred to reconsider her assertion of the lawyer-client privilege, noting that while the privilege protects the substance of communications, it does not protect the "fact of" the communications. He requested she re-process his initial request and specifically disclose "details about the delivery and receipt of the communication (date, time, subject line)" and then redact what she considered to be privileged. Ms. Aldred acknowledged the modified request on March 30, 2018. She provided the date, time and subject line data from the privileged communications to Mr. Zaitz on April 5, 2018.

Insofar as the petition relates to the data provided to Mr. Zaitz on April 5, 2018, we deny the petition as moot. The only remaining issue is whether the balance of the material withheld by Ms. Aldred is exempt under the lawyer-client privilege. The lawyer-client privilege applies to confidential communications made for the purpose of facilitating the rendition of professional legal services to a client. ORS 40.255(2). A confidential communication is "a communication not intended to be disclosed to third parties other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client." ORS 40.255(1)(b). The client owns the privilege. ORS 40.255(2)-(3).

We reviewed all of the material for which Ms. Aldred asserts the lawyer-client privilege. It consists of 34 emails, including 26 emails from Ms Aldred to legal counsel in the Oregon Judicial Department (OJD), and eight emails from OJD legal counsel to Ms. Aldred. Each email relates to either a request for, or the provision of legal services to Ms. Aldred. Evidence these communications were intended to remain confidential includes Ms. Aldred's assertion of the lawyer-client privilege, the fact that they were not shared with any third parties for purposes other than for the rendition of legal services, and 19 of 34 emails contain "PRIVILEGED," "PRIVILEGED ATTORNEY/CLIENT COMMUNICATION," or "CONFIDENTIAL" in the subject line. Based upon our review, we find that each of the 34 emails was a confidential communication made for the purpose of rendering legal services to Ms. Aldred. Accordingly, we find that all of the withheld emails qualify under the lawyer-client privilege and that any further separation of nonexempt material is not reasonably possible. We also find that Ms. Aldred, as the client, was permitted to assert the privilege.

Because the records withheld by Ms. Aldred are privileged under the lawyer-client privilege, we conclude they are expressly exempt from public disclosure under ORS 192.355(9). As a result, we respectfully deny your petition.

Sincerely,

Frederick M. Boss
Deputy Attorney General

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