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August 28, 2018

VIA EMAIL ONLY: gregorychaimov@dwt.com

Gregory Chaimov
1300 SW Fifth Avenue, Ste 2400
Portland, OR 97201

Re: Petition for Public Records Disclosure Order
Department of Administrative Services
DOJ File No. 107011-GA0048-18

Dear Mr. Chaimov:

This letter is the Attorney General's response to your petition for disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478.[1] Your petition, which we received August 3, 2018, asks the Attorney General to order the Department of Administrative Services (DAS) to produce records generally described as state agency requests to the Office of Legislative Counsel (LC) to draft proposed legislation. For the reasons discussed below, we respectfully deny your petition.

The Public Records Law confers the right to inspect public records in Oregon, unless such records are exempt under ORS 192.338, 192.345, or 192.355. ORS 192.314(1). The law is a disclosure law, and exemptions from disclosure must be express. Even express exemptions are to be narrowly construed, meaning that "if there is a plausible construction of a statute favoring disclosure of public records, that is the construction that prevails." *Colby v. Gunson*, 224 Or App 666, 676 (2008). 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.*

[1] Thank you for granting an extension on the deadline to issue this order.

In preparation for the 2019 legislative session, DAS required agencies to submit their proposed legislative concepts to DAS using a form entitled "2019 Agency Request to Office of Legislative Counsel for Drafting of Legislation." With respect to those concepts that were approved, the same form was subsequently forwarded to LC with an additional signature indicating that the agency's proposed concept had been approved. *See* ORS 173.130(2) ("[u]pon the written request of a state agency, the Legislative Counsel may prepare or assist in the preparation of legislative measures that have been approved for preparation in writing by the Governor or the Governor's designated representative.") All agency legislative concepts were submitted to DAS by June 2018. 234 were subsequently forwarded to LC for drafting.[2]

Your petition explains that you routinely request legislative concepts from the Governor's Office before each legislative session and that you received most of them in the past. This year, you requested "copies of agencies' requests for permission to have measures drafted for the 2019 regular legislative session and of requests to the Office of Legislative Counsel for drafting services for those measures."[3] The Governor's Office responded that it did not have responsive records and referred you to DAS. DAS denied your request in its entirety, citing the lawyer-client privilege (ORS 192.355(9)(a) incorporating ORS 40.225) and the exemption for internal advisory communications (ORS 192.355(1)).

You now ask the Attorney General to order DAS to provide you with copies of the legislative concepts. You contend that the forms are not internal advisory communications and that the public interest in encouraging frank communications between agencies in this case does not clearly outweigh the public's interest in disclosure. You also raise several arguments explaining why you do not believe the lawyer-client privilege applies in this instance. We conclude that the documents you have requested are protected by the lawyer-client privilege.[4]

ORS 192.355(9)(a) expressly 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." The lawyer-client privilege 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." ORS 40.225(2). Accordingly, ORS 192.355(9)(a) permits public bodies to decline to disclose public records that are protected by the lawyer-client privilege. *See, e.g., Port of Portland v. Ore. Center for Environ. Health*, 238 Or App 404, 409 (2011) (predecessor statute to ORS 192.355(9)(a) encompasses lawyer-client privileged communications); *Klamath County School Dist. v. Teamey*, 207 Or App 250, 259 (2006) (same).

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[2] DAS received a total of 270 legislative concept forms from state agencies. Five were not approved and 31 were ultimately withdrawn.

[3] Your petition suggests there are two sets of records responsive to your request; i.e., agency requests for permission as distinct from agency requests to LC. DAS informs us that agencies do not submit separate requests for permission. Rather, the new DAS form serves both purposes. Accordingly, our analysis is limited to whether DAS' decision to withhold the forms was permitted under Oregon Public Records Law.

[4] Because we conclude the forms are covered by the lawyer-client privilege, we need not address DAS' alternative argument that the legislative concepts are exempt under ORS 192.355(1) as internal advisory communications.

The Oregon Supreme Court has held that application of the lawyer-client privilege is contingent upon three findings. *See State ex rel. OHSU v. Haas*, 325 Or 492, 501 (1997). First, the communication must be "confidential" within the meaning of ORS 40.225(1)(b) (a communication "not intended to be disclosed to third persons" other than to those necessary to facilitate the rendition of professional legal services). Second, the communication must have been made for the purpose of facilitating the rendition of professional legal services. And third, the communication must have been between the parties described in one of the paragraphs of ORS 40.225(2)(a)-(e). *Id.* If all three elements are satisfied, the lawyer-client privilege applies. *Teamey*, 207 Or App at 261-62. If an entire communication is deemed confidential, a public body is not required to separate exempt from nonexempt material under ORS 192.338. *See Port of Portland*, 238 Or App at 413.

DAS Communications Director Elizabeth Craig explained why DAS believes all three elements of the lawyer-client privilege are satisfied in this case. The first element – a confidential communication – depends on "the intent of the parties to shield the communication from disclosure." *State v. Ogle*, 297 Or 84, 87 (1984). In this regard, Ms. Craig informed us that DAS changed its process in 2018 to make clear that it intended to keep legislative concept forms confidential. First, in May 2018, DAS informed all state agencies that legislative concepts "will be temporally exempt from disclosure until Legislative Counsel has submitted bill drafts to the Governor's Office for final approval (this should be done by November 30, 2018)." Unlike forms used in prior years, the header now states "Confidential and Attorney-Client Privileged," and the form also contains the following italicized paragraph:

> *This document is a request for legal services. By completing this form, the named agency asks the Office of Legislative Counsel to draft legislation for introduction in the 2019 Legislative Session based on the instructions below. Although it is expected that agencies will have discussed legislative concept ideas with stakeholders, agencies are directed to treat this document as confidential and privileged and, accordingly, not to share the text of this form outside of state government before legislation is drafted and finalized.*

These changes convincingly demonstrate that DAS intends the forms be kept confidential. And ORS 173.230(1) requires LC to keep such matters confidential. Under the circumstances, we conclude the legislative concepts are "confidential communications" under ORS 40.225(1)(b).

Regarding the second element, the Oregon Supreme Court has recognized that a communication is made for the purpose of facilitating the rendition of legal services "if it makes it easier for an entity to make use of legal advice or services." *Port of Portland,* 238 Or App at 411 *(*citing *OHSU*, 325 Or at 502). In this case, Ms. Craig notes the principal purpose of the form is to communicate to attorneys in LC the policy ideas that agencies want the Legislative Assembly to adopt, so that LC can turn those concepts into proposed statutory language, pursuant to ORS 173.130(2). She expressed the view that the drafting undertaken by LC constitutes a legal service. And Legislative Counsel Dexter Johnson confirmed that he shares the view that LC's drafting of agency-proposed legislation is a legal service LC provides to requesting agencies. The shared view of DAS and LC is consistent with ORS 173.130(5), which

expresses a legislative determination that this drafting constitutes a legal service performed by LC for the requesting agency:

> ***Except as provided in subsection (2)*** of this section and ORS 173.135, the Legislative Counsel shall not give opinions ***or provide other legal services*** to persons or agencies other than the Legislative Assembly and members and committees of the Legislative Assembly.

(Emphasis added.) We therefore conclude that the services provided by LC constitute legal services.[5] The form on which the legislative concepts are translated to LC clearly facilitates these legal services by informing LC what is desired. The second element of the lawyer-client privilege is satisfied.

We now turn to whether the legislative concepts constitute communications between parties described in 40.225(2)(a)-(e). We have no trouble concluding that they are. LC is a lawyer rendering legal services, as indicated by ORS 173.130(5). Executive agencies are entities "rendered professional legal services by a lawyer" and therefore "clients" as defined by ORS 40.225(1)(a). Subsection (2)(a), which applies the privilege to communications "[b]etween the client * * * and the client's lawyer" therefore protects the forms insofar as they are communicated between DAS and LC. And subsection (2)(d), which applies to communications "between representatives of the client or between the client and a representative of the client" protects the forms insofar as they are communicated within the Executive Branch.

In adopting this interpretation, we are not suggesting that the privilege generally protects all communications within an agency regarding subjects about which an agency may want legal advice. A discussion about whether to pursue a particular legislative change, or what that legislative change might look like, is not inherently a conversation to facilitate professional legal services. Nor is the fact that an agency has decided to pursue a legislative change inherently privileged. That is true even though actually pursuing the legislative change may require legal services pursuant to ORS 173.130(2) and (5). The fact that legal services may be necessary or desirable to implement a decision does not mean that discussions about the decision are necessarily discussions to facilitate legal services. As a result, information about the contents of the legislative concept forms may exist in non-privileged communications. Indeed, the general subjects of all of the forms could well be available from non-privileged sources. But our decision deals specifically with a form expressly intended to communicate, to an attorney, confidential information that will facilitate the attorney's rendition of legal services.[6] Ultimately, we do not need to resolve any broader question about the confidentiality of proposed legislative concepts, and this decision should not be interpreted as doing so.

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[5] In general, state agencies must obtain legal services from the Attorney General pursuant to ORS chapter 180. But the legislative assembly can authorize agencies to obtain legal services elsewhere. ORS 173.130 constitutes such an authorization for the specific legal service of drafting legislation.

[6] *See, e.g.*, *Teamey*, 207 Or App at 260, fn 3 (2006) (citing *State v. Riddle*, 330 Or 471 (2000) to support proposition that "the attorney-client privilege does not prevent the disclosure of facts underlying confidential communications" but noting that the request under consideration sought "disclosure of the communications—the reports—themselves").

For the foregoing reasons, we conclude DAS was permitted to exempt the legislative concept forms from disclosure as lawyer-client privileged communications. We therefore respectfully deny your petition.

Sincerely,

Frederick M. Boss
Deputy Attorney General

FMB:nog/DM9143934
c via email only: Elizabeth Craig, DAS