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January 23, 2019

VIA EMAIL ONLY: roland@rilawgroup.com

Roland Iparraguire
10121 SE Sunnyside Road, Suite 300
Clackamas, OR 97015

Re: Petition for Public Records Disclosure Order
Oregon Department of Education
DOJ File No. 581090-GA0005-19

Dear Mr. Iparraguire:

This letter is the Attorney General's order responding to your petition for disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478. Your petition, which we received January 15, 2019,[1] asks the Attorney General to order the Oregon Department of Education (ODE) to disclose certain e-mails requested by you on behalf of one of your clients. 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. When a public record contains both exempt and nonexempt information, the public body must separate and disclose the 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.*

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

Your petition stems from an October 11, 2018 records request to ODE for certain e-mails. Because ODE's initial search yielded nearly 100,000 potentially responsive e-mails, you worked with ODE to refine your request. By the end of October, the pool of e-mails had been reduced to 6,245 e-mails, which ODE listed for you in a spreadsheet. On January 10, 2019, you identified 554 specific e-mails from the spreadsheet that you requested ODE disclose.

ODE responded on January 14, 2019, providing you with 314 of the 554 e-mails you requested. In its response, ODE explained that the remaining 240 e-mails were not disclosed because they were either duplicates of other e-mails you received, determined to be non-responsive to your initial request, or exempt from disclosure under the lawyer-client privilege. ODE did not identify which of the 240 e-mails fell into each of those categories. Your petition asks us to examine those 240 e-mails to determine whether they may be withheld.

We contacted Emily Nazarov, ODE Government and Legal Affairs Manager, regarding your petition. She explained that with respect to the non-responsive and duplicate e-mails, it was not ODE's intent to deny your request for those records. Rather, ODE was merely seeking to minimize the time associated with reviewing e-mails that were either duplicates or not responsive to your initial public records request. In light of your petition, ODE has agreed to disclose the otherwise nonexempt portions of those e-mails to you soon. We therefore deny as moot those aspects of your petition relating to the non-responsive and duplicate e-mails.

We now examine whether the remaining records withheld by ODE are exempt under the lawyer-client privilege. The 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). 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). ORS 192.355(9)(a) – which exempts from disclosure public records made confidential or privileged under Oregon law – permits public bodies to withhold 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).

In response to your petition, ODE identified ten e-mails for which it asserts the lawyer-client privilege. ODE identified nonexempt material in six of those e-mails that it now agrees to separate and provide to you. We have reviewed those portions of the e-mails that ODE intends to withhold as lawyer-client privileged communications. Those portions include correspondence with DOJ-appointed contact counsel related to the provision of legal services to ODE. Because ODE intends those portions remain confidential, we conclude they are protected from disclosure by the lawyer-client privilege. And ODE, as the client, is permitted to assert the privilege in this case. We have also reviewed the four remaining e-mails that ODE claims are privileged in their entirety. For similar reasons, we conclude they are privileged and do not contain any nonexempt information that can reasonably be separated and disclosed. We therefore deny that aspect of your petition relating to e-mails containing lawyer-client privileged communications.

For the foregoing reasons, we respectfully deny your petition.

Sincerely,

Frederick M. Boss
Deputy Attorney General

FMB:pjn/DM9404418
c via email only: Emily Nazarov, ODE