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September 3, 2019

VIA EMAIL ONLY: boquist@aol.com

Senator Brian Boquist
17080 Butler Hill Road
Dallas, OR 97338

Re: Petition for Public Records Disclosure Order
Oregon Legislative Assembly
DOJ File No.: 142001-GA0122-19

Dear Senator Boquist:

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. Your petition, which we received August 26, 2019, asks the Attorney General to order the Oregon Legislative Assembly ("Legislature") to disclose records relating to certain reports made against you. For the reasons that follow, 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. 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 its actions. ORS 192.411(1).

a. Background

Your petition explains that on July 1, 2019, you submitted a public records request to Jessica Knieling, the Legislature's Human Resources Interim Director, and to Brenda Baumgart of Stoel Rives LLP, outside legal counsel to the Legislature. Your request related to reports from members and employees of the Legislature about public statements you made that may have contributed to an intimidating and hostile work environment. We understand that Ms. Baumgart

was retained[1] by the Legislature to examine those reports pursuant to Legislative Branch Personnel Rule 27, Harassment-Free Workplace ("Rule 27").[2] Ms. Baumgart issued an "Interim Finding & Recommendations" report on June 25, 2019, in which she concluded that your public statements constituted credible threats of violence directed at the Senate President and the Oregon State Police and thereby violated Rule 27. In light of Ms. Baumgart's interim report, you requested Ms. Knieling and Ms. Baumgart disclose the following 16 categories of records:

1. Copy of the formal complaint including name, persons involved in harassment, parties & witnesses, conduct or discrimination or harassment, date or time period, and potential remedy requested per Rule 27(6)(b).

2. Provide your best documentation clearing the Human Resource Director from any conflicts of interest since this State Senator over a month ago served notice to the HR Director of pending pay equity complaints against her with BOLI, and a pre-existing Rule 27 complaint is still standing involving her failures. Reference Rule 27(6)(a).

3. Provide documentation of what immediate action was taken to protect the alleged complainant per Rule 27(6)(d).

4. Provide the compete and entire list of members and employees who allegedly cooperated with the alleged investigation per Rule 27(6)(f).

5. Provide your notice you allegedly gave to this State Senator that you had received a formal complaint and were initiating an investigation against me per Rule 27(6)(g).

6. Provide a copy of the draft findings you allegedly provided to this State Senator per Rule 27(6)(i).

7. Provide a copy of the notice you allegedly gave to this State Senator outlining my right to review the draft investigation and request modifications prior to the final report per Rule 27(6)(j).

8. Provide a copy of the final findings you allegedly gave this State Senator, the so far unnamed complainant, and the appointing authority per Rule 27(6)(k).

9. Provide a copy of the notice provided to the highest-ranking caucus member per Rule 27(6)(c)(A) and Rule 27(6)(c)(A) [sic].[3]

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[1] The Legislature's authority to retain outside counsel comes from ORS 173.135, which gives the Legislative Counsel Committee authority to "retain any member of the Oregon State Bar, to appear in, commence, prosecute or defend any action, suit, matter, cause or proceeding in any court or agency of this state or of the United States."

[2] *See* House Concurrent Resolution 11 (2019), adopted by the Senate on January 14, 2019 (amending Legislative Personnel Rule 27, Harassment-Free Workplace).

[3] The Legislative Branch Personnel Rules in effect during the relevant timeframe did not include a Rule 27(6)(c)(A). We understand you intended to cite Rule 27(7)(c)(A).

10. Provide a copy of the presiding officer's notification to this State Senator per Rule 27(6)(c)(F) [sic].[4]

11. Provide a copy of the suspension of Senate Rule 6.40 related to Ms. Baumgart's one page narrative provide to me attached. Reference Senate Rule 6.40. Reference Senate Rule 1.01(12).

12. Ms. Baumgart's one page attachment alleges criminal threats, therefore, provide 100% of the communications in regard to this matter with the Oregon State Police and the Marion County District Attorney.

13. Two Oregon State Senators allege either you two, or those involved in the process in the Legislature, attempted, clearly for political reasons, to get a temporary restraining order against this State Senator, therefore, provide 100% of this documentation or deny in writing such documents exist or such action was attempted.

14. Provide the name of the individual who provided this to the media while you failed to notify this State Senator of anything.

15. Provide 100% of the documentation and communications with Dexter Johnson and Betsy Imholt related to this alleged complaint.

16. Again, this is a formal legal request for 100% of the correspondence, emails, documents, notes, electronic communications, and telephone records related to the attached alleged complaints.

We understand that Ms. Knieling forwarded your request to the Office of Legislative Counsel ("LC") for processing in accordance with the Legislature's established public records request procedures. Your petition explains that Cameron Miles, an LC Staff Attorney, responded to your request on July 23, 2019 by providing 204 pages of partially redacted records. In a cover letter accompanying the response, Mr. Miles stated that the redacted material and some additional records were exempt from disclosure under various public records exemptions, to include ORS 192.355(4) (information submitted in confidence) and 192.355(9) (information made confidential under state law, specifically, the lawyer-client privilege found in ORS 40.225).

Your petition explains your belief that LC's reply was not responsive to your request. You assert that almost none of the requested documents were disclosed to you; particularly the documentation that you believe should have been created under Rule 27(6). Your petition asks the Attorney General to order the disclosure of "100% of the public records in possession of anyone in the Oregon State Senate, or Legislative Branch" relating to the reports made against you. You also ask that the records be disclosed without any redactions.

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[4] The Legislative Branch Personnel Rules in effect during the relevant timeframe did not include a Rule 27(6)(c)(F). We understand you intended to reference Rule 27(7)(c)(F).

b. Legislative Counsel's Position

In light of your petition, we contacted Mr. Miles. He explained LC's position that your July 1, 2019 request was limited to the records of Ms. Knieling and Ms. Baumgart. He also indicated that LC has not received a request from you for the records of any other members or employees of the Legislature, or for records in the custody of the Legislature generally. Accordingly, he argues that the scope of our review under ORS 192.411 should be limited to the material that was withheld from Ms. Knieling's and Ms. Baumgart's records. Regarding those records, Mr. Miles acknowledged that LC did not gather or review any public records in Ms. Baumgart's possession based on the assumption that all of her records would be exempt under the lawyer-client privilege. In light of your petition, however, LC has agreed to review the public records in Ms. Baumgart's custody and to disclose any nonexempt material to you.[5]

Regarding Ms. Knieling's records, Mr. Miles explained that there were no records responsive to the first eight parts of your request. He noted that Rule 27 provides two means by which to report workplace harassment and intimidation, including informal reports under Rule 27(5) and formal complaints under Rule 27(6). He explained that all of the reports in this case were submitted informally and that the Legislature has not received any formal complaints against you. And since no formal complaints have been filed, he explained, there are no records responsive to those parts of your request seeking documents created under Rule 27(6). He also indicated that Ms. Knieling had no records responsive to parts 10 through 14 of your request. As to the ninth part of your request, Mr. Miles indicated that the responsive notice was disclosed to you without any redactions.

Mr. Miles explained that LC disclosed 204 pages of material responsive to the last two parts of your request, including 41 pages from which some information was redacted. In light of your petition, LC has agreed to provide you with unredacted versions of three of those pages. Mr. Miles indicated that the remaining redactions pertain to information that reveals the identities of individuals who submitted or forwarded[6] informal reports of workplace harassment or intimidation under Rule 27(5). He explained LC's position that those reports were submitted in confidence and are therefore conditionally exempt in their entirety under ORS 192.355(4). Mr. Miles noted, however, that in applying ORS 192.355(4) to the informal reports in this instance, LC determined that the public interest would not suffer by the disclosure of the reports insofar as source-identifying information could be redacted.

According to Mr. Miles, LC also withheld another 105 records[7] that it believes are exempt from disclosure in their entirety. Those records include six informal reports that, LC asserts, were submitted in confidence under Rule 27(5) and from which there was no practicable

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[5] Mr. Miles informs us that Ms. Baumgart is unavailable until mid-September and that LC will not have access to any of the public records in her possession until that time.

[6] The record reveals that in several instances, employees submitted their informal reports to their supervisors, who then forwarded the reports to Ms. Knieling for processing. In some instances, supervisors submitted informal reports themselves on behalf of their employees generally.

[7] LC initially indicated that it withheld 118 records, but upon further review determined that 13 of those records, consisting of 41 pages, were system-generated duplicates.

way to redact source-identifying information. LC also withheld 99 records that it considered to be attorney-client privileged communications with Ms. Baumgart and attorneys in LC.

c. Scope of Request

We find that LC's determination that your request was limited to Ms. Knieling and Ms. Baumgart's records was reasonable under the circumstances. In reaching this conclusion, we observe that your request was addressed specifically to Ms. Knieling and Ms. Baumgart and included multiple references to records that you believe they created or were in their possession. In contrast to your petition, we note that your original request did not seek records "in possession of *anyone* in the Oregon State Senate, or Legislative Branch" (emphasis added). We also observe that in a previous petition filed by you in this matter, you specified that your original request was directed "to employees not an elected official." *See* Public Records Order, Jul 12, 2019, Boquist. Under the circumstances, we cannot conclude that the scope of your request encompassed all records in the possession of anyone in the Senate or the Legislature. We therefore deny that aspect of your petition that asks us to order LC to disclose records beyond those requested from Ms. Knieling and Ms. Baumgart. You may, of course, submit a new request to LC for any additional records you may want.

d. Information Submitted in Confidence

LC claims that certain material it redacted or withheld was submitted in confidence and is therefore conditionally exempt under ORS 192.355(4). That provision exempts from disclosure:

> Information submitted to a public body in confidence and not otherwise required by law to be submitted, where such information should reasonably be considered confidential, the public body has obliged itself in good faith not to disclose the information, and when the public interest would suffer by the disclosure.

The purpose of this exemption is to encourage the voluntary submission of information to public bodies with some reasonable assurance that it will be kept confidential. *See* Attorney General's Public Records and Meetings Manual at 102 (2019) ("Manual"). For the exemption to apply, the following elements of ORS 192.355(4) must be satisfied:

1. The source must have submitted the information on the condition that it would be kept confidential;

2. The source must not have been required by law to provide the information;

3. The information itself must be of a nature that reasonably should be kept confidential;

4. The public body obliged itself in good faith not to disclose the information; and

5. The public interest would suffer by the disclosure.

In this case, Mr. Miles explained that none of the reporting parties were required by law to submit the informal reports. Next, he asserted that informal reports of harassment or intimidation should reasonably be considered confidential because Rule 27(5)(g) generally requires employees and members to keep information about such reports confidential. He also emphasized that Rule 27(7) provides that reporting parties may request their informal reports remain anonymous and that the name of a reporting party will not be disclosed to the alleged harasser without the reporting party's consent. *See* Rule 27(7)(b)-(c). Mr. Miles indicated that, because of concerns about retaliation, the reporting parties reasonably expected their reports would remain confidential in this case. He also represented that none of the reporting parties have consented to the disclosure of their names to you. Finally, Mr. Miles explained LC's position that by adopting Rule 27(5)(g), the Legislature generally obliged itself not to disclose information relating informal reports.

Under the circumstances, we have no problem concluding that the informal reports submitted in this instance satisfy the first four elements of ORS 192.355(4). Rule 27 reflects the Legislature's intent to afford some confidentiality to such reports. For example, one distinction between the informal reporting rules and the formal complaint rules is the lack of any anonymous reporting or confidentiality provisions in the latter. Indeed, this difference could explain, at least in part, why all of the reports in this matter were submitted informally.

Regarding the final element of ORS 192.355(4), Mr. Miles asserted that LC only withheld information from the informal reports to the extent it could be used to identify a reporting party. In some instances, LC was able to redact names but otherwise disclose the informal reports to you. In other cases, he explained, the entire report was withheld because there was no practicable way to redact source-identifying information. Mr. Miles argued that revealing the identity of the reporting parties would chill members and employees of the Legislature from reporting workplace harassment in the future. This, in turn, could harm the public interest because it could limit the Legislature's ability to detect and correct employment conditions that may threaten the well-being of its workforce. Mr. Miles also argued that the public interest in disclosing the identities of the reporting parties is nominal in this instance because each report stemmed from widely reported public statements made by you. Therefore, he claimed, disclosing the identities of the reporting parties would not assist the public in determining whether those statements were actually made or whether the informal reports were credible.

After reviewing the relevant materials, we conclude that LC has met its burden of sustaining the decision to withhold source-identifying information from the informal reports. This includes the six reports where there does not appear to be a practicable way to redact such information. We find that disclosing the identities of the reporting parties in this instance is likely to chill informal reporting in the future, thereby impairing the public's substantial interest in ensuring the Legislature maintains a harassment-free workplace. We also find LC's approach to be consistent with the conclusion of the Oregon Court of Appeals that the public interest will not suffer by the disclosure of information submitted in confidence if source-identifying information can be redacted. *Gray v. Salem-Keizer School Dist.*, 139 Or App 556, 565 (1996). And given the public nature of the statements that were reported in this instance, we are unable

to conclude that the public interest would be meaningfully advanced by disclosing the identities of the reporting parties to you. We therefore deny that aspect of your petition relating to the material LC withheld under ORS 192.355(4).

e. Lawyer-Client Privilege

We now consider the records that LC claims are exempt under the lawyer-client privilege. 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 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) (ORS 192.355(9)(a), then codified at ORS 192.502(9)(a), encompasses lawyer-client privilege); *Klamath County School Dist. v. Teamey*, 207 Or App 250, 259 (2006) (same).

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(l)(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. 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). 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.

We have reviewed the records LC identified as lawyer-client privileged communications and find that they qualify for the privilege. Approximately half of those records are communications between Ms. Knieling and Ms. Baumgart and they relate directly to the legal services for which Ms. Baumgart was retained. Most of the remaining records encompass communications between Ms. Knieling and LC and clearly relate to the provision of legal services traditionally performed by LC. A handful of records are internal communications between Ms. Knieling and key members of the professional staff that reference legal services or advice provided by Ms. Baumgart and LC. Finally, Mr. Miles informed us that Ms. Knieling considers all of these communications to be confidential. Under the circumstances, we find that the communications were intended to be confidential, were made to facilitate the rendition of legal services, and were made among parties described in ORS 40.225(2)(a)-(e). We therefore conclude that LC was permitted to withhold those records from disclosure as lawyer-client privileged communications.

f. Conclusion

To the extent your petition relates to material that LC has now agreed to provide to you, we deny your petition as moot. We also deny that aspect of your petition asking us to order LC to disclose records beyond the scope of your original request. For the reasons discussed above, we conclude that LC was permitted to withhold source-identifying information from the informal reports that were submitted in confidence. We also conclude that the remaining records withheld by LC come under the lawyer-client privilege and are thereby expressly exempt from disclosure under ORS 192.355(9)(a). We therefore respectfully deny your petition.

Sincerely,

Frederick M. Boss
Deputy Attorney General

FMB:pjn/DM9807681
c via email only: Cameron Miles, Office of Legislative Counsel