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March 15, 2021

Rafael Mora Contreras, #18-05511
215 SW Adams MS35
Hillsboro, OR 97123

Re: Petition for Public Records Disclosure Order
Oregon Department of Corrections
DOJ File No.: 291011-GA0023-21

Dear Mr. Contreras:

This letter responds to your petition for disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478. Your petition asks the Attorney General (AG) to order the Oregon Department of Corrections (DOC) to disclose any nonexempt records withheld or redacted by DOC from its response to a recent records request from you. Your petition also asks the AG to order DOC to refund the processing fees you paid. 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).

In response to your petition, we contacted Michelle Dodson, DOC Records Officer. She provided us with redacted and unredacted copies of the records disclosed to you. In the version disclosed to you, DOC redacted two items – an e-mail and a single sentence that appears twice in the records. Ms. Dodson explained DOC's position that both items consist of attorney-client privileged communications that are exempt from disclosure under ORS 192.355(9)(a).

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 attorney-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) (predecessor statute to ORS 192.355(9)(a) encompasses lawyer-client privileged communications).

We have reviewed the material withheld by DOC as attorney-client privileged communications. The first item consists of an e-mail from a DOC employee to the DOJ Trial Division requesting advice. The second item is a single sentence documenting legal advice received from a DOJ attorney. We have no trouble concluding that both items of redacted material relate to the provision of legal services by DOJ to DOC. And because DOC intends those communications remain confidential, we conclude they are protected from disclosure by the attorney-client privilege. *See id*. (determination that entire communication is confidential disposes of requirement to separate exempt and nonexempt material under ORS 192.338). We therefore deny that aspect of your petition relating to information withheld under the privilege.

DOC also withheld two e-mail attachments from the records it disclosed to you, each consisting of a spreadsheet. According to Ms. Dodson, DOC withheld the spreadsheets at the request of the Washington County District Attorney's office because they contain investigatory information compiled as part of ongoing criminal proceedings against you. She also informed us that the spreadsheets are the same records that we considered in Public Records Order, Aug 26, 2020, Burks. In our prior order we concluded that DOC was permitted to withhold the records under ORS 192.345(3), which conditionally exempts "investigatory information compiled for criminal law purposes" unless the public interest requires disclosure in the particular instance. We have confirmed that the records withheld by DOC in this instance are indeed the same. And because we are not aware of any material change in the public interest in this information since we issued our prior order, we adopt our prior analysis. Consistent with that analysis, we conclude that DOC is permitted to withhold this information under ORS 192.345(3) until the conclusion of any pending criminal proceedings.[1]

We now turn to your request that we order DOC to refund the processing fees you paid for these records because you do not believe they reasonably reflect DOC's actual costs. *See* ORS 192.324(4) (agencies may establish fees reasonably calculated to reimburse actual costs of making records available). It has long been our position that the AG does not have authority to review the reasonableness of a fee or to determine whether it accurately reflects an agency's actual cost of disclosing records. *See Attorney General's Public Records and Meeting Manual* at 22 (2019) (there is no provision in the Public Records Law that authorizes a person to petition the AG to review the reasonableness of an agency's fees). Therefore, we must dismiss this aspect of your petition due to a lack of jurisdiction.

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[1] You argue that you have a constitutional or statutory right to this information as a matter of discovery in your criminal case. But this is not the appropriate forum for addressing your discovery, due process, or other constitutional rights. We are not a court and we do not have the authority to adjudicate such matters.

For the reasons discussed above, we respectfully deny your petition.

Sincerely,

FREDERICK M. BOSS
Deputy Attorney General

FMB:pjn/
c via e-mail only: Michelle Dodson (DOC)