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September 23, 2019

VIA EMAIL ONLY: dsupham58@gmail.com

Donald Scott Upham
3906 SW Altadena Ave
Portland, OR 97239

Re: Petition for Public Records Disclosure Order
Oregon State Police
DOJ File No. 257001-GA0125-19

Dear Mr. Upham:

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 asks us to order the Oregon State Police (OSP) to disclose certain records that it withheld from you in response to two separate records requests. 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. 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.*

The first part of your petition stems from a July 26, 2019 request to OSP in which you sought records about a petition you filed with our office in 2018. Specifically, you requested:

1. The notification of my petition for review that you received from the [Attorney General (AG)].

2. Each record you transmitted to the AG.

3. Any request you sent to the AG requesting that OSP be allowed to disclose only the substance of each category of public records.

4. Any response you received from the AG to my request #3.

5. A statement of reasons you sent to the AG explaining why each category of the records I requested should not be disclosed to me.

6. Any other record you created for your use or any record you sent to the Deschutes County [District Attorney (DA)] [or] Oregon's AG in reference to my review petition.

7. Any record you received from any person or agency, including but not limited to the Deschutes County DA or the AG, regarding my review petition.

Your petition indicates that OSP responded to your request on September 9, 2019. OSP disclosed some records but withheld others that OSP claimed were exempt under the lawyer-client privilege. Your petition asserts that OSP's reply was "meaningless because OSP failed to describe the records I requested that were withheld." You now ask us to order OSP to disclose the records that it withheld.

We contacted Laura Heathcock, Administrative Specialist in OSP's Central Records Section. She indicated that OSP does not have any records responsive to parts two through five of your request. She also explained that OSP initially withheld 15 emails that are responsive to the remainder of your request under the lawyer-client privilege. She informed us, however, that OSP has now disclosed nine of those emails to you, each of which relates to the first part of your request. With respect to those emails, we deny your petition as moot.

Ms. Heathcock claimed the remaining six emails are exempt from public disclosure under ORS 192.355(9), incorporating the lawyer-client privilege codified at ORS 40.225. ORS192.355(9)(a) expressly exempts records "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).[1] *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 to be confidential, an agency 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 six emails OSP identified as lawyer-client privileged communications and find that they qualify for the privilege. Four of the emails are communications between OSP and OSP's DOJ-assigned contact counsel and they clearly relate to the provision of legal services to OSP by DOJ. The two remaining emails are communications among OSP employees that reference legal services or advice provided by DOJ. According to Ms. Heathcock, OSP intended that all of those communications remain confidential. Under the circumstances, we find that the communications were made to facilitate the rendition of legal services, were made among parties described in ORS 40.225(2)(a)-(e), and were intended to be confidential. We therefore conclude that OSP was permitted to withhold those records from disclosure as lawyer-client privileged communications.

The second part of your petition relates to your August 23, 2019 request for OSP records relating to a particular police officer's conduct in one of your client's cases. Your petition indicates that OSP denied your request on September 9, 2019. In its response, OSP explained that it identified one record responsive to your request, but that it was exempt under ORS 181A.830(3). You now ask us to determine whether OSP may withhold that record from disclosure.

ORS 181A.803(3) prohibits agencies from disclosing information about a personnel investigation of a public safety employee if the investigation does not result in disciplinary action.[2] And as noted above, ORS 192.355(9)(a) expressly exempts records from public disclosure if such disclosure is otherwise prohibited under Oregon laws such as ORS 181A.803(3). After reviewing the record withheld by OSP, we conclude that it may be withheld under ORS 181A.830(3) because it consists entirely of information about a personnel

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[1] Under ORS 40.225(2)(a)-(e), the privilege applies to confidential communications:

a. Between the client or the client's representative and the client's lawyer or a representative of the lawyer;
b. Between the client's lawyer and the lawyer's representative;
c. By the client or the client's lawyer to a lawyer representing another in a matter of common interest;
d. Between representatives of the client or between the client and a representative of the client; or
e. Between lawyers representing the client.

[2] The relevant provision states that "[a] public body may not disclose information about a personnel investigation of a public safety employee of the public body if the investigation does not result in discipline of the employee."

investigation against a public safety employee that did not result in discipline. We note that ORS181A.803(4) provides several exceptions to the general prohibition on disclosure.[3] However, your petition does not explain why you believe any of those exceptions apply in this instance. And on the record before us, we are unable to conclude that any of those exceptions apply here.

For the foregoing reasons, we conclude OSP was permitted to withhold the records at issue because they are expressly exempt under ORS 192.355(9)(a), incorporating ORS 40.225 (lawyer-client privilege) and ORS 181A.830(3) (personnel investigations of public safety employees). We therefore respectfully deny your petition.

Sincerely,

Frederick M. Boss
Deputy Attorney General

FMB:pjn/DM9844141
c: via email only: Laura Heathcock, OSP

[3] Under ORS 181A.830(4), the prohibition on disclosure contained in ORS 181A.830(3) does not apply:

a. When the public interest requires disclosure of the information.
b. When the employee consents to disclosure in writing.
c. When disclosure is necessary for an investigation by the public body, The Department of Public Safety Standards and Training or a citizen review body designated by the public body.
d. When the public body determines that nondisclosure of the information would adversely affect the confidence of the public in the public body.