ELLEN F. ROSENBLUM
ATTORNEY GENERAL

FREDERICK M. BOSS
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

Justice Building
1162 Court Street NE
Salem, Oregon 97301-4096
Telephone: (503) 378-6002

November 10, 2019

VIA E-MAIL ONLY: sodell@martenlaw.com

Steve Odell
1050 SW Sixth Ave, Ste 2150
Portland, OR 97204

Re: Petition for Public Records Disclosure Order
Oregon Department of Energy
DOJ File No.: 330010-GA0151-21

Dear Mr. Odell:

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 the Attorney General to order the Oregon Department of Energy (ODOE) to disclose certain records that it withheld in response to a public records request submitted by 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).

Your petition stems from a records request submitted by you to ODOE on October 11, 2021, for:

> [A]ny and all financial, rate, reliability, and other consumer-impact analyses related to operations of the Federal Columbia River Power System, or any of its constituent projects, and potential modifications to such operations, that the Oregon Department of Energy has prepared in the last nine months, as well as the underlying research and data on which such analyses rely or are based.

In its October 22, 2021, response to your request, ODOE informed you that it had located two e-mail threads, each accompanied by a single attachment, that it considered to be responsive to your request. However, ODOE determined that both e-mail threads were expressly exempt from disclosure under ORS 192.355(9)(a) as attorney-client privileged communications. ODOE also claimed that both e-mail threads were conditionally exempt under ORS 192.345(1) because they also pertain to ongoing litigation.

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." One such law is ORS 40.225, which 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 attorney-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).

The Oregon Supreme Court has held that application of the attorney-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 attorney-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 e-mail threads withheld by ODOE and find that they are attorney-client privileged communications.[1] First, the communications were between parties described in ORS 40.225. Specifically, the first e-mail thread was from a DOJ-assigned trial attorney to multiple state agency clients that are involved in similar litigation, including ODOE, and the second e-mail thread is ODOE's response. Next, the first e-mail requests that the state agency clients review, and edit as appropriate, an attachment summarizing the state's legal strategy in pending litigation. The second e-mail forwards ODOE's edits to the attachment. We therefore find that the communications were made to facilitate DOJ's rendition of legal services to its clients. The e-mails and attachments are also labelled "Attorney-Client Privileged Communication," thereby demonstrating that the addressees intended the communications be

[1] As a technical matter, our review disclosed that neither e-mail thread is actually responsive to your records request because neither refers to any analyses prepared by ODOE. According to ODOE, the department has not prepared any of the analyses described in your records request over the last nine months which means, in effect, that it does not possess any records responsive to your request.

kept confidential. Finally, ODOE, as a DOJ client, is permitted to assert the privilege in this instance and there is no evidence in the available record to suggest that the privilege has been waived. *See* ORS 40.280 (waiver of privilege by voluntary disclosure).

Because the e-mail threads qualify as attorney-client privileged communications, we conclude that ODOE was permitted to withhold them from you. We therefore respectfully deny your petition.[2]

Sincerely,

Frederick M. Boss
Deputy Attorney General

FMB:pjn
c via e-mail only: Janine Benner (ODOE)

[2] Because we conclude that the records are expressly exempt as attorney-client privileged communications, we need not address ODOE's claim that the records are also conditionally exempt from disclosure under ORS 192.345(1) insofar as they may pertain to ongoing litigation.