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July 25, 2022

VIA E-MAIL ONLY: pcashman20@gmail.com

Patrick Cashman
3024 SW Iowa St
Portland, OR 97239

Re: Petition for Public Records Disclosure Order
Department of Land Conservation and Development
DOJ File No.: 660001-GA0061-22

Dear Mr. Cashman:

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 Department of Land Conservation and Development (the "Department") to disclose three e-mails 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 the Department on June 16, 2022, for any correspondence to or from a named Department employee and relating to a petition submitted by you. According to your petition, the Department completed its response to your request on June 30, 2022, by disclosing 17 records to you. The Department also withheld three e-mails from you, claiming they were exempt from disclosure as attorney-client privileged communications. In response to a subsequent request by you, on July 6, 2022, the Department also provided you with the non-privileged metadata for the withheld e-mails. Your petition

followed and expresses your belief that the Department has misapplied the attorney-client privilege and that the public interest requires the Department to disclose the withheld e-mails in this instance.

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 three e-mails withheld by the Department and conclude that they are attorney-client privileged communications. First, each e-mail was addressed exclusively to parties described in ORS 40.225(2)(a)-(e); specifically, each e-mail was between Assistant Attorney General (AAG) Steven Shipsey, the Department's DOJ-assigned contact counsel, and a small number of Department employees. Next, each e-mail contains AAG Shipsey's legal advice to the Department and the Department's consideration of that advice. We therefore find that the communications were made to facilitate DOJ's rendition of legal services to the Department. We also contacted AAG Shipsey, who represented that both he and the Department intended that the withheld e-mails be confidential in their entirety. Our review of those communications discloses no reason to second-guess his representation. Finally, the Department, 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).

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Because the withheld e-mails qualify as attorney-client privileged communications, we conclude that the Department was permitted to withhold them from you under ORS 192.355(9).[1] We therefore respectfully deny your petition.

Sincerely,

Lisa M. Udland
Deputy Attorney General

ACF:pjn
c via e-mail only: Casaria Taylor (Department of Land Conservation and Development)

[1] Although you assert that the public interest requires disclosure in this instance, we cannot order disclosure on the basis of the public interest because the application of ORS 40.225 is not conditioned upon the balancing of the public interest.