ELLEN F. ROSENBLUM
ATTORNEY GENERAL

LISA M. UDLAND
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

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

November 7, 2022

VIA E-MAIL ONLY: jon@sagebrush-law.com

Jon Dennis
PO Box 305
Ontario, OR 97914

Re: Petition for Public Records Disclosure Order
Oregon Health Authority
DOJ File No.: 443001-GA0102-22

Dear Mr. Dennis:

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 Health Authority (OHA) to disclose records that you believe were either withheld or that OHA failed to locate in response to a public records request. For the reasons discussed below, we respectfully deny your petition at this time.

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 on May 31, 2022 for e-mails since October 2020 between specific individuals and containing specific search terms. OHA provided you with an estimate of the cost to make the e-mails available to you, which you paid at the end of July 2022. Thereafter, OHA attempted to disclose the responsive e-mails to you on August 2, 2022 and September 12, 2022, but for unknown reasons neither attempt was successful. You finally received the e-mails from OHA on October 3, 2022. After reviewing them, you believe OHA has either withheld responsive e-mails or that it failed to conduct an adequate search to locate responsive e-mails. As support for your belief, you state that you reasonably expected to see the term "entheogenic" appear in the results – though it was not one

of your specified search terms – but that the term did not appear in any of the e-mails you received. You also note that the most recent e-mail disclosed by OHA was dated April 19, 2022, but you believe there should be more responsive e-mails after that date.

In response to your petition, we contacted Jeanne Windham, OHA's Public Records Coordinator. Notwithstanding your belief that there should be additional records responsive to your request, she explained OHA's position that it has already located and disclosed all nonexempt records responsive to your request. She explained OHA's position that it conducted a search for e-mails using the search parameters provided by you and that OHA disclosed all of the responsive records it located to you, with the exception of 23 e-mails (discussed below). She also provided us with a copy of the search form she submitted to the technicians who conducted the search. Our review of the form confirmed that OHA's search parameters mirrored the specific addressees, search terms, and time frames specified in your request. Finally, in the event there was an error in the initial search, OHA has offered to conduct a new search to determine whether there are in fact any additional e-mails responsive to your request.

Ms. Windham also informed us that OHA initially withheld 23 e-mails from you after determining that they were privileged attorney-client communications. After reviewing those e-mails and discussing them with Ms. Windham, OHA has withdrawn its claim of privilege as to eight of the e-mails and we understand that they have been disclosed to you. As for the remaining fifteen e-mails, OHA continues to assert that they are privileged and exempt from disclosure under the Public Records Law.

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, ORS 40.225, provides that clients have "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).

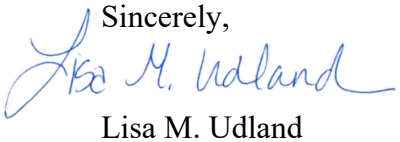
The Oregon Supreme Court has held that application of the attorney-client privilege is contingent upon three findings. *See State ex rel. OHSU v. Haas*, 325 Or 492, 501 (1997). First, the communication must be "confidential" within the meaning of ORS 40.225(l)(b) (a communication "not intended to be disclosed to third persons" other than to those necessary to facilitate the rendition of 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 met, the attorney-client privilege applies unless it has been waived. *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 fifteen e-mails that OHA asserts are exempt and conclude that OHA was permitted to withhold them as attorney-client privileged communications. First, each was addressed exclusively to parties described in ORS 40.225(2)(a)-(e); specifically, each e-mail was between one or more DOJ attorneys and one or more OHA employees. Next, each e-mail contained either a request to DOJ for legal advice, DOJ's advice, or OHA consideration of that advice.[1] We therefore find that the communications were made to facilitate DOJ's rendition of legal services to OHA. We also contacted AAG Shannon O'Fallon, OHA's DOJ-assigned contact counsel, who represented that both DOJ and OHA intended that the withheld e-mails be confidential in their entirety. Our review of those communications disclosed no reason to second-guess her representation. Finally, OHA, 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 withheld e-mails are confidential attorney-client communications, they are privileged under ORS 40.225 and exempt from disclosure under ORS 192.355(9). We therefore respectfully deny your petition as to those e-mails. As for the remainder of your petition, we have no reason to second-guess Ms. Windham's representation that OHA reasonably believes it has already located and disclosed to you all nonexempt e-mails responsive to your request. And we cannot order OHA to disclose records that do not exist. Moreover, OHA has agreed to conduct a new search to determine whether any responsive e-mails were overlooked in its initial search, and it will inform you of the results of that search. Considering OHA's representations and willingness to conduct a new search, we respectfully deny the remainder of your petition at this time.

Sincerely,



Lisa M. Udland
Deputy Attorney General

ACF:pjn
c via e-mail only: Jeanne Windham (OHA)

[1] We also observe that none of the withheld e-mails contain the term "entheogenic," nor are any of them dated after April 19, 2022.