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April 25, 2023

VIA E-MAIL ONLY: jjacoby@bakercityherald.com

Jayson Jacoby
2005 Washington Ave, Ste 101
Baker City, OR 97814

Re: Petition for Public Records Disclosure Order
Oregon Department of Forestry
DOJ File No.: 629400-GA0037-23

Dear Mr. Jacoby:

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 Forestry (ODF) to disclose its investigative report for the October 6, 2022, West Campbell wildfire. For the following reasons, 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).

According to your petition, ODF denied your request for the report by asserting that it is currently exempt under ORS 192.345(1). That provision provides that the following information is exempt from disclosure unless the public interest requires disclosure in the particular instance:

> Records of a public body pertaining to litigation to which the public body is a party if the complaint has been filed, or if the complaint has not been filed, if the public body shows that such litigation is reasonably likely to occur. This exemption does not apply to litigation which has been concluded * * * .

ORS 192.345(1).

In response to your petition, we spoke with Assistant Attorney General Michael Grant, DOJ's assigned counsel for ODF. As background, he explained that ODF has a statutory responsibility to seek reimbursement for costs incurred extinguishing human caused fires on its protected lands if it can identify a liable party. *See* ORS 477.068. ODF therefore investigates such wildfires in order to identify liable parties, as well as to ascertain its legal rights and prospects for cost recovery.

In this instance, Mr. Grant explained ODF's position that the report is currently exempt under ORS 192.345(1) because ODF believes the department is reasonably likely to engage in cost recovery litigation related to the West Campbell wildfire. As support for ODF's position, Mr. Grant explained that:

1. The investigation was conducted at his direction, as ODF's assigned counsel, to assess legal liability for ODF cost recovery. The report, which is addressed to DOJ, was prepared by two experts under contract with DOJ and it is marked as confidential work product.
2. ODF incurred over $100,000 in fire suppression costs in this case.
3. The experts determined that the fire was human caused. The responsible party is therefore liable for ODF's fire suppression costs pursuant to ORS 477.068, ORS 477.085 and/or ORS 477.120.
4. ODF will be submitting a demand to the responsible party to recover those costs and intends to file suit to recover those costs if the demand is not paid within 90 days.

Mr. Grant also cited Oregon Rule of Civil Procedure 36(B)(3) ("ORCP 36(B)(3)"), which provides in relevant part:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable * * * and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative * * * only on a showing that the party seeking discovery has substantial need of the materials in the preparation of such party's case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Id. The Oregon Supreme Court has interpreted this provision as limiting, with some exceptions, pretrial discovery of work product prepared by an expert for an attorney in anticipation of litigation. *See Stevens v. Czerniak*, 366 Or 392 (2004).

Under the circumstances, we conclude that ODF has met its burden of demonstrating that the requested report is exempt from disclosure. Specifically, we conclude that it constitutes expert work product, within the meaning of ORCP 36(3)(B), and that it pertains to litigation that is reasonably likely to occur. And as work product, the report clearly falls within the scope of the materials made conditionally exempt by ORS 192.345(1). *See Lane County School District v. Parks*, 55 Or App 416, 419-20 (1981) (citing with approval a California appellate decision

construing an exemption similar to ORS 192.345(1) to protect work product). ODF is therefore permitted to withhold the report unless the public interest requires disclosure in this instance.

In determining whether the public interest requires disclosure in this instance, we note that ORS 192.345(1) is a temporary exemption – it is no longer available once litigation is abandoned or concluded. Because ODF's report will be available to the public at a future date, we must therefore determine whether the public interest requires disclosure at this particular time. According to Mr. Grant, the public has an interest in recovering the costs that ODF incurred responding to this fire and ODF asserts that its cost recovery efforts could be impaired by prematurely disclosing the otherwise exempt report. Accordingly, ODF believes the public interest weighs in favor of postponing disclosure until any litigation is abandoned or concluded. In support of your public interest argument, your petition notes only that the wildfire burned near Baker City and that there is widespread interest among the local community in the results of the investigation. Your petition does not explain, however, why you believe the public interest requires disclosure at this time. On balance, we conclude that the public interest does not require ODF to disclose the report at this time. We therefore respectfully deny your petition.

Sincerely,

Lisa M. Udland

LISA M. UDLAND
Deputy Attorney General

ACF:pjn
c via e-mail only: Michael Grant (DOJ)