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June 5, 2023

VIA E-MAIL ONLY: miles@columbiariverkeeper.org

Miles Johnson
Columbia Riverkeeper
P.O. Box 950
Hood River, OR 97031

Re: Petition for Public Records Disclosure Order
Oregon Department of Fish and Wildlife
DOJ File No.: 635020-GA0095-23

Dear Mr. Johnson:

This letter is the Attorney General's response to your petition, on behalf of Columbia Riverkeeper, 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 Fish and Wildlife (ODFW) to disclose materials it withheld in response to a records request. Alternatively, you ask us to order ODFW to produce a list describing each document it withheld and explaining why ODFW believes each is exempt. 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 its actions. ORS 192.411(1).

Your petition stems from a March 2023 request for records relating to recent changes to OAR 635-412-005 and OAR 635-412-0035(6). According to your petition, ODFW completed its response to you in late April 2023 and ODFW did not indicate at that time whether it had withheld any responsive records. However, your review of ODFW's response suggested to you that ODFW had withheld some responsive records. After inquiring whether ODFW had more

responsive records, ODFW informed you that it "withheld and/or redacted some of the records based on ORS 192.355(9)(a) (exemption for public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law); ORS 40.225 (attorney client privilege)." Your appeal followed.

Your petition asserts that ODFW's response fails to provide a sufficiently specific, fact-based justification for its partial denial that would enable Columbia Riverkeeper to evaluate the application of the claimed exemptions. You also note that ODFW's response suggests that ODFW has redacted some of the requested records, but that ODFW has not furnished you with any redacted records. You therefore ask us to order ODFW to disclose the records it withheld, including any redacted records. Alternatively, you ask us to order ODFW to produce a list of the withheld documents that identifies dates, authors, and recipients; describes their contents; and explains why ODFW believes they are exempt.

In response to your petition, we contacted Michelle Tate, Executive Assistant in the Office of the ODFW Director. As an initial matter, she explained, ODFW did not mean to suggest that it had redacted records in this instance and ODFW has not, in fact, redacted any responsive records. Rather, she explained, ODFW's response was only intended to inform you that to the extent ODFW "withheld and/or redacted" records, it was under the attorney-client privilege. We have no reason to second-guess Ms. Tate's representation that ODFW does not possess any redacted records. And because we cannot order ODFW to disclose records that do not exist, we respectfully deny this aspect of your petition.

Next, Ms. Tate informed us that ODFW did withhold six records from you after determining that they constitute confidential attorney-client communications. Therefore, she explained, it is ODFW's position that they are exempt from disclosure under ORS 192.355(9)(a), incorporating ORS 40.225. 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." (Emphasis added.) ORS 40.225 is one such law because it 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." 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 six records that ODFW withheld, which consist of five e-mail threads and one electronic document. We conclude that ODFW was permitted to withhold them as 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 one or more Department of Justice (DOJ) attorneys and one or more ODFW employees. Next, each e-mail contained either a request to DOJ for legal advice, DOJ's advice, discussion of DOJ's advice, or ODFW's consideration of that advice. We therefore find that the e-mail communications were made to facilitate DOJ's rendition of legal services to ODFW. Ms. Tate and Assistant Attorney General Anika Marriott, ODFW's DOJ-assigned contact counsel, have also represented that both DOJ and ODFW intended that the withheld e-mails be confidential in their entirety. Our review of those communications disclosed no reason to second-guess their representations. We also find that the electronic document that ODFW withheld is also covered by ORS 40.225 because it consists entirely of confidential communications that were copied from one of the privileged e-mails. Finally, ODFW, 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 we conclude the records ODFW withheld are privileged under ORS 40.225, they are expressly exempt from public disclosure under ORS 192.355(9)(a). We therefore respectfully deny your petition insofar as you seek an order compelling their disclosure.

We now consider your alternative request that we order ODFW to prepare a list describing each withheld record along with an explanation for why it was withheld. Your petition notes that the *Attorney General's Public Records and Meetings Manual* (the "*Manual*") recommends that when an agency withholds a record, "it should also consider briefly explaining the nature of the records withheld or redacted for each exemption asserted." *Id*. at 30. Notwithstanding this suggestion, there is no provision of the Public Records Law requiring agencies to provide such explanations. Nor does the law require agencies to prepare new records in response to public records requests, or to produce lists or descriptions of any records they may withhold. *See Manual* at 7 (the law does not require agencies to create new public records, disclose the reasoning behind their actions, answer questions about their records, or analyze their records). The law requires only that when an agency asserts that records are exempt, it must notify the requester of the specific statutory exemption(s) upon which the agency based its determination. *See* ORS 192.329(2)(b). The record in this case demonstrates that ODFW complied with that requirement.

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Finally, because our authority in this instance is limited to determining whether ODFW was permitted to withhold the records, we lack any authority to order the alternative relief you seek. *See* ORS 192.411(1).[1] Because we have concluded that ODFW was permitted to withhold the records under the attorney-client privilege in this instance, we respectfully deny your petition.

Sincerely,

Lisa M. Udland

Lisa M. Udland
Deputy Attorney General

ACF:pjn
c via e-mail only: Michelle Tate (ODFW)

[1] Regardless of whether some of the information you seek as alternative relief might be available from ODFW as a public record, you have not requested such a document from ODFW and we therefore cannot entertain your request that we order ODFW to produce any such document to you.