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September 12, 2023

VIA E-MAIL ONLY: jeff@saveoregonschools.org

Jeff Myers
8755 SW 165th Avenue
Beaverton, OR 97007

Re: Petition for Public Records Disclosure Order
Oregon Department of Education
DOJ File No.: 581001-GA0134-23

Dear Mr. Myers:

This letter is the Attorney General's response to your petition for the disclosure of records under the Oregon Public Records Law, ORS 192.311 to 192.478. Your petition asks the Attorney General to order the Oregon Department of Education (ODE) to disclose the records that it redacted or withheld in response to a records request.[1] 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 June 2023 request for records that include the name of your X (formerly Twitter) handle, PapaBearMyers, during a specific timeframe. According to your petition, ODE completed its response in late August 2023 and ODE indicated that it "withheld or redacted documents that are protected by Oregon's attorney client privilege laws based on ORS

[1] As a preliminary matter, after receiving your petition, ODE provided to you several emails that it previously withheld as exempt from disclosure under ORS 192.355(9)(a), incorporating ORS 40.225 (attorney-client privilege), in response to your records request. To the extent you were appealing the non-disclosure of any information you have since received in those records, we therefore respectfully dismiss that aspect of your petition as moot. Solely at issue here are two discrete records that contain e-mail threads with certain emails redacted based on ORS 192.355(9)(a), incorporating ORS 40.225.

192.355(9)(a) and ORS 40.225." Your appeal followed, challenging ODE's application of ORS 192.355(9)(a), which incorporated ORS 40.225.

Among other things, your petition asserts that the attorney-client privilege does "not extend to situations where they were committing fraud or a crime"[2] and that the public interest requires disclosure in this instance. To support these assertions, you state that you "have reason to believe ODE staff engaged legal counsel in an effort to take action against factual, evidence-based information I released on Twitter, possibly including communication to Twitter officials to suppress content that would impose upon my free speech rights." You assert that this is based in part on Elon Musk "releasing information referred to as the 'Twitter Files', which showed communications between government officials and Twitter employees, and many of those communications involved suppressing speech that was deemed 'bad' (aka disinformation) by government officials." Lastly, you claim that you were "informed by other Oregonians who had shared experiences of being monitored and even provided evidence of ODE monitoring me."

In response to your petition, we contacted Emily Nazarov, ODE Government and Legal Affairs Manager. Ms. Nazarov informed us that she redacted two records (each containing a separate e-mail thread) after determining that they constitute confidential attorney-client communications. Therefore, she explained, it is ODE's position that the information contained behind those redactions is 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 attorney-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

[2] You cite to ORS 40.225(4)(a), which provides that there is no attorney-client privilege if "the services of the lawyer or lawyer referral service were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud[.]"

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 two e-mail threads that ODE redacted.[3] We conclude that ODE was permitted to redact 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 ODE employees. Next, each e-mail contained either a request to DOJ for legal advice, DOJ's advice, discussion of DOJ's advice, or ODE's consideration of that advice. To be clear, none of the e-mails contained communications in which ODE engaged DOJ attorneys "to take action against factual, evidence-based information [you] released on Twitter, possibly including communication to Twitter officials to suppress content that would impose upon my free speech rights." To the extent that ODE had, in fact, engaged DOJ attorneys in that manner, it is unclear to us how that would constitute "fraud or a crime."[4] We therefore find that the e-mail communications were made to facilitate DOJ's rendition of legal services to ODE, and not to enable the commission of "fraud or a crime." We also contacted Assistant Attorney General Jake Hogue, ODE's DOJ-assigned contact counsel, who represented that both DOJ and ODE intended that the redacted e-mail threads be confidential with respect to the information concealed. Our review of those communications disclosed no reason to second-guess their representations. Finally, ODE, 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 ODE withheld are privileged under ORS 40.225, they are expressly exempt from public disclosure under ORS 192.355(9)(a).

Finally, we note that "the exemptions in ORS 192.355 are not dependent on whether the public interest requires disclosure in the particular instance." *Attorney General's Public Records and Meetings Manual* at 86 (2019) (internal quotations omitted). Therefore, in response to your assertion that the public interest requires disclosure in this instance, we conclude that it does not. Because we have concluded that ODE was permitted to redact 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

KG9/pjn
c via e-mail only: Emily Nazarov (ODE)

[3] We note as an initial matter that these e-mails were responsive to your records request merely because "PapaBearMyers" appears in your own e-mail signature. That phrase does not appear in the body of any e-mails at issue here.

[4] While this evaluation necessarily requires us to assess our own DOJ e-mails with clients of DOJ, we note that you are entitled to seek review of this response in circuit court, which would have the power to review the records as well. *See* ORS 192.411.