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

October 12, 2023

VIA E-MAIL ONLY: saltatrix13@gmail.com

Re: Petition for Public Records Disclosure Order
Oregon Department of Education
DOJ File No.: 581001-GA0146-23

Dear Mr. Smith:

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 withheld in response to a records request. 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 an August 2023 request for records related to discussions about COVID-19 as a restrictable disease and the updating of the Communicable Disease Guidance For Schools released in May 2023. In support of your request, you provided the names of specific employees and search terms you believed would help ODE locate responsive records. After conducting its initial search, ODE informed you in mid-September that it had located 107 e-mails responsive to the search terms you provided. On September 21, 2023, ODE completed its response to you by providing 21 e-mail threads and informing you that ODE withheld documents that it determined to be exempt from disclosure under the privilege for attorney-client communications.

Your appeal followed and expressed your belief that ODE withheld most of the responsive records because it only disclosed 21 of the 107 e-mails it located. You also argue that disclosing this information is in the public interest because it relates to Oregon's current public

health policies. We understand your petition to be appealing ODE's claim that it was permitted to withhold responsive records from you under the attorney-client privilege.

We contacted Emily Nazarov, ODE Government and Legal Affairs Manager, regarding your petition. First, she explained that after reviewing the 107 e-mails ODE located during its initial search, it determined that only 26 were responsive to your request. Of those, she explained, ODE withheld only one e-mail and four calendar invitations after determining that they contained confidential attorney-client communications. Specifically, ODE withheld one e-mail containing legal advice sent by a DOJ attorney to members of ODE's staff. ODE also withheld a responsive DOJ memorandum of advice that was attached to four otherwise non-responsive calendar invitations.

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 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 responsive materials that ODE withheld and find that they constitute attorney-client privileged communications. The withheld materials were addressed exclusively to the parties described in ORS 40.225(2)(a)-(e), they contained DOJ's advice, and they were sent to facilitate DOJ's rendition of legal services to ODE. We also contacted Assistant Attorney General Jake Hogue, ODE's DOJ-assigned contact counsel, who represented that both DOJ and ODE understood these materials to be confidential. Our review of those materials disclosed no reason to second-guess his representation. 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 materials ODE withheld are privileged under ORS 40.225, they are expressly exempt from public disclosure under ORS 192.355(9)(a). Finally, although you assert that the public interest requires disclosure in this instance, the application of ORS 192.355 is not conditioned upon the public's interest in disclosure. *See Attorney General's Public Records and Meetings Manual* at 86 (2019) ("the exemptions in ORS 192.355 are not dependent on whether the public interest requires disclosure in the particular instance").

Because we conclude that ODE was permitted to withhold these materials under the attorney-client privilege, we respectfully deny your petition.

Sincerely,

Lisa M. Udland

Lisa M. Udland
Deputy Attorney General

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