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March 18, 2024

VIA E-MAIL ONLY: nick@thelundreport.org

Nick Budnick
The Lund Report

Re: Petition for Public Records Disclosure Order
Oregon Health Authority
DOJ File No.: 443029-GA0021-24

Dear Mr. Budnick:

This letter is the Attorney General's response to your petition, on behalf of *The Lund Report*, under the Oregon Public Records Law, ORS 192.311 to 192.478. Your petition, dated February 26, 2024,[1] asks the Attorney General to order the Oregon Health Authority (OHA) to disclose material that OHA redacted or withheld in response to two recent records requests. For the reasons that follow, we dismiss your petition in part and deny it in part.

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 192.450(1). The agency carries the burden to sustain any such denial. *Id.*

The first part of your petition relates to a request for e-mails pertaining to the OHA's review of the proposed merger of two nonprofit healthcare service providers, CareOregon and SCAN. We understand that OHA furnished all of the requested e-mails to you, but that OHA redacted material from some of them claiming the material is exempt from public disclosure under ORS 192.355(1) (internal advisory communication) and ORS 40.225 (attorney-client privilege). OHA also withheld several e-mail attachments in their entirety citing the same exemptions, as well as ORS 415.501(13) (confidential information obtained from the applicants to facilitate OHA's review). The second part of your petition relates to a separate request for

[1] We thank you for granting an extension of time in which to respond.

OHA's draft Review Report and Recommendation relating to the proposed merger as of January 12, 2023. OHA denied your request for these records citing the same exemptions. Your petition asks us to determine whether OHA was permitted withhold these materials.

We discussed your petition with Sarah Bartelman, OHA's Health Care Market Oversight Program Manager, and Assistant Attorney General Karine Gialella, one of OHA's DOJ-assigned contact counsel. They informed us that OHA has agreed to disclose those portions of the e-mails that were redacted under the exemption for internal advisory communications, except for one set of documents discussed below. OHA has also agreed to disclose a portion of a January 4, 2023 e-mail thread that it previously withheld under the attorney-client privilege. Regarding the e-mail attachments and draft Review Report and Recommendation that OHA withheld, OHA has also withdrawn its claim that they are exempt in their entirety and will be disclosing them to you subject to the redaction of information OHA determines is exempt. Because OHA has agreed to disclose these materials to you, we dismiss these aspects of your petition as moot. You may, of course, submit a new petition if you wish to appeal any redactions to the additional material that OHA discloses to you.

OHA continues to assert that the material redacted from one set of documents is exempt under ORS 192.355(1) as internal advisory communications. ORS 192.355(1) exempts from disclosure communications "within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to any final agency determination of policy or action." The exemption does not apply "unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure." *Id*. When balancing the public interest, one consideration is the extent to which public disclosure would "chill" employees' willingness to express their opinions and observations without inhibition. *See City of Portland v. Oregonian Publ'g Co., 200 Or App 120* (2005).

The specific documents at issue are attached to two January 4, 2024 e-mails with the subject "CO Talking Point – A/C Privilege." Those attachments include proposed agency notifications and talking points in anticipation of the conclusion of OHA's review of the proposed merger, and they present alternative proposals based on different potential outcomes. The first e-mail is from an OHA staff member soliciting input and advice from Ms. Bartelman and Ms. Gialella on the attached drafts. The second e-mail contains Ms. Bartelman's response, in which she offered her comments and suggested edits to the drafts, posed additional questions, and solicited legal input from Ms. Gialella.

After reviewing those documents, we conclude that OHA was permitted to withhold the redacted material as internal advisory communications. The redacted material represents part of a frank communication within OHA and with DOJ that was advisory in nature, covered other than purely factual materials, and was preliminary to any final agency action. In this instance, we also find that OHA has adequately described how publicly disclosing this material may "chill" OHA staff's willingness to express their uninhibited opinions and observations in writing in the future. And we find little public interest in the disclosure of the preliminary version of

OHA's talking points in this instance. We therefore conclude that the public interest in encouraging such frank communications clearly outweighs the public interest in disclosure in this instance.

Next, we evaluate OHA's claim that the remaining material redacted from the e-mails is exempt from disclosure under the attorney-client privilege, ORS 40.225. ORS 192.355(9)(a) 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 the 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; i.e., the communication "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)-€. *Id.* If all three elements are met, the attorney-client privilege applies unless it has been waived. *Klamath County School District v. Teamey,* 207 Or App 250, 261-62 (2006). 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.

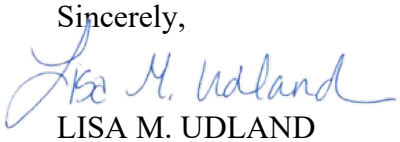
We have reviewed the portions of the e-mails that OHA claims are privileged and find that they constitute attorney-client privileged communications. The redacted portions were addressed exclusively to the parties described in ORS 40.225(2)(a)-€, the e-mails were sent to facilitate DOJ's rendition of legal services to OHA, and both Ms. Bartelman and Ms. Gialella represented that both DOJ and OHA understood the redacted material to be confidential. Our review of those portions of the e-mails disclosed no reason to second-guess their 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 as to those communications. *See* ORS 40.280 (waiver of privilege by voluntary disclosure). Because we conclude those redacted portions of the e-mails are privileged under ORS 40.225, OHA was permitted to withhold that material under ORS 192.355(9)(a).

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For the reasons discussed above, we respectfully deny those aspects of your petition that are not moot as the result of OHA's agreement to disclose additional records to you.

Sincerely,



LISA M. UDLAND
Deputy Attorney General

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c via e-mail only: Sarah Bartelman (OHA)