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March 25, 2024

VIA E-MAIL ONLY: tgomez1080@gmail.com

Teresa Gomez
159 Pembrook St SE
Salem, OR 97302

Re: Petition for Public Records Disclosure Order
Oregon State Bar
DOJ File No.: 993001-GA0033-24

Dear Ms. Gomez:

This letter is the Attorney General's response to your petition under the Oregon Public Records Law, ORS 192.311 to 192.478. Your petition asks the Attorney General to order the Oregon State Bar (the "Bar") to disclose material that the Bar either redacted or withheld in response to a recent public records request. 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.*

Your petition relates to a request for all records pertaining to complaints filed against four attorneys. We understand that the Bar furnished you with more than 1,300 pages of responsive records. The Bar's response also noted that some records were redacted or withheld because disclosure would constitute an unreasonable invasion of privacy (ORS 192.355(2)) or because some contained attorney-client privileged communications (ORS 40.225). Your petition explains your belief that the Bar improperly withheld its correspondence with two of the attorneys named in the complaints. You also assert that the Bar improperly redacted information from the records it disclosed.

We discussed your petition with Nik Chourey, the Bar's Deputy General Counsel. He explained that the Bar's initial response was partially inaccurate in that the Bar did not actually withhold any responsive records from you. Regarding the additional correspondence you seek, he indicated that the Bar does not possess correspondence with the two attorneys named in your petition because the Bar was able to resolve those complaints without contacting either attorney. As we have no reason to second-guess Mr. Chourey's representation, we dismiss this aspect of your petition because we cannot order the disclosure of records that do not exist.

Next, Mr. Chourey explained that all but one of the redactions in the records disclosed to you consist of material the Bar determined to be exempt under the personal privacy exemption, ORS 192.355(2)(a). That provision permits agencies to withhold information of a personal nature if "public disclosure would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance." *Id*. Disclosure constitutes an unreasonable invasion of privacy if "an ordinary reasonable person would deem [disclosure] highly offensive." *Jordan v. MVD,* 308 Or 433, 442-43 (1989). The party seeking disclosure has the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy. ORS 192.355(2)(a).

In this instance, Mr. Chourey explained, the Bar relied upon the personal privacy exemption to redact social security numbers (SSNs), drivers' license numbers, dates of birth, and the name of a crime victim. After discussing your petition with Mr. Chourey, he informed us that, except for the redacted SSNs, the Bar has agreed to disclose this information to you. We therefore dismiss your petition with respect to the redacted information the Bar has now agreed to disclose to you.

We also conclude that in this instance, the Bar was permitted to withhold the SSNs under ORS 192.355(2)(a). We recognize that individuals have a heightened privacy interest in their SSNs and believe that an ordinary reasonable person would consider the public disclosure of their SSN to be highly offensive in most instances. We have therefore concluded that SSNs may be withheld under the personal privacy exemption and have recommended that agencies not disclose SSNs without advice from legal counsel. *See Attorney General's Public Records and Meetings Manual* at A-8 (2019). Your petition does not assert that the disclosure of SSNs in this instance would *not* constitute an unreasonable invasion of privacy, and nothing in the available record supports the conclusion that the public interest by clear and convincing evidence requires their disclosure in this instance. ORS 192.355(2)(a).[1] We therefore respectfully deny this aspect of your petition.

Finally, we evaluate the Bar's claim that the remaining material it withheld 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

[1] We also note that federal law generally prohibits the redisclosure of lawfully obtained SSNs, and that violations may be subject to federal criminal penalties. *See* 47 Or Atty Gen 1 (1993) (discussing the prohibition in 42 USC § 405(c)(2)(C)(viii) on the redisclosure of SSNs by persons authorized to obtain or maintain them); 42 USC § 405(a)(8) (felony to disclose, use, or compel the disclosure of SSNs in violation of federal law); and ORS 192.355(8) (exempting records or information the disclosure of which is prohibited by federal law).

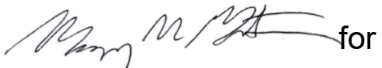
restricted or otherwise made confidential or *privileged* under Oregon law." (Emphasis added.) ORS 40.225 is such a law because it provides that clients have "a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating 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 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). *Id*. 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)-(e). *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).

We have reviewed the material the Bar claims is privileged, which consists of a single paragraph, and find that the privilege applies. The redacted paragraph was authored by an attorney in the Bar's Client Assistance Office as part of a memorandum referring a complaint to the Bar's Office of Disciplinary Counsel. It was therefore addressed to the parties listed in ORS 40.225(2)(a)-(e). Mr. Chourey explained the Bar's position that the redacted paragraph contains legal analysis and advice about a pending disciplinary matter and that it was sent to facilitate the rendition of legal services to the Bar. And, he explained, the parties to the memorandum understood the redacted material to be confidential. Our review of the redacted material disclosed no reason to second guess Mr. Chourey's representations. We therefore conclude the redacted paragraph is privileged and deny the remainder of your petition.

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

Sincerely,



for

LISA M. UDLAND
Deputy Attorney General

ACF\pjn
c via e-mail only: Nik Chourey (Oregon State Bar)