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May 15, 2024

VIA E-MAIL ONLY: chris@waterleague.org

Christopher Hall
Water League
P.O. Box 1033
Cave Junction, OR 97523

Re: Petition for Public Records Disclosure Order
Oregon Water Resources Department
DOJ File No.: 690303-GA0048-24

Dear Mr. Hall:

This letter is the Attorney General's response to your petition, on behalf of the Water League, 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 Water Resources Department (OWRD) to disclose Attorney General Advice – DOJ File No. 690302 GN0836-06 (Dec 1, 2008), which OWRD asserts is exempt from disclosure under the attorney-client privilege. 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).

We discussed your petition with Jesse Ratcliffe, OWRD's DOJ-assigned contact counsel. He explained OWRD's position that the legal advice you seek is exempt from disclosure under ORS 192.355(9)(a), incorporating ORS 40.225 (attorney-client privilege). 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 the 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)-(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 legal advice you seek and find that it constitutes an attorney-client privileged communication. The advice was addressed exclusively to the parties described in ORS 40.225(2)(a)-(e), was sent to facilitate DOJ's rendition of legal services to OWRD, and Mr. Ratcliffe informs us that both DOJ and OWRD understood the advice to be confidential. Our review of the advice disclosed no reason to second-guess his representation. Finally, OWRD, 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 advice is privileged under ORS 40.225, OWRD was permitted to withhold it under ORS 192.355(9)(a).

You do not dispute that the legal advice you requested is covered by the attorney-client privilege. However, you assert that the advice or a condensation of the advice must be disclosed under ORS 192.355(9)(b), which operates as a partial exception to ORS 192.355(9)(a)'s confidentiality rule. Under that provision, agencies may not withhold *factual information* contained in an otherwise privileged record if five conditions are met; specifically:

1. The basis for the claim of exemption is the attorney-client privilege, ORS 40.225;

2. The factual information is not prohibited from disclosure under other state or federal law, regulation or court order and is not otherwise exempt from disclosure under the Public Records Law;

3. The factual information was compiled by or at the direction of an attorney as part of an investigation on behalf of the agency in response to information of possible wrongdoing by the agency;

4. The factual information was not compiled in preparation for litigation, arbitration or an administrative proceeding by or against the agency; *and*

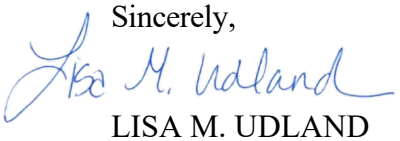
5. The holder of the privilege under ORS 40.225 has made or authorized a public statement characterizing or partially disclosing the factual information compiled by or at the attorney's direction. ORS 192.355(9)(b).

All five conditions must be satisfied before the Public Records Law requires the disclosure the factual information contained in an otherwise privileged record. *Id*. Alternatively, if all five conditions are satisfied the agency may prepare and disclose a condensation from the record of the significant facts that are not otherwise exempt from disclosure. ORS 192.360(1).

In this instance, we find that the exception in ORS 192.355(9)(b) does not apply because at least one of the necessary conditions has not been satisfied. Specifically, the advice you seek was not prepared by or at the direction of an attorney as part of an investigation into possible wrongdoing by OWRD.[1] *See* ORS 192.355(9)(b)(C). We also note that there is nothing in the available record suggesting to us that OWRD has made or authorized a public statement characterizing or partially disclosing the factual information contained in the advice you seek. *See* ORS 192.355(9)(b)(E). We therefore conclude that OWRD is not compelled to disclose the factual information contained in the advice, or to prepare and disclose a condensation of such factual information.

Finally, your petition also explains your belief that the public interest requires disclosure in this instance. We observe, however, that when incorporating ORS 40.225, the application of ORS 192.355(9)(a) does not depend upon the public interest in disclosure. *See Attorney General's Public Records and Meetings Manual* at 86 (2019) (exemptions in ORS 192.355 are "not dependent upon whether 'the public interest requires disclosure in the particular instance.'"). We thus conclude that OWRD is permitted to withhold the privileged advice notwithstanding the public interest in its disclosure and therefore respectfully deny your petition.

Sincerely,



LISA M. UDLAND
Deputy Attorney General

ACF/pjn
c via e-mail only: Mindy Lane (OWRD)
Jesse Ratcliffe (DOJ)

[1] We also observe that the record you seek consists entirely of statutory analysis, conclusions, and legal advice, and does not contain the sort of investigative factual information to which ORS 192.355(9)(b) applies.