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

June 20, 2024

VIA E-MAIL ONLY: pcashman20@gmail.com

Patrick Cashman
3024 SW Iowa St.
Portland, OR 97239

Re: Petition for Public Records Disclosure Order
Oregon Judicial Department
DOJ File No.: 198040-GA0060-24

Dear Mr. Cashman:

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 Judicial Department (OJD) to disclose the records that it redacted 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 a request for records of an OJD employee during a four-day timeframe. According to your petition and subsequent communication, OJD completed its response and indicated that it redacted documents that are protected by Oregon's attorney client privilege laws based on ORS 192.355(9)(a) and ORS 40.225. Your appeal followed, challenging OJD's application of ORS 192.355(9)(a), which incorporated ORS 40.225.

As part of this petition, you also allege that OJD incorrectly redacted communications between two OJD employees, neither of whom are attorneys, on the basis that the communications are protected by Oregon's attorney client privilege laws based on

ORS 192.355(9)(a) and ORS 40.225. In addition, you allege that OJD incorrectly redacted "the From / To / Date metadata" in a redacted image disclosed by OJD.[1]

In response to your petition, we contacted Tim Lewis, Senior Assistant General Counsel for OJD. He informed us that he redacted a thread of messages between himself and an OJD employee after determining that they constitute confidential attorney-client communications. He also explained that he redacted one message between two non-attorney OJD employees, in which those employees were transmitting a duplicated image of confidential attorney-client communications.[2] He lastly confirmed that no "From / To / Date metadata" was redacted from any messages. Therefore, Mr. Lewis explained, it is OJD'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)-(f). *Id*. The court in *Haas* held that employees of a client entity can be "representatives of the client" within the meaning of ORS 40.225(2)(d) and that communications about legal advice between only these employees—without an attorney—does not waive the attorney-client privilege. 325 Or at 509. If all three of these elements are met, the attorney-client privilege applies unless it has been waived. *Teamey*, 207 Or App at 261-62; *see* ORS 40.280 (waiver of privilege by voluntary disclosure). Lastly, 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.

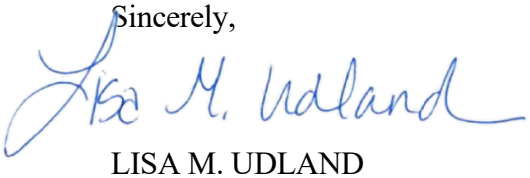
We have reviewed the records that OJD redacted based on ORS 192.355(9)(a) and

[1] However, our review of the unredacted and redacted versions of the message at issue confirms that "the From / To / Date metadata" was not redacted and is viewable in the redacted version of the disclosed message. There is a page break in the PDF version of the message that splits the contents of the redacted message in two parts, only one of which appears in your petition but both of which appear in OJD's disclosure.
[2] Our review of the unredacted versions of the records confirms this.

ORS 40.225. We conclude that OJD was permitted to redact them as attorney-client privileged communications. First, each message was addressed exclusively to parties described in ORS 40.225(2)(a)-(f); specifically, each message was between one or more OJD attorneys and one or more OJD employees, with the exception of one message in which two OJD employees communicated about a copy of such a message containing legal advice. As the court in *Haas* held, this communication between these OJD employees does not require the presence of an attorney in order to remain privileged and to meet the definition of ORS 40.225(2)(d). Next, each message contained either a request to the OJD attorney for legal advice, the OJD attorney's advice, discussion of the OJD attorney's advice, or OJD's consideration of that advice. We therefore find that the communications were made to facilitate an OJD attorney's rendition of legal services to OJD. When we contacted Tim Lewis, he represented that both he and the OJD employee intended that the redacted messages be confidential with respect to the information concealed. Our review of those communications disclosed no reason to second-guess their representations. Finally, there is no evidence in the available record to suggest that the privilege has been waived by OJD.

Because the records OJD redacted qualify as attorney-client privileged communications under ORS 40.225, we conclude that OJD was permitted to redact them from you under ORS 192.355(9)(a). We therefore respectfully deny your petition.

Sincerely,



LISA M. UDLAND
Deputy Attorney General

KG9/pjn
c via e-mail only: Tim Lewis (OJD)