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March 31, 2025

VIA E-MAIL ONLY: pelissierdr@gmail.com

Daniel Pelissier
239 Pine Lake Drive
Eagle Point, OR 97254

Re: Petition for Public Records Disclosure Order
Oregon Department of Forestry
DOJ File No.: 629400-GA0034-25

Dear Mr. Pelissier:

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 Forestry (ODF) to disclose an email 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 to ODF for records of communications related to the Upper Applegate Fire. According to your petition, ODF indicated that it redacted one email that ODF contends is protected by Oregon's attorney client privilege laws based on ORS 192.355(9)(a). ODF also cited the litigation exemption found at ORS 192.345(1). Your appeal followed, challenging ODF's application of these two exemptions.

In response to your petition, we contacted Assistant Attorney General Matt DeVore, ODF's DOJ-assigned contact counsel. He informed us that ODF redacted the body of an email sent by Kiel Nairns (an ODF employee) to Stacy Savona (another ODF employee) because it contained confidential attorney-client communications. Mr. DeVore explained that this email relates to a legal matter he is currently advising ODF on. In the context of that representation, Mr. DeVore contacted Ms. Savona at ODF and asked her to provide some more information to support his legal analysis. In response to Mr. DeVore's request, Mr. Nairns gathered the requested information and emailed it to his supervisor Ms. Savona, who then forwarded it to Mr. DeVore. Mr. DeVore explained that he needed the information in the redacted email so that he could properly advise ODF on the application of law. Therefore, Mr. DeVore explained, it is ODF'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 facilitating the rendition of legal services 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. *Klamath County School Dist. v. Teamey*, 207 Or App 250, 261-62 (2006); *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 email that ODF redacted based on ORS 192.355(9)(a) and ORS 40.225. We conclude that ODF was permitted to redact it as attorney-client privileged communications. First, the email was addressed exclusively to parties described in ORS 40.225(2)(a)-(f); specifically, the email was between ODF employees. As the court in *Haas* held, this communication between these ODF employees does not require the presence of an attorney to remain privileged and to meet the definition of ORS 40.225(2)(d). Next, the message itself discusses information gathered at the request of ODF's attorney. We therefore find that the communications were made to facilitate an attorney's rendition of legal services to ODF. When we contacted Matt DeVore, he represented that both he and the ODF employees intended that the redacted message be confidential with respect to the information concealed. Our review of those communications disclosed no reason to second-guess this representation. Finally, there is no evidence in the available record to suggest that the privilege has been waived by ODF.

Because the records ODF redacted qualify as attorney-client privileged communications under ORS 40.225, we conclude that ODF was permitted to redact them from you under ORS 192.355(9)(a).[1] We therefore respectfully deny your petition.

Sincerely,

Lisa M. Udland

LISA M. UDLAND
Deputy Attorney General

DP9/pjn
c via e-mail only: Jessica Neujahar, Public Affairs Officer, Oregon Department of Forestry
Matt DeVore, Assistant Attorney General, Department of Justice

[1] Because we find the email is exempt under ORS 192.355(9)(a), we do not reach ODF's second argument concerning the litigation exemption provided by ORS 192.345(1).