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December 3, 2025

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.: 443852-GA0164-25

Dear Mr. Budnick:

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 Health Authority (OHA) to disclose fully a memorandum 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. *Id*.

Your petition stems from a request to OHA for a memorandum authored by the law firm of Brown and Peisch. Your petition explains that OHA disclosed to you a portion of the memorandum but withheld the remainder under a claim of attorney client privilege. Your petition asks the Attorney General to review the memorandum to ensure that OHA "performed the appropriate legal analysis given the complexities of what is and is not covered under attorney-client privilege when it comes to Oregon Public Records Law * * *."

In considering your petition, we reviewed an unredacted copy of the memorandum you requested. We also reviewed correspondence related to your records request provided by both you and OHA. Additionally, we discussed your petition with Shannon O'Fallon, OHA's assigned Attorney General contact counsel.

Your records request and related petition arise from a series of written questions you submitted to OHA. In response to one of those questions, OHA's communications officer informed you that OHA had requested a review of other state Medicaid benefit frameworks. You then requested a copy of that review from OHA's records officer. The responsive record is a memorandum prepared at the request of OHA by Special Assistant Attorney Generals (SAAGs) from Brown & Peisch, a law firm that advises clients on regulatory matters pertaining to Medicaid and other federally funded health and benefit programs. After receiving your records request, OHA elected to disclose to you a portion of the memorandum that specifically describes processes and policies in other states concerning the scope of benefits covered by Medicaid. OHA withheld, as privileged, the remainder of the memorandum.

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*. 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).

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We have reviewed the memorandum that OHA withheld based on ORS 192.355(9)(a) and ORS 40.225. We conclude that OHA was permitted to withhold it as an attorney-client privileged communication. First, the memorandum was authored by SAAGs who represent OHA, and we confirmed with OHA Deputy Director David Baden that the memorandum was distributed to a discrete group of OHA employees. We therefore find that the memorandum was distributed exclusively to the parties described in ORS 40.225(2)(a)-(f). Next, the withheld portion of the memorandum provides the attorney's legal analysis of certain federal rules and regulations. We therefore find that the communication was made to facilitate an attorney's rendition of legal services to OHA. Finally, the memorandum is labeled as "Attorney-Client Communication" and "Privileged and Confidential," and OHA has confirmed that the memorandum was treated as a confidential document.

In response to your public records request, OHA exercised its discretion to disclose to you the portion of the memorandum addressing the existing practices of certain states. Under Oregon law, this action does not constitute a waiver of the attorney-client privilege. *See* ORS 40.280 (for purposes of waiver "voluntary disclosure does not occur when a public body * * * discloses information or records in response to a [public records request]"). And there is no evidence in the available record to suggest that the privilege has otherwise been waived by OHA.

Finally, your petition explains that, in this instance, "the public has a clear right to know what lawyers have told the Oregon Health Authority." While OHA has discretion to provide the records to you, the Attorney General lacks legal authority to order OHA to release the records in the public interest. *See* Attorney General's Public Records and Meetings Manual at 73 (2024) (exemptions in ORS 192.355 are "not dependent upon whether 'the public interest requires disclosure in the particular instance.'"). We therefore respectfully deny your petition.

Sincerely,

BENJAMIN GUTMAN
Interim Deputy Attorney General

DP9/pjn
c via e-mail only: Jeanne Windham, Oregon Health Authority
Shannon O'Fallon, Senior Assistant Attorney General, Department of Justice