

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON, by and through
Department of Administrative Services,

Appellant,

v.

GREGORY A. CHAIMOV,

Respondent.

Marion County Circuit
Court No. 18CV39159

Appellate Court No. A169203

EMERGENCY MOTION FOR
TEMPORARY STAY / STAY

**EMERGENCY MOTION UNDER
ORAP 7.35**

MOTION

In a judgment entered this morning, the Marion County Circuit Court ordered the Department of Administrative Services (DAS) to disclose by **5 p.m. tomorrow (Friday October 26)** documents that DAS believes are protected by attorney-client privilege. Once the documents are disclosed, they cannot be undisclosed. This court should immediately stay the circuit court's judgment to prevent release of the documents while it reviews the merits of DAS's argument. Accordingly, pursuant to ORS 19.360, DAS moves for a stay pending resolution of this appeal and, at the very least, a temporary stay of the judgment pending full briefing on the stay motion.

Counsel for DAS notified opposing counsel about this emergency motion. Opposing counsel objects to this motion and intends to file a response expeditiously.

ARGUMENT

A. Background

The Oregon Constitution expressly authorizes the Governor to submit proposed legislation to the legislature. Or. Const. Art. V, § 11. The Governor fulfills this constitutional task by directing executive branch agencies to submit requests to Legislative Counsel for the drafting of legislation. Before submission to Legislative Counsel, these requests are reviewed and approved (or disapproved) by the Governor's Office. Att-15 (Williams Decl. ¶ 9). This is the process prescribed by Oregon statute: ORS 173.130(2) provides that, "Upon the written request of a state agency, the Legislative Counsel may prepare or assist in the preparation of legislative measures that have been approved for preparation in writing by the Governor[.]" DAS helps coordinate this process on behalf of the Governor. Att-13 (Williams Decl. ¶ 2).

Oregon law provides that only Legislative Counsel may draft proposed legislation. *See* ORS 173.130(2); Rules of the Oregon Senate, 213.07 ("The Executive Department, administrative agencies, boards and commissions, and the Judicial Branch, shall have all measures for presession filing with the Senate drafted by Legislative Counsel."); Rules of the Oregon House 2017-2018, 12.20(1) (requiring legislative counsel draft language for all measures introduced in the House).

In preparation for the 2019 legislative session, DAS required agencies to submit their proposed legislative concepts to DAS using a form entitled “2019 Agency Request to Office of Legislative Counsel for Drafting of Legislation.” (“Request Form”). Att-13 (Williams Decl. ¶ 3). The Request Forms were completed electronically in the spring of 2018 by the agencies via a web-based computerized system called “BillTracker.” Att-13–14 (Williams Decl. ¶ 4).

After the Governor’s Office review process, the Request Forms that had been approved by the Governor were transmitted to Legislative Counsel to begin the drafting process. Att-15 (Williams Decl. ¶ 9). All agency Request Forms and supporting materials were submitted to DAS by June 2018. Att-14 (Williams Decl. ¶ 5). Of those, 234 were subsequently forwarded to Legislative Counsel for drafting. Att-15 (Williams Decl. ¶ 9).

Petitioner requested that DAS disclose the Request Forms pursuant to Oregon’s public records law. Att-4 (Am Compl ¶¶ 13–15). DAS denied the request and petitioner sought review by the Attorney General. Att-4 (Am Compl ¶ 18). The Attorney General issued a public records order concluding that the records sought were exempt from disclosure because of attorney-client privilege. Att-8–12 (Am Compl Ex. 10).

Petitioner filed a complaint in the circuit court pursuant to ORS 192.411(2). Att-1–7 (Am Compl). Petitioner and DAS filed cross-motions for

summary judgment, and the court heard argument and considered the motions on October 24, 2018. Att-27 (SJ Order). The circuit court granted petitioner's motion and denied DAS's motion orally on October 24, 2018, concluding that Legislative Counsel does not have an attorney-client relationship with state agencies and therefore DAS failed to show that the documents were exempt from disclosure. Att-27 (Order). The court signed the order and judgment on October 25, 2018. Att-27–34 (Order; Judgment). The court also ordered that DAS provide the requested records by October 26th at 5 p.m. Att-28, 31 (Order; Judgment). DAS requested a stay from the trial court orally at the hearing on October 24th; the trial court denied the stay. Att-28 (Order).

DAS filed a notice of appeal on October 25, 2018, followed by this emergency motion for stay.

B. This court should grant a stay pending resolution of the appeal.

This court should reverse the circuit court's order denying a stay, and issue a stay because DAS is likely to prevail on appeal and enforcement of the judgment would require DAS to disclose documents that it believes are protected by attorney-client privilege. The court should grant a temporary stay

pending its decision on the stay request because the trial court ordered the records disclosed by 5 p.m. tomorrow.¹

In deciding whether to grant a motion to stay, this court considers the factors outlined in ORS 19.350(3):

- (a) The likelihood of the appellant prevailing on appeal.
- (b) Whether the appeal is taken in good faith and not for the purpose of delay.
- (c) Whether there is any support in fact or in law for the appeal.
- (d) The nature of the harm to the appellant, to other parties, to other persons and to the public that will likely result from the grant or denial of a stay.

ORS 19.350(3); *Doe I v. State*, 164 Or App 543, 547, 993 P2d 822 (1999), *reviden*, 330 Or 138 (2000) (appellate courts consider ORS 19.350(3) factors). In addition, this court considers “such other factors as [it] considers important.” ORS 19.350(3). In this case, the court should consider the importance of the issue at stake—attorney-client privilege between Legislative Counsel and numerous state agencies. Each of the specific factors listed in statute also weigh in favor of staying the judgment.

¹ As noted above, DAS moved the trial court for a stay, and the trial court denied the stay. DAS accordingly believes that a 14-day temporary stay is in place by virtue of ORS 19.360(1). But to avoid uncertainty and further trial-court litigation in light of the court’s order that the documents be disclosed tomorrow, DAS requests an immediate temporary stay from this court.

1. DAS has legal and factual support for its position and is likely to prevail on appeal.

The law and facts developed on summary judgment support DAS's position that the Request Forms are subject to attorney-client privilege and therefore exempt from disclosure under the public records law. 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." And Oregon law provides that "[a] client has 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." ORS 40.225(2) (also referred to as Oregon Evidence Code (OEC) Rule 503).

Thus, ORS 192.355(9)(a) permits public bodies to decline to disclose public records that are protected by the attorney-client privilege. *See, e.g., Port of Portland v. Oregon Cntr. for Environ. Health*, 238 Or App 404, 409–10, 243 P3d 102 (2010) (predecessor statute to ORS 192.355(9)(a)² encompasses attorney-client privileged communications); *Klamath County School Dist. v. Teamey*, 207 Or App 250, 259, 140 P3d 1152 (2006) (same). And the

² "The provisions of the Public Records Law were amended and renumbered in 2017." *Pamplin Media Grp. v. City of Salem*, 293 Or App 755, 757, ___ P3d ___ (2018) (citing Or. Laws 2017, ch. 456; Or. Laws 2017, ch. 654; Or. Laws 2017, ch. 728).

protection is unconditional. “Unlike certain other provisions [of the public records law] * * * which expressly require courts to balance confidentiality and public interest, the [attorney-client privilege] exemption here applies without regard to such considerations.” *Teamey*, 207 Or App at 260–61.

The Request Forms are subject to the attorney-client privilege. The privilege applies to communications that are: (1) “confidential” within the meaning of ORS 40.225(1)(b) (a communication “not intended to be disclosed to third persons” other than to those necessary to facilitate the rendition of professional legal services); (2) for the purpose of facilitating the rendition of professional “legal services”; and (3) between the parties described in one of the paragraphs of ORS 40.225(2)(a)-(e). *See, e.g., State ex rel. OHSU v. Haas*, 325 Or 492, 501, 942 P2d 261 (1997); *Teamey*, 207 Or App at 261–62. Each of those requirements is met.

First, the Request Forms were “confidential” because the parties intended them to be. *See State v. Ogle*, 297 Or 84, 87, 682 P2d 267 (1984) (whether communication is confidential depends on “the intent of the parties to shield the communication from disclosure”). For at least the past five years, Request Forms have been kept confidential by agencies during the Governor’s review and Legislative Counsel drafting process. Att-14 (Williams Decl. ¶ 6). Around

May 2018 DAS told agencies that the Request Forms were confidential and

would not be released in response to public records requests while Legislative Counsel was working on the bill language. Att-3, 18 (Am Compl ¶ 10; Craig Decl. ¶ 3). Also by May 2018, the Request Forms online and when printed stated:

This document is a request for legal services. By completing this form, the named agency asks the Office of Legislative Counsel to draft legislation for introduction in the 2019 Legislative Session based on the instructions below. Although it is expected that agencies will have discussed legislative concept ideas with stakeholders, agencies are directed to treat this document as confidential and privileged and, accordingly, not to share the text of this form outside of state government before legislation is drafted and finalized.

Att-14–15 (Williams Decl., ¶¶ 7–8). And Legislative Counsel considers the bill drafting requests forms to be confidential. Att-24 (Johnson Decl. ¶ 9); see ORS 173.230(1) (requiring legislative counsel to keep any matter before it confidential if the requestor designates it confidential). Thus the agencies submitting the requests and Legislative Counsel intended that the Request Forms would be kept confidential while Legislative Counsel was doing its work in response to the agencies’ requests.

Second, the Request Forms are for the purpose of facilitating the rendition of professional “legal services.” Legislative Counsel bill drafting is a legal service. It is described as a legal service in statute. See ORS 173.130(2) & (5) (directing Legislative Counsel to prepare legislative measures that have

been approved by the Governor, authorizing Legislative Counsel to charge for its services, and providing that “except” with respect to bill drafting Legislative Counsel “shall not give opinions or provide other “legal services” to” “agencies”).³ Bill drafting also fits within the test for what constitutes the

³ ORS 173.130 provides:

(1) The Legislative Counsel shall prepare or assist in the preparation of legislative measures when requested to do so by a member or committee of the Legislative Assembly.

(2) Upon the written request of a state agency, the Legislative Counsel may prepare or assist in the preparation of legislative measures that have been approved for preparation in writing by the Governor or the Governor’s designated representative. The Legislative Counsel may also prepare or assist in the preparation of legislative measures that are requested in writing by the Judicial Department, the Governor, the Secretary of State, the State Treasurer, the Attorney General or the Commissioner of the Bureau of Labor and Industries. In accordance with ORS 283.110, the Legislative Counsel may charge the agency or officer for the services performed.

(3) The Legislative Counsel shall give such consideration to and service concerning any measure or other legislative matter before the Legislative Assembly as is requested by the House of Representatives, the Senate or any committee of the Legislative Assembly that has the measure or other matter under consideration.

(4) The Legislative Counsel, pursuant to the policies and directions of the Legislative Counsel Committee and in conformity with any applicable rules of the House of Representatives or Senate, shall perform or cause to be performed research service requested by any member or committee of the Legislative Assembly in connection with the performance of legislative functions. Research assignments made by joint or concurrent resolution of the Legislative Assembly shall be given priority over other research requests received by the Legislative Counsel. The research service to be performed includes the administrative services incident to the accomplishment of the research requests or assignments.

practice of law. *See In re Conduct of Morin*, 319 Or 547, 563, 878 P2d 393 (1994) (“[T]he practice of law includes the drafting * * * of documents and the giving of advice in regard thereto any time an informed or trained discretion must be exercised in the selection or drafting of a document to meet the needs of the persons being served.”); Att-21–24 (Johnson Decl. ¶¶ 3–8 (describing Legislative Counsel legal staff and the bill drafting process which Legislative Counsel considers to be legal services and involves informed and trained discretion, individualized advice, and legal research)).

While the Attorney General generally is the State’s lawyer, ORS 173.130(2) and (5) expressly authorize and indeed require agencies and the Governor to procure a particular legal service—bill drafting—from Legislative Counsel. Thus, Legislative Counsel provides that particular legal services to agencies, and the Request Forms facilitate those services because they are used

(5) The Legislative Counsel shall give an opinion in writing upon any question of law in which the Legislative Assembly or any member or committee of the Legislative Assembly may have an interest when the Legislative Assembly or any member or committee of the Legislative Assembly requests the opinion. Except as provided in subsection (2) of this section and ORS 173.135, the Legislative Counsel shall not give opinions or provide other legal services to persons or agencies other than the Legislative Assembly and members and committees of the Legislative Assembly.

(6) The Legislative Counsel may enter into contracts to carry out the functions of the Legislative Counsel.

to communicate to attorneys in Legislative Counsel the policy ideas that the agencies want Legislative Counsel to turn into proposed statutory language.

Third, the Request Forms are communications between parties listed in ORS 42.225(2)(a) (“the client or the client’s representative and the client’s lawyer or a representative of the lawyer”). Executive agencies are entities “rendered professional legal services by a lawyer” and therefore “clients” as defined by ORS 40.225(1)(a). And Legislative Counsel is the lawyer rendering services.

Moreover, as DAS asserted below in the alternative, even if Legislative Counsel was without the authority to enter in to an “attorney-client relationship” with state agencies, the Request Forms were nevertheless exempt from disclosure as privileged confidential communications “by the client * * * to a lawyer representing another in a matter of common interest.” ORS 40.225(2)(c); *see Port of Portland*, 238 Or App at 413–16 (finding common interest where elements of ORS 40.225(2)(c) are satisfied). With the Request Forms, state agencies are communicating with Legislative Counsel who unquestionably represents the legislature. State agencies have a common interest with the legislature in seeing well-drafted bills capturing the agencies’ policy ideas come before the legislature for consideration. This too provides

another basis for the attorney-client privilege; and yet, the trial court did not even address this argument in its oral ruling.

In sum, DAS is likely to prevail on appeal. The law and facts support that the bill drafting services Legislative Counsel provides are “legal services” to state agencies, and the Request Forms are intended by those agencies and Legislative Counsel to be confidential and thus, they are protected by the attorney-client privilege. The Request Forms are accordingly, exempt from disclosure under the public records law.

2. This appeal is taken in good faith and not for reasons of delay.

DAS has filed this appeal in good faith, based on its belief that the trial court erred. The issue is likely to arise again and review by this court is necessary to give final resolution to the controversy.

3. The balance of harms weighs in favor of a stay.

Harm to DAS from denial of the stay outweighs any harm from delaying enforcement of the judgment. Disclosure of the documents cannot be undone. Plaintiff asserted below that there was no dispute that the documents would be subject to disclosure *after* Legislative Counsel completed its drafting and the bills are released. But there is nothing in the record to suggest that DAS plans to spontaneously publish any of the Request Forms, and in particular there is nothing to suggest that Request Forms that were withdrawn during the drafting

process will be disclosed at all. Ultimately, DAS believes the Request Forms at issue are subject to attorney-client privilege and exempt from disclosure at this time. That DAS may later decide to waive that privilege and disclose does not erode the attorney-client nature of the documents. If DAS is correct that the records are privileged, then the records are unconditionally exempt from disclosure. If DAS discloses the documents and later prevails on appeal, it will have been significantly harmed by being forced to disclose privileged documents at a time that it had not chosen to waive the privilege.

Moreover, absent a stay, DAS may lose its ability to pursue its appeal. That is, enforcement of the judgment and disclosure of the records that are the subject of the judgment may moot DAS's appeal.⁴

Plaintiff has asserted that there is a strong public need for disclosure of the documents in the near term. But any potential harm to plaintiff (or the public) in delaying immediate enforcement of the judgment requiring disclosure is outweighed by the harms that flow from DAS being forced to disclose privileged documents before this court considers DAS's arguments that the

⁴ DAS is not conceding that the appeal would be mooted by disclosure, but believes that is likely. *See Clapper v. Oregon State Police*, 228 Or App 172, 178, 206 P3d 1135 (2009) (where, by the time of trial, plaintiff had received all of the records that he had requested, court held that a ruling by the court would have had no effect on the rights of either party and the case was therefore moot).

documents are exempt from disclosure. The trial court's judgment will constrain the ability of state agencies to, as they have for many years, receive confidential legal services from Legislative Counsel in drafting bills that capture the policy ideas of the agencies and facilitate the executive branch's discharge of its constitutional responsibility to propose legislation. The balance of harms weighs in favor of preserving the status quo to allow this court to review the important legal issues presented here.

CONCLUSION

This court should enter a temporary stay prior to the trial court's October 26, 2018, 5 p.m. deadline for disclosure and should reverse the trial court's denial of DAS's motion for a stay pending appeal.

Respectfully submitted,

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Attorney General
BENJAMIN GUTMAN #160599
Solicitor General

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IN THE CIRCUIT COURT FOR THE STATE OF OREGON
FOR THE COUNTY OF MARION

GREGORY A. CHAIMOV,
Plaintiff,

v.
STATE OF OREGON, by and through the
Oregon department of Administrative Services,
Defendant.

Case No. 18CV39159
AMENDED COMPLAINT

Not Subject to Mandatory Arbitration

Plaintiff alleges:

PRELIMINARY STATEMENT

1.

This is an action pursuant to the Oregon Public Records law to enjoin the defendant from withholding public records and to order the production thereof.

JURISDICTION

2.

The Circuit Court for Marion County has subject matter jurisdiction pursuant to ORS 192.415, ORS 192.431 and ORS 28.010.

VENUE

3.

Venue is appropriate in Marion County because the defendant is located in Marion County and because ORS 192.431 requires a case of this nature to be filed in that county.

1 **BACKGROUND AND PARTIES**

2 4.

3 Defendant Oregon Department of Administrative Services (“DAS”) is an agency of the
4 State of Oregon.

5 5.

6 Prior to each legislative session, the Governor of this state is permitted to submit to the
7 Legislative Assembly bills for proposed legislation pursuant to ORS 171.130. Prior to so doing,
8 the Governor seeks recommendations from each of her agencies.

9 6.

10 In years past the Governor has required agencies to submit their proposed legislative
11 concepts using a form which, among other things, requires the agency to identify a problem or
12 issue it seeks to resolve and to propose a way of changing the law to address the issue so
13 identified (“Legislative Concept Approval Form”).

14 7.

15 Also in years past, the Governor has maintained a practice of approving or disapproving
16 the proposals. Proposals approved by the Governor are forwarded to the office of Legislative
17 Counsel for drafting as proposed bills to be filed by the Governor prior to the commencement of
18 each legislative session for consideration during the upcoming legislative session.

19 8.

20 Plaintiff is an attorney who is a member of the government relations practice of the law
21 firm of Davis Wright Tremaine LLP (“Firm”). For many years, Plaintiff, and his Firm have
22 made requests to the office of the Governor of the state of Oregon under the Oregon Public
23 Records Law, ORS 192.311 et seq. to provide him copies of the Legislative Concept Approval
24 Form so he can, in turn, supply the forms to clients of the Firm and other interested parties. His
25 interest in doing so is to assure that he and other citizens know how and why their government
26 wishes to change the law.

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9.

Since 2010 the Governor's office has provided the Legislative Concept Approval Form pursuant to Plaintiff's requests. A table of contents, supplied by the Governor's office pursuant to a public records request in 2015 (Exhibit 1) illustrates the scope and breadth of those proposals. Thousands of forms similar to those illustrated by Exhibits 2 (require change of compulsory education enrollment age from 7 to 5), 3 (expand inmate health insurance), 4 (limit information available to the public on offender data bases), and 5 (create licensing regime and fee structure for loan servicers) have been provided in past years and for previous legislative sessions.

10.

In May of 2018, defendant DAS informed all state agencies that legislative concepts "will be temporally exempt from disclosure [under the Public Records Law] until Legislative Counsel has submitted bill drafts to the Governor's Office for final approval (this should be done by November 30, 2018)" which is well after the November general election.

11.

Unlike the forms used in previous years, the new forms state, in part: "Although it is expected that agencies will have discussed legislative concept ideas with stakeholders, agencies are directed to treat this document as confidential and privileged and, accordingly, not to share the text of this form outside of state government before legislation is drafted and finalized."

12.

In 2018, defendant DAS received 270 new concepts from state agencies. Five were not approved and 31 were ultimately withdrawn. The remainder (234) were forwarded by DAS to the Office of Legislative Counsel for drafting as proposed legislation for the 2019 Legislative Assembly's consideration.

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13.

On July 11, 2018, Plaintiff requested the Governor, under the provisions of the Public Records Law, provide copies of the Legislative Concept Approval Form as he had done in prior years. See Exhibit 6.

14.

On July 17, 2018 the office of the Governor replied that it did not have any records responsive to the request (unlike in past years).

15.

On July 19, 2018, Plaintiff made the same request to defendant DAS.

16.

On July 20, 2018, defendant DAS acknowledged that it was the custodian of the requested records. See Exhibit 7.

17.

On July 30, 2018, defendant DAS denied the request and determined that “the above records are exempt from disclosure under ORS 192.355(1) based on attorney-client privilege.” See Exhibit 8.

18.

On August 3, 2018, Plaintiff filed an appeal with the Attorney General concerning the same. See Exhibit 9.

19.

On August 28, 2018, following extensions of time granted by Plaintiff, the Attorney General denied Petitioner’s appeal. See Exhibit 10.

FIRST CLAIM FOR RELIEF

20.

Plaintiff incorporates those matters alleged in paragraphs 1 through 19 above.

1 21.

2 The Attorney General's denial of Plaintiff's appeal of Defendant's decision should be
3 reversed because:

- 4 a. The Office of Legislative Counsel is not permitted to represent any state agency
5 other than the legislative branch;
- 6 b. ORS 180.060 grants the Attorney General, the exclusive authority to serve as
7 legal counsel for the executive department of state government;
- 8 c. Services which may be provided by the office of Legislative Counsel for
9 assistance in the preparation of legislative measures pursuant to ORS 173.130 are
10 not legal services.
- 11 d. To the extent ORS 173.130 on its face permits the office of Legislative Counsel to
12 provide legal services to the executive branch, the statute is unconstitutional and
13 invalid in violation of Article III of the Oregon Constitution (separation of
14 powers).
- 15 e. The records requested are not exempt under ORS 192.355(9)(a) since no lawyer-
16 client privilege exists between the Office of Legislative Counsel and agencies
17 which make up the Executive Branch.
- 18 f. Any lawyer-privilege which may have existed has been waived.

19 22.

20 Pursuant to ORS 192.431, the court should enjoin Defendant from withholding the
21 records and should order the production of the improperly withheld records at the earliest
22 possible date and well prior to the November general election.

23 23.

24 Plaintiff is entitled to an aware of his reasonable attorney fees pursuant to ORS
25 192.431(3).

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24.

Pursuant to ORS 192.431(2), except as to causes the court considers of greater importance, this proceeding must take precedence on the docket over all other causes and must be assigned for hearing and trial at the earliest practicable date and be expedited in every way.

25.

WHEREFORE, Plaintiff prays for judgment as follows:

- 1. Enjoining the Defendant from withholding the records and ordering the production thereof at the earliest possible date;
- 2. Awarding Plaintiff his reasonable attorney fees, costs and disbursements incurred herein;
- 3. Giving this case precedence on the docket over other matters pursuant to ORS 192.431(2); and
- 4. Awarding any other relief the Court considers just and equitable.

DATED this 2nd day of October 2018.

DAVIS WRIGHT TREMAINE LLP

By s/ John A. DiLorenzo
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Attorneys for Plaintiff

1 CERTIFICATE OF SERVICE

2 I hereby certify that I served a copy of the foregoing **AMENDED COMPLAINT** on:

3 Ms. Sarah Kay Weston
4 Ms. Carla Scott
5 DOJ Trial Division
6 100 SW Market St
7 Portland, OR 97201
Telephone: (971) 673-1880
Facsimile: (971) 673-5000
Email: sarah.weston@doj.state.or.us
Email: carla.a.scott@doj.state.or.us

8 Of Attorneys for Defendant

9 by mailing a copy thereof in a sealed, first-class postage prepaid envelope,
10 addressed to said attorney's last-known address and deposited in the U.S. mail at Portland,
Oregon on the date set forth below;

11 by causing a copy thereof to be hand-delivered to said attorney's address as
12 shown above on the date set forth below;

13 by sending a copy thereof via overnight courier in a sealed, prepaid envelope,
addressed to said attorney's last-known address on the date set forth below;

14 by faxing a copy thereof to said attorney at his/her last-known facsimile number
15 on the date set forth below; or

16 by emailing a copy thereof to said attorney at his/her last-known email address as
set forth above.

17 by using electronic transmission of a notice of filing by the electronic filing
18 system provided by the Oregon Judicial Department, Odyssey File and Serve.

19 DATED this 2nd day of October 2018.

20 DAVIS WRIGHT TREMAINE LLP

21 By s/ John A. DiLorenzo

22 John A. DiLorenzo, OSB #802040

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25 Attorneys for Plaintiff



DEPARTMENT OF JUSTICE

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August 28, 2018

VIA EMAIL ONLY: gregorychaimov@dwt.com

Gregory Chaimov
1300 SW Fifth Avenue, Ste 2400
Portland, OR 97201

Re: Petition for Public Records Disclosure Order
Department of Administrative Services
DOJ File No. 107011-GA0048-18

Dear Mr. Chaimov:

This letter is the Attorney General's response to your petition for disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478.¹ Your petition, which we received August 3, 2018, asks the Attorney General to order the Department of Administrative Services (DAS) to produce records generally described as state agency requests to the Office of Legislative Counsel (LC) to draft proposed legislation. 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. Even express exemptions are to be narrowly construed, meaning that "if there is a plausible construction of a statute favoring disclosure of public records, that is the construction that prevails." *Colby v. Gunson*, 224 Or App 666, 676 (2008). 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 any such denial. *Id.*

¹ Thank you for granting an extension on the deadline to issue this order.

Gregory Chaimov
August 28, 2018
Page 2

In preparation for the 2019 legislative session, DAS required agencies to submit their proposed legislative concepts to DAS using a form entitled "2019 Agency Request to Office of Legislative Counsel for Drafting of Legislation." With respect to those concepts that were approved, the same form was subsequently forwarded to LC with an additional signature indicating that the agency's proposed concept had been approved. See ORS 173.130(2) ("[u]pon the written request of a state agency, the Legislative Counsel may prepare or assist in the preparation of legislative measures that have been approved for preparation in writing by the Governor or the Governor's designated representative.") All agency legislative concepts were submitted to DAS by June 2018. 234 were subsequently forwarded to LC for drafting.²

Your petition explains that you routinely request legislative concepts from the Governor's Office before each legislative session and that you received most of them in the past. This year, you requested "copies of agencies' requests for permission to have measures drafted for the 2019 regular legislative session and of requests to the Office of Legislative Counsel for drafting services for those measures."³ The Governor's Office responded that it did not have responsive records and referred you to DAS. DAS denied your request in its entirety, citing the lawyer-client privilege (ORS 192.355(9)(a) incorporating ORS 40.225) and the exemption for internal advisory communications (ORS 192.355(1)).

You now ask the Attorney General to order DAS to provide you with copies of the legislative concepts. You contend that the forms are not internal advisory communications and that the public interest in encouraging frank communications between agencies in this case does not clearly outweigh the public's interest in disclosure. You also raise several arguments explaining why you do not believe the lawyer-client privilege applies in this instance. We conclude that the documents you have requested are protected by the lawyer-client privilege.⁴

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." The lawyer-client privilege provides that "[a] client has 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." ORS 40.225(2). Accordingly, ORS 192.355(9)(a) permits public bodies to decline to disclose public records that are protected by the lawyer-client privilege. See, e.g., *Port of Portland v. Ore. Center for Environ. Health*, 238 Or. App. 404, 409 (2011) (predecessor statute to ORS 192.355(9)(a) encompasses lawyer-client privileged communications); *Klamath County School Dist. v. Teamey*, 207 Or. App. 250, 259 (2006) (same).

² DAS received a total of 270 legislative concept forms from state agencies. Five were not approved and 31 were ultimately withdrawn.

³ Your petition suggests there are two sets of records responsive to your request; i.e., agency requests for permission as distinct from agency requests to LC. DAS informs us that agencies do not submit separate requests for permission. Rather, the new DAS form serves both purposes. Accordingly, our analysis is limited to whether DAS' decision to withhold the forms was permitted under Oregon Public Records Law.

⁴ Because we conclude the forms are covered by the lawyer-client privilege, we need not address DAS' alternative argument that the legislative concepts are exempt under ORS 192.355(1) as internal advisory communications.

The Oregon Supreme Court has held that application of the lawyer-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(1)(b) (a communication “not intended to be disclosed to third persons” other than to those necessary to facilitate the rendition of professional legal services). Second, the communication must have been made for the purpose of facilitating the rendition of professional legal services. And third, the communication must have been between the parties described in one of the paragraphs of ORS 40.225(2)(a)-(c). *Id.* If all three elements are satisfied, the lawyer-client privilege applies. *Teamey*, 207 Or App at 261-62. 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.

DAS Communications Director Elizabeth Craig explained why DAS believes all three elements of the lawyer-client privilege are satisfied in this case. The first element – a confidential communication – depends on “the intent of the parties to shield the communication from disclosure.” *State v. Ogle*, 297 Or 84, 87 (1984). In this regard, Ms. Craig informed us that DAS changed its process in 2018 to make clear that it intended to keep legislative concept forms confidential. First, in May 2018, DAS informed all state agencies that legislative concepts “will be temporally exempt from disclosure until Legislative Counsel has submitted bill drafts to the Governor’s Office for final approval (this should be done by November 30, 2018).” Unlike forms used in prior years, the header now states “Confidential and Attorney-Client Privileged,” and the form also contains the following italicized paragraph:

This document is a request for legal services. By completing this form, the named agency asks the Office of Legislative Counsel to draft legislation for introduction in the 2019 Legislative Session based on the instructions below. Although it is expected that agencies will have discussed legislative concept ideas with stakeholders, agencies are directed to treat this document as confidential and privileged and, accordingly, not to share the text of this form outside of state government before legislation is drafted and finalized.

These changes convincingly demonstrate that DAS intends the forms be kept confidential. And ORS 173.230(1) requires LC to keep such matters confidential. Under the circumstances, we conclude the legislative concepts are “confidential communications” under ORS 40.225(1)(b).

Regarding the second element, the Oregon Supreme Court has recognized that 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). In this case, Ms. Craig notes the principal purpose of the form is to communicate to attorneys in LC the policy ideas that agencies want the Legislative Assembly to adopt, so that LC can turn those concepts into proposed statutory language, pursuant to ORS 173.130(2). She expressed the view that the drafting undertaken by LC constitutes a legal service. And Legislative Counsel Dexter Johnson confirmed that he shares the view that LC’s drafting of agency-proposed legislation is a legal service LC provides to requesting agencies. The shared view of DAS and LC is consistent with ORS 173.130(5), which

expresses a legislative determination that this drafting constitutes a legal service performed by LC for the requesting agency:

Except as provided in subsection (2) of this section and ORS 173.135, the Legislative Counsel shall not give opinions or provide other legal services to persons or agencies other than the Legislative Assembly and members and committees of the Legislative Assembly.

(Emphasis added.) We therefore conclude that the services provided by LC constitute legal services.⁵ The form on which the legislative concepts are translated to LC clearly facilitates these legal services by informing LC what is desired. The second element of the lawyer-client privilege is satisfied.

We now turn to whether the legislative concepts constitute communications between parties described in 40.225(2)(a)-(e). We have no trouble concluding that they are. LC is a lawyer rendering legal services, as indicated by ORS 173.130(5). Executive agencies are entities “rendered professional legal services by a lawyer” and therefore “clients” as defined by ORS 40.225(1)(a). Subsection (2)(a), which applies the privilege to communications “[b]etween the client * * * and the client’s lawyer” therefore protects the forms insofar as they are communicated between DAS and LC. And subsection (2)(d), which applies to communications “between representatives of the client or between the client and a representative of the client” protects the forms insofar as they are communicated within the Executive Branch.

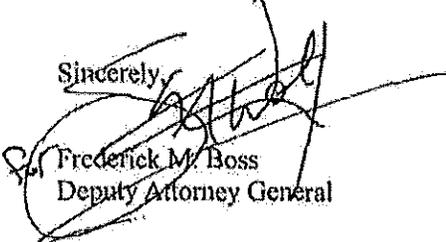
In adopting this interpretation, we are not suggesting that the privilege generally protects all communications within an agency regarding subjects about which an agency may want legal advice. A discussion about whether to pursue a particular legislative change, or what that legislative change might look like, is not inherently a conversation to facilitate professional legal services. Nor is the fact that an agency has decided to pursue a legislative change inherently privileged. That is true even though actually pursuing the legislative change may require legal services pursuant to ORS 173.130(2) and (5). The fact that legal services may be necessary or desirable to implement a decision does not mean that discussions about the decision are necessarily discussions to facilitate legal services. As a result, information about the contents of the legislative concept forms may exist in non-privileged communications. Indeed, the general subjects of all of the forms could well be available from non-privileged sources. But our decision deals specifically with a form expressly intended to communicate, to an attorney, confidential information that will facilitate the attorney’s rendition of legal services.⁶ Ultimately, we do not need to resolve any broader question about the confidentiality of proposed legislative concepts, and this decision should not be interpreted as doing so.

⁵ In general, state agencies must obtain legal services from the Attorney General pursuant to ORS chapter 180. But the legislative assembly can authorize agencies to obtain legal services elsewhere. ORS 173.130 constitutes such an authorization for the specific legal service of drafting legislation.

⁶ See, e.g., *Teamey*, 207 Or App at 260, fn 3 (2006) (citing *State v. Riddle*, 330 Or 471 (2000) to support proposition that “the attorney-client privilege does not prevent the disclosure of facts underlying confidential communications” but noting that the request under consideration sought “disclosure of the communications—the reports—themselves”).

Gregory Chaimov
August 28, 2018
Page 5

For the foregoing reasons, we conclude DAS was permitted to exempt the legislative concept forms from disclosure as lawyer-client privileged communications. We therefore respectfully deny your petition.

Sincerely,

Frederick M. Boss
Deputy Attorney General

FMB:nog/DM9143934
c via email only: Elizabeth Craig, DAS

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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

GREGORY A. CHAIMOV,

Plaintiff,

v.

STATE OF OREGON, by and through the
Oregon Department of Administrative
Services,

Defendant.

Case No. 18CV39159

DECLARATION OF AMY WILLIAMS IN
SUPPORT OF DEFENDANT'S RESPONSE AND
CROSS MOTION FOR SUMMARY
JUDGMENT

ORS 20.140 - State fees deferred at filing

1. My name is Amy Williams. I am the legislative coordinator for the Department of Administrative Services (DAS). One of my responsibilities in this role is helping to coordinate the solicitation of agency legislative concepts from agencies on behalf of the Governor. I make this declaration from personal knowledge.

2. In the spring of even numbered years, state agencies across state government are solicited for ideas for legislative changes. DAS helps coordinate this effort on behalf of the Governor's Office.

3. In preparation for the 2019 legislative session, the Oregon Department of Administrative Services (DAS) DAS communicated to agencies that they would be required to submit their proposed legislative concepts to DAS using a form entitled "2019 Agency Request to Office of Legislative Counsel for Drafting of Legislation." ("the Request Form").

4. Agencies completed the Request Form electronically and submitted it to DAS via a web-based computerized system called "BillTracker" in the spring of 2018. This was the first

1 year that the agencies used BillTracker to submit their Request Forms to DAS. Only the agency,
2 DAS and the Governor's Office have electronic access to a given agency's Form within
3 BillTracker.

4 5. Agencies were instructed that a Request Form should not be completed in
5 BillTracker until the proposal had been fully vetted and approved within the agency. The
6 deadline for agencies to complete the Request Form within BillTracker was April 13, 2018 (or
7 April 9 for agencies with more than ten proposed legislative concepts). The same Request Form
8 was also used for "placeholders." Placeholders are legislative concepts that require additional
9 information before they can be drafted into legislation. Placeholder Request Forms must be
10 initially submitted by April 13, with the supplemental documentation submitted to DAS by June
11 8 (or June 6 for agencies with five or more placeholders).

12 6. I have worked with agency legislative concepts for nearly five years. For all of
13 that time, it has been my understanding that the Request Forms are something that agencies are
14 to keep confidential and not share publically during the Governor's review and legislative
15 counsel drafting process. That is, although the underlying ideas would be subject to discussion
16 with stakeholders, the Request Forms themselves were not for public distribution. Once draft
17 legislation, which was public, was produced, the specific bill language itself could be the focus
18 of discussions. To the best of my knowledge, the individuals in charge of managing legislative
19 concepts and Request Forms at the agencies have shared this understanding.

20 7. In May of this year, the BillTracker system the agencies had used to submit their
21 Request Forms was modified in a number of respects. First, the agencies were given the ability to
22 print copies of their Request Forms. Previously, the system had not allowed agencies to print
23 copies of the Request Forms once they submitted them to DAS. Second, the system was set so
24 that each printed Request Form would now state "Confidential and Attorney-Client Privileged"
25 across the top, and would also contain the following italicized paragraph:

26

Page 2 - DECLARATION OF AMY WILLIAMS IN SUPPORT OF DEFENDANT'S RESPONSE
AND CROSS MOTION FOR SUMMARY JUDGMENT
SW2/crr/9209784-v1

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

Att - 14

1 *This document is a request for legal services. By completing this*
2 *form, the named agency asks the Office of Legislative Counsel to*
3 *draft legislation for introduction in the 2019 Legislative Session*
4 *based on the instructions below. Although it is expected that*
5 *agencies will have discussed legislative concept ideas with*
6 *stakeholders, agencies are directed to treat this document as*
7 *confidential and privileged and, accordingly, not to share the text*
8 *of this form outside of state government before legislation is*
9 *drafted and finalized.*

10 8. The changed language described in paragraph 7, above, appear in the online
11 version of the Request Form when the form is being filled out or edited, and appear on the
12 printed copy when the Request Form is printed or converted to a PDF.

13 9. By June of 2018, agencies had completed the Request Forms – a total of 270.
14 Following the Governor’s office review process, the Request Forms approved by the Governor
15 were transmitted in paper form to legislative counsel to begin the drafting process. Thirty one
16 forms were withdrawn by the agencies, and five were not approved by the Governor, leaving 234
17 to be forwarded to Legislative Counsel to begin drafting.

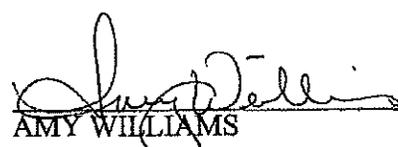
18 10. Not every request to legislative counsel results in a draft bill that is filed with the
19 legislature. Certain agency concepts are withdrawn during the legislative counsel drafting
20 process and never result in a final bill. So far this round, more than 45 requests have already
21 been withdrawn, and our office anticipates that more will be withdrawn before the final bills are
22 completed.

23 11. Once Legislative Counsel completes final drafts of Bills, the Governor’s office
24 will review the draft bills and make determinations about which to file with the legislature for the
25 Legislature’s consideration, and which will not be filed. The deadline for filing is in December,
26 2018.

**I hereby declare that the above statement is true to the best of my knowledge and
 belief, and that I understand it is made for use as evidence in court and is subject to penalty
 for perjury.**

 DATED October 8, 2018.

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AMY WILLIAMS

Page 4 - DECLARATION OF AMY WILLIAMS IN SUPPORT OF DEFENDANT'S RESPONSE
AND CROSS MOTION FOR SUMMARY JUDGMENT
SW2/crr/92.09784-v1

Department of Justice
100 SW Market Street
Portland, OR 97201
(971) 673-1880 / Fax: (971) 673-5000

1 **CERTIFICATE OF SERVICE**

2 I certify that on October 8, 2018, I served the foregoing DECLARATION OF AMY
3 WILLIAMS IN SUPPORT OF DEFENDANT'S RESPONSE AND CROSS MOTION FOR
4 SUMMARY JUDGMENT upon the parties hereto by the method indicated below, and addressed
5 to the following:

6 John DiLorenzo
7 Davis Wright Tremaine
8 1300 SW Fifth Ave., Ste. 2400
9 Portland, OR 97201

HAND DELIVERY
 MAIL DELIVERY
 OVERNIGHT MAIL
 SERVED BY E-FILING

10
11 s/ Sarah Weston
12 SARAH WESTON #085083
13 Assistant Attorney General
14 CARLA A. SCOTT #054725
15 Senior Assistant Attorney General
16 Trial Attorneys
17 Tel (971) 673-1880
18 Fax (971) 673-5000
19 Sarah.Weston@doj.state.or.us
20 Of Attorneys for Defendant
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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

GREGORY A. CHAIMOV,

Plaintiff,

v.

STATE OF OREGON, by and through the
Oregon Department of Administrative
Services,

Defendant.

Case No. 18CV39159

DECLARATION OF ELIZABETH CRAIG IN
SUPPORT OF DEFENDANT'S RESPONSE AND
CROSS MOTION FOR SUMMARY
JUDGMENT

ORS 20.140 - State fees deferred at filing

1. My name is Elizabeth Craig. I am the communications director for the Department of Administrative Services (DAS). One of my responsibilities in this role is working on DAS responses to public records. I make this declaration from personal knowledge.

2. In the spring of even numbered years, state agencies across state government are solicited for ideas for legislative changes. DAS helps coordinate this effort on behalf of the Governor's Office.

3. After the agencies had finished the initial round of submissions in April of 2018, DAS communicated to the agencies, through emails and verbal communications, that DAS would not release the Request Forms in response to any public records requests while legislative counsel's work was ongoing.

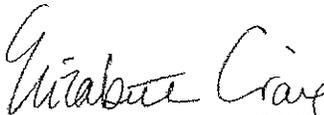
5. To my knowledge, no agency has produced their 2018 Request Forms in response to a public records request. I would expect that, had any agency received a public records

request for its Request Forms, it would have notified and consulted DAS (or the Governor's Office, which would have notified DAS) before producing those Request Forms.

6. To date, DAS has not disclosed the 2018 Request Forms in response to a public records request.

I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

DATED October 10, 2018.


ELIZABETH CRAIG

1 **CERTIFICATE OF SERVICE**

2 I certify that on October 10, 2018, I served the foregoing AMENDED DECLARATION
3 OF ELIZABETH CRAIG IN SUPPORT OF DEFENDANT'S RESPONSE AND CROSS
4 MOTION FOR SUMMARY JUDGMENT upon the parties hereto by the method indicated
5 below, and addressed to the following:

6 John DiLorenzo
7 Davis Wright Tremaine
8 1300 SW Fifth Ave., Ste. 2400
9 Portland, OR 97201

HAND DELIVERY
 MAIL DELIVERY
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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

GREGORY A. CHAIMOV,

Plaintiff,

v.

STATE OF OREGON, by and through the
Oregon Department of Administrative
Services,

Defendant.

Case No. 18CV39159

DECLARATION OF DEXTER JOHNSON IN
SUPPORT OF DEFENDANT'S RESPONSE AND
CROSS MOTION FOR SUMMARY
JUDGMENT

ORS 20.140 - State fees deferred at filing

1. My name is Dexter Johnson. I am the Legislative Counsel. I have served as Legislative Counsel since December of 2007. Prior to that time, I worked in the office of legislative counsel as a staff attorney, and then a deputy legislative counsel, from 1994 through mid-2006. I worked in the Clackamas County Counsel's office from mid-2006 until December of 2007. I am an attorney, member of the Oregon State Bar, and admitted to practice law in Oregon.

2. I make this declaration from personal knowledge.

3. In the office of Legislative Counsel, I oversee 18 attorneys and 28 non-legal staff persons. Each of the attorneys employed in the office of legislative counsel is a member of the Oregon State Bar and admitted to practice law in Oregon.

4. In even numbered years, the Office of Legislative Counsel provides bill drafting services to state agencies. We consider these services to be legal services. For bills for the 2019

1 session, our office required agency requests to be submitted to the Office of Legislative Counsel
2 not later than June 1, 2018.

3 5. Below, I describe the general process that the Office of Legislative Counsel
4 follows with agency bill drafting requests.

5 A. Bill drafting requests from agencies are delivered to the Office of
6 Legislative Counsel on a form, which this year is captioned "2019 Attorney Request to Office of
7 Legislative Counsel for Drafting of Legislation Request" ("Request Form"). The Form contains
8 information that helps our office begin the process of drafting a bill. For example, the "Problem"
9 and "Proposed Solution" sections of the Request Form communicate what policy idea the
10 requester is seeking to have captured in bill language.

11 B. Each attorney in the Office of the Legislative Counsel specializes in
12 particular subject areas. When the Office of Legislative Counsel receives an agency Request
13 Form, it is assigned to a lawyer in the office based on the subject matter of the request.

14 C. The attorney who is assigned the bill drafting request reviews the Request
15 Form to understand what the requester is trying to achieve. In some cases this will involve
16 making additional inquiries of the requester; in other cases the request form may be sufficient.

17 D. Once the attorney understands the request, he or she generally conducts
18 legal research on the implications of the request. For example, the attorney may research
19 whether federal law or substantive provisions of the state or federal constitution bars the
20 approach suggested in the request. The attorney must consider whether procedural requirements
21 in the Oregon Constitution, such as the requirement that bills consist of a single subject, are
22 satisfied. The attorney must research whether the proposal would modify or otherwise affect
23 existing laws or programs. If this research reveals legal problems or potential unintended
24 impacts, the attorney communicates his or her findings to the requester. The office of
25 Legislative Counsel may not attempt to influence the legislation. *See* ORS 173.240 (legislative

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1 counsel prohibited from attempting to influence legislation). Thus, it is up to the requester to
2 decide whether to proceed in the face of identified constitutional or other issues. However, the
3 attorneys in the Office of Legislative Counsel are expected to communicate relevant legal
4 findings so that the requester can make an informed decision. The lawyer may also, if
5 appropriate, advise the requester regarding options for modifying the proposal to avoid the
6 problems identified.

7 E. The attorney also uses the Legislative Counsel's computer database to
8 search for related state statutes that would be affected or may need to be modified, so that such
9 modifications can be captured in the draft bill.

10 F. The attorney then drafts statutory language that, in the attorney's
11 judgment, best accomplishes the policy goals outlined in the request and has the best chance of
12 resulting in a legally defensible bill. As part of the drafting process, the attorney must often be
13 aware of, consider, and choose among the special meanings of terms in the Oregon Statutes, as
14 well as the form and stylistic conventions applicable to bills.

15 G. After the attorney completes a draft, it is carefully copy-edited by the
16 legislative counsel's editorial staff (consisting of editors and publication specialists, who are not
17 lawyers). This editorial staff also check to ensure that the draft conforms to the form and style
18 manual.

19 H. An invoice for the work to date is then presented to the requesting agency.
20 Once the agency pays the invoice, a first draft of the bill lanugage is provided to the requesting
21 agency. The agency reviews the draft, and if it is satisfied, the attorney's work on the request is
22 complete. More often, the agency provides comments and suggestions, and sends it back to the
23 assigned attorney, where a second draft is prepared following as many of the above steps as are
24 appropriate to the task. In preparing the second draft there are often further discussions between
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1 the attorney and the agency representatives regarding how to best translate the agency's policy
2 goal into proposed statutory language.

3 I. Finally, once the second and final draft of the bill is complete, the agency
4 is presented with a final invoice. Once the invoice is paid, the final bill language is delivered to
5 the agency. The deadline for our office getting all final bill language completed for agencies is
6 not later than November 5, 2018.

7 6. Not all legislative bill drafting requests make it through the drafting process.
8 Often, agencies will withdraw their requests, for one reason or another. Once a request is
9 withdrawn, the Office of Legislative Counsel does not do any further work on it.

10 7. This year, the agencies and the Governor's Office have until December 21, 2018
11 to decide whether to actually pre-session file the bills our office has drafted to have them
12 considered by the Legislature. Under house and senate rules, once bills are pre-session filed with
13 the clerk, they are public information. Bills that have been pre-session filed are published in
14 OLIS, the Legislature's online system, in January.

15 8. As noted above, Legislative Counsel charges agencies for bill drafting services.
16 The billed rate for this session is \$161 per hour. This represents a blended rate for proportionate
17 attorney and editorial time, based generally on the Oregon Department of Justice billing rates.
18 Oregon DOJ charges agencies \$182 per hour for attorney time, and \$91 per hour for paralegal
19 time.

20 9. Under ORS 173.230, Legislative Counsel must keep matters that it handles
21 confidential if the requester designates the matter as confidential. Our office views the 2018-
22 2019 agency bill drafting requests as confidential matters, and treats them as such.

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1 I hereby declare that the above statement is true to the best of my knowledge and
2 belief, and that I understand it is made for use as evidence in court and is subject to penalty
3 for perjury.

4 EXECUTED on October 8, 2018.

5 
6 DEXTER JOHNSON

1 **CERTIFICATE OF SERVICE**

2 I certify that on October 8, 2018, I served the foregoing DECLARATION OF DEXTER
3 JOHNSON IN SUPPORT OF DEFENDANT'S RESPONSE AND CROSS MOTION FOR
4 SUMMARY JUDGMENT upon the parties hereto by the method indicated below, and addressed
5 to the following:

6 John DiLorenzo
7 Davis Wright Tremaine
8 1300 SW Fifth Ave., Ste. 2400
Portland, OR 97201

HAND DELIVERY
 MAIL DELIVERY
 OVERNIGHT MAIL
 SERVED BY E-FILING

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10 s/ Sarah Weston
11 SARAH WESTON #085083
12 Assistant Attorney General
13 CARLA A. SCOTT #054725
14 Senior Assistant Attorney General
15 Trial Attorneys
16 Tel (971) 673-1880
17 Fax (971) 673-5000
18 Sarah.Weston@doj.state.or.us
19 Of Attorneys for Defendant
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IN THE CIRCUIT COURT FOR THE STATE OF OREGON
FOR THE COUNTY OF MARION

GREGORY A. CHAIMOV,

Plaintiff,

v.

STATE OF OREGON, by and through the
Oregon department of Administrative Services,

Defendant.

Case No. 18CV39159

**ORDER (PROPOSED) ON CROSS
MOTIONS FOR SUMMARY
JUDGMENT**

This matter having come before the court on October 24, 2018, concerning parties' cross-Motions for Summary Judgment, and the court having reviewed the pleadings, memoranda, declarations and files herein, and following oral argument, being fully advised in the matter,

The court concludes that unless state law explicitly provides otherwise, only the Attorney General may represent state executive agencies, and Legislative Counsel may only act as attorney for the legislative assembly. For the reasons noted in the transcript, the Court cannot find that the Department of Administrative Services ("DAS") could have expected that it maintained an attorney-client relationship with Legislative Counsel. The statutory language in ORS 173.130(2) and (5) is not sufficient to establish a lawyer-client relationship between the Office of Legislative Counsel and Defendant. Although Legislative Counsel must keep confidential all documents provided to it or members of its office, that outcome is a product of statute, not of the attorney-client privilege.

Accordingly, the State has failed to carry its burden of showing why the public records at issue here should be exempt and not be subject to disclosure.

1 IT IS HEREBY ORDERED that plaintiff's Motion for Summary Judgment is
2 GRANTED; defendant's Motion for Summary Judgment is DENIED; defendant's oral motion
3 for Stay of Judgment Pending Appeal pursuant to ORS 19.350, made before this court on
4 October 24, 2018, is DENIED.

5 IT IS FURTHER ORDERED that Defendant be enjoined from withholding the records
6 described in the amended complaint.

7 IT IS FURTHER ORDERED that Defendant produce the records to Plaintiff's counsel on
8 or before 5:00 p.m., Friday, October 26, 2018.

Signed: 10/25/2018 11:20 AM

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11

 Circuit Court Judge Audrey J. Broyles

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15 Submitted by:

16 John A. DiLorenzo, OSB #802040
17 DAVIS WRIGHT TREMAINE LLP
18 E-mail: [johndilorenzo@dwt.com](mailto: johndilorenzo@dwt.com)
19 Of Attorneys for Plaintiff
20
21
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CERTIFICATE OF READINESS – UTCR 5.100

(check all that apply):

This proposed order or judgment is ready for judicial signature because:

1. Each party affected by this order or judgment has stipulated to the order or judgment, as shown by each party's signature on the document being submitted.
 2. Each party affected by this order or judgment has approved the order or judgment, as shown by each party's signature on the document being submitted or by written confirmation of approval sent to me.
 3. I have served a copy of this order or judgment on each party entitled to service and:
 - a. No objection has been served on me.
 - b. I received objections that I could not resolve with a party despite reasonable efforts to do so. I have filed a copy of the objections I received and indicated which objections remain unresolved.
 - c. After conferring about objections, [role and name of objecting party] agreed to independently file any remaining objection.
 4. Service is not required pursuant to subsection (3) of this rule, or by statute, rule or otherwise.
 5. This is a proposed judgment that includes an award of punitive damages and notice has been served on the Director of the Crime Victims' Assistance Section as required by subsection (5) of this rule.
- Other:

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing **ORDER (PROPOSED) ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** on:

Ms. Sarah Kay Weston
Ms. Carla Scott
DOJ Trial Division
100 SW Market St
Portland, OR 97201
Telephone: (971) 673-1880
Facsimile: (971) 673-5000
Email: sarah.weston@doj.state.or.us
Email: carla.a.scott@doj.state.or.us

Of Attorneys for Defendant

- by mailing a copy thereof in a sealed, first-class postage prepaid envelope, addressed to said attorney's last-known address and deposited in the U.S. mail at Portland, Oregon on the date set forth below;
- by causing a copy thereof to be hand-delivered to said attorney's address as shown above on the date set forth below;
- by sending a copy thereof via overnight courier in a sealed, prepaid envelope, addressed to said attorney's last-known address on the date set forth below;
- by faxing a copy thereof to said attorney at his/her last-known facsimile number on the date set forth below; or
- by emailing a copy thereof to said attorney at his/her last-known email address as set forth above.
- by using electronic transmission of a notice of filing by the electronic filing system provided by the Oregon Judicial Department, Odyssey File and Serve.

Dated this 25th day of October 2018.

DAVIS WRIGHT TREMAINE LLP

By: s/ John A. DiLorenzo, Jr.

John A. DiLorenzo, Jr. OSB #802040
E-mail: johndilorenzo@dwt.com
Attorneys for Plaintiff

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IN THE CIRCUIT COURT FOR THE STATE OF OREGON
FOR THE COUNTY OF MARION

GREGORY A. CHAIMOV,

Plaintiff,

v.

STATE OF OREGON, by and through the
Oregon department of Administrative Services,

Defendant.

Case No. 18CV39159

GENERAL JUDGMENT

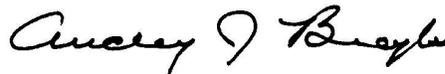
Based on the Order on the parties' Cross-Motions for Summary Judgment dated
October 25, 2018, it is hereby

ORDERED AND ADJUDGED:

1. Defendant be enjoined from withholding the records referenced in the Amended Complaint.
2. Defendant is ordered to produce the records to Plaintiff's counsel on or before 5:00 p.m., Friday, October 26, 2018.
3. Plaintiff may apply for his attorney fees, costs and disbursements pursuant to ORCP 68(c).

ORDERED AND ADJUDGED.

Signed: 10/25/2018 11:20 AM



Circuit Court Judge Audrey J. Broyles

1 Submitted by:

2 John A. DiLorenzo, OSB #802040
3 DAVIS WRIGHT TREMAINE LLP
4 E-mail: [johndilorenzo@dwt.com](mailto: johndilorenzo@dwt.com)
5 Of Attorneys for Plaintiff
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1 **CERTIFICATE OF READINESS – UTCR 5.100**

2 (check all that apply):

3 This proposed order or judgment is ready for judicial signature because:

- 4 1. Each party affected by this order or judgment has stipulated to the order or judgment, as
5 shown by each party’s signature on the document being submitted.
- 6 2. Each party affected by this order or judgment has approved the order or judgment, as
7 shown by each party’s signature on the document being submitted or by written
8 confirmation of approval sent to me.
- 9 3. I have served a copy of this order or judgment on each party entitled to service and:
- 10 a. No objection has been served on me.
- 11 b. I received objections that I could not resolve with a party despite reasonable
12 efforts to do so. I have filed a copy of the objections I received and indicated
13 which objections remain unresolved.
- 14 c. After conferring about objections, [role and name of objecting party] agreed to
15 independently file any remaining objection.
- 16 4. Service is not required pursuant to subsection (3) of this rule, or by statute, rule or
17 otherwise.
- 18 5. This is a proposed judgment that includes an award of punitive damages and notice has
19 been served on the Director of the Crime Victims’ Assistance Section as required by
20 subsection (5) of this rule.

21 Other:

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing **GENERAL JUDGMENT** on:

Ms. Sarah Kay Weston
Ms. Carla Scott
DOJ Trial Division
100 SW Market St
Portland, OR 97201
Telephone: (971) 673-1880
Facsimile: (971) 673-5000
Email: sarah.weston@doj.state.or.us
Email: carla.a.scott@doj.state.or.us

Of Attorneys for Defendant

by mailing a copy thereof in a sealed, first-class postage prepaid envelope, addressed to said attorney's last-known address and deposited in the U.S. mail at Portland, Oregon on the date set forth below;

by causing a copy thereof to be hand-delivered to said attorney's address as shown above on the date set forth below;

by sending a copy thereof via overnight courier in a sealed, prepaid envelope, addressed to said attorney's last-known address on the date set forth below;

by faxing a copy thereof to said attorney at his/her last-known facsimile number on the date set forth below; or

by emailing a copy thereof to said attorney at his/her last-known email address as set forth above.

by using electronic transmission of a notice of filing by the electronic filing system provided by the Oregon Judicial Department, Odyssey File and Serve.

Dated this 25th day of October 2018.

DAVIS WRIGHT TREMAINE LLP

By: s/ John A. DiLorenzo, Jr.

John A. DiLorenzo, Jr. OSB #802040

E-mail: johndilorenzo@dwt.com

Attorneys for Plaintiff

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on October 25, 2018, I directed the original Emergency Motion for Temporary Stay / Stay to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon John DiLorenzo Jr., attorney for respondent, using the court's electronic filing system.

/s/ Jona J. Maukonen
JONA J. MAUKONEN #043540
Assistant Attorney-In-Charge
jona.j.maukonen@doj.state.or.us

Attorney for Appellant
State of Oregon