The Department of Justice provides all of the legal services for the State of Oregon, including but not limited to state agency boards and commissions. The Natural Resources Section of General Counsel Division provides legal advice to this Commission through your contact counsel Erin Donald (Wildlife) and Anika Marriott (Fish), and both are available for general advice related to Oregon Public Records Law, Public Meetings Law, and any other matter related to Commission business.

PRIVILEGED & CONFIDENTAL
ATTORNEY-CLIENT COMMUNICATION

Confidentiality of document:
This document is a confidential communication from attorney to client. Neither the document nor its contents should be routinely circulated beyond the immediate addressees unless counsel is first consulted. This document should not be attached to or made a part of an agenda for any public meeting, nor should it be discussed by any public body in open session without first consulting with counsel.

I. Attorney Client Privilege

The general rule under the Oregon Public Records Act is that public records must be disclosed once requested. Further, with respect to litigation, the general rule is that all information pertinent to a case is discoverable, if requested. The exceptions in both instances are documents that fall under one or more privileges when that privilege has not been waived – meaning the information has been kept confidential.

Accordingly, the attorney client privilege protects confidential communications between an attorney and their clients that is either (a) legal advice provided a client at their request; or (b) information pertinent to client's request for legal advice that is shared with attorney for that purpose. In the latter example, we generally argue that this includes information shared with attorney for the purpose of making that attorney aware of subject matter that could result in potential litigation so that the attorney may provide guidance on how to proceed.

The reason the law protects confidential communications between attorneys and clients is to foster open, candid conversations so that I can best represent your interests, i.e., without compromising your legal positions by revealing strategy or weaknesses to opposing parties. The law provides an incentive to communicate with your attorney so that people/companies/agencies have lots of opportunities to be made aware of their legal rights and obligations. In short, as long as you are speaking with me confidentially (see my comments below regarding confidentiality) you should never feel that you cannot admit error, mention a weakness or discomfort about anything just because you think it may be used against ODFW in a future lawsuit.

An attorney client privilege has two components: It is a communication that (a) involves the transfer of legal advice or information pertinent to the provision of legal advice, and (b) is confidential.

A. Transfer of Legal Advice

In other words, the confidential communication must be either from ODFW to me to assist me in giving you legal advice or it must be from me to you responding to an inquiry for legal advice. The gray area is always confidential communications where an attorney is simply copied, but there is no express request for legal advice in the communication. In those cases, DOJ may argue that as your general counsel that attorney has been requested to look over communication to advise them if something raises a red flag, or actually requested that the information be shared with them so that they could advise appropriately – but for obvious reasons – it is always best to address the attorney at some point in the communication to maintain the protection of the privilege over that document. For instance, if in an email thread, you added the following language this would support the application of the privilege to those documents: "Pursuant to legal advice provided during our last meeting, the following steps will be taken…"; or "At our meeting last Friday where we discussed legal risks, we made a decision to .. .." or "At advice of counsel, I am proceeding in the following manner . . . " or otherwise, "as requested by counsel, I have provided the following information . . . ." In other words, if I (or anyone else within DOJ) was at a meeting with you, DOJ likely gave some legal advice that caused you to discuss the legal risks I raised and make a decision with the benefit of that information: This makes those meeting notes subject to privilege and *any* follow-up meetings, or information provided to me that may be relevant to acting upon the legal advice or allow me to continue to provide legal advice on the subject matter of that communication.

B. Confidentiality

The second component that is arguably the most important is that the communication must be confidential. A confidential communication is one where only the individuals within ODF who *need to know* the information are given that communication. A person needs to know the information if they are necessary to act upon the legal advice or to provide information that assists in provision of legal advice. For example, if a biologist's job is to write an analysis of the effects on a particular species by a given proposed action, and a manager must approve a mitigation plan based upon information in that analysis taking into account any legal risks that I may identify from information in that analysis, then all individuals who participate in the writing up of the analysis or transmission of it to next step in the approval process may be copied on communication without waiving the privilege.[1] In contrast, the privilege is waived (i.e., no longer applies) if the communication is shared with someone outside of ODFW, or otherwise, with someone at ODFW that has no role in subject matter of communication.[2] Significantly, we strongly recommend appropriate steps such as **clear labeling** should always be taken to maintain confidentiality of communications.

As a general recommendation, if an ODFW employee believes that for one reason or another a particular action raises potential legal issues, whether because of a potential ESA violation or

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[1] Note: secretaries or assistants count as if they were the approvers themselves; same goes for deputies and directors.

[2] Note also: As a state agency the privilege is not likely waived if you share information with another State agency but we do not recommend it unless it is clear that both agencies are receiving legal advice in the communication.

contract issue, then if this employee would like to document their concern or ODFW would like to discuss this matter in a meeting or in correspondence, it is best that you request I review the information / participate in the meeting so that this discussion may be protected from later discovery and that all such correspondence is labeled clearly as "**Confidential** for the purposes of consulting with legal counsel." You may decide at what stage in the email thread that I be brought into the conversation, but I caution that all communications prior to my involvement will not likely fall under the privilege. Therefore, if an employee wants to raise a concern in an email, if you do not want that *written* concern to be given to a potential litigant in the future, then calling them or saying in your *written* communication that you have a concern and leaving it at that is advisable. And then once you bring me into the loop, then candid, frank *written* discussion can take place and you may request legal advice given that information and act as you deem fit. In short, if you think some communication may lead to a supervisor seeking legal advice based upon the information, mention this to your supervisor over the phone and let them make the call whether to involve me in any future written communications before putting in writing specific concerns.

C. Summary

A communication is subject to attorney client privilege IF:

- it is from me responding to request for legal advice, OR
- it provides information that is relevant to your request for legal advice or otherwise assists me in providing legal advice AND
- it is marked "CONFIDENTIAL" and not shared with those that do not *need to know* the information.

II. Work Product Doctrine

In general, the work product doctrine protects documents that are prepared by an attorney, or documents prepared by the attorney's clients at request of that attorney, for the purpose of preparing and evaluating possible defenses to anticipated litigation. This doctrine does not protect documents that are prepared in the ordinary course of business, and the party seeking the protection of documents bears the burden of establishing that these documents were not prepared in the client's ordinary course of business but at the direction of the attorney for purposes of preparing their defense. The purpose of shielding attorney work product from disclosure is to allow a litigator to creatively develop strategies, legal theories, and mental impressions without fear of having other side gain access through discovery. Accordingly, it is very important that when you are answering any inquiry from one of your attorneys at DOJ that you appropriately label these communications as **Confidential** and ensure it is clear in the header that you are providing this information pursuant to a request from [attorney].

The work product doctrine is substantially less protective than the attorney client privilege, because an opposing party in litigation may overcome this protection by establishing that they have a "substantial need of the materials in preparation of [its] case and that [it] is unable without undue hardship to obtain the substantial equivalent of the materials by other means." *See* Fed. R. Civ. Proc. 26(b)(3). In reviewing a plaintiff's request for such documents, a court would evaluate whether the party has made a strong showing of document's relevance to

case, and whether they can obtain the facts or their substantial equivalent from other sources. And in most cases, where the information may be separated such that the portion of the documents that constitutes facts can be separated from portions including opinions, then the former portion may likely be discoverable, whereas, the portion containing opinions may be entitled to absolute protection.

A. Prepared in Anticipation of Litigation; Not in Ordinary Course of Business

The threshold question under the work product doctrine is whether the materials sought to be protected were prepared "in anticipation of litigation." Therefore, it is very important to provide a subject description or other label for the documents that plainly establish that the documents were prepared either in anticipation of litigation or during the ongoing defense in the litigation. This is especially important if ODFW would otherwise create similar documents in the ordinary course of business, but in a particular instance, DOJ has specifically asked you (or your manager, who then assigns you) to create a separate document for its evaluation.

B. Ordinary Work Product or Opinion Work Product

The second inquiry is whether the materials are ordinary work product, which could be obtained after a showing of substantial need and undue hardship, or opinion work product – documents including the impressions, thoughts, risk evaluations – the latter being near absolutely protected and discoverable only in rare circumstances. *Again*, this warrants careful labeling of "**Confidential** DOJ Work Product" such that if it comes down to redacting portions of a document, you establish clearly where your opinion on a particular matter was in response to a question asked by DOJ for the specific purpose of evaluating the agency's defense.

C. Summary

A document is subject to work product doctrine IF

- Its creation or modification was requested by DOJ;
- It's a response to a question from DOJ, or it is a document necessary to provide your response;
- It includes DOJ's risk assessment (think relevant portion of meeting notes).

III. Conclusion

Lastly, it is important to recognize that regardless of the label that you give to a particular document, this labeling will not automatically make that document attorney client privileged or attorney work product. Eventually, in complying with a discovery request or public records request, DOJ will have to assess whether the labeling is correct when we evaluate the documents you provide us. And while 'over labeling' is better than 'under labeling,' (because it alerts us to review the document for potential privilege or other protection such as work product doctrine) you should be cautious about anything you put in written form – assuring yourself that you will stand behind what you have stated in writing and feel comfortable that it could eventually be part of an article in the Oregonian.

In sum, when in doubt, use your best judgment, and if you are writing something down or creating a document at my request or associated with a request from DOJ, or you are asking me to give you legal guidance on a particular topic, always keep documents confidential and label them CONFIDENTIAL. You can also put a label of Attorney Client Privilege or Attorney Work Product if you think there's a chance it may be so protected, but CONFIDENTIAL is always correct and it will always alert us to review document for potential protection from discovery.