

IN THE SUPREME COURT OF THE STATE OF OREGON

CITY OF PORTLAND, an Oregon
municipal corporation,

Plaintiff-Respondent,
Petitioners on Review.

v.

MARK BARTLETT,

Defendant-Appellant,
Respondent on Review.

Multnomah County Circuit
Court No. 16CV0529

A164469

S067940

RESPONDENT'S BRIEF ON THE MERITS

Review of the decision of the Court of Appeals
on appeal from the judgment of the Circuit Court for Multnomah County,
Eric J. Neiman, Judge

Opinion Filed: June 10, 2020

Majority opinion by Shorr, J., joined by Egan, C.J., and Armstrong, Ortega,
Tookey, DeHoog, Aoyagi, Mooney, and Kamins, JJ.

Dissenting opinion by Powers, J., joined by DeVore and James, JJ.

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I. LEGAL QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

A. First Question Presented

Does ORS 192.390 require that public records, over 25 years old and containing content made privileged under OEC 503, be made available for inspection?

B. First Proposed Rule of Law

Disclosure is required. The 25 year sunset of ORS 192.390 applies to exemptions in ORS 192.355. The exemption from disclosure of attorney-client privileged content is found in ORS 192.355, at (9)(a). A privilege, but *not* an exemption, is created in the evidentiary rule of OEC 503. Under ORS 192.314 the exemption for attorney-client privileged content must be expressly provided by, as relevant here, ORS 192.355. ORS 192.355(9)(a) is necessarily an exemption found in ORS 192.355. The 25 year sunset rule of ORS 192.390 applies to exemptions in ORS 192.355, including the exemption for attorney-client privileged content, found in ORS 192.355(9)(a).

C. Second Question Presented

If that disclosure is required by ORS 192.390, does that requirement violate the “home-rule” provisions of the Oregon Constitution?

D. Second Proposed Rule of Law

That public records over 25 years old and containing information made privileged by the evidentiary rule in OEC 503 must be made available for

inspection does not violate the “home-rule” provisions of the Oregon Constitution.

II. SUMMARY OF ARGUMENT

The question here is what did the legislature intend in enacting ORS 192.390, and in particular to what does the 25 year sunset apply. Neither the majority nor the dissent in the Court of Appeals found an answer in the legislative history of ORS 192.390. Respondent agrees. In all events, however, this Court has established in *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009), that in order to determine the intent of the legislature it will first examine the text of a statute and its context. The majority in the Court of Appeals found that the text of ORS 192.390 requires the public records in question to be made available. The dissent and the City, do agree that the text of ORS 192.390 means that the 25 year rule of 192.390 applies to exemptions in ORS 192.355 but contend that the exemption for attorney-client privileged content in public records is not found in ORS 192.355, but rather “outside” that statute. Respondent contends that, under ORS 192.314, the exemption in question must be provided in ORS 192.355.

Respondent will address provisions of Oregon law that provide context for the meaning of ORS 192.390. These include OEC 101, OEC 503, and its subsection (7), ORS 192.311, ORS 192.314, ORS 192.415(2) and (3), and ORS 192.398.

The keystone of the City’s position is a mistaken conflation of “privilege” and “exemption.” OEC 503 is an evidentiary rule of privilege within the Oregon Evidence Code. It applies to “all courts in this state,” (with rare exceptions), as provided by OEC 101(1). It applies to “civil actions, suits and proceedings, criminal actions and proceedings and to contempt proceedings except those in which the court may act summarily,” as provided in OEC 101(2). In OEC 101(3) the Oregon Evidence Code expressly refers to ORS 44.225, which defines attorney-client privilege. That subsection states that the privilege defined in the Oregon Evidence Code “apply at all stages of all actions, suits, and proceedings.”

While the evidentiary rule of OEC 503 defines the attorney-client privilege that applies in matters in all Oregon courts, it does not constitute a public records exemption. While OEC 503 defines a privilege for attorney-client information, the exemption for disclosure of that information in public records must, pursuant to ORS 192.314, be found in ORS 192.355 and not in OEC 503. The City’s “outside” contention is not supported by Oregon statute.

III. ARGUMENT

The City of Portland and Respondent Mark Bartlett agree that the documents sought by Respondent and held by the City are public records, as defined in ORS 192.311(5)(a). They also agree that the legislature’s inclusion of 192.355 in the text of ORS 192.390 is a reference to the exemptions from

disclosure found in ORS 192.355.¹ The disagreement between the City and Respondent arises from the City's contention that exemption from disclosure of attorney-client privilege in public records is not "created by" or "found in" ORS 192.355(9)(a) but instead is created "outside" 192.355, namely in OEC 503. Respondent agrees that the attorney-client *privilege* is created by OEC 503. The public records *exemption* for attorney-client privileged content, however, is found in ORS 192.355(9)(a), as ORS 192.314 provides it must be.

1. Evidentiary "privilege" and public records "exemption" are different.

The City's Brief is replete with statements that are correct, but respectfully, not relevant. For example, lightly paraphrased is "Attorney-client privilege is not defined within ORS 192.355, or even mentioned. That privilege is 'created by,' 'codified by' and found 'outside' ORS 192.355." Petitioner's Brief on the Merits, p. 12.

The City's refers to "privilege" when it often means "exemption." That they are not the same thing is made clear in several provisions of Oregon law. Subsection (7) of OEC 503 makes the distinction plain. That provision makes

¹ ORS 192.338 is also referenced in ORS 192.390 but because it addresses only the separating of content within a public record that must be disclosed from content exempt from disclosure, it need not be further discussed. ORS 192.345 need not be further discussed, either; as Petitioner states in its Brief on the Merits, page 17, "[T]he only statute cited in the 'notwithstanding clause' of ORS 192.390 that has any arguable bearing on the attorney-client privilege is ORS 192.355."

express that privilege is maintained for an attorney-client communication even when that communication is in a public record must be disclosed. In making that distinction, OEC 503(7) expressly refers to disclosure under “ORS 192.311 to 192.478,” the Oregon Public Records Law in its entirety.

ORS 192.415(2) and (3) also demonstrate that evidence code privilege and public records exemption/disclosure are distinct. Those provisions make express that privilege, an evidentiary matter, is maintained even if disclosure of information that is privileged is ordered.

The misapprehended conflation of evidence code privilege and public records exemption or disclosure is the foundation for the City’s argument that attorney-client “privilege” is not found in ORS 192.355(9)(a) but instead exists elsewhere, or “outside” that statute. To be clear, that assertion is true as stated, but only because it addresses “privilege.” It is not true, however, that *exemption* from disclosure of attorney-client content in a public record is found “outside” ORS 192.355.

2. The City’s contention—that attorney-client “privilege,” by which it usually intends to convey “exemption,” is found “outside” ORS 192.355—is precluded by the requirements of ORS 192.314.

Despite its conflation of terms, the City certainly and rightly contends that attorney-client privileged information in a public record is ordinarily *exempt* from disclosure. The City insists, however, that such exemption is

provided by and found in OEC 503 and that it is not provided in ORS 192.355. ORS 192.314 makes that contention untenable.

As ORS 192.314 plainly states, all exemptions from the otherwise universal rule of disclosure of public records must be “expressly provided by... ORS 192.355,” as relevant here. When the City correctly states that attorney-client privileged content is generally *exempt* from disclosure, that exemption *must* be found in ORS 192.355.

3. ORS 192.390 presents no constitutional conflict with federal law.

The City argues that the 25 year sunset of ORS 192.390 would be in direct conflict with federal law if it applied to exemptions under ORS 192.355(8). That “if,” however, is illusory. The Supremacy Clause of the United States Constitution prohibits that application.

4. There is no conflict between OEC 503 and ORS 192.390.

As described in *Port of Portland v. Ore. Center for Environ Health*, 238 Or App 404, 409-10, 243 P3d 102 (2010, *rev den*, 350 Or 230 (2011)), OEC 503 and what is now numbered ORS 192.355(9)(a) are not in conflict. The former creates an evidentiary privilege regarding attorney-client information. The latter creates an exemption from disclosure of attorney-client privileged information within a public record. Contrary to the City’s contention, these provisions work together and are not in conflict. Correctly understood, privilege is in fact never lost under OEC 503. That is the case even when the

25 year sunset in ORS 192.390 is applied to attorney-client information in a public record.

5. ORS 192.398 would not make sense if the City were correct.

The City's position is that while ORS 192.398 conspicuously does not mention attorney-client privileged content, it needn't because ORS 192.390 does not apply to that "privilege."

First, if as the dissent suggested "more clarity" is wanted, ORS 192.398 surely should have included another subsection addressing another claimed exception to ORS 192.390, namely that the sunset provision of ORS 192.390 applies only to exemptions "specifically enumerated" in ORS 192.345 and 192.355 and does not apply to the catchall provision of ORS 192.355(9)(a).

Second, the City contends that legislative history shows that the 25 year sunset in ORS 192.390 was created for and focused on "longitudinal...and genealogical research." If that conclusion about the scope of the sunset provision were correct, it would make no sense that ORS 192.398 would include, as it does, exceptions for matters clearly unrelated to that purported limitation.

Finally, if the City's position were correct—that ORS 192.390 does not apply to exemptions "outside" ORS 192.355—then ORS 192.398 would yet in a third way make no sense. An examination of the enumerated exemptions in ORS 192.345 and .355 clearly shows that some, or arguably all, matters

addressed as exceptions in ORS 192.398 are not found in the enumerated lists of ORS 192.355 or even .345. If the City were correct, ORS 192.398 would then be listing exceptions for “outside” matters that, following the City, are *ab initio* not in ORS 192.355 and hence not subject to ORS 192.390. It would be absurd to enact a statute that includes wholly unnecessary exceptions to the application of ORS 192.390, exceptions concerning matters to which, in the City’s contention, ORS 192.390 could never apply.

6. Application of ORS 192.390’s 25 year sunset to information made privileged by OEC 503 does not violate “home-rule” provisions of the Oregon Constitution.

ORS 192.390’s sunset rule is not directed at the structures and procedures of local government but is instead a general law addressing social objectives, in this case the societal value of government transparency in disclosure of public records after 25 years, even if they contain attorney-client privileged content. ORS 192.390 does not preempt local government law, either, nor does it cause any local government to waive any privilege. Application ORS 192.390’s sunset of an exemption from disclosure of public records containing privileged attorney-client information, is not unconstitutional.

IV. CONCLUSION

ORS 192.314 requires that an exemption from disclosure of a public record—including an exemption from disclosure of a public record containing attorney-client information made privileged by OEC 503—*must* be found *in*

ORS 192.355 and does not exist “outside” its express provision there. The linchpin of the City’s position is its insistence on “outside.” “Privilege” is found “outside” ORS 192.355 but ORS 192.314 precludes the City’s contention that a public records “exemption” for attorney-client privileged content is found “outside” ORS 192.355. While the parties agree that the 25 year sunset in ORS 192.390 applies to all exemptions in ORS 192.355, they disagree about whether the exemption for attorney-client privileged content in public records is found in ORS 192.355 or “outside” it. ORS 192.314 answers that questions; the exemption cannot be found outside ORS 192.355. Because there is agreement that ORS 192.390’s 25 year sunset applies to exemptions in ORS 192.355, that sunset applies to exemptions of attorney-client privileged content in public records, found in ORS 192.355(9)(a).

Dated this 4th day of March, 2021.

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Brief Length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(1)(b), and (2) the word-count of this brief (as described in ORAP 5.05(1)(a)) is 1,938 words.

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I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(3)(b)(ii).

Dated: March 4, 2021.

s/ Duane A. Bosworth

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 4th day of March, 2021, I filed the original of the foregoing **RESPONDENT'S BRIEF ON THE MERITS** by using the court's electronic filing system; I served the same on:

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