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January 8, 2016

Mark Bartlett
2747 N.E. 22nd Ave.
Portland, OR 97212

Lauren King
Deputy City Attorney
Office of the City Attorney
1221 S.W. Fourth Ave., Suite 430
Portland, Oregon 97204

Re: Petition of Mark Bartlett requesting certain legal opinions and a memorandum from the City of Portland

Dear Mr. Bartlett and Ms. King:

In his public records petition under ORS 192.410 et seq., petitioner Mark Bartlett appeals the denial of his request for the following documents from the City of Portland:

City Attorney opinions 81-44, 82-150, 88-165 and a memorandum dated March 9, 1990 from City Attorney Jeffrey Rogers to Mayor Bud Clark and Commissioners Lindberg and Bogle.

Mr. Bartlett originally requested these documents on September 14, 2015. The City denied Mr. Bartlett's request citing attorney-client privilege as defined in ORS 40.225 and incorporated into the public records law by way of ORS 192.502(9).

Mr. Bartlett argues that because the documents at issue are more than 25 years old, OR S192.495 requires their disclosure notwithstanding any exemption that might have previously applied.

Having reviewed the documents at issue they clearly qualify as attorney-client privileged advice and are all over 25 years. We do not need to further address their contents here because the specifics of the advice they contain are not relevant to resolution of the legal question before us. The only question for this office to resolve is whether or not ORS 192.495 requires that they now be disclosed.

DISCUSSION

As amplified below this office agrees with Mr. Bartlett that, regardless of whether or not the records at issue were subject to attorney-client privilege when created, ORS 192.495 requires that they now be disclosed.

A. Attorney-client privilege – ORS 192.502(9), ORS 40.225

ORS 192.502(9) exempts from disclosure under the public records law:

> Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law.

It has long been recognized that Oregon's public agencies may receive confidential advice from their attorneys just as any private organization might. The public records law recognizes this confidentiality by incorporating attorney-client privilege by way of ORS 192.502(9). *Port of Portland v. Or. Ctr. for Envtl. Health*, 238 Or App 404, 409 (2010) (so noting).

Attorney-client privilege has been recognized as far back as 1862 in Oregon's statutes and as early as the mid-seventeenth century in common law jurisprudence. See, *State ex rel. North Pacific Lumber Co. v. Unis*, 282 Ore. 457, 462 (1978); Geoffrey Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061 (1978). Rules of common law continue to apply in Oregon's legal system where they have not been modified or abrogated by statute. *State v. Black*, 193 Or 295 (1951).

The legislature is presumed to be aware of its previous enactments and, accordingly, the more recently enacted statute controls in the event of any conflict. *State v. Langdon*, 330 Or 72, 84 (2000) (where statutes irreconcilably conflict, the more recent controls). The right of the public to inspect its government's records is a creation of statute, and our legislature has clearly stated that government documents are presumed to be open to inspection:

> Every person has a right to inspect any public record of a public body in this state, except as otherwise expressly provided by ORS 192.501 to 192.505.

ORS 192.420(1).

Attorney-client privilege, and indeed any rule of confidentiality found outside the public records law, may only supersede the default presumption of disclosure if an express provision of ORS 192.501–192.505 so states. In most cases this will be either 192.502(9) (incorporating other confidentiality provisions of Oregon law) or 192.502(8) (incorporating other confidentiality provisions of Federal law).

In 1979 the legislature passed ORS 192.495, which created a 25 year limit on public records exemptions. The language of ORS 192.495 is unambiguous:

> Notwithstanding ORS 192.501 to 192.505 and except as otherwise provided in ORS 192.496,[1] public records that are more than 25 years old shall be available for inspection.

[1] ORS 192.496 identifies four categories of records to which the 25 year rule does not apply, none of which touch on attorney-client privilege: medical records, records that have been sealed by court order, records of an individual's incarceration or probation, and student records.

Although no published judicial opinions have interpreted this statute, the attorney general has previously recognized that ORS 192.495 compelled disclosure of old medical records notwithstanding a claim of physician-client privilege. *In re petition of Smith*, Att'y Gen. PRO (2/7/1994). In *Smith*, the attorney general wrote that:

> The exemption from disclosure for patient records is based on the incorporation of the psychotherapist/patient and the physician/patient privileges into the Public Records Law by ORS 192.502(8) [subsequently renumbered to 192.502(9)]. Because ORS 192.495 operates "notwithstanding ORS 192.501 to 192.505," and therefore notwithstanding ORS 192.502(8), that exemption is no longer applicable after twenty-five years.

Id. at p. 6.

The City points to *Bachman*, an attorney general's public records letter opinion dated August 6, 2009 as an example of an non-enumerated exception to the 25-year disclosure rule. In *Bachman* the attorney general relied on ORS 174.020, which provides:

> When a general and particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent.

The attorney general concluded that ORS 192.495 was a general provision under ORS 174.020 and that a statute relating to the confidentiality of juvenile court records was a particular provision and, thereby, made the records exempt from disclosure even though they were over 25 years old.

It is admittedly difficult to reconcile the attorney general's differing results in *Bachman* and *Smith* (supra). ORS 174.020 was in effect at the time of both decisions. While we regularly look to the attorney general's opinions as persuasive authority, we are not bound by these decisions on matters of public records law. However, in the present case, the comparison between the physician-client privilege in *Smith* and attorney-client privilege is more analogous than that between the confidentiality of juvenile court records in *Bachman* and attorney-client privilege.

Where the legislature has intended to privilege public records indefinitely, it has very clearly so stated. For example, ORS 314.835 protects income tax records held by the state's department of revenue with the following mandate:

> no subpoena or judicial order shall be issued compelling the department or any of its officers or employees, or any person who has acquired information pursuant to [...] any other provision of state law to divulge [...] any particulars set forth or disclosed in any return.

ORS 419B.035 protects records relating to reports of child abuse by specifically identifying, and setting aside, the entire public records law, including ORS 192.495:

> notwithstanding the provisions of [...] ORS 192.210 to 192.505 [...] reports and records compiled under the provisions of ORS 419B.010 to 419B.050 are confidential and many not be disclosed[.]

It is consistent with the well-established principles of open government in Oregon that the legislature should see fit to place a temporal limit on the otherwise perpetual attorney-client privilege as to the advice government attorneys have given to other government actors. Given the absence of attorney-client privilege in ORS 192.496, and the lack of an express or particular indication of legislative intent within ORS 40.255 to override the public records law, we must conclude that ORS 192.495 applies in this case.

B. Legislative History

The City cites House and Senate committee hearings at which the state archivist provided testimony that his purpose in proposing the bill that would become ORS 192.495 and 192.496 was to remove impediments to accessing old records for genealogical research. However, the legislative history appears ambiguous at best when taken in totality.[2]

Regardless of the announced intent of the state archivist in supporting the bill, the legislature wrote the statute that it wrote. *State v. Gaines*, 346 Or 160, 171 (2009), permits consideration of legislative history even when a statute is facially unambiguous, but cautions that "text and context remain primary, and must be given primary weight in the analysis" against testimony presented to the legislature. This is because, "there is no more persuasive evidence of the intent of the legislature than the words by which the legislature undertook to give expression to its wishes." *Id.*

The Court of Appeals has recently summarized the strong presumption of disclosure under Oregon's public records law:

> Disclosure of public records is the rule and exemptions from disclosure are to be narrowly construed and any exemption from disclosure under the Public Records Law must be explicitly stated by statute and not merely implied by the law. That broad rule reflects the strong and enduring Oregon policy that public records and government activities shall be open to the public.

Mail Tribune, Inc. v. Winters, 236 Or App 91, 94 (2010) (internal citations and quotations omitted). Given this skeptical standard of review with respect to any claim of exemption, and the caution against reading in exemptions that are not expressly stated, we are not convinced that we may depart from the unambiguous plain text of ORS 192.495.

C. Oregon Rules of Professional Conduct

The City argues that releasing the requested information would violate their attorneys' legal ethical obligations to keep confidential client information. ORCP 1.6, cited by the city, includes a specific exception stating that a lawyer may reveal information relating to a client's

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[2] See, e.g., *Relating to Access to Public Records: Hearing on HB 2011 Before the H. Comm. On Judiciary*, 1979 Leg., 60th Sess. (Jan. 31, 1979) (statement of State Archivist James Porter at min. 0242) ("CHAIRMAN GARDNER asked if there were any items of information that might find their way into the state archives that should never be disclosed. MR. PORTER stated that he could not honestly think of any. The business of the state is public business. If government is going to reach decisions and make determinations on information that cannot be disclosed to the people, he would rather the government not ask for the information in the first place.")

representation in order to comply with other law. ORCP 1.6(b)(5). The Oregon Public Records Law is "other law" and would appear to permit the city attorney to release such records without violating the general confidentiality provisions of ORCP 1.6.

Moreover, the records at issue likely exist in locations other than the City Attorney's Office.[3] Disclosure of a copy of the records, by a person other than an attorney for the City, from the records of a different city bureau, would not appear to run afoul of the Rules of Professional Conduct even if ORCP 1.6(b)(5) did not already provide the necessary relief.[4]

D. Public Policy

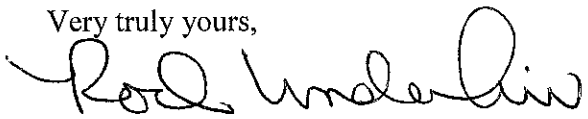
This office appreciates that the City has clear policy arguments as to why disclosure of aged attorney-client communication would be a bad idea. We also recognize that the question presented in this appeal involves significant stakes beyond the narrow scope of the individual records sought in this case. However, this office is not statutorily empowered to balance those concerns in the face of the plain language of ORS 192.495. We must presume that the legislature was aware of these issues both when it enacted ORS 192.495 establishing a 25 year limit on public records exemptions and also when it declined to include attorney-client advice within the scope of ORS 192.496.

The confluence of ORS 192.495 and 40.225 presents complex and important issues that would be well served by judicial or legislative clarification. To the extent that the parties disagree with our interpretation or application of ORS 192.495 we would encourage them to seek judicial review of this order as provided in ORS 192.450 and 192.460.

ORDER

The petition is granted. The City of Portland is ordered to promptly disclose City Attorney opinions 81-44, 82-150, 88-165 and the memorandum dated March 9, 1990 requested by Mr. Bartlett. This disclosure is subject to payment of fees to the city, if any, not exceeding the actual cost in making the information available.

Very truly yours,



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Multnomah County, Oregon

[3] The City's response indicates the city archives division was the initial recipient of the request for disclosure and implies that the copies are in that bureau's possession. Copies undoubtedly have been archived by the recipients of the legal advice at issue in addition to those held by the City Attorney's Office.

[4] To be clear, we are ordering these records produced, wherever they reside. We merely propose a second solution to the ethical problem raised by the City Attorney's Office.

Notice to Public Agency

Pursuant to ORS 192.450(2), 192.460, and 192.490(3) your agency may become liable to pay petitioner's attorney's fees in any court action arising from this public records petition (regardless whether petitioner prevails on the merits of disclosure in court) if you do not comply with this order and also fail to issue within seven days formal notice of your intent to initiate court action to contest this order, or fail to file such court action within seven additional days thereafter.

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