**Summary of Court of Appeals Decision in**

***City of Portland v. Bartlett*, 304 Or. App. 580, 468 P.3d 980 (2020)**

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## I. Facts of the Case

Mark Bartlett submitted a public-records request to the City, asking for "City Attorney opinions 81-44, 82-150, 88-165 and a memorandum dated March 9, 1990 from City Attorney Jeffery Rogers to Mayor Bud Clark and commissioners Lindberg and Bogle." The City denied that request, citing attorney-client privilege.

Bartlett challenged the City's denial before the Multnomah County District Attorney. The District Attorney confirmed that the requested records were indeed covered by the attorney-client privilege: "Having reviewed the documents at issue, they clearly qualify as attorney-client privileged advice * * *." But the District Attorney went on to hold that, as a matter of law, ORS 192.390 limits the attorney-client privilege to only 25 years for all public bodies, including the City. Here, because the requested records were "all over 25 years [old]," the District Attorney ordered the City to disclose the records.

The City challenged that decision in the Multnomah County Circuit Court. Both parties introduced evidence and filed cross-motions for summary judgment. The trial court eventually ruled for the City, concluding that the documents remained privileged and were not subject to disclosure even though they were more than 25 years old:

> "[T]he material facts needed to decide summary judgment are undisputed. Defendant requested three City Attorney opinion letters and one memorandum. All came within the attorney-client privilege at the time they were written. All are more than 25 years old. * * * After considering the arguments and the entire summary judgment record, the Court concludes that the documents remain privileged."

In particular, the trial court held that ORS 192.390 did not "impose a time limit on the [attorney-client] privilege in the government setting" and that, "in codifying the attorney-client privilege in OEC 503, the Legislative Assembly did not create an exception for public records."

## II. The Decision of the Court of Appeals

Bartlett appealed to the Oregon Court of Appeals, which reversed the judgment of the trial court in a split *en banc* opinion. The Court of Appeals held

that the public-records law requires that public bodies make attorney-client communications available for inspection when those communications are older than 25 years old. In reaching that holding, the court rejected the City's two main arguments: First, that ORS 192.390, which provides for the disclosure of public records older than 25 years old, does not include attorney-client privileged communications. Second, alternatively, that the operation of ORS 192.390 in this context would violate the Home Rule amendments of the Oregon Constitution.

In rejecting the City's first argument, the court construed ORS 192.390's provision that, "[n]otwithstanding ORS 192.338, 192.345, and 192.355," records older than 25 years old must be disclosed. As relevant here, ORS 192.355 exempts from disclosure public records that are confidential and privileged under Oregon law. The court reasoned that this exemption did not apply once ORS 192.390's condition—becoming older than 25 years old—was met, because ORS 192.390 operates "[n]otwithstanding . . . ORS 192.355." As context for its construction of ORS 192.390, the court noted that disclosure is the default rule in public-records law (citing ORS 192.314).

The court also disagreed with the City's view that OEC 503 controlled as a conflicting and "more specific" law governing attorney-client privilege. That disagreement was based on the fact that ORS 192.355 expressly refers to OEC 503 and that OEC 503(7) expressly contemplates that privileged documents might be required to be disclosed under the public-records law. However, the court did not directly address the text of OEC 503(2), which provides: "A client has a privilege to refuse to disclose and to prevent any other person from disclosing [confidential attorney-client communications]."

In rejecting the City's second argument regarding Home Rule, the court held that ORS 192.390 does not unjustifiably impinge on the "structure and procedures of local agencies." Specifically, the court explained that the statute is a general law that "favor[s] the societal value of public disclosure of documents after 25 years, even when those documents might otherwise be confidential due to a recognized privilege."

## III. Dissenting Opinion

Judge Powers wrote a dissenting opinion, joined by two other judges, in which he largely agreed with the City's arguments. In particular, he viewed ORS 192.390 as limited to the exemptions specifically codified in ORS 192.345 and 192.355. Thus, in his view, ORS 192.390 does not affect the right to refuse to disclose privileged communications under OEC 503. He noted that the legislature chose to specifically identify ORS 192.338, 192.345, and 192.355 rather than provide generally that "public records that are more than 25 years old shall be available for inspection."

Judge Powers also pointed out that the majority's opinion has the effect of sunsetting *all* confidentiality laws after 25 years, regardless of where they're codified:

> "The full impact of the reasoning by the majority opinion will have far reaching consequences. By using the catch-all exemption in ORS 192.355(9)(a) to apply a 25-year sunset to all public records exemptions found in Oregon law, a wide range of exemptions will no longer be viable despite the underlying policy interest embodied in the exceptions not necessarily being diminished by the passage of time such as:
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> • ORS 18.048(2)(b)—crime victim information;
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> • ORS 40.275(2)—identity of an informant;
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> • ORS 247.973(5)—information on voter's disability in voter registration records;
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> • ORS 314.835(1)—information in state tax returns;
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> • ORS 342.850(8)—teacher personnel files where a district school board has adopted rules governing access;
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> • ORS 409.273(2)—location of sexual assault crises centers that have received grants from, or entered into a contract with, the Department of Human Services;
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> • ORS 409.292(3)—location of facilities for family and domestic violence programs that have received grants from, or entered into a contract with any public agency; and
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> • ORS 433.045(4)(a)—identity of individuals receiving HIV-related tests by any licensed health care provider.
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> In short, the legislature undoubtedly intended to place a time limit on the use of specified public records exemptions when it enacted ORS 192.390 using a narrow notwithstanding clause. Because we should take the legislature at its word and not expand the reach of that tailored notwithstanding clause by effectively turning it from a targeted 25-year sunset provision into a comprehensive sunshine

> provision that forecloses the use of each and every public records exception under Oregon law after 25 years, I respectfully dissent."

*Bartlett*, 304 Or App at 605-06.

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