



CITY OF
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February 4, 2025

Representative Jason Kropf, Chair
House Committee on Judiciary
900 Court St. NE, Hearing Room F
Salem, OR 97301

Re: HB 2533

Dear Chair Kropf and Members of the Committee:

Thank you for the opportunity to provide testimony in support of HB 2533. Generally, documents that are generated by a public body are available to members of the public through a public records request, subject to certain exemptions. One exemption is if the document is covered by attorney/client privilege. In the private sector, the attorney/client privilege has no expiration date. However, the Oregon Supreme Court held in a 2022 case that for public entities, the attorney/client privilege exemption lasts only 25 years.¹

This statutory change in HB 2533 is a compromise to partially restore the attorney/client privilege exemption so that client confidentiality is extended from 25 years to 50 years. The City of Portland supports the compromise which balances the permanent attorney/client privilege and confidentiality enjoyed by private persons against the public interest in disclosure.

The purpose of the attorney/client privilege is to ensure that clients can be frank with pertinent facts so their attorneys can provide the best legal advice. The attorney/client privilege prohibits an attorney from disclosing, without the client's consent, "any communication made by the client to [the attorney], or [the] advice given [by the attorney] thereon, in the course of professional employment."² Public bodies are included in the definition of client in Oregon Statutes and United States common law. The Oregon courts have explained that the privilege is a bedrock to our legal system holding, "[the] privilege is essential to public justice, for did it not exist no [one] would dare to consult a professional adviser."³

Extending the exemption to public records requests for privileged records from 25 to 50 years creates greater certainty for the disclosures made when legal advice is sought.

¹*City of Portland v. Bartlett*, 369 Or. 606, 608, 509 P.3d 99, 102 (2022).

²The attorney client privilege was original codified with this wording in 1862. General Laws of Oregon, Civ Code, ch VIII, title III, § 702(2), p 325 (Deady 1845-6). The current codification can be found at ORS 40.255.

³*Ex parte Bryant*, 106 Or 359, 363, 210 P 454 (1922).

The U.S. Supreme Court explained that certainly is a necessity for the attorney client privilege to be effective: “An uncertain privilege is little better than no privilege at all.”⁴ The attorney client privilege “encourage[s] a client to disclose all relevant facts to his attorney by removing any apprehension that the confidential communications will later be disclosed to others.”⁵

The Second Circuit observed that the traditional rationale for recognizing the attorney client privilege applies with “special force in the government context.”⁶ Municipal corporations routinely perform functions that have significantly greater legal impacts than is typical in the private sector, and government employees are expected to understand, uphold, and execute the law in a variety of contexts.

As the Oregon Supreme Court explained, “The state acts through its employees, and many of the functions that the state undertakes on behalf of its citizens entail risks of liability that few private entities would choose to bear—guarding prisoners, policing the streets, and intervening in families to protect children from abuse, to name only a few.”⁷ To perform difficult and legally impactful functions on behalf of the public, cities need the best possible legal advice. To get the best legal advice, City employees need to know their communications with City Attorneys will be confidential and privileged.

The current exemption of 25 years is a fairly short period of time in the legal world. The City has ongoing cases that could be harmed if the exemption is not extended.

For example, our City is a party to the Portland Harbor litigation, which is long-term environmental litigation that will soon be 25 years old. In 2000, the Environmental Protection Agency (EPA) listed the Portland Harbor, a 10-mile stretch of the lower Willamette River between the Broadway Bridge and the Columbia Slough, on the National Priorities List under the Superfund Act. On December 8, 2000, the EPA issued a “General Notice Letter” to the City under the Superfund Act; such a letter constitutes a “suit,” requiring insurers to provide a defense under the Oregon Environmental Cleanup Assistance Act. The Portland Harbor Superfund Site litigation involves over 100 parties, both public and private, and is expected to be completed well after the current 25-year limit on attorney/client privilege exemption for public entities. The majority of the parties involved in Portland Harbor are private businesses, who are alleged to have released industrial, hazardous substances into the Willamette River; these private parties will continue to enjoy the protections of the attorney/client privilege. The City, and the communities we represent, should not be in a worse legal position or be forced to pay more tax dollars because the other private litigants can keep their records confidential

⁴ *Upjohn Co. v. United States*, 449 US 383, 393 (1981).

⁵ *Vela v. Sup Ct*, 208 Cal App 3d 141, 147, 255 Cal Rptr 921, 924 (1989).

⁶ *In re Grand Jury Investigation*, 399 F3d 527, 534 (2d Cir 2005).

⁷ *Horton v. Oregon Health & Sci. Univ.*, 359 Or. 168, 222, 376 P.3d 998, 1029 (2016)

Additionally, City Attorneys represent not just the City but individual employees who have been named in lawsuits because they were acting on behalf of the City. Indeed, under the Oregon Tort Claims Act, the City has a legal duty to defend those employees “against any tort claim or demand, whether groundless or otherwise, arising out of an alleged act or omission occurring in the performance of duty.”⁸ Those employees should not receive a second-class attorney/client privilege compared to their privately employed counterparts. In the normal course of representation, City Attorneys become privy to private information such as family status, personal history, or prior conduct unrelated to their public employment, just to name a few examples.

Indeed, Oregon Courts have recognized that access to such confidential information is key to effective representation.

Over the course of my career, I have represented the State of Oregon, the City of Portland, and individual employees in personal and official capacities at both entities. I have met with state and city employees to prepare them for depositions and trial testimony. I have asked them to entrust me with confidences and personal information so that I could most effectively represent the State or the City and protect the interests of the public. Those public employees deserve the benefit of the attorney/client privilege like any other person who is involved in litigation.

I became an attorney for public bodies to ensure that the decision makers for the government received the best legal representation and the best legal advice I could possibly provide. For all public body attorneys to provide the best legal advice, HB 2533 is necessary, so that clients will feel comfortable seeking legal advice and providing all relevant facts.

HB 2533 is necessary to bring the attorney/client privilege for public bodies in greater parity to that enjoyed by every other person seeking legal advice in Oregon.

Jenifer Johnston

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⁸ ORS 30.285(1).