



CIRCUIT COURT OF OREGON

FIFTH JUDICIAL DISTRICT
CLACKAMAS COUNTY COURTHOUSE
807 MAIN STREET
OREGON CITY, OR 97045

ENTERED

JUL 23 2019

BY: RKM

Verified Correct Copy of Original 7/23/2019.

HENRY C. BREITHAAPT
Judge Pro Tem

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July 23, 2019

SENT VIA EMAIL

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Re: Bialostosky v. Cummings; Case No. 19CV11216

Parties,

This matter is before the court on cross motions for summary judgment. Plaintiff, in his complaint, requests declaratory relief, asserting that the defendant is a “public body” under Chapter 192 of the Oregon Revised Statutes and is therefore required to provide to him copies of the contents of a notebook maintained by defendant in connection with her service as a commissioner of the City of West Linn.

Plaintiff’s reading of the definition of “public body” is, as conceded by plaintiff at the hearing on this matter, critical to his assertion that the notebook is a “public record.” That can be seen in the definition of a “public record,” in ORS 192.311(5)(a):

“ ‘Public record’ includes any writing that contains information relating to the conduct of the public’s business, including but not limited to court records, mortgages, and deed records, prepared, owned, used or retained by a public body regardless of physical form or characteristics.”

For the notebook to be a public record, it must therefore have been “prepared, owned, used or retained by a public body.”

Defendant asserts that she is not a public body, and therefore the notebook does not fit within the definition of a public record subject to disclosure under state law.

Under ORS Chapter 192, a public body:

“includes every state officer, agency, department, division, bureau, board and commission; every county and city governing body, school district, special district, municipal corporation, and any board, department, commission, council, or agency thereof; and any other public agency of this state.”

Plaintiff conceded at the hearing that the defendant does not fit any of the terms relating to city government, with one exception. Plaintiff asserted that defendant is an “agency” of the City of West Linn. In the hearing plaintiff conceded that defendant is not an agent of the City of West Linn. Plaintiff’s argument in this respect is not well taken. Given the listing of city-related entities: that is a governing body, board, department, commission, council or agency, the accepted rule of statutory construction dictates that the entities listed have decisive aspects in common. Cf. *King City Rehab, LLC v. Clackamas County*, 214 Or App 333, 341 (2007). In this case the aspect that is decisive is that the entities listed are just that: entities. The collection of descriptive nouns does not indicate that an individual, as opposed to an entity on which the individual serves, is within the definition of public body as that is applied at the county or lower level of government.

Additionally, the definition of “public body” itself shows that when the legislature desired to include individuals within the definition, it knew how to do so. With respect to the state level of government, by including in the definition the term “state officer,” and concluded its description of covered persons with the phrase “and any other public agency of this state,” this permitting a reading that a state officer might be included in the residual phrase referring to an agency. No such expression of inclusion of individuals within the definition is found as to sub-state levels of government. The legislature did not refer to individuals by using the term “officers” of such governments. Nor did it indicate inclusion indirectly through reference to a residual clause referring to a public agency.

Plaintiff also argued that ORS 192.431, vesting in the circuit courts jurisdiction over actions for injunctive relief in public records cases, necessarily leads to the conclusion that this defendant must be a public body. Otherwise, argues plaintiff, how could his case be in this court under a statute authorizing the relief he seeks? The first problem with plaintiff’s argument is that it is premised on a conclusion that a statute providing for certain forms of relief is definitional with respect to the terms it uses. That is not the case. ORS 192.311, and not ORS 192.431, provides definitions for the chapter. Second, plaintiff ignores ORS 192.427, a statute that provides jurisdiction when a public record is in the custody of a public official and not in the custody of a public body. ORS 192.427 and ORS 192.431, read together, indicate that if a public record is in question, a person requesting the record may proceed against the public body under ORS 192.431 and against an officer having custody of the record under ORS 192.427. These statutes do not define either a public record or a public body.

The court notes that the immediately preceding discussion demonstrates the mistake plaintiff made in relying on a proceeding in Multnomah County in which Judge Souede concluded that a city official must be a public body because, if he was not a public body, "he would not be subject to Oregon's Public Records laws at all." Opinion and Order of Judge Souede issued in case 18CV04107, *Bechtel v. City of Portland and Ted Wheeler*, at page 6, footnote 5. That case involved a document that was concededly a public record, although subject to certain exceptions from disclosure. Judge Souede did not need to conclude that a city official must be a public body in order to require the official to make a public record available. The provisions of ORS 192.427, without relying on the status of a public official as a public body, provides that judicial action against a public official having custody of a public record is available to enforce the public records law. The relief depends not on the status of the official as a public body, but rather on the status of the record in the custody of the official having the status of a public record subject to disclosure. As discussed in the initial portion of this opinion, because the defendant is not a public body, the notebook in question, unlike the document in the Multnomah County case, is not a public record. The notebook was not, as required by the definition contained in ORS 192.311(5)(a), "prepared, owned, used or retained by a public body." That being the case, ORS 192.427 provides no route to relief for plaintiff.

The court finally notes that although plaintiff makes reference to the West Linn City Council Rules in his briefing, he concedes that his case is based entirely on state law and reference to the city council rules was only to aid his argument are public records under Oregon state law. Plaintiff's Motion for Partial Summary Judgment, page 10, footnote 4. Chapter 192 does not make local jurisdiction governing body rules relevant to determination of terms defined in chapter 192. Additionally, the expansive definition of "writing" in ORS 192.311(7) to include such things as letters, words, sounds, etc., for purposes of the definition of a "public record" does not complete the analysis. The critical step in the analysis is that the record be "prepared, owned, used or retained" by a public body.

As the defendant is not a "public body," her writings in the notebook in question are not subject to inspection under ORS Chapter 192.

Counsel for defendant is to prepare a form of order with specific language indicating that defendant is entitled to a declaration that she is not obligated to provide her notebook to plaintiff for the reason that she is not a public body and the matter at issue is not a public record. The order should also indicate that plaintiff is not entitled to the relief he has requested. Those declarations must also be included in the form of judgment to be submitted by defendant as well.

Very truly yours,

Signed: 7/23/2019 04:52 PM



Henry Breithaupt, Judge

Henry C. Breithaupt
Judge