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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

PUBLIC RESOURCE ORG INC,
Plaintiff,
v.
OREGON DEPARTMENT OF CONSUMER
AND BUSINESS SERVICES,
Defendant.

Case No. 24CV30573
MOTION TO DISMISS
ORAL ARGUMENT REQUESTED
ORS 20.140 - State fees deferred at filing

I. UTCR MATTERS

Pursuant to UTCR 5.050, Defendant requests oral argument on this motion. Defendant estimates 30 minutes will be required for argument and requests official court reporting services.

II. MOTION TO DISMISS

Pursuant to ORCP 21 A(1)(h), Defendant Oregon Department of Consumer and Business Services (“DCBS”) moves for an order dismissing Plaintiff Public Resource Organization, Inc.’s (“Plaintiff”) Complaint in its entirety for failure to state ultimate facts sufficient to constitute a claim.¹ This motion is supported by the Complaint, the exhibits attached thereto, and the following points and authorities.

¹ The Complaint refers to “BCD” throughout, which Defendant understands as a reference to the agency’s “Building Codes Division.”

1 III. POINTS AND AUTHORITIES

2 A. Introduction

3 Plaintiff filed suit against DCBS on June 24, 2024, challenging the fact that the agency
4 does not possess or provide free access to “integrated digital versions”² of model building codes
5 incorporated into its administrative rules by reference and challenging DCBS’ contracts with the
6 private companies that create and maintain those model codes. Plaintiff seeks relief for two
7 claims, alleging: (1) that the lack of free access to integrated digital version of the codes violates
8 Article I, section 8 of the Oregon Constitution and (2) that DCBS’s contracts are “unenforceable
9 because they prevent [Plaintiff], and the people of Oregon, from accessing the Codes...and
10 speaking the Codes...” (See Compl. ¶ 30).

11 The Complaint fails to state a claim upon which relief can be granted. The first claim
12 fails as a matter of law because Article I, section 8 is not self-executing and the Complaint fails
13 to identify a source of law entitling Plaintiff to relief. Alternatively, the allegations in the
14 Complaint do not implicate Article I, section, 8 because that provision does not entitle Plaintiff
15 to *access* the information it seeks to publish and the contracts are not subject to challenge under
16 that provision. The second claim fails as a matter of law because the Complaint identifies no
17 authority that would allow Plaintiff to challenge contracts to which Plaintiff is not a party.

18 B. Background

19 1. Oregon Building Codes

20 The State’s building codes include “structural standards for the installation and use of
21 mechanical, heating and ventilation devices and equipment; and standards for prefabricated

22 _____
23 ² The Complaint does not define “integrated digital versions” of the codes. Defendant
24 understands “integrated codes” to refer to model codes that are then amended by Oregon and
25 published as single “integrated” codes. Defendant understands Plaintiff’s reference to
26 “integrated digital codes” to mean the unofficial and privately compiled versions of the codes
that include the full text of the base model code with the Oregon amendments and that are
published by, and available for purchase from, various private entities that develop and copyright
model codes. Because free “read-only” access to those versions is available through DCBS’s
website, Defendant further understands Plaintiff’s Complaint to be referring to *paid* versions of
the integrated codes which provide additional features such as downloading.

1 structures...” ORS 455.020. DCBS “adopts model building codes, standards and other
2 publications by reference, as necessary, through administrative rule to create the state building
3 code.” OAR 918-008-0000(1). DCBS is authorized to adopt “specialty codes,” which are
4 defined by rule as published collections of standards governing particular fields of construction
5 which are generally accepted and used in the United States (“model codes”) and combined with
6 Oregon-specific amendments. *See* OAR 918-008-0010(3).

7 **2. Plaintiff’s Complaint**

8 Plaintiff “hosts copies of safety codes that various government entities have incorporated
9 into law, such as building codes, fire safety codes, pipeline safety standards, and food safety
10 standards” on its websites. (Compl. ¶ 5). In 2023, Plaintiff filed requests under the Oregon
11 Public Records Law for “integrated digital copies” of specialty codes from DCBS. (*Id.* ¶¶ 11,
12 25). DCBS and the Oregon Department of Justice (“DOJ”) denied Plaintiff’s request, noting that
13 DCBS did “not possess any integrated digital copies” of the codes. (*Id.* ¶ 25). DOJ further
14 explained that the official versions of Oregon’s building codes are codified in Oregon
15 Administrative Rules Chapter 918, which are freely available for the public to download from
16 the Secretary of State’s website and noted, however, that DCBS “maintain[ed] physical copies of
17 [the] integrated versions in [its] offices for inspection...” (*Id.* Ex. 2, at 2 at n 2).

18 Plaintiff subsequently initiated this litigation, contending that the lack of free access to
19 the integrated digital version of the codes violates the Oregon Constitution and that DCBS’s
20 contracts with the private companies who maintain those digital versions are unenforceable.

21 **C. Standard of Review**

22 The Oregon Rules of Civil Procedure require a “plain and concise statement of the
23 ultimate facts constituting a claim for relief.” ORCP 18 A. In determining the sufficiency of a
24 complaint under ORCP 21A(1)(h), courts accept as true all well-pleaded factual allegations in
25 the complaint and give the plaintiff the benefit of all favorable inferences that may be reasonably
26 drawn from the well pleaded allegations. *See Bailey v. Lewis Farm, Inc.*, 343 Or 276, 278

1 (2007). A complaint must allege facts that would, if true, entitle a plaintiff to relief; merely
2 reciting legal conclusions is not enough. *See Fearing v. Bucher*, 328 Or 367, 371 (1999); *see*
3 *also Tydeman v. Flaherty*, 126 Or App 180, 182 (1994) (“We disregard allegations that are
4 conclusions of law.”).

5 **D. Argument**

6 **1. Claim 1 fails because Plaintiff identifies no legal authority that entitles it to**
7 **relief under Article I, section 8 and even if Plaintiff had a right to relief, the**
8 **allegations in the Complaint do not implicate that provision.**

9 **i. Plaintiff has not demonstrated that it is entitled to relief.**

10 Plaintiff alleges that, by not making the unofficial and privately compiled versions of the
11 integrated digital versions of the codes available to it, DCBS has violated its right under Article
12 I, section 8 of the Oregon Constitution “to view and speak [the codes’] contents freely.” (*See*
13 *Compl.* ¶ 18). Plaintiff seeks a declaration that DCBS “cannot restrict free public access” to the
14 codes. (*Id.* at 8, “Prayer for Relief”). However, Plaintiff fails to identify any source of law that
15 creates a right of action for it to seek declaratory relief directly under the Oregon Constitution.
16 As the Oregon Supreme Court has noted, Article I, section 8 is “nonself-executing” and:

17 persons whose rights under Article I, section 8, of the Oregon Constitution are
18 violated by a municipality or its employees may not bring an action for damages
19 against the municipality or its employees directly under the constitution, but will be
20 limited to existing common-law, equitable, and statutory remedies.

21 *Hunter v. City of Eugene*, 309 Or 298, 304 (1990). There is no private right of action under
22 Article I, section 8 and Plaintiff has therefore failed to state a claim under that provision.

23 Furthermore, without any citation to a source of law which would entitle Plaintiff to
24 relief, it is impossible for the Court to determine whether Plaintiff even has standing to bring this
25 case. *See Kellas v. Dept’t of Corr.*, 341 Or 471, 476-77 (2006) (“ ‘Standing’ is a legal term that
26 identifies whether a party to a legal proceeding possesses a status or qualification necessary for
the assertion, enforcement, or adjudication of legal rights or duties.”); *see also MT & M Gaming,*
Inc. v. City of Portland, 360 Or 544, 553 (2016) (“in Oregon, standing is not a generic concept

1 but largely depends on the statute under which the plaintiff seeks relief.”) (internal citations
2 omitted). Plaintiff has therefore failed to offer sufficient information for the Court to determine
3 that it has jurisdiction over this matter.

4 ii. **The allegations in the Complaint do not implicate Article I, section 8**
5 **because the provision does not provide for a right of access to**
6 **information and the challenged contracts are not the type of**
7 **enactments subject to challenge.**

8 Even if Plaintiff were able to establish that it was entitled to relief, its claim under the
9 Oregon Constitution still fails as a matter of law. Plaintiff alleges that Article I, section 8
10 guarantees a right to “view, copy, comment upon, and share” the integrated digital codes and that
11 DCBS’s “pattern, practice, and policy of off-loading possession and control of the Codes has
12 vitiated” that right. (Compl., ¶ 18). However, Plaintiff’s interpretation of the right guaranteed
13 by Article I, section 8, lacks a legal basis.

14 In relevant part, Article I, section 8, provides that “[n]o law shall be passed restraining
15 the free expression of opinion, or restricting the right to speak, write, or print freely on any
16 subject...” It is well established in Oregon law that Article I, section 8, provides protections
17 against governmental restrictions on speech but does not create an affirmative right to access
18 information about which one would like to speak. *See, e.g., State ex rel. Oregonian Pub. Co. v.*
19 *Deiz*, 289 Or 277, 287 (1980) (Linde, J., concurring) (Article I, section 8, “is not itself an ‘Open,
20 Sesame’ to public offices, or records, or other information. It does not give journalists a
21 constitutional claim to the information which it gives them the freedom to publish. That they are
22 left to get for themselves.”); *State ex rel. KOIN-TV, Inc. v. Olsen*, 300 Or 392, 410, (1985) (“We
23 have not been given any reasoning to support the claim that the constitutional text [of Article I,
24 Section 8,] grants the right to copy.”); *Oregon Newspaper Publishers Ass’n v. Dep’t of Corrs.*,
25 156 Or App 30, 37 (1998) (“[I]t is far from clear that section 8 extends to access to government
26 records.”). Plaintiff’s assertion, therefore, that Article I, section 8 guarantees “free public

1 access” to the codes has been squarely rejected by Oregon’s courts. (See Compl. ¶ 19)
2 (emphasis added).

3 Furthermore, even if the right to access the unofficial and privately compiled versions of
4 the integrated digital codes were protected under the Oregon Constitution—which it is not—
5 Plaintiff’s challenge to DCBS’s contracts with private companies who control those versions³ is
6 not directed toward an enactment subject to challenge under Article I, section 8. The Court of
7 Appeals’ summary of the Article I, section 8 analytical landscape is instructive:

8 [State v. Robertson, 293 Or 402 (1982) and State v. Plowman, 314 Or 157 (1992)]
9 and numerous subsequent Article I, section 8 cases...divide the universe of
10 enactments that are subject to a challenge under that provision into three categories.
11 The first consists of enactments directed toward expression *per se*, such as an anti
12 obscenity statute that imposes penalties...The second category consists of
13 enactments that are directed toward some regulable results and ‘expressly prohibit’
14 expression used to achieve those results...such as a statute that penalizes threats to
15 coerce a person into performing an act that she has the right to refuse...The third
16 category...consists of enactments that regulate or prohibit conduct ‘without
17 referring to expression at all...but may, when enforced, interfere with a person’s
18 expression. An example is a statute that imposes a penalty for criminal trespass,
19 imposed against a political protestor.

16 State v. Babson, 249 Or App 278, 285-86 (2012) (internal citations omitted). Plaintiff’s
17 challenge to DCBS’s contracts with private companies fails to implicate Article I, section 8
18 under any of the three categories. First, Plaintiff’s offer no evidence that the contracts restrict or
19 are directed toward any expression. (See Compl., ¶ 10, Ex. 1) (contracts between DCBS and the
20 International Code Council and the National Fire Protection Association describing scope of
21 contract terms, compensation, licensing, copyright, and other technical matters). Second, except
22 for provisions related to the relationship between the contracting parties and the services to be
23 provided under the contracts, the contracts make no mention of a regulable result arguably

24 _____
25 ³ Defendant notes that Oregon’s courts have not addressed the question of “whether a
26 governmental policy adopted by an executive officer that only affects contractual relationships of
that government, and does not enact or implement a general rule of civil conduct, qualifies as a
‘law,’ whose enactment or enforcement is constrained by Article I, section 8.” *Karuk Tribe of
California v. Tri-County Metro. Transp. Dist. of Oregon*, 241 Or App 537, 547 n.7, (2011).

1 related to speech or expression. (*See id.*). Finally, Plaintiff’s allegation that the contracts
2 interfere with its ability to speak freely lacks merit. The integrated codes that Plaintiff seeks are
3 available in *physical* form at DCBS for inspection and Plaintiff offers no authority to support a
4 contention that it is not only entitled to the information it seeks, but that it is entitled to that
5 information in its preferred format. (*See* Compl., ¶ 25, Ex. 2 at 2 n2). Accordingly, the
6 allegations in the Complaint fail to implicate Article I, section 8 and Claim 1 must be dismissed.

7 **2. Claim 2 fails because Plaintiff identifies no legal authority demonstrating it is**
8 **entitled to relief when it is not a party to the contracts it challenges.**

9 Plaintiff is not entitled to any relief as to contracts to which it is not a party. The
10 Complaint seeks a declaration that DCBS’s contracts with third parties are “void and
11 unenforceable for public policy reasons.” (*See* Compl. at 8, “Prayer for Relief”). However, the
12 Complaint makes no allegation that Plaintiff is a party to those contracts and the exhibits
13 attached thereto demonstrate that it is not. (*See e.g.*, Compl., ¶ 10, Ex. 1). Claim 2 fails because
14 Plaintiff does not have any contractual rights under those agreements. *See e.g., Yunker v. Kaiser*
15 *Found. Health Plan of Oregon*, 46 Or App 165, 172 (1980) (“As to the Clinic, it was not a party
16 to the agreement and the trial court properly ruled there was no evidence of breach of contract by
17 the Clinic.”).

18 The Complaint identifies no source of authority that provides a right of action for a
19 nonparty to a contract to raise a claim against that contract for being void as against public
20 policy. In the absence of such authority, the general principle that contracts may only be
21 enforced—or, in the inverse, challenged—by individuals who are parties to or beneficiaries of
22 those contracts precludes Plaintiff from stating a common law contract claim. *See, e.g.*,
23 *Stonecrest Properties, LLC v. City of Eugene*, 280 Or App 550, 558-59 (2016) (holding that an
24 individual property owner did not have the right to enforce an agreement between a property
25 developer and a city). Even Plaintiff’s authority in the Complaint supports this conclusion.
26 Plaintiff cites to *Bagley v. Mt. Bachelor, Inc.*, 356 Or 543 (2014) for the proposition that “[a]n

1 agreement is illegal if it contrary to law, morality, or public policy.” (Compl. ¶ 27). In that case,
2 the Oregon Supreme Court addressed whether a release and indemnity agreement between the
3 parties—a snowboarder and ski area operator—violated public policy and was unconscionable.
4 See 356 Or at 545. In other words, *Bagley* is meaningfully distinguishable from this present case
5 and offers no support for Plaintiff’s attempt to challenge contracts to which it is not a party. See
6 e.g. *Blessing v. Ocean Accident & Guarantee Corp.*, 152 Or 632, 641 (1936) (denying plaintiff’s
7 claim that contract was void as against public policy because her “deceased husband was not a
8 party to the contract and, upon his death, it vested no right in her…”). Accordingly, Claim 2
9 fails as a matter of law.

10 **IV. CONCLUSION**

11 For the foregoing reasons, this Court should dismiss this case for failure to state a claim.

12 DATED October 4, 2024.

13 Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 4, 2024, I served the foregoing MOTION TO DISMISS upon the parties hereto by the method indicated below, and addressed to the following:

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