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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

Hon. Natasha A. Zimmerman

DEFENDANT'S REPLY TO MOTION TO
DISMISS AMENDED COMPLAINT

Hearing: June 6, 2025 1:00 pm

ORS 20.140 - State fees deferred at filing

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1 **I. INTRODUCTION**

2 Plaintiff Public.Resource.Org, Inc. (“Plaintiff” or “Public Resource”) alleges that the
3 Oregon Department of Consumer and Business Services (“Defendant” or “DCBS”) has violated
4 its rights under Article I, section 8 of the Oregon Constitution by entering into contracts with
5 third party service providers (“Private Standards Companies”) which would require Public
6 Resource to pay a fee to download and reprint copies of the state’s model building codes on its
7 website. Public Resource also alleges that DCBS has violated Oregon Public Records Law
8 (“PRL”) by failing to invoke an exemption to producing the digital integrated version of the
9 model codes that Plaintiff requested or by otherwise completing Plaintiff’s public records
10 request.¹

11 The Court lacks jurisdiction over Plaintiff’s First and Third Claims, which seek relief
12 under the Uniform Declaratory Judgments Act (“UDJA”), because neither claim raises a
13 justiciable controversy and because Plaintiff has failed to establish standing for either claim. As
14 to justiciability, Plaintiff’s argument that declaratory relief would entitle it to access the currently
15 copyrighted version of the model codes or somehow shield it from potential future liability is
16 speculative and merely seeks an impermissible advisory opinion from this Court. As to standing,
17 Plaintiff offers no authority to support the contention that an injury to its organizational mission
18 constitutes an injury to a “legally recognized interest” and fails to explain how a declaration that
19 the contracts are void would have any practical effect on its ability to copy and reproduce the
20 model codes.

21 As to Plaintiff’s Second Claim, Plaintiff fails to allege facts sufficient to state a claim
22 under the PRL. Plaintiff does not dispute that it has the opportunity to inspect hard copies of the
23 integrated codes it requested or that there is a free digital version of the integrated codes online.

25 ¹ Defendant notes that, although Plaintiff seeks an order from this Court directing DCBS to
26 produce the codes as Plaintiff requested them, Plaintiff does not allege in its Amended
 Complaint that DCBS violated the PRL by *denying* its records request, only that DCBS did not
 complete that request.

1 Plaintiff cites no authority to support its contentions that DCBS' obligations under the PRL are
2 not satisfied by those opportunities for inspection or access or that DCBS' response to its records
3 request is somehow incomplete because Plaintiff does not agree with the basis on which DCBS
4 completed the request.

5 For the reasons discussed below, the Court should reject Plaintiff's arguments and grant
6 Defendant's Motion to Dismiss Amended Complaint ("Motion") in its entirety.

7 **II. ARGUMENT**

8 **A. Plaintiff's arguments fail to establish that the First and Third Claims raise** 9 **justiciable controversies.**

10 The parties agree that the "two irreducible requirements for justiciability" articulated by
11 *Hale v. State* govern this Court's analysis, namely that a justiciable controversy "must include
12 present facts, and [that] it must be a dispute in which a prevailing plaintiff can receive
13 meaningful relief from a losing defendant." 259 Or App 379, 384 (2013) (cited in Pl.'s Opp'n to
14 Def.'s Mot. to Dismiss Am. Compl. (Opp'n) at 9). Neither requirement is met for the First and
15 Third Claims.

16 As to the First Claim, Plaintiff fails to identify what specific present facts a judgment
17 from this Court might affect. The analysis in *Petix v. Gillingham*, which Plaintiff cites in its
18 Opposition, is instructive. See Opp'n at 8 (citing 325 Or App 157 (2023)). That case, also
19 brought under the UDJA, addressed whether the defendant, a purchaser of a certificate of sale
20 and redemption rights, had redeemed the property. 325 Or App at 159. The court in *Petix* found
21 there to be a justiciable controversy because:

22 "[P]laintiff alleged that she had a valid judgment against Lucas secured by a lien against
23 property he once owned, that there was a foreclosure sale, followed by transfers and
24 assignments of certificates and redemption rights, and that those transfers and
25 assignments resulted in a redemption that restored her lien rights in the property.
26 Whether or not plaintiff is legally correct, she alleged facts that are current, real, and
disputed."

1 *Id.* at 166. The Amended Complaint is devoid of any similarly “current,” “real” or even
2 arguably “disputed” facts that might serve as the basis of a controversy. The First Claim seeks a
3 declaration that the Codes are officially the law of the State of Oregon and that DCBS cannot
4 restrict free public access to them. *See* Am. Compl. ¶ 21. However, Plaintiff makes no
5 allegation that the former assertion is disputed in any way and then acknowledges, as to the latter
6 assertion, that DCBS *already* provides free access to the public. *See id.* ¶ 14.

7 Plaintiff argues that the First Claim presents a justiciable controversy because declaratory
8 relief would shield it from potential future liability. *See* Opp’n at 9 (“An order from this
9 Court...will invariably mean the text of the Codes are not ownable, and that Public Resource
10 cannot be subject to liability for distributing their contents.); *see also id.* (“Public Resource
11 wishes to ‘speak’ the Codes...without fear of reprisal.”) First, the Amended Complaint fails to
12 allege that Plaintiff *itself* has any specific fear of future reprisal, just that “users” generally “are
13 unable to ‘speak the Codes freely without fear of a lawsuit...” *See* Am. Compl. ¶ 14. Second, for
14 such declaratory relief to provide meaningful relief, a series of hypothetical events must occur:
15 (1) Plaintiff would have to devise a way to bypass what it describes as the “technologically
16 locked-down” format of the current free version of the digital Codes such that it could download
17 and copy them; (2) Plaintiff would then have to publish the Codes to its website; (3) the Private
18 Standard Companies would have to become aware of this alleged breach of contractual terms of
19 use; (4) the Private Standard Companies would have to bring suit against Public Resource; and
20 (5) Public Resource would have to successfully be able to use this Court’s judgment as an
21 affirmative defense. “That is the epitome of contingent and speculative facts[,]” which are
22 insufficient to serve as the foundation for a justiciable controversy. *See Couey v. Atkins*, 357 Or
23 460, 471 (2015).

24 Under the Third Claim, Plaintiff seeks a declaration that the contracts between DCBS
25 and the Private Standards Companies are void and unenforceable. *See* Am. Comp. ¶ 44.
26 Plaintiff argues that the Court can offer meaningful relief for this claim because it can “direct

1 [DCBS] to procure a copy of the Codes that [DCBS] is statutorily directed to maintain and
2 enforce, and that copy will be subject to the PRL request by Public Resource [and]....
3 Alternatively, this Court can order [DCBS] to comply with the retention requirements in the PRL
4 which mandate each state agency to maintain a ‘public record or accurate copy’ of public
5 records.” Opp’n at 11. First, as Plaintiff acknowledges, DCBS already provides free public
6 access to the Codes in digital and physical form. *See* Am. Compl. ¶ 14; *see also* Opp’n at 6-7.
7 What Plaintiff desires is digital access which would allow it to copy, download, and publish the
8 Codes to its website without having to pay for those technological features. Second, Plaintiff
9 fails to explain how the relief it envisions is possible under the Third Claim. If Plaintiff is
10 successful, the challenged contracts are extinguished and their provisions, which include the
11 terms by which DCBS has acquired access to the Private Standards Companies’ model building
12 codes, will be made unenforceable. *See e.g.*, Am. Compl. Ex. 1 at 8-9 (“Contract for the
13 Purchase of Services” between DCBS and International Code Council describing terms of
14 service). How then would DCBS have access to the Codes, including the digital version that
15 Plaintiff requests which allows for downloading and copying? And more importantly, how could
16 the Court order DCBS to procure copies of documents (digital versions of the Codes that allow
17 for copying and downloading) that DCBS no longer had contractual access to because the Court
18 has found those contracts unenforceable? The meaningful relief Plaintiff imagines defies
19 common sense. Plaintiff has therefore failed to identify a “concrete impact” from the requested
20 relief under the Third Claim. *See Hale*, 259 Or App at 387.

21 Additionally, Plaintiff’s argument that the Private Standards Companies are not
22 necessary parties for the Third Claim is incorrect. ORS 28.110 states that “[w]hen declaratory
23 relief is sought, all persons shall be made parties who have or claim any interest which would be
24 affected by the declaration, and no declaration shall prejudice the rights of persons not parties to
25 the proceeding.” As the Oregon Court of Appeals has noted, “[t]hat provision [ORS 28.110] has
26 long been held to be a jurisdictional requirement.” *See State ex rel. Dewberry v. Kulongoski*, 220

1 Or 345, 356 (2008) (internal citation omitted). Plaintiff seeks a declaration that duly executed
2 contracts between DCBS and third-party companies are “void and unenforceable...” *See* Am.
3 Compl. at 11 (“Prayer for Relief”); *see also* Opp’n at 11 (“If this Court enters an order declaring
4 that [DCBS’s] contracts with Private Standards Companies are void for public policy under the
5 Oregon constitution and/or the PRL, those contractual provisions will be unenforceable.”). The
6 contract rights of those companies fall squarely within the protections of the UDJA. *See MT &*
7 *M Gaming, Inc. v. City of Portland*, 360 Or 544, 563 (2016) (“Whatever else may be included in
8 the phrase ‘rights, status or other legal relations’ in ORS 28.020, the phrase certainly includes
9 property and contract rights.”) (quoting *Eckles v. State*, 306 Or 380, 385 (1988)). The Court is
10 therefore barred from issuing relief for the Third Claim for this reason as well.

11 **B. Plaintiff’s arguments fail to establish that it has standing to bring the First**
12 **and Third Claims.**

13 To be entitled to relief under the UDJA, a plaintiff must demonstrate that: (1) it has
14 suffered “some injury or other impact upon a legally recognized interest beyond an abstract
15 interest in the correct application or the validity of the law;” (2) the aforementioned injury “must
16 be real or probable, not hypothetical or speculative;” and (3) “the court’s decision must have a
17 practical effect on the rights that the plaintiff is seeking to vindicate.” *See Morgan v. Sisters*
18 *School Dist. No. 6*, 353 Or 189, 195-97 (2013) (internal citations omitted). Plaintiff’s arguments
19 that it has met these requirements fail.

20 As to the first and second elements, Defendant’s Motion argues that Plaintiff has failed to
21 identify a specific injury and instead simply seeks general declaratory relief about the lawfulness
22 of DCBS’s practices. *See* Mot. at 7-8. In response, Plaintiff argues that DCBS’s “actions
23 prevent [it] from achieving its distinct mission [to make government records and the law more
24 readily available and accessible to citizens].” *See* Opp’n at 14. Plaintiff cites no authority to
25 support the proposition that an alleged injury to an organization’s general mission constitutes an
26 injury to a “legally recognized interest” for standing purposes under the UDJA and Defendant is

1 aware of none. Existing caselaw demonstrates that organizations, like other “persons” within the
2 meaning of the UDJA, must show a practical and concrete impact on their rights. *See* ORS
3 28.020; *see also* ORS 28.130. For example, in *American Civil Liberties Union of Oregon, Inc. v.*
4 *City of Portland*, the court rejected the ACLU’s arguments that the risk of images of its legal
5 observers being broadcast during police livestreams established standing because the ACLU
6 failed to “show[] an adverse effect on the ACLU as an organization...[and] failed to identify a
7 direct or indirect effect on its legally recognized interests...” 338 Or App 750, 772 (2025). In
8 contrast, the court found that hotel owners and trade organizations in *Oregon Restaurants and*
9 *Lodging Association v. City of Bend* who challenged an ordinance which reduced the City’s
10 tourism expenditure rate had demonstrated the requisite injury for purposes of the UDJA. 313
11 Or App 772 (2021). There, the plaintiff organization and entities “depend[ed] on tourism in
12 Bend” and the court held that “the reduction in funds for tourism promotion would have concrete
13 and plausible fiscal ramifications” on them. *Id.*

14 There are no similar facts in this case to support a finding that Public Resource has
15 suffered or will suffer any injury to a legally recognized interest. Plaintiff attempts to argue that
16 DCBS’s contracts with the Private Standards Companies unconstitutionally restrict its free
17 speech rights in violation of Article I, section 8. However, Plaintiff acknowledges that the
18 contracts it challenges provide it with free access to the Codes in digital form and that the Codes
19 are also available to it in physical form. *See* Am. Compl. ¶ 14; *see also* Opp’n at 6-7. The
20 speech restriction or “injury” Plaintiff alleges then is the fact that this access does not allow
21 Plaintiff to “search, print, copy, or paste the Codes” without paying for those features. *See*
22 Opp’n at 6-7. Plaintiff cites no authority to support the proposition that Article I, section 8 of the
23 Oregon Constitution has been interpreted to mean that the right to speak includes the right to
24 access government documents in the preferred technological format and the payment option of
25 the speaker such that Plaintiff has a “legally protected interest” in searching, printing, copying,
26 and pasting the Codes for free. Furthermore, Plaintiff fails to explain how its mission of

1 providing access to government records (which, in this case, are already freely available to the
2 public) and its desire to “speak” the Codes for free are accomplished only by being able to
3 download and post the Codes to its website as opposed to, for example, simply directing the
4 public from its website to the existing free versions of the Codes. Plaintiff has therefore
5 identified no injury to a legally protected interest.

6 As to the third standing requirement, Plaintiff argues that “the Court can remedy the harm
7 caused by [DCBS] in many ways.” *See* Opp’n at 14. However, none of its suggestions are
8 compelling. Plaintiff argues that the Court can “declare that...the entire text of the Codes are
9 officially the law of the State of Oregon such that [DCBS] cannot restrict Public Resource’s free,
10 public access to the Codes.” *Id.* at 14-15. As noted, Plaintiff and other members of the public
11 already have free access to the Codes; what Plaintiff requests is unpaid access to additional
12 technological features. *See* Opp’n at 6. Plaintiff suggests that the Court can also “declare that
13 [DCBS’s] contracts with Private Standards Companies are void and cannot be used to prevent
14 [Public Resource] from exercising its constitutional right to view and speak the Codes[.]” *Id.* at
15 15. Plaintiff has failed to provide any logical argument as to how, if the contracts are terminated
16 and the Private Standards Companies no longer provide access to their copyrighted model
17 building codes, Plaintiff will then be able to “speak” the Codes following this Court’s
18 declaration. Finally, Plaintiff suggests that the Court may simply “issue whatever relief the
19 Court, in its equitable discretion, deems just and proper.” *Id.* at 15. As a general matter,
20 Defendant agrees that courts exercise broad latitude in fashioning relief. However, the question
21 before this Court is not what kinds of relief Plaintiff might be entitled to. The question is
22 whether Plaintiff, which has the burden of demonstrating it has standing under the UDJA, has
23 shown that a decision by the Court will, in fact, have a practical effect on its rights. The Court is
24 not called on to guess as to what that relief might be and, consequently, what effect it might
25 have.

1 In sum, Plaintiff has failed to established any of the three requirements to demonstrate
2 standing under the UDJA. Accordingly, the First and Third Claims must be dismissed.

3 **C. Plaintiff's arguments fail to establish that the Second Claim states a claim**
4 **under Oregon Public Records Law.**

5 Defendant's Motion argues that the Second Claim fails because Plaintiff does not allege
6 facts to show that DCBS violated the PRL by not completing Plaintiff's public records request.
7 What Plaintiff alleges is that DCBS failed to invoke an exemption to disclosure and Plaintiff
8 seeks an order requiring production of the version of the codes it requested. *See* Am. Compl. ¶
9 30-31, 33. Plaintiff does not allege in its Amended Complaint or argue in its Opposition that
10 production of the requested records is the only way a public body can complete a public records
11 request. Nor can it, because ORS 192.329(2) provides six circumstances under which a public
12 body's response to a public records request is complete and providing access to the requested
13 records or invoking an exemption from disclosure are only two.

14 In its Opposition, Plaintiff appears to argue that it has a cause of action under ORS
15 192.427. *See* Opp'n at 16. However, that statute, which pertains to the denial of the right to
16 inspect or to receive a copy of a public record by an elected official (not a public body), is
17 irrelevant to the present case. As is Plaintiff's reliance on *Bialostosky v. Cummings*, 319 Or App
18 352 (2022), for the proposition that the Court of Appeals reversed a trial court's decision based
19 on its rejection of the defendant city councilor's argument that the city council was not the
20 custodian of the requested records (the city councilor's notes). *See* Opp'n at 16-17. Plaintiff
21 misreads the case. In *Bialostosky*, the court concluded that the city councilor herself was a
22 "public body" subject to the PRL and that it accordingly "need not address" the argument that
23 the city itself was a custodian of the councilor's notes. 319 Or App at 368.

24 Plaintiff argues that DCBS' response to its public records request is not complete because
25 DCBS "entered into contracts with the Private Standards Companies to dispossess themselves
26 [sic] of the right to produce the integrated codes." Opp'n at 17-18. However, the status of these

1 contracts is irrelevant to the question of whether DCBS complied with its obligations under the
2 PRL. Pursuant to ORS 192.329(2)(d), which provides that a request is completed when “[t]o the
3 extent the public body is not the custodian of records that have been requested, [it] provides a
4 written statement to that effect[.]” DCBS notified Public Resource that it (DCBS) did not have
5 possession of the requested records. *See* Am. Compl.¶ 13. Plaintiff fails to respond to the
6 argument in Defendant’s Motion that DCBS complied with the PRL by “mak[ing] the public
7 record available in the form in which the public body maintains the public record” as provided in
8 ORS 192.324(3).

9 Plaintiff concedes that both the free digital and hard copy versions of the integrated codes
10 are the law and does not dispute that it can access and inspect those versions. *See* Opp’n at 19, n
11 7. However, Plaintiff appears to argue that the ability to “share or reproduce” the public record it
12 has requested is required under the PRL but it points to no authority for that assertion. *See id.* at
13 19. Plaintiff contends that providing access to the hard copy versions of the integrated codes
14 does not satisfy DCBS’ obligations under the PRL because that version is available for
15 inspection only and cannot be copied. *See id.* First, Plaintiff makes no allegations in the
16 Amended Complaint about the hard copies of the Codes.² *See Chaney v. Shell Oil Co.*, 111 Or
17 App 556, 567 (1992) (in reviewing a motion to dismiss for failure to state a claim, a court is
18 limited to “the face of the complaint.”). Second, by its plain terms, ORS 192.324(1)(b) requires
19 DCBS to provide a “reasonable *opportunity to inspect* or copy the public record[.]” an
20 opportunity which was offered to Public Resource. *See* Am. Compl., Ex. 2 at 2 n. 3 (noting that
21 DCBS “maintain[s] physical copies of those integrated versions in their offices for
22 inspection...”).

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25 ² Plaintiff asserts that it is “repeated throughout [Defendant’s] Motion” that “the hard copies are
26 for ‘inspection’ only.” Opp’n at 19. However, the Motion makes no representations regarding
whether the hard copies of the integrated codes can be copied; it only states that the hard copies
are available for inspection.

1 Plaintiff does not respond at all to Defendant's arguments regarding ORS 192.318(1),
2 which provides that the duty of the custodian of a public record is to "furnish proper and
3 reasonable opportunities for inspection and examination of the records in the office of the
4 custodian and reasonable facilities for making memoranda or abstracts therefrom, during the
5 usual business hours." Instead, Plaintiff argues that its purported inability to "copy and print its
6 own hard copy codes for its own usage" is unconstitutional. Opp'n at 19-20. That assertion,
7 however, is neither a basis for Plaintiff to get relief under the PRL nor is it relevant to Plaintiff's
8 PRL claim at all.³

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23 ³ Plaintiff states in its Opposition that it pursued its Second Claim "based on guidance from the
24 Court" and that it "followed the Court's directive, and included the Second Claim in its
25 [Amended Complaint]." Opp'n at 17. Those statements misconstrue the Court's comments
26 during the January 6, 2025, status conference regarding Defendant's motion to dismiss the
original complaint in this case. Plaintiff's insinuation that the Court provided any instruction to
Plaintiff regarding its litigation strategy is inappropriate and does not warrant a detailed
response.

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DATED May 13, 2025.

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1 **CERTIFICATE OF SERVICE**

2 I certify that on May 13, 2025, I served the foregoing DEFENDANT’S REPLY TO
3 MOTION TO DISMISS AMENDED COMPLAINT upon the parties hereto by the method
4 indicated below, and addressed to the following:

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