IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

CITY OF PORTLAND, an Oregon municipal corporation,

Plaintiff,

v.

EVERGREEN FREEDOM FOUNDATION dba Freedom Foundation, a nonprofit organization, and LABORERS' LOCAL 483, a labor organization,

Defendants.

Case No. 17CV47002

Opinion and Order on Motions for Summary Judgment

The city brought this action under ORS 192.411(2) after the district attorney ordered it to "promptly disclose" records requested by the Freedom Foundation, which the city had withheld. I have jurisdiction under ORS 192.431(1) to enjoin the city from continuing to withhold the records. But, at this point, there is nothing to enjoin, because the city is no longer withholding the records – at least, no one is contending that it is.

The city says that it has produced all of the records covered by the request, and the foundation agrees. Indeed, the foundation says that it's completely satisfied with the city's production; it doesn't want more than what the city disclosed – the names of city employees "represented by" the defendant union, which includes both union members and non-union members because the union owes a duty to represent them all.

You'd think the city would be happy with that outcome, but it's not. It would like the court to rule that it can withhold information about union membership – that such information is exempt from disclosure under the public records law. The foundation, however, is not seeking that information in this proceeding, although it might in some later one. So, on that issue, there is no actual controversy between the parties and nothing for me to decide. A ruling on the exemption issue would be advisory, and Oregon courts aren't authorized to give "advice" outside of deciding an actual and present dispute, unless the circumstances described in ORS 14.175 apply, and they don't apply here.[1]

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[1] ORS 14.175 is a codification of the "capable of repetition, yet evading review" exception to mootness doctrine, which every state but Oregon followed until *Couey v. Atkins*, 357 Or 460, 515-20 (2015), overruled *Yancy v. Shatzer*, 337 Or 345 (2004). The statute reads in part:

> "In any action in which a party alleges that an act, policy or practice of a public body * * * is unconstitutional or is otherwise contrary to law, the party may continue to prosecute the action and the court may issue a judgment on the validity of the challenged act, policy or practice even though the specific act, policy or practice giving rise to the action no longer has a practical effect on the party if the court determines that:
>
> "(1) The party had standing to commence the action;
>
> "(2) The act challenged by the party is capable of repetition, or the policy or practice challenged by the party continues in effect; and
>
> "(3) The challenged policy or practice, or similar acts, are likely to evade judicial review in the future."

The party that brought this action did not bring it to challenge an act, policy or practice of a public body. That party – the city – *is* the public body. And there is no reason to believe the union-exemption issue will evade review if it ever comes up again – that is, if someone requests union-related information and the city denies it.

Notwithstanding *Couey*, dismissal is still the appropriate disposition when a case is moot and doesn't fall within ORS 14.175. *See Progressive Party of Oregon v. Atkins*, 276 Or App 700, *rev den*, 360 Or 697 (2016). Outside of that statute, the usual rules of justiciability still apply, including the principle "that declaratory relief is available only when it can affect in the present some rights between the parties." *See id.* at 708 (citations and internal quotation marks omitted); *see also Couey*, 357 Or at 520 (declining to hold that the constitution "imposes no constraints on the exercise of judicial power); *In re Ballot Title*, 247 Or 488, 491-92 (1967) (judicial function does not include giving advice that "would not conclude or vindicate any right or remedy nor bind anyone at all").

As a fallback, the city would like me to "rule" that the foundation's request – and, hence, the DA's order – encompassed information about union membership. But, here again, there is no dispute. The foundation doesn't claim that the request and order *did* encompass that information, which, if it had, would mean that the city had *not* complied with the request and order, something the foundation doesn't contend, as noted above.

The city worries that the foundation will contend *that* later – that it will someday, somehow, claim that this particular records request, not some new one, *does* in fact encompass information about which employees hold union cards and that such information is not exempt from disclosure. Of course, if that happens, the court can decide *then* whether the information is in fact encompassed by the request and, if so, whether it is exempt. But a decision on those issues now, before they actually arise, if ever they do, is the very definition of an advisory opinion.

In sum, there is no actual controversy between the parties, and no relief the court could grant that would have any practical effect on their rights. That makes the action non-justiciable. I recognize that another judge on this court concluded earlier that the action was "not moot" because, she said, "[a] reasonable interpretation of the District Attorney's order is that it requires the release of union membership information." I don't share that view of the order.[2] But, even if I did, it would not change my conclusion that

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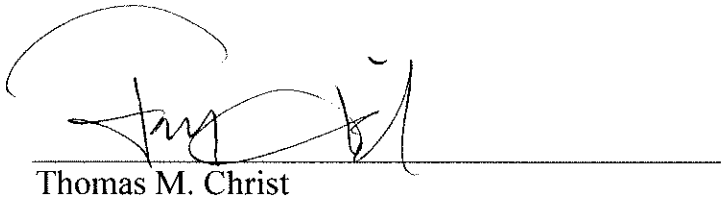
[2] The order said that the foundation had requested the city "to disclose the following records: * * * the names of all City of Portland employees who are represented by Laborers' Local 483," and it directed the city "to promptly disclose the requested records," with exceptions not relevant here, and nothing more.

the case is now moot because, however the order might be read, the foundation is not presently seeking that information and, therefore, the city is not presently withholding it. So, again, there is nothing for me to enjoin.

That leaves nothing for me to do but deny the city's motion for summary judgment and grant part of the foundation's cross-motion (the part seeking dismissal, not the part seeking a declaration of rights), and then enter a judgment of dismissal. *See Clapper v. Oregon State Police*, 228 Or App 172, 178 (2009).[3]

DATED: April 20, 2018.



Thomas M. Christ
Judge Pro Tempore

[3] *Clapper* was an action to compel disclosure of requested pubic records. "[B]y the time of trial," however, "[the] plaintiff had received all of the records that he requested." 228 Or App at 178. The Court of Appeals concluded that, at that time, the case was moot because "[a] ruling by the [trial] court would have no effect on the rights of either party." *Id.* The court went on to say that "[w]here a case becomes moot, dismissal is the appropriate disposition, and, [t]ypically, when a judgment dismisses the complaint, the defending party is considered the prevailing party." *Id.* (citations and internal quotation marks omitted). The court thus held that the defendant "was therefore entitled to judgment as a matter of law" and that the trial court "did not err in granting its motion for summary judgment." *Id.*; *see also Progressive Party of Oregon*, 276 Or App at 702 (affirming trial court's dismissal of action after "concluding that it was moot and that the issues raised did not fall within the 'capable of repetition, yet evading review' exception to the mootness doctrine that is embodied in ORS 14.175").