



CIRCUIT COURT OF OREGON
THIRD JUDICIAL DISTRICT
MARION COUNTY COURTHOUSE
P.O. BOX 12869
SALEM, OREGON 97309-0869

TRACY A. PRALL
Circuit Court Judge
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August 5, 2015

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RE: Cylvia Hayes v. Oregonian Publishing Co.
Marion County Circuit Court Case No. 15CV04530

Counsel,

This matter came before the court on June 24, 2015 for hearing on defendant's Motion for Summary Judgment. Plaintiff appeared by and through counsel, Whitney P. Boise. Defendant appeared by and through counsel, Charles F. Hinkle. The court reviewed defendant's Motion, plaintiff's Response, defendant's Reply, and all supporting declarations. The court heard oral argument and took the matter under advisement.

Defendant then submitted defendant's Motion for Leave to File Memorandum After Argument. Plaintiff had no objection, defendant's Motion was allowed, and plaintiff filed a Reply. Thereafter, the Attorney General filed a Motion for Leave to File Brief Amicus Curiae Regarding Jurisdiction. The parties had no objection, the Attorney General's Motion was allowed, and both parties filed responses.

Now, having fully reviewed the matter, the court makes the following findings of fact and conclusions of law:

JURISDICTION

The court will first address the issue of jurisdiction raised by plaintiff for the first time in her Response to the Motion for Summary Judgment. Plaintiff contends that this court does not have jurisdiction over this matter because the Attorney General did not have authority under ORS 192.450(1) to review defendant's petition or issue an order requiring plaintiff to disclose records. Plaintiff argues that ORS 192.450(1) does not give the Attorney General authority to make a determination regarding public inspection of public records of *any* public body; it only gives the Attorney General authority to make such determinations about public records of a public body that is a "*state agency*."

Plaintiff argues, that because *plaintiff* herself is not a "state agency," defendant should have followed the procedure set out in ORS 192.460, which is the statutory provision that applies if a person is "denied the right to inspect or to receive a copy of any public record of a public body *other than a state agency****." Plaintiff argues the Attorney General should have declined to make any determination on defendant's petition under ORS 192.450(1) and defendant should have petitioned the District Attorney of Deschutes County, the county in which plaintiff lives, to make the determination as provided in ORS 192.460(1)(a). Finally, plaintiff argues that because defendant should have followed the procedure set out in ORS 192.460, jurisdiction lies in Deschutes County.

While the court agrees with plaintiff that she is not a "state agency" as defined by ORS 192.410(5), the determinative question for jurisdiction under ORS 192.450 is not whether *plaintiff* is a state agency, it is whether the record being sought is a public record *of* a state agency. The records being sought are copies of all emails concerning state business sent or received by any email address of plaintiff's since January 1, 2011. As will be discussed more fully below, between January 1, 2011, and the time of the public records request, plaintiff was acting as a state officer within the Governor's Office. The Governor's Office *is* a state agency. Therefore, any emails concerning state business that plaintiff sent or received during that time are records *of* a state agency. Pursuant to ORS 192.450, "any person denied the right to inspect or to receive a copy of any public record of a state agency may petition the Attorney General to review the public record***."

Additionally, pursuant to ORS 192.450(2), proceedings for injunctive or declaratory relief from an order issued by the Attorney General pursuant to ORS 192.450(1) are to be instituted "in the Circuit Court for Marion County." Regardless of where defendant should have filed the public records request, it filed the public records request with the Attorney General. The Attorney General reviewed defendant's public records request and issued an order to disclose public records pursuant to ORS 192.450(1). Subsequently, plaintiff filed her Complaint for Declaratory Relief from the Attorney General's order in Marion County pursuant to ORS

192.450(2). Plaintiff's Complaint acknowledges and alleges "[t]his court has jurisdiction and venue is proper in Marion County as set forth in ORS 192.450(2)."

Therefore, the court finds defendant properly petitioned the Attorney General to review its public records request pursuant to ORS 192.460(1) and plaintiff properly filed her Complaint for Declaratory Relief in Marion County pursuant to ORS 192.460(2).

SUMMARY JUDGMENT

Defendant moves for summary judgment, dismissing plaintiff's complaint in its entirety and enjoining plaintiff from withholding the email records that the Attorney General ordered her to disclose.

The moving party is entitled to summary judgment "if the pleadings, depositions, affidavits, declarations and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." ORCP 47 C. "No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment." *Id.* A fact is "material" if it might affect the outcome of a case. *Zygar v. Johnson*, 169 Or. App. 638, 646 (2000).

"Public Body"

ORS 192.420 provides, subject to certain exceptions, "[e]very person has a right to inspect any public record of a public body in this state." ORS 192.410(4) defines "public record" as "any writing containing information relating to the conduct of the public's business *** prepared, owned, used or retained by a public body regardless of physical form or characteristics." Under that definition, the email records sought by defendant in this case cannot be "public records" unless plaintiff is a "public body." ORS 192.410(3) defines "public body" as follows:

"'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."

In *Marks v. McKenzie High School Fact-Finding Team*, the Oregon Supreme Court held, if a private entity is the "functional equivalent" of a public body, then the private entity is subject to the Public Records Law. *Marks v. McKenzie High School Fact-Finding Team*, 319 Or. 451

(1994). In deciding *Marks*, the Court set out six nonexclusive factors relevant in determining whether a private entity is the functional equivalent of a public body. In weighing the significance of the various factors, the court's focus was on whether the policies underlying the Public Records Law required that the private entity's records be available for inspection. The court noted that the factors were "relevant, although no single factor is either indispensable or dispositive." *Id.* at 463.

Determination of whether plaintiff is the functional equivalent of a "public body" within the meaning of ORS 192.140(3) depends on the characterization of plaintiff and the nature and attributes of plaintiff's relationship with government and governmental decision making. *Id.* In determining the proper characterization of plaintiff, the six non-exclusive factors set out in *Marks* are relevant:

1. The entity's origin (e.g., whether the entity was created by government or had some origin independent of government).
2. The nature of the function assigned to and performed by the entity (e.g., whether that function is one traditionally associated with government or is one commonly performed by private entities).
3. The scope of the authority granted to and exercised by the entity (e.g., does the entity have the authority to make binding governmental decisions, or is it limited to making nonbinding recommendations).
4. The nature and level of government financial involvement with the entity. (Financial support may include payment of the entity's members or fees as well as provision of facilities, supplies and other nonmonetary support.)
5. The nature and scope of government control over the entity's operation.
6. The status of the entity's officers and employees (e.g., whether the officers and employees are government officials or government employees).

The first factor discussed in *Marks* is "[t]he entity's origin (e.g., whether the entity was created by government or had some origin independent of government)." *Id.* at 463. The evidence on summary judgment establishes that Governor Kitzhaber authorized, encouraged, and allowed plaintiff to participate actively in the executive branch of government as First Lady of Oregon. For purposes of the *Marks* analysis, the fact that plaintiff, as First Lady of Oregon, was "created by government," specifically by the Governor, weighs in favor of finding that plaintiff is a "public body."

The second factor discussed in *Marks* is "[t]he nature of the function assigned to and performed by the entity (e.g., whether that function is one traditionally associated with government or is one commonly performed by private entities)." *Id.* The evidence on summary judgment establishes plaintiff performed functions similar to those functions performed by policy advisors and senior policy advisors employed by the Governor's office. Plaintiff herself set out

the functions she believed she performed or hoped to perform on behalf of the Governor's Office in her February 2014 "revised work portfolio." Plaintiff led the Oregon Prosperity Initiative, did significant work toward Oregon's adoption of the "Genuine Progress Indicator" (GPI) as a measure of policy outcomes, regularly participated in high level executive branch meetings, orchestrated meetings of state officials, and directed state employees in their work. Plaintiff performed functions "traditionally associated with government" and not commonly performed by private entities weighing in favor of finding that plaintiff is a "public body."

The third factor discussed in *Marks* is "[t]he scope of the authority granted to and exercised by the entity (e.g., does the entity have the authority to make binding governmental decisions, or is it limited to making nonbinding recommendations)." *Id.* The evidence on summary judgment establishes that plaintiff interjected herself into high-level policy matters. She had extensive interactions with multiple state agencies. State employees were expected to, and did regard her as having authority roughly equivalent to that of a senior policy advisor. The Governor's Legal Counsel considered plaintiff to be her client and had plaintiff sign a conflict of interest disclosure form in which plaintiff was referred to as "a public official." The Governor himself confirmed her authority when he directed his chief of staff to ensure that plaintiff had a role in defining and developing his policy around the clean economy initiative. Although plaintiff's authority may have only been advisory, the scope of that authority was significantly different than the authority exercised by the Fact Finding Team in *Marks*. The scope of authority wielded by plaintiff weighs in favor of finding that she is a "public body."

The fourth factor discussed in *Marks* is "[t]he nature and level of government financial involvement with the entity. (Financial support may include payment of the entity's members or fees as well as provision of facilities, supplies, and other nonmonetary support.)" *Id.* at 463-464. The evidence on summary judgment establishes plaintiff was reimbursed for expenses connected with official business, and was provided with an office, a desk, and a computer in the governor's office. The official website of the Governor's Office contained a web page devoted exclusively to plaintiff as "First Lady Cylvia Hayes." This factor weighs in favor of finding that plaintiff is a "public body."

The fifth factor discussed in *Marks* is "[t]he nature and scope of government control over the entity's operation" *Id.* at 464. The evidence on summary judgment establishes that plaintiff served at the pleasure of the Governor. In February 2015, the Governor announced plaintiff would no longer have any role in the administration. This factor weighs in favor of finding that plaintiff is a "public body."

The sixth factor discussed in *Marks* is "[t]he status of the entity's officers and employees (e.g., whether the officers and employees are government officials or government employees)." *Id.* at 464. While plaintiff did not employ government officials or employees, the evidence on summary judgment establishes that plaintiff had a significant role within the Governor's Office

and authority over government employees. She regularly directed state employees to assist her in carrying out her activities relating to governmental business. This factor also weighs in favor of finding that plaintiff is a "public body."

Defendant has the burden of showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. ORCP 47 C. The court's function is to determine whether there is an unresolved issue of material fact, *Taylor v. Baker*, 279 Or. 139, 145 (1977), and to review the record in the light most favorable to plaintiff. *Stanfield v. Laccoarce*, 288 Or. 659, 665 (1980); *Seeborg v. General Motors Corporation*, 284 Or. 695, 699 (1978). When a motion for summary judgment is supported as provided in ORCP 47 D, the opposing party "may not rest upon the mere allegations or denials of that party's pleadings" but must, by affidavit or otherwise, set forth specific facts showing that there is a genuine issue of material fact. "Absent counter-affidavits or conflicting evidence, facts set forth in a supporting affidavit will be taken as true." *Comley v. State Bd. of Higher Ed.*, 35 Or. App. 465, 469-70 (1978). It was incumbent upon plaintiff in opposing summary judgment to submit evidence creating a genuine issue of material fact on the question of whether she was a "public body." Plaintiff has failed to submit such evidence. Therefore, considering all of the evidence on summary judgment, the court concludes that there is no genuine issue of material fact as to whether or not plaintiff is a "public body." The evidence on summary judgment establishes that plaintiff is a "public body" for purposes of the Public Records Law.

Constitutional Avoidance

Plaintiff's assertion that the court "should interpret the public records statute narrowly" is contrary to the clear legislative intent of the Public Records Law and contrary to various appellate court decisions which establish that the Public Records Law shall be construed broadly. The court finds that the doctrine of constitutional avoidance does not apply in this case where the court is not deciding which of two plausible statutory constructions to adopt but rather applying undisputed facts to the law.

Self-Incrimination Privilege

While the court denied, in part, defendant's Motion for Partial Summary Judgment on plaintiff's self-incrimination claim, it has not made a final determination as to that claim. The court granted defendant's motion with respect to emails held by plaintiff that correspond to the more than 94,000 emails already released by Governor Kate Brown's office but found that the foregone conclusion doctrine does not apply to any emails other than those already released. While plaintiff presented no affidavit or declaration in opposition to the Motion for Partial Summary Judgment, "when the evidentiary matter in support of the motion for summary judgment does not establish the absence of a genuine issue, summary judgment must be denied, *even if no opposing evidence is presented.*" *Warren L. Bostick Family Trust v. Magliocco*, 64

Or. App. 305, 309 (1983) (emphasis added), citing *Pelege v. Chrysler*, 278 Or. 223, 227 n. 2 (1977); ORCP 47. Considering all of the evidence on summary judgment, the court found there is a question of fact as to whether any additional responsive emails exist. The court implicitly found that there is a genuine issue of material fact as to whether the “act of production” doctrine applies to any remaining emails on plaintiff’s computer and thus whether the self-incrimination privilege applies.

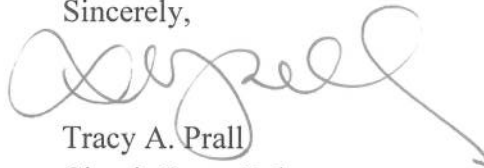
Plaintiff asserts the privilege against self-incrimination on the ground that producing the requested emails would subject her to possible prosecution by the federal authorities. While there is no prosecution pending against plaintiff, the evidence on summary judgment establishes that a criminal investigation may be underway. Regardless, a person’s assertion of the Fifth Amendment privilege does not depend on whether a criminal prosecution is pending. See, e.g. *Empire Wholesale Lumber Co. v. Meyers*, 192 Or. App. 221, 227 (2004). The appropriate inquiry is whether the testimony in question would provide evidence of a particular crime. *Id.* The “testimony” in this case is the plaintiff’s acknowledgement that a particular email is related to public business versus her private business. Based upon the record before the court viewed in a manner most favorable to plaintiff, an objectively reasonable juror could return a verdict for plaintiff on her claim of self-incrimination.

The court’s decision on the self-incrimination claim does not, however, relieve plaintiff of her obligation to release emails responsive to the public records request, it simply relieves her of the task of identifying which of the remaining emails are responsive to the public records request and which are not. Therefore, pursuant to ORS 192.490, plaintiff shall, within the next fourteen (14) days, release all of her remaining emails to the court for *in camera* review. The court will then determine which of plaintiff’s remaining emails are responsive to the public records request and will thereafter release such emails, if any, to defendant.

CONCLUSION

Defendant’s Motion for Summary Judgment on Count 1 (Ms. Hayes is Not a “Public Body”) is **GRANTED**. Mr. Hinkle shall prepare and appropriate order within seven (7) days. This matter shall be set for a status conference at the parties’ earliest convenience to discuss the logistics of releasing plaintiff’s remaining emails to the court for *in camera* review.

Sincerely,



Tracy A. Prall
Circuit Court Judge