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

MARY MERTENS JAMES
Circuit Court Judge
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August 24, 2016

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Re: Oracle America, Inc. v. Governor Kate Brown
Case No. 15CV30762

Dear Counsel:

This matter comes before the Court on defendants' Motion to Dismiss and Motion to Strike the Claim; and defendant's Motion for Summary Judgment. Oral argument took place on June 16, 2016. Pilar French and Mark Selwyn appeared and represented plaintiff, Oracle America, Inc.; Lisa Kaner and John Rothermich appeared and represented defendant, Governor Kate Brown.

Regarding the Motion to Dismiss and Motion to Strike the Claim, the Court received defendant's Motion and supporting Declarations, plaintiff's Response, and

defendant's Reply. Regarding the defendant's Motion for Summary Judgment, the court received defendant's Motion and supporting Declarations, plaintiff's Response and supporting Declaration, and defendant's Reply and supporting Declarations.

Following oral argument, I then took the matters under advisement. I have carefully reviewed the pleadings, exhibits and undisputed material facts presented, and applicable statutes and case law. Now, being fully advised, this letter sets forth my decision.

I. INTRODUCTION

The Public Records Law provides the public with the right to inspect non-exempt public records. ORS 192.420(1). It also provides a cause of action and expedited procedure to challenge whether the government improperly withheld any public records. ORS 192.490(1). The Public Records Law does not provide parties with the right to second-guess, in court, how the government maintains and searches for public records, nor does the Public Records Law provide for a court to entertain such actions or to grant any relief for claims concerning the "how" of public records maintenance.

II. FACTS NOT IN DISPUTE

Oracle's action here arises from its public records request to the Office of the Governor on April 6, 2015. (Am Compl ¶ 28.) Oracle's request sought records sent to or from certain consultants to Dr. Kitzhaber and certain employees of the Office of the Governor, documents related to the "Kitzhaber for Governor" campaign, documents related to Cover Oregon, the Oregon Health Authority, Oracle, the Oregon health insurance exchange, or the Federal Government health insurance exchange, or Federally Facilitated Marketplace, since October 1, 2013.

As is standard procedure, Oracle's request was put in line behind other public records requests that came before it. Oracle's request—and many other requests—sought records that would encompass emails of employees of the Office of the Governor, including those of former Governor Kitzhaber ("Dr. Kitzhaber"). Dr. Kitzhaber used a Gmail account—Governor.Kitzhaber@gmail.com (the "Official Email Account")—while in office to conduct State business. The Department of Administrative Services ("DAS") enabled that account to auto-forward emails to the State's servers for archiving. Dr. Kitzhaber also used two personal email

accounts—hundredthmeridian@att.net and jk.hundredthmeridian@gmail.com (the "Personal Email Accounts")—while in office. The Personal Email Accounts are largely the focus of Oracle's complaint. In February 2015, shortly before Dr. Kitzhaber left office, DAS discovered that it had inadvertently archived emails to Dr. Kitzhaber's Personal Email Accounts. DAS provided a copy of Dr. Kitzhaber's Personal Email Accounts to him before he left office.

To respond to public records requests for Dr. Kitzhaber's email, including Oracle's April 6, 2015 request, the Office of the Governor, with the assistance of the Oregon Department of Justice, reviewed Dr. Kitzhaber's email from the State's archive of Dr. Kitzhaber's governor.kitzhaber@gmail.com account, email sent from Dr. Kitzhaber's jk.hundredthmeridian@gmail.com account to employees of the Office of the Governor, and email provided by Dr. Kitzhaber's personal counsel from the jk.hundredthmeridian@gmail.com and governor.kitzhaber@gmail.com accounts that his counsel determined qualified as a "public record" under ORS 192.410(4)(a). Declaration of Jermaine F. Brown ("Brown Decl"), ¶ 3.

Given the large number of public records requests, the Office of the Governor disclosed all of Dr. Kitzhaber's nonexempt public record email directly to the public. The Office of the Governor carefully reviewed the available email, and identified those email that fell within the definition of "public record" in ORS 192.410(4) and were not subject to an exclusion from disclosure in ORS 192.501 or ORS 192.502. *Id.* ¶ 4. All available nonexempt email that fell within the definition of a public record was then published on the website of the Office of the Governor. *Id.*

The Office of the Governor responded to Oracle's specific request on June 1, 2015.[1] On August 12, 2015, the Office of the Governor informed Oracle of the cost for review and release of responsive records *from* other Governor's Office employees. However, Oracle never paid for that work and therefore abandoned the remainder of its request. (Isaak Decl Ex 5 at 3 (Dec. 3, 2015 letter to Oracle closing Oracle's request for failure to pay).)

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[1] Oracle concedes that its first basis for its claim—that the Governor constructively denied Oracles public records request by failing to deny or grant the request within seven days—is not an independent ground for declaratory or injunctive relief. (Oracle Opp'n at 10 n 4.) That basis, paragraph 75(a), is stricken from Oracle's complaint.

On September 8, 2015, the Office of the Governor released over 18,000 pages of Dr. Kitzhaber's emails to Oracle and the public. (Isaak Decl Ex 1) On October 5, the Governor's Office released another 1,000 pages of Dr. Kitzhaber's public records to Oracle. On October 6, November 19, and December 1, 2015, the Office of the Governor released to the public, respectively, over 17,000 pages of emails, over 15,000 pages of emails, and over 5,000 pages of emails from Dr. Kitzhaber's accounts. (Isaak Decl Exs 2-4). The Office of the Governor provided Dr. Kitzhaber's records to the public, including Oracle, without charge. This process is now complete. The Office of the Governor has reviewed, applied exemptions, and produced more than 50,000 pages of Dr. Kitzhaber's incoming emails, including thousands of pages from the two Personal Email Accounts that Dr. Kitzhaber's counsel returned to the State. (Isaak Decl Ex 5 (Dec. 3, 2015 letter to Oracle stating process and release complete).) Where possible, the email was produced with exempted material redacted. Only where an entire email was subject to an exemption or did not meet the definition of public record, was it withheld in its entirety.

Also in September 2015, in *Rosenblum v. Oracle*, Marion County Case No. 14C20043, the State moved for an order specifying the terms and conditions for discovery from the Dr. Kitzhaber's Personal Email Accounts inadvertently archived on the State's server. The State requested that the court enter an order pursuant to ORCP 36 C determining whether plaintiffs have proper "possession, custody, or control" under ORCP 43 A of the Personal Email Accounts and were required to review and produce documents from them in response to Oracle's discovery requests. In response to that motion, Oracle moved to compel the State to review and produce documents from the Personal Email Accounts. Dr. Kitzhaber moved to intervene, contending that his statutory and constitutional rights would be violated by the State's review. On November 20, Judge Geyer denied Oracle's motion to compel and granted the State's motion. Judge Geyer held it would be illegal for the State to release or disclose documents from the Personal Email Accounts on the State's server:

> "I will make the following findings of fact and conclusions of law: I know that defendant Oracle takes exception to this, but the fact is that the evidence before this court is uncontroverted that former Governor Kitzhaber's entire collection of emails on the Hundredth Meridian Gmail account were inadvertently recorded by state servers. Prior release or disclosure by the plaintiff would have

> constituted a violation of ORS 165.540. So it strikes this court that they did the right thing by coming forward with a motion for protective order."

(McIntire Decl Ex 2, 11/20/2015 Mot to Compel Tr at 97:20-98:6.). On December 11, the Court ordered that the State's "release or disclosure" of the Personal Email Accounts in DAS's archive would have constituted a violation of state law. (McIntire Decl Ex 1 at 2.)[2]

Unarchived Emails: The State did not archive sent emails from the Official Email Account from January 3, 2013 to February 18, 2015 (the date Dr. Kitzhaber left office). (Declaration of Misha Isaak ("Isaak Decl") ¶ 3.) The State also did not archive sent emails from the jk.hundredthmeridian@gmail.com account for that time period. (Brown Decl, ¶ 4.) However, Dr. Kitzhaber has access to a personal archive of sent email from the Official Email Account and his personal jk.hundredthmeridian@gmail.com account. (Id. ¶¶ 3, 4.) On December 4, 2015, counsel for Dr. Kitzhaber provided to the State copies of all sent emails from the Official Email Account during this time period. As of the hearing in this case, Counsel for Dr. Kitzhaber was in the process of reviewing sent emails from the Personal Email Accounts for this time period to determine which emails constitute state business, and is returning those emails to the State as well. (*Id.* ¶ 4, Ex 7 (Dec. 14, 2015 letter from Janet Hoffman to Edward N. Siskel).) Counsel for Dr. Kitzhaber returned a portion of the sent emails from the Personal Email Accounts for this time period on February 4, 2016. Id. The Governor's Office has taken, and continues to take, appropriate steps to ensure that sent email from the Official Email Account and the Personal Email Accounts from January 3, 2013 to February 18, 2015 are released to Oracle and other

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[2] At the time of this hearing, a federal grand jury investigation was pending. On July 13, 2016, the Ninth Circuit quashed the Grand Jury Subpoena, holding that Dr. Kitzhaber had a reasonable expectation of privacy in much of his personal email (although the Fourth Amendment's protection does not extend to any use of a personal email account to conduct public business.) It also held that he may not personally assert the attorney-client privilege for his communications with the State of Oregon's attorneys, as those privileges belong to and must be asserted by the State. *In Re Grand Jury Subpoena*, JK-15-029, *USA v Kitzhaber* (Case No. 15-35434In this case, the State has asserted the privilege, not Dr. Kitzhaber.

requesters, notwithstanding the fact that those emails were not archived by the State and *are not the subject of Oracle's public records request.* [3] (*Id.* ¶¶ 3, 4)

This process for sent emails from the Personal Email Accounts for the relevant time period is the same as the process that the Governor's Office followed with respect to the incoming emails inadvertently archived by the State, pursuant to Judge Geyer's ruling, except that counsel for Dr. Kitzhaber is accessing Dr. Kitzhaber's personal archive as opposed to a copy of an archive inadvertently created by the State and later provided to Dr. Kitzhaber.

In response to Oracle's allegations in this action that public records were not disclosed, the Office of the Governor created an exemption log that lists all of Dr. Kitzhaber's email withheld from its public disclosure that were responsive to Oracle's April 6, 2015 public records request. (Brown Decl, ¶ 5 & Exs 1-3 (hereinafter "Exemption Log").) Similar to a privilege log, the Exemption Log lists the date, sender(s), recipient(s), cc recipient(s), and subject line of each document withheld or redacted. For each document, the Exemption Log also indicates whether the primary email or an attachment was withheld or redacted, whether the document was produced in redacted form or withheld in its entirety, lists the statutory exemption(s) under which the document was withheld, and describes for each document the information withheld to the extent possible, without disclosing the exempt material. Finally, the Exemption Log assigns each document withheld or redacted a control number for ease of reference.

The names of attorneys that sent, received or were copied on records on the log are listed in bold typeface. These attorneys include former General Counsel to the Office of the Governor, Liani Reeves, and Special Assistant Attorney General Lisa Kaner.

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[3] These facts are addressed to the extent they are related to Oracle's request for Declaratory Relief. It bears noting that because many emails sent from the Official Email Account and the jk.hundredthmeridian@gmail.com account from January 3, 2013 to February 18, 2015 that concern state business were sent to or copied one or more additional State employees, the State already disclosed many of the non-exempt records from these accounts during this time period.

III. DISCUSSION AND DECISION

Oracle's Complaint identifies five bases for relief; the first having been abandoned. It is most appropriate, however, to frame the Complaint in terms of the type of documents that Oracle seeks. Oracle complains about four categories of records: (1) emails in Dr. Kitzhaber's personal email account archived without consent on DAS's server ("inadvertently archived" or "Off Limits Archive")(fourth basis); (2) official emails that the State did not archive but that Dr. Kitzhaber has access to and provided to the State which, in turn, were disclosed ("unarchived")(third and fourth basis); (3) documents that the Office of the Governor reviewed and withheld pursuant to statutory exemptions (second basis); and (4) documents listed on the Withheld Non-Public Records Log, which pertain solely to Dr. Kitzhaber's reelection campaign, or personal political campaign communications related to other candidates (second basis). Oracle's fifth basis for its Complaint is a claim for alleged delay. Oracle also makes a sixth claim under the Uniform Declaratory Judgment Act.

First, Oracle wants the Court to order the State to search Dr. Kitzhaber's personal email to retrieve public records. Dr. Kitzhaber maintains that State officials could not review the inadvertently archived Personal Email Accounts on the State's server. He contends that because he never consented to DAS's archive of his Personal Email Accounts, the State's review of that archive would violate state law and the state and federal constitutions. Nevertheless, Dr. Kitzhaber's counsel reviewed the inadvertently archived emails. Dr. Kitzhaber's counsel gave to the State the emails she identified as relating to state business and retained private communications that did not involve state business. The Office of the Governor then reviewed the returned emails, applied exemptions under the Public Records Law, and released non-exempt public records to requestors, including Oracle. (Isaak Decl Ex 6 (9/8/2015 letter to Oracle describing that process).

The Office of the Governor is bound by the Court's order in *Rosenblum v. Oracle*, *supra*, and is prohibited from reviewing the Personal Email Accounts in the archive on the State's server (the "Off-Limits Archive"). Moreover, Judge Geyer ordered a Special Master to review the Off Limits Archive, and disclose any nonexempt public records, if any, that remain. It is noteworthy that this is the precise solution suggested by the Ninth Circuit in its decision in *In Re Grand Jury Subpoena*, JK-15-029, fn. 2, *supra*, at 21 ("[W]e note that one option, not mentioned by the

parties, would be engaging a neutral third party to sort Kitzhaber's emails. (citation omitted"). The State's Motion to Dismiss is allowed.

In addition to asking the Court to order the Office of the Governor to review and disclose emails from the Off-Limits Archive, Oracle asks the Court to find that the Office of the Governor violated the Public Records Law by inadvertently failing to archive certain sent emails from the Official Email Account and the jk.hundredthmeridian@gmail.com account.

The Office of the Governor did not violate the Public Records Law by inadvertently failing to archive some of the emails from Dr. Kitzhaber's Official Email Account or his personal email account (jk.hundrethmeridian@gmail.com). Oracle's fourth basis for relief fails because there is no statutory support for such a claim. Further, the issue is moot, because Dr. Kitzhaber had access to those non-archived emails and provided the State with copies of those non-archived emails; the Governor's Office reviewed them, applied exemptions, and released non-exempt public records. These facts are undisputed. (3/14/2016 Suppl. Decl. of Misha Isaak ¶ 2 – 5). Where a case becomes moot, dismissal is the appropriate disposition[.]" (See *Clapper v. Oregon State Police*, 228 Or App 172, 178 (2009) ("by the time of trial, plaintiff had received all of the records that he had requested. A ruling by the court would have had no effect on the rights of either party. The case was therefore moot.").)

Oracle contends that the Public Records Law permits it to litigate *how* a public agency searches for or maintains documents, and that somehow the Governor's Office's efforts fall short. Oracle is wrong, both on the law and the facts. Oracle relies on *In Defense of Animals v. Oregon Health Sciences University*, 199 Or App 160, 182 (2005), for its contention that the Public Records Law allows it to challenge any and all issues that are "integral to the issue of access, or denial of access, to public records[.]" That case does not stand for such a broad proposition. Instead, the Court of Appeals concluded that the trial court could review the reasonableness of fees charged for obtaining public records because the statute expressly provides that fees can be charged, so the fees were integral to the issue of access to public records. *Id.* at 182-83. Fees are not at issue in this case.

The Public Records Law is designed to provide an expedited process for releasing non-exempt documents within the possession of a public agency to citizens requesting those documents. The statutory scheme does not contemplate or, even intimate, that citizens can turn what is intended to be an expedited court case into a referendum on the adequacy of the methods by which public agencies keep records. The State's Motion to Dismiss is allowed.

The third category of documents which Oracle seeks disclosure of includes documents that the Office of the Governor reviewed and withheld pursuant to statutory exemptions.

The Governor's Office applied the ORS 192.502(2) exemption in two different ways. First, the Governor's Office applied the personal privacy exemption under ORS 192.502(2) by redacting mobile phone numbers and similar information from many of the documents listed on Exhibits 1 and 3 prior to disclosure to the public. Oracle does not challenge the propriety of these redactions. The Court therefore grants summary judgment finding that the Governor's Office correctly applied the ORS 192.502(2) exemption as to documents listed on Exhibits 1 and 3 of the Brown Declaration.

Second, it listed ORS 192.502(2) as a secondary applicable exemption for documents identified on the Exhibit 2 log as "not subject to disclosure" because the majority of those documents contain personal mobile phone numbers, not used to conduct state business, and personal email addresses for non-State employees. The Office of the Governor is permitted to redact confidential personal information prior to production. The Governor's Office correctly applied the personal information exemption under ORS 192.502(2).

The third exemption applied by the Office of the Governor was pursuant to ORS 192.501(1), records of a public body pertaining to litigation to which the public body is a party if the complaint has been filed, or if the complaint has not been filed, if the public body shows that such litigation is reasonably likely to occur.

Oracle's second basis for relief—that the Governor's Office improperly withheld documents under particular exemptions without explaining at the time of the release of documents which exemption applies for each withheld record—might have been subject to dismissal at the time it was filed. The Public Records Law does not require the Office of the Governor (or any agency) to provide at the time

that the documents are released an individualized explanation of why each particular document withheld is exempt under one or more specific exemptions. The Public Records Law has no such requirement. ORS 192.410 – 192.505 (no requirement for exemption log); *cf. In Defense of Animals*, 199 Or App at 170 (failure of agency to provide individualized exemption log to the Attorney General after requester challenged the agency's withholding did not waive agency's right to make individualized assessment and defend withheld public records in later court action). In opposition to this motion, Oracle cites cases that discuss the burden that an agency must meet in a court case challenging the withholdings; none of those cases hold, or even suggest, that an agency violates the Public Records Law when the agency fails to provide an individualized exemption list *before* litigation has commenced. In *Kluge v. Oregon State Bar*, 172 Or App 452, 454 (2001), the Oregon Supreme Court concluded that the defendant agency had not submitted sufficient evidence at summary judgment for a court to conclude that each document was exempt. *Id.* at 454 & 459. Similarly, *Brown v. Guard Publishing Co.*, 267 Or App 552 (2014), also concerned the quantum of evidence needed at summary judgment. *Id.* at 569. Nothing in those cases purports to establish that an agency must provide an individualized exemption log before litigation.

However, in this case, the Office of the Governor has provided an individualized exemption list, in its Summary Judgment Motion and Declarations in Support. (Brown Decl.) The issue then, is straightforward: are the documents individually described in detail on the exemption logs public records? If so, did the Governor's Office correctly determine they were subject to one of the statutory exemptions to public disclosure? There is no other evidence beyond the descriptions provided on the log (and *in camera* review of the documents) that would meaningfully assist the Court in answering these questions. While Oracle insists that the record before the Court is insufficient to resolve this case on summary judgment, the Court is satisfied that it has the ability to determine whether the Governor's Office correctly identified public records and applied the OPRL's statutory exemptions.

Because the individualized exemption log descriptions establish the applicability of the relied-upon OPRL exemptions, the Court allows the Governor's Office's motion for summary judgment and resolves now any part of the case remaining after the resolution of the Governor's Office's Motion to Dismiss. The Office of the Governor properly withheld records under the statutory exemptions established by its exemption log. Contrary to Oracle's argument that a higher hurdle must be met, the OPRL requires only that an agency or officer make an "individualized" showing

that each record withheld or redacted falls within one of the exemptions. *Mail Tribune, Inc. v. Winters*, 236 Or App 91, 95 (2010) (quoting *Guard Publ'g Company v. Lane Cty. Sch. Dist. No. 4J*, 310 Or 32, 39 (1990)); *see Turner v. Reed*, 22 Or App 177, 182 (1975) (suggesting agency should "(1) describe the records in question with as much particularity as possible, consistent with the claim of confidentiality; and (2) indicate, separately for each record, the [] exemption or exemptions that it claims to be applicable"). Such showing is sufficient if it allows the Court to effectively review the agency's actions. *See Miscavige v. I.R.S.*, 2 F3d 366, 368 (11th Cir 1993) ("Affidavits can be sufficient for summary judgment purposes in a FOIA case if they provide as accurate a basis for decision as would sanitized indexing, random or representative sampling, *in camera* review, or oral testimony."). This process can be supplemented by *in camera* review where the description of a document alone is insufficient. *See Brown v. Guard Publ'g Co.*, 267 Or App 552, 569-70 (2014) (holding *in camera* review appropriate where other evidence insufficient to establish exemption); *Port of Portland v. Oregon Ctr. for Envtl. Health*, 238 Or App 404, 408 (2010) (affirming grant of summary judgment upholding attorney-client privilege exemption based on *in camera* review).

Applying these principles, Oregon courts have granted summary judgment on public records exemption issues without discovery where the agency makes a sufficient showing, through declarations or *in camera* review, that an exemption applies. *See Jordan v. Motor Vehicles Div.*, 308 Or 433, 443 (1989) (affirming grant of summary judgment based on declaration testimony); *Port of Portland*, 238 Or App at 408 (affirming grant of summary judgment upholding attorney-client privilege exemption based on *in camera* review); *Clapper v. Oregon State Police*, 228 Or App 172, 177-178 (2009) (granting summary judgment prior to discovery); *see also, e.g., Lane v. Dep't of Interior*, 523 F3d 1128, 1136-38 (9th Cir 2008) (affirming grant of summary judgment in FOIA case in favor of agency based on "somewhat conclusory" affidavit and *in camera* review). Furthermore, under analogous FOIA cases, federal courts routinely review an agency's application of disclosure exemptions by reviewing logs or indices similar to those submitted by the Governor's Office in this case, generally without allowing discovery. *See, e.g., Judicial Watch, Inc. v. United States Dep't of Hous. & Urban Dev.*, 20 F Supp 3d 247, 258 (DDC 2014) (granting summary judgment on privilege exemptions based on *Vaughn* index); *Toensing v. United States Dep't of Justice*, 999 F Supp 2d 50, 59-60 (DDC 2013) (same).

The handful of Oregon OPRL cases Oracle cites are not to the contrary. These cases stand for the noncontroversial propositions that exemptions to disclosure under the public records law are narrowly construed, and that the public body has the burden to show that an exemption applies to a particular record. *See, e.g., Guard Pub'g Co. v. Lane Cty. Sch. Dist. No. 4J*, 310 Or 32, 40 (1990); *Brown*, 267 Or App at 554. The three cases Oracle cites denying summary judgment to the public body are highly fact-specific and thus provide little guidance in the present case.[4]

The Governor's Office correctly determined that communications concerning an incumbent governor's campaign activities do not meet the definition of "public record" in ORS 192.410(4)(a). Documents listed on the Withheld Non-Public Records Log, although responsive to Oracle's public records request, do not contain "information relating to the conduct of the public's business." As described on the log, a great majority of the documents withheld as not public records pertain solely to Dr. Kitzhaber's reelection campaign, a distinctly private matter for Dr. Kitzhaber, not one relating to the conduct of the public's business. Other documents include correspondence about Dr. Kitzhaber's personal endorsement of other political candidates or social issues, and correspondence of a personal nature from former campaign staff, family, or friends.

The Office of the Governor is not required by Oregon statutes or case law to justify its non-disclosure of documents or information that are not "public records." It did so here, however, to demonstrate that the purely personal or campaign-related documents described in the Exemption Log are exempt from disclosure. The information in the exemption logs is sufficient to assess the determinations made by the Governor's Office on this issue, and demonstrates that the Governor's Office has appropriately withheld the listed records.

The Governor's Office appropriately applied the pertaining to litigation exemption to communications related to the State's impending litigation with Oracle. The

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[4] Oracle cites *Royal Industries, Inc. v. Harris*, 52 Or App 277, 279 (1981) for the proposition that a plaintiff seeking records in a public records case may overcome summary judgment by submitting evidence to create an issue of fact. But *Royal Industries* involved a breach of contract action, and is therefore irrelevant to a public records case. *Id.* In any event, Oracle has not submitted evidence to create an issue of fact.

detailed exemption logs show that a handful of records rely on the exemptions for attorney-client privileged communications and internal advisory communications, and these are squarely supported by the log descriptions. The context of the documents confirms that the descriptions in the exemption logs are correct, and thus do not raise an issue of fact concerning the logs' accuracy. The Governor's Office appropriately withheld or redacted records that relate to settlement negotiations and impending litigation with Oracle under the exemption for records "pertaining to litigation." *See* ORS 192.501(1). As the document descriptions on the exemptions logs indicate, these documents all address reasonably likely litigation, whether with Oracle or the United States. While the *Attorney General's Public Records and Meetings Manual* uses the phrase "narrowly construed" in describing the exemption, that phrase refers to the general statement in the single Oregon case to interpret the exemption that *all* OPRL exemptions are "narrowly construed." *Lane Cty. Sch. Dist. No. 4J v. Parks*, 55 Or App 416, 420 (1981). Citing *Parks*, the *Manual* explains that agencies should apply the exemption at least as broadly as work product protection in litigation. *See Attorney General's Public Records and Meetings Manual*, at 37-39.[5] This is consistent with *Parks*' adoption of the rationale of a California case holding that a similar California exemption essentially gives public agencies the benefit of work product protection and the attorney-client privilege. *Parks*, 55 Or App at 420. To allow a party to obtain through a public records request protected work product it could not obtain in litigation would defeat the purpose of the exemption.

The wording of the statutory exemption is actually broader than the protection of the work product doctrine. *Compare* ORS 192.501(1) (exempting documents "pertaining to litigation") *with* ORCP 36 B(3) (protecting documents "prepared in anticipation of litigation"). That said, the exemption is similar to the work product doctrine insofar as there is no requirement that an attorney be involved in the communication for the exemption to apply. *See* ORS 192.501(1); *see, e.g., Haugh v. Schroder Inv. Mgmt. N. Am. Inc.*, No 02 CIV 7955 DLC, 2003 WL 21998674 (SDNY Aug. 25, 2003) (communications with public relations consultant were protected work product). To determine whether a record is protected work product, courts determine whether the records at issue were created to address threatened litigation or for an independent business purpose. *See In re Grand Jury Subpoena*

[5] A true and correct copy of the relevant portions of the *Attorney General's Public Records and Meetings Manual* are attached as Exhibit 1 to the Supplemental Declaration of John C. Rothermich In Support of Motion for Summary Judgment.

(Mark Torf/Torf Envtl. Mgmt.), 357 F3d 900, 907-08 (9th Cir 2004) (citing *United States v. Adlman*, 134 F3d 1194, 1195 (2d Cir 1998)).

Applying the principle that the State is entitled to withhold documents pertaining to litigation that were not prepared for another business purpose, the Governor's Office appropriately withheld or redacted the documents subject to ORS 192.501(1). All email for which the Governor's Office has relied on ORS 192.501(1) are dated between January 19, 2014 and February 15, 2015, when litigation with Oracle was "reasonably likely" or already pending, and the log descriptions indicate that the communications pertain to the possible litigation or pending litigation. Oracle's own privilege log indicates that Oracle is withholding email as work product dated as early as January 2, 2014. (Supplemental Declaration of John C. Rothermich in Support of Defendant's Motion for Summary Judgment ("Rothermich Supp'l Decl."), Exh. 2.) Even without Oracle's admission, undisputed facts show that litigation was "reasonably likely" in January 2014. The State learned by September 2013 that Oracle would be unable to deliver a functioning website to Cover Oregon by the original October 2013 deadline. Cover Oregon stopped paying Oracle amounts billed in September 2013. In December 2013, the State retained the Markowitz Herbold firm to investigate possible claims against Oracle and to defend Oracle's impending claims for payment and represent the State and Cover Oregon in litigation. (*See* Declaration of Lisa A. Kaner in Support of Defendant's Motion for Summary Judgment, ¶ 2.). Oracle ultimately filed the first of several lawsuits to arise out of the relationship in August of 2014, asserting claims against Cover Oregon in federal court for breach of contract and *quantum meruit*. (*See* Rothermich Supp'l Decl., Exh. 3.)

The exemption logs and redacted documents listed thereon further corroborate that litigation was likely by January 2014. For instance, emails from January 19 and 20, 2014, with the Governor's Office counsel, Liani Reeves, involved a "litigation hold notice" related to anticipated litigation with Oracle. (*See* Brown Decl., Exh. 1, Record Nos. 18-19.) Similarly, a February 11, 2014 email from then Cover Oregon Director, Dr. Bruce Goldberg, to the Governor, attached a memorandum entitled "Oracle Negotiations," which explains that Oregon was withholding approximately $69 million in payments demanded by Oracle, and that Oracle was threatening to "walk away" from the Cover Oregon project unless the State immediately paid at least $37 million. (*See* Brown Decl., Exh.1, Record No. 20; Rothermich Supp'l Decl., Exh.4.)

The exemption logs satisfy the Governor's Office's burden to show that records withheld or redacted under ORS 192.501(1) pertain to litigation with Oracle that was "reasonably likely to occur." Oracle's arguments that six specific documents (of nearly 100 withheld or redacted under ORS 192.501(1)) do not "pertain to litigation" or were insufficiently or incorrectly described on the exemption logs are incorrect and irrelevant.[6] They are irrelevant because their arguments concern whether or not the documents are privileged, not whether they pertain to litigation. In its briefing, the Governor's office provided detailed review of the documents in context which confirms that the descriptions of the documents are accurate, and that they were properly withheld or redacted. The Governor's Office correctly withheld attorney-client privileged communications and work product under ORS 192.502(9), OEC 503 and ORCP 36 B(3). Summary Judgment in favor of the State is allowed.

The OPRL provides that a public body receiving a public records request "shall respond as soon as practicable and without reasonable delay." ORS 192.440(2). The "reasonableness" of the Governor's search efforts is a factual question that cannot be resolved at the motion to dismiss stage. The Governor acknowledges that public bodies in OPRL suits are, like federal agencies in the FOIA context, obligated to demonstrate at the summary judgment stage that they have conducted a reasonable search for responsive records.

Oracle took the position that it is entitled to discovery concerning the adequacy of the Governor's Office's search for Dr. Kitzhaber's email while the motions to dismiss were pending. Belatedly, Oracle put at issue whether it was entitled to relief under the OPRL for adequacy of the Governor's Office's search (despite not raising the issue in its opposition brief). In response to Oracle's argument, in an

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[6] Oracle does not explain how it obtained the unredacted documents submitted in support of its opposition. To the extent such documents contain privileged communications and protected work product, the Governor's Office denies that Oracle's possession of these documents reflects a waiver due to the likelihood that Oracle's source did not have authority to waive privilege or work product protection controlled by the Governor's Office, the Oregon Department of Justice or the State. *See State ex rel. Lause v. Adolf*, 710 SW2d 362, 365 (Mo Ct App 1986) (individuals lacked authority in litigation to waive association's privilege to assert advice of counsel defense); *Wrench LLC v. Taco Bell Corp.*, 212 FRD 514, 517 (WD Mich 2002) (low level employee lacks authority to waive privilege).

abundance of caution, the Governor's Office filed three declarations in support of its Reply in Support of Motion to Stay Discovery in this case and in support of the Motion for Summary Judgment. These declarations described the process by which the Governor's Office searched for, gathered and reviewed Dr. Kitzhaber's email responsive to Oracle's public records request. (See Defendant's Reply in Support of Motion to Stay Discovery, at 4-7; Declaration of Daryl Kottek in Support of Defendant's Motions to Stay Discovery and for Summary Judgment ("Kottek Decl."); Declaration of Greg Scott in Support of Defendant's Motions to Stay Discovery and for Summary Judgment ("Scott Decl."); Declaration of Noah Ellenberg in Support of Defendant's Motions for Summary Judgment and to Stay Discovery ("Ellenberg Decl.").)

Oracle moved to strike these declarations on the ground that they raise new arguments in a reply brief. (See Motion to Strike, at 2-4). In response, counsel for Defendants offered to allow Oracle (with leave of the Court) to file sur-replies to the Motion to Stay Discovery and this Motion for Summary Judgment in order to address the new declarations. Oracle refused this offer. (Rothermich Supp'l Decl, Exh.11.)

The Court grants summary judgment on that claim, rather than require the Governor's Office to file a separate motion for summary judgment to address the search issue. It has been briefed abundantly, and sufficient evidence is already before the Court to make the determination. No published Oregon cases have reviewed the adequacy of an agency's search for records under the OPRL. The declarations before the Court are sufficient, however, to grant summary judgment under analogous federal law considering challenges to an agency's search under the Freedom of Information Act (FOIA). *See, e.g.*, *Lane v. Dep't of Interior*, 523 F3d 1128, 1134 (9th Cir 2008) (upholding grant of summary judgment concerning reasonableness of search for records based on agency affidavits); *SafeCard Servs., Inc. v. S.E.C.*, 926 F2d 1197, 1201 (DC Cir 1991) (same). FOIA cases hold that an agency searching for public records "need not show that it produced every responsive document, but only that 'the search for those documents was adequate.'" *Lane*, 523 F3d at 1139 (9th Cir 2008) (citations omitted). In making such a showing, "[a]gency affidavits enjoy a presumption of good faith that withstand purely speculative claims about the existence and discoverability of other documents." *Chamberlain v. U.S. Dep't of Justice*, 957 F Supp 292, 294 (DDC 1997) (citations omitted) aff'd sub nom, *Chamberlain v. Dep't of Justice*, 124 F3d 1309 (DC Cir 1997). To overcome this presumption of good faith and justify

discovery, the plaintiff "must make a showing of bad faith on the part of the agency sufficient to impugn the agency's affidavits or declarations." *Carney v. U.S. Dep't. of Justice*, 19 F3d 807, 812 (2d Cir 1994) (citing *Goland v. CIA*, 607 F.2d 339, 355 (DC Cir 1978) cert denied, 445 US 927 (1980); see also *Lane*, 523 F3d at 1139 (agency affidavits demonstrated adequacy of searches).

Here, the declarations of the individuals involved in gathering Dr. Kitzhaber's email show that their actions were reasonable and undertaken in good faith. On April 22, 2015, Enterprise Technology Services (ETS) for the State of Oregon received a request from the Governor's Office to collect all emails from or to governor.kitzhaber@gmail.com. (Kottek Decl., ¶ 2.) The time frame for this search was 2011 to the present. (*Id.*) An employee collected the emails and created two email archive .pst files. (*Id.* ¶ 4.) Because the Governor's Office is a DAS client agency, the DAS archives are the only State of Oregon email archives where the email account for governor.kitzhaber@gmail.com emails was archived. (*Id.*)

Based on the scope of the request from the Governor's Office, Mr. Kottek's staff collected available email from the DAS archives. (Kottek Decl., ¶ 6.) The two .pst files were provided to the Governor's office. (*Id.*) Noah Ellenberg, at that time a Public Records Attorney for the Office of the Governor, reviewed the documents. (Ellenberg Decl., ¶ 2.) Mr. Ellenberg completed his review of theses emails by mid-November 2015, and the Governor's office began publishing emails in September 2015. (*Id.*)

With regard to the jk.hundredthmeridian@gmail.com account, Dr. Kitzhaber produced to the Governor's Office emails from that account that were public records, as described in connection with Defendant's Motion to Dismiss. (Supplemental Declaration of Misha Isaak in Support of Defendant's Motions to Dismiss and Strike the Claim ("Isaak Supp'l Decl."), ¶ 3.) In addition, a paralegal at Markowitz Herbold searched the emails collected from DAS for all emails to and from jk.hundredthmeridian@gmail.com. (Scott Decl., ¶ 2.) He provided the resulting emails to the Office of the Governor. (*Id.* ¶ 3.) The Governor's Office reviewed the jk.hundredthmeridian@gmail.com emails received from both sources for purposes of public release. (Isaak Supp'l Decl., ¶ 4.)

This collection and review process for both the official and personal accounts was reasonable and adequate, and the Court grants summary judgment in favor of the

Defendant. Where an agency's declarations are "adequate on their face," "discovery relating to the agency's search . . . is unnecessary" and summary judgment is appropriate. *Carney*, 19 F3d at 812. This is consistent with the OPRL, which limits the Court's jurisdiction to ordering the production of documents that have been "improperly withheld." ORS 192.490. If an agency has conducted a reasonable search, it cannot have "improperly withheld" documents it did not find through those reasonable efforts. Summary judgment is therefore appropriate on this record because the Officer of the Governor reviewed the entire archive of Governor Kitzhaber's official email account, acted in good faith to locate and obtain public records from the jk.hundredthmeridan@gmail.com account, and Oracle has no evidence to the contrary. See *Lane*, 523 F3d at 1134 (granting summary judgment); *SafeCard Servs.*, 926 F.2d at 1201 (same).

Oracle's fifth basis for relief alleges that the Governor violated the OPRL by unreasonably delaying production of public records. (FAC ¶ 175(e).) The Governor responded by pointing out that Oracle's remedy was its right to file a lawsuit to compel disclosure of improperly withheld records seven days after its request, ORS 192.465(2), and the statute's requirement that the lawsuit be "expedited in every way," ORS 192.490(2). It also moved to dismiss under ORCP 21 A(1) and A(8) on the ground that there is no "claim" available for unreasonable delay under the OPRL or the Uniform Declaratory Judgment Act ("DJA") ORS 28.010. (Mot. at 22-23.) The Public Records Law does not give the court jurisdiction to review the promptness of a state agency's release of records; rather, it gives a records-requestor a mechanism to promptly obtain unreleased documents. Oracle did not avail itself of this mechanism.

Addressing the substance of these allegations, the Office of the Governor set forth the timeline in responding the multiple related public records requests. The record before the Court of the undisputed facts does not support any claim for unreasonable delay, if one could be brought. The sheer mass of documents that required collection and review, the combination of personal and official emails, the need to conduct an individualized assessment of the content of each document all illustrate that the Office of the Governor and the Department of Justice responded as soon as practicable and without unreasonable delay. The Motion to Dismiss on this basis is allowed.

Oracle's claim for declaratory relief under the DJA fails to allege a justiciable controversy. Oracle cites to *In Defense of Animals*, 199 Or. App.160 (2005) at

182, which held that declaratory relief under the DJA is available in OPRL cases "in regard to the denial of the right to inspect or receive a copy of a public record, ORS 192.450(2); ORS 192.490(1); and the denial of a fee waiver or fee reduction, ORS 192.440(5)." The court identified these as issues "integral to the issue of access, or denial of access, to public records for inspection or copying," where such relief is not expressly provided for in the OPRL. *Id.* In this case, Oracle seeks declaratory relief based on the Governor's alleged failure to preserve and inadequate search for public records, and unreasonable delay in responding to public records requests—for which it says the OPRL does not provide an express remedy. The Court having addressed the unreasonable delay claim, there is no other basis under the DJA for relief aside from the right to file a claim to compel production after seven days.

With respect to the complaint that the Governor's Office erred in preserving documents, the Court finds that the Governor's Office did what it could to recover and capture the documents that were stored other than in its own server, and complied with is legal obligation to produce or withhold as exempt documents located in the search. Neither the statutory framework nor case law allows citizens to litigate whether the Office of the Governor "failed to request" documents from Dr. Kitzhaber, a private citizen, nor does it allow for claims that the State failed to "maintain, care for, or control" public records.

Further, Oracle's contentions concerning the failure to archive all the emails from the Official Email Account and the personal e-mail account are moot. The Governor's Office requested, and Dr. Kitzhaber returned, the non-archived emails from the official account and public records from his personal email account. (3/14/2016 Isaak Decl. ¶¶ 2 – 3.) The Governor's Office reviewed and produced the responsive public records, after applying statutory exemptions, on March 11, 2016. (Id. ¶¶ 4 – 5 & Ex. 1) This is now moot. See *Clapper v. Oregon State Police*, 228 Or App 172, 178 (2009) (public records lawsuit moot once records released to the plaintiff).

For a case to be justiciable under the DJA, three requirements must be satisfied: (1) "there must be 'some injury or other impact upon a legally recognized interest beyond an abstract interest in the correct application or the validity of a law;" (2) "the injury must be real or probable, not hypothetical or speculative;" and (3) the court's decision must have a practical effect on the rights that the plaintiff is seeking to vindicate." *Doyle v. City of Medford*, 356 Or. 336, 372 (2014). Oracle

cannot satisfy one or more of the requirements. The State's Motion to Dismiss is granted.

IV. CONCLUSION

The Governor's Office has satisfied its obligations under the OPRL to conduct a reasonable search for Dr. Kitzhaber's email, to withhold purely private email that are not public records, and to accurately apply statutory exemptions to disclosure in good faith. Oracle failed to avail itself to the proper mechanism to claim unreasonable delay in what was decidedly a complex and consistent effort to provide public records access to the public, including Oracle, pursuant to the governmental transparency Oregon's Public Records Law protects. Some bases for relief are properly the subject of a Motion for Dismissal, as indicated in the discussion and decision, above. To the extent any portion of Oracle's case remains after the Court's rulings Defendant's Motion to Dismiss, the Court grants summary judgment in favor of Defendant and dismisses this case in its entirety.

Will Ms. Kaner please prepare an order and judgment consistent with this letter opinion?

Very truly yours,

Mary Mertens James
Circuit Court Judge

MMJ/clt
c: File