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

**AVION WATER COMPANY, INC., an  
Oregon corporation,**

Plaintiff,

vs.

**SOURCE WEEKLY, an assumed  
business name of LAY IT OUT, INC.,  
an Oregon corporation, and HANNA  
MERZBACH**

Defendants.

Case No.

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF  
PURSUANT TO OREGON PUBLIC  
RECORDS LAW**

(Declaratory Relief; Oregon Public  
Records Law)

Filing Fee: \$281 (ORS 21.135(2))

Not Subject to Mandatory Arbitration

Plaintiff alleges:

1.

This is a case arising out of Oregon Public Records Law, ORS 192.311 to  
192.478.

2.

Plaintiff Avion Water Company, Inc., is a registered domestic business  
corporation, with its principal place of business in Bend, Oregon.

3.

Defendant Source Weekly is an assumed business name of Lay It Out, Inc., a  
newspaper publishing organization located in Bend, Oregon. Lay It Out, Inc. is  
registered with the Oregon Secretary of State as a domestic business corporation.

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4.

Defendant Hanna Merzbach is an independent journalist writing a story for Defendant Source Weekly.

5.

Plaintiff is a locally owned, private water utility that provides water to approximately 14,000 customers in Deschutes and Crook Counties.

6.

Plaintiff has no authority to make binding governmental decisions.

7.

No governmental entity provides financial support to Plaintiff.

8.

Plaintiff's officers and employees are not governmental officials or governmental employees. Plaintiff's board of directors is elected by Plaintiff's shareholders.

9.

On May 16, 2022, Defendant Merzbach, while working on a story to be published by Defendant Source Weekly, submitted a purported public records request to Plaintiff, seeking the following records: (1) street addresses for Plaintiff's top 15 urban water users in calendar year 2021; (2) the number of gallons of water used by these customers in 2021; and (3) the amount of money spent on water by these customers in 2021. Attached as Exhibit 1 is a true and correct copy of Defendant Merzbach's purported public records request and fee waiver request.

10.

In response to Defendants' public records request, Plaintiff informed Defendants that it was not subject to Oregon Public Records Law, ORS chapter 192, because it is neither a public body nor the functional equivalent of a public body. Attached as Exhibit

1 2 is a true and correct copy of Plaintiff's response to Defendants' purported public  
2 records request.

3 11.

4 On May 19, 2022, Defendants petitioned the Deschutes County District Attorney  
5 to review Plaintiff's denial of its public records request. Attached as Exhibit 3 is a true  
6 and correct copy of Defendants' petition to District Attorney Hummel.

7 12.

8 On May 20, 2022, in an email to District Attorney Hummel and Plaintiff's  
9 counsel, Defendants clarified that they were requesting records relating to Plaintiff's "top  
10 residential water users of 2021." Attached as Exhibit 4 is a true and correct copy of  
11 Defendant's May 20, 2022, email.

12 13.

13 On May 26, 2022, the Deschutes County District Attorney issued his ruling on  
14 Defendants' petition for review. The District Attorney concluded that Plaintiff was not a  
15 public body subject to Oregon Public Records Law, but that Plaintiff was the functional  
16 equivalent of a public body under the factors set out in *Marks v. McKenzie High School*  
17 *Fact-Finding Team*, 319 Or 451, 878 P2d 417 (1994). The District Attorney also  
18 concluded that the residential addresses requested by Defendants were not exempt under  
19 ORS 192.355(28). Accordingly, the District Attorney ordered Plaintiff to produce the  
20 requested records to Defendants or seek review of his decision in the circuit court.  
21 Attached as Exhibit 5 is a true and correct copy of District Attorney Hummel's May 26,  
22 2022, ruling.

23 **FIRST CLAIM FOR RELIEF**

24 **(Declaratory Judgment)**

25 14.

26 Plaintiff incorporates by reference paragraphs 1 - 13, above.

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15.

This is an action for declaratory judgment pursuant to ORS chapter 28 and ORS 192.415.

16.

A present and actual controversy exists between the parties because the parties disagree as to whether Plaintiff is subject to Oregon Public Records Law, ORS chapter 192, and whether Defendants are entitled to the records it requested from Plaintiff.

17.

Plaintiff seeks the following judicial declarations:

- A. Plaintiff is not a public body under Oregon Public Records Law, ORS 192.311 to 192.478; and
- B. Plaintiff is not the functional equivalent of a public body under the factors set out in *Marks*; or
- C. In the alternative, even if Plaintiff were a public body or the functional equivalent of a public body, the records sought by Defendants are exempt from disclosure under ORS 192.355(28).

**SECOND CLAIM FOR RELIEF  
(Injunctive Relief)**

18.

Plaintiff incorporates by reference paragraphs 1 - 16, above.

19.

Oregon Public Records Law permits an entity ordered by the District Attorney to produce records to seek injunctive relief from the circuit court, ORS 192.411 and ORS 192.415.

20.

1 Plaintiff requests that the Court enjoin Defendants from enforcing the District  
2 Attorney's order requiring Plaintiff to produce records to Defendants.

3 WHEREFORE, Plaintiff prays for a judgment in its favor and against Defendants  
4 as follows:

5 1. Declaring that Plaintiff is not a public body under Oregon Public Records  
6 Law, ORS chapter 192;

7 2. Declaring that Plaintiff is not the functional equivalent of a public body  
8 under the factors set out in *Marks*;

9 3. In the event that the Court determines that Plaintiff is subject to the  
10 Oregon Public Records Law, declaring that the records ordered produced by the  
11 Deschutes County District Attorney are exempt from disclosure under ORS 192.355(28);

12 4. Enjoining Defendants from enforcing the District Attorney's order  
13 requiring Plaintiff to produce records to Defendants;

14 5. Declaring that Plaintiff is the prevailing party;

15 6. Awarding Plaintiff its reasonable costs and disbursements incurred herein;  
16 and

17 7. Awarding Plaintiff such other relief as the Court deems just and equitable.

18 DATED this 7<sup>th</sup> day of June, 2022.

19 HARRANG LONG GARY RUDNICK P.C.

20  
21 By: s/Erica Tatoian  
22 C. Robert Steringer, OSB #983514  
23 bob.steringer@harrang.com  
24 Erica Tatoian, OSB #164896  
25 erica.tatoian@harrang.com  
26 Of Attorneys for Plaintiff AVION WATER  
COMPANY, INC., an Oregon corporation

Trial Attorney: C. Robert Steringer