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CIRCUIT COURT OF THE STATE OF OREGON
COUNTY OF DESCHUTES

AVION WATER COMPANY, INC., an
Oregon corporation,

Plaintiff,

v.

SOURCE WEEKLY, an assumed
business name of LAY IT OUT, INC., an
Oregon corporation,

Defendant.

Case No. 22CV18513

**DEFENDANT SOURCE
WEEKLY'S OPPOSITION TO
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

Hearing Date: Aug. 11, 2023
Time: 10:15 a.m.

I. INTRODUCTION

Avion manages a public resource (water), using public infrastructure (rights-of-way), while receiving significant government support (an exclusive franchise agreement), and working closely with government officials and regulators (from rate-setting to water quality). Yet Avion asks this Court to hold that it is, as a matter of law, a purely private entity entitled to keep its customers' basic water usage data secret from the public. To prevail on its motion, Avion must show that no reasonable factfinder could find it is the functional equivalent of a public body under the Oregon public records law ("OPRL"). See *Kluge v. Oregon State Bar*, 172 Or. App. 452, 457, 19 P.3d 938, 941 (2001); *Marks v. McKenzie High Sch. Fact-Finding Team*, 319 Or. 451, 463, 878 P.2d 417, 424 (1994). Avion cannot do so, rendering summary judgment

1 inappropriate. Indeed, numerous facts show Avion’s public nature, such as its
2 status as the exclusive water service provider in large sections of the City of
3 Bend—a status conferred by local ordinance—and its role in distributing a
4 public good to the public. Granting summary judgment for Avion would be
5 erroneous and would permit Avion to act as the functional equivalent of a
6 government body without the transparency mandated by public records law,
7 barring the public from understanding local water usage during the worst
8 drought in 1,200 years.

9 **II. LEGAL STANDARD**

10 On a motion for summary judgment, courts “determine whether there are
11 any genuine issues of material fact and whether the moving party is entitled to
12 judgment as a matter of law.” *Kluge*, 19 P.3d at 941. This standard applies fully
13 in public records cases. Although “[g]enerally, [courts] review public records
14 proceedings *de novo* on the record,” *id.*, “that ignores the procedural posture of
15 this case; the standard is actually more favorable to [the nonmoving party
16 requester] than that,” *Brown v. Guard Publ’g Co.*, 267 Or. App. 552, 562, 341
17 P.3d 145, 151 (2014). In OPRL cases, as with all motions for summary
18 judgment, courts “view the evidence and all reasonable inferences that may be
19 drawn from the evidence in the light most favorable to the nonmoving party.”
20 *Kluge*, 19 P.3d at 941. Summary judgment is appropriate “only if no objectively
21 reasonable factfinder could return a verdict for” the nonmoving party. *Id.* When
22 “the summary judgment record permits competing inferences,” the motion must
23 be denied. *Brown*, 341 P.3d at 147.

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1 **III. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

2 **A. The public interest in monitoring water use.**

3 “Water is life. Water impacts nearly every part of our lives and is
4 essential for human survival.” Declaration of Steven M. Wilker (“Wilker Decl.”),
5 Ex. 13 at 7. It is a shared, finite resource, and under Oregon law, “all of the
6 waters within this state belong to the public for use by the people[.]” ORS
7 536.310(1). “[T]he economic and general welfare of the people of this state and
8 the future growth and development of this state” depend on the “utilization and
9 control of the water resources of this state,” making water use a “matter of
10 greatest concern and highest priority.” ORS 536.220(a). To that end, water
11 utilities are either run or closely regulated by government to ensure the safety,
12 quality, and affordability of their water.

13 The public’s interest in monitoring water use is only continuing to
14 increase, as the western United States is experiencing the worst megadrought in
15 1,200 years. Declaration of Jason Wick (“Wick Decl.”), Ex. 11 at 6 n.3 (citing
16 Nathan Rott, *Study Finds Western Megadrought Is the Worst in 1,200 Years*,
17 Nat’l Pub. Radio (Feb. 14, 2022),
18 [https://www.npr.org/2022/02/14/1080302434/study-finds-western-megadrought-](https://www.npr.org/2022/02/14/1080302434/study-finds-western-megadrought-is-the-worst-in-1-200-years)
19 [is-the-worst-in-1-200-years](https://www.npr.org/2022/02/14/1080302434/study-finds-western-megadrought-is-the-worst-in-1-200-years)). Like much of central Oregon, Deschutes County
20 has not been spared. The governor has declared a county-wide drought
21 emergency. Wilker Decl., Ex. 14. Groundwater levels have dropped as
22 population levels have risen. Wilker Decl., Ex. 15. Water is, unavoidably, a
23 matter of the highest public concern.

24 **B. Source Weekly’s reporting on local water use.**

25 Against this backdrop, in spring 2022, Hanna Merzbach—a freelance
26 reporter writing for defendant Source Weekly—set out to report on the largest

1 residential and commercial water users in Bend and Redmond. Noting that
2 “residential wells are drying up at alarming rates” locally and “signs of climate
3 change and intensifying drought are striking in every corner of the West,” she
4 aimed to inform readers about who in their communities was using up the most
5 water. Wilker Decl., Ex. 16 at 1–2.

6 Ms. Merzbach submitted public records requests to Bend, Redmond, and
7 Avion Water Company, seeking information on their top fifteen users’ street
8 addresses, number of gallons used, and amount of money spent on water in
9 2021. Wilker Decl., Exs. 17–18; Wick Decl., Ex. 7. Bend and Redmond fulfilled
10 Ms. Merzbach’s OPRL requests. Wilker Decl., Exs. 17–18. After studying data
11 received from those municipalities, Ms. Merzbach was able to report that “Bend
12 Water’s top residential customer used 10 times as much water as the city’s
13 average residential customer,” and that “[m]ost of Bend and Redmond’s largest
14 commercial users are schools and hospitals—but breweries, labs and one car
15 wash also made the list.” Wilker Decl., Ex. 16 at 4.

16 Avion, however, denied Ms. Merzbach’s request for the utility’s top water
17 users, arguing that it was not subject to the OPRL because it was neither a
18 public body nor the functional equivalent of one. Wick Decl., Ex. 8. As a result,
19 Ms. Merzbach and Source Weekly’s readers “were left with an incomplete picture
20 of residential water usage, since Avion serves roughly 15% of Bend, including
21 the fast-growing developments on the north and east sides of town.” Wilker
22 Decl., Ex. 16. Although she also sought data on Avion customers from Bend, city
23 officials stated that while they supported transparency surrounding water usage
24 they did not have the requested information. *Id.*; *see also* Wilker Decl., Ex. 17.

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1 **C. The District Attorney’s order and Avion’s suit.**

2 On May 19, 2022, Ms. Merzbach sought review of Avion’s denial with the
3 Deschutes County District Attorney, pursuant to ORS 192.415. Wick Decl., Ex.
4 9. On May 26, the District Attorney entered an order holding that Avion was the
5 functional equivalent of a public body under the six-factor test set forth in *Marks*
6 *v. McKenzie High School Fact-Finding Team*, 878 P.2d at 424–25, and was
7 therefore subject to the OPRL. Wick Decl., Ex. 11 (“DA Order”) at 2–6. The
8 District Attorney also rejected Avion’s argument that the requested records were
9 exempt from disclosure under ORS 192.355(28), which exempts names, dates of
10 birth, Social Security numbers, and a few other categories of information about
11 water customers, but not physical addresses. *Id.* at 6–7. Accordingly, the
12 District Attorney ordered Avion to produce the requested records or seek review
13 in this Court. *Id.* at 7–8.

14 Avion filed the instant action on June 7, 2022, seeking a declaration that
15 it is not a public body or the functional equivalent of one and that the requested
16 records are exempt, and an injunction preventing Source Weekly from enforcing
17 the District Attorney’s order. Compl. ¶¶ 14–20. On August 5, 2022 Source
18 Weekly answered and counterclaimed, seeking an injunction ordering Avion to
19 produce the requested records. Ans. & Counterclaim ¶¶ 29–37.

20 **IV. ARGUMENT**

21 **A. Oregon’s public records law creates a strong public policy in**
22 **favor of disclosure.**

23 Under Oregon law, “[e]very person has a right to inspect any public record
24 of a public body in this state, except as otherwise expressly provided[.]” ORS
25 192.314(1). Oregon’s “public records law encapsulates the ‘strong and enduring
26 policy that public records and governmental activities be open to the public.’”

1 | *Port of Portland v. Oregon Ctr. for Env't Health*, 238 Or. App. 404, 408–09, 243
2 | P.3d 102, 106 (2010) (quoting *Jordan v. Motor Vehicles Div.*, 308 Or. 433, 438,
3 | 781 P.2d 1203, 1205 (1989)). Accordingly, “the default rule of the public records
4 | law is disclosure.” *City of Portland v. Bartlett*, 304 Or. App. 580, 590, 468 P.3d
5 | 980, 987 (2020), *aff'd*, 369 Or. 606, 509 P.3d 99 (2022). Exceptions must be
6 | construed narrowly and the proponent of non-disclosure bears the burden of
7 | justifying their withholding. *Id.*

8 | **B. Fact issues preclude finding, on summary judgment, that**
9 | **Avion is not the functional equivalent of a public body.**

10 | In *Marks v. McKenzie High School Fact-Finding Team*, the Oregon
11 | Supreme Court held that the OPRL applies not only to public bodies, but also to
12 | private entities that operate as the “functional equivalent” of public bodies. 878
13 | P.2d at 423–24. This “functional’ approach [is] similar to that taken by the
14 | federal courts and by the courts of many of our sister states,” and turns on “the
15 | character of that entity and the nature and attributes of that entity’s
16 | relationship with government and governmental decision-making.” *Id.* at 424.
17 | As in OPRL cases generally, courts making this assessment should be guided by
18 | “[t]he policy of governmental openness that underlies the” OPRL; “that the
19 | public should have access to information on which governmental decisions are
20 | based.” *Id.* at 426; *see also* DA Order at 6 (noting, in finding Avion was
21 | functional equivalent of public body, that “I must consider that I am required to
22 | read the public records law broadly, in furtherance of the Oregon Legislature’s
23 | underlying policy in favor of disclosure”).

24 | Such a doctrine is essential to preserving the core purpose of public
25 | records laws. “[T]he public’s fundamental right to scrutinize the performance of
26 | public services . . . should not be subverted by government or by private entity

1 merely because public duties have been delegated” to a private entity. *Memphis*
2 *Publ’g Co. v. Cherokee Child. & Fam. Servs., Inc.*, 87 S.W.3d 67, 78 (Tenn. 2002).
3 “Privatization may be desirable in itself, but it should not come without . . .
4 leaving public accountability intact.” *Id.* at 77 (internal quotation marks and
5 citation omitted). Otherwise, “by maintaining and controlling previously public
6 records, private companies may control public access to such records in ways
7 that are ‘at odds with the very purpose of public records laws.’” *Id.* (quoting
8 Matthew Bunker & Charles Davis, *Privatized Government Functions and*
9 *Freedom of Information: Public Accountability in an Age of Private Governance*,
10 75 *Journalism & Mass Comm’n Q.* 464, 464–68 (1998)).

11 To guide trial courts’ analysis, the *Marks* Court laid out six non-exclusive
12 factors that it found “relevant,” to determining whether a private entity operates
13 as the functional equivalent of a public body, “although no single factor is either
14 indispensable or dispositive.” 878 P.2d at 424–25. They are:

15 (1) The entity’s origin (*e.g.*, whether the entity was created by
16 government or had some origin independent of government).

17 (2) The nature of the function assigned to and performed by the
18 entity (*e.g.*, whether that function is one traditionally associated
19 with government or is one commonly performed by private
20 entities).

21 (3) The scope of the authority granted to and exercised by the
22 entity (*e.g.*, does the entity have the authority to make binding
23 governmental decisions, or is it limited to making nonbinding
24 recommendations).

25 (4) The nature and level of government financial involvement
26 with the entity. (Financial support may include payment of the

1 entity's members or fees as well as provision of facilities,
2 supplies, and other nonmonetary support.)

3 (5) The nature and scope of government control over the entity's
4 operation.

5 (6) The status of the entity's officers and employees (e.g.,
6 whether the officers and employees are government officials or
7 government employees).

8 *Id.*

9 The functional equivalency test is inherently case-specific and fact-bound.
10 “[E]ach arrangement must be examined anew and in its own context.” *Id.* at
11 423 (quoting *Ry. Lab. Execs.’ Ass’n v. Consol. Rail Corp.*, 580 F. Supp. 777, 778
12 (D.D.C. 1984)). It is, therefore, a determination poorly suited to summary
13 judgment in favor of the entity, particularly where, as here, many facts
14 undermine its claim to be purely private as a matter of law. An examination of
15 each of the *Marks* factors in the context of this case further underscores that
16 Avion is not entitled to summary judgment on the record before this Court.
17 *Brown*, 341 P.3d at 147.

18 **First**, although Avion was not created by government, the *Marks* Court
19 emphasized that no factor is dispositive. *Marks*, 878 P.2d at 424.

20 **Second**, “[t]he nature of the function assigned to and performed by” Avion
21 is one “traditionally associated with government.” *Id.* As the District Attorney
22 correctly found, “[t]his factor is supportive of a finding of Avion being the
23 functional equivalent of a public body” because “Oregon State Government has a
24 long history of providing water to Oregonians and regulating the use of water
25 consumed by Oregonians,” and “government water utilities provide water to over
26 80 percent of US residents.” DA Order at 3; *cf.*, e.g., *Clarke v. Tri-Cities Animal*

1 *Care & Control Shelter*, 181 P.3d 881, 885 (Wash. Ct. App. 2008) (finding animal
2 control is governmental function); *Memphis Publ’g Co.*, 87 S.W.3d at 79 (same,
3 as to children’s social services); *Laine v. City of Rockaway Beach*, 134 Or. App.
4 655, 664, 896 P.2d 1219, 1223 (1995) (firefighting); *Connecticut Humane Soc’y v.*
5 *Freedom of Info. Comm’n*, 591 A.2d 395, 399 (Conn. 1991) (humane society); *Fox*
6 *v. News-Press Publ’g Co.*, 545 So. 2d 941, 943 (Fla. Dist. Ct. App. 1989) (towing
7 company); *Bd. of Trs. of Woodstock Acad. v. Freedom of Info. Comm’n*, 436 A.2d
8 266, 271 (Conn. 1980) (secondary school education).

9 Nationally, nearly ninety percent of people in the United States receive
10 their water from a publicly owned water utility. *See, e.g.*, Wilker Decl., Ex. 22 at
11 1; Ex. 23 at 1 (“[P]ublic drinking water systems . . . provide drinking water to 90
12 percent of Americans.”). Statewide, publicly owned water utilities “serve a
13 majority of Oregonians,” while the “portion” of water utilities with private
14 ownership are subject to government oversight through the Public Utility
15 Commission (“PUC”). Wilker Decl., Ex. 24 at 1. Locally, Bend’s water utility
16 serves around 75% of the city’s population. Wilker Decl., Ex. 25 at 7, 12; *see also*
17 Wilker Decl., Ex. 19 (U.S. Environmental Protection Agency data showing that,
18 in the second quarter of 2023, Bend’s municipal water utility served a population
19 of 68,538, while Avion served 36,331 people across Deschutes and Crook
20 Counties, and Roats served 5,727 people in Deschutes County).

21 Governments have a long history of owning and operating water utilities,
22 satisfying the “traditional[]” element of this factor. Bend has run its municipal
23 water utility since 1926. *See* Wilker Decl., Ex. 26 at 20, 31, 34. Nationally,
24 many cities have likewise operated municipal water utilities for a century or
25 longer, and “the provision of a municipal water supply” has long been considered
26 “an essential governmental function,” regardless of the fact that publicly owned

1 utilities have coexisted with “municipal water-works . . . operated for profit by
2 private industry.” *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 542
3 (1985) (citing *Brush v. Comm’r*, 300 U.S. 352, 370 (1937)); *see also Provident*
4 *Inst. for Sav. v. City of Jersey City*, 113 U.S. 506, 516 (1885) (“The providing of a
5 sufficient water supply for the inhabitants of a great and growing city is one of
6 the highest functions of municipal government[.]”); Wilker Decl., Ex. 21 at 5
7 (describing how, “for health and public safety reasons,” “[f]rom about 1880 to
8 about 1920, thousands of cities . . . assumed public control of their water
9 systems”).¹

10 State law further confirms that providing water to the public is a function
11 traditionally, and closely, associated with government. Under Oregon law, “all
12 of the waters within this state belong to the public for use by the people for
13 beneficial purposes without waste[.]” ORS 536.310(1). Accordingly, “it is the
14 policy of the State of Oregon to ensure a water supply sufficient to meet the
15 needs of existing and future beneficial uses of water, and to adequately manage
16 the state’s water resources.” ORS 536.241(2). The state’s role in adjudicating
17 water rights and regulating water utilities dates to the turn of the twentieth
18 century. *See* Wilker Decl., Ex. 27 at 7; DA Order at 9. In other words, Oregon
19 water is now—and has traditionally been—owned by the public, provided to the
20 public by publicly owned and managed utilities, and publicly regulated.

21 ¹ Avion’s statement that “61% of water systems in Oregon are privately
22 owned” is not to the contrary. Pl.’s Mot. for Summ. J. (“MSJ”) at 11 (citing
23 *Tatoian Decl.*, Ex. 1 at 3). Most investor-owned water utilities serve small
24 populations—a pattern that holds true in Bend. The fact remains that most
25 Americans, Oregonians, and Bend residents are served by publicly owned water
26 utilities. Wilker Decl., Exs. 19, 22–23, Ex. 25 at 7, 12–13. And, in any event,
Marks does not ask whether Avion’s function is statistically more likely to be
performed by government, but rather whether that function is traditionally
associated with government.

1 Avion’s twice-repeated contention that “operating a water utility is not an
2 activity that is exclusive to government,” and its lengthy descriptions of the
3 various types of water utilities, are inapposite. MSJ at 10, 12. The second factor
4 asks whether Avion’s function is “traditionally associated with” government,
5 *Marks*, 878 P.2d at 424, not “exclusive to” it. While water service can be
6 provided by public or private water utilities, the operative fact is that water
7 service is traditionally associated with—and far more often provided by—
8 government. For the same reason, Avion’s citation to an old case stating that
9 operating a municipal water utility is not “a duty of sovereignty” fails to prove
10 its point. MSJ at 10 (quoting *Twohy Bros. Co. v. Ochoco Irr. Dist., Crook Cnty.*,
11 108 Or. 1, 40, 216 P. 189, 190 (1923)). Whether or not Bend and other cities are
12 required to provide the public with water service, they do, and have traditionally
13 done so. *See also Twohy Bros. Co.*, 216 P. at 190 (finding that for an “irrigation
14 district,” like “a water system,” “[i]ts acts and duties are public” and performed
15 “for the benefit of that portion of the public within its limits”). This *Marks* factor
16 tips decidedly in Source Weekly’s favor, and against a grant of summary
17 judgment for Avion.

18 **Third** is “[t]he scope of the authority granted to and exercised by” Avion:
19 “(e.g., does [Avion] have the authority to make binding governmental decisions,
20 or is it limited to making nonbinding recommendations).” *Marks*, 878 P.2d at
21 424. This factor favors finding Avion is the functional equivalent of a public
22 body because, as the District Attorney aptly held, “Avion has the authority to
23 establish water utility rates for their customers,” which “impact[s] the public”
24 even though the PUC must ultimately approve Avion’s rates. DA Order at 3–4.
25 Avion itself determines when to set a new rate, calculates the desired rate, and
26 files the rate application with the PUC. *Cf. Allen v. Day*, 213 S.W.3d 244, 255

1 (Tenn. Ct. App. 2006) (sports arena’s ability to set pricing supported finding it
2 was functional equivalent of public body, regardless of government’s oversight
3 role as to rates). Avion’s secretary and treasurer Richard Bailey testified that
4 during his seventeen-and-a-half years with the utility he did not recall the PUC
5 ever declining to approve a new Avion rate tariff. Wilker Decl., Ex. 2 (“Bailey
6 Tr.”) at 25:21–24. Although the PUC typically proposes a lower rate, Avion and
7 the PUC then work together to set a rate that enables Avion to recover its costs
8 and make a profit. *Id.* at 25:25–26:22. Avion’s rates are often set at around
9 ninety percent of its initial requests. *Id.* at 56:14–57:3. In other words, Avion’s
10 own rate-setting decisions unavoidably affect its customers and the public.

11 These decisions are hardly akin to “establish[ing] the price of a Big Mac,”
12 which Avion notes is not “a governmental decision.” MSJ at 14. Unlike
13 hamburgers, water is essential to human life. As discussed above, providing
14 water service to the public is a function long associated with government, as are
15 decisions on how much the public pays for that service. And while a dissatisfied
16 McDonald’s customer could go down the road to Burger King, Avion’s customers
17 are essentially stuck with Avion. Within Bend, Avion has the exclusive
18 authority to serve customers inside its service franchise territory. Wick Decl.,
19 Ex. 6 at 1–9 (“Franchise Agmt.”) at Sec. 3. That territory covers a significant,
20 and growing, population—projected to hit 50,000 people by 2040. Wilker Decl.,
21 Ex. 4 at 31–32, 31–32; Ex. 3 (“Wick Tr.”) at 60:19–61:1. Outside Bend, in the
22 parts of Avion’s service territory where Avion does not have the exclusive right
23 to operate, Avion’s president Jason Wick explained that it would be prohibitively
24 expensive and “very unlikely” for customers to purchase the water rights and
25 build the necessary infrastructure to obtain alternative service. Wick Tr. at
26 48:4–17; *see also id.* at 45:14–19.

1 Additionally, Avion has other forms of authority, which it fails to
2 acknowledge. Under its franchise agreement with Bend, memorialized in the
3 city code, Avion has the authority to build in public rights-of-way, an authority
4 Avion routinely exercises. Franchise Agmt. at Sec. 3; Wick Tr. at 48:18–49:4; *see*
5 *also Laine*, 896 P.2d at 1223 (looking to city ordinances to assess entity’s
6 authority). Avion acquires water rights, which it uses to supply customers.
7 Wick Tr. at 32:4–33:4. Avion creates water conservation programs for
8 customers. *Id.* at 24:16–25:5, 30:22–31:6. The franchise agreement authorizes
9 Avion to enact rules and regulations related to the provision of water service to
10 its customers, which Avion has done. Franchise Agmt. at Sec. 7; Wick Tr. at
11 71:7–72:2. For example, Avion requires customers living in accessory dwelling
12 units, or “ADUs,” to obtain a separate meter—a requirement Bend did not need
13 to sign off on and has not implemented for its own utility. Wick Tr. at 78:20–
14 80:2; Wilker Decl., Ex. 10. Avion made the “internal policy decision” to share
15 monthly reports of its new and terminated customers with Bend, to facilitate the
16 city’s sewer billing. Bailey Tr. at 58:2–59:4; Wilker Decl., Ex. 6. Avion decides
17 whether it needs to renovate or put in new pipes; Bend has “no say.” Wick Tr. at
18 70:10–17. Like Avion’s rates, Avion’s exercise of its decision-making authority in
19 these areas unavoidably affects the public and its water use.

20 Moreover, the *Marks* Court analyzed under the third factor whether the
21 requested information was available through another public body, such that the
22 public could already access the information driving governmental decisions.
23 *Marks*, 878 P.2d at 425. In *Marks*, the Court held that this factor weighed
24 against finding the entity at issue was the functional equivalent of a public body
25 because requesters could access all of the information at issue through the school
26 board—a public body subject to OPRL. *Id.* Here, in contrast, the requested

1 information on Avion’s customers’ individual-level water usage and spending is
2 not available through any other government entity. Bend does not have that
3 information. *See* Wilker Decl., Exs. 17, 33.² Nor does the PUC, the Oregon
4 Water Resources Department, nor any other agency. *See* Bailey Tr. at 61:21–
5 62:13. Absent this Court’s finding that Avion is subject to the OPRL, the public
6 will have no access to water usage information for a significant portion of the
7 community.

8 *Fourth*, the *Marks* test looks to “[t]he nature and level of government
9 financial involvement with the entity,” including “nonmonetary support.”
10 *Marks*, 878 P.2d at 424–25. Avion has significant financial involvement with
11 government, particularly through its franchise agreement with Bend, pursuant
12 to which Avion has the exclusive right to serve customers in its territory and the
13 right to build and operate in public streets and rights-of-way. These facts, as the
14 District Attorney correctly held, tip this factor toward finding Avion is the
15 functional equivalent of a public body. DA Order at 4.

16 As to Avion’s exclusive service territory, this part of the franchise
17 agreement ensures that Avion does not have to compete with Bend or another
18 utility for customers. Franchise Agmt. at Sec. 3. Bend may only serve
19 customers in Avion’s territory if Avion is failing to adequately do so, in which
20 case Bend would first have to notify Avion. *Id.* Avion testified that this has
21 never happened. Wick Tr. at 47:19–25. Second, Avion’s ability to build and
22 operate its water system using Bend’s streets and rights-of-way is also critical.

23
24 ² Although Avion does send Bend limited information on water customers’
25 usage, Avion only includes data from two low-usage winter months and does not
26 provide financial information. Wilker Decl., Ex. 33. In contrast, Source
Weekly’s request in this case seeks customers’ full-year water usage and
expenditures. Wick Decl., Ex. 7.

1 Under the franchise agreement, Bend “grants to [Avion] the right and privilege
2 to construct, erect, operate and maintain its facilities, in, upon, along, across,
3 above, over and under the streets, alleys, and public ways . . . for the provision of
4 water services in City.” Franchise Agmt. at Sec. 3; *cf. Marks*, 878 P.2d at 425
5 (looking at government’s “provision of facilities”). Whereas Avion often must
6 compensate private landowners to secure an easement or right-of-way on their
7 land, such as by giving them water credit or money, Avion need not make those
8 same payments to obtain an easement or right-of-way from Bend. *See Wick Tr.*
9 *at 49:2–18, 57:22–59:21; Wilker Decl., Ex. 7* (showing Avion did not pay Bend for
10 an easement); *Ex. 8* (showing Avion paid private landowner \$6,500 future water
11 credit for easement); *Ex. 28* (showing Avion paid private landowner \$25,000 cash
12 for easement). Avion needs many easements and rights-of-way to run its water
13 system—and has recorded nearly 800 such documents in Deschutes County—so
14 this provision of the franchise agreement has a meaningful financial impact. *See*
15 *Wilker Decl., Ex. 29.*

16 Avion attempts to wave away these facts by arguing that its franchise
17 agreement with Bend “is merely a type of license” which “does not grant Avion a
18 property interest in the city’s rights-of-way,” and adds that it has extensive
19 service territory outside Bend. MSJ at 16. Yet that is not the relevant analysis
20 under this factor; rather, *Marks* asks whether Avion benefits financially from its
21 relationship with government. *Marks*, 878 P.2d at 424–25. Undeniably, it does.

22 Beyond these two provisions of the franchise agreement, Avion receives
23 various other forms of financial and nonmonetary support from government.
24 While Avion pays a franchise fee to Bend, currently set at six percent of gross
25 operating revenue, Bend has agreed its water utility must pay the same
26 franchise fee—otherwise, Avion would be at a significant competitive

1 | disadvantage. Franchise Agmt. at Sec. 12; Bend Code 3.20.020(A)(1); Bailey Tr.
2 | at 50:14–51:9; Wick Tr. at 20:8–20 (testifying that “the City doesn’t like that
3 | clause” but Avion negotiated it “because the City is our competitor, and we don’t
4 | want them to levy fees against developers to make them choose the city over
5 | us”), 52:15–53:8. Further, Bend recently passed an ordinance swapping service
6 | territory with Avion, which it found would benefit both utilities financially. *See*
7 | Wick Decl., Ex. 6 at 16–20; Wilker Decl., Ex. 30 at 7 (Bend presentation noting
8 | that the swap would “[p]revent need for Avion to construct major assets” in the
9 | area); Ex. 1 (“Jackson Tr.”) at 19:19–21:5. Further, Avion and Bend have an
10 | agreement under which Avion sells water to Bend for use at the municipal
11 | airport. Bailey Tr. at 31:23–32:6; Wilker Decl., Ex. 31. Bend also sold Avion
12 | part of a defunct water system, for which Avion now collects customers’
13 | payments. *See* Wilker Decl., Ex. 4 at 16; Ex. 25 at 11.

14 | In all, from Avion’s exclusive service territory to its use of public rights-of-
15 | way to its franchise fee and other financial arrangements, Avion has significant
16 | financial involvement with government, further militating against summary
17 | judgment in Avion’s favor. *Cf. Allen*, 213 S.W.3d at 256 (finding this factor
18 | favors finding functional equivalence given extent of government’s
19 | “entanglement with the financial affairs of” the entity, which “are not limited to
20 | funding”).

21 | ***Fifth***, courts examine “[t]he nature and scope of government control over
22 | the entity’s operation.” *Marks*, 878 P.2d at 425. Avion is subject to government
23 | control in many areas of its operations. The PUC approves Avion’s rates, service
24 | territory, certain contracts, and other elements of its operation, and reviews
25 | Avion’s annual reports on its investors and financials. *See* ORS 757.061; ORS
26 | 757.495; ORS 757.125; Wilker Decl., Ex. 5; Ex. 12; Ex. 32. Out of Oregon’s

1 approximately 3,500 water utilities, the PUC estimates that Avion is one of only
2 thirty-three fully rate-regulated water utilities. Wilker Decl., Ex. 4 at 3. The
3 Oregon Water Resources Department approves Avion’s water rights permits and
4 water management and conservation plans. OAR 690-086-0010; OAR 690-310-
5 0040; Wilker Decl., Ex. 4 at 9. The Oregon Health Authority monitors Avion’s
6 water quality, well construction, and requires Avion to provide customers with
7 annual reports on water quality. OAR 333-061-0043; Wick Tr. at 75:4–14;
8 Jackson Tr. at 16:1–13; *cf. Clarke*, 181 P.3d at 884–86 (finding this factor
9 supports finding entity “is the functional equivalent of a public agency” where it
10 “is only permitted to” operate “in a manner approved by” government, and “is
11 also required to keep records and submit monthly reports,” constituting “a
12 notable degree of governmental control”); *Allen*, 213 S.W.3d at 259 (finding
13 same, citing government’s “extensive regulation and control” over entity,
14 including its budget and pricing); *Pub. Citizen Health Rsch. Grp. v. Dep’t of*
15 *Health, Educ., & Welfare*, 449 F. Supp. 937, 941 (D.D.C. 1978) (same, where
16 entity “operates under direct, pervasive, continuous regulatory control affecting
17 even minutia of the procedures and functions”). The District Attorney cited
18 these regulatory requirements and others in finding this factor supported
19 finding Avion is the functional equivalent of a public body. DA Order at 5.

20 Contrary to Avion’s contentions, the government’s control over Avion also
21 extends beyond regulatory oversight. *Cf. MSJ* at 17–18. Avion’s role in
22 providing water to the public means the utility has close and frequent
23 involvement with various government bodies. Avion’s day-to-day operations in
24 Bend are governed by the terms of the franchise agreement, which is enacted
25 and amended by city ordinance. Franchise Agmt. Avion can only operate within
26 its service territory, which is subject to approval by Bend and the PUC, leading

1 Avion and Bend to discuss and enact service territory swaps. Franchise Agmt.
2 at Sec. 3; Wick Tr. at 45:14–46:22; Jackson Tr. at 19:19–21:5; Wick Decl., Ex. 6
3 at 10–20; Wilker Decl., Ex. 30; *Laine*, 896 P.2d at 1224 (finding this factor
4 favored holding fire department was functional equivalent of public body where
5 “[t]he city further had the authority to define the geographic scope of the
6 department’s activities”). Numerous emails between Avion and Bend reflect how
7 Bend’s decisions affect Avion’s day-to-day operations. *See, e.g.*, Wilker Decl., Ex.
8 9 (Bend agreeing not to charge Avion fees for a permit); Ex. 11 (Avion asking
9 Bend to revise paving standards); *cf. Laine*, 896 P.2d at 1224 (finding that while
10 “the city did not directly control the day-to-day operations of the” entity at issue,
11 it “exercised significant control . . . in other ways,” satisfying this factor). From
12 Avion’s daily operations to its steady regulatory oversight, numerous facts
13 counsel against finding this factor supports Avion’s claim to be a purely private
14 entity as a matter of law.

15 *Sixth* and last is “[t]he status of the entity’s officers and employees (*e.g.*,
16 whether the officers and employees are government officials or government
17 employees).” *Marks*, 878 P.2d at 425. Although Avion’s employees are not
18 government officials or employees, courts’ review of the functional equivalent
19 test is holistic and not bound by any one factor. *Id.* at 424.

20 In all, with four of the six *Marks* factors supporting a finding that Avion is
21 the functional equivalent of a public body subject to the OPRL, the Court should
22 not grant summary judgment for Avion. Because, in this case, “the summary
23 judgment record permits competing inferences,” many of which favor Source
24 Weekly, Avion’s summary judgment motion must be denied. *Brown*, 341 P.3d at
25 147.

26 ///

1 **CONCLUSION**

2 In sum, the determination of whether Avion is the functional equivalent of
3 a public body is one that cannot be made as a matter of law. It is necessarily a
4 fact-bound determination that is inappropriate for summary judgment. As the
5 factual submissions of the parties and the analysis above demonstrates, four of
6 the six factors weigh strongly in favor of finding that Avion is the functional
7 equivalent of a public body. Avion’s motion for summary judgment should be
8 denied.

9 DATED: July 26, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **DEFENDANT SOURCE WEEKLY'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** on:

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- by electronic means through the Court's File & Serve system on the date set forth below; and
- by causing a copy thereof to be emailed to each attorney at said attorney's last-known email address on the date set forth below.

DATED: July 26, 2023.

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