

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

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,**

Defendant.

Case No. 22CV18513

**PLAINTIFF’S REPLY IN SUPPORT  
OF MOTION FOR SUMMARY  
JUDGMENT**

**I. INTRODUCTION**

Plaintiff Avion Water Company (“Avion”) is a privately owned, for-profit corporation. It is not subject to the Oregon Public Records Law, because it is neither a public body by definition nor the “functional equivalent” of a public body under the six-factor test set out in *Marks v. McKenzie High Sch. Fact-Finding Team*, 319 Or 451, 463-64, 878 P2d 417 (1994). Attempting to avoid summary judgment, defendant misconstrues each contested *Marks* factor and asks the Court to reach implausible legal conclusions based on undisputed facts. Taking each factor in order:

1. It is uncontested that Avion was *not* created by government.
2. Selling water is commonly performed by private entities and is not an activity that is exclusive to government. In fact, for decades Oregon’s appellate courts recognized that even when municipalities operate water

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

utilities, they do so in a proprietary capacity and not as an exercise of governmental functions.

3. Avion has no authority to make binding *governmental* decisions. Deciding what to charge for a product and where to sell it might be decisions, but they are not *governmental* decisions. And in any event, Avion’s charges are subject to PUC approval and its service territory is greatly affected by PUC and City of Bend decisions.

4. Avion does not receive financial or other nonmonetary support from government. This factor is focused on whether Avion’s money is public money, and that clearly is not satisfied by the City of Bend’s purchase of water from Avion or by the right-of-way access for which Avion pays handsomely under its franchise.

5. No governmental entity controls Avion’s operation. Here, defendant ignores the difference between government *regulation* (to which all of us are subject to varying degrees) and government *control* (which means the power to control day-to-day operations or the power to appoint employees and officers). If the mere fact of government regulation was enough to turn a private entity into a public entity, every person and entity in the state potentially would qualify as the functional equivalent of a public body.

6. It is uncontested that Avion employees are *not* governmental employees.

Thus, the decision whether Avion is the functional equivalent of a public body is not a close one. Every factor leans decisively against such a finding. And even if the Court concludes that one *Marks* factor or another is a closer call than Avion would admit, the only plausible legal conclusion that can be reached on this record – giving defendant

1 the benefit of all reasonable inferences and taking the *Marks* factors as a whole – is that  
2 Avion is not the functional equivalent of a public body. Accordingly, Avion respectfully  
3 requests that summary judgment be entered in its favor.

4 **II. ARGUMENT**

5 **A. Courts regularly decide on the pleadings or on summary judgment**  
6 **whether an entity is subject to the public records law.**

7 Defendant mistakenly argues that a trial is needed to decide whether Avion is a  
8 public body. Defendant’s Response at 8. Respectfully, it is not that hard to decide  
9 whether a privately owned, for-profit corporation is in fact a unit of government. *Marks*,  
10 the seminal case on this topic, was decided on the pleadings at trial and on appeal. 319  
11 Or at 453. Courts – including this one – have determined on summary judgment whether  
12 an entity is subject to Oregon’s Public Records Law. *See, e.g., Miller v. Water*  
13 *Wonderland Im. Dist.*, 141 Or App 403, 405, 918 P2d 849 (1996), *rev’d on other*  
14 *grounds*, 326 Or 306 (1998) (affirming Deschutes County Circuit Court’s entry of  
15 summary judgment); *Forsham v. Harris*, 445 US 169, 100 S Ct 977 (1980) (affirming  
16 entry of summary judgment and concluding privately controlled entity is not subject to  
17 the Freedom of Information Act); *Irwin Mem. Blood Bank of San Fran. Med. Soc. v.*  
18 *American Nat. Red Cross*, 640 F2d 1051 (1981) (same).<sup>1</sup> When parties do not dispute  
19 issues of historical fact – as is the case here – courts determine whether an entity is the  
20 functional equivalent of a public body as a matter of law. *Laine v. City of Rockaway*  
21 *Beach*, 134 Or App 655, 661, 896 P2d 1219 (1995).

---

23  
24 <sup>1</sup> The *Marks* court found it relevant to look to federal cases construing the Freedom of  
25 Information Act (“FOIA”) because the Oregon Public Records Law was modeled in  
26 part on FOIA and federal courts also apply the “functional equivalent” test to  
determine whether an entity is subject to FOIA. *Marks*, 319 Or at 458-59.

1 Defendant confuses its submission of voluminous evidence with the existence of a  
2 genuine issue as to a material fact. A bench trial is not necessary to elicit essentially the  
3 same evidence as is before the Court in this motion and to make a decision that must be  
4 made by the Court as a matter of law.

5 **B. Giving defendant the benefit of all favorable inferences from the**  
6 **evidence in the record, Avion is not the functional equivalent of a**  
7 **public body.**

8 The parties agree this case is to be decided by application of the six-factor test in  
9 *Marks*. Giving defendant the benefit of all favorable inferences in the summary judgment  
10 record, every one of the *Marks* factors weighs against defendant’s argument that Avion  
11 somehow is the functional equivalent of a public body that is subject to Oregon’s Public  
12 Records Law.

13 **1. Avion was not created by government.**

14 The first *Marks* factor is undisputed: Avion was *not* created by government. *See*  
15 Defendant’s Response at 8 (so conceding). As a result, this factor weighs *against* a  
16 finding that Avion is the functional equivalent of a public body.

17 **2. Avion has not been assigned a function traditionally associated**  
18 **with government.**

19 The second *Marks* factor concerns “the nature of the function assigned to and  
20 performed by the entity (*e.g.*, whether that function is one traditionally associated with  
21 government or is one commonly performed by private entities).” 319 Or at 463. It is  
22 undisputed that no governmental entity has assigned a function to Avion. Accordingly,  
23 the only issue the parties dispute is whether operating a water utility is a function  
24 “traditionally associated with government or is one commonly performed by private  
25 entities.”

1 Defendant argues that this factor supports a finding that Avion is the “functional  
2 equivalent” of a public body because (1) many people nationwide and in Oregon receive  
3 water from a publicly owned water utility; and (2) water is “owned by the public.”  
4 Neither argument leads to the conclusion asserted by defendant.

5 **a. Operating a water utility is a function commonly**  
6 **performed by private entities.**

7 Both parties agree: Operating a water utility is a function performed both by  
8 public and private entities. See Avion’s Motion at 10-13. The Oregon Supreme Court  
9 has rejected the notion that supplying water is “a duty of sovereignty.” *Twohy Bros. Co.*  
10 *v. Ochoco Irr. Dist., Crook Cnty.*, 108 Or 1, 40, 216 P 189 (1923).<sup>2</sup> And when municipal  
11 entities operate water utilities, Oregon courts have determined that their doing so was  
12 exercising “private and proprietary powers,” rather than performing a governmental  
13 function. *Coast Laundry, Inc. v. Lincoln City*, 9 Or App 521, 526, 497 P2d 1224 (1972)  
14 (“[T]he construction, operation and maintenance of waterworks, gas works and lighting  
15 plants by an Oregon municipal corporation for the benefit and convenience of its  
16 inhabitants constitute the exercise of private and proprietary powers \* \* \* and that a  
17 municipal corporation engaged in the business of supplying water to its inhabitants is  
18 engaged in an undertaking of a private nature.”); *Butler v. City of McMinnville*, 126 Or  
19 56, 60, 268 P 760 (1928) (“It is well settled here, as elsewhere, that, when a municipality  
20 undertakes to supply water to its citizens for profit, it is acting in its proprietary capacity  
21 as distinguished from its governmental functions.”); *Pac. Paper Co. v. City of Portland*,

---

22 <sup>2</sup> Defendant suggests that this Court should ignore this “old case” because it “fails to  
23 prove” the point that providing water is a function traditionally performed by  
24 government. Defendant’s Response at 11. Although “old,” the case has never been  
25 overruled and defendant has failed to articulate any basis to claim that the authority is  
26 no longer good law.

1 68 Or 120, 124, 135 P 871 (1913) (recognizing “the rule in this state that a system of  
2 waterworks operated for profit by a city belongs to the municipality in its private rather  
3 than in its public or governmental character”). Thus, the operation of a water utility is  
4 not traditionally associated with government.<sup>3</sup>

5 As noted in Avion’s Motion, 61% of water systems in Oregon are privately  
6 owned. Defendant does not dispute this fact. Instead, defendant offers evidence about  
7 the number of people who receive water services from a municipally owned utility,  
8 versus a privately owned utility. As defendant itself acknowledges, the second *Marks*  
9 factor does not “ask whether Avion’s function is statistically more likely to be performed  
10 by government, but rather whether that function is traditionally associated with  
11 government.” Defendant’s Response at 10 n 1. Based on the undisputed evidence  
12 presented by both parties, defendant cannot reasonably dispute that operating a water  
13 utility is a function “commonly performed by private entities” such as Avion.  
14 Accordingly, the second *Marks* factor weighs against a finding that Avion is the  
15 “functional equivalent” of a public body.

16 **b. Avion’s water is personal property – not public**  
17 **property.**

18 Defendant argues that “water is now – and has traditionally been – owned by the  
19 public, provided to the public by publicly owned and managed utilities, and publicly  
20

21 \_\_\_\_\_  
22 <sup>3</sup> Although the Oregon Supreme Court has found the governmental/proprietary  
23 distinction less useful over the years for determining rights in some contexts, *e.g.*, *NW*  
24 *Nat. Gas Co. v. City of Portland*, 300 Or 291, 298-302, 711 P2d 119 (1985), courts  
25 continue to recognize the distinction in other contexts. *City of Mosier v. Hood River*  
26 *Sand, Gravel, and Ready-Mix, Inc.*, 206 Or App 292, 320, 136 P3d 1160 (2006);  
*Board of Klamath County Com'rs v. Select Cnty. Employees*, 148 Or App 48, 52 n 2,  
939 P2d 80, *rev den*, 326 Or 57 (1997) (applying distinction in other contexts).

1 regulated.” Defendant’s Response at 10. This argument is legally incorrect for three  
2 reasons.

3 First, the *Marks* test does not turn on whether a private entity is using a public  
4 resource. Trees, solar rays, and wind are also public resources, but one could not  
5 reasonably argue that this makes the operations of timber companies, solar farms, and  
6 windmill farms governmental functions such that those entities are the functional  
7 equivalent of public bodies.

8 In any event, although “[a]ll water within the state from all sources of water  
9 supply belongs to the public[,]” ORS 537.110, “after water has been appropriated and  
10 diverted from natural streams into artificial works it becomes personal property.” *Coast*  
11 *Laundry, Inc.*, 9 Or App at 526 (citing *Vaughan v. Kolb*, 130 Or 506, 511-12, 280 P 518  
12 (1929)). That is, “[u]nder Oregon’s water code, a claim for water, if proved, results in  
13 the issuance of a certified water right giving the holder title to the right.” *Klamath*  
14 *Irrigation Dist v. United States*, 348 Or 15, 53, 227 P3d 1145 (2010).

15 Here, it is undisputed that Avion obtains its water rights through water rights  
16 certificates. Wick Decl. ¶12, Ex. 5. That is, Avion has undergone the statutory process  
17 to acquire ownership over the water it provides to its customers. *Fort Vannoy Irr. Dist. v.*  
18 *Water Res. Com'n*, 345 Or 56, 85, 188 P3d 277 (2008) (“[T]he party that holds an  
19 ownership interest in a certificated water right—*i.e.*, the “holder”—is the party that  
20 undertook the procedures in ORS chapter 537 that culminated in the issuance of the  
21 certificate. Stated differently, the department's issuance of a certificate appears to be the  
22 act that vests the ownership interest associated with a certificated water right in the party  
23 to which the certificate is issued.”). Accordingly, the water Avion supplies to its  
24 customers does not belong to the public – it is Avion’s personal property.

1           Second, municipal water utilities and private water utilities are not “publicly  
2 regulated” in the same manner. Whereas private water utilities are subject to oversight  
3 by the Oregon Public Utilities Commission (“PUC”), ORS chapter 757, municipal  
4 utilities and PUDs regulate their own rates, theoretically subject to oversight by their  
5 constituents. ORS 261.465 (authorizing board of PUD to fix rates); *Kliks v. Dalles City*,  
6 216 Or 160, 173, 335 P2d 366 (1959) (“The defendant city has the power to fix the rates  
7 to be charged for water which it sells.”). As described below, the distinction further  
8 separates privately-owned water utilities from their governmental counterparts.

9           Finally, defendant has cited no authority to support its position that a private  
10 water utility, or *any* public utility, is subject to public records law because of its provision  
11 of services to the public. The only authority Avion has located on the matter has  
12 concluded that private, for-profit utilities are not subject to public records law. *Stewart v.*  
13 *Williams Commc'ns, Inc.*, 85 SW3d 29 (Mo Ct App 2002) (telecommunications utility);  
14 *BlueStar Energy Servs., Inc. v. Illinois Com. Comm'n*, 374 Ill App 3d 990, 871 NE2d 880  
15 (2007) (had acquisition agreement between two electricity utilities not been disclosed to  
16 the Illinois Commerce Commission, it would not be subject to disclosure under public  
17 records law).

18           Defendant has failed to identify a genuine issue of material fact involving the  
19 second *Marks* factor. It is undisputed that operating a water utility is a function  
20 commonly performed by private entities, and the Oregon Supreme Court has held that  
21 water service is not a governmental function even when an actual municipality is  
22 providing it. There is no legal or factual basis to conclude otherwise. Accordingly, this  
23 factor weighs *against* a conclusion that Avion is the functional equivalent of a public  
24 body.



1                                   **3.     Avion has no authority to make binding decisions for**  
2                                   **government.**

3                                   The third *Marks* factor requires the court to consider “the scope of the authority  
4 granted to and exercised by the entity (*e.g.*, does the entity have the authority to make  
5 binding governmental decisions, or is it limited to making nonbinding  
6 recommendations).” 319 Or at 463. Defendant argues that Avion’s ability to set its own  
7 rates and its authority under its franchise agreement with Bend “favors finding Avion is  
8 the functional equivalent of a public body.” Again, defendant’s position is wrong as a  
9 matter of law. Deciding what to charge for a product and where to sell it might be  
10 decisions, but they are not *governmental* decisions, let alone *binding* governmental  
11 decisions.

12                                  Defendant’s Response includes a laundry list of actions Avion takes in the course  
13 of its business – the sorts of actions any business might take – and urges the Court to  
14 view them as exercises of governmental decision making. A point-by-point reply might  
15 not be necessary given how obvious it is that the actions do not constitute governmental  
16 decisions, but Avion addresses them in the remainder of this section.

17                                  Defendant apparently cannot decide what to make of the fact that the rates  
18 charged by public utilities are subject to PUC approval. With respect to the  
19 “governmental decisions” *Marks* factor, defendant wants the Court to conclude that the  
20 PUC rubber stamps Avion’s water rates and, therefore, Avion decides what to charge for  
21 water. (Elsewhere, defendant argues that Avion should be considered the functional  
22 equivalent of a public body because it is regulated by the PUC.)

23                                  Defendant’s argument is off base primarily because deciding the price for a  
24 service is not a binding governmental decision. But it also is wrong as a matter of law.  
25 Unlike municipally-owned utilities, Oregon law does not provide a public utility the  
26 authority to set its own rates: The authority to set water rates is limited to the PUC. *See*

1 ORS 756.040 (granting PUC the power to establish fair and reasonable rates). Contrary  
2 to defendant’s suggestion, the PUC does not simply rubber-stamp a utility’s requested  
3 rates:

4 “When deciding whether to approve a proposed rate  
5 adjustment, Commissioners must ensure the change is fair  
6 and reasonable for utility customers while also allowing the  
7 utility service provider the opportunity to recover  
8 reasonable costs and earn a reasonable return on its  
9 investments. The Oregon Public Utility Commission (PUC)  
10 uses a quasi-judicial investigation to examine a utility's  
11 operating expenses, investments, and capital costs. Once  
12 new rates are set, the utility is obligated to charge only the  
13 rates approved by the PUC, unless changed by the PUC.  
14 **This ensures the PUC alone is empowered to judge the  
15 reasonableness of rates and prohibits price  
16 discrimination by ensuring all 'similarly situated  
17 customers' are subject to the same rates, terms, and  
18 conditions.”<sup>4</sup>**

12 (Emphasis added). The PUC’s process in approving a utility’s rate includes “up to a  
13 year-long investigation into the [rate] filing to determine if any changes in rates are  
14 warranted by evaluating many components of the proposed cost – such as the cost of  
15 labor, purchased energy, and the cost of capital.” *Id.* Rate-making proceedings involve  
16 not only the utility’s rate filing application, but an evidentiary hearing process, including  
17 public comment. *Id.*; *see also* OAR 860-036-2020 and OAR 860-036-2030 (describing  
18 rate revision requirements for water utility).

19 Defendant cites no legal authority to support its position that Avion has the  
20 authority to establish water utility rates for its customers. Instead, defendant cites to  
21 deposition testimony of Avion’s secretary and treasurer, Richard Bailey, who testified  
22 that he did not “recall the PUC ever declining to approve a new Avion rate tariff” and  
23

---

24 <sup>4</sup> Oregon Public Utility Commission, Utility Regulation, Rates and Tariffs, *available at*  
25 <https://www.oregon.gov/puc/utilities/Pages/Rates-Tariffs.aspx> (last accessed August  
26 7, 2023).

1 that “Avion and the PUC then work together to set a rate that enables Avion to recover its  
2 costs and make a profit.” Defendant’s Motion at 12. None of that testimony establishes  
3 that Avion makes binding decisions for government, and defendant fails to explain  
4 otherwise. In sum, defendant has cited no legal or factual basis to conclude that Avion  
5 has the authority to establish water utility rates for its customers, other than complying  
6 with the process required by the PUC and Oregon law.

7 In support of its position that Avion has the authority to make binding  
8 governmental decisions, defendant emphasizes that “water is essential to human life” and  
9 that Avion “has exclusive authority to serve customers inside its service franchise  
10 territory.” Defendant’s Response at 12. There is no material dispute as to either of those  
11 facts, but neither has any bearing on whether Avion makes binding decisions for  
12 government.

13 The Oregon Water Resources Department is responsible for appropriating water  
14 in the State of Oregon under its water rights certificate process –*that* is the public entity  
15 responsible for deciding to whom to appropriate the State of Oregon’s water. ORS  
16 537.153. As noted above, when the Water Resources Department issued water right  
17 certificates to Avion in accordance with the statutory and regulatory process, that water  
18 became the personal property of Avion. *See* ORS 537.250(3) (“Rights to the use of water  
19 acquired under the provisions of the Water Rights Act \* \* \* shall continue in the owner  
20 thereof so long as the water shall be applied to a beneficial use under and in accordance  
21 with the terms of the certificate[.]”); ORS 537.270 (“A water right certificate \* \* \* shall  
22 be conclusive evidence of the priority and extent of the appropriation therein described in  
23 any proceeding in any court or tribunal of the state[.]”). Nothing about this process or the  
24 fact that water is essential to human life informs whether Avion makes binding  
25 governmental decisions under *Marks*.

1           Moreover, it is unclear why defendant attributes the scope of Avion’s service  
2 territory to a decision made by Avion, as opposed to a decision made by the City of  
3 Bend. After all, cities have the unique power to regulate public utilities operating within  
4 their rights-of-way, ORS 221.415, including:

5                           “Requir[ing] any public utility, by ordinance or otherwise,  
6                           to make such modifications, additions and extensions to its  
7                           physical equipment, facilities or plant or service within  
8                           such city as shall be reasonable or necessary in the interest  
9                           of the public, and designat[ing] the location and nature of  
                         all additions and extensions, the time within which they  
                         must be completed, and all conditions under which they  
                         must be constructed.”

10           ORS 221.420(2)(b). Avion could not operate within the City of Bend’s rights of way  
11 without the City’s express consent. As a result, the fact that Avion operates within the  
12 City of Bend does not lead to the conclusion that Avion makes binding governmental  
13 decisions.

14           Defendant next argues that Avion has “other forms of authority” relevant to the  
15 third *Marks* factor. None of them equate to making binding governmental decisions, or  
16 raise genuine issues of material fact:

- 17           • “Under its franchise agreement \* \* \* Avion has the authority to build in public  
18 rights-of-way, an authority Avion routinely exercises.” Defendant’s Response  
19 at 13. This is true, but irrelevant. As noted above, Oregon law provides cities  
20 with significant power to regulate public utilities operating within their rights-  
21 of-way. ORS 221.420(2)(a) (authorizing cities to “determine by contract or  
22 prescribe by ordinance or otherwise, the terms and conditions, including  
23 payment of charges and fees, upon which any public utility \* \* \* may be  
24 permitted to occupy the streets, highways or other public property within such  
25 city and exclude or eject any public utility \* \* \* therefrom”); ORS

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

224.420(2)(b) (authorizing cities to control the location of a public utility’s facilities and direct a time within which any extension must be completed); ORS 221.470 (requiring a public utility to remove its property from municipal right-of-way after expiration of grant, privilege, or franchise or the utility’s property “shall be forfeited and escheated to the state or municipal corporation wherein situated”).<sup>5</sup> The City of Bend’s Municipal Code requires a franchise to operate a water utility within the city’s limits. City of Bend Municipal Code 14.10.010(B) (“No person other than the City may sell water by piped delivery to a property without a City franchise.”). Thus, there is nothing unique or governmental about Avion’s franchise with the City of Bend – it is a requirement to operate within the City’s rights-of-way.

- “Avion acquires water rights, which it uses to supply customers.” Defendant’s Response at 13. This is true, but irrelevant. Wick Decl. ¶12, Ex. 5. Avion follows the statutory procedure for obtaining water right certificates from the Oregon Water Resources Department. It is the Water Resources Department that decides whether to issue the water right certificate to Avion – not the other way around. Nothing about this fact suggests Avion makes binding decisions for government.
- “Avion creates water conservation programs for customers.” Defendant’s Response at 13. This is true, but irrelevant. It says nothing about whether Avion has the authority to make binding governmental decisions.

---

<sup>5</sup> These powers do not exist outside of cities. ORS 758.010(1) (“Except within cities, any person has a right and privilege to construct, maintain and operate its water \* \* \* service lines, fixtures and other facilities along the public roads in this state \* \* \* free of charge, and over lands of private individuals[.]”).

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

- “The franchise agreement authorizes Avion to enact rules and regulations related to the provision of water services to its customers, which Avion has done.” Defendant’s Response at 13. This is true to an extent, but irrelevant. Avion’s authority under the franchise agreement is limited to promulgating “such reasonable rules and regulations governing the conduct of [Avion’s] business as shall be reasonably necessary to enable [Avion] to exercise its rights and perform its obligations under th[e] franchise, and to assure uninterrupted service to its customers.” Wick Decl., Ex. 6 at 5. Any such regulations are “subject to the provisions of th[e] ordinance and any other governmental regulations.” *Id.* Thus, these are rules governing Avion’s own business, promulgated to comply with the City’s requirements. They do not constitute the exercise of governmental decision making.
- “Avion has made the ‘internal policy decision’ to share monthly reports of its new and terminated customers with Bend, to facilitate the city’s sewer billing.” Defendant’s Response at 13. This is true, but irrelevant. Again, this fact says nothing about whether Avion makes binding governmental decisions. Sharing business records is not a governmental decision.
- “Avion decides whether it needs to renovate or put in new pipes; Bend has ‘no say.’” Defendant’s Response at 13. This is true, to an extent, but irrelevant. Cities have “no say” in a lot of decisions businesses make. But it also is true that the franchise agreement requires Avion to conduct its operations “including installation, construction or maintenance of its facilities, in a safe and workmanlike manner so as to not present a danger to the public or City.” Wick Decl., Ex. 6 at 2. The franchise also requires that Avion “construct and maintain those portions of its facilities that are located within the City of Bend

1           \* \* \* in compliance with City and State standards for the provision of the  
2           service,” with specific standards in the franchise agreement itself. *Id.* at 3-4.  
3           Avion “shall maintain and improve its facilities according to generally  
4           accepted practices and standards in the regional water utility industry.” *Id.* at  
5           4. The City of Bend “shall have the right to inspect all construction or  
6           installation of [Avion] facilities.” *Id.* at 6. Thus, Avion is bound by the  
7           franchise agreement to maintain its pipes and facilities to certain standards. In  
8           maintaining its facilities, Avion is not making binding governmental  
9           decisions, and defendant fails to articulate otherwise.

10       As is evident, each of the facts identified by defendant are undisputed. None of them,  
11       however, demonstrate that Avion has the authority to make decisions that would be  
12       binding on government.

13           Defendant has failed to identify a genuine issue of material fact involving the  
14       third *Marks* factor. There is no legal or factual basis to conclude that Avion has made or  
15       has the authority to make binding governmental decisions. Accordingly, this factor  
16       weighs *against* a finding that Avion is the functional equivalent of a public body.

17                               **4.     Avion does not receive financial support from government.**

18           The fourth *Marks* factor concerns the “nature and level of government financial  
19       involvement with the entity. (Financial support may include payment of the entity’s  
20       members or fees as well as provision of facilities, supplies, and other nonmonetary  
21       support).” 319 Or at 463-64. This factor turns on whether the entity is receiving public  
22       money. *Irwin Memorial*, 640 F2d at 1056 (evaluating whether American Red Cross  
23       receives federal money apart from its governmental contracts); *Tatoian Decl.*, Ex. 6 at 4  
24       (Attorney General opinion considering whether entity receives public funds). Defendant  
25       relies on Avion’s franchise agreement, use of public rights-of-way, and “other financial  
26

HARRANG LONG P.C.  
111 SW Columbia St.,  
Suite 950  
Portland, OR 97201  
Phone (503) 242-0000  
Fax (541) 686-6564

1 arrangements” to argue that Avion “has significant financial involvement with  
2 government” such that it is the functional equivalent of a public body. Defendant’s  
3 Response at 14. They do not.

4 Before discussing the merits of defendant’s arguments, it is helpful to examine a  
5 case where a court found that this factor had been satisfied. In *Laine*, the Oregon Court  
6 of Appeals held that the fourth *Marks* factor had been met because

7 “the city provided nearly all of the fire department’s  
8 financial support. It provided the department with its  
9 equipment, buildings and money for personnel training.  
10 The city owned the fire hall and paid for its upkeep. The  
11 city also paid for the insurance on the fire trucks and the  
12 workers, including workers’ compensation insurance. The  
13 city paid small monthly salaries to the fire chief, an  
14 assistant fire chief and a secretary-treasurer. The city also  
15 paid a lump sum to the department to be distributed to the  
16 volunteer members as ‘call pay.’”

17 134 Or App at 658. Nothing identified by defendant in this record comes close to  
18 establishing that character or amount of financial support.

19 Defendant overstates the extent to which Avion’s franchise agreement with the  
20 City of Bend is “exclusive.” Defendant’s Response at 14. By its terms, the franchise  
21 agreement is “nonexclusive.” Wicks Decl., Ex. 6 at 2 (Section 3). The nonexclusively  
22 provision is two-fold. First, the City reserves its right to operate its *own* water utility. As  
23 to that reservation, the City of Bend agrees not to operate its own water utility within  
24 Avion’s service area, unless Avion “will not serve the customer(s) or [Avion] is not  
25 providing service that meets the standards of a public water utility.” *Id.* Second, the City  
26 reserves the right “to grant a similar use of streets, alleys, and public ways to another  
person.” *Id.* Read correctly, the franchise agreement does not provide Avion with a level  
of financial or nonmonetary support to implicate the third *Marks* factor.



1 Defendant again emphasizes Avion’s “ability to build and operate its water  
2 system using Bend’s streets and rights-of-way.” Defendant’s Response at 14-15. As  
3 described above, Oregon law vests cities with the authority to regulate their rights-of-  
4 way, and the City of Bend’s Municipal Code requires franchise agreements with utilities  
5 before the utility may operate within City limits. That the City of Bend has chosen to  
6 exercise its authority to regulate utilities operating within its rights-of-way does not speak  
7 to the nature and level of government’s financial involvement with Avion. Indeed, the  
8 franchise agreement – like any contract – comes at a cost to Avion:

- 9 • Avion must “pay, save harmless and indemnify City from any loss or claim  
10 against City on account of or in connection with any activity of [Avion] in the  
11 construction, operation or maintenance of its facilities and services,” Wick  
12 Decl., Ex. 6 at 2;
- 13 • Avion must secure comprehensive liability insurance at specific levels and  
14 identify the City of Bend as an insured, *id.* at 3;
- 15 • Avion must construct and maintain its facilities to conform to certain  
16 standards, *Id.* at 3-4;
- 17 • Avion must obtain permits from the City and comply with City ordinances  
18 concerning use of the City’s right-of-way, *Id.* at 5;
- 19 • Avion “at its own cost and expense and in a manner approved by the City”  
20 must “replace and restore all paving, sidewalk, driveway or surface of any  
21 street or alley disturbed, in as good condition before the disturbance,” *Id.* at 5;
- 22 • If the City of Bend requires Avion to “change the location of any facility  
23 within the public right of way,” Avion must pay for the expense of any such  
24 change or removal, *Id.* at 5; and

- 1           • Avion must pay a franchise fee to the City of Bend, totaling six percent of  
2           Avion’s gross revenue within the City limits, *Id.* at 6, City of Bend Municipal  
3           Code 3.20.020.

4           Defendant ignores all these costs, and instead argues that Avion financially  
5           benefits from its dealings with the City of Bend because it need not pay the City to obtain  
6           an easement or right-of-way. Defendant’s Response at 15. Nothing supports that  
7           statement, including the evidence cited by defendant, and it is debunked by the plain  
8           language of the franchise agreement. Jason Wick testified that Avion *does* pay to install  
9           waterlines in city streets, both in the form of the franchise fee and by obtaining individual  
10          permits. Wick Tr. at 49:2-18.<sup>6</sup> Similarly, Mr. Wick testified that the City of Bend asked  
11          Avion to install a waterline to its airport, and in consideration for Avion’s running the  
12          waterline to the airport, the City of Bend provided Avion an easement to the airport at no  
13          cost to Avion:

14                   “A.    The easement for airport line.

15                   “Q:   And what was the purpose of this easement?

16                   “A:    The City wanted water, and it was the shortest  
17                   distance so it was the cheapest option.

18                   “Q:    So the City provided an easement so that you could  
19                   provide a waterline to their facility from wherever your  
20                   main connection was?

21                   “A:    Correct.

22                   “Q:    And this was – provision of this easement allowed  
23                   you, allowed Avion, to provide water to the City that the  
24                   City would then pay for?

---

24          <sup>6</sup> Excerpts of Mr. Wick’s deposition transcript are attached as Exhibit 3 to the  
25          Declaration of Steven M. Wilker in Support of Defendant Source Weekly’s  
26          Opposition to Plaintiff’s Motion for Summary Judgment.

1           “A: It was our requirement so we would do the project.  
2           We told them we needed an easement for our waterline so  
3           they provided it.

4           “Q: And they needed the water, they needed the  
5           waterline so they provided the easement?”

6           “A: I’m thinking they were more concerned about fire  
7           flow because it’s to the Bend airport and the line does  
8           provide fire flow; so it’s also a safety issue.”

9 Wick Tr. 57: 2-21. The testimony could not be clearer: The City of Bend asked Avion to  
10 run its facilities to the City’s airport so that the City could have water; as a necessary  
11 condition of running the waterline to the airport, Avion requested an easement over City  
12 land. This does not support a finding of financial benefit to Avion – it shows a logical,  
13 mutually beneficial deal in which the City provided Avion the means (the easement) to  
14 provide the City with the resources it needed (water at the City’s airport).

15           Defendant contends that Avion “attempts to wave away these facts by arguing  
16 that its franchise agreement with Bend ‘is merely a type of license’ which ‘does not grant  
17 Avion a property interest in the city’s rights-of-way.” Defendant’s Response at 15  
18 (quoting Avion’s Motion at 16). Avion waved nothing away by citing controlling,  
19 applicable authority, where Oregon appellate courts have held that utility franchise  
20 agreements *are* contractual licenses which do not provide the utility with a property  
21 interest in the city’s rights-of-way. Defendant has cited no contrary authority and has  
22 failed to explain why Avion’s franchise agreement with the City of Bend provides it  
23 greater rights than those at issue in the cases cited.

24           Finally, defendant points to several other facts that, in its view, demonstrate that  
25 Avion receives various other forms of financial and nonmonetary support from  
26 government. *See* Defendant’s Response at 15-16. None of the identified facts support  
such a conclusion. Indeed, each fact merely demonstrates that Avion and the City of  
Bend enter into mutually beneficial agreements, supported by consideration. In short,

1 defendant's position appears to be that, if Avion's agreements with the City of Bend are  
2 not disadvantageous to Avion, it is somehow receiving financial support from  
3 government. A private entity does not receive financial support from government merely  
4 because the government compensates the entity for services rendered. *Fosham*, 445 US  
5 at 180 ("Grants of federal funds generally do not create a partnership or joint venture  
6 with the recipient, nor do they serve to convert acts of the recipient from private acts to  
7 governmental acts absent extensive, detailed, and virtually day-to-day supervision.").  
8 Nothing in this record establishes that Avion receives any financial support from  
9 government.

10 Defendant has failed to identify a genuine issue of material fact involving the  
11 fourth *Marks* factor. No government entity pays for Avion's facilities, equipment, or  
12 personnel. There is no legal or factual basis to conclude that Avion receives any financial  
13 support from government. Accordingly, this factor weighs *against* a finding that Avion  
14 is the functional equivalent of a public body.

15 **5. Avion is not controlled by government.**

16 The fifth *Marks* factor concerns the "nature and scope of government control over  
17 the entity's operation." 319 Or at 464. Defendant maintains that government exercises  
18 significant control over Avion because (1) the PUC regulates Avion; (2) the Oregon  
19 Water Resources Department approves Avion's water rights permits and water  
20 management and conservation plans; (3) the Oregon Health Authority monitors Avion's  
21 water quality, well construction, and requires Avion to provide customers with annual  
22 reports on water quality; and (4) Avion's day-to-day operations are governed under the  
23 franchise agreement with the City of Bend. Defendant's Response at 16-17. Defendant's  
24 arguments confuse those forms of regulation with control over Avion. None of these  
25 facts – alone or together – rise to the level of governmental control under *Marks*.

1           In *Marks*, the court evaluated government’s supervision over the entity’s “day-to-  
2 day operation.” 319 Or at 465. In *Laine*, this factor was satisfied where the city could  
3 elect and remove the fire chief, define the powers and duties of the fire department,  
4 define the geographic scope of the department’s activities, and control the department’s  
5 operating budget. 134 Or App at 665. Moreover, the fire department’s own bylaws  
6 recognized the city’s authority by providing that “the fire chief was responsible to the  
7 mayor, the city council and the city manager for the proper administration and efficient  
8 operation of the department. In accordance with the bylaws, the chief made monthly  
9 reports to the city council concerning everything from membership attendance to the  
10 number of emergency calls to vehicle maintenance.” *Id.* at 665-66. The city’s control  
11 over the fire department was so extensive that “if the city had withdrawn its financial  
12 support, the fire department would have ceased to exist.” *Id.* at 665. *See also Irwin*, 640  
13 F2d at 1056 (although American Red Cross was not “totally free from federal  
14 supervision,” “[i]t is settled that government officials do not direct the everyday affairs of  
15 the Red Cross”).

16           As explained below, there are no comparable facts in this record to conclude that  
17 Avion is controlled by government.

18                           **a.     PUC regulation**

19           The PUC does not control Avion’s operations.<sup>7</sup> The PUC regulates Avion  
20 *because* it is a private utility and not a municipal utility. *See* ORS 757.005(1) (defining  
21 ///  
22  
23

---

24 <sup>7</sup> Defendant’s position that the PUC controls Avion because it regulates Avion’s rates  
25 is inconsistent with its previous argument that Avion exercises governmental  
26 authority by setting its own rates.

1 public utility). Because public utilities are “natural monopolies,” they “often are granted  
2 exclusive territories within which to operate,” and their rates are regulated by the PUC to  
3 balance the interests of the consumer and utility investor. *Gearhart v. Pub. Util. Comm'n*  
4 *of Oregon*, 356 Or 216, 219-20, 339 P3d 904 (2014); ORS 756.040(1).

5 As noted above, no court has determined that a public utility is subject to public  
6 records law, even though all public utilities are regulated by the PUC. Although the PUC  
7 regulates certain aspects of Avion’s services, it does not have a say about the day-to-day  
8 operations of the utility. The PUC does not manage or supervise Avion’s day-to-day  
9 operations, and the PUC has no say in who Avion employs or appoints to Avion’s Board  
10 of Directors. Rather, Avion’s personnel manage its day-to-day operations and its  
11 shareholders appoint its Board of Directors. Wick Decl. ¶¶7-8. There is therefore no  
12 basis to conclude that the PUC controls Avion’s operation.

13 **b. Oregon Water Resources Department**

14 The Oregon Water Resources Department does not exercise governmental control  
15 over Avion when it issues water rights certificates to Avion. “[A]ny person intending to  
16 acquire the right to the beneficial use of any of the surface waters of this state” must  
17 “make an application to the Water Resources Department for a permit to make the  
18 appropriation.” ORS 537.130(1). Only certain uses of water do not require a water right  
19 certificate. ORS 537.141 (emergency firefighting, nonemergency firefighter training,  
20 forest management activities). Once a water right certificate is issued, it is generally  
21 perpetual as long as the water continues to be applied to a beneficial use. ORS  
22 537.250(3).

23 ///

24 ///

25 ///

1 Nothing about the water rights certificate process allows government to control  
2 Avion's operation. Defendant has not identified any factual or legal basis to suggest that  
3 the Oregon Water Resources Department continues to supervise Avion after it has issued  
4 a water rights certificate, or that the department exercises any other type of control over  
5 Avion's operations.

6 Similarly, the Oregon Water Resources Department does not exercise  
7 governmental control over Avion because Avion files water management and  
8 conservation plans with the department.<sup>8</sup> Oregon law requires public and private water  
9 suppliers to submit plans for the department's review. OAR 690-076-0030 and OAR  
10 690-086-0040 (defining "municipal water suppliers" and "agricultural water suppliers"  
11 subject to regulations). The purpose is to "ensure the efficient use of the state's water  
12 resources and to facilitate water supply planning." OAR 690-086-0010(1). Defendant  
13 fails to explain how this process requires the Oregon Water Resources Department to  
14 supervise or exercise any other type of control over Avion's operations. Nor is there a  
15 legal or factual basis to reach such a conclusion. As a result, there is no basis to conclude  
16 that the Oregon Water Resources Department controls Avion's operation.

17 **c. Oregon Health Authority**

18 The Oregon Health Authority does not control Avion's operation. All water  
19 systems "providing water for human consumption through constructed conveyances other  
20 than pipes to at least 15 service connections or that regularly serves 25 individuals daily  
21 at least 60 days of the year" must file water quality reports. OAR 333-061-0010(2).  
22  
23

---

24 <sup>8</sup> Defendant's argument about water conservation plans is contrary to its prior  
25 argument that Avion exercises governmental authority by creating "water  
26 conservation plans for its customers." Defendant's Response at 13.

1 These reports are filed with the Oregon Health Authority and provided to the water  
2 utility's customers. OAR 333-061-0043. The report contains information about toxins,  
3 metals, and contaminants found in the utility's water supply. *Id.*

4 Defendant fails to explain how preparing and sharing water quality reports  
5 subjects Avion to control by the Oregon Health Authority. Nothing cited demonstrates  
6 that the Oregon Health Authority supervises or exercises any other type of control over  
7 Avion's operations. Nor is there a legal or factual basis to reach such a conclusion. As a  
8 result, there is no basis to conclude that the Oregon Health Authority controls Avion's  
9 operation.

10 **d. City of Bend**

11 The City of Bend does not control Avion's operations.<sup>9</sup> The City of Bend has no  
12 say about the day-to-day operations of Avion. As defendant itself acknowledges, "Avion  
13 decides whether it needs to renovate or put in new pipes; Bend has 'no say.'" *Defendant's*  
14 *Response* at 13. The City of Bend does not manage or supervise Avion's  
15 day-to-day operations, and it has no say in who Avion employs or appoints to Avion's  
16 Board of Directors. There is no basis to conclude that the PUC controls Avion's  
17 operation.

18 Defendant has failed to identify a genuine issue of material fact involving the fifth  
19 *Marks* factor. Because there is no legal or factual basis to conclude that Avion's  
20 operations are controlled by government, this factor weighs *against* a finding that Avion  
21 is the functional equivalent of a public body.

22  
23  
24 <sup>9</sup> Defendant's position again is contradictory: Defendant argues both that Avion has  
25 extensive authority akin to governmental decision making under its franchise  
26 agreement with the City of Bend, *Defendant's Response* at 13, and that Avion is  
controlled by the City of Bend, *Defendant's Response* at 17.



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**6. Avion’s employees are not government officials or government employees.**

The sixth *Marks* factor is undisputed: Avion’s officers and employees are not governmental officials or employees. *See* Defendant’s Response at 18. Accordingly, this factor weighs *against* a finding that Avion is the functional equivalent of a public body.

**C. Defendant’s public interest arguments are mistaken and misplaced.**

Defendant makes other arguments why this Court should allow it to pry into Avion’s private affairs. For example, defendant argues it is legally significant that the requested information is unavailable from any other governmental entity. Defendant’s Response at 13-14. That is not a factor under *Marks*. If it were, every private entity would be subject to Oregon’s Public Records Law. The public is not entitled to private information merely because defendant is curious about it and cannot obtain it elsewhere.

Defendant’s emphasis on the “public interest in monitoring water use” also is irrelevant to the issue before this Court. The *Marks* factors do not concern the nature of the records requested; they concern the nature of the entity from which the records are sought. If the entity is not a public body or the “functional equivalent” of a public body, it does not matter how much the public is interested in the entity’s records.

Public utilities like Avion are not listed among those entities subject to Oregon’s Public Records Law, despite their existence 60 years before the law was enacted. The legislature has, however, determined that *certain* records of a public utility are subject to disclosure, but only to the extent they are within the government’s possession. *See*

///  
///  
///  
///

1 Avion’s Motion at 20. Absent a determination that Avion is the functional equivalent of  
2 a public body, this Court cannot order Avion to disclose its records to defendant.

3 **III. CONCLUSION**

4 For all these reasons, Avion requests that the Court enter summary judgment in  
5 Avion’s favor.

6 DATED this 7th day of August, 2023.

7 HARRANG LONG P.C.

8

9 By: s/ Erica Tatoian  
10 C. Robert Steringer, OSB #983514  
11 bob.steringer@harrang.com  
12 Erica Tatoian, OSB #164896  
13 erica.tatoian@harrang.com  
14 Of Attorneys for Plaintiff AVION WATER  
15 COMPANY, INC., an Oregon corporation

16 Trial Attorney: C. Robert Steringer

17

18

19

20

21

22

23

24

25

26

