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May 26, 2022

Kyle Wuepper
Attorney for Avion Water Company
[REDACTED]

Hanna Merzbach
The Source Weekly
[REDACTED]

Dear. Mr. Wuepper and Ms. Merzbach:

Thank you for your prompt and insightful presentation of the issues. This letter constitutes my ruling in the matter of the Source Weekly's appeal of Avion's denial of their recent public records request.

BACKGROUND

- The Source Weekly, a newspaper in Deschutes County, requested, pursuant to Oregon's Public Records Law, the following records from Avion: street addresses for Avion's top 15 residential water users in calendar year 2021; The number of gallons of water used by these customers in 2021; the amount of money spent on water by these customers in 2021.
- In their response to the Source, Avion declined to provide the requested records and asserted that they are not subject to Oregon's Public Records Law because they are neither a public body or the functional equivalent of a public body.
- Pursuant to ORS 192.415, on May 19, 2022, the Source petitioned my office to review Avion's denial of their public records request.
- In their response to the Source's appeal (May 23, 2022 letter to me with copy to the Source), Avion reiterated their argument that they are not a public body, nor are they the functional equivalent of a public body, thus they are not subject to Oregon's public records law. Avion also advanced a new argument: Assuming arguendo that Avion is found to be the functional equivalent of a public body, the records requested by the Source are nonetheless exempt from disclosure based on ORS 192.355(28) which on its face exempts from disclosure certain personally identifiable information of customers of public utilities.

ANALYSIS

Avion argues that they are not subject to Oregon’s Public Records law because they are not a public body, nor are they the functional equivalent of a public body. They also argue in the alternative that if they are found to be a public body, the records requested in this matter are exempt from disclosure per the terms of ORS 192.355(28).

I. Is Avion a Public Body? If Not, Are They the Functional Equivalent of One?

The answer to the first question is straightforward: No, per the terms of Oregon’s Public Records law, Avion does not meet the definition of a public body¹, and the Source does not dispute this. Avion is a private company that provides water to customers who pay Avion for the water they use; they are not a government utility.

The parties focused their arguments on the issue of whether Avion is the “functional equivalent” of a public body. The parties are correct to cite to the Oregon Supreme Court case of *Marks School Fact-Finding Team*, 319 OR 451 (1994) as the seminal case on the issue of whether a non-public entity is the functional equivalent of a public body such that they must comply with Oregon’s Public Record’s law. The parties understand this case and accurately described the court’s analysis, so I will jump right to the holding of the Court:

[W]e hold that the determination of whether a particular entity is a “public body” * * * will depend on the character of that entity and the nature and attributes of that entity's relationship with government and governmental decision-making. In determining the proper characterization of a particular entity, the following factors * * * are relevant, although no single factor is either indispensable or dispositive:

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

¹ “Public body’ includes every state officer, agency, department, division, bureau, board and commission; every county and city governing body, school district, special district, municipal corporation, and any board, department, commission, council, or agency thereof; and any public agency of this state.” ORS 192.311(4)

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

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

Id. at 463

With this framework and guidance in mind, here's my analysis:

- **Avion's origin (e.g., whether Avion was created by government or had some origin independent of government)**
 - There is no evidence in the record regarding Avion being created by government, or having an origin that is anything but what they describe on their website: a private company formed in 1968 to provide water to a subdivision in SE Bend.
 - This factor militates against a finding of Avion being the functional equivalent of a public body.

- **The nature of the function assigned to and performed by Avion (e.g., whether that function is one traditionally associated with government or is one commonly performed by private entities)**
 - Oregon State Government has a long history of providing water to Oregonians and regulating the use of water consumed by Oregonians. As described in detail in the *History of the Oregon Public Utility Commission*, which is attached to this opinion (Exhibit 1) and incorporated as part of my ruling: "Utility regulation in Oregon has its roots in statutes adopted by the Provincial Government to the Oregon Territory prior to statehood." <https://www.oregon.gov/puc/about-us/Pages/History.aspx>

While Avion is correct to point out that the provision of utilities has been historically *shared* by both public and private entities, it is traditionally *associated* with government, as government water utilities provide water to over 80 percent of US residents.

 - This factor is supportive of a finding of Avion being the functional equivalent of a public body.

- **The scope of the authority granted to and exercised by Avion (e.g., does Avion have the authority to make binding governmental decisions, or is it limited to making nonbinding recommendations)**
 - Avion has the authority to establish water utility rates for their customers. While this authority is broad, it is not absolute, as it is tempered by the fact that Oregon's Public Utility Commission (PUC) exercises "rate regulation" authority over Avion and other private water utilities (ORS 757.061).

This PUC oversight authority, while significant, does not serve to vitiate Avion of the “scope of authority” that the Supreme Court had in mind in *Marks* for this prong of their “functional equivalent” test. In this prong, the Court is interested in an assessment of whether a non-governmental actor merely makes a nonbinding recommendation to a government body, or whether they on their own issue a decision that will impact the public. The Court was not concerned with whether a decision issued by a nongovernmental actor is subject to post hoc regulatory review.

- This factor is supportive of a finding of Avion being the functional equivalent of a public body.
- **The nature and level of government financial involvement with Avion. (Financial support may include payment of Avion’s members or fees as well as provision of facilities, supplies, and other nonmonetary support)**
 - There is no evidence in the record of government financial involvement with Avion, but there is evidence of significant nonmonetary governmental support provided to Avion. Specifically, Avion entered into a franchise agreement with the City of Bend (“Avion Water Service Franchise”) that grants two significant nonmonetary supports to Avion:
 - The City of Bend granted Avion the right and privilege to construct and operate its facilities on, over, and under City streets and rights of way.
 - The City of Bend agreed to not serve new customers within Avion’s service area unless Avion chose not to continue to serve the customers or Avion’s provision of service was inadequate.
 - Avion points out that this franchise agreement only applies to their operations within the City of Bend, and that they have numerous customers outside of the city limits of Bend. Fair enough, however, this factor is concerned with the nature and level of government nonmonetary support provided to Avion. This step of the *Marks* test does not ask if nonmonetary financial support provided to Avion constitutes all of the support required to operate Avion. Nor does it ask if any of the government support received by Avion is limited by geography or some other factor. This step of the *Marks* test requires me to assess whether Avion has received any government support, and if they have, to assess the nature and level of this support.

I find that the franchise agreement between Avion and the City of Bend constitutes the type of nonmonetary support contemplated by the Supreme Court in *Marks*. I also find that this level of nonmonetary government support is significant.
 - This factor is supportive of a finding of Avion being the functional equivalent of a public body.

- **The nature and scope of government control over Avion’s operation**
 - Avion has the authority to establish service rules and regulations related to provision of water to their customers, however, this authority is limited by the Oregon Public Utility Commission’s “service regulation” authority. See ORS 757.061(1)(b). Here are a few examples of the numerous types of government control exercised by the Public Utility Commission (PUC) over Avion and other private water utilities:
 - Requirement for Avion to keep and maintain certain records. (ORS 757.125);
 - Requirement for Avion to keep “filing schedules” in their office. (ORS 757.240);
 - Requirement for Avion to conduct testing of appliances used for the measuring of service, when requested by the PUC. (ORS 757.255);
 - Requirement for Avion to obtain preapproval from the PUC prior to disposal, mortgage, or encumbrance of certain operative utility property or consolidation with another utility. (ORS 757.480).
 - This factor is supportive of a finding of Avion being the functional equivalent of a public utility.
- **The status of Avion's officers and employees (e.g., whether the officers and employees are government officials or government employees)**
 - There is no evidence in the record of Avion officers or employees being government officials or government employees.
 - This factor militates against a finding of Avion being the functional equivalent of a public body.

Having applied the *Marks* functional equivalence test, I conclude that four of the factors are supportive of Avion being the functional equivalent of a public utility and two of the factors militate against such a finding. Math, however, is an inappropriate discipline for deciding this case. In other words, an analysis that was limited to deeming a 4-2 “score” a “win” for the Source Weekly would be counter to the guidance provided by the Supreme Court in *Marks*. As stated earlier in this opinion, the Supreme Court emphasized that all factors are relevant to a functional equivalence analysis, and none are dispositive: “In determining the proper characterization of a particular entity, the [six] factors * * * are relevant, although no single factor is either indispensable or dispositive * * *” *Marks* at 464, FN 9.

At the end of the day, rulings in functional equivalence cases must focus on the relative importance of each factor to the unique circumstances present in each case, and apply a totality of the circumstances standard. This means that in some reviews, while only one factor may be supportive of an entity being the functional equivalent of a public body, and five factors, for example, may militate against such a ruling, the appropriate ruling might nonetheless be that the entity is the functional equivalent of a public body because the facts of the one favorable factor are particularly compelling.

Likewise, in some cases, five factors, for example, might be supportive of an entity being the functional equivalent of a public body and only one factor might militate against such a finding, yet the appropriate

ruling might nonetheless be that the entity is not the functional equivalent of a public body because the facts of the five factors in favor of functional equivalence might not be particularly compelling and the facts of the one factor on the other side of the equation might be strikingly significant.

Additionally, when I decide this matter, I must consider that I am required to read the public records law broadly, in furtherance of the Oregon Legislature’s underlying policy in favor of disclosure².

After considering everything just discussed, and dissecting and analyzing the specific facts in each of the six factors, I find that the facts present in the four factors that are in favor of a finding of Avion being the functional equivalent of a public body provide the most accurate characterization of Avion’s status. In other words, I find that for the purposes of the Source Weekly’s public records request in this matter, Avion is the functional equivalent of a public body.

Factors I found to be particularly persuasive, included: the provision of water utility service to the public is traditionally associated with the government, to a significant degree (over 80 percent of US customers receive their water from the government). The City of Bend entered into a franchise agreement with Avion that provides Avion with an exclusive agreement to provide water service in a particular geographic area of the City and authorizes Avion to use City streets and rights-of-way to do it. Avion sets their own water rates. Avion is regulated by the Oregon Public Utility Commission. Additionally, we’re in the West, we’re in a drought³, and this request relates to water usage.

II. Are the Records Exempt from Disclosure Per ORS 192.355(28)?

In addition to arguing that they are not a public body subject to Oregon’s public records law, Avion argues that even if they are deemed to be a public body, the records requested by the Source Weekly are exempt from disclosure per the terms of ORS 192.355(28). This statute states:

The following public records are exempt from disclosure under ORS 192.311 to 192.478: Personally identifiable information about customers of a municipal electric utility or a people’s utility district or the names, dates of birth, driver license numbers, telephone numbers, electronic mail addresses or Social Security numbers of customers who receive water, sewer or storm drain services from a public body as defined in ORS 174.109. * * *

The Source Weekly asked Avion for the service addresses of the 15 largest users of water in 2021, the number of gallons used by those customers in 2021, and the amount of money spent on water by these 15 customers in 2021.

² “Reading the provisions broadly is also consistent with the legislative policy underlying the Inspection of Public Records law, as that policy has been explained by the Supreme Court. * * * The Inspection of Public Records law is built on the underlying policy that favors disclosure of public records. Oregon has a strong and enduring policy that public records and governmental activities be open to the public.” *Bialostosky v. Cummings* 319 Or App 352, 359 (2022) (Internal citations omitted).

³ 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>

Avion argues that the addressees of their water customers constitute personally identifiable information, thus they are prohibited by Oregon law from providing the Source with the addresses of their 15 largest users of water.

Avion does not articulate how the exemption in ORS 192.355(25) applies to the non-address requests made by the Source Weekly: the amount of gallons of water consumed by Avion's top 15 users and the amount of money spent on water by these 15 customers.

Regarding the Source Weekly's request for the amount of gallons of water used by Avion's top 15 residential customers in 2021, and the amount of money each of these 15 customers spent on water, there is no credible argument to be made that ORS 192.355(28) exempts this information from disclosure.⁴ I find this exemption does not apply to the number of gallons of water consumed in 2021 by Avion's top 15 residential consumers of water, nor does it apply to the amount of money spent on water by these customers in 2021.

The issue of whether this exemption bars the release of the addresses of Avion's top 15 consumers of water is a more interesting question, and one that reasonable people can disagree on. Obviously, residential addresses are not one of the specific categories of personally identifiable information listed in the statute, yet one can colorably argue that the list is not exclusive, and residential addresses should be considered included in the statute's purview of personally identifiable information.

When deciding which of these two reasonable arguments should carry the day, I am guided Oregon's public records law which places the burden of persuasion on Avion. "The burden is on [Avion] to sustain its action⁵." ORS 192.411(1)

Because Avion and the Source Weekly both make persuasive arguments, and neither argument convinces me that is more likely than not the accurate legal analysis, I find that Avion did not carry their burden of persuasion in this matter. In other words, because Avion failed to convince me that residential addresses of their water users constitute a type of personally identifiable information that falls within the purview of ORS 192.355(25), I find that these residential addresses are not exempt from disclosure by this statute.

CONCLUSION

For the purposes of the Source Weekly's public records request at issue in this case, Avion is the functional equivalent of a public body, thus they are subject to Oregon's public records law.

⁴ Nor does Avion attempt to make such an argument. Avion's exemption argument is implicitly focused on the disclosure of the addresses of the top 15 consumers of water; Avion did not directly address the issue of whether the usage numbers, and fees paid, could be released without being connected to particular addresses.

⁵ I did not apply this burden to the initial question of whether Avion is the functional equivalent of a public body. Having determined that they are, it is appropriate at this step of my review to place the burden of persuasion on Avion.

The personally identifiable information exemption contained in ORS 192.355(28) does apply to the records requested by the Source Weekly, thus, Avion must provide the Source with the records they requested.

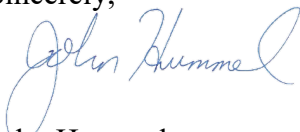
The default length of time to comply with public records appeal orders, per ORS 192.407(3)(a), is seven days, however, the statute grants me authority to extend the deadline to a date I “conclude is appropriate.” Because ORS 192.368 provides a mechanism for members of the public to request their home addresses not be disclosed by a public body, if disclosure would imperil the personal safety of the individual or a family member residing with them, I extend the deadline for Avion to comply with this order, but only as to the part of my order that requires the disclosure of addresses (my order to disclose water usage and money spent on water will adhere to the default length of seven days). This time extension will afford Avion sufficient time to process exemption requests from any of their 15 top water users who believe their personal safety would be at risk if their address was released by Avion⁶.

By 5:00 PM on June 2, 2022, Avion must either provide the Source Weekly with records that contain the number of gallons used in 2021 by the 15 largest residential users of water and the amount of money spent on water in 2021 by these 15 customers⁷, or seek review of my decision in Deschutes County Circuit Court.

By 5:00 PM on June 16, 2022, Avion must either provide the Source Weekly with records that contain the service addresses of their 15 largest users of residential water in 2021, or seek review of my decision in Deschutes County Circuit Court.

Thank you again for your timely submission of pleadings and for your professional interactions during this process.

Sincerely,



John Hummel
District Attorney

⁶ If any of these 15 customers request an exemption, and if Avion grants any exemption request pursuant to ORS 192.368, the Source of course has the legal right to seek review of the decision by filing a petition with my office.

⁷ Avion never addressed whether they are in possession of responsive records. It is reasonable to assume that a water utility is in possession of records that contain the quantity of water consumed by their customers and the amount of money spent by their customers to purchase water.



History of the Oregon Public Utility Commission

About Our Past

Utility regulation in Oregon has its roots in statutes adopted by the Provincial Government to the Oregon Territory prior to statehood.

July 5, 1843—the first act regulating a “public utility” enacted by the then “Provincial Government,” six years before the Territorial Government was established. This included regulating mills and millers.



Boston Mill, Albany, Oregon—1892

First built in 1853, then rebuilt in 1862 after a fire. It is the oldest continually operating water powered grist mill in Oregon.

October 19, 1876—the first instance in Oregon history of the regulation of a utility by a commission at the recommendation of Governor L.F. Grover and enacted by the Legislature. It was designed to effectively regulate the activities of the Locks Company.

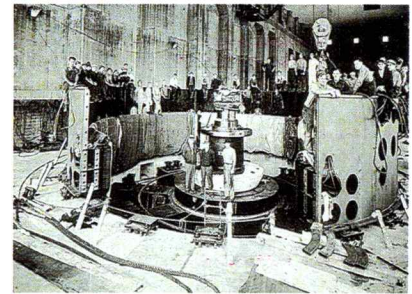
October 10, 1898—the Board of Railroad Commissioners was abolished, leaving the responsibility of accepting annual reports from regulated entities to be completed by the Secretary of State’s Office.

February 19, 1907—The Railroad Commission was created with an elected three member board.

November 29, 1912—The Railroad Commission’s jurisdiction was extended to include utilities and transportation regulation with the addition of the “Public Utility Act of 1911.” This act was the first place in Oregon history to mention the regulation of telephone service.

July 1, 1915—February 28, 1931—the Railroad Commission was renamed the Public Service Commission of Oregon.

March 1, 1931—The Commission dropped from three members to one and the name was changed to the Public Utilities Commissioner, which was appointed by the governor.

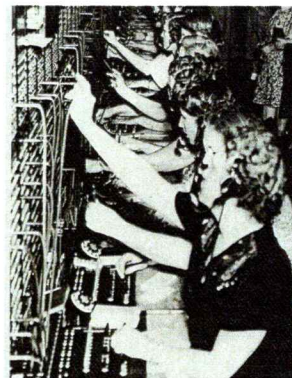


Bonneville Dam Turbine being assembled, which was completed in 1937.

1986—Oregon voters approved a ballot measure changing the office back to a three-person, Governor-appointed Commission and changing the name to the Public Utility Commission of Oregon.

1995—Congress deregulated much of the transportation industry. The regulation of motor transportation and rail safety was transferred to the Oregon Department of Transportation.

1999—House Bill 3615 gave the Governor the authority to appoint the Commission Chair.



Telephone operators demonstrating the switchboard of early years.

