

**From:** [Tamara Barnes](#)  
**To:** [Public Records Task Force](#)  
**Subject:** Public Records issues- Lane County  
**Date:** Monday, May 09, 2016 10:58:10 AM  
**Attachments:** [McNamara Motion for Summary Judgment.pdf](#)

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I am going to be unable to make the meeting today here in Eugene. In Lane County we have had issues with exorbitant cost for public records and problems getting responses, specifically from Lane County. It seems to me that since access to public records is a thing, that retrieval of such records should not be considered extra work.

We have here in Lane County an issue with Greenhill Humane Society who has contracted to run our public animal shelter (since 2012). Since Greenhill gets over \$500,000 per year of taxpayer dollars, we feel that they should be subject to Open Records laws, and provide documents upon request related to the public shelter.

We have had to file a lawsuit (attached) to compel Greenhill to provide records relating to the operation of the public shelter. Since its becoming more common for government agencies to contract out the running of some services, there is no provision in Oregon law that covers this issue specifically.

Any entity that takes taxpayer dollars and runs via public contract an agency or program, or part of a program formerly run by the government, should be subject to Oregon Open Records laws. This should exclude, for example a contracting company that builds a school.

We have tried for over two years to obtain these records both from Greenhill Humane Society and the government jurisdictions that have contracted with Greenhill. (Lane County, City of Eugene, City of Springfield). Greenhill flatly refuses to comply, and the jurisdictions tell us that they are not the custodians of the records, Greenhill is. The one time the City of Eugene offered to research an item for us, the cost was prohibitive and we already had that information anyway.

As you can see, this run around is far from transparent and there is no accountability for these vast sums of taxpayer dollars. This is a loophole that needs to be fixed. Would a service provided by the government for decades, across the country be considered traditionally governmental in nature? Greenhill is attempting to argue that animal sheltering is not a traditional government function, yet here in Lane County it was provided by the county for decades until 2012. This is another clarification needed in the laws.

We are waiting for the judge's decision in this case, but regardless, these loopholes should be closed and taxpayers should have access to records like this.

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*Anyone who remains silent when wrongdoing is witnessed is the reason it does not end.*

**"Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence."**

**- John Adams**

**"The truth is like a lion. You don't have to defend it. Let it loose. It will defend itself."**

**~ St. Augustine**



1 In support of this motion, Defendant relies upon the pleadings on file in this case, the  
2 attached exhibits, and the following points and authorities.

3 **POINTS AND AUTHORITIES**

4 **I. STATUTORY AND CASELAW BACKGROUND**

5 This action alleges a violation of the OPRA, specifically the unlawful failure of  
6 Plaintiff to respond to Defendant’s public records request in the manner required. Plaintiff—a  
7 contracted agency with the City of Springfield, the City of Eugene, and Lane County to  
8 provide shelter services for these public jurisdictions—is a public body pursuant to the OPRA  
9 regarding documents and records pertaining to the 1st Avenue Shelter, the public animal  
10 shelter for those public jurisdictions. Responses to Defendant’s public records requests sent to  
11 the City of Springfield, the City of Eugene, and Lane County make clear that Greenhill  
12 Humane Society and/or the 1st Avenue Shelter are the custodians of public records pertaining  
13 to Springfield, Eugene, and Lane County. As such, Plaintiff is required to comply with the  
14 OPRA in a timely fashion.

15 Plaintiff has been, at all times relevant to this motion, acting as a functional equivalent  
16 of a public body in possession and control of the records requested by Defendant.

17 Under ORS 192.420(1), “Every person has a right to inspect any public record of a  
18 public body in this state, except as otherwise expressly provided by ORS 192.501 (Public  
19 records conditionally exempt from disclosure) to 192.505 (Exempt and nonexempt public  
20 record to be separated).” A local government entity, including a nonprofit corporation such as  
21 Plaintiff that is contracted to administer and manage a public entity such as the 1<sup>st</sup> Avenue  
22 Shelter, the only public animal shelter, is not allowed to refuse to provide copies of records  
23 that are not expressly exempt from disclosure under the above referenced portions of the  
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1 OPRA. ORS 192.420(1). Additionally, in responding to a public records request, a public  
2 body has an express legal duty to “separate the exempt and nonexempt” portions of any  
3 responsive records and “make the nonexempt material available for examination” to a records  
4 requestor. ORS 192.505.

5 Pursuant to ORS 192.440(1), “The custodian of any public record that a person has a  
6 right to inspect shall give the person, upon request: (a) A copy of the public record if the  
7 public record is of a nature permitting copying; or (b) A reasonable opportunity to inspect or  
8 copy the public record.” Furthermore, “If a person makes a written request to inspect a public  
9 record or to receive a copy of a public record, the public body receiving the request shall  
10 respond as soon as practicable and without unreasonable delay.” ORS 192.440(2). This  
11 section additionally provides:

12 The response of the public body must acknowledge receipt of the request and must  
13 include one of the following:

14 (a) A statement that the public body does not possess, or is not the custodian  
15 of, the public record.

16 (b) Copies of all requested public records for which the public body does not  
17 claim an exemption from disclosure under ORS 192.410 (Definitions for ORS  
18 192.410 to 192.505) to 192.505 (Exempt and nonexempt public record to be  
19 separated).

20 (c) A statement that the public body is the custodian of at least some of the  
21 requested public records, an estimate of the time the public body requires  
22 before the public records may be inspected or copies of the records will be  
23 provided and an estimate of the fees that the requester must pay under  
24 subsection (4) of this section as a condition of receiving the public records.

25 (d) A statement that the public body is the custodian of at least some of the  
26 requested public records and that an estimate of the time and fees for  
27 disclosure of the public records will be provided by the public body within a  
28 reasonable time.

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1 (e) A statement that the public body is uncertain whether the public body  
2 possesses the public record and that the public body will search for the record  
3 and make an appropriate response as soon as practicable.  
4

5 (f) A statement that state or federal law prohibits the public body from  
6 acknowledging whether the record exists or that acknowledging whether the  
7 record exists would result in the loss of federal benefits or other sanction. A  
8 statement under this paragraph must include a citation to the state or federal  
9 law relied upon by the public body.  
10

11 ORS 192.440(2).

12 In *Marks v. McKenzie High Sch. Fact-Finding Team*, the Supreme Court of Oregon  
13 outlined the relevant factors to consider in determining whether a private entity is the  
14 functional equivalent of a public body under the OPRA and made clear that no single factor is  
15 either indispensable or dispositive:

- 16 (1) The entity's origin (e.g., whether the entity was created by government or had  
17 some origin independent of government).
- 18 (2) The nature of the function assigned to and performed by the entity (e.g., whether  
19 that function is one traditionally associated with government or is one commonly  
20 performed by private entities).
- 21 (3) The scope of the authority granted to and exercised by the entity (e.g., does the  
22 entity have the authority to make binding governmental decisions, or is it limited to  
23 making nonbinding recommendations).
- 24 (4) The nature and level of government financial involvement with the entity.  
25 (Financial support may include payment of the entity's members or fees as well as  
26 provision of facilities, supplies, and other nonmonetary support.)
- 27 (5) The nature and scope of government control over the entity's operation.
- 28 (6) The status of the entity's officers and employees (e.g., whether the officers and  
29 employees are government officials or government employees).  
30

31 *Marks v. McKenzie High Sch. Fact-Finding Team*, 319 Or. 451, 463-64, 878 P.2d 417, 424-25  
32 (1994). The Court explained that these factors should be considered based on a “functional”  
33 approach: “...the determination of whether a particular entity is a ‘public body’ within the  
34 meaning of ORS 192.410(3) will depend on the character of that entity and the nature and

1 attributes of that entity's relationship with government and governmental decision-making.”

2 *Id.*

3 Finally, several other Oregon cases have used the *Marks* factors to determine whether  
4 an entity is the functional equivalent of an agency or department of a city. *See Laine v. City*  
5 *of Rockaway Beach*, 134 Or. App. 655, 663, 896 P.2d 1219, 1223 (1995) (“Weighing together  
6 all the foregoing factors, we conclude that the fire department was not, before 1991, a private  
7 entity, but was instead a functional agency or department of the city government.”); *State ex*  
8 *rel. Eckles v. Livermore*, 72 Or.App. 650, 696 P.2d 1153 (1985), *aff’d sub nom State ex rel.*  
9 *Eckles v. Woolley*, 302 Or. 37, 726 P.2d 918 (1986) (SAIF Corporation was not a private  
10 corporation); see also *McClain v. Regents of the University*, 124 Or. 629, 265 P. 412 (1928)  
11 (University ruled “state agency” for purposes of indebtedness).

## 12 **II. FACTUAL BACKGROUND**

13 Defendant, Debi McNamara, is a volunteer animal welfare advocate performing public  
14 interest watchdog functions. In that capacity, she made numerous public records requests to  
15 Plaintiff regarding the services provided by Plaintiff through the 1<sup>st</sup> Avenue Shelter. Plaintiff  
16 never responded to her requests, nor produced or provided any records to her.

17 Plaintiff, Greenhill Humane Society and Society for the Prevention of Cruelty to  
18 Animals, is an Oregon non-profit charitable corporation that operates a principal place of  
19 business at 88530 Green Hill Road, Eugene, Lane County, Oregon 97402, as well as operates  
20 an animal shelter at 3970 West 1<sup>st</sup> Avenue, Eugene, Lane County, Oregon 97402. Plaintiff’s  
21 Complaint, p. 1-2. On or about August 2, 2012, Plaintiff registered with the assumed business  
22 name of 1<sup>st</sup> Avenue Shelter. Plaintiff’s Complaint, p. 3. The 1<sup>st</sup> Avenue property is jointly  
23 owned by the City of Eugene, the City of Springfield, and Lane County, which used their  
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1 joint authority to give Greenhill Humane Society possession and use of the facility for public  
2 shelter and adoption services. Exhibit 1, p. 2.

3 Plaintiff contracts with Eugene and Lane County to provide public shelter and  
4 adoption program operations, animal intake, administration services (including: “Financial  
5 accounting of the public shelter and adoption program will be separate from other financial  
6 activity of shelter and adoption contractor.”), facilitation of community partnerships and  
7 involvement, euthanasia, customer services, placement or transfer of animals, and *required*  
8 *reporting*. Exhibit 1, p. 13-16; Exhibit 2, p. 16-20 (emphasis added).

9 The reporting requirements within the contract with Eugene include the specification:  
10 “Monthly reports on the public shelter and adoption program’s activities and disposition of  
11 animals will be made by Contractor to contracting jurisdiction and will be available to the  
12 public.” Exhibit 1, p. 15-16. The reporting requirements within the contract with Lane County  
13 include the specification: “Contractor will provide County with the results of the following  
14 performance measures and make them available to the public.” Exhibit 2, p. 19. The reports in  
15 both Eugene and Lane County are to include the number of impounded animals, number of  
16 stray animals accepted, number of animals returned to owners, number of animals adopted,  
17 amount of shelter and adoption fees paid, donation summary, number and destinations of  
18 animals transferred out of shelter, number of animals stolen, number of animals that are dead  
19 on arrival, number of animals that died in shelter care, number of animals euthanized and  
20 reason for euthanasia, live release date, volunteer hours, and other data as requested and  
21 available. Exhibit 1, p. 16; Exhibit 2, p. 19-20.

22 Plaintiff’s contract with Springfield requires Greenhill Humane Society to provide  
23 shelter and euthanasia services for dogs and cats, requires the city to pay for monthly costs of  
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1 services, requires Greenhill to provide books and records to the city for services performed  
2 under the contract that “shall be open and available for the purpose of audit and inspection at  
3 reasonable and convenient times,” and for the two parties to cooperate in sharing information  
4 including information that “may be necessary for city to assume full responsibility for dogs  
5 and other animals within its boundaries on termination of this agreement.” Exhibit 3, p. 11-12.

6 On or about June 16, 2014, Defendant’s prior attorney, Mark Jordan, filed public  
7 records requests on her behalf with Greenhill Humane Society, the City of Springfield, Lane  
8 County, and the City of Eugene regarding services provided by Plaintiff at the 1st Avenue  
9 Shelter.

10 1) The City of Springfield responded to the request by stating: “The City of  
11 Springfield does not have possession of these documents. Greenhill and First Avenue would  
12 have these records.” Exhibit 4. No documents or records were provided.

13 2) Lane County responded to the request by stating: “Lane County does not keep these  
14 records. Contact Cary Lieberman, Greenhill Humane Society, 88530 Greenhill Road, Eugene,  
15 OR 97402.” Lane County also provided a few general websites that did not respond to the  
16 specific records requests. Exhibit 5. No documents or records were provided.

17 3) The City of Eugene responded by referring Defendant to a webpage that did not  
18 provide the requested information. Exhibit 6. No documents or records were provided.

19 4) Plaintiff did not respond to Defendant’s requests despite numerous follow-up  
20 attempts by attorney Jordan. Exhibit 7.

21 Defendant’s attorney Lauren Regan then modified Jordan’s request on October 20,  
22 2014, and informed Greenhill that Defendant was resetting the clock on the public records  
23 requests’ response time requirement. Exhibit 8. Attorney Regan then called Greenhill several  
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1 times and finally spoke with Director of Operations attorney Jaclyn Rudebeck Semple, who  
2 verbally acknowledged the requests and stated that she would get in touch soon. However,  
3 Semple never contacted Defendant's attorney nor did she provide responsive documents.

4 As a result, on February 6, 2015, Defendant's attorneys were forced to file a petition  
5 for review with the Lane County District Attorney's office after Plaintiff simply ignored and  
6 refused to respond in any way to the numerous requests and communications from  
7 Defendant's attorneys regarding her public records requests. Exhibit 9. Plaintiff responded to  
8 the petition on February 25, 2015. Exhibit 10.

9 On April 30, 2015, the District Attorney issued an Order in response to the petition for  
10 review. Under *Marks*, the District Attorney found Greenhill Humane Society to be a private  
11 entity that is the functional equivalent of a public body pursuant to contracts with local  
12 governments to provide animal sheltering services. Based on this finding, the District  
13 Attorney found that records possessed by Greenhill Humane Society for purposes that are  
14 governmental in nature are subject to disclosure under the Oregon Public Records Act.  
15 Exhibit 11. Greenhill then filed a Complaint with this Court contesting the Order issued by  
16 the Oregon District Attorney.

17 Greenhill Humane Society's status as a functional equivalent of a public body is  
18 established by applying the factors set forth in *Marks*. The decisions made by the City of  
19 Eugene, City of Springfield, and Lane County to contract with Greenhill Humane Society  
20 happened as a result of a budget shortfall for Lane County Animal Services (LCAS). LCAS  
21 handled animal code enforcement and field services, dog licensing, and shelter and adoption  
22 services. This budget shortfall led to each governmental entity continuing to maintain animal  
23 code enforcement, field services, and licensing, and contracting with Greenhill Humane

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1 Society to provide the public shelter and adoption services at the 1st Avenue Shelter location,  
2 which was the existing public shelter. Exhibit 1, p. 11. Under the *Marks* factors, Greenhill  
3 Humane Society taking responsibility for the public shelter and adoption services in this way  
4 illustrates both that the 1st Avenue Shelter was government created (it was the public shelter  
5 managed by government entities, then transitioned to being managed by Greenhill through a  
6 contract with government entities) as well as that it serves a traditional government function  
7 (the government had in fact been serving the function prior to the budget shortfall, and the  
8 government contracted with Greenhill as a way to continue to take care of the animals in the  
9 community). In addition, the pre-existing staff at the public shelter continued to work at the  
10 1st Avenue Shelter upon commencement of the Greenhill contract.

11 In the contract between the governments and Greenhill Humane Society, the City of  
12 Eugene acted as the main contracting agency (Lane County and City of Springfield similarly  
13 contracted with Greenhill. *See* Exhibits 2 and 3, respectively.). It is the City that must approve  
14 the supervisor of Greenhill Humane Society's performance and the City also sets the  
15 guidelines for the conduct, demeanor, and appearance of Greenhill's employees. Exhibit 1, p.  
16 3-4. The contract also specifies that although Greenhill Humane Society is an independent  
17 contractor that controls the manner in which services are performed, the City specifies the  
18 nature of the services and the results to be achieved. Exhibit 1, p. 5. The City is the owner of  
19 all work product created for it under the contract. Exhibit 1, p. 7. Pursuant to *Marks*, these  
20 aforementioned conditions of the relationship between the City and Greenhill Humane  
21 Society illustrate that, although Greenhill has some control over the manner of operations, it is  
22 the government that has the ultimate authority over the performance of employees, what  
23 services are to be performed, and what the results should be in order to be in compliance with  
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1 the terms of the agreement. Additionally, the City pays for the services provided by Greenhill  
2 under the contract. Exhibit 1, p. 83.

3 Furthermore, the contracts with City of Eugene, City of Springfield, and Lane County  
4 require that Plaintiff provide information that is made available to them and *made available to*  
5 *the public*, as outlined above. The contract language repeatedly and consistently refers to the  
6 operating of the 1st Avenue Shelter as a *public* shelter, along with specifically requiring that  
7 information be available to the public and to the respective government entities—all  
8 demonstrating that the intent of government contracting with Greenhill Humane Society to  
9 operate the 1st Avenue Shelter was to continue its precedent of being a public shelter that is  
10 intertwined with government function, and that shall continue to be accountable to the  
11 taxpaying public through the sharing of records. In addition, as discussed previously, the  
12 Cities and County also believed Greenhill was the responsible public records custodian for  
13 Defendant’s request as indicated in their public records responses. *See* Exhibits 4, 5, 6.  
14 Plaintiff’s failure to timely comply with the OPRA for over a year also negates the public  
15 interest function of public records laws and prevents Defendant from sufficiently performing  
16 her public watchdog functions for this controversial animal shelter.

17 Based on both the factors outlined in *Marks* and the spirit of that Court’s “functional  
18 approach” to determining whether an entity serves as a public body, Greenhill Humane  
19 Society is a public body that subsequently has the obligation to respond to public records  
20 requests as such.

21 **III. STANDARD OF REVIEW**

22 Summary judgment shall be granted when no genuine issue as to any material fact  
23 exists and the moving party is entitled to prevail as a matter of law. ORCP 47 C. In a public  
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1 records case, the Court reviews a grant of summary judgment on cross-motions to determine  
2 if there are any disputed issues of material fact and if either party was entitled to prevail as a  
3 matter of law. *Hood Technology Corp. v. OR-OSHA*, 168 Or.App. 293, 295, 7 P.3d 564  
4 (2000); *see also Kluge v. Oregon State Bar*, 172 Or.App. 452, 457, 19 P.3d 938 (2001); *Port*  
5 *of Portland v. Oregon Ctr. for Env'tl. Health*, 238 Or. App. 404, 408, 243 P.3d 102, 106  
6 (2010). No genuine issue to any material fact exists when, viewed in a light most favorable to  
7 the adverse party, no objectively reasonable juror could return a verdict for the adverse party.  
8 *Id.* Under ORCP 47 C, “[t]he adverse party has the burden of producing evidence on any issue  
9 raised in the motion as to which the adverse party would have the burden of persuasion at  
10 trial.” *Id.* Under the burden-shifting analysis created by ORCP 47 C, the adverse party to the  
11 motion has the “burden of offering admissible evidence to create a genuine issue of material  
12 fact” once the moving party has put an element of the case in issue. *Davis v. Cnty. of*  
13 *Clackamas*, 205 Or. App. 387, 394, 134 P.3d 1090, 1094 (2006).

#### 14 **IV. DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT**

15 Plaintiff is the functional equivalent of a public body under *Marks v. McKenzie High*  
16 *Sch. Fact-Finding Team*, yet Plaintiff never responded to Defendant’s public records requests  
17 as required by the OPRA. This Court should therefore grant declaratory judgment in the  
18 Defendant’s favor and award attorney fees and costs.

19 In *Kluge v. Oregon State Bar*, 172 Or.App. 452, 455, 19 P.3d 938 (2001), the Court of  
20 Appeals ruled that:

21 Oregon has a “strong and enduring policy that public records and  
22 governmental activities be open to the public.” *Jordan v. MVD*, 308 Or. 433, 438, 781  
23 P.2d 1203 (1989). The guiding principle in Oregon is to protect the public's right to  
24 inspect public records. ORS 192.420 (“Every person has a right to inspect any public  
25 record of a public body in this state, except as otherwise expressly provided \* \* \*.”);

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1 *City of Portland v. Anderson*, 163 Or.App. 550, 553, 988 P.2d 402 (1999). Disclosure  
2 is the rule and exemptions from disclosure are to be narrowly construed. *Oregonian*  
3 *Publishing v. Portland School Dist. No. 1J*, 144 Or.App. 180, 184, 925 P.2d 591  
4 (1996), *aff'd on other grounds* 329 Or. 393, 987 P.2d 480 (1999). When a public body  
5 withholds public records from disclosure, that body carries the burden of sustaining  
6 that action upon judicial review. ORS 192.490(1).  
7

8 Injunctive relief is also appropriate under ORS.490(1), and this Court must order  
9 Plaintiff to immediately provide the requested public records to the Defendant without cost  
10 due to the exorbitant delay and bad faith demonstrated by Plaintiff's failure to even  
11 acknowledge Defendant's requests.

12 Defendant has fully exhausted all administrative remedies available under the OPRA.

13 Defendant was forced to expend costs and to obtain the services of attorneys to take  
14 this action and is entitled to reasonable costs and attorney fees pursuant to ORS 192.490(3).

### 15 CONCLUSION

16 For the reasons stated above, Defendant respectfully requests that this Court enter  
17 summary judgment for Defendant because, as a matter of law, no question of material fact  
18 exists in the elements of her claim.

19 Dated November 3, 2015.  
20

21 *s/ Lauren C. Regan*  
22 Lauren C. Regan, OSB #970878  
23 Attorney for Defendant-Requestor  
24 Civil Liberties Defense Center  
25

26 Also on the brief: *s/ Amanda E. Schemkes*  
27 Amanda E. Schemkes, OSB #154180  
28 Civil Liberties Defense Center  
29

1 **CERTIFICATE OF SERVICE**

2 I certify that on November 3, 2015, I served or caused to be served a true and  
3 complete copy of the foregoing DEFENDANT'S MOTION FOR SUMMARY JUDGMENT  
4 on the party or parties listed below as follows:

- 5  Via CM / ECF Filing  
6  Via First Class Mail, Postage Prepaid  
7  Via Email

8  
9  
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16

17  
18  
19 By: /s/ Lauren C. Regan  
20 Lauren C. Regan, Attorney at Law