



DEPARTMENT OF JUSTICE

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November 22, 2023

VIA E-MAIL ONLY: jalderman@equestrianmedia.group and chunter@bradleybernstein.com

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Oregon Humane Society
c/o Colin Hunter
Bradley Bernstein Sands
1425 SW 20th Ave, Ste 201
Portland, OR 97201

Re: Petition for Public Records Disclosure Order
Oregon Humane Society, Humane Law Enforcement Division
DOJ File No.: 137048-GA0001-23

Dear Mr. Alderman and Mr. Hunter:

This letter is the Attorney General's response to Mr. Alderman's petition, on behalf of the Equestrian Media Group, for the disclosure of records under the Oregon Public Records Law, ORS 192.311 to 192.478. His petition asks the Attorney General to direct the Oregon Humane Society (OHS) to disclose certain records at no cost and without delay. OHS denied his request asserting that it is a private non-profit corporation and therefore not a "public body" subject to the Oregon Public Records Law. Mr. Alderman's petition asks us to find that, to the extent OHS engages in law enforcement activities, it is the functional equivalent of a public body for purposes of the Public Records Law. For the reasons that follow, we grant Mr. Alderman's petition.

a. Background.

OHS is a private, non-profit public benefit corporation that provides a wide range of animal welfare services. One service OHS provides is to investigate alleged violations of Oregon animal cruelty laws. These investigations are conducted by employees in OHS' Humane Law Enforcement Division (the "HLE Division") who are commissioned as Humane Special Agents. Under Oregon law, these special agents must be certified by the Oregon Department of Public Safety Standards & Training and commissioned as law enforcement officers by the Superintendent of the Oregon State Police (OSP).¹ According to OHS' website, Humane Special Agents are "highly-trained, sworn police

¹ See ORS 181A.340.

officers” with statewide authority to investigate allegations of animal cruelty, and are “authorized to issue criminal citations, author search warrants, and assist other law enforcement agencies in investigation, crime scene processing and evidence collection.”²

The records at issue in this instance relate to alleged probation violations by Gwenyth Davies, who was convicted in 2020 on eleven misdemeanor counts of animal neglect. According to Mr. Alderman’s petition, in August 2023, Oregon’s Special Animal Cruelty Prosecutor, on behalf of the Lane County District Attorney, filed a motion to show cause for multiple probation violations by Ms. Davies. The motion referenced an investigative report prepared by the OHS HLE Division. Because the report was not filed with the motion, Mr. Alderman requested a copy from OHS under the Public Records Law. He also requested OHS disclose any e-mail communications between the HLE Division and Ms. Davies, or with Lane County Animal Services relating to Ms. Davies. OHS denied Mr. Alderman’s request by responding that “OHS is a private nonprofit; it is neither a public body nor the functional equivalent of one. Accordingly, the public records laws do not apply to it.” Mr. Alderman’s appeal followed.

b. Oregon Public Records Law and Private Entities.

The Public Records Law confers a right to inspect or receive copies of any public records of a public body in Oregon, subject to certain exemptions and limitations.³ A “public body” includes, but is not limited to, “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 other public agency of this state.”⁴ “State Agency” means “any state officer, department, board, commission or court created by the Constitution or statutes of this state.”⁵ Any person denied the right to inspect or to receive a copy of any public record of a state agency may petition the Attorney General to review the record to determine if it may be withheld from public inspection.⁶

We have previously observed that on its face, the Public Records Law does not apply to private entities such as non-profit corporations and cooperatives.⁷ However, the Oregon Supreme Court concluded in a 1994 case that if an ostensibly private entity is the “functional equivalent” of a public body, the Public Records Law applies to it.⁸ The court explained that such a determination “will

² Oregon Humane Society, *About Humane Law Enforcement*, <https://www.oregonhumane.org/report-cruelty/> (accessed November 15, 2023).

³ See ORS 192.314(1).

⁴ ORS 192.311(4); *see also* Public Records Order, Feb 12, 2015, Hinkle and Boise (observing that the statutory definition of a “public body” is not expressly exclusive).

⁵ ORS 192.311(6).

⁶ ORS 192.411(1).

⁷ See *Attorney General’s Public Records and Meetings Manual* at 3 (2019) (“*Manual*”).

⁸ *Marks v. McKenzie High School Fact-Finding Team*, 319 Or 451 (1994).

depend on the character of that entity and the nature and attributes of that entity’s relationship with government and government decision-making.”⁹ The court identified the following factors, commonly referred to as the *Marks* factors, as relevant to making this determination:

- (1) The private 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(s) assigned to and performed by the private entity (*e.g.*, whether the function(s) are traditionally performed by government or commonly performed by private entities).
- (3) The scope of the authority granted to and exercised by the private 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 private entity (financial support may include payment of the entity’s members or fees as well as provision of facilities, supplies, and other nonmonetary support).
- (5) The nature and scope of government control over the private entity’s operations.
- (6) The status of the private entity’s officers and employees (*e.g.*, whether the officers and employees are government officials or government employees).¹⁰

The court noted that the evaluation of the *Marks* factors is “functional” – “no single factor is either indispensable or determinative” and the list is not intended to be exclusive.¹¹ In weighing the significance of the various factors, the court was guided by the need to protect the policies underlying the Public Records Law; *i.e.*, ensuring public access to information on which governmental decisions are based.¹²

Consistent with the court’s guidance, we have determined that the Attorney General may review a petition claiming that an ostensibly private entity is the functional equivalent of a public body

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⁹ *Id.* at 463.

¹⁰ *Id.* at 463-64.

¹¹ *Id.*

¹² *Id.* at 466.

that is a state agency under these factors.¹³ We have also concluded that some private entities “might be the functional equivalent of a public body only with respect to functions that are governmental in nature,” in which case only the records related to those governmental functions are subject to inspection.¹⁴ That is, even if a private entity might be functionally equivalent to a public body for some purposes, it does not follow that all of the information in that entity’s possession will relate to functions that are governmental in nature.

c. Discussion.

Although Mr. Alderman acknowledges that OHS is a private entity, he asks us to find that, with respect to its law enforcement activities, the HLE Division is the functional equivalent of a public body under the Public Records Law. Because we find that such functions are traditionally governmental in nature, we conclude that the policy of ensuring public access to information on which governmental decisions are based requires OHS to make records relating to its law enforcement activities available for public inspection. In reaching this determination, we have evaluated the *Marks* factors as follows:

1. *Was OHS or its HLE Division created by the government?*

No. However, the HLE Division’s current law enforcement authorities were granted by the state in 2012,¹⁵ and the division’s operations are governed by an agreement between the state and OHS.¹⁶ We also understand that prior to 2012, OHS special agents were “employed” for many years

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¹³ See *Manual* at 3-4. See also Public Records Orders, Feb 12, 2015, Hinkle and Boise (e-mails in personal account of Governor’s unofficial policy advisor and “First Lady” subject to inspection where they contained information relating of the public’s business); Jan 31, 2001, Hinkle (Oregon School Activities Association not the functional equivalent of a state agency); Sep 3, 2002, Long (same for Oregon Public Broadcasting); Nov 19, 2002, Forrester (same for Citizens Utility Board); Mar 29, 2004, Redden (same for Oregon Historical Society); Jul 24, 2008, Rios (same for Oregon Bridge Delivery Partnership, under contract with the Department of Transportation); Oct 23, 2017, Livingston & Owens (same for Mid-Willamette Valley Community Action Agency); and Jul 24, 2019, Heilman (same for Coordinated Care Organizations under contract with Oregon Health Authority).

¹⁴ *Manual* at 5 (citation omitted).

¹⁵ See, e.g., ORS 181A.340 (specifying the requisite qualifications to be commissioned as a Humane Special Agent); ORS 181A.345(3)(b) (defining a Humane Special Agent as a person commissioned by the OSP Superintendent and who is engaged in the enforcement of animal welfare laws); and ORS 181A.345(1) (providing that Humane Special Agents “shall work cooperatively with law enforcement agencies in enforcing animal welfare laws and shall defer to the direction of a law enforcement agency having jurisdiction over the commission of a violation of animal welfare laws”).

¹⁶ OSP Agreement #257-0903-14, Humane Special Agent Operations and Commission Agreement between the State of Oregon, acting by and through the Oregon Department of State Police, and the Oregon Humane Society (April 6, 2021) (the “Operating Agreement”) (“the parties expect that OSP and the Superintendent will hold OHS employees to the same standard as it holds its own employees when commissioning OHS certified police officers as Humane Special Agents”).

by the Governor under ORS 131.805.¹⁷ Absent these arrangements and authorities, it does not appear that OHS, the HLE Division, or its special agents would have any independent authority to conduct traditional law enforcement activities.

2. Are the law enforcement functions performed by the HLE Division traditionally associated with government?

Yes, and as noted above, the law enforcement authority exercised by the HLE Division and its special agents was extended to OHS by the state. The agreement between OSP and OHS also recognizes that:

[T]he individuals employed by OHS who conduct animal cruelty investigations and act as certified police officers, are authorized to act in the name of the State of Oregon and charged with the duty to act under color of Oregon law, consistent with the ethical, legal and policy standards and requirements which apply to every sworn police officer of the State[.]^{18, 19}

To facilitate the performance of these law enforcement functions by Humane Special Agents, the agreement also grants the HLE Division access to the state's Law Enforcement Data System (LEDS), OSP Regional Dispatch Centers, the Oregon State Radio System, and associated radio and mobile data terminal resources.²⁰

In response to Mr. Alderman's petition, OHS concedes that law enforcement is a function traditionally associated with government. However, it argues, "it is also true that the enforcement of Oregon's animal cruelty laws is a function 'commonly performed by private entities' – namely, OHS."

¹⁷ ORS 131.805 provides, in relevant part:

The Governor may employ, at such salaries as the Governor deems reasonable for the services rendered, special agents to effect the apprehension and conviction of criminals, the return of fugitives from justice, the investigation of cases in which the Governor believes the laws of the state are being violated, the supervision of persons paroled or conditionally pardoned from the Department of Corrections or the collection of evidence in any case, civil or criminal, in which the state is interested whenever in the judgment of the Governor it is necessary * * *.

¹⁸ Operating Agreement at 1.

¹⁹ We also observe that in a wide range of Oregon statutes, Humane Special Agents are expressly included in the definitions various law enforcement positions and agencies that are normally associated with public bodies, including definitions of "law enforcement officer," "peace officer," "police officer," "enforcement officer," "law enforcement agency," "criminal justice agency," and "public safety personnel." *See, e.g.*, ORS 131.915 (defining "law enforcement officer" for required profiling reports); ORS 133.005 (defining "peace officer" for purposes of arrest authority); ORS 133.525 (defining "police officer" for purposes of search and seizure authority), ORS 153.005 (defining "enforcement officer" for purposes of issuing citations), ORS 161.015 (defining "peace officer" for purposes of the criminal code), ORS 181A.010 (defining "law enforcement agency" and "criminal justice agency" for various regulatory purposes), ORS 181A.338 (defining "police officer" authorized to procure certain surplus military equipment), and ORS 181A.355 (defining "police officer" and "public safety personnel" for purposes of DPSST certification).

²⁰ Operating Agreement at 11.

It notes, for example, that for approximately 100 years, OHS paid the City of Portland to employ a police officer dedicated to enforcing animal cruelty laws. And from approximately 1990 to 2012, several OHS employees were commissioned by the Governor under ORS 131.805 to perform these functions.

Although these examples demonstrate that OHS has long been affiliated with the enforcement of the state’s animal cruelty laws and that the state has, at times, vested humane law enforcement authority in certain OHS employees, we are not persuaded by OHS’ argument. The arrangements described by these examples demonstrate that the underlying law enforcement activities are functions traditionally associated with government and that performing these activities requires express authority from state and local authorities.²¹ Moreover, neither example demonstrates that such law enforcement functions are “commonly performed” by private entities, independent from state and local law enforcement. Rather, we understand that OHS’ law enforcement activities are routinely performed by, and in coordination with, other law enforcement bodies such as animal control agencies.²² We are also not aware of any other private entities with similar access to sensitive law enforcement tools such as LEDS or other police data and radio networks.

3. *What is the scope of the HLE Division’s law enforcement authority; e.g., does it have authority to make binding governmental decisions?*

OHS argues that although Humane Special Agents investigate potential violations of animal welfare laws and make recommendations based on those investigations, they do not have the authority to make charging decisions or otherwise bind any public body. However, as noted above, when enforcing Oregon’s animal cruelty laws, Humane Special Agents exercise statewide policing authority “with the *duty to act under color of Oregon law*.”²³ Their authorities necessarily include the power to arrest individuals, issue citations, obtain warrants, conduct searches, and seize property. The record in this case also demonstrates that the HLE Division also has at least some involvement in monitoring compliance with terms of probation. We find that such functions involve actions and decisions that are both consequential and binding upon the government.²⁴

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²¹ *Cf. State v. Newcomb*, 359 Or 756 (2016) (state conceded that a Humane Special Agent was a “government actor” when he executed a warrantless seizure of an animal).

²² *See, e.g.*, ORS 181A.345 (requiring humane special agents to “work cooperatively with law enforcement agencies in enforcing animal welfare laws,” and to “defer to the direction of a law enforcement agency having jurisdiction over the commission of a violation of animal welfare laws”); and Operating Agreement at 3 (defining “Law Enforcement Agency” for purposes of operational coordination as including “OSP, a county sheriff’s office, a district attorney’s office, a municipal police department, a police department established by a university * * *, the law enforcement division of OHS, and a law enforcement division of a county or municipal animal control agency that employs sworn officers.”).

²³ Operating Agreement at 1 (emphasis added).

²⁴ *Cf. Newcomb*, 359 Or 756 (illustrating the binding consequences of a warrantless seizure of an animal by a Humane Special Agent).

4. *What is the nature and level of government financial involvement with OHS or its HLE Division?*

We understand that OHS is privately funded and that it does not receive any direct financial assistance from the state for any of its routine operations, including its law enforcement operations. By law, Humane Special Agents serve at the expense of OHS, and OHS is also required to indemnify the state and its employees from and against any tort claim or demand arising out of an alleged act or omission of an OHS employee.²⁵ OHS is also required to reimburse OSP for the actual costs of any equipment provided to and any expenses incurred on behalf of OHS.²⁶

5. *What is the nature and scope of government control over the HLE Division's law enforcement operations?*

State law does not give government officials any responsibility for, operational control over, the HLE Division's day-to-day operations. As the agreement between OSP and OHS provides:

[T]he State of Oregon, the Superintendent, and OSP shall not control the means or manner of OHS certified police officers' performance of their duties and responsibilities as Humane Special Agents. OHS shall at all times and in all respects remain solely responsible for determining the appropriate means and manner of its commissioned certified police officers' performance of duty as Humane Special Agents.²⁷

That said, we observe that the HLE Division and its employees are subject to significant public oversight. First, the OSP Superintendent commissions Humane Special Agents and has broad authority to revoke those commissions.²⁸ It follows that the OSP Superintendent has the authority to completely revoke or suspend the HLE Division's policing authority, and has done so as recently as 2018.²⁹ Humane Special Agents are also required to "defer to the direction of a law enforcement agency having jurisdiction" over violations of animal welfare laws.³⁰ We also note that if the HLE Division receives a mandatory report of animal abuse from a veterinarian, it is statutorily required to investigate if there is reasonable cause to believe aggravated animal abuse has occurred.³¹ Finally, we

²⁵ ORS 181A.340(1)(c) and (5); *see also* Operating Agreement at 17.

²⁶ Operating Agreement at 17.

²⁷ *Id.* at 14.

²⁸ ORS 181A.340.

²⁹ *See* Nick Budnick, *State Police Halt Oregon Humane Society Investigations*, Portland Tribune (Aug 30, 2018), available at https://www.portlandtribune.com/news/state-police-halt-oregon-humane-society-investigations/article_442e5c76-1edb-5267-ba80-7b1c993af986.html (accessed Nov 17, 2023).

³⁰ ORS 181A.345(1).

³¹ *See* ORS 686.450 (defining "law enforcement agency" for purposes of mandatory animal abuse reports), and ORS 686.460 (requiring law enforcement agencies to investigate certain mandatory reports of animal abuse from veterinarians).

note that the agreement with OSP obligates OHS to provide certain operational information to OSP, including annual and periodic reports, and to participate in regular meetings with OSP regarding operational issues.³² The agreement also requires that upon completion of an animal welfare law enforcement action or investigation conducted by a Humane Special Agent, “OHS *shall* provide all reports and evidence to the law enforcement agency and prosecutor having jurisdiction of an alleged violation of animal welfare laws.”³³

Under the circumstances, we find that the HLE Division’s law enforcement activities are subject significant operational coordination with, and oversight by, various state and local agencies. And although the government does not exercise day-to-day operational control over the HLE Division and its special agents, state law does impose certain operational restrictions and requirements upon the division.

6. *Are the HLE Division’s employees or special agents government officials or government employees?*

Humane Special Agents and other HLE Division employee are not government employees. However, as state-commissioned police officers “authorized to act in the name of the State of Oregon and charged with the duty to act under color of Oregon law,” we have no trouble concluding that Humane Special Agents are government actors when enforcing Oregon’s animal cruelty laws.³⁴

d. Conclusion.

On balance, our evaluation of the *Marks* factors leads us to conclude that the HLE Division is the functional equivalent of a public body under the Public Records Law. It follows that records relating to the division’s law enforcement activities that contain “information relating to the conduct of the public’s business” are “public records” subject to public inspection.³⁵ We therefore grant Mr. Alderman’s petition with respect to the investigative records he seeks, and order OHS to disclose all nonexempt materials to him as soon as practicable and without unreasonable delay.

Because this order is the first notice to OHS that it must comply with the Public Records Law as to its humane law enforcement operations, the various rights and responsibilities associated with that law, including the processing timeframes prescribed by ORS 192.39, attach as of the date of this

³² See Operating Agreement at 9 (required annual reports relating to the operations of the HLE Division, and quarterly meetings to discuss “operational and administrative issues related to the work” of the HLE Division and its special agents).

³³ Operating Agreement at 12 (emphasis added).

³⁴ Operating Agreement at 1. Cf. *Newcomb*, 359 Or 756 (Humane Special Agent considered a “government actor” when executing warrantless seizure of an animal); and Public Records Order, Feb 12, 2015, Hinkle and Boise (many state officials, such as voluntary members of state boards and commissions, are not employees of the state).

³⁵ ORS 192.311(5)(a); and ORS 192.314(1).

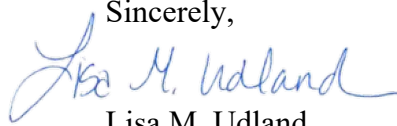
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order. We therefore decline at this time to order disclosure within a particular timeframe or to order OHS to waive any reimbursable costs associated with processing Mr. Alderman's request.

Sincerely,



Lisa M. Udland
Deputy Attorney General

ACF/pjn