



ROD UNDERHILL, District Attorney for Multnomah County

600 County Courthouse • Portland, Oregon 97204 • 503 988-3162 • FAX 503 988-3643
www.mcda.us

May 10, 2016

David N. Allen
P.O. Box 1321
Newport, Oregon 97365

Joseph Vance
Miller Nash Graham & Dunn
500 Broadway St., Suite 400
Vancouver, Washington 98660

Re: Petition of David Allen requesting Oregon Wave Energy Trust meeting minutes

Dear Mr. Allen and Mr. Vance:

In his public records petition under ORS 192.410 et seq., petitioner David Allen requests this office to order the Oregon Wave Energy Trust (OWET) to disclose the following documents:

- 1) **OWET bylaws and all amendments to them currently in effect.**
- 2) **Minutes of the annual, regular, and special meetings of the OWET board of directors (exclusive of any scheduled executive session) held from June 1, 2015 through the date of the request (March 20, 2016).**

On March 20, 2016 petitioner requested these documents from OWET. On April 20, 2016, having received no response to his request, petitioner filed an appeal with this office. OWET filed a response stating that it was not subject to the public records law because it was not a “public body” within the meaning of Oregon law.

OWET is an Oregon-based non-profit organization that was incorporated in 2011. OWET has used its resources to fund education, market development, and research projects relating to wave energy. OWET’s primary source of funding is grant funding from the Oregon Innovation Commission (Oregon InC), a public-private partnership whose mission, according to its website, is to fund “individual initiatives with the potential to build or coalesce industry clusters around new or emerging technology in specific areas where Oregon holds unique, national advantages.” Oregon InC’s board is chaired by the governor and its other members are either appointed by the governor or are members of state government. ORS 284.706. Oregon InC is funded by Business Oregon, a state agency.

DISCUSSION

A. The district attorney’s authority to hear this case

As a threshold matter, OWET has challenged this office’s legal authority to even determine whether or not OWET is subject to the public records law.

We disagree with OWET's suggestion that this office lacks the authority to act in this case. A person seeking public records may not go to court under the public records law unless and until he or she has exhausted non-judicial remedies before the district attorney or Attorney General. *Morse Bros. v. Or. Dep't of Econ. Dev.*, 103 Or App 619, 622 (1990). This office, the Attorney General, and the courts have all addressed the question of whether or not an entity is or is not subject to the public records law. Indeed, the two cases where our appellate courts have directly addressed this issue both began as proceedings in which the district attorney issued an order under the authority of ORS 192.460. *Marks v. McKenzie High Sch. Fact-Finding Team*, 319 Or 451, 454 (1994) (noting initial appeal to the district attorney), *Laine v. City of Rockaway Beach*, 134 Or App 655 (1995) (same).

OWET argues that Article III, section 1 of the Oregon Constitution prevents this office, as a part of the executive branch, from exercising any function of the judiciary.¹ As applied here, it argues, that would include determining whether or not OWET is a public or private entity for purposes of the public records law. This office is not empowered to render an opinion as to constitutional issues. *In re petition of Shepherd for Hovies*, MCDA PRO 06-10 (2006) (so stating).

As a statutory matter this office is confident that inherent in our authority to resolve public records disputes is the authority to determine whether or not an entity is subject to the public records law. See, e.g., *In re petition of Michael Dolan*, MCDA PRO 03-01 (2003) (applying *Marks* factors to conclude the Albina Community Development Corporation not subject to the public records law). Our review provides a sub-judicial forum (akin to an administrative hearing) for rapid resolution of public records disputes. Consideration of a public records case by this office does not impair either party's ability to seek de novo review in the circuit court if unsatisfied with this office's order. ORS 192.490.

We have the authority to determine if we have jurisdiction.

B. Is OWET a public body?

The Supreme Court has held that, in addition to traditional governmental bodies, the public records law also applies to private entities that are the "functional equivalent" of a public agency. *Marks v. McKenzie High Sch. Fact-Finding Team*, 319 Or 451 (1994). OWET is correct that this office lacks the jurisdiction to order an entity that is not a public body, or its functional equivalent, to do anything with respect to its records.

The *Marks* court found six factors relevant to its determination:

- (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).

¹ **Article III, Section 1. Separation of powers.** The powers of the Government shall be divided into three separate branches, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these branches, shall exercise any of the functions of another, except as in this Constitution expressly provided.

- (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.)
- (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).

Marks, 319 Or at 463-64.

The government may not shield portions of its operations by spinning them off as “private” bodies. Making a city fire department an independent organization, for example, did not relieve it of its public records obligations. *Laine v. City of Rockaway Beach*, 134 Or App 655 (1995) (noting, among other things, the traditional and core governmental service provided).

As to OWET, the only *Marks* factor weighing strongly in petitioner’s favor is the level of government financial involvement. The preponderance, although not the entirety, of OWET’s funding appears to come from Oregon InC grant money, which in turn comes from the State.

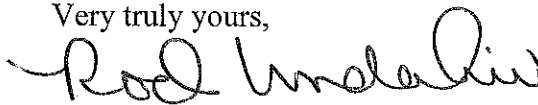
On the other hand, there is no indication of any direct government control over OWET’s operations, decision making, or personnel. The organization’s purpose appears to be funding and advocacy for research, development, and business interests relating to wave energy projects in the region. OWET does not make binding governmental policy decisions. Were reliance on state funding a litmus test, then many or most recipients of government grants would be subject to the public records law, a conclusion for which we see no precedent.

Accordingly, we do not find that OWET is the functional equivalent of a public body.

ORDER

The petition is dismissed for lack of jurisdiction.

Very truly yours,



ROD UNDERHILL
District Attorney
Multnomah County, Oregon