



ROD UNDERHILL, District Attorney for Multnomah County

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May 22, 2017

Stephanie Swanson
Enhabit
1733 N.E. Seventh Avenue
Portland, Oregon 97212

Christian Trejbal
2436 N. Wygant Street
Portland, Oregon 97217

Re: Petition of Christian Trejbal received May 16, 2017, to disclose the records of names and addresses for applicants for the Multnomah County and Enhabit Project "A Place For You."

Dear Ms. Swanson and Mr. Trejbal:

In his public records petition under ORS 192.410 et seq., petitioner Christian Trejbal requests this office to order Enhabit to disclose the following document:

- 1) The names and addresses of all applicants for the Accessory Dwelling Unit Pilot Program named "A Place For You."**

On May 3, 2017, the petitioner requested the above described records from Multnomah County. A representative of Multnomah County informed the petitioner that the County did not maintain those records and referred petitioner to Enhabit.

Enhabit is a non-profit corporation that has contracted for a fee with Multnomah County to promote the opportunity to homeowners to sign up for a pilot program to place Accessory Dwelling Units (ADUs) on homeowners' property. The ADUs would be used to provide temporary housing for homeless families for five years. The ADUs then the permanent property of the homeowners. Enhabit's role is to include overseeing design and installation, working on site selection, and serving as a point of contact for participants. Over 1000 applications from homeowners were received. Multnomah County will decide which homeowners will participate in the pilot program.

Enhabit was originally formed by the City of Portland's Bureau of Planning and Sustainability. Eventually, it was separated from city government and became a non-profit corporation. Enhabit partners¹ with contractors, lenders, utilities, and local governments. Enhabit, according to its website, is a home renewal provider that assists homeowners by guiding them through services that include energy efficiency upgrades, seismic strengthening, indoor air quality improvements and solar energy installations. None of Enhabit's current board members or employees are current government officials. For managing this \$350,000 pilot project, Enhabit is being paid a fee by Multnomah County.

On May 3, 2017, petitioner submitted a written request for the records to Ms. Swanson, the vice president of communications for Enhabit. Petitioner agreed to pay reasonable copying and postage fees of not more than \$50.

On May 8, 2017, Ms. Swanson denied the request for the records on the grounds that Enhabit is a private non-profit corporation and is not subject to the public records law.

DISCUSSION

Is Enhabit a public body?

ORS 192.420 provides that, "every person has a right to inspect any public record of a public body in this state." The public records law on its face, thus only applies to public agencies.

However, the Supreme Court has also interpreted this language to apply to private entities that are the "functional equivalent" of a public agency. *Marks v. McKenzie High Sch. Fact-Finding Team*, 319 Or 451 (1994). Both parties have cited *Marks v. McKenzie*, which found six relevant factors:

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

¹ For a full list of Enhabit's partners, please see <https://enhabit.org/partners/>

- (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.

As to Enhabit, the only *Marks* factor that weighs in petitioner's favor that Enhabit is the "functional equivalent" of a public agency is the origin of Enhabit, which began as a part of the City of Portland.

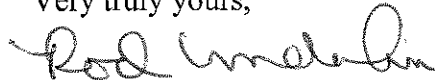
None of the other *Marks* factors appear to be present. Enhabit is engaged in activity that is traditionally associated with a non-profit organization. Enhabit is not the final decision maker as to who will be allowed to participate in the project. Enhabit has contracted with Multnomah County for a fee for its services. One of Enhabit's board members is an associate professor for Portland State University, but none of the other employees or board members is currently a member of a government agency.

Accordingly, we do not find that Enhabit 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