



ROD UNDERHILL, District Attorney for Multnomah County

600 County Courthouse • Portland, Oregon 97204 • 503 988-3162 • FAX 503 988-3643

www.mcda.us

February 14, 2018

Benjamin Kerensa
bkerensa@gmail.com (via email only)

Tony Garcia
Deputy City Attorney
Portland City Attorney's Office
1221 S.W. Fourth Avenue, Suite 430
Portland, Oregon 97204

David Linn
Chair
Montavilla Community Association
david@montavillapdx.org (via email only)

Re: Petition of Benjamin Kerensa seeking records from the Montavilla Community Association

Dear Mr. Kerensa, Mr. Garcia, and Mr. Linn:

In his public records petition, dated February 1, 2018, petitioner Benjamin Kerensa requests that this office order the Montavilla Community Association (MCA) to disclose certain records relating to its members, board, finances, and communications. Petitioner acknowledges that the MCA, one of Portland's 95 neighborhood associations, is a 501(c)(3) non-profit organization, but asserts that it is nonetheless subject to the public records law due to its connection to the City of Portland.

Because petitioner has alleged that the MCA is functionally a part of the City of Portland, the City Attorney's office has, at our request, provided a response on behalf of the City of Portland. We did not receive a separate submission from the MCA.

For the reasons discussed below, we conclude that the MCA is not subject to the Oregon Public Records Law and, accordingly, this office lacks the authority to consider this petition.

DISCUSSION

A. Is the Montavilla Community Association a public body?

The Oregon 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). 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 consider when assessing an organization's status:

- (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.
- (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.

This test recognizes that 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 by a fire department).

Unlike in *Laine* the MCA arose independent of any official recognition or involvement by the City of Portland. Currently, the City of Portland’s Office of Neighborhood Involvement (ONI) does regulate the neighborhood associations and requires that they maintain certain minimum standards in order to be recognized by the city. See PCC 3.96.030 and “Standards for Neighborhood Associations, District Coalitions, Business District Associations, and the Office of Neighborhood Involvement,” 2005 (<https://www.portlandoregon.gov/oni/article/97870>).

A neighborhood association’s failure to meet the promulgated standards could result in the city “decertifying” a neighborhood association, which would suspend any benefits that flow from formal recognition. These benefits include: directory listing on ONI’s webpage, inclusion in city publications, notification by city bureaus on local planning matters, and general support services for neighborhood outreach and crime prevention. “Standards for Neighborhood Associations” Sec. III(B). In short, the city does not directly control the activities of the MCA, but has some persuasive power over its operations due to the benefits it can grant or suspend.

Other than the loose control described above, none of the other *Marks* factors suggest that the MCA is the functional equivalent of a public body. The MCA was constituted by neighborhood residents prior to any city process for recognizing neighborhood associations. The MCA has no public employees, does not possess any enforcement power over residents, has no authority to make laws or regulations, and receives no direct funding from the city. It, like all

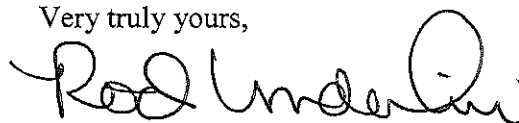
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other neighborhood associations, is a voluntary association of residents of a particular neighborhood. These associations can organize residents and advocate with the city on behalf of their membership, but in this they are no different than any other private interest organization. We do not find that the MCA is the "functional equivalent" of a public body under the *Marks* test.

ORDER

Accordingly, the petition is dismissed for lack of jurisdiction.

Very truly yours,

A handwritten signature in black ink that reads "Rod Underhill". The signature is written in a cursive style with a large, looped "O" at the end.

ROD UNDERHILL

District Attorney

Multnomah County, Oregon

18-05