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Marie Tyvoll
mtyvoll@gmail.com [via email only]

Leslie Hammond
SWNI Board President
7688 S.W. Capitol Highway
Portland, Oregon 97219

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

Re: Petition of Marie Tyvoll seeking emails from Southwest Neighborhoods, Inc.

Dear Ms. Tyvoll, Ms. Hammond, and Mr. Garcia:

Petitioner, Marie Tyvoll, has filed a petition under the public records law in which she asks this office to order Southwest Neighborhoods, Inc (SWNI) to provide her with certain emails that may be in its possession. This petition follows SWNI denying petitioner's request for the records on the grounds that it is not a public body subject to Oregon's public records law. Petitioner argues that, under the relevant standards, SWNI is the functional equivalent of a public body and, thereby, obligated to respond to her request.

Because petitioner has alleged that SWNI 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. The materials submitted to this office by petitioner and the City were provided to SWNI, which elected not to supplement the record.

The City of Portland has 95 neighborhood associations, which are private non-profit entities that exist to represent the interests of the residents in a particular area. There are also seven district coalitions within the City of Portland, which are either contracted, or run, by the City to provide training, orientation, information, and support to the neighborhood associations. Two of the seven district coalitions are staffed by the City employees; SWNI is one of the five independently run coalitions.

This office has previously concluded that a neighborhood association is not a public body subject to the public records law. *Petition of Kerensa*, MCDA PRO 18-05 (2018). Although the analysis is a closer call as to SWNI, for the reasons discussed below, we reach the same conclusion. Accordingly, this office lacks the authority to consider this petition on the merits.

DISCUSSION

A. Is SWNI 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).

Although *Marks* and *Laine* are the only appellate opinions applying this test, this office has considered the question as to a number of organizations. We have determined that a neighborhood association within the City of Portland is not the functional equivalent of a public body. *Petition of Kerensa*, MCDA PRO 18-05 (2018). We have also concluded that the Oregon Wave Energy Trust, a non-profit receiving the preponderance of its funding from the State, was not subject to the public records law. *Petition of Allen*, MCDA PRO 16-06 (2016). Similarly, we have concluded that Enhabit, a housing non-profit contracting with the county, and the Albina Community Development Corporation were not the equivalents of public bodies. *Petition of Trejbal*, MCDA PRO 17-27 (2017) and *Petition of Dolan*, MCDA PRO 03-01 (2001). Most of

these cases involved entities that met few, if any, of the *Marks* factors. The present case bears closer consideration.

i. Entity's Origin

SWNI was created by community members in 1978 as Southwest Neighborhood Information, Inc., a public benefit corporation with a mission to further “education, research, and an exchange of information for the citizens of Southwest Portland as they may relate to their total environment.” SWNI Articles of Incorporation, July 26, 1978. Secretary of State records indicate that the organization renamed itself to the current “Southwest Neighborhoods, Inc” in 1997, but that the stated purposes of the organization have remained constant. SWNI has certainly achieved a level of recognition by the City of Portland and shares a collaborative purpose with the City in many areas, but its official record does not show any direct government involvement in its origin.

ii. Nature of the entity's function

Petitioner points to the fact that the City itself controls two of the seven district coalitions, which are staffed by its own employees, as evidence that SWNI's function is governmental. That is, it is important enough to the government that, where a district coalition is not performing that function to the City's standards, the City has assumed responsibility for the work itself. The City responds that the test is not whether or not any governmental body has ever performed the work of the body, but whether its function is a core or traditional governmental service.

There is merit to both arguments. While this factor would certainly weigh more heavily in favor of functional equivalence were the service a core function, such as the fire department in *Laine* or a school, as in *Marks*, that the City sees fit to run two of the seven coalitions on its own does speak to the nature of the district coalition's function.

iii. Scope of authority

SWNI does not have the ability to bind the City contractually, it may not approve permits, nor take any enforcement action. While the City may rely heavily on its advice and recommendations in certain areas, its authority does not extend beyond advisory. This factor weighs against functional equivalence.

iv. Financial involvement

The City of Portland provides roughly 85% of SWNI's annual operating budget. Much of this funding is pass-through in that SWNI then re-grants the money to organizations, including neighborhood associations, that will promote its mission in the region. Having a large amount of governmental funding does not, itself, make a body a public body. *Petition of Allen*, MCDA PRO 16-06 (2016) (“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.”) However, when present together with other signs of governmental power or control, funding becomes more relevant.

v. *Operational control*

SWNI is not directly city-controlled and has its own board and executive director. The City promulgates standards for neighborhood associations and district coalitions that it expects those organizations to meet to continue to receive official recognition. We previously discussed the relevance of these standards as applied to neighborhood associations in *Kerensa*:

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.

Kerensa, MCDA PRO 18-05. The additional persuasive power the City has over a district coalition as distinct from a neighborhood association is the funding it provides and, as petitioner points out, the existential consequences of withdrawing that funding. While this, undoubtedly, increases the persuasive force the City has, should it choose to exercise it, this does not amount to direct operational control.

vi. *Status of SWNI employees*

SWNI staff and board members are not City employees.

vii. *Balancing of factors*

This case is a close call. On the one hand is the importance to the City of the district coalitions in furthering community engagement as evidenced by its direct control of two of the seven and the significant amount of government funding SWNI receives. On the other, SWNI has no public employees; it is an organization that arose independent of government; and the City has no control over its operations apart from the power to stop funding it.

Many non-governmental organizations in our community provide important public services and receive significant grant funding from the government to do so. There must be, and is, a distinction between being important to government and being the equivalent of government. As such, we find the deciding factor in this otherwise closely balanced case to be SWNI's lack of policy-making authority under the third *Marks* factor.

The primary thrust of the Supreme Court's analysis in *Marks* is on the transparency of government decision-making. *Marks*, 319 Or 451 at 465. So too in *Laine* where the fire district employees in *Laine* were vested with the power of arrest, the power to grant or deny certain permits, and the authority to declare a state of emergency. *Laine*, 134 Or App 655 at 664. With that independent, and core, policy-making and enforcement authority came the obligation of transparency under the public records law.

SWNI, by contrast, can make no final policy decisions on behalf of the City of Portland. In *Kerensa*, we held that neighborhood 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.” District coalitions perhaps have greater sway with the City, but that is a difference of degree, not nature. Taken collectively, the *Marks* factors indicate that SWNI is not the functional equivalent of a public body.

Accordingly, this office lacks the authority to consider this petition on the merits.

Very truly yours,



ROD UNDERHILL
District Attorney
Multnomah County, Oregon