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VIA EMAIL ONLY

Alan Kessler
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Christine Taylor
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Re: Petition of Alan Kessler seeking records from Clean & Safe

Dear Mr. Kessler and Ms. Taylor:

In his public records petition, dated January 6, 2023, petitioner Alan Kessler requested that this office order Clean & Safe, Inc. to disclose emails to or from its executive director during a 40-day period. Clean & Safe responds that it is a 501(c)(3) nonprofit organization and not subject to the public records law. Petitioner acknowledges that Clean & Safe is a nonprofit, but asserts that under existing Supreme Court interpretation of the public records law Clean & Safe is the “functional equivalent” of a public body and, thereby, required to comply with the public records law. *Marks v. McKenzie High School Fact-Finding Team*, 319 Or 451 (1994).

At a high level, Clean & Safe is a nonprofit organization, funded by a city-collected business license fee, that provides services to businesses within an Enhanced Service District (ESD) in downtown Portland. These services primarily include: safety coordinators (security guards), sidewalk ambassadors, a “Downtown District Attorney Administrative Aid,” and janitorial workers. Petitioner argues that these functions are governmental functions that, when combined with the other factors in *Marks*, subject Clean & Safe to Oregon’s Public Records Law. For the reasons discussed in more detail below, we agree in part.

DISCUSSION

A. Legal Framework

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 concluded that “the determination of whether a particular entity is a ‘public body’ [...] will depend on the character of that entity and the nature and attributes of that entity’s relationship with government and governmental decision-making.” *Id.* at 463. To inform this analysis, the court identified six factors to consider:

- (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. *Marks* issues come up rarely in published judicial opinions and a brief survey the few cases that have interpreted *Marks* provides useful context.

Marks itself involved a school board that wished to investigate issues in a high school establishing a fact-finding team comprised of private citizens to investigate and report back. When a member of the public sought to obtain records directly from that fact-finding team, they were rebuffed and ultimately sued. The court’s decision, although analyzing all the factors listed above, was primarily informed by the failure to show that the entity in question was given any decision-making authority. *Marks* at 466. The court found that the policy goals behind the public records law were served by having school board records available for inspection and declined to require the same of the fact-finding team directly.

The next year in *Laine v. City of Rockaway Beach*, 134 Or App 655 (1995) the Court of Appeals found that a reorganizing a previously public fire district as an independent nonprofit organization did not relieve it of its public records obligations. In reaching this conclusion the court relied on: the traditional and core governmental service provided by a fire department; that the fire department was directly established by the City; the direct control the city retained over the department; and that the department’s top-ranking officers were all paid by the city.

This office has found the Montavilla Community Association, an officially recognized Portland neighborhood association, not subject to the public records law because it was formed independent of any official recognition and because it “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.” *Petition of Kerensa*, MCDA PRO 18-05 at 2 (2018). We have also concluded that the fact that a nonprofit research organization receives substantially

all of its funding from State grants does not make it a public body. *Petition of Allen*, MCDA PRO 16-06 (2016).

The Attorney General has issued a handful of *Marks* decisions over the years, including *Petition of Rios*, Att’y Gen. PRO (7/28/2008) (finding Oregon Bridge Delivery Partners’ payroll records not subject to the public records law because the specific function relating to the records sought was non-governmental); *Petition of Long*, Att’y Gen. PRO (9/3/2002) (Oregon Public Broadcasting not a public body despite being chartered by the state and receiving ongoing state funding); and *Petition of Forrester*, Att’y Gen. PRO (11/19/2002) (Citizen’s Utility Board, although created by statute and granted special privileges by statute, not a public body).

B. Application of *Marks* to Clean & Safe

i. Was Clean & Safe created by the City of Portland?

No. Although Clean & Safe exists to fill a function envisioned and allowed for by the City of Portland, it was not created or chartered by the City. Clean & Safe’s counsel writes that in 1988 the City of Portland allowed for the formation of an Enhanced Service District in downtown Portland by ordinance, and that the relevant City Code provision states that the City would later contract with “a non-profit corporation or other non-profit entity established by property owners or licensees in the District for the purpose of providing services that benefit the District.” PCC 6.06.020(N); See also, PCC 6.06.010.

Petitioner argues that Clean & Safe exists only to fill a specific niche created by city ordinance: to manage public money for the purpose of providing services in a specific geographic area. Clean & Safe rejoins that the ESD was created by a vote of the property managers, who then sought approval from the City, and then independently formed Clean & Safe to administer the ESD that had been so-approved.

The circumstances of Clean & Safe’s origins fall somewhere between the direct government creation in *Marks* and *Laine* and the *post hoc* recognition of an independent organization in *Kerensa*. Unlike in *Kerensa*, businesses in the ESD created Clean & Safe for the purpose of official recognition but, unlike *Marks* and *Laine*, it is also clear that its creation was ground-up rather than government-originated. This is bolstered by the provision providing that a substantial minority of the property managers can dissolve the ESD without recourse from the City. PCC 6.06.230. On balance we find this factor to weigh, slightly, against finding Clean & Safe the functional equivalent of a public body.

ii. Are Clean & Safe’s functions traditionally associated with government?

Neutral. PCC 6.06.010 provides that the license fees required of district property managers “will be used to provide, through a qualified contractor, cleaning, security, crime prevention, business development, transportation, public policy, housing, and marketing and communications services, or any such services, that benefit properties in the district.” Pursuant to this section, the City has contracted with Clean & Safe primarily to provide safety coordinators, sidewalk ambassadors, a “Downtown District Attorney Administrative Aid,” and janitorial workers. City of Portland Contract #30007911 (11/18/2021).

Providing security, basic sanitation, and public housing are undoubtedly functions associated with government. However, plenty of private entities also provide these same services either in lieu of or to supplement those provided by government. As to security services, the contracts make clear that Clean & Safe's private security functions are in addition to, not in lieu of, the police officers routinely assigned to the patrol districts within the ESD. The same can be said of the enhanced cleaning services. The City provides basic street sweeping services to all residents and has created franchises for debris removal for all residents. Clean & Safe augments those services for property managers in the ESD, which is an option available to any property owner or tenant.

On balance this factor is neutral.

iii. What is the scope of Clean & Safe's authority?

The "authority" referenced in *Marks* and *Laine* is the authority to make binding decisions on behalf of government. *Marks*, 319 Or at 464-65; *Laine*, 134 Or App at 644. The Attorney General has likewise so-interpreted this factor. *Petition of Long*, Att'y Gen. PRO (9/3/2002) (concluding there was "no way in which decisions made by OPB personnel bind the actions of state government" and finding this dispositive of the "authority" factor).

Clean & Safe has no authority to set City policy, legally bind the City to action, or enter contracts on behalf of the City. Those connected to Clean & Safe with more direct government involvement (the police officers and legal assistant discussed below) are not policymakers nor do they have any supervisory authority or control over Clean & Safe's operations. Having carefully reviewed the relevant ordinances and contracts, we find this factor weighs against finding Clean & Safe to be a public body.

iv. What is the nature and level of government financial involvement with Clean & Safe?

Substantial. That an organization draws all, or substantially all, of its funding from government does not, standing alone, make it the functional equivalent of 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, Clean & Safe's situation is distinguishable from many other nonprofit contractors.

The Portland City Code mandates collection of fees from property management businesses in the ESD for the exclusive use of Clean & Safe (the "qualified contractor") in providing services for the collective benefit of the properties being managed. PCC 6.06.010. Put another way, Clean & Safe's funding source is direct taxation, an exclusive government prerogative.

Private organizations, including homeowner's associations, clubs, and other voluntary associations, collect fees from their members and administer them for their collective benefit without becoming public bodies. However, those fees are imposed by private contract or deed restrictions and not by legislation. Furthermore, PCC 6.06.215 provides that the City may use this license fee revenue stream as security for City debt undertaken for City-financed improvements to the ESD. That Clean & Safe draws the vast majority of its funding from

government-mandated, and specifically-earmarked, fees weighs in favor of it serving a governmental function.

- v. *What is the nature and scope of government control over Clean & Safe's operations?*

The City exercises little control over Clean & Safe's operations beyond the requirements and controls placed on any government contractor. The contract with Clean & Safe mandates processes for members of the public to lodge complaints about Clean & Safe safety coordinators. Section VII (J). It also provides that the certain city officers may review Clean & Safe internal investigations and make recommendations regarding removal of safety coordinators. *Id.* These sections also mandate regular public reporting requirements for the various contracted services Clean & Safe provides.

Apart from the specific call-outs in the complaint process, these reporting requirements are not unusual for government contractors. As to the complaint provisions in VII(J), the City retains only the authority to "recommend" action to Clean & Safe.

In *Marks* the Court found the "control" factor weighed against public status because "there is nothing in the complaint to suggest that the board exercised any sort of supervision over [the fact-finding team's] day-to-day operation." *Marks*, 319 Or at 465. As in *Marks* there is nothing we have seen to indicate that the City has any authority over employment decisions or supervision regarding any Clean & Safe employee. The Court reached the opposite conclusion in *Laine*, noting that the city retained authority to terminate the fire department's chief without cause. *Laine*, 134 Or App at 665. The City of Portland retains the authority to terminate its contract with Clean & Safe and, were it to do so, the vast majority of Clean & Safe's funding would end, but this dynamic is separately addressed under the "financial involvement" factor and does not independently indicate direct control. See, *Petition of Allen*, MCDA PRO 16-06 (2016).

- vi. *Are Clean & Safe's officers and employees government officials or government employees?*

No. None of Clean & Safe's officers or employees are government employees, or appointed by government, but that does not tell the full story. In support of his argument under this factor, petitioner points to five individuals who collectively fall into two categories. First, Clean & Safe employs a legal assistant who is assigned to support the Multnomah County District Attorney's Office's Strategic Prosecution and Services Unit and assist with administrative coordination of criminal cases that arise within the district. Second, Clean & Safe pays most of the costs of four police officers who are assigned by Central Precinct to support Clean & Safe's safety coordinators in providing a visible security presence in the district.

The Portland Police Bureau (PPB) officers assigned to the Clean & Safe district remain PPB employees subject to all policies, procedures, and chain of command that apply to any other PPB employee. That they are largely funded by Clean & Safe does not make them Clean & Safe employees. The only Clean & Safe employee who performs a direct government function is the legal assistant assigned to support the district attorney's office.

vii. Balancing

The Attorney General has recognized that nonprofits can serve many functions, frequently simultaneously. *Petition of Rios*, Att’y Gen. PRO at 4 (7/24/2008) (“we note the possibility that a single entity could perform some functions that are governmental under the functional approach of *Marks*, while performing other functions that would not meet that standard.”) see also, *Id.* at n.3. Ultimately in *Rios* the Attorney General determined it appropriate to look at the entity’s functional equivalency in relation to the particular records requested. *Id.* at 4 (“the policies underlying the Public Records Law would be adequately protected [...] by a rule subjecting an entity’s records to disclosure under the Public Records Law only to the extent that the records are possessed pursuant to governmental functions being performed by the entity.”)

On the record before us we do not find that Clean & Safe, as a whole, is the functional equivalent of a public body under *Marks*. We do think that the financial arrangement described above is a significant factor in favor of public status. And the direct assistance that Clean & Safe receives from, and provides to, core governmental public safety agencies is, at best, evenly balanced with the independence of its management and leadership. However, we find the lack of the direct control present in *Laine* and the lack of direct policymaking authority as emphasized in *Marks* slightly outweighs those factors.

However, we do find that Clean & Safe’s role as a pass through for tax-based funding of public (police) or functionally public (district attorney legal assistant) positions does subject it to the public records law under *Marks* as construed by *Rios* as to those particular functions. Since it is plausible that the emails of Clean & Safe’s executive director will contain records directly relevant to the funding, supervision, or operations of these five positions, records on those topics “contain[] information relating to the conduct of the public’s business” as defined in ORS 192.311(5)(a) and must be released unless otherwise exempt from disclosure.

ORDER

Accordingly, Clean & Safe is ordered to produce non-exempt records responsive to petitioner’s request specifically related to the funding, supervision, and operations of the contracted Central Precinct police officers and the “Downtown District Attorney Administrative Aid.” This order is pursuant to ORS 192.407(1). As today is the first day Clean & Safe has received formal notice it must comply with the public records law as to portions of its operations, pursuant to ORS 192.407(3)(a), we find that it is appropriate that Clean & Safe complete its response to this request within 15 business days of this order, subject to the payment of fees, if any, not to exceed those authorized by ORS 192.324(4) and the tolling provisions of ORS 192.329(3)(a).

Very truly yours,



MIKE SCHMIDT
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