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IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF MULTNOMAH

	)	
	)	Case No. 20CV35030
MARIE TYVOLL and SHANNON	)	
HILLER-WEBB,	)	DECLARATION OF SIMON WHANG IN
	)	SUPPORT OF DEFENDANT’S MOTION
Plaintiffs,	)	FOR SUMMARY JUDGMENT
	)	
v.	)	
	)	
SOUTHWEST NEIGHBORHOODS, INC.,	)	
an Oregon Public Benefit Corporation,	)	
	)	
Defendant.	)	

I, Simon Whang, declare and state:

- 1. I am the attorney for Defendant in the above-entitled matter. I make this statement in support of Defendant’s Motion for Summary Judgment.
- 2. Attached as Exhibit 1 is a true and correct copy of the City of Portland’s April 8, 2020 letter to the Multnomah County District Attorney.
- 3. Attached as Exhibit 2 is a true and correct copy of the Multnomah County District Attorney’s May 18, 2020 letter denying Maria Tyvoll’s petition.

I DECLARE THAT THE ABOVE STATEMENTS ARE TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND THEY ARE MADE FOR USE AS EVIDENCE IN COURT AND ARE SUBJECT TO PENALTY FOR PERJURY.

DATED this 9<sup>th</sup> day of December, 2021.

/s/ Simon Whang  
Simon Whang, OSB No. 035282



CITY OF  
**PORTLAND, OREGON**  
OFFICE OF THE CITY ATTORNEY

**Tracy Reeve, City Attorney**  
1221 S.W. 4<sup>th</sup> Avenue, Suite 430  
Portland, Oregon 97204  
Telephone: (503) 823-4047  
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April 8, 2020

**Via email: adam.gibbs@mcda.us**

Adam W. Gibbs  
Multnomah County District Atty Office  
Multnomah County Justice Center  
1120 SW Third Avenue, Room 358  
Portland, OR 97204

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

Dear DDA Gibbs:

This office is in receipt of your email dated April 2, 2020, including the petition of Marie Tyvoll dated March 30, 2020. In her petition, Ms. Tyvoll seeks an order compelling Southwest Neighborhoods, Inc. (SWNI) to provide:

"All emails, including any attachments, stored anywhere within the SWNI email account for Sylvia Bogeli (i.e. sylvia@swni.org) that were either sent from or addressed to (including From:, To:, CC:, BCC:, etc.) one or more of: Jim McLaughlin, Marianne Fitzgerald, Lee Buhler, and Don Baack, and which were sent between November 1, 2010 and January 31, 2012."

You have asked the City for a position and argument on whether public records laws apply to district coalitions—as opposed to neighborhood associations. You indicated that because this appeal related to a procedural matter you “are not requesting copies of the underlying records at this time.” Please note that the City of Portland does not maintain custody or control of the requested records as explained in more detail below, however, the City may have some of the records if the City was included on the emails, or if an e-mail string was otherwise provided to the City. Importantly, this response represents the City of Portland’s position on the issues presented. The City does not represent SWNI and cannot speak for SWNI. Additionally, SWNI was not made party to this petition so it is not clear that the District Attorney’s decision would be binding on SWNI.

#### BACKGROUND

Ms. Tyvoll filed a public records petition on March 4, 2020 to SWNI. Ms. Tyvoll asserts that SWNI has not responded to her request apart from asserting that SWNI is not subject to the public records law. However, it does not appear that SWNI was contacted for a position, therefore, petitioner’s assertions cannot be verified.

The District Attorney issued a summary order on March 30, 2020 denying the petition and cited its prior holding that neighborhood associations are not public bodies for purposes of the public records law. *Petition of Kerensa*, MCDA PRO 18-05 (2018). Petitioner asked for reconsideration, explaining that her petition was to a District Coalition which is a different type of entity. The District Attorney reconsidered the summary denial and asked the City of Portland for a response on the issue.

Portland residents can create an autonomous organization with residents within a geographic boundary and obtain formal recognition by the City. The primary purpose of these groups is to serve the needs of the community; not the needs of the City. These groups fall within two classifications: neighborhood associations and district coalitions. Both types of organizations allow residents to weigh-in on issues affecting the livability and quality of their neighborhood. The difference between the two is that district coalitions will encompass a larger geographic area, and therefore, contain several neighborhood associations. District coalitions are contracted by the City of Portland to provide training, orientation, information and support to neighborhood associations. The City only provides direct grant funding to district coalitions which then distribute a portion of the funds to the neighborhood associations within its geographic boundaries. All 95 neighborhood associations are private entities.

There are seven District Coalitions with two different formats. Five of the district coalitions are independent private non-profit entities like SWNI. The two district coalitions that have greater City involvement are not at issue here, and therefore, are outside the scope of this response. Instead, this letter will discuss the format for the five independent private non-profit district coalitions, which includes SWNI.

## DISCUSSION

A. Independent non-profit district coalitions such as SWNI are not public bodies for purposes of Oregon Public Records Law

The Oregon Supreme Court determined that a private entity could be considered a public body for purposes of public records law if it was the “functional equivalent” of a public agency. *Marks v. McKenize High School Fact-Finding Team*, 319 Or 451, 463 (1994). In *Marks*, the Court developed a six-factor test to determine if the private entity is the functional equivalent of a public body. Those factors are:

- 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(s) assigned 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 authority granted to and exercised by the entity (e.g., does the entity have the authority to make binding government decisions, or is it limited to making nonbinding recommendations);
- 4) The nature and level of governmental 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 governmental control over the entity's operation; and
- 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 463-464.

In this case, the totality of the six factors weighs against a determination that the five independent non-profit district coalitions (including SWNI) are public entities.

1. Independent non-profit district coalitions such as SWNI are not public bodies **because they were privately created and are not City of Portland creations.**

When entities were created by the government, courts have held that this weighs in favor of finding that the entities were the functional equivalent of government bodies. Thus, for example, in *Marks*, the School Board asked the Confederation of School Administrators to appoint the Fact-Finding Team at issue in that case. *Marks*, 319 Or at 464. Thus, it was held to originate with the public body which weighed in favor of finding it to be a functional equivalent of a public agency. *Id.* Likewise, in *Laine*, the Fire Chief was created by City Charter and directed the Fire Chief to organize a fire department. *Laine v. City of Rockaway Beach*, 134 Or App 655 (1995). Again, this creation by the public body weighed in favor of a finding that the fire department in *Laine* was a public body for purposes of public records obligations.

In contrast, an origin independent of the government body weighs against finding district coalitions are the functional equivalent of a public body. In this instance, Portland's five non-profit independent district coalitions were not created by the government. They are each private associations of individuals. In this case, SWNI was created by community members in 1978 as Southwest Neighborhood Information, Inc. and assumed by SWNI in 1997. It is a nonprofit public benefit corporation registered with the Oregon Secretary of State under Registry Number 130372-13. Thus, like the neighborhood coalition analyzed in *Petition of Kerensa*, SWNI "arose independent of any official recognition or involvement of the City of Portland." *Petition of Kerensa*, MCDA PRO 18-05 (2018) at 2. Even had the City created or been involved in the creation of a district coalition, that factor alone would not make a coalition the functional equivalent of a public agency. See *Petition of Trejbal*, MCDA PRO 17-27 (2016). Accordingly,

this *Marks* factor weighs against independent district coalitions such as SWNI being the functional equivalent of a public agency.

2. Independent non-profit district coalitions such as SWNI are not public bodies because they do not perform traditional government functions.

In *Marks*, the court determined that a group assigned to investigate a high school administration was related to the operation of that school and that operations of school were functions traditionally associated with the government. *Marks*, 319 Or at 464. Similarly, in *Laine*, fire fighting was held to be a traditionally government function. *Laine v City of Rockaway Beach*, 134 Or App 655 (1995). In contrast, the functions performed by SWNI are similar to other private, civic and charitable organizations designed to improve local neighborhood communities.

SWNI, not the City of Portland, established its bylaws. According to SWNI's bylaws, the purposes for the organization are:

- a. To encourage, support and coordinate civic participation in matters affecting the livability of Southwest Portland by providing educational resources and maintaining communication between individuals, neighborhood associations, public agencies, business organizations, private and other organizations;
- b. To encourage and support activity of neighborhood associations in southwest Portland;
- c. To provide assistance for activities and projects of neighborhood associations in Southwest Portland upon request;
- d. To represent the membership of SWNI in matters affecting the livability of Southwest Portland;
- e. To reflect the full diversity of all people found within its boundaries, including but not limited to communities of color, immigrant and refugee populations, renters, and individuals of all income levels; and
- f. To provide personnel and resources necessary to accomplish the above purposes.

<https://www.swni.org/sites/default/files/2019-05/Adopted%20SWNI%20Bylaws%20Sept%2C%2026%2C%202018.pdf>.

All these functions are typically performed by private entities. Moreover, these are not traditional government functions like police, fire, schools, etc. Like the neighborhood association in *Kerensa*, this is an association of residents who can organize and advocate for the interests of their residential group. The difference is that District Coalitions cover a larger geographic area and contract directly with the City. As the District Attorney noted in *Kerensa*, "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."

*Petition of Kerensa, MCDA PRO 18-05 (2018) at 3.*

Petitioner seems to argue that because the City is sponsoring two district coalitions with greater City involvement, that makes the five other private non-profit district coalitions public bodies as well. However, that would turn this factor on its head. The question is not whether any public body has ever performed this function, but whether the function is traditionally a government function. To find otherwise would mean that any instance when a government engages in non-traditional services, it converts the entire industry to government bodies. For example, some governments construct low income housing, but that does not convert all low-income housing construction to a traditional government function. The government engaging in construction would be subject to public records law, but other government grantees still would not be because they are not the functional equivalent of a government body.

3. Independent non-profit district coalitions such as SWNI are not public bodies because they **have no authority to make binding decisions for the City.**

The court in *Marks* held that when an entity's scope of authority did not include the ability to make decisions to bind the public body, this weighed against finding that the entity was the functional equivalent of the government body. *Marks*, 319 Or at 464-465.

The five independent non-profit district coalitions, such as SWNI, do not have authority to make binding decisions for the City. These district coalitions (like other community organizations, including neighborhood associations) can express their views to City leaders and bureaus. City leaders and bureaus often reach out to district coalitions and seek input from them as part of their broader community engagement efforts. However, SWNI cannot make binding decisions for the City. As in *Marks*, there is no evidence that the City "has committed itself in any way to follow [the private entity's] recommendation." *Marks*, 319 Or at 465. Because the independent District Coalitions like SWNI cannot bind the City, this factor weighs against finding the independent District Coalitions like SWNI are the functional equivalents of public entities.

4. Independent non-profit district coalitions such as SWNI are not public bodies even though **the City provides lump sum grants to qualifying district coalitions.**

The courts look at the degree of financial support provided to an entity as a factor to consider as part of the determination of whether an entity is the functionally equivalent of a public body. The City of Portland Office of Civic & Community Life does provide grant funding to all five independent community-governed non-profit district coalition offices that provide leadership training, organizing support and other technical assistance to neighborhood associations and other community organizations in their districts. The five independent non-profit district coalitions reported that the grant provided by the Office Community & Civic Life for fiscal year 2019-2020 represents 85% to 100% of their organizational budget. In the

proposed budget for fiscal year 2019-2020, SWNI represented that 15% of their \$357,370 organizational budget is funding from a source other than the Office of Community & Civic Life.

Receipt of public grants is not sufficient to make an entity the functional equivalent of a public body. The District Attorney determined that OWET was not a public body even despite the fact that most of OWET funding being from the State of Oregon: ‘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.’ *Petition of Allen*, MCDA PRO 16-06 (2016) at 3. Indeed, the District Attorney explained that the receipt of grant money alone would not make an entity a public body: “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.” *Id.* See also *Petition of Dolan*, MCDA PRO 03-01(2001) (Albina CDC received government grants but was not the functional equivalent of a public body).

Likewise, in this case, the independent non-profit district coalitions like SWNI receive grants from the City. However, this factor alone does not convert them to the functional equivalent of public entities.

- 5. Independent non-profit district coalitions such as SWNI are not public bodies because the City has a contractual relationship with SWNI and other district coalitions but does not control their day to day operations.**

In *Laine*, the court determined that the City of Rockaway Beach exercised significant control over the fire department by approving the election of the fire chief, whom it could remove, by having the authority to define the powers and duties of the fire department which it did through a series of ordinances such as giving fire fighters the ability to arrest disorderly persons, and by defining the geographic scope of the fire departments activities. *Laine*, 134 Or App at 665. The court found this level of control weighed in favor of finding the fire department was the functional equivalent of a public agency. *Id.*

In contrast, the District Attorney held that neighborhood associations were not the functional equivalents of public bodies even though the City does regulate neighborhood associations, district associations and business associations. *Petition of Kerensa*, MCDA PRO 18-05 (2018) at 2. A neighborhood association’s failure to follow City standards could result in the City “decertifying” it and suspending certain benefits. *Id.* After analyzing this “loose control,” the District Attorney held that, “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.” *Petition of Kerensa*, MCDA PRO 18-05 (2018) at 2.

The City exercises the same persuasive power but no direct control over independent, non-profit district associations. Like neighborhood associations, district coalitions are required

to meet certain criteria (“ONI Standards”) in order to be recognized by the City as codified in Portland City Code Chapter 3.96. ONI Standards require a degree of open meetings and records retention, though not to the same degree as the law that applies to public bodies. The composition of the board of directors is to be primarily composed of delegates duly selected by member neighborhood associations; and prescribed processes for determining and amending the organizational affiliation of District Coalitions and member neighborhood Associations. See e.g. Standards for Neighborhood Associations, District Coalitions, Business District Associations, And the Office of Neighborhood Involvement (<https://www.portlandoregon.gov/civic/article/97870>). But like a neighborhood association discussed in *Kerensa*, a district coalition could choose to "de-certify," and it would continue to exist as a private entity, albeit without the enjoyment of some of the recognized benefits. SWNI, as the other independent, non-profit district coalitions choose their own boards, sets their own agendas, and manage their own affairs. Indeed, the ONI standards state: “Except as otherwise stated, the working and procedural relationship(s) among Neighborhood Associations, District Coalitions, and District Coalition staff shall be determined by the groups involved, and these relationships shall be respected by the Office of Neighborhood Involvement.”<sup>1</sup> The District Coalitions, and not the City, make these day to day decisions.

The City has a contractual relationship with the five independent non-profit district coalitions like SWNI. The City does not exercise control over the day to day operations and does not decide who is on the boards or employed by the District. The petitioner does not assert the City “exercised any sort of supervision over defendants day-to-day operation.” *Marks*, 319 Or at 465. Thus, this factor weighs against finding that the district coalitions were public bodies.

6. Independent non-profit district coalitions such as SWNI are not public bodies because **district coalition officers and staff are not City employees.**

Finally, to the extent that a nonprofit district coalition has officers or staff - they are not City employees. The officers are elected in accordance with each district coalition’s bylaws and primarily consist of people who live, own property, or operate a business within the district coalition boundaries. SWNI staff are not City employees, though grant funds are used for staff. City standards make it clear that District Coalition staff are not City employees and any personal decisions are made by the districts. See e.g. Standards for Neighborhood Associations, District Coalitions, Business District Associations, And the Office of Neighborhood Involvement (<https://www.portlandoregon.gov/civic/article/97870>). Thus, this factor weighs against finding that the independent nonprofit district coalitions like SWNI are public bodies because their employees are not City employees, nor do they operate under City control.

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<sup>1</sup> The Office of Neighborhood Involvement is the predecessor name to the Office of Community & Civic Life

After reviewing the six factors, the only one that seems to weigh in petitioner's favor is that district coalitions receipt of grant money. Indeed, that is really the only difference between neighborhood associations, which were found to not be public bodies in *Kerensa*, and district coalitions. District coalitions may receive lump sum grants if they meet certain criteria. However, that single factor is not sufficient to change an entity into the functional equivalent of a public body, as the District Attorney explained in *Petition of Allen*, MCDA PRO 16-06 (2016).

At its core the public records law is to allow the public access to records that show the business and decisions of the public body. In this instance, SWNI cannot bind the City or make decisions for it. SWNI's actions are those of a private grantee, not a public body. Thus, the purposes of the public records law would not be fulfilled in searching the personal email of SWNI. As the Oregon Supreme Court explained: "In this case, because defendant's operations were independent of government, and because defendant did not have any authority to make decisions for the school board, access to defendant's records was not necessary to serve the policy goals behind the Inspection of Public Records Law." *Marks 319 Or 466*.

Accordingly, you should dismiss Ms. Tyvoll's petition because SWNI is not the functional equivalent of a public body.

B. Ms. Tyvoll's request seeks records beyond the seven-year retention period

For grantees such as SWNI, the City asks that they maintain business records for seven years as part of the contract grant terms. Thus, even assuming the emails being requested were limited to those relating to the business of SWNI, it is unlikely that they would still exist 8-10 years after creation. See e.g. Standards for Neighborhood Associations, District Coalitions, Business District Associations, And the Office of Neighborhood Involvement (<https://www.portlandoregon.gov/civic/article/97870>) Record Retention, Part O, No. 2, p. 45. It would be worthwhile for SWNI to indicate whether any such records even exist, otherwise this petition is moot.

## CONCLUSION

For the reasons explained above, SWNI is not acting as a public body for public records purposes. This petition should be dismissed for lack of jurisdiction of this private entity.

Additionally, it does not appear that SWNI was served with a copy of the petition. SWNI needs to be served and given an opportunity to respond for an order to be binding on them. The City's Office of Community & Civic Life will contact SWNI and request these records on petitioner's behalf and pursue any contractual remedies that the City may have available.

Adam W. Gibbs  
April 8, 2020  
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Please do not hesitate to contact me with any questions.

Cordially,

*/s/ Tony García*

Tony García  
Deputy City Attorney

TG:klk

cc: Ms. Marie Tyvoll (mtyvoll@gmail.com)



**ROD UNDERHILL**, District Attorney for Multnomah County

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

May 18, 2020

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

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the date stated below, I served the foregoing DECLARATION  
3 OF SIMON WHANG IN SUPPORT OF DEFENDANT’S MOTION FOR SUMMARY  
4 JUDGMENT on the following:

5 Alan Lloyd Kessler  
6 1001 SE Sandy Blvd. Suite 210  
7 Portland, OR 97214  
ak@alankessler.law  
Attorney for Plaintiffs

- 8  by mailing a true and correct copy, certified by me as such, place in a sealed envelope  
9 and addressed to the party at the address set forth above, and deposited with postage  
prepaid in the U.S. Post Office at Portland, Oregon;
- 10  by facsimile to the fax number set forth above;
- 11  by electronic mail to the email address set forth above;
- 12  by electronic service, by selecting as a service contact the individual named above  
13 through Odyssey File & Serve, the electronic filing system, at the time the document was  
electronically filed with the Court.
- 14  by hand-delivery to the person or at the address set forth above.

15 DATED December 9, 2021.

16  
17 /s/ Simon Whang  
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Of Attorneys for Defendant  
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