

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

**MARIE TYVOLL and SHANNON HILLER-
WEBB,**

PLAINTIFFS,

v.

**SOUTHWEST NEIGHBORHOODS, INC., an
Oregon public benefit corporation,**

DEFENDANT.

CASE NO. 20CV35030

**Plaintiffs' Response to
Defendant's Motion for
Summary Judgment &
Cross-Motion for Summary
Judgment**

Oral argument requested (45 minutes)

REQUEST FOR ORAL ARGUMENT

Plaintiffs Marie Tyvoll and Shannon Hiller-Webb request, under UTCR 5.050, that the court hold a one-hour recorded oral argument on the parties' cross-motions for summary judgment.

MOTION

Plaintiffs cross-move this court for an order, under ORCP 47, granting summary judgment in their favor, and against defendant Southwest Neighborhoods, Inc. (SWNI), on both of their claims for relief. In support of their cross-motion, Plaintiffs rely on the case record, supporting declarations from Marie Tyvoll, Shannon Hiller-Webb, James J. McLaughlin, and Rian Peck, and the

1 points and authorities set forth below. Plaintiffs further request that the court
2 grant the following relief on their claims:

- 3 1. A declaration that SWNI is, or at all relevant times was, a “public
4 body” or the functional equivalent, subject to the Oregon Public
5 Records Act;
- 6 2. A declaration that SWNI unlawfully withheld public records from
7 Plaintiffs;
- 8 3. An order requiring SWNI to disclose all public records it unlawfully
9 withheld from Plaintiffs;
- 10 4. An order enjoining SWNI from withholding public records in the
11 future;
- 12 5. A declaration that Plaintiffs are the prevailing party and are entitled
13 to their reasonable costs and attorney fees under ORS 192.431(3)
14 and ORCP 68.

15 **MEMORANDUM OF LAW**

16 **I. Introduction**

17 This case presents the court with the question whether defendant SWNI,
18 as a District Coalition, violated the Oregon Public Records Act when it refused to
19 disclose its public records to Plaintiffs, claiming it was not a “public body” and
20 not subject to the public records law.

21 SWNI’s position then, and now, does not comport with the role that
22 District Coalitions play in the City of Portland’s system of governance. District
23 Coalitions (when they function as they are intended to, at least) are the City’s
24 mechanism for communicating with its constituents in an organized fashion. The
25 City notifies District Coalitions about its planned activities in the Coalition’s
26 district, which the Coalition in turn communicates—for the City—to the
27 Neighborhood Associations in its district. PCC 3.96.040. But that is only one
third of the equation. The second part of District Coalitions’ role is to convene
the feedback and opinions of Neighborhood Associations, compile that feedback

1 for the City, and communicate it to the Office of Community & Civic Life, which
2 then facilitates the District Coalitions' access to the relevant City bureaus and
3 Commissioners so that City officials can hear from the people. *Id.* And that is
4 where the final third of SWNI's function comes into play—the City has also
5 granted District Coalitions the authority to represent the views and opinions of
6 the Neighborhood Coalitions in its district. *Id.* In other words, District Coalitions
7 are not only the City's mouthpiece to the people about what the City has planned
8 for their neighborhoods, but they are also the neighborhoods' representatives and
9 advocates to City officials.

10 The purpose underlying the Oregon Public Records Act is to grant
11 Oregonians access to the information upon which their government officials and
12 representatives are relying to make the decisions that affect them. *Marks v.*
13 *McKenzie High School Fact-Finding Team*, 319 Or 451, 466 (1994). District
14 Coalitions like SWNI have information to which the people deserve access: What
15 information does the City communicate to SWNI? What of that information does
16 SWNI communicate to Neighborhood Associations? What do Neighborhood
17 Associations communicate to SWNI? What conversations does SWNI have to
18 organize a collective voice to bring to the City (and what voices are not heard)?
19 What information does SWNI convey to the City (and what information does it
20 not convey)?

21 Given SWNI's role as a key player in the form of participatory democracy
22 that our City designed, its attempt to cloak itself behind corporate formalities
23 should not be upheld. Plaintiffs respectfully request that this court grant their
24 cross-motion for summary judgment and deny SWNI's competing motion.
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II. Facts

Until recently, SWNI operated as a district coalition. District coalitions are creatures of City Code. *See* PCC 3.96.010 (describing purpose of Neighborhoods Program); 3.96.020 (defining “District Coalition”); 3.96.040 (outlining “Functions of District Coalitions”).¹ They are one part of the City’s Neighborhoods Program, a “framework by which the people of the City of Portland may effectively participate in civic affairs and work to improve the livability and character of their Neighborhoods and the City.” PCC 3.96.010.

The Neighborhoods Program is multi-layered. At the most local level, there are 94 Neighborhood Associations, which are connected to specific, non-overlapping neighborhood boundaries that span the City limits. PCC 3.96.020; 3.96.030; Peck Decl. Ex. 2 (City’s *About Neighborhood System* webpage).

In broad terms, Neighborhood Associations exist to advise the City and “[m]ake recommendation(s) concerning a particular action, policy or other matter * * * on any topic affecting the livability, safety and economic vitality of the Neighborhood, including but not limited to land use, housing, community facilities, human resources, social and recreational programs, traffic and transportation, environmental quality and public safety,” and “[a]ssist City agencies in determining priority needs” of their neighborhood. PCC 3.96.030(B).

At the next level are the City’s seven District Coalitions. PCC 3.96.040; *see also* Peck Decl. Ex. 3 (City’s *About District Coalition Offices* webpage). District Coalitions are, like their names suggests, a coalition of several Neighborhood Associations. *See* PCC 3.96.020. They operate in defined geographic boundaries—Southwest Portland, North Portland, Northeast Portland, etc.—and “are funded by Portland taxpayers.” Peck Decl. Ex. 3, at 1.

¹ For the Court’s convenience, a copy of Portland City Code Chapter 3.96 is attached to Rian Peck’s declaration as Exhibit 1.

1 According to the Office of Community & Civic Life (“Civic Life”), District
2 Coalitions are the “direct channel” between the City and Neighborhood
3 Associations, through which Neighborhood Associations “engage in City decision-
4 making” and “represent neighborhood interests in land use and development
5 decisions.” *Id.* at 4. Civic Life explains its rationale for creating District
6 Coalitions as follows:

7 “Neighborhood Associations are volunteer-led and require
8 regular elections that are confined to city limits and for these
9 reasons, the City realized it needed to expand its ability to
10 provide better administrative support to ensure that
11 neighborhood associations could be successful as they built
12 community and organized events. As a result, the City created
the seven independent District Coalition Offices that were
initially set-up as independently run non-profit organizations.”

13 *Id.*

14 At the highest level of the communications chain is Civic Life, which is an
15 “agency of the City of Portland, whose purpose is to facilitate citizen
16 participation and improve communication among citizens, Neighborhood
17 Associations, non-profit District Coalitions/City-staffed District Coalitions, City
18 agencies, and other entities.” PCC 3.96.020(E). Aside from acting “as an
19 information clearinghouse” between the City and Neighborhood Associations, it
20 assists Neighborhood Associations and District Coalitions with “planning and
21 developing programs for public involvement, crime prevention, dispute
22 resolution and budget review.” PCC 3.96.020(A)–(B).

23 This case focuses on District Coalitions, and Plaintiffs’ claims turn on
24 whether District Coalitions like SWNI are so closely connected with City
25 government—taking into account how they were formed, what functions they
26 serve, the degree of control the City exercises over them, and the like—that they
27 are functionally “public bodies” for purposes of Oregon’s Public Records Law,

1 ORS 192.311(4). *Marks v. McKenzie High Sch. Fact-Finding Team*, 319 Or 451,
2 458 (1994); *Laine v. City of Rockaway Beach*, 134 Or App 655, 663–66 (1995).
3 The nuances of that analysis will be discussed more fully in the legal argument
4 portion of this brief but, for now, it is important to delve slightly more deeply
5 into the history and purpose behind Portland’s neighborhood systems—and the
6 role that District Coalitions like SWNI were designed to play in those systems—
7 to understand why it is so crucial for the court to declare that SWNI is subject to
8 the disclosure and transparency requirements of the Oregon Public Records Act.

9 **A. Portland City Council spent three years planning for and developing the Neighborhoods**
10 **Program before officially creating it by ordinance in 1974.**

11 Today, Civic Life explains that “the City prioritized creating [Civic Life’s
12 predecessor, the Office of Neighborhood Associations] to support Portland’s
13 unique commissioner form of government.” Peck Decl. Ex. 2, at 3. That
14 “government structure is unique because commissioners represent the entire city,
15 unlike other cities that elect politicians to advocate for the needs of specific
16 neighborhood boundaries.” *Id.* Thus, “[b]y creating the Office of Neighborhood
17 Associations, the City was establishing a direct channel for neighborhoods to
18 engage in City decision-making, determine neighborhood needs, and represent
19 neighborhood interests in land use and development decisions.” *Id.* On its
20 webpage archiving the over 35-year history of the Neighborhoods Program, Civic
21 Life states that “Portland’s neighborhood system and commitment to public
22 participation has been nationally recognized for many years.”²

23 The Neighborhoods Program was indeed borne of the need for City
24 leaders to find a more effective means of communicating with and consulting
25 neighborhoods before making decisions that affected them. In the late 1960s and

26 ² Portland Office of Community & Civic Life, *History and Related Documents*,
27 <https://www.portlandoregon.gov/civic/38585>.

1 early 1970s, Portland's historic neighborhoods were falling into a state of
2 disrepair, and City planners were making sweeping decisions that those
3 neighborhoods were "beyond salvage" and "expendable," making them
4 appropriate for "clearance type urban renewal."³ Facing the City's planned
5 obliteration of the communities they lived in, neighborhood activists galvanized
6 to protest the City's decisions and, often, did not stop until they succeeded in
7 foiling the City's plans entirely (some of which the City had worked on for
8 years).⁴

9 City planners, having had their hard work blocked, came to realize that
10 "neighborhood activists were organizing to oppose change [because] 'they [had]
11 not been given the opportunity to become fully involved in affecting change' in
12 their neighborhoods."⁵ In 1971, the planners responded by proposing that the
13 City create a formal system through which neighborhoods could band together as
14 districts which, in turn, would have a direct line of communication with City
15 government leaders and staff, and to work collaboratively to develop their
16 neighborhoods.⁶ The Portland Planning Commission approved the planners'

17 ³ DR. CARL ABBOTT, PORTLAND: PLANNING, POLITICS, AND GROWTH IN A TWENTIETH-CENTURY
18 CITY, *Chapter 9: The New Public Interest: Neighborhood Planning, 1957-80*, at 2, 4
19 (1983), *available at* <https://www.portlandoregon.gov/civic/article/320345> (hereinafter
20 "Abbott"). *See also* League of Women Voters of Portland, Portland's Neighborhood
21 Associations—Part 1—History, at 1 (Oct. 2005), *available at*
22 <https://www.portlandoregon.gov/civic/article/363352> (hereinafter "League of Women
23 Voters"); DR. PAUL ROLAND LEISTNER, DISSERTATION: THE DYNAMICS OF CREATING STRONG
24 DEMOCRACY IN PORTLAND, OREGON 150–51 (2013), *available at*
25 <https://www.portlandoregon.gov/civic/article/492423> (hereinafter "Leistner"). *See also*
26 Peck Decl. ¶ 5.

27 ⁴ Abbott, at 2–3 (describing how Lair Hill neighbors protested the City's 1970
plans for their neighborhood for so long that the City lost funding when the
Nixon administration suspended spending on urban renewal projects). *See also*
League of Women Voters, at 1; Leistner, at 148–49.

⁵ Leistner, at 149.

⁶ *Id.* at 151.

1 proposal, reasoning: “It should be apparent that if the City is to prepare itself for
2 the changes that must be made, it must redirect the powerful force of citizen
3 involvement from its present role of opposition to the much more meaningful
4 task of creation.”⁷

5 The 1971 Proposal presented a significant shift in decision making power,
6 with the Planning Commission stating that city planners would act as a
7 “technical advisor” to the districts, but that “plan decisions are *always* made by
8 the” districts.⁸ The Planning Commission identified four key players in this new
9 framework: the districts, city planners, the Planning Commission, and City
10 Council, with “each [being] reliant on the other.”⁹

11 City Council adopted the Planning Commission’s 1971 Proposal and, in
12 1972, created a District Planning Organization Task Force to develop the
13 specifics of how the system would work.¹⁰ According to the *Oregonian*, the Task
14 Force included representatives from “the Planning Commission, Housing
15 Authority of Portland, Portland Development Commission, neighborhood
16 organizations and the general public.”¹¹ The Task Force’s proposal departed
17 slightly from that of the Planning Commission, in that it suggested not just
18 districts, but a two-tier system for neighborhood involvement—neighborhood
19 associations and district organizations.¹² It also argued that City Council needed
20 to grant the organizations “more than token authority,” because “[m]uch of the
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22 ⁷ *Id.* (citing Portland Planning Commission Proposal for District Planning (1971),
23 at 1)).

24 ⁸ Leistner, at 154 (citing 1971 Proposal at 4).

25 ⁹ *Id.* at 152 (citing 1971 Proposal at 2).

26 ¹⁰ *Id.* at 157.

27 ¹¹ *Id.* (citing *Schrunk appoints 16 to aid area plans*, OREGONIAN, (Jan. 27, 1972)).

¹² *Id.* at 160 (citing Portland District Planning Organization Task Force, Task Force
Report at 3 (1972)).

1 quality in neighborhood participation can be lost if that participation is reduced
2 to ‘after the fact’ reaction.”¹³

3 As for the district organizations, the Task Force recommended that the
4 City fund a headquarters office that would have clerical staff support for
5 neighborhood organizations, with the district organization serving as a “liaison
6 between the neighborhood and city staff,” to “expedite plans/programs on a local
7 level.”¹⁴ And whereas neighborhood associations would organize themselves,
8 Planning Commission staff “would establish the district boundaries within which
9 [District Planning Organizations] could be established,” considering “terrain, land
10 use, and population,” following “natural and man-made barriers whenever
11 feasible.”¹⁵

12 Mayor Neil Goldschmidt in 1973 set aside funding for a new “Bureau of
13 Neighborhood Organizations” to draft an ordinance and prepare the City for
14 implementing the Task Force’s proposals.¹⁶ After more community feedback, City
15 Council adopted an ordinance in 1974, creating the Neighborhoods Program,
16 renaming the Bureau of Neighborhood Associations to the Office of
17 Neighborhood Associations, and mothballing the proposal to create district
18 organizations, which neighborhood activists feared would be too closely tied to
19 the City and thus present another level of bureaucracy between neighborhood
20 associations and the City. Council Ordinance No. 137816 (Feb. 7, 1974).¹⁷

21 In 1975, City Council passed an ordinance revising the Neighborhoods
22 Program, based on lessons learned in its first year in existence. Council
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24 ¹³ *Id.* (citing Task Force Report at 3–4).

25 ¹⁴ Leistner, at 168–69 (citing Task Force Report, Attachment 8).

26 ¹⁵ *Id.* at 167–68 (citing Task Force Report, Attachment 7).

27 ¹⁶ *Id.* at 167–68.

¹⁷ Peck Decl. Ex. 5. *See also* Leistner at 180–82.

1 Ordinance No. 140905 (Nov. 26, 1975).¹⁸ Though Council still did not formally
2 include district organizations as part of the program, it authorized the Office of
3 Neighborhood Associations to “establish[] with City funding” district offices,
4 with the “hiring and firing of staff” requiring consultation between the
5 neighborhood associations and the City, subject to final approval of the
6 “Commissioner-in-Charge.”¹⁹

7 **B. SWNI’s creation and role as a District Coalition**

8 After City Council passed that ordinance in 1975, the Director of the Office
9 of Neighborhood Associations availed herself of the opportunity to create district
10 offices and worked to negotiate contracts with representatives from
11 Neighborhood Associations to do so.²⁰ SWNI filed its Articles of Incorporation
12 with the Oregon Secretary of State in 1978,²¹ and less than a year later, City
13 Council approved its already negotiated contract to serve as a District Coalition.
14 Council Ordinance No. 148013 (1979).²²

15 City Council, in that ordinance, explained that the ONA had, up to that
16 point, been “directly administrating” the Southwest district coalition office, and
17 declared that the office should be “contracted to” SWNI. *Id.* § 1.1. To ensure that
18 “there will be no interruption in the services of the office,” Council declared “that
19 an emergency exists,” and the ordinance should take effect immediately. *Id.* § 2.

20 SWNI’s original contract with the City made SWNI the liaison between
21 Neighborhood Associations and the City “on matters affecting the physical and
22 social quality of the Southwest Portland area as a place to live and work.” 1979
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24 ¹⁸ Peck Decl. Ex. 6.

25 ¹⁹ *Id.* § 3.96.070(c).

26 ²⁰ Leistner at 212.

27 ²¹ Peck Decl. Ex. 7.

²² Peck Decl. Ex. 8.

1 Contract, § II.2.²³ The contract provided that the SWNI office would have a
2 Coordinator who was responsible for “select[ing] and terminat[ing]” office staff,
3 but could not make “any final decision on employment matters” without first
4 notifying the City and SWNI’s Board. *Id.* § VII.D. As far as hiring and firing the
5 Coordinator, the “final selection and termination will be decided by the mutual
6 agreement of the Commissioner responsible for ONA and SWNI.” *Id.* § VII.E. The
7 contract also established a detailed, line-item budget for SWNI, complete with
8 the Office of Neighborhood Associations’ accounting codes and a requirement
9 that SWNI present itemized requests for reimbursement that directly referred to
10 those budget line items. *Id.* at § 5 & Exhibit A.

11 Over the decades, SWNI’s responsibility grew to perform other district-
12 specific functions for the City. For instance, in the 1980s, SWNI’s contract with
13 the City included not only its traditional communications and information role,
14 but also an agreement to implement the City’s Crime Prevention Program.
15 Council Ordinance No. 159751 (June 10, 1987).²⁴ SWNI was required to carry
16 out Neighborhood Crime Prevention activities, including: “develop[ing] and
17 maintain[ing] neighborhood watch and other anti-crime neighborhood networks”;
18 coordinating among Neighborhood Associations and City agencies “to deal with
19 neighborhood crime problems”; “develop[ing] crime prevention programs which
20 provide citizens with personal safety techniques and skills”, and; provid[ing]
21 public information about neighborhood crime prevention activities.” Crime
22 Prevention Contract § III.B.²⁵ Also as part of that program, SWNI administered a
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24 ²³ The 1979 contract is an exhibit to Ordinance No. 148013, which is attached to the
25 Peck Declaration as Exhibit 8.

26 ²⁴ Peck Decl. Ex 9.

27 ²⁵ The Crime Prevention Contract is an exhibit to Ordinance No. 159751, which is
attached to the Peck Declaration as Exhibit 9.

1 Neighborhood Mediation program to resolve “neighbor to neighbor disputes and
2 other neighborhood conflicts.” *Id.* § III.C.

3 Beginning in 1999, the City delegated to SWNI a role in managing the
4 Southwest watershed, including assisting the City with implementing its 2005
5 Portland Watershed Management Plan. Council Ordinance No. 187888 (July 13,
6 2016).²⁶ The purpose of that Plan was to manage “watershed health including
7 citizen-led activities such as stormwater management, revegetation, education,
8 and stewardship”—the “success” of which Council recognized “relie[s] on the
9 extent of citizen and community participation.” *Id.* § 1.1–1.2. City Council
10 approved the contract with SWNI to “fund[] SWNI’s efforts in capacity-building,
11 project development, outreach and engagement, and program administration
12 related to stormwater management, water quality protection, pollution
13 prevention, erosion control, invasive plant removal, and native plant
14 landscaping.” *Id.* § 1.4. SWNI’s work for the City in that capacity continued
15 through at least fiscal year 2020-2021, with the City setting a detailed line-item
16 budget for SWNI—including the salary for SWNI’s employee and hourly wage
17 rates for “volunteer labor.” Hiller-Webb Decl. Ex. 3, at 8.

18 SWNI, of course, also performed work for the City to notify Neighborhood
19 Associations about land-use planning decisions that affect them directly, to
20 coordinate Neighborhood Association feedback, and to advocate for their position
21 with City staff. Tyvoll Decl. ¶ 23.

22 **C. Plaintiffs’ personal observations of SWNI’s dysfunction as a District Coalition is**
23 **what led them to ask SWNI for records.**

24 Plaintiffs have both been actively involved in their Neighborhood Associations—
25 Tyvoll, in the Hillsdale Neighborhood Association, and Hiller-Webb, in the South
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27 ²⁶ Peck Decl. Ex. 10.

1 Burlingame Neighborhood Association. Tyvoll Decl. ¶ 2; Hiller-Webb Decl. ¶ 3. Until
2 recently, both of their Neighborhood Associations were affiliated with SWNI and,
3 consistently with City Code, chose one representative to serve on SWNI's Board of
4 Directors. Tyvoll Decl. ¶ 6; Hiller-Webb Decl. ¶ 4; PCC 3.96.020(C)(1).

5 Hiller-Webb was selected by her Neighborhood Association to serve on the SWNI
6 Board in 2018. Hiller-Webb Decl. ¶ 4. And Tyvoll, in 2019. Tyvoll Decl. ¶ 4. When they
7 began attending SWNI meetings, it became apparent to both of them that many of
8 SWNI's Officers and Board members had been serving in those roles for years—and, in
9 some cases, a decade or more. Tyvoll Decl. ¶ 7; Hiller-Webb Decl. ¶ 5. The long-timers on
10 the Board had their own shorthand language of speaking with one another on matters
11 that were not immediately apparent to others that were new in the room, especially
12 when it came to matters affecting transportation and land use. Hiller-Webb Decl. ¶ 5. In
13 other words, the learning curve was steep, and it took some time for Plaintiffs to
14 understand SWNI's operations and the decisions the Board was making. Tyvoll Decl. ¶ 7;
15 Hiller-Webb Decl. ¶ 5.

16 After Hiller-Webb had spent some time on the Board, she became more familiar
17 with its financials and processes. Hiller Webb Decl. ¶ 7. There was a \$10,000 line item
18 on the budget that she did not understand, because it was listed as a "SWNI Board" asset
19 and was also designated as "restricted funds." Hiller-Webb Decl. ¶ 7, Ex. 1. When asked,
20 the Board Treasurer joked that it was "magical money," that its origins were unclear, but
21 that it was "seed money" from years ago and not actually subject to any restrictions.
22 Hiller-Webb Decl. ¶ 9. This explanation further concerned Hiller-Webb in that the source
23 was not specified and the Board's position on it being "restricted" or "unrestricted" was
24 inconsistent. *Id.* Taking it upon herself to do more research, Hiller-Webb then found the
25 official minutes from the August 2018 SWNI Board Meeting—during which she had
26 been absent—and learned that the funds had previously been introduced by the Board
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1 Treasurer as “legacy money.” *Id.* ¶ 11. Tyvoll was also present for these conversations
2 and was equally as curious as Hiller-Webb. Tyvoll Decl. ¶ 12.

3 Having served on several boards of directors in the past and understanding a
4 board member’s fiducial oversight requirements and organizational risk mitigation,
5 Hiller-Webb was disturbed by the Treasurer’s responses. Hiller-Webb Decl. ¶ 9. She
6 continued to ask questions over the next several months, during board meetings and in
7 additional correspondence to the organization’s leaders. *Id.* ¶ 8. The Executive Director
8 stated she would send the Board additional information about the “magical money” but
9 never did. *Id.* ¶ 10. As Hiller-Webb and Tyvoll continued to ask for clarification, they
10 became further concerned about this issue when, in response, the Treasurer Charlie Van
11 Rossen abruptly resigned and walked out of the October 2019 SWNI board meeting. *Id.*
12 ¶ 12.

13 Around this time, a former SWNI Board member reached out to Hiller-Webb and
14 told her that a previous Board member some years ago had experienced similar
15 treatment from the SWNI Board when he asked similar questions. Hiller-Webb Decl. ¶
16 16. He was ultimately removed from the Board—the only occurrence in memory of this
17 happening. *Id.* See also McLaughlin Decl. ¶ 15.

18 That inquisitive Board member was Jim McLaughlin, a local former lawyer who
19 dedicated his career to investigating and prosecuting (as an AUSA for the District of
20 Oregon) or holding civilly liable (as an Oregon Assistant Attorney General and a private
21 practitioner) people who committed fraud or other financial crimes. McLaughlin Decl. ¶
22 3. Like Tyvoll and Hiller-Webb, McLaughlin had been a de facto SWNI Board member
23 after his Neighborhood Association, the West Portland Park Neighborhood Association,
24 selected him to serve as its representative on the SWNI Board. *Id.* ¶ 4.

25 McLaughlin started asking questions in 2011, after the Board learned that SWNI’s
26 then-most recent paychecks to its employees had all bounced. McLaughlin Decl. ¶ 6. In
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1 response, SWNI's then-President Brian Russell formed an internal investigation
2 committee and asked McLaughlin to serve on it. *Id.* ¶ 8. He agreed. *Id.* As the
3 investigation committee was culling through SWNI's financial records, they realized
4 there was evidence of SWNI's mismanagement of taxpayer money extending back to at
5 least 2006. *Id.* ¶ 9. That discovery led Rod Underhill, then the Chief Deputy DA, to
6 prosecute SWNI's Operations Manager Virginia Stromer for embezzling at least
7 \$130,000 from SWNI. *Id.* ¶ 13, Ex. 1. Stromer pleaded guilty and was sentenced to 3
8 years and 2 months in state prison. *Id.*

9 Perhaps even more disturbing than the embezzlement itself, McLaughlin and the
10 investigation committee uncovered that SWNI's Executive Director Sylvia Bogert had
11 known—since at least 2004—that there was an earlier embezzlement: Someone had
12 fraudulently racked up over \$19,000 in charges unrelated to SWNI on SWNI's American
13 Express Credit Card. McLaughlin Decl. ¶ 9. Yet, Bogert never told the Board about those
14 charges in the intervening 7 years. *Id.* ¶ 11. Nor did she freely volunteer that
15 information to the investigation committee. *Id.* ¶ 10. Instead, she took out a personal
16 loan, converted the credit card debt to personal debt, concealed it from the SWNI Board,
17 and took no measures to institute proper financial controls moving forward. *Id.* ¶ 12.

18 Two years after Bogert took out the personal loan to cover that credit card debt,
19 Stromer (who had been working for SWNI at the time the AmEx charges were made)
20 started the series of embezzlements that formed the basis for her criminal convictions.
21 *Id.* ¶ 13. In McLaughlin's view, based on his professional experience and his experience
22 at SWNI, Bogert's failure to promptly inform the Board of the unauthorized AmEx
23 charges, and failure to take any other mitigating action, created the conditions for the
24 second, much larger, \$130,000 embezzlement. *Id.*

25 News coverage of the embezzlement was nearly non-existent. Tyvoll Decl. ¶ 14;
26 Hiller-Webb Decl. ¶ 16. Hiller-Webb was active in her neighborhood in 2011 when
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1 Stromer’s embezzlement came to light, but had never heard of it (or any part of it) and
2 barely knew what SWNI was. Hiller-Webb Decl. ¶ 16. Indeed, it wasn’t until she was
3 introduced to McLaughlin in late 2019 that she learned that SWNI had *twice* been the
4 victim of embezzlement, *twice* on Executive Director Sylvia Bogert’s watch. Tyvoll Decl.
5 ¶ 14; Hiller-Webb Decl. ¶ 16.

6 For all that, Bogert was still SWNI’s Executive Director, some 8 years after
7 Stromer’s prosecution and some 15 years after she learned of and decided to conceal the
8 AmEx fraud. Tyvoll Decl. ¶ 14; Hiller-Webb Decl. ¶ 16. The mystery of that \$10,000
9 “magical money” went from an unsettling oddity to a blaring alarm bell—Hiller-Webb
10 and Tyvoll felt that it was imperative for them to find out where that money had come
11 from. Tyvoll Decl. ¶ 12; Hiller-Webb Decl. ¶ 9.

12 Hiller-Webb submitted formal requests for financial records via email to Bogert
13 and SWNI President Leslie Hammond. Hiller-Webb Decl. ¶ 18. Even though Hiller-Webb
14 was entitled to those records as a Board member, Bogert and Hammond stonewalled. *Id.*;
15 Tyvoll Decl. ¶ 13, Ex. 2.

16 As Hiller-Webb was continuing to search for answers, Bogert, Hammond, and
17 other members of SWNI’s Executive Committee began in early 2020 to discuss the
18 possibility of SWNI applying for a Paycheck Protection Program (PPP) loan under the
19 Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020. Hiller-Webb Decl.
20 ¶ 19. SWNI, however, has dedicated funding from the City—earmarked for this very
21 purpose—to cover its employees’ paychecks. *Id.* That dedicated funding had not been cut
22 by the City; nor had SWNI suffered significant financial losses as a result of the COVID-
23 19 pandemic. *Id.* ¶ 21. In fact, it was set to receive Civic Life grant funding to cover the
24 remainder of fiscal year 2020 and the upcoming fiscal year 2021. *Id.* See also Marsh &
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1 Minick, P.C., *Forensic Audit: Findings Report, Southwest Neighborhoods, Inc.* 40–41
2 (Nov. 13, 2020) (the “Forensic Audit Report”).²⁷

3 Despite SWNI’s financial stability, the SWNI Board voted to apply for a PPP loan,
4 out of speculative “concern” that the City might decrease its grant funding at some
5 unspecified time in the future. Hiller-Webb Decl. ¶ 21; Tyvoll Decl. ¶ 16; Forensic Audit
6 Report at 40–41. SWNI’s President and Treasurer worked together to submit the
7 application on April 30, 2020. Hiller-Webb Decl. ¶ 21; Forensic Audit Report at 39.
8 When SWNI signed the PPP Borrower Application on that day, it had enough cash on
9 hand to cover three months’ worth of payroll expenses and was expecting its next grant
10 disbursement from Civic Life just one month later. Hiller-Webb Decl. ¶ 21; Forensic
11 Audit Report at 41.

12 Hiller-Webb and Tyvoll vehemently disagreed with the Board’s decision to apply
13 for a PPP loan, for both moral and legal reasons. Hiller-Webb Decl. ¶ 21; Tyvoll Decl. ¶
14 16. Moral, because SWNI had more than sufficient funds to continue its operations,
15 whereas many local businesses back in April 2020—right after the physical distancing
16 restrictions went into effect—had lost all of their revenue stream, could not pay their
17 employees, and were on the verge of shuttering their doors permanently. *Id.* Legal,
18 because their understanding of the PPP loan program was that PPP funds were to be
19 used for the purpose of meeting payroll obligations and, given that SWNI had dedicated
20 grant monies from the City to do just that, she did not see how SWNI could represent
21 truthfully to the federal government that the PPP loan funds would be used for that
22 purpose. *Id.*

23 Hiller-Webb and Tyvoll made their objections known to the Board at an
24 Emergency Board Meeting held in early May 2020, called for the purpose of discussing

25 _____
26 ²⁷ A full copy of Marsh & Minick’s Audit Report is available via Oregon Public
27 Broadcasting at
https://www.opb.org/pdf/Forensic%20Audit%20of%20SWNI_1605822641636.pdf.

1 how to repurpose the Civic Life grant money for some other use, so that the PPP loan
2 funds could be used toward payroll (therefore rendering them forgivable under PPP loan
3 terms). Hiller-Webb Decl. ¶ 23. *See also* Forensic Audit Report at 42. The Board did not
4 heed Hiller-Webb and Tyvoll’s concerns and voted to accept the PPP loan. Hiller-Webb
5 Decl. ¶ 20; Forensic Audit Report at 42–45. It received \$66,300 in PPP funding shortly
6 after that. Hiller-Webb Decl. ¶ 20; Forensic Audit Report at 45.

7 Over the next few weeks, the Board—again over Hiller-Webb and Tyvoll’s
8 objections—voted to create a “Community Engagement Allocation Program” (CEAP),
9 purportedly to “plan and conduct community engagement projects in response to the
10 COVID-19 crisis.” Hiller-Webb Decl. ¶ 23; Tyvoll Decl. ¶ 21; Forensic Audit Report at 48.
11 In other words, SWNI “created a new grant program” as a “mechanism for SWNI to
12 claim they had COVID impact to their budget and services to comply with the purpose
13 they had stated on the PPP Borrower Application.” Forensic Audit Report at 48.

14 **D. After Plaintiffs blew the whistle on SWNI’s misconduct to Civic Life, the City paused**
15 **SWNI’s funding, ordered a forensic audit, and ultimately defunded SWNI based on**
16 **the audit results**

17 In the months leading up to SWNI’s acceptance of the PPP loan, Plaintiffs were in
18 communication with Civic Life about obtaining documents related to the 2011
19 embezzlement. Hiller-Webb Decl. ¶ 22; Tyvoll Decl. ¶ 18. The then-Director of Civic Life,
20 Suk Rhee, was not aware of that embezzlement until after Plaintiffs raised the issue. *Id.*

21 In June 2020, as their conversations about obtaining documents related to the
22 embezzlement were ongoing, Hiller-Webb and Tyvoll asked Civic Life if it was aware that
23 SWNI had applied for and received a PPP loan. Hiller-Webb Decl. ¶ 23; Tyvoll Decl. ¶ 21.
24 Again, Director Rhee had not been informed of that, either. *Id.*

25 When the Commissioner of Civic Life, Councilmember JoAnn Hardesty, learned of
26 SWNI’s PPP loan application, she sought to have SWNI be a topic of the upcoming
27 ordinance providing another year of funding and for the SWNI leadership and Executive

1 Director to be available before City Council. Tyvoll Decl. ¶ 21. That led to City Council
2 voting, on July 9, 2020, to withhold SWNI's undisbursed grant funds pending a forensic
3 audit. Council Ordinance No. 190044 (July 9, 2020).²⁸

4 Civic Life retained an outside financial crimes consulting firm, Marsh & Minick,
5 P.C., to conduct the audit. The audit scope covered the period from October 1, 2010
6 through September 30, 2020, and investigated “concerns about a continuation of
7 suspicious activity, abuse of power, conflicts of interest, lack of transparency and
8 inequitable practices among SWNI and the Board of Directors.” Forensic Audit Report at
9 2.

10 Marsh & Minick conducted its investigation for over two months, during which
11 time it reviewed, among other things: SWNI's financial records, payroll records,
12 contracts with the City, Board materials, including meeting minutes and video
13 recordings, organizational documents, internal policies; court and police records related
14 to the embezzlement; and the PPP loan documents. *Id.* at 112–14. It also conducted 25
15 hours of interviews with current and former SWNI employees, Board members, and
16 community members who had engaged with SWNI. *Id.* at 112.

17 Tyvoll, Hiller-Webb, and McLaughlin were among the people Marsh & Minick
18 interviewed during its investigation. Hiller-Webb Decl. ¶ 24; Tyvoll Decl. ¶ 22;
19 McLaughlin Decl. ¶ 22. The Marsh & Minick findings released in November 2020 were
20 consistent with Plaintiffs' and McLaughlin's observations and experiences—it concluded
21 that there had been financial mismanagement to the tune of \$179,332.24 during the
22 scope period and that, separately, SWNI had lost \$174,265.25 as a result of the
23 embezzlement—for a total of \$356,597.49 in financial loss, fraud, waste, misuse, and
24 abuse of taxpayer-provided funds. Forensic Audit Report at 7.

25
26
27 ²⁸ Peck Decl. Ex. 11.

1 It also concluded that SWNI had either “absent and deficient” or “dysfunctional
2 and ineffective” controls in each of the five components of the Internal Control
3 Integrated Framework control components it analyzed. *Id.* at 8. Those dysfunctions and
4 deficiencies at SWNI presented “[o]pportunities * * * for errors, mismanagement, waste,
5 abuse and fraud of financials due to a lack of oversight, willful blindness to risks, and a
6 breakdown of transparency and communications at SWNI.” *Id.* Further, the auditors
7 found that the lack of transparency at SWNI “resulted in a limited ability to prevent and
8 detect unusual or concerning activity, and hindered SWNI’s ability to remediate
9 problems.” *Id.*

10 Based on all that, City Council voted in March 2021 to defund SWNI and to grant
11 Civic Life funding to create two new staff positions to provide city-supported services to
12 Southwest neighborhoods. Ordinance No. 190321 (March 10, 2021).²⁹ City Council
13 explained that the “audit noted board dysfunction including harassment and bullying
14 which are in opposition to the City’s values of equity, inclusion, and collaboration.” *Id.* at
15 1 (§ 1.3). Council continued: “As a result of these findings, the Office of Community &
16 Civic Life will no longer provide grant funds to SWNI for district coalition services, and
17 will instead provide district coalition services to Southwest neighbors in accordance with
18 City Code 3.96 and ONI standards, as it currently does for two other districts.” *Id.* at 1 (§
19 1.6). It directed Civic Life “to immediately begin an open and competitive recruitment
20 process for those positions upon adoption of this ordinance.” *Id.* at 2 (subparagraph (b)).

21 The City has since filled the two Coordinator positions created by City Council
22 Ordinance No. 190321. Peck Decl. Ex. 13, at 1–2. One of the people it hired to serve as
23 Coordinator is Sharon Keast, who worked at SWNI as its communications and
24 technology support liaison before it was defunded. *Id.*

25
26
27 ²⁹ Peck Decl. Ex. 12.

1 By all appearances, Civic Life and the Coordinators are now performing the same
2 functions that the City had contracted SWNI to perform—namely, “provid[ing] liability
3 insurance coverage for Southwest neighborhoods”; “build[ing] a communications
4 infrastructure for Southwest neighborhoods * * * including a newsletter, website, events
5 calendar and social media presence”; “implement[ing] administer[ing] the small grants
6 and reimbursement initiatives for Southwest neighborhoods”; “facilitat[ing] ongoing
7 communications with all City bureaus” and Southwest neighborhood associations”; and
8 “inventorying & prioritizing work in Southwest neighborhoods.” *Id.*

9 In sum, the City retracted SWNI’s authority to serve as a District Coalition and
10 took it upon itself to perform the same functions for the City that SWNI should have
11 been performing, were it not for all the mismanagement and dysfunction.

12 **E. The City’s decision to take over SWNI makes sense, because District Coalitions,**
13 **whether “private” or City-staffed, represent a sizeable portion of the City’s budget**
14 **and have had significant influence in shaping Portland.**

15 Today, over one-third of Civic Life’s budget goes to District Coalitions.
16 Peck Decl. Ex. 4. Three of those District Coalitions are City-staffed and four are
17 nonprofits. *Id.* The four nonprofits that remain after the City defunded SWNI
18 have budgets that range from 92% to 100% funding by the City. *Id.* When SWNI
19 was in operation, its budget consisted of 85% funding from the City, with the
20 other 15% coming from direct community donations and advertising revenue.
21 Hiller-Webb Decl. ¶ 26.

22 That funding does not take into account land use appeal fee waivers from
23 the City’s Bureau of Development Services (BDS). Though the fee waivers apply
24 directly to Neighborhood Associations, the District Coalitions work to organize
25 Neighborhood Associations to raise those appeals. Tyvoll Decl. ¶ 23. According
26 to records from BDS, in just a three-year period from 2016 to 2019, just under
27 one half of all land use appeals submitted to the City were brought by

1 Neighborhood Associations. Tyvoll Decl. Ex. 5. In all but two of the 35 appeals
2 Neighborhood Associations brought, BDS waived the appeal fee of \$1,000,
3 amounting to a \$33,000 benefit. *Id.* By contrast, for the remaining 37 appeals—
4 submitted by people and entities other than Neighborhood Associations—BDS
5 granted only two fee waivers. *Id.*

6 The effect of Neighborhood Associations’ advocacy—organized through
7 the District Coalitions—has been significant.³⁰ The BPS Planning History Report
8 specifically highlights the influence that Neighborhood Associations and District
9 Coalitions had in overruling City planners’ proposal to rezone neighborhoods in
10 the Southwest to increase density (i.e., create space for multi-family or lower
11 income housing).³¹ The Report notes that Southwest neighborhoods were
12 “enraged about the prospect of redeveloping single-family neighborhoods and
13 increasing density,” resulting in City planners’ draft zoning maps being
14 “scrapped” and the final plan being “drastically different from the initial plan.” It
15 explains: “The demographics and power dynamics of Southwest were * * * very
16 different [from other neighborhoods]. Southwest residents tended to be well-
17 educated, higher income, and typically white. They were also much more
18 organized and well-resourced * * * [and] were more effective at using
19 neighborhood associations as a tool for organizing at public hearings and other
20 places for public participation.”³²

21 The results in Southwest neighborhoods are stark. The Southwest has the
22 largest concentration of the City’s white population, the highest concentration of

23
24 ³⁰ See Portland Bureau of Planning & Sustainability, *Historical Context of Racist*
25 *Planning: A History of How Planning Segregated Portland* (Sept. 2019), available
26 at [https://www.portland.gov/sites/default/files/2019-](https://www.portland.gov/sites/default/files/2019-12/portlandracistplanninghistoryreport.pdf)
27 [12/portlandracistplanninghistoryreport.pdf](https://www.portland.gov/sites/default/files/2019-12/portlandracistplanninghistoryreport.pdf) (the “BPS Planning History Report”).

³¹ *Id.* at 16.

³² *Id.*

1 households living at 140% of Median Family Income, and next to no
2 neighborhoods that have been deemed “definitely declining” or “hazardous” by
3 lenders.³³ This has led to “inequitable benefits from homeownership,” with white,
4 single-family households accumulating wealth as property values rise, while at
5 the same time receiving greater federal subsidies due to their “higher value
6 mortgage interest deductions.”³⁴ Through all this, SWNI enjoyed the benefit of
7 having the authority to make decisions about whether Neighborhood
8 Associations could affiliate with them, thereby ensuring that the Neighborhood
9 Association would get the benefit of District Coalitions’ funding, organizing
10 efforts, and access to City officials.³⁵

11 Given the substantial effect that the Neighborhoods Program has had on
12 shaping our City, as well as the enormous chunk of Civic Life’s budget that goes
13 toward creating the conditions for that to happen, it is no surprise that City
14 Council has chosen to condition its recognition of District Coalitions on the
15 coalitions’ compliance with the 2005 ONI Standards. PCC 3.96.040. Nor is it any
16 surprise that Civic Life (formerly ONI), in turn, has written its Standards in a
17 manner that touches nearly every aspect of District Coalitions’ operation,
18 including choice of entity, bylaws, personnel policies, grievance procedures, and
19 staff salaries, to name a few. It also requires them to submit forward-looking
20 Annual Action Plans, including proposed budgets, and backward-looking 6-Month
21 Reports to demonstrate their adherence to the Standards.³⁶

22
23 ³³ *Id.* at Figs. 9, 10, & 11.

24 ³⁴ *Id.* at 23 & Fig. 12.

25 ³⁵ Office of Neighborhood Involvement, *Standards for Neighborhood*
26 *Associations, District Coalitions, Business District Associations, and the Office of*
27 *Neighborhood Involvement* § III.C.6 (July 13, 2005), available at
<https://www.portlandoregon.gov/civic/article/97870> (“2005 ONI Standards”).

³⁶ 2005 ONI Standards, at 13–23.

F. The public records request at issue in this case

Given that Hiller-Webb's requests for SWNI's records, in her capacity as a Board member, were repeatedly refused by SWNI, they decided to try another approach: submitting public records requests to SWNI under Oregon's Public Records Law. Hiller-Webb Decl. ¶ 18; Tyvoll Decl. ¶ 24 & Ex. 4.³⁷ As an example of one of those requests, Tyvoll submitted the following request to SWNI on March 4, 2020:

All emails, including any attachments, stored anywhere within the SWNI email account for Sylvia Bogert (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.

Tyvoll Decl. Ex. 3. Consistently with its previous responses to both Hiller-Webb and Tyvoll, SWNI denied Tyvoll's request, contending that it was not a public body subject to the Oregon Public Records Law. Tyvoll Decl. ¶ 24; Hiller-Webb Decl. ¶ 18.

Tyvoll appealed SWNI's denial to the Multnomah County District Attorney, according to the procedure set forth at ORS 192.415(1)(a). Initially, the District Attorney summarily denied Tyvoll's appeal, explaining that the District Attorney's Office had "previously considered the question of whether or not a *neighborhood association*, such as SWNI, is a public body for purposes of the public records law and concluded that it is not," and citing *Petition of*

³⁷ Tyvoll believed that SWNI would respond to her public records request, given that one of her first acts as President of her Neighborhood Association was to assist SWNI with responding to a public records request to SWNI submitted by a constituent about a matter involving her neighborhood. Tyvoll Decl. ¶ 10. Both SWNI and HNA produced public records to that constituent without any pushback. Tyvoll Decl. Ex. 1A (SWNI's response) & 1B (HNA's response).

1 *Kerensa*, MCDA PRO 18-05 (2018). Tyvoll Decl. Ex. 6 (DA Gibbs, March 30,
2 2020, Letter) (Emphasis added.).

3 Tyvoll wrote to the District Attorney to request that he reconsider his
4 decision, given that SWNI is a District Coalition and not a Neighborhood
5 Association, and thus presented a different legal question than the one in
6 *Kerensa*. Tyvoll Decl. Ex. 7. After reviewing Tyvoll's description of the
7 distinction between District Coalitions and Neighborhood Associations, the
8 District Attorney granted her request for reconsideration and forwarded her
9 appeal to the City Attorney's Office. Tyvoll Decl. Ex. 8.

10 The City Attorney responded to Tyvoll's appeal, arguing that SWNI is not a
11 public body subject to the Oregon Public Records Law and offering a detailed
12 legal analysis to support its position. Tyvoll Decl. Ex. 9. After receiving the City
13 Attorney's response, the District Attorney informed SWNI about Tyvoll's appeal
14 and gave it one week to submit a response if it wished to weigh in on its own
15 behalf.³⁸ Tyvoll Decl. Ex. 10. SWNI "elected not to supplement the record."
16 *Petition of Tyvoll*, MCDA PRO 20-11, at 1 (May 18, 2020).³⁹

17 _____
18 ³⁸ Tyvoll was not required to serve her appeal to the DA on SWNI or the City. Per the
19 Multnomah County District Attorney's public records appeal procedures, the District
20 Attorney may choose to summarily deny a public records appeal or, instead, to seek a
21 response from the public body. The District Attorney appears to have initially believed
22 that the City Attorney could respond on SWNI's behalf and did not solicit input from
23 SWNI itself. After the City Attorney took the position that it could not respond on
24 SWNI's behalf and so it was "not clear that the District Attorney's decision would be
25 binding on SWNI," Tyvoll Decl. Ex. 9, the District Attorney emailed SWNI directly to
26 solicit its input on Tyvoll's appeal, Tyvoll Decl. Ex. 10. SWNI chose not to respond on its
27 own behalf.

³⁹ SWNI's decision to rely on the City Attorney to, in effect, represent SWNI's position is
logically inconsistent with its position that it is an independent, private entity. SWNI's
existential confusion does not end there: When responding to Civic Life's request for
records from SWNI, SWNI attempted to withhold the records from the City unless the

1 After reconsideration, the District Attorney determined that whether
2 District Coalitions like SWNI are “public bodies” subject to the public records
3 laws “is a close call.” *Id.* He nevertheless denied Tyvoll’s appeal, reasoning that
4 “the deciding factor in this closely balanced case” was “the third *Marks* factor,”
5 relating to an entity’s “policy-making authority.” *Id.* at 4. On that factor, the
6 District Attorney found that, though District Coalitions “perhaps have greater
7 sway with the City” than neighborhood associations do, they lack authority to
8 make or enforce policy decisions for the City. *Id.* at 4–5. He thus concluded that
9 District Coalitions like SWNI are not the functional equivalent of public bodies
10 and are not subject to public records laws. *Id.* at 5.

11 Tyvoll and Hiller-Webb filed this complaint under ORS 192.31, to request
12 that this Court conduct a de novo review and conclude that SWNI is required to
13 comply with the disclosure requirements under the Oregon Public Records Law.

14 III. Legal Standard

15 Summary judgment is appropriate when the court can resolve the parties’
16 dispute as a matter of law, because there is no genuine dispute about the material
17 facts. ORCP 47 C; *JAL Constr., Inc. v. Friedman*, 191 Or App 492, 496 (2004).
18 Whether SWNI, during the relevant time period, was a “public body” or the
19 “functional equivalent” of a public body will require the court to make both
20 “findings of historical fact,” and “conclusions concerning the legal significance of
21 those facts.” *Laine v. City of Rockaway Beach*, 134 Or App 655, 661 (1995).

22
23
24 _____
25 City paid SWNI a fee in excess of \$30,000. Tyvoll Decl. Ex. 13. The 2005 ONI Standards
26 do not provide for District Coalitions to charge fees for producing those records.
27 Apparently, SWNI took the position that it could avail itself of the benefit available to
public bodies under ORS 192.324(4)(a), to charge “fees reasonably calculated to
reimburse the public body’s actual cost of making the public records available.”

1 “The Public Records Law reflects a strong legislative policy in favor of
2 disclosure of public records.” *Marks v. McKenzie High Sch. Fact-Finding Team*,
3 319 Or 451, 474 (1994) (citing *City of Portland v. Rice*, 308 Or. 118, 121-22,
4 775 P.2d 1371 (1989)). “Any doubts in interpreting the Public Records Law
5 should be resolved in favor of providing information to the public.” *Marks*, at
6 474. “The underlying policy of such access is that ‘there will be an opportunity to
7 determine whether those who have been entrusted with the affairs of
8 government are honestly, faithfully and competently performing their function
9 as public servants.’” *Id.* at 474–75 (citing *MacEwan v. Holm*, 226 Or 27, 38
10 (1961)).

11 Thus, contrary to SWNI’s assertion, Plaintiffs do not bear the burden of
12 persuasion on their claims. For, under the Oregon Public Records Act, this
13 Court’s review is de novo “and the burden is on the public body to sustain its
14 action.” ORS 192.431(1); *Guard Publishing Co. v. Lane Cnty. Sch. Dist.*, 310 Or
15 32, 38–39 (1990) (“[T]he burden of proof is on the public body to sustain its
16 action by a preponderance of the evidence.”). But even so, as the court will see,
17 Plaintiffs’ cross-motion presents undisputed evidence of the “historical facts” that
18 lead the court to just one legal conclusion: SWNI is a “public body” for purposes
19 of the Oregon Public Records Law.

20 **IV. Argument**

21 Oregon law looks to substance over form when determining if an entity is
22 a public body subject to the Public Records Act. *Marks*, 319 Or at 458; *Laine*, 134
23 Or App at 663–66. That is, even a privately organized or incorporated entity can
24 be required to respond to public records requests, so long as it is “so connected to
25 the city to be fairly considered an agency or department of the city government.”
26 *Laine*, 134 Or App at 660–61. Ultimately, whether an entity is a public body
27

1 “depend[s] on the character of that entity and the nature and attributes of that
2 entity’s relationship with government and governmental decisionmaking.”

3 *Marks*, 319 Or at 463. And the term “public body” includes an entity, “which is
4 subordinate to a politically accountable public body.” *Marks*, 319 Or at 475.

5 *Marks* is the first case in which the Oregon appellate courts were asked to
6 discern the legislature’s intent when it defined “public body” broadly in ORS
7 192.410(3). *Id.* at 457. *Marks* was about a “high fact-finding team” that the
8 Confederation of Oregon School Administrators (COSA) organized at the request
9 of McKenzie School Board, to investigate concerns raised about McKenzie High
10 School. *Id.* at 453. The plaintiff argued that the fact-finding team was a “public
11 body” because it was commissioned by a school district and therefore was a
12 “commission” under ORS 192.410(3). *Id.* at 456.

13 The Oregon Supreme Court’s statutory analysis concluded that there was
14 no single definition that applies to “public body” and that, instead, Oregon courts
15 should follow the example of other jurisdictions in using a multi-factor test to
16 determine whether entities are the “functional equivalent” of public bodies. *Id.* at
17 459–61. The factors the *Marks* court identified as relevant were:

- 18 (1) The entity’s origin (e.g., whether the entity was created by
19 government or had some origin independent of
government).
- 20 (2) The nature of the function assigned to and performed by
21 the entity (e.g., whether that function is one traditionally
22 associated with government or is one commonly performed
by private entities).
- 23 (3) The scope of the authority granted to and exercised by the
24 entity (e.g., does the entity have the authority to make
25 binding governmental decisions, or is it limited to making
nonbinding recommendations).
- 26 (4) The nature and level of government and financial
27 involvement with the entity. (Financial support may
include payment of the entity’s members or fees as well as

1 provision of facilities, supplies, and other nonmonetary
2 support.)

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

5 (6) The status of the entity's officers and employees (e.g.,
6 whether the officers and employees are government
7 officials or government employees).

8 *Id.* at 463–64. The Court clarified, however, that “no single factor is either
9 indispensable or dispositive,” and that the “foregoing list is not intended to
10 be exclusive. *Id.* at 463, n 9. Indeed, “[a]ny factor bearing on the character
11 of the entity and the entity's relationship with government may be
12 relevant in determining whether that entity is a ‘public body’ subject to the
13 Inspection of Public Records Law.” *Id.* at n 9.

14 Applying those factors to the case before it, the *Marks* court
15 concluded that the fact-finding team was not the functional equivalent of a
16 public body and was not subject to the public records disclosure
17 requirements. *Id.* at 466. Of the six identified factors, it determined that
18 only the first and second were met—the plaintiff had alleged that the
19 school district created the fact-finding team to perform one of the board's
20 statutory duties—but otherwise there were no allegations that the team
21 had entered a contract with the board, that the board had any control or
22 supervision over the team's operation, or that the team was receiving any
23 government support (financial or otherwise). *Id.*

24 As to the third factor, the team's decision-making authority, the
25 Court began by emphasizing that the “policy of governmental openness
26 that underlies the Inspection of Public Records Law rests on the premise
27 that *the public should have access to information on which governmental
decisions are based.*” *Id.* (citing ORS 192.630) (emphasis added). Due to

1 the nature of the work it was performed to do—conduct an investigation
2 and report its findings to the board—the Court concluded that the team’s
3 “investigation could have affected matters of public concern only through
4 the vehicle of defendant’s report,” and that report would become a public
5 record once it was submitted to the board. *Id.* The public would thus have
6 access to all of the same information to which the board had access in
7 making its decision—the information in the team’s report. In other words,
8 the policy underlying the public records law, that the “public should have
9 access to information on which governmental decisions are based,” would
10 be satisfied. *Id.*

11 The only other appellate case in Oregon to consider this question is
12 *Laine v. City of Rockaway Beach*, 134 Or App 655 (1995). If *Marks* is a
13 good bookend for what is not a public body, *Laine* is a good bookend for
14 the opposite. The entity at issue in *Laine* was a fire department that for
15 years had been operating independently as a Rural Fire Protection District
16 and that, in 1991, incorporated as a public benefit nonprofit corporation.
17 *Id.* at 659. Because the fire department in *Laine* bears great similarity to
18 SWNI here, it will be helpful to walk through the Court of Appeals’
19 analysis of the *Marks* factors in detail.

20 (1) *Origins.* The Court noted that the fire “department itself was
21 not created by ordinance,” but that was not dispositive. The Court
22 looked beyond that, noting that the department was created “shortly
23 after *the city* had entered into an agreement to take over the
24 Rockaway Rural Fire Protection District,” and city council had also
25 created the fire chief position and directed the chief to create a fire
26 department. *Id.* at 663.

1 (2) *Function.* This factor also weighed in favor of concluding that
2 the fire department was an agency or department of the city,
3 because, aside from firefighting, the department had authority to
4 declare a state of emergency in the case of “any hazardous waste
5 accident,” and could arrest people if they were engaging in
6 disorderly conduct near fires. *Id.* at 658–59. The Court noted that
7 firefighting, policing, and general welfare were “function[s]
8 traditionally associated with government.” *Id.* at 664.

9 (3) *Authority.* The Court reiterated that the fire department
10 had authority to arrest people if they were engaged in disorderly
11 conduct near fires. It also found it significant that the fire
12 department could enter indemnification agreements with property
13 owners, through which the property owners would be indemnified
14 and held harmless if they donated their buildings to the fire
15 department for training. That was sufficient authority to weigh in
16 favor of concluding that the fire department was part of the city. *Id.*
17 at 664–65.

18 (4) *Financial involvement.* The fire department was nearly
19 fully funded by the City, though “some support came from other
20 sources.” That also weighed in favor of concluding that the fire
21 department was a part of the city. *Id.* at 665.

22 (5) *Control.* The Court granted that the city “did not
23 directly control the department’s day-to-day operations.” *Id.*
24 “Nevertheless, the city exercised significant control over the
25 department in other ways.” *Id.* The Court then noted: the city could
26 approve the election of the fire chief and remove him with or
27

1 without cause; the city could “define the powers and authorities of
2 the fire department, as evidenced by the enactment of a variety of
3 ordinances”; the city “had the authority to define the geographic
4 scope of the department’s activities”; the city had authority to
5 “control the fire department’s operating budget”; and, “if the city had
6 withdrawn its financial support, the fire department would have
7 ceased to exist.” *Id.* Finally, the fire department’s chief made regular
8 reports to the city about the fire department’s operations. *Id.* at 666.
9 Thus, the Court concluded that “although the city did not exercise
10 complete control over the inner workings of the fire department, it
11 cannot fairly be said, as the city suggests, that the fire department
12 operated completely free of oversight and supervision of the city.”
13 *Id.* That factor, too, weighed in favor of concluding that the fire
14 department was part of the city government. *Id.*

15 (6) *Employment status.* This is the only factor that weighed
16 against finding that the department was part of the city. The Court
17 reasoned that the salaries the city directly paid to the chief, assistant
18 chief, and the secretary-treasurer were “nominal” and that the “call
19 pay” for volunteer firefighters was “a small amount,” too. *Id.*

20 With those bookends in place, this motion will now turn to explaining why
21 the *Marks* factors are met in this case.

22 **A. *Marks* factor one: SWNI was created by the City.**

23 SWNI was created by the City to be a District Coalition. To be sure, SWNI
24 was formed as a nonprofit corporation. But just as the organizational form of the
25 fire department in *Laine* was not dispositive in and of itself, it should not be
26 dispositive here.
27

1 As explained in detail above, SWNI was formed shortly after the City spent
2 years—first through the Planning Commission and then through a Task Force
3 created by City Council—planning and designing the Neighborhoods Program.
4 The Director of the Office of Neighborhood Associations worked with
5 Neighborhood Associations to define districts and establish district offices. As
6 relevant to SWNI's formation, it is apparent that those negotiations included
7 SWNI—less than a year after it became a legal entity, City Council approved a
8 contract that Office of Neighborhood Associations had already negotiated with
9 SWNI.

10 In other words, SWNI did not appear out of thin air. It was formed after
11 City Council spent years planning for the Neighborhoods Program, forming an
12 entire city bureau to administer and support it, and only after City Council had
13 authorized the Director of that bureau to create the offices that would later
14 become District Coalition Offices. This factor weighs in favor of finding that the
15 City created SWNI.

16 **B. Marks factor two: SWNI performed essential government functions and now that it is**
17 **defunct, the City has replaced SWNI with its own employees.**

18 SWNI performs functions traditionally associated with the government. As
19 the Civic Life website recognizes, Portland's commissioner-led system of
20 government is unique. The City learned in the 1960s and 1970s that it could not
21 effectively perform its essential function of developing infrastructure without
22 having a direct line of effective communication with the districts and
23 neighborhoods their plans impacted—a role traditionally filled by elected district
24 representatives in other cities. It created the Neighborhoods Program to fill that
25 void.

26 When it was operating as a District Coalition, SWNI communicated for the
27 City by giving Neighborhood Associations notice of the City's plans for its
neighborhoods and district. It then helped Neighborhood Associations plan and

1 coordinate meetings, solicit feedback, and worked to align the Neighborhood
2 Associations so that they could present a united front when offering the City
3 feedback on its proposals.

4 On top of serving as a liaison between neighborhoods and the government,
5 SWNI played integral roles in the City's policing (through the Crime Prevention
6 Program) and environmental preservation (through the Bureau of Environmental
7 Services Watershed Management Program). SWNI also served a quasi-judicial
8 function, in that it reviewed appeals from Neighborhood Associations in its
9 district when disputes arose among them.

10 Communications, policing, environmental preservation, and dispute
11 resolution are traditionally functions associated with the government. That is
12 likely why the City filled SWNI's role before it existed and immediately
13 reassumed that role when it defunded SWNI. If SWNI's functions were not
14 essential to the City's unique form of governance, the City surely would not take
15 it upon itself to perform those exact same functions in SWNI's absence.

16 **C. *Marks* factor three: SWNI had authority to, and did, make decisions that heavily
17 influenced City Council and shaped a whole City quadrant.**

18 The third *Marks* factor is the one that the District Attorney deemed
19 dispositive in this "otherwise closely aligned case." *Petition of Tyvoll*, MCDA
20 PRO 20-11 at 5. Aside from the Supreme Court's directive that no single factor in
21 *Marks* should carry such weight, the District Attorney erred in his analysis
22 because he too narrowly construed this factor. That is, his analysis assumed that
23 SWNI needed to have the authority to bind the City before this factor could
24 weigh in favor of finding SWNI to be part of the City. Not so.

25 As the *Marks* court explained, the purpose of the Public Records Act is
26 relevant here: The "policy of governmental openness that underlies the Inspection
27 of Public Records Law rests on the premise that *the public should have access to*

1 *information on which governmental decisions are based.” Id. (citing ORS*
2 *192.630) (emphasis added). Unlike the fact-finding team in Marks, SWNI was*
3 *not an ad hoc committee organized for the limited purpose of conducting an*
4 *investigation and reporting its findings and recommendations to the City, which*
5 *the City could take or leave.⁴⁰ It had a relationship with the City for over 70*
6 *years, and its authority to coalesce Neighborhood Associations’ opinions could*
7 *make or break the plans that officials had for the City. That is made apparent by*
8 *the fact that nearly one half of all land use review appeals the City had to*
9 *adjudicate from 2016–2019 were brought by Neighborhood Associations. And*
10 *that does not even take into account the sway that SWNI had over city officials*
11 *before the land use review process even began. See BPS History Report.*

12 In sum, SWNI was more than a government contractor and it had “more
13 than a token role” in shaping the City. This factor weighs in Plaintiffs’ favor, too.

14 **D. Marks factor four: SWNI has been almost entirely City-funded since its founding.**

15 SWNI does not dispute that this factor weighs in Plaintiffs’ favor, given
16 the extent to which it was funded by the City. The significance of this factor is
17 more apparent than ever now. SWNI no longer serves as a District Coalition
18 because the City’s vote to defund it not only stripped it of the majority of its
19 operating budget, but also revoked the City’s recognition of SWNI as a District
20 Coalition and removed SWNI’s access to and influence over City decision making.

21 **E. Marks factor five: The City has exercised far greater control over SWNI than it would**
22 **over typical private nonprofits or typical government contractors.**

23 SWNI’s relationship with the City was characterized by far more control
24 than typical private nonprofits or government contractors. SWNI’s existence as a
25

26 ⁴⁰ Looking at it from another angle, Marsh & Minick is far more like the high school fact-
27 finding team in *Marks* than SWNI is.

District Coalition was governed by and subject to a City Ordinance and Civic Life's Standards. Those laws and regulations affected:

- SWNI's choice of entity as a nonprofit.
- Who could serve on SWNI's board of directors.
- SWNI's operating budget.
- The number and salary of SWNI's employees.
- SWNI's hiring and firing decisions.

SWNI also was required to submit annual plans to Civic Life and to submit twice annual reports about its activities. Of course, perhaps the most glaring evidence of the City's control over SWNI happened last year, with City Council's decision to withhold SWNI's funding pending a forensic audit and then to defund and replace SWNI with its own employees when the results of that audit were released. This factor weighs in Plaintiffs' favor.

F. *Marks* factor six: SWNI employees were not City employees, but the City regularly exercised control over its hiring and firing decisions and employee compensation.

SWNI's employees may not have been City employees per se, but the City played more of a role in SWNI's employment decisions than one would expect it to play with respect to a private, independent contractor. Indeed, SWNI's original contract with the City included set salaries for SWNI's employees and gave the City authority to review and approve hiring and firing decisions. More recently, BES set the salary for at least one of SWNI's employees. It is inaccurate, then, to say there is no evidence that should be taken into account on this factor.

G. Other relevant considerations.

The Oregon Supreme Court in *Marks* left open the possibility that other considerations could weigh into the "functional equivalent" analysis. Plaintiffs end by offering the court with two further factors to consider in this analysis.

1 First, Plaintiffs urge this court to consider the fundamental disparity that
2 SWNI's and the City's position would create. That is, SWNI and the City both
3 argued that SWNI should not be subject to the Public Records Act because SWNI
4 was a privately run District Coalition, as opposed to a City-staffed one. What
5 they fail to note is that City-staffed District Coalitions clearly are subject to the
6 Public Records Act. As a result, if SWNI's position is upheld, Portlanders' access
7 to avail themselves of the Public Records Act to discern what their District
8 Coalitions are doing on their behalf would be dependent on the entirely arbitrary
9 line of whether they live in a district with a privately run or a City-staffed office.
10 That kind of policy, to put it bluntly, is just plain bad.

11 Finally, SWNI serves as an important lesson in what happens when public
12 entities that are designed to represent constituents' interests lack transparency.
13 Plaintiffs never knew of the fraud that SWNI suffered, despite being active in
14 their neighborhoods and communities in SWNI's district. They even served on
15 the SWNI board without knowing about it. And it was only by chance that they
16 uncovered it, with Hiller-Webb's inquiries that led to her and Tyvoll's
17 introduction to McLaughlin. The Public Records Act exists for a reason: to give
18 Oregonians the mechanism for holding our representatives accountable, for
19 preventing waste and mismanagement, and for exposing public corruption. Had
20 the Public Records Act not been thwarted here, perhaps SWNI's waste of
21 taxpayer funds could have been stopped years ago.

22 CONCLUSION

23 For the reasons stated above, Plaintiffs request that this court deny
24 SWNI's motion for summary judgment and, instead, grant Plaintiffs' cross-
25 motion for summary judgment on both of their claims. Plaintiffs also request
26
27

1 that this Court declare that they are entitled to their reasonable attorneys' fees
2 and costs as the prevailing party.
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4

5
6 DATED: January 11, 2022



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CERTIFICATE OF SERVICE

I certify that on **January 11, 2022**, I caused to be served a full and exact copy of the above **Plaintiffs' Response to Defendant's Motion for Summary Judgment & Cross-Motion for Summary Judgment** via email to Simon Whang (Simon@SimonWhangLaw.com) and Alan Kessler (AK@AlanKessler.Law). I further certify that all parties have agreed to service by email under ORCP 9 G.

DATED: January 11, 2022



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