MIKE SCHMIDT, District Attorney for Multnomah County

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July 12, 2024

VIA EMAIL ONLY

Marie Tyvoll
mtyvoll@gmail.com

Stephanie Dolan
Law Garden NW
stephanie@lawgardennw.com

Re: Petition of Marie Tyvoll seeking records from the South Burlingame Neighborhood Association

Dear Ms. Tyvoll and Ms. Dolan:

On June 11, 2024, petitioner Marie Tyvoll emailed a public records request to the South Burlingame Neighborhood Association (SBNA) seeking a particular petition referenced in a meeting agenda from March. The SBNA president, Susan Holloway, acknowledged the request on June 13 and disputed that it was a subject to the public records law. On July 3, 2024, the sixteenth business day after submitting the request to SBNA, petitioner sought relief from this office pursuant to ORS 192.407, alleging that SBNA had exceeded the 15-day statutory timeline for completing its response to a public records request.

For the reasons discussed below we conclude that the record does not support a finding that SBNA is the functional equivalent of a public body and, as such, this office lacks jurisdiction to grant petitioner the relief she seeks.

DISCUSSION

A. The burden of production as to jurisdictional facts

A county district attorney has jurisdiction to adjudicate disputes involving access to records of public bodies, other than state agencies, headquartered in the county. ORS 192.415. This authority further extends to private bodies that are the "functional equivalent" of a public agency. *Marks v. McKenzie High Sch. Fact-Finding Team*, 319 Or 451 (1994). As such, 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.

Marks sets out the factors to consider in determining whether or not an organization is the functional equivalent of a public body; these are discussed further below. However, we are confronted here with a threshold issue that has not been squarely presented in any of our previous decisions nor, to our knowledge, in the public records decisions of the Attorney General or a court: who holds the burdens of production and persuasion and what is the standard of proof for the facts necessary to establish our jurisdiction? We find today that, consistent with the

procedural rulings of the Oregon Supreme Court and the Supreme Court of the United States, both burdens lie with petitioner and the standard of proof is preponderance of the evidence.

In the context of a public records petition to the district attorney there are four elements necessary to establish our jurisdiction:

1. Petitioner has made a request for a public record to an entity based in Multnomah County;[1]

2. That entity is a public body or the functional equivalent of a public body;[2]

3. A petition alleges that the public body has either denied a records request in whole or part, unduly delayed in responding to a request, or has unreasonably denied a requested fee waiver.[3]

4. The request does not involve the records or decision of an elected official.[4]

In most public records petitions, these jurisdictional elements are self-evident from the face of a petition drafted in the format specified in ORS 192.422. Once a petitioner has established jurisdiction, the burden is on the public body to sustain its action. ORS 192.411. However, nothing in Chapter 192 purports to place on an entity the burden of proving that it is not a public body. The default rule in our judicial system is that the party seeking to invoke a tribunal's authority bears the burden of establishing that the particular tribunal has jurisdiction to hear their case. The Supreme Court of the United States has concisely stated this principle:

> [A plaintiff] must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing. If he does make them, an inquiry into the existence of jurisdiction is obviously for the purpose of determining whether the facts support his allegations. In the nature of things, the authorized inquiry is primarily directed to the one who claims that the power of the court should be exerted in his behalf. As he is seeking relief subject to this supervision, it follows that he must carry throughout the litigation the burden of showing that he is properly in court. […] If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof. And where they are not so challenged the court may still insist that the jurisdictional facts be established or the case be dismissed, and for that purpose the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence.

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[1] ORS 192.324 (setting out public body's obligation to respond upon receipt of a written request); ORS 192.415 (vesting jurisdiction over petitions relating to non-state agencies in the county district attorney for the county in which a public body's administrative offices are located)

[2] ORS 192.314 (creating right to inspect the records of a public body); *Marks v. McKenzie High School Fact-Finding Team*, 319 Or 451 (1994) (extending that right to records of a nominally private body that serves as the "functional equivalent" of a public body).

[3] ORS 192.415 (denied requests); ORS 192.324(6) (fee waivers); ORS 192.407 (undue delay)

[4] ORS 192.427 (divesting the district attorney of jurisdiction to consider petitions involving the decisions or records of an elected official)

McNutt v. Gen. Motors Acceptance Corp. of Indiana, 298 US 178, 189, (1936). Oregon follows the same rule. *State ex rel. Sweere v. Crookham*, 289 Or 3, 7 (1980) ("The burden of coming forward with 'jurisdictional facts' lies upon the party asserting jurisdiction") (citing *McNutt*).

In most cases, administrative review by the district attorney is a jurisdictional prerequisite for bringing a public records dispute to circuit court. *Morse Bros., Inc. v. Oregon Department of Economic Development*, 103 Or App 619, 622 (1990). No Oregon court has addressed the procedural question of establishing administrative jurisdiction in the specific context of an ORS 192.415 proceeding before a county district attorney. However, we do not think the legislature could have intended the district attorney to have jurisdiction to hear a petition that the circuit court would not have jurisdiction to review. And it is beyond question that in any subsequent litigation in circuit court on this matter the procedural rules of civil litigation place the burden of production for jurisdictional facts on the plaintiff. See, *Sweere*, 289 Or at 7. As such, we find that proceedings under ORS 192.415 must follow the ordinary rules of jurisdiction applicable to civil litigation. A petitioner, accordingly, must adduce in their petition, argument, or attachments sufficient facts to allow us to find by a preponderance of the evidence that the entity from whom records are sought is a public body subject to this office's jurisdiction under ORS 192.415.

B. Application of *Marks* to facts alleged

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

> (1) The entity's origin (e.g., whether the entity was created by government or had some origin independent of government).
>
> (2) The nature of the function assigned to and performed by the entity (e.g., whether that function is one traditionally associated with government or is one commonly performed by private entities).
>
> (3) The scope of the authority granted to and exercised by the entity (e.g., does the entity have the authority to make binding governmental decisions, or is it limited to making nonbinding recommendations).
>
> (4) The nature and level of government financial involvement with the entity. (Financial support may include payment of the entity's members or fees as well as provision of facilities, supplies, and other nonmonetary support.)
>
> (5) The nature and scope of government control over the entity's operation.
>
> (6) The status of the entity's officers and employees (e.g., whether the officers and employees are government officials or government employees).

Marks v. McKenzie High School Fact-Finding Team, 319 Or 451, 463-64 (1994).

Petitioner argues that Judge Hodson's ruling in *Tyvoll v. SWNI*, Mult. Co. Cir. Ct 20CV35030, finding that SW Neighborhoods, Inc. met the *Marks* criteria, and overruling this office's prior decision to the contrary, should control our decision here.

At the outset, the difference between a neighborhood association and a district coalition is important context to this dispute. The City of Portland has 95 neighborhood associations, which are 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. SBNA, at issue in this petition is a neighborhood association. SWNI, the entity at issue in *Tyvoll v. SWNI*, was a district coalition.

Petitioner's attachment of the *SWNI* judgment, a case to which petitioner was a named party, containing only the bottom-line decision, overlooks Judge Hodson's actual ruling from the bench. In fact, Judge Hodson found contrary to the proposition that petitioner is now suggesting his order stands for. As part of the findings Judge Hodson made in granting petitioner's motion for summary judgment, he stated:

> Portland residents can create autonomous organizations within a geographic boundary and obtain formal recognition by the city. These groups fall into the classification of neighborhood associations and district coalitions. Both allow residents to weigh in on issues affecting the livability and quality of their neighborhood. The difference is that a coalition encompasses a larger geographic area and therefore it contains several neighborhood associations and from my perspective, as argued by the plaintiffs, is performing a key government function in communicating with its citizens — that is the neighborhood associations — to the point in which the city has entered into taking over that role in a number of instances.
>
> […]
>
> All 95 neighborhood associations in Portland are private entities and neither side contends that neighborhood associations are public bodies for purposes of the public records law.

Tyvoll v. SWNI, 20CV35030, Ruling of March 25, 2022 (J. Hodson) (transcription of FTR audio recording). He went on to find in petitioner's favor that SWNI, a district coalition, was the functional equivalent of a public body under *Marks* in contrast to the neighborhood associations it served.

With that context, Judge Hodson's ruling in *SWNI* reaffirms this office's prior conclusion that Portland's neighborhood associations are independent of government and not subject to the Oregon Public Records Law.[5] *Petition of Kerensa*, MCDA PRO 18-05 (2018). In *Kerensa* we wrote:

[5] The City of Portland requires that neighborhood associations make many of their records available to the public in exchange for receiving official recognition and a number of other benefits from the City. See, PCC 3.96.060(K)

> The MCA [Montavilla Community Association] has no public employees, does not possess any enforcement power over residents, has no authority to make laws or regulations, and receives no direct funding from the city. It, like all other neighborhood associations, is a voluntary association of residents of a particular neighborhood. These associations can organize residents and advocate with the city on behalf of their membership, but in this they are no different than any other private interest organization.

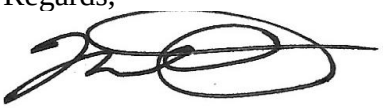
Id. at 2. We noted that the City's authority to "decertify" a neighborhood association, and thereby cut off benefits that flow to it from the City provided it with "some persuasive power over its operations," but that this was not sufficient in itself to consider a neighborhood association the functional equivalent of a public body under *Marks*.

The factual information petitioner has put forth in support of her petition pertains to the general benefits, guidance, and financial support afforded to neighborhood associations by the City.[6] We found such evidence insufficient under *Marks* in *Kerensa*. *SWNI*, if anything, reinforces that conclusion.

ORDER

Accordingly, the petition is dismissed for lack of jurisdiction as the record does not establish that the South Burlingame Neighborhood Association is the functional equivalent of a public body.

Regards,



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(authorizing the Office of Community & Civic Life to establish open meetings and public records standards for neighborhood associations); "Standards for Neighborhood Associations, District Coalitions, Business District Associations, and the Office of Neighborhood Involvement" (2005) Section VII(M) as adopted by Resolution 36329 (July 13, 2005). This, however, is a matter of internal governance to a neighborhood association or the City's enforcement of its standards. Our authority derives solely for the Oregon Public Records Law, which the above-cited authorities do not purport to impose on neighborhood associations.

[6] Specifically petitioner identifies seven factors applicable to all neighborhood associations, or to Southwest Portland neighborhood associations collectively: 1) The City of Portland reimburses all Neighborhood Association for expenses up to $1,000 per year with the Community Activities Fund; 2) The City of Portland allows Neighborhood Associations to apply for land use appeal fee waivers; 3) SW Neighborhood Associations receive Directors & Officers (D&O) insurance from District Coalition Neighbors West-Northwest (NWNW); 4) SW Neighborhood Associations receive statutory filing date reminders from Civic Life; 5) SW Neighborhood Associations receive notice of certain land development proposals and an invitation to comment from Civic Life; 6) SW Neighborhood Associations are planning to join District Coalition NWNW and will enjoy a variety of services provided by NWNW; 7) SW Neighborhood Associations receive a variety of additional services and support.