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November 19, 2002

By FAX and first class mail
Scott Forrester
2030 NW 7th Place
Gresham, OR 97030

Re: *Petition for Public Records Disclosure Order*:
Citizens' Utility Board Records

Dear Mr. Forrester:

This letter is the Attorney General's order on your petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition, which we received on November 8, 2002,[1] asks the Attorney General to order the Citizens' Utility Board (CUB) to disclose the following records: (1) "a photocopy of the most current list of the elected Board of Directors for C.U.B. * * * * includ[ing] the name, address, telephone and fax numbers and email address(es)"[2]; (2) the most current and complete list of all C.U.B. members by each Congressional District * * * * includ[ing] all the information kept or stored on the database(s), to include but not limited to, name of member(s), member address(es), telephone and fax numbers for both home and office, email address(es) for home or office and all phone number(s)"; (3) "a copy of every agenda and the minutes or meeting notes for all meetings from January 1996 to present"; (4) "a photocopy of each 'Annual Audit' by an independent C.P.A., as required under O.R.S. 774.040(2), for the most recent 5 years"; and (5) "a photocopy of each 'Annual financial statement' of the Citizens Utility Board for the most recent 5 years." For the reasons that follow we respectfully deny your petition.

[1] We appreciate your extending the time within which the law would have otherwise obligated us to respond.

[2] CUB is managed by "The Citizens' Utility Board of Governors." ORS 774.060. We assume that your request is for information about individuals serving on the Board of Governors.

You requested the identified records from Bob Jenks, CUB's Executive Director. In separate letters, Mr. Jenks and CUB's attorney, Jason Eisdorfer, responded to your requests. Mr. Jenks agreed to provide you with the records identified above in categories 3 through 5. Also, with respect to the information you requested in category 1, Mr. Eisdorfer provided you with the names and addresses of the elected members of the CUB Board of Governors as well as of other CUB officers. A request for records is "moot" if intervening events – in this case CUB's decision to provide you with certain of the records you requested – have satisfied the request. Therefore, with respect to these records we deny your petition as moot.

Mr. Eisdorfer denied your request for records about CUB members and did not provide you with telephone, fax or email numbers for CUB Governors. In other words, CUB has denied your request for all of the records in category 2 and partially denied your request for records in category 1.

Mr. Eisdorfer's letter to you states CUB's belief that it is not subject to the Public Records Law. We agree.

The Public Records Law, ORS 192.410 to 192.505, confers a right to inspect any public record of a *public* body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. The Public Records Law defines "public body" to include "every state officer, agency, department, division, bureau, board and commission * * * and any other public agency of this state." ORS 192.410(3). Any person denied the right to inspect or to receive a copy of any public record of a state agency may petition the Attorney General to review the public record to determine if it may be withheld from disclosure.[3] ORS 192.450(1).

The Public Records Law does not specify what determines whether a body is public or private. However, in *Marks v. McKenzie High School Fact-Finding Team*, 319 Or 451, 878 P2d 417 (1994), the court analyzed whether a fact-finding team comprised of private citizens but established at the initiative of a school district was subject to the Public Records Law. A review of the text, context and legislative history of the Public Records Law did not disclose whether the legislature intended to apply the Public Records Law to an entity such as the fact-finding team. *Id.* at 456-457 *citing PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-612, 859 P.2d 1143 (1993). Therefore, the court considered "how the legislature would have intended the statute to be applied had it considered the issue." *Id.* at 457 *citing PGE*, 317 Or at 612.

Concluding that "the determination of whether a particular entity is a 'public body' within the meaning of ORS 192.410(3) will depend on the character of that entity and the nature and attributes of that entity's relationship with government and

[3] Under the Public Records Law, "state agency" is defined to mean "any state officer, department, board, commission or court created by the Constitution or statutes of this state* * *." ORS 192.410(5).

governmental decision-making," *id.* at 463, the court identified and applied a set of factors that bear on that question. *Id.* at 463-464. Therefore, we analyze CUB under the factors cited in *Marks*, which are:

1) The entity's origin (was it created by government or was it created independently?);
2) The nature of the function(s) assigned and performed by the entity (are these functions traditionally performed by government or are they commonly performed by a private entity?);
3) The scope of the authority granted to and exercised by the entity (does it have the authority to make binding decisions or only to make recommendations to a public body?);
4) The nature and level of any governmental financial and non-financial support;
5) The scope of governmental control over the entity; and
6) The status of the entity's officers and employees (are they public employees?).[4]

1. Was CUB created by government? Yes. CUB is an "independent nonprofit public corporation" that was established by the people's adoption of a ballot measure in the November 6, 1984 election. ORS 774.030.

2. Are CUB's functions traditionally associated with state government? No. CUB advocates for utility consumers. Its powers, as listed in ORS 774.030, include conducting research, funding demonstration projects and representing consumers' interests before the legislature, the courts and the executive branch of state government.[5] ORS 774.020 confirms that CUB is limited to being an advocate for utility consumers "before legislative, administrative and judicial bodies." These activities are in no way exclusive to government and may be performed by privately-created advocacy organizations.

3. What is the scope of CUB's authority, *e.g.*, does CUB have authority to make binding decisions for state government? CUB does not have authority to make binding decisions for state government. Nothing in CUB's enumerated responsibilities allows it to resolve or decide any issue of public policy or even to make any finding of fact with binding consequence for the determination of an issue of public policy. CUB does not exercise authority that controls any aspect of state government. An entity formed and operated by private parties without a statutory mandate could do what CUB is authorized to do.

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[4] Factors are taken from the ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2001), 3-4.

[5] ORS chapter 774 requires utility companies to include materials provided by CUB in their billings to utility consumers. ORS 774.120 – 774.160. However, shortly after CUB was created the U.S. Supreme Court held requirements unconstitutional due to their infringement upon the First Amendment rights of utility companies. *Pacific Gas and Electric Company v. Public Utilities Commission of California*, 475 US 1, 106 SCt 903 (1986).

4. Does CUB receive support from state government? Some. According to Mr. Jenks, CUB does not receive public funds but is wholly funded by private means. However, CUB does enjoy some benefits that private advocacy organizations do not. It has a statutory right to intervene in a state agency or judicial proceeding, and, by statute, it has standing to obtain judicial or administrative review of an agency's action. *See* ORS 774.180. These capabilities may not be most aptly described as "government support," but they constitute special treatment given to CUB by statute.

5. What is the nature and scope of state control over CUB's operation? The state exercises very little control over CUB's operations. Management of CUB rests with a Board of Governors, the members of which are elected by utility consumers who join CUB. Provisions of ORS chapter 774 specify that statutes traditionally governing the operation of state agencies, such as those relating to public funds, do not apply to CUB. CUB is exempt from statutes governing activities specific to state agencies, including, public contracting and purchasing, public printing, state financial administration and the administration and auditing of public funds.[6] ORS 774.190(1). Also, the Administrative Procedures Act, ORS 183.310 to 183.550, does not apply to CUB's determinations and actions. ORS 774.190(2).

6. Are CUB's officers and employees state government officials or employees? No. ORS 774.190 specifies that CUB is exempt from the State Personnel Relations Law and that CUB's employees are not "employees" for purposes of the public employees retirement laws. Moreover, because CUB does not engage in the activities of government, there is little basis to conclude that those employed by CUB are government officials.

Under the factors specifically considered by the court in *Marks*, CUB possesses only two characteristics of an entity that is the functional equivalent of a state agency. It was created by government and has some rights in relation to administrative and judicial proceedings not shared by private organizations. However, on balance and given the complete absence of the remaining characteristics, we conclude that CUB is not a public body or the functional equivalent of a public body for purposes of the Public Records Law.

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[6] Your petition argues that CUB is subject to the Public Records Law, citing the fact that a statute identifying the laws from which CUB is exempt, ORS 774.190(1), does not list the Public Records Law. But an equally strong contrary inference can be drawn from the fact that audits of CUB's financial affairs are "public record(s) subject to inspection in the manner provided" in the Public Records Law. ORS 774.040(2). If CUB were a public body under ORS 192.410(3), it would be redundant for its statutes to specify that its financial audits are public records.

Conclusion

The limited powers, duties, and purposes of the Citizens' Utility Board are telling. Simply put, like the fact-finding team commissioned to assist a local school board in *Marks,* CUB performs only advocacy or advisory functions. It performs no governmental decision-making function. Like the entity at issue in *Marks,* CUB is not an entity subject to the Public Records Law. Because we find that CUB is not subject to the Public Records Law, we respectfully deny your petition for disclosure.

Sincerely,

Peter D. Shepherd

PETER D. SHEPHERD
Deputy Attorney General

AGS11291
c: Bob Jenks, Executive Director, CUB