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October 24, 2017

SENT VIA EMAIL ONLY: michaellivingston1@msn.com and hlowens2@msn.com

Michael Livingston & Sarah Owens
585 Winter Street NE Apt 715
Salem, OR 97301

Re: Petition for Public Records Disclosure Order
Mid-Willamette Valley Community Action Agency
DOJ File No. 914200-GA0135-17

Dear Mr. Livingston and Ms. Owens:

This letter responds to your petition of October 9, 2017, asking the Attorney General to order the Mid-Willamette Valley Community Action Agency to disclose its bylaws under the Oregon Public Records Law, ORS 192.410 to 192.505.[1] We respectfully deny your petition as we conclude that this agency is not the functional equivalent of a state agency and that therefore we do not have the authority to consider your petition.

Your petition shows that the agency denied your public records request for a copy of its bylaws, stating that its bylaws are not public records subject to disclosure. You concede in your petition that the agency is a nonprofit corporation and that it is not a state agency, but assert that it is the functional equivalent of a public body due to the substantial amount of money it receives from the State of Oregon to carry out state programs. You note that you seek the agency's bylaws as part of an attempt to obtain information about the agency's use of nearly half a million dollars in state funds to purchase an office building.

Generally, Oregon's Public Records Law applies only to public bodies. *See* ORS 192.420(1) (providing a right to inspect any public record of *a public body* in Oregon). However, the Oregon Supreme Court has adopted a six-factor test to determine whether an entity is the functional equivalent of a public body, and therefore subject to Public Records Law:

[1] Thank you for granting an extension on the deadline to issue an order.

(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). Because the Attorney General only has the authority to consider petitions when a state agency has denied a records request or request for fee waiver, ORS 192.450(1), our inquiry focuses on the agency's relationship to Oregon state agencies.

The Oregon Housing & Community Services Department (OHCS) administers antipoverty funds to community action agencies such as the Mid-Willamette Valley Community Action Agency. *See* ORS 458.505(1)–(2). We spoke with Ben Fetherston, Jr., an attorney for the agency. He explained that the agency's position is that it is not the functional equivalent of a public body for purposes of Public Records Law. He told us that the agency was incorporated as a nonprofit in 1969 by private citizens; that 38% of its funding comes from state grants; that while the agency is subject to the terms of grant agreements, those agreements do not provide for management or operational control by the state; that the agency's board of directors is not selected by the state; and that the agency has no authority to make any decision that is binding on the state.

We also spoke with Marilyn Miller at OHCS, who provided similar information; that is, OHCS distributes funds to the agency through a master grant agreement, the agency is not subject to management or day-to-day control by OHCS; and the agency has no ability to make decisions that bind OHCS. Every three years, OHCS reviews a grantee's files to ensure the grantee is complying with the terms of the master agreement.

Based on this information, we conclude that the agency is not the functional equivalent of a state agency. It was created as a nonprofit organization, not as a public body; there is no indication that its employees are considered to be public employees; the agency has no authority to make binding decisions for the state; and the agency is not subject to day-to-day oversight by the state, although it must comply with the terms of the master grant agreement. While assisting the homeless is a function performed by public bodies, it is also a function performed by private nonprofit organizations. And while the agency does receive a significant portion of its funds

from the state, this is the sole factor that weighs in favor of the agency being the functional equivalent of a state agency, and is outweighed by the other factors supporting a contrary finding.

Because the Mid-Willamette Valley Community Action Agency is not the functional equivalent of a state agency, the Attorney General cannot resolve your petition under ORS 192.450(1). Therefore, we respectfully deny your petition.

Sincerely,

FREDERICK M. BOSS
Deputy Attorney General

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