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July 24, 2019

Kelsey Heilman
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Re: Petition for Public Records Disclosure Order
Cascade Health Alliance Records
DOJ File No.: 443001-GA0054-19

Dear Ms. Heilman:

This letter is the Attorney General's response to your petition for the disclosure of records under the Oregon Public Records Law, ORS 192.311 to 192.478. Your petition, which we received on June 18, 2019,[1] asks the Attorney General to direct the Cascade Health Alliance (CHA) to produce its policies and procedures for authorizing the use of Direct Acting Antiviral (DAA) medications in the treatment of Hepatitis C. Your petition explains that CHA denied your request because it is a private entity and not a "public body" under the Oregon Public Records Law.. Your petition asks us to find that CHA is the functional equivalent of a public body for purposes of the Public Records Law. For the reasons that follow, we respectfully deny your petition.

The Public Records Law confers a right to inspect or receive copies of any public records of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.314. A "public body" includes "every state officer, agency, department, division, bureau, board and commission; every county and city governing body, school district, special district, municipal corporation, and any board, department, commission, council or agency thereof; and any other public agency of this state." ORS 192.311(4). "State Agency" is defined to mean "any state officer, department, board, commission or court created by the Constitution or statutes of this state." ORS 192.311(6). 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 record to determine if it may be withheld from public inspection. ORS 192.411(1).

[1] We appreciate your agreement to extend the time for us to respond to your petition.

Your petition asks us to find that CHA is the functional equivalent of a "public body" as defined in ORS 192.311(4), based upon the factors adopted by the Oregon Supreme Court in *Marks v. McKenzie High School Fact-Finding Team*, 319 Or 451 (1994). We have previously determined that the Attorney General may review a petition claiming that an ostensibly private entity is the functional equivalent of a public body that is a state agency under the *Marks* test. *See Attorney General's Public Records Manual* (2019) ("*Manual*") at 3-4.[2]

We begin by summarizing the court's analysis in *Marks*. The issue before the court was whether an ad hoc fact-finding team comprised of private citizens selected by a private association of school administrators was a "public body" under the Public Records Law. The court concluded that the team, which was tasked with investigating, reporting on, and making recommendations to a public school district, was not a public body or the functional equivalent of a public body. The court's analysis involved three levels of statutory interpretation, beginning with a review of the text and context of ORS 192.410(3)[3] to determine whether the Legislature intended to encompass an entity such as the fact-finding team within the term "public body." *Marks* at 456-57. The court found nothing in the text or context of the statutory definition of "public body" to help it determine whether the Legislature meant for the term to encompass the fact-finding team. *Id.* The court then proceeded to the next level of statutory interpretation by examining the statute's legislative history for guidance. *Id.* The court found that the relevant legislative history provided little help.

After concluding that the text, context and legislative history of the Public Records Law did not make Legislature's intent clear, the court resorted to general maxims of statutory construction to resolve the uncertainty. *Id.* at 457. Specifically, the court sought to determine how the Legislature "*would have intended* the statute to be applied had it considered the issue." *Id.* (emphasis added). The court concluded that the Legislature would have intended for the resolution of this issue to "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. The court proceeded to identify and apply the following factors that bear on that inquiry:

> (1) The entity's origin (*e.g.*, whether the entity was created by government or had some origin independent of government).
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> (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).

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[2] *See also* Public Records Order (PRO), Jan 31, 2001, Hinkle (Oregon School Activities Association not a public body); PRO, Sep 3, 2002, Long (Oregon Public Broadcasting not a public body); PRO, Nov 19, 2002, Forrester (Citizens Utility Board not a public body); PRO, Mar 29, 2004, Redden (Oregon Historical Society not a public body); and PRO, Jul 24, 2008, Rios (Oregon Bridge Delivery Partnership, under contract with the Department of Transportation, not a public body).

[3] ORS 192.410(3) was the predecessor to ORS 192.311(4). The statutory definition of "public body" did not change when the statute was renumbered.

(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).

Id. at 463-64. The overall purpose of this test is "functional." The court noted that "no single factor is either indispensable or determinative" and that this list was not intended to be exclusive. *Id.* In weighing the significance of the various factors, the court was guided by the need to protect the policies underlying the Public Records Law; i.e., ensuring public access to information on which governmental decisions are based. *Id.* at 466.

Your petition argues that CHA is the functional equivalent of a public body under the *Marks* factors. Your position is based upon CHA's status as a Coordinated Care Organization (CCO). As a CCO, CHA has contracted with the Oregon Health Authority (OHA) to coordinate regional medical assistance to qualified individuals under the state's Medicaid plan. Applying the *Marks* factors, you argue that (1) because CCOs were created by statute, the state is responsible for CHA's origin; (2) the functions CHA performs relating to the coordination of medical assistance under the state's Medicaid program – such as coverage determinations – are traditional functions of government; (3) CHA exercises broad authority with regard to these traditional government functions, such as approving or denying coverage; (4) CHA's revenue comes almost exclusively from a combination of state and federal funds; and (5) CCOs are highly regulated such that the state exercises a high degree of control over their operations. Finally, you contend that a finding that CCOs are not public bodies would be inconsistent with the goals of the Public Records Law because it would mean the state "can avoid transparency and accountability in key government programs merely by contracting with private entities, regardless of the type of services those entities provide."

In light of your petition, we contacted CHA's legal counsel, Kelly Knivila of Stoel Rives, LLC. She explained CHA's position that the text, context and legislative history of the relevant statutes in this case make it clear that the Legislature did not intend to encompass private entities such as CHA, or CCOs generally, within the Public Records Law definition of a public body. Because the Legislature's intent is clear, she argues, it is neither proper nor necessary for us to apply the *Marks* factors to determine whether CHA is the functional equivalent of a public body. She explains that CHA is a private Limited Liability Company (LLC) and that the definition of a "public body" in ORS 192.311(4) does not encompass private entities such as LLCs or corporations. She also expresses CHA's view that the Legislature has specifically addressed the need for public oversight by expressing its strong desire for transparency over the operations of CCOs. She notes that consistent with this desire, the Legislature and OHA have enacted a number of transparency-promoting statutes and rules,

such as provisions relating to CCO record keeping, routine reporting to OHA, financial reporting, application disclosures, agency access to CCO records, public participation and membership in community advisory committees, and public access to certain meetings of CCO governing bodies. And, she notes, much of this information is available to the public through OHA's website or through its public records. These provisions, she argues, demonstrate that CCO transparency has already been addressed through legislative and rule making processes. More importantly, she contends, none of these provisions explicitly subject CCOs to the Public Records Law.

Ms. Knivila also points to recent legislation that, CHA believes, supports the conclusion that the Legislature does not regard CCOs as public bodies. This includes House Bill 4018 (2018) (HB 4018), which originally included a provision requiring certain meetings of CCO governing bodies to comply with the Public Meetings Law – a body of law that contains a definition of "public body" similar to the definition found in the Public Records Law. HB 4018, Section 2 (introduced). According to Ms. Knivila, such a provision would not have been necessary if the Legislature already considered CCOs public bodies under the Public Meetings Law. She also notes that the original provision was rejected and replaced with a provision affirmatively stating that such meetings are *not* subject to the Public Meetings Law. HB 4018, Section 18(2) (enacted). Ms. Knivila argues that if CCOs are not public bodies for purposes of the Public Meetings Law, then by extension they are not public bodies under the Public Records Law. She also cites Senate Bill 1041 (2019) (enacted) (SB 1041), which provides that any self-evaluative audit document submitted by CCOs to OHA, and in the possession of OHA, "remains the property" of the CCO and is not subject to disclosure by OHA under the Public Records Law. She argues that this provision demonstrates the Legislature's intent that a CCO's records are private property and are not public records subject to disclosure under the Public Records Law.

Finally, Ms. Knivila argues that if the Legislature's intent remains unclear to us, OLC has nevertheless failed to demonstrate that CHA is the functional equivalent of a public body under the *Marks* factors. Regarding the first factor, she notes that CHA is a wholly private LLC, created by Cascade Comprehensive Care, Inc. (CCC), a private corporation. And notwithstanding the fact that CCC created CHA to bid for a CCO contract, CHA is a private contractor and was not created by the state. Regarding the second *Marks* factor, she argues that CHA is performing functions commonly performed by private entities, such as risk based managed care, that are not traditionally associated with government functions. Third, she asserts that CCOs exercise only limited authority and that OHA retains both primary and ultimate authority over the state's Medicaid program. She explains that the scope of CHA's discretionary authority is limited primarily to utilization management, care coordination, and provider network management. And even these functions, she asserts, are heavily regulated by OHA. Ms. Knivila also argues that CCOs have no authority to bind OHA because their decisions may be appealed to OHA, which can issue final orders that are binding on CCOs. As to the fourth factor, she contends that the nature of CHA's funding weighs against a finding that it is a public body because that funding is governed by the terms of its contract. She indicates that CHA does not receive direct appropriations or ad hoc reimbursements from the state, and the state does not share in CHA's financial risk. Finally, she argues that the extensive regulation of CCOs does not equate to state control over their activities. For example, she explains that OHA has no authority over CHA's day-to-day operations and it does not have the power to appoint or remove CHA's officers. She also

contends that the degree of regulation is not unlike other highly regulated commercial managed care and insurance entities that are not subject to the Public Records Law.

We begin by examining the relevant text, context and legislative history to see if we can discern whether the Legislature intended to encompass CCOs within the Public Records Law definition of a "public body." *See Marks,* 319 Or at 456-57. If the Legislature's intent is clear, then the more general test adopted by the court in *Marks* does not apply.

After reviewing the relevant text, context and legislative history, we conclude that the Legislature did not intend for CCOs, including CHA, to fall within the definition of a "public body." First, we have previously observed that on its face, the Public Records Law does not apply to private entities such as nonprofit corporations and cooperatives. *Manual* at 3. And in contrast to each of the ostensibly private entities previously examined by the courts and by us,[4] CCOs are subject to a substantial body of interrelated statutes, rules and contract provisions that provide considerable context for our analysis.[5] *See Marks*, 319 at 456-57 (the relevant context includes "other provisions of the same statute and other related statutes") (*quoting PGE v. Bureau of Labor and Industries*, 317 Or 606, 611 (1993) (internal quotations omitted)).

Several statutes and rules specifically address CCO transparency, including extensive CCO reporting requirements to OHA.[6] Much of the information reported to OHA is available to the public

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[4] *See,.e.g., Marks*, 319 Or 451 (ad hoc fact-finding body not a public body); *Laine v. City of Rockaway Beach*, 134 Or App 655, 663 (1995) (volunteer fire department found determined to be a public body); and note 2 above.

[5] *See, e.g.,* ORS 414.620 to 414.686; and OAR Chapter 410.

[6] *See, e.g.*, ORS 414.018(3)(g) (Legislature's finding that the goals of the state's Medicaid program require "an integrated and coordinated health care system in which … [i]nteractions between the Oregon Health authority and coordinated care organizations are done in a transparent and public manner."); ORS 414.625 (requires OHA to adopt by rule CCO qualification criteria and requirements, including reporting requirements, to be integrated into CCO contracts; states that CCOs may be a single corporate structure or a network of provided organized through contract; requires CCOs to establish standards for publicizing CCO activities to keep the community informed); ORS 414.627 (requires CCOs to have community advisory councils that includes community members, establishes council public meeting and reporting requirements; states that council meetings are not subject to the Public Meetings Law); ORS 414.651 (OHA shall establish CCO financial reporting requirements and submission reqnirements for outcome and quality data); ORS 414.655 (CCOs shall report to OHA on uniform quality measures for primary care home and behavioral health homes); ORS 414.661 (OHA shall conduct annual quality reviews of each CCO, OHA shall collect a standard list of documents as part of its review) HB 4018 (2018) and OAR 410-141-3025 (requires CCO governing bodies to provide public notice of meetings where substantive decisions are made, permits members of the public to attend and provide testimony at the meetings, requires recording or minutes of the meetings and making them available to the public, states that meetings of governing bodies are not subject to the Public Meetings Law); OAR 410-141-3010(6) (CCO applications may be disclosed to the public upon award of a contract); OAR 410-141-3015 (entities applying for certification as a CCO must certify how it will assure transparency in governance and agree to provide access to certain financial, outcomes, quality and efficiency metrics that will be transparent and publicly reported); OAR 410-141-3390 (interactions between OHA or the Department of Consumer and Business Services and CCOs shall be done in a transparent and public manner; OHA exercises sole discretion in determining whether records in its custody that were provided by a CCO are confidential under the Public Records Law); OAR 410-141-3180 (CCO record keeping requirements); OAR 410-141-3230 to 410-141-3247 (required notices to members regarding grievances and appeals to OHA); OAR 410-141-3255 (grievance and appeals record keeping and required reports to OHA); OAR 410-141-3270 (CCO marketing guidelines to be developed with OHA through a "transparent public process, including stakeholder input."); and OAR 410-141-3370 (required disclosures of CCO financial solvency reports to OHA).

as part of OHA's public records and as part of OHA's reporting requirements. *See* SB 1041, Section 54(3) (itemizing CCO reports that OHA "shall make readily available to the public on an easily accessible website, and shall annually report to the Legislative Assembly"). We find that these transparency provisions are distinct from the Public Records Law and many would appear to be unnecessary if CCOs are subject to the Public Records Law.[7] These provisions provide strong contextual support for our conclusion that the Legislature did not intend to encompass CCOs within the definition of a "public body." And considering OHA's broad regulatory and oversight responsibilities over CCOs, we are also satisfied that these transparency provisions adequately protect the general policies underlying the Public Records Law.

As we are able to discern the Legislature's intent in this instance, we do not need to apply the *Marks* factors to determine how the Legislature "would have intended" the Public Records Law to apply to CCOs "had it considered the issue." *Marks,* 319 Or at 457 (citations omitted). But even under the *Marks* factors we would conclude that CHA is not the functional equivalent of a public body. For example:

> (1) CHA is a private company and was not created by the state. Although the Legislature created the concept of a CCO, the term CCO is certification or designation given to an existing entity that qualifies under OHA's rules to contract with OHA. This factor weighs in favor of finding that CHA is not the functional equivalent of a public body.
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> (2) Administering the Medicaid program has been a job of nearly all state governments since the federal Medicaid law was enacted in 1963. But the state, like the federal government in administering Medicare, may choose to deliver benefits either directly (through fee for service) or indirectly (through risk-bearing contractors). When the Oregon Health Plan was created in 1994, the state chose to shift the provision of health care for the indigent *away* from the traditional fee-for-service model (where the state and federal governments pay directly for services and are at risk) toward a managed care model (where a third party pays and is at risk for the cost and quality of services provided). That a private CCO like CHA delivers Medicaid health benefits to its members is a logical consequence of the state's choice on how to deliver these benefits. It does not mean CHA is engaged in the traditional governmental function of administering the state's Medicaid program. This factor weighs in favor of finding that CHA is not the functional equivalent of a public body.
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> (3) CHA can and does make important decisions affecting the delivery of health care services to its members, even if certain of these decisions can be appealed to OHA. Thus, it does more just make non-binding recommendations. But CHA may make decisions for its members only within the specific authority the Legislature and OHA have granted CHA by statute and rule, as incorporated into CHA's contract. OHA has not, and could not consistent with the Oregon Constitution, delegated its governmental responsibility for administering the state's Medicaid program to CHA. This factor weighs in favor of finding that CHA is not the functional equivalent of a public body.

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[7] *See, e.g.*, ORS 414.625(2)(p) (each CCO shall establish standards for publicizing CCO activities to keep the community informed); and OAR 410-141-3010 (OHA, and not CCOs, determines whether CCO application information labeled confidential meets public records exemptions requirements).

(4) Most of CHA's funding comes through capitated payments it receives for Medicaid health services. The capitated payments to CHA and the other CCOs are not itemized in OHA's budget. Rather, OHA receives state general funds, which it combines with federal financial participation (FFP), to issue monthly capitation payments to CCOs including CHA. The FFP is subject to exacting scrutiny by the federal Centers for Medicare and Medicaid Services (CMS) to assure compliance with federal law. Once CMS approves CCO capitation rates, the FFP is paid to OHA, not to the CCOs. CHA's contract with OHA requires it to pay for the medical expenses of its members, as well as for its own administrative expenses, from its capitation payments. Although OHA receives detailed financial reports on how CHA spends its money, neither OHA nor the federal government exercises budgetary control over CHA or directly shares in its overall financial risk. This factor weighs in favor of finding that CHA is not the functional equivalent of a public body.

(5) As noted above, CHA's operations are subject to considerable governmental oversight. But we cannot conclude that the amount of regulation in this instance equates to government control of CHA's operations. There are no indications that OHA exercises any control of CHA's day-to-day operations or that it has the ability to appoint or remove officers or employees. *See Marks*, 319 Or at 465. *See also Laine v. City of Rockaway Beach*, 134 Or App 655, 663 (1995) (volunteer fire department found to be a public body, in part, because city approved election of fire chief, could remove chief for cause, and because city controlled department's operating budget). And, for purposes of establishing government control, we do not see any major distinctions between CCOs and other highly regulated private entities – such as managed care organizations and private insurance companies – that we do not regard as public bodies under the Public Records Law. This factor weighs in favor of finding that CHA is not the functional equivalent of a public body.

(6) According to Ms. Knivila, none of CHA's officers or employees are government officials or employees. This factor weighs in favor of finding that CHA is not the functional equivalent of a public body.

For the foregoing reasons, we conclude that CHA is not a public body under the Public Records Law. We therefore lack jurisdiction to resolve your appeal and must respectfully deny your petition.

Sincerely,



Frederick M. Boss
Deputy Attorney General

FMB:pjn/DM9727150
c via email only: Kelly Knivila, Stoel Rives LLP