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July 9, 2021

**VIA E-MAIL ONLY:** sllvolin@gmail.com

Stephanie Volin
29 South Valley Road
West Orange, NJ 07052

Re: Petition for Public Records Disclosure Order
*Oregon Law Foundation*
DOJ File No.: 173048-GA0001-21

Dear Ms. Volin:

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 15, 2021,[1] asks the Attorney General to direct the Oregon Law Foundation ("Foundation") to disclose records pertaining to Interest on Lawyer Trust Accounts (IOLTA) maintained by a particular Oregon attorney. The Foundation denied your request asserting that it is a private non-profit corporation and therefore not a "public body" subject to the Oregon Public Records Law. Your petition asks us to find that the Foundation is the functional equivalent of a public body for purposes of the Public Records Law. For the reasons that follow, we cannot reach such a finding with respect to the specific records you seek. We must therefore respectfully dismiss your petition due to a lack of jurisdiction.

a. Oregon Public Records Law

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" means "any state officer, department, board, commission or court

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

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).

b. The Oregon Law Foundation, Lawyer Trust Accounts, and IOLTA

The Foundation is a non-profit public benefit corporation, incorporated in 1981 with an independent board of directors and tax-exempt status as a charitable entity. *See* Oregon Law Foundation, Articles of Incorporation, *available at* https://sos.oregon.gov/business/pages/find.aspx (accessed Jul 1, 2021) ("Foundation's Articles of Incorporation"). According to the Foundation, it serves as a vehicle through which the legal profession – separate from the regulatory functions served by the Oregon State Bar (the "Bar") – can raise private funds to advance its stated purposes of providing legal aid to the poor, improving the administration of justice, and promoting the study of law.

In 1983, the Foundation implemented a voluntary IOLTA program that allowed Oregon lawyers to direct the interest paid on certain lawyer trust accounts to the Foundation. An IOLTA account is one in which a lawyer deposits client funds that will not produce net income for a client, in which case the client suffers no loss from IOLTA interest being paid to the Foundation. *See* Oregon Law Foundation, *For Lawyers*, https://olf.osbar.org/lawyers/ (accessed Jun 23, 2021). In 1988, Oregon lawyers approved a proposal to make the IOLTA program mandatory. Consistent with that vote, the Oregon Supreme Court approved rule changes making the program mandatory in 1989. *See* Oregon Law Foundation, *About Us*, https://olf.osbar.org/about/ (accessed Jun 23, 2021).

The current rules governing lawyer trust accounts and IOLTA are found in Oregon Rule of Professional Conduct (ORPC) 1.15-1, *Safekeeping Property*,[2] and ORPC 1.15-2, *IOLTA Accounts and Trust Account Overdraft Notification*.[3] ORPC 1.15-2(h)(3) envisions that financial institutions will enter agreements with the Foundation to remit interest earned on IOLTA accounts to the Foundation

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[2] ORPC 1.15-1, which governs lawyer trust accounts, states in relevant part:

> (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession separate from the lawyer's own property. Funds, including advances for costs and expenses and escrow and other funds held for another, shall be kept in a separate "Lawyer Trust Account" maintained in the jurisdiction where the lawyer's office is situated. Each lawyer trust account shall be an interest bearing account in a financial institution selected by the lawyer or law firm in the exercise of reasonable care. Lawyer trust accounts shall conform to the rules in the jurisdictions in which the accounts are maintained. * * *

[3] ORPC 1.15-2, which governs IOLTA accounts, states in relevant part:

> (a) A lawyer trust account for client funds that cannot earn interest in excess of the costs of generating such interest ("net interest") shall be referred to as an IOLTA (Interest on Lawyer Trust Accounts) account. IOLTA accounts shall be operated in accordance with this rule and with operating regulations and procedures as may be established by the Oregon State Bar with the approval of the Oregon Supreme Court.
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> (b) All client funds shall be deposited in the lawyer's or law firm's IOLTA account unless a particular client's funds can earn net interest. All interest earned by funds held in the IOLTA account shall be paid to the Oregon Law Foundation as provided in this rule.

and to report to the Foundation certain limited account information.[4] Although it is not clear from the text of the rule why financial institutions must report limited account information to the Foundation, the Foundation informs us that such reports facilitate its efforts to encourage financial institutions to increase the rates they pay on IOLTA accounts.

In this instance, the particular IOLTA records you requested contain only the following account information: name and firm number of the attorney who established the IOLTA account; name of the financial institution; account number; and the account balance, rate of return and interest accrued each month. The records do not contain any client information or detail any account transactions.

c. Private Entities and the Public Records Law

We have previously observed that on its face, the Public Records Law does not apply to private entities such as non-profit corporations and cooperatives. *See Attorney General's Public Records Manual* at 3 (2019) ("*Manual*"). However, in *Marks v. McKenzie High School Fact-Finding Team*, 319 Or 451 (1994), the Oregon Supreme Court concluded that if an ostensibly private entity is the "functional equivalent" of a public body, the Public Records Law applies to it. The court identified the following factors as relevant in making this determination:

(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).

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[4] ORPC 1.15-2 states in relevant part:

> (h) A lawyer or law firm may maintain a lawyer trust account only at a financial institution that:
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> (3) has entered into an agreement with the Oregon Law Foundation: (i) to remit to the Oregon Law Foundation, at least quarterly, interest earned by the IOLTA account, computed in accordance with the institution's standard accounting practices, less reasonable service charges, if any; and (ii) to deliver to the Oregon Law Foundation a report with each remittance showing the name of the lawyer or law firm for whom the remittance is sent, the number of the IOLTA account as assigned by the financial institution, the average daily collected account balance or the balance on which the interest remitted was otherwise computed for each month for which the remittance is made, the rate of interest applied, the period for which the remittance is made, and the amount and description of any service charges deducted during the remittance period * * * .

(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. Consistent with the court's guidance, we have 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* factors. *See Manual* at 3-4.[5] We have also concluded that some private entities "might be the functional equivalent of a public body only with respect to functions that are governmental in nature," in which case only the records related to those governmental functions are subject to inspection. *Id.* at 5 (citation omitted). That is, even if a private entity might be functionally equivalent to a public body for some purposes, it does not follow that all of the information in that entity's possession will relate to functions that are governmental in nature.

d. Discussion

Although your petition acknowledges that the Foundation is a private non-profit corporation, you characterize it as being "under the umbrella" of the Bar. You therefore ask us to find that the Foundation is the functional equivalent of a state agency. In this instance, our evaluation of the *Marks* factors leads us to conclude that the Foundation is not the functional equivalent of a state agency with respect to the specific IOLTA records you seek because they do not relate to functions that are traditionally governmental in nature.

1. Was the Foundation created by the state or a state agency? Yes. In its response to your petition, the Foundation acknowledges that it was created by the Bar, which is as a state agency. *See State ex rel Frohnmayer v. Oregon State Bar*, 207 Or 304 (1989) (the Bar is a state agency subject to the Public Records Law). However, the Foundation notes that it was incorporated in 1981 as a separate non-profit charitable corporation, with an independent board of directors and with a mission distinct from that of the Bar or any other governmental entity.

2. Are the Foundation's functions traditionally associated with state government? No. The Foundation asserts that it only performs charitable, not governmental, functions. Specifically, as a private non-profit corporation, the Foundation distributes grants for charitable purposes, does so

[5] *See also* Public Records Order (PRO), Jan 31, 2001, Hinkle (Oregon School Activities Association not the functional equivalent of a state agency); PRO, Sep 3, 2002, Long (same for Oregon Public Broadcasting); PRO, Nov 19, 2002, Forrester (same for Citizens Utility Board); PRO, Mar 29, 2004, Redden (same for Oregon Historical Society); PRO, Jul 24, 2008, Rios (same for Oregon Bridge Delivery Partnership, under contract with the Department of Transportation); PRO, Oct 23, 2017, Livingston & Owens (same for Mid-Willamette Valley Community Action Agency); and PRO, Jul 24, 2019, Heilman (same for Coordinated Care Organizations under contract with Oregon Health Authority).

independently from the Bar or any other public body, and operates free from other restrictions that would apply to governmental entities.

We observe that the voluntary IOLTA program adopted by the Foundation in 1983 did not assume responsibility for or replicate any functions traditionally performed by state government. Rather, the program enabled access to otherwise unavailable interest earned on private lawyer trust accounts and the Foundation became the beneficiary of that interest. We are not aware of any analogous programs operated by state government. Consistent with its status as a private non-profit corporation, the Foundation then used those private funds for charitable purposes. Such charitable activities are commonly performed by private entities, not governments.

The IOLTA program became a state program when the Supreme Court assumed responsibility for its management and made participation mandatory in 1989. But we do not believe that change affected the Foundation's basic relationship with the program, which is to be the beneficiary of interest earned on IOLTA accounts. More importantly, we understand the Foundation receives the IOLTA account information you requested to facilitate its charitable operations; i.e., to support its efforts to encourage financial institutions to pay higher interest in IOLTA accounts. The Foundation asserts that it does not receive or maintain this information to conduct any functions that are traditionally governmental. And in this instance, we are not able to discern any traditionally governmental purpose for which the Foundation receives or maintains the specific IOLTA account information you seek. *See* Public Records Order, Jul 24, 2008, Rios (policies underlying the Public Records Law are adequately protected by subjecting a private entity's records to disclosure only to the extent they are possessed to conduct governmental functions being performed by the entity).

3. What is the scope of the Foundation's authority; e.g., does the Foundation have authority to make binding decisions for state government? Your petition notes that you "cannot think of any other private entity that could require that an entire group of people – who are required by statute to be members of that group (a state agency) – must give the private entity the interest from their bank accounts." In response, the Foundation asserts that it does not have authority to make any decisions that are binding upon the state government because it does not exercise any governmental powers in the context of the IOLTA program. The Foundation emphasizes the fact that it did not promulgate the rules governing Oregon's IOLTA program, nor does it have any authority to regulate lawyers or to enforce compliance with the program.

After reviewing the relevant authorities – including the Bar Act (ORS Chapter 9), the Bar's Bylaws, the ORPCs, and the Foundation's articles of incorporation – we have found no basis for concluding that the Foundation has been granted or is exercising any governmental authority with respect to the IOLTA program generally, or with respect to the specific account information you seek. The Foundation's only roles in relation to the IOLTA program are to receive interest and to negotiate certain agreements with financial institutions. The interest it receives is used only to support the Foundation's charitable activities and those activities are not governed by the IOLTA program or by any other state agency. And such charitable activities are not traditionally associated with the functions of state government. We also note that the Bar and Supreme Court are responsible for enforcing compliance with the IOLTA program, not the Foundation. *See* ORPC 1.15-2(a) ("IOLTA accounts shall be operated in accordance with this rule and with operating regulations and procedures

as may be established by the Oregon State Bar with the approval of the Oregon Supreme Court."), and ORS 9.675 (requiring active members of the bar to certify annually to the Bar whether they maintain lawyer trust accounts in Oregon).

4. What is the nature and level of government financial involvement with the Foundation? The Foundation is the sole beneficiary of interest earned on IOLTA accounts by virtue of the state-enacted, state-enforced mandatory IOLTA program. In 2019, the Foundation reported $2,671,330 in IOLTA receipts, which represented more than 92% of the Foundation's total revenue that year. *See* Oregon Law Foundation, *2019 Form 990 Tax Return* (Nov 4, 2020), *available at* https://olf.osbar.org/files/2021/05/2019-OLF-Tax-Return-Public.pdf (accessed Jun 30, 2021). Clearly the Foundation's finances are heavily dependent upon this state program. But the Foundation reports that it does not receive any direct financial support from the Bar or any other state entity, nor does any governmental entity direct how the Foundation manages or distributes the interest it receives. And if the Foundation were to dissolve, its assets would be distributed to another charity rather than revert to the state.

5. What is the nature and scope of state control over the Foundation's operations? The Oregon Rules of Professional Conduct direct that any interest earned on IOLTA accounts shall be paid to the Foundation, but the Bar and the Supreme Court are responsible for ensuring that Oregon lawyers comply with that requirement. *See* ORPC 1.15-2(a) and (b), ORS 9.675, and ORS 9.490. We also note that among the Foundation's thirteen directors, three are appointed by the Bar's Board of Governors and one is appointed by the Chief Justice of the Supreme Court. *See* Foundation's Articles of Incorporation. Because the appointed directors may be removed by the official entitled to appoint them, the Board of Governors and the Chief Justice could ostensibly exert some ongoing influence over the work of their appointees on the Foundation's board. *Id*. However, those positions constitute a minority of the board.

Beyond the state connections described above, we have not been able to locate any authority purporting to give the Bar, the Supreme Court, or any other state agency continuing management or official control over the Foundation's charitable operations. Similarly, we have no basis for concluding that the Foundation is directly accountable to any governmental entities generally, or with particular regard to the IOLTA records you have requested.

6. Are the Foundation's officers and employees state government officials? The Foundation explained its position that it does not have any employees. Rather, the Foundation has contracted with the Bar to use Bar employees as the Foundation's Executive Director and administrative staff, and the Foundation reimburses the Bar for their salaries and expenses. *See* Oregon Law Foundation, *Policies and Procedures* at 38 (Mar 1, 2021), *available at* https://olf.osbar.org/files/2021/03/2021-03-policies-and-procedures.pdf (accessed Jun 25, 2021). The Foundation is otherwise comprised of a voluntary thirteen-member board of directors, including one state employee who serves in an elected position. *See* Oregon Law Foundation, *Policies and Procedures* at 2.

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e. Conclusion

On balance, our evaluation of the *Marks* factors leads us to conclude that the Foundation does not possess the particular IOLTA records you have requested as part of any governmental function. The Foundation was incorporated to fulfill charitable purposes and these records are used to advance those functions. Although it is the sole beneficiary of funds generated by a state-enacted program, the Foundation is not subject to state budgetary control and its assets would not revert to the state if it were to dissolve. The Foundation operates without any direct management or official control by a state agency, it does not exercise any authority to make decisions binding upon any state instrumentality, and it is not accountable to any state agency. Most importantly, with regard to the specific IOLTA records you seek, the Foundation does not appear to possess that information in any capacity that is functionally governmental. It follows that disclosing those records to you will not advance the goal, articulated by the court in *Marks*, of ensuring public access to information on which governmental decisions are based. Because we conclude that the Foundation is not the functional equivalent of a state agency with respect to the specific IOLTA account records you seek, we lack jurisdiction to resolve your appeal and must respectfully dismiss your petition.

Sincerely,

Frederick M. Boss
Deputy Attorney General

FMB:pjn
c via email only: Bill Penn (OLF)