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VIA E-MAIL ONLY: aeffinger@wweek.com and david@angelicalfo.com

Anthony Effinger
Willamette Week
2220 NW Quimby St.,
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David Angeli
Angeli & Calfo
121 SW Morrison Street, Ste 400
Portland, OR 97204

Re: Petition for Public Records Disclosure Order
Anthony Effinger v. Oregon Community Foundation
DOJ File No.: 137048-GA0001-25

Dear Mr. Effinger and Mr. Angeli:

This letter is the Attorney General's response to Mr. Effinger's petition, on behalf of *Willamette Week*, for the disclosure of records under the Oregon Public Records Law, ORS 192.311 to 192.478. His petition asks the Attorney General to direct the Oregon Community Foundation (OCF) to disclose certain records related to grants administered under Project Turnkey—a state-funded shelter creation project. OCF denied his request asserting that it is a private nonprofit corporation and therefore not a "public body" subject to the Oregon Public Records Law. The petition argues OCF is the functional equivalent of a public body when administering Project Turnkey.

Transparency is a cornerstone of good governance. The public has a legitimate interest in understanding how decisions involving substantial taxpayer funds are made. But the question here is not whether disclosure of the requested records would promote accountability or confidence in state-funded programs. The question is whether the Oregon Public Records Law requires OCF to disclose those records. For the reasons that follow, we deny Mr. Effinger's petition.

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a. Background.

In 2020, the Legislature created Project Turnkey to address a statewide shortage of shelter beds caused by COVID-19 and wildfire displacement.[1] It appropriated $65 million to the Department of Administrative Services (DAS) to fund two grants, designating OCF as the recipient. OCF was to use the grant funds "to support shelter through [sub]grants to local community organizations for the acquisition, retrofitting, and potential operation" of shelter properties throughout Oregon.[2]

To carry out the Legislature's intent, DAS entered into two grant agreements with OCF. These agreements required OCF to use the funds "to award subgrants to local organizations for their acquisition, retrofitting, and potential operation" of shelter properties. The agreements required OCF to apply specific "criteria for the selection of subgrant awards," including the subgrantee's "previous experience in operating shelter services" and submission of "an operational plan" by the subgrantee.

According to its initial report to the Legislature, OCF's Project Turnkey subgrantees created 19 new shelters in 13 counties, leading to a 20% increase in the state supply of shelter beds.[3] Of the initial $65 million, $6.8 million was granted by OCF to Rockwood Community Development Corporation (Rockwood CDC), and $1.3 million to Operation Rebuild Hope.

Mr. Effinger, a journalist, reported on mismanagement issues concerning these two subgrantees. To further that reporting, Mr. Effinger sent a public records request to OCF for the grant applications submitted by Operation Rebuild Hope and Rockwood CDC. OCF denied the request, stating it is a private nonprofit that does not disclose applications "from our nonprofit partners because they trust us with details that may or may not be public."

After OCF denied the request, Mr. Effinger filed this petition, asking the Attorney General to find OCF is the functional equivalent of a public body. He argues that OCF controlled tens of millions[4] in taxpayer funds and described itself as the state's "fiscal agent and administrator." Mr. Effinger states the public has an interest in understanding why OCF believed these two subgrantees could sustain their operations for years to come, given that Operation Rebuild Hope's operations were curtailed and Rockwood CDC's discontinued.

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[1] *See* Legislative Fiscal Office Analysis of DAS funding request for Project Turnkey for October 23, 2020, and November 9, 2020, meetings of the Joint Emergency Board, available at Analyst: (October 23, 2020) and Analyst: (November 9, 2020).
[2] *See* Oct 30 2020 Certificate of the Oregon Legislative Emergency Board, available at EB Certificate 10-23-2020.pdf; Nov 9, 2020 Certificate of the Oregon Legislative Emergency Board, available at EB Certificate 11-9-2020.pdf.
[3] Oregon's Project Turnkey 2021 Report to the Oregon State Legislature, available at project-turnkey-report.pdf
[4] In 2020, the Legislature approved $65 million in initial funding for Project Turnkey. In 2021 and 2022, lawmakers extended the program and approved additional funding. Because the subgrant applications requested by Mr. Effinger were funded by OCF from the $65 million allocated in 2020, we have confined our analysis to that portion of the program.

b. Oregon Public Records Law and Private Entities.

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.[5] A "public body" includes, but is not limited to, "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."[6] "State Agency" means "any state officer, department, board, commission or court created by the Constitution or statutes of this state."[7] 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.[8]

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.[9] However, the Oregon Supreme Court concluded in a 1994 case that if an ostensibly private entity is the "functional equivalent" of a public body, the Public Records Law applies to it.[10] The court explained that such a determination "will depend on the character of that entity and the nature and attributes of that entity's relationship with government and government decision-making."[11] The court identified the following factors, commonly referred to as the *Marks* factors, as relevant to making this determination:

(1) The private 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(s) assigned to and performed by the private entity (*e.g.,* whether the function(s) are traditionally performed by government or commonly performed by private entities).

(3) The scope of the authority granted to and exercised by the private 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 private 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 private entity's operations.

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[5] *See* ORS 192.314(1).
[6] ORS 192.311(4); *see also* Public Records Order, Feb 12, 2015, Hinkle and Boise (observing that the statutory definition of a "public body" is not expressly exclusive).
[7] ORS 192.311(6).
[8] ORS 192.411(1).
[9] *See Attorney General's Public Records and Meetings Manual* at 3 (2024) ("*Manual*").
[10] *Marks v. McKenzie High School Fact-Finding Team*, 319 Or 451 (1994).
[11] *Id*. at 463.

(6) The status of the private entity's officers and employees (*e.g.,* whether the officers and employees are government officials or government employees).[12]

The court noted that the evaluation of the *Marks* factors is "functional" – "no single factor is either indispensable or determinative" and the list is not intended to be exclusive.[13] 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.[14]

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 these factors.[15] 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.[16] 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.

c. Discussion.

On balance, we do not find that OCF's administration of the Project Turnkey grants is traditionally governmental in nature. In reaching this determination, we have evaluated the *Marks* factors as follows:

1. *Was OCF created by the government?*

OCF is an independent nonprofit charitable corporation. It was not created by statute, executive order, or governmental charter. This factor weighs against finding that OCF is the functional equivalent of a public body.

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[12] *Id*. at 463-64.
[13] *Id*.
[14] *Id.* at 466.
[15] *See Manual* at 3-5. *See also* Public Records Orders, Feb 12, 2015, Hinkle and Boise (e-mails in personal account of Governor's unofficial policy advisor and "First Lady" subject to inspection where they contained information relating of the public's business); Jan 31, 2001, Hinkle (Oregon School Activities Association not the functional equivalent of a state agency); Sep 3, 2002, Long (same for Oregon Public Broadcasting); Nov 19, 2002, Forrester (same for Citizens Utility Board); Mar 29, 2004, Redden (same for Oregon Historical Society); Jul 24, 2008, Rios (same for Oregon Bridge Delivery Partnership, under contract with the Department of Transportation); Oct 23, 2017, Livingston & Owens (same for Mid-Willamette Valley Community Action Agency); and Jul 24, 2019, Heilman (same for Coordinated Care Organizations under contract with Oregon Health Authority).
[16] *Manual* at 4 (citation omitted).

2. *Are the functions contracted to OCF through Project Turnkey traditionally performed by government or commonly performed by private entities?*

The Legislature created Project Turnkey to address a gap between needed and available shelter beds. Both public bodies and private nonprofits have historically provided shelter for those in need.[17] We have previously concluded that a nonprofit's administration of antipoverty funds provided by Oregon Housing and Community Services (OHCS) through a master grant agreement did not amount to a governmental function.[18] OCF's specific role in Project Turnkey—selecting subgrantees to acquire and convert existing properties to shelters—could have been performed by a state agency such as OHCS.[19] But grant making is not the exclusive province of government; nonprofits like OCF routinely administer charitable grantmaking.[20] Functional equivalence requires more—an intrusion into a role traditionally reserved for government. It arises when a private organization performs core governmental functions such as enforcing criminal law,[21] operating a fire department,[22] or directing state employees engaged in high-level executive branch work.[23] Because OCF's grant administration does not implicate these types of core governmental functions, this factor weighs against finding OCF to be the functional equivalent of a public body.

3. *What is the scope of OCF's authority under Project Turnkey; e.g., does it have authority to make binding governmental decisions?*

OCF evaluated and selected subgrantees who received tens of millions to acquire, retrofit, and operate shelters for the State's citizens. In a practical sense, these are binding decisions directly impacting the allocation of Oregon taxpayer dollars. But the Legislature elected to distribute the Project Turnkey money to OCF via grant. And this same argument—control and distribution of taxpayer funds—holds true any time a nonprofit accepts a grant. The government grants the funds with a broader public purpose in mind, but by law, grant funds are "for the purpose of supporting or stimulating a *program of the recipient*" when "no substantial involvement by the contracting agency is anticipated other than monitoring compliance with grant conditions."[24] By awarding the Project Turnkey grants, the State committed $65 million to support an OCF program, subject only to the limited conditions contained in the grant agreement. Legally, selecting subgrantees was a decision binding on OCF, not the State.

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[17] *See* Public Records Order, Oct 12, 2017, Livingston and Owens ("while assisting the homeless is a function performed by public bodies, it is also a function performed by private nonprofit organizations.").
[18] *Id*.
[19] OHCS is statutorily charged with encouraging and assisting "in the planning, development, construction, rehabilitation, and conservation of dwelling units for persons and families of lower income." ORS 456.559. And OHCS "may effect loans, grants and other funding awards to accomplish department housing programs." ORS 456.561(1).
[20] According to public filings, OCF made approximately 3,500 grants in 2025.
[21] Public Records Order, Nov 22, 2023, Alderman.
[22] *Laine v. City of Rockaway Beach*, 134 Or App 655, 664 (1995) ("Firefighting is a service that is uniquely governmental.").
[23] Public Records Order, Feb 12, 2015, Hinkle and Boise.
[24] ORS 279A.010(1)(k)(A)(ii) (emphasis added).

Treating grantees as private, not public bodies, aligns with our precedent[25] and federal law. The *Marks* factors were adopted on the premise that the Legislature intended the Public Records Law to mirror similar laws, including the federal Freedom of Information Act (FOIA).[26] Accordingly, we look to federal court decisions on comparable issues.[27] The U.S. Supreme Court considered whether a private organization, funded entirely by $15 million in federal grants, qualified as a federal agency under FOIA.[28] It held the nonprofit's records were exempt, noting that "[g]rants of federal funds generally do not create a partnership or joint venture with the recipient, nor do they convert the acts of the recipient from private acts to governmental acts absent extensive, detailed, and virtually day-to-day supervision."[29] The Project Turnkey grant agreements do not permit the type of extensive oversight described by the Supreme Court. They require OCF to submit three progress reports and allow DAS to inspect certain program records. They do not authorize OCF to contract on the State's behalf, exercise police powers, or otherwise bind the State—except in selecting subgrantees. For these reasons, this factor is neutral in determining whether OCF is the functional equivalent of a public body.

4. *What is the nature and level of government financial involvement with OCF and the Project Turnkey program?*

The State funded the entirety of the $65 million Project Turnkey program via grants to OCF. OCF indicates, however, that its annual revenue is drawn primarily from private donations and endowment returns. We find this factor to be neutral in considering whether OCF is the functional equivalent of a public body.

5. *What is the nature and scope of government control over OCF?*

The State has no authority to direct OCF's day-to-day decisions or set OCF policy. And, as noted above, by law a state grant involves "no substantial involvement by the contracting agency * * * in the program other than involvement associated with monitoring compliance with the grant conditions."[30] This factor weighs against finding that OCF is the functional equivalent of a public body.

6. *Are OCF's employees government officials or government employees?*

OCF states that its employees are private nonprofit personnel. This factor weighs against finding that OCF is the functional equivalent of a public body.

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[25] *See* Public Records Order, Oct 12, 2017, Livingston and Owens (finding nonprofit grantee not functional equivalent of a public body).
[26] *Marks*, 319 Or 451, 457.
[27] *See also Oregonian Publishing Co. v. Portland School District No. 1J,* 152 Or App 135, 138 (1998) (turning to FOIA cases to analyze waiver of exemptions); *Jensen v. Schiffman,* 24 Or App 11, 14–16 (1976) (analyzing exemption for criminal investigatory information by looking to federal case law on similar FOIA exemption).
[28] *Forsham v. Harris*, 445 US 169, 171-72 (1980)
[29] *Id*. at 173-74.
[30] ORS 279A.010(1)(k)(A)(ii).

d. Conclusion.

On balance, our evaluation of the *Marks* factors leads us to conclude that OCF's administration of the Project Turnkey program does not make it the functional equivalent of a public body under the Public Records Law.

Beyond the *Marks* factors, we considered whether the Legislature intended to subject OCF to the Public Records Law under Project Turnkey. The Legislature created Project Turnkey through Emergency Board actions in October and November 2020. The legislation consisted of a single paragraph directing DAS to grant funds to OCF to support shelter through subgrants and required OCF to report certain program information to the Legislature.[31] The text provides no indication that lawmakers viewed OCF as a public body or intended it to follow the Public Records Law, public contracting rules, or other requirements for state agencies. Legislative history shows the Emergency Board recommended "an abbreviated application and evaluation process for acquisition and remodeling of suitable properties," prioritizing rapid deployment of funds because "as winter approaches, the demand for safe, warm shelter space will become acute."[32] In its first report, OCF echoed this goal:

> We couldn't have been successful without OCF having the flexibility to move quickly. If this had been solely a state project and we had to look at public contracting rules and all sorts of other things, this would have never happened.[33]

In short, nothing in the text, history, or context suggests the Legislature intended OCF to be treated as a state agency. To the contrary, it chose to bypass OHCS and other agencies to expedite funding and shelter construction.

That conclusion does not mean that nondisclosure is good governance. Nothing in this order precludes OCF from disclosing any of the requested records voluntarily or the Legislature from requiring public release of subgrant applications in the future. But our task is to enforce the laws as they exist in light of the policy choices the Legislature made. For the foregoing reasons, we respectfully deny Mr. Effinger's petition.

Sincerely,

Benjamin Gutman
Deputy Attorney General

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[31] *See* Oct 30 2020 Certificate of the Oregon Legislative Emergency Board, available at EB Certificate 10-23-2020.pdf; Nov 9, 2020 Certificate of the Oregon Legislative Emergency Board, available at EB Certificate 11-9-2020.pdf.
[32] *See* Legislative Fiscal Office Analysis of DAS funding request for Project Turnkey for November 9, 2020, meetings of the Joint Emergency Board, available at Analyst: (November 9, 2020).
[33] Oregon's Project Turnkey 2021 Report to the Oregon State Legislature, available at project-turnkey-report.pdf