

**In the
Supreme Court of Ohio**

STATE, <i>ex rel.</i> HARM REDUCTION	:	Case No. 2022-0966
OHIO	:	
935 River Road Suite G	:	
Granville, OH 43023	:	
Relator,	:	
	:	
vs.	:	
	:	<u>MERIT BRIEF OF RELATOR</u>
ONEOHIO RECOVERY	:	
FOUNDATION,	:	
41 South High Street, suite 2600	:	
Columbus, OH 43215	:	
Respondent.	:	
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I. INTRODUCTION

While on its face this case presents a simple scenario – the Relator made a public records request that the Respondent denied – the case has more profound implications. The true question raised here is whether the State of Ohio and the overwhelming majority of its local governments may offload responsibility for allocating the majority of funds recovered in litigation arising from the opioid crisis to a “private” Foundation. This is an especially important question given that the Foundation was conceived and created by governmental action, the Foundation board is made up primarily of political appointments of elected officials, 100% of the Foundation’s funding is money funneled to it by state and local governments, and the Foundation contracted to bind itself to Ohio’s Public Records Act.

II. STATEMENT OF FACTS

Harm Reduction Ohio (“HRO”) is a non-profit organization that advocates for overdose prevention and provides emergency opioid overdose reversal medication to citizens throughout the state (see Complaint, paragraph 1). The OneOhio Recovery Foundation, Inc. (the “Foundation”), was established in December 2021 to direct the distribution of funds received by the state as part of a settlement agreement with various opioid manufacturers and distributors (see complaint, paragraph 2).

On June 19, 2022, Harm Reduction Ohio President Dennis Cauchon made a public records request (“Request”) to the Foundation board’s provisional Chairperson, Kathryn Whittington. The Request sought “[a]ll documents prepared for the OneOhio Recovery Foundation Board for its June 23 meeting” in addition to records for unnoticed meetings held by the Foundation board. A true and correct copy of the Request is attached as Exhibit 2 to the Affidavit of Dennis Cauchon. (See Submission of Evidence by HRO, p. HR0015).

As of the time of this filing, the Foundation has failed to respond to the Request or acknowledge it in any way. At a meeting of the Foundation board held on June 23, 2022, counsel for the Foundation informed board members that it is exempt from the purview of the Ohio Public Records Act (“OPRA”) (see Complaint paragraph 6).

The Foundation never asserted a statutory exemption to justify its refusal to produce the requested record. Rather, the Foundation contends that, as a private entity, the Foundation is not subject to the Ohio Public Records Act. (See Answer of the Foundation, ¶15). The pertinent facts, however, belie this argument.

The Foundation was conceived as part of a Memorandum of Understanding (“MOU”) between the State of Ohio and the majority of Ohio’s local governments. (See MOU, pp. HR006-HR0014). The MOU directed every aspect concerning the opioid settlement recovery. Section B of the MOU directed that 55% of the funds recovered from the settlement of opioid litigation (“Opioid Funds”), to which the state and local

governments were parties, would go to the (then yet to be formed) Foundation. (See p. HR 0007). The allocated funds could be used only pursuant to “Approved Purposes” set out in the MOU. (Id.)

Exhibit A to the MOU set forth a specific strategy for using the Opioid Funds. (See pp. HR 0017-25). As a recipient of Opioid Funds, the Foundation was obligated to abide by this strategic directive. (See p. HR 0017).

At Section D, the MOU set out specific directives as to the formation of the Foundation. The MOU divided the state into 19 Regions. Eight of the Regions consisted of one or two county metropolitan regions, and the eleven other Regions were multi-county, non-metropolitan regions. (See p. HR 0009). For example, Region 1 consists of only Franklin County, while Region 18 consists of Union, Marion, Morrow, Knox, Licking, Fairfield and Delaware Counties.

Local governments within a Region joined in the Foundation by legislative action. Thus, for example, the city of Zanesville passed Ordinance 2021-94 joining the OneOhio MOU and Ordinance 2022-110, approving of the OneOhio Region 12 Governance Structure. (See p. HR 0067-0071). Under that Governance Structure, 8 Board members of Region 12’s Board of Directors were appointed by each Board of County Commissioners in the Region, while another 8 Board members were appointed by the legislative authority of each municipality serving as a county seat in the Region. (Id.). These 16 governmental appointments thus represented 16 of 26 Region 12 Board seats. (Id.)

The MOU also set forth explicit directives for the formation of the Foundation Board. It provides that the Board is to consist of 29 members. Five of the 29 are selected by the Governor, one by the Attorney General and four from the State Legislature. (Id.) The non-metropolitan Regions pick eleven members and the metropolitan Regions pick eight. (Id.) The Foundation's executive director, by the terms of the MOU, is hand-picked by the Governor. (Id.) The executive director's salary is fixed by a schedule published by the Ohio Department of Administrative Services. (Id).

The Foundation's disbursement of funds is required to be consistent with the MOU, including Exhibit A to the MOU, which sets out "Ohio Abatement Strategies." (See pp. HR 0017-25).

The MOU also provides at Section 12:

The Foundation, Expert Panel, and any other entities under the supervision of the Foundation shall operate in a transparent manner. *Meetings shall be open, and documents shall be public to the same extent they would be if the Foundation was a public entity. . . .* The bylaws of the Foundation Board regarding governance of the Board as adopted by the Board, may clarify any other provisions in this MOU except this subsection. This substantive portion of this subsection shall be restated in the bylaws. (Emphasis added).

Despite this unequivocal directive, the bylaws as adopted by the Foundation do not contain the substantive portion of Section 12. (See pp. HR pp. 0054-55).

It is clear from the materials heralding the creation of the Foundation that the State considered it part and parcel of its strategy to address the opioid crisis in Ohio.

In a statement announcing the MOU, Governor DeWine announced:

“I am pleased that Ohio’s communities have agreed to come together as OneOhio,” . . . “It’s a simple concept, but when we are united, we are stronger. OneOhio puts us in the best position to face the drug companies did so much to destroy lives and communities when they got Ohioans hooked on their highly addictive products.” (See HR p. 0027).

Similarly, the Columbus City Attorney commented:

“Our state is facing an opioid addiction crisis, and our community has been particularly hard hit. The City of Columbus is hopeful that by joining forces and uniting as a state, the OneOhio plan will bring us swifter resolution that will ultimately provide much-deserved and needed resources to save lives. We must hold the drug manufacturers and distributors responsible for their role in this epidemic.” (See HR p. 0028).

The OneOhio Recovery Foundation is discussed in detail on the website maintained by RecoveryOhio. (See pp. HR0029-31). Also at the RecoveryOhio website, the Foundation is described as follows:

“The OneOhio Recovery Foundation is divided into 19 regions and is designed to allow communities to take a regional approach to abating the opioid epidemic. More information on the OneOhio Recovery Foundation can be found at RecoveryOhio.ohio.gov.” (See pp. HR0032-33).

The RecoveryOhio website lists the Foundation as one of “Our Resources.” (See pp. HR0034 -36).

III. ARGUMENT

Proposition of Law No. I

Relator has a clear legal right to inspect the Records Maintained by the OneOhio Recovery Foundation.

A. Standard of Review

“Mandamus is the appropriate remedy to compel compliance with R.C. 149.43, Ohio’s Public Records Act.” *State ex rel. ACLU of Ohio v. Cuyahoga County Bd. of Comm’rs*, 128 Ohio St.3d 256, 2011-Ohio-625, 943 N.E.2d 553, ¶ 24 (internal quotations omitted). To establish entitlement to a writ of mandamus, a relator must establish, by clear and convincing evidence: “[1] a clear legal right to the requested relief, [2] a corresponding clear legal duty on the part of respondents, and [3] the lack of an adequate remedy in the ordinary course of the law.” *Id.* at ¶ 31. A relator need not establish the third element in an action to enforce R.C. 149.43. *Id.* at ¶ 24.

B. The records requested by Relator are “public records” that must be made available for inspection and copying pursuant to R.C. 149.43(B)(1).

The OPRA defines “public record” as “any record that is kept by any public office.” R.C. 149.43(A)(1). Accordingly, to be subject to disclosure under the Act, information requested must be: (1) a “record”; and (2) “kept by any public office.” If the records satisfy this definition, they may only be withheld if the record’s custodian proves that the record “falls squarely” within an exception to disclosure. *State ex rel. Cincinnati Enquirer v. Jones-Kelley*, 118 Ohio St.3d 81, 2008-Ohio-1770, 886 N.E.2d 206, ¶ 10.

The Foundation has taken the position that it is not subject to the requirements of the OPRA, because it is a private entity. But the Supreme Court of Ohio has held that a private entity is still obligated to comply with R.C. 149.43 upon a clear and convincing showing that it is the functional equivalent of a public office. *State ex rel. Oriana House, Inc. v. Montgomery*, 110 Ohio St. 3d 456, 462, 2006-Ohio-4854, 854 N.E.2d 193, ¶ 24. When

applying the functional equivalency test, Ohio courts analyze all pertinent factors, including (1) whether the entity performs a governmental function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the entity was created by the government or to avoid the Public Records Act. *Id.* at ¶ 24. While all these factors must be taken into account, no single factor is dispositive. *Id.* at ¶ 23.

1. The Foundation performs a Governmental Function

The first prong of the functional equivalency tests contemplates whether the entity in question performs a “historically government function” or one that has traditionally been performed by private entities. *State ex rel. Bell v. Brooks*, 130 Ohio St. 3d 87, 91, 2011-Ohio-4897, 955 N.E.2d 987, ¶ 22.

Although the nature and creation of the Foundation is unique to the ongoing opioid crisis afflicting the state, it is not the first example of an entity established using the non-profit organizational form for the purpose of distributing settlement money across the state. In 2000, the Ohio General Assembly enacted Senate Bill 192, establishing the Tobacco Use Prevention and Control Foundation (“TUPCF”). Under former R.C. 183.08, the TUPCF was tasked with overseeing the allocation of billions of dollars received by the state through settlement agreements with big tobacco companies. These allocations were targeted at local governments and private organizations actively

working to provide relief and health services to citizens afflicted by the severe health detriments of nicotine addiction and long term use of tobacco products.

In 2010, the Supreme Court of Ohio issued its opinion in *Tobacco Use Prevention & Control Found. Bd. Of Trustees v. Boyce*. While the case did not explicitly deal with an analysis of the OPRA, it conclusively held that the TUPCF was a public body subject to the requirements of the Ohio Open Meetings Act, a similar piece of legislation. *See*, 127 Ohio St. 3d 511, 518, 2010-Ohio-6207, 941 N.E.2d 745, ¶ 29 (holding that the TUPCF violated R.C. 121.22 for failing to conduct a meeting open to the public). Notwithstanding the open meetings considerations at issue in that case, the history of the TUPCF demonstrates that the allocation of settlement funds for the benefit of citizens in the state is a traditionally government function. TUPCF further demonstrates that utilization of the non-profit form is part and parcel to carrying out this function, and does not exempt the Foundation from its duty to comply with the requirements of R.C. 149.43.

Furthermore, the Foundation is tasked through the MOU with distributing hundreds of millions of dollars equitably to 19 government regions based on recommendations of 19 regional governmental boards. The Foundation's 55 percent share of settlement spending must adhere to the same "Ohio Abatement Strategies" the state and local governments use when spending their settlement shares, 15 percent and 30 percent respectively. Abatement Strategies for dealing with a public health crisis fall under the umbrella of traditional government functions, including law enforcement,

drug courts, opioid prescription monitoring and expansion of public health programs now run by local health departments and mental health boards. It strains any sort of reason to assert that the Foundation spending settlement money in the same way as state and local governments does not constitute a historically governmental function.

2. Level of Government Funding

The fact that a private entity receives government funds does not automatically convert that entity into a public office subject to the OPRA. *Oriana House*, 110 Ohio St. 3d 456 at ¶ 29. Nevertheless, the level of funding received by such an entity is relevant for determining if it is subject to the requirements of R.C. 149.43. *Id.* at ¶ 32.

The Foundation has no source of funding other than what is provided to it by the government's opioid settlement. The MOU dictates that 55 percent of the opioid settlement money received by the state will be disbursed to the Foundation for the purposes of benefiting local communities (see p. HR0007). The MOU contains another provision further providing that "[t]he State of Ohio and the Local Governments understand and acknowledge that additional steps should be undertaken to assist the Foundation in its mission, at a predictable level of funding, regardless of external factors." (see p. HR0008). The MOU does not provide for any other mechanism by which the Foundation receives funding. Accordingly, the Foundation receives **100 percent** of its funding from the government.

3. Extent of Government Involvement or Regulation

The third prong of the functional equivalency test contemplates whether a government entity controls the day-to-day operations of the Foundation. *See, State ex rel. Stys v. Parma Cmty. Gen. Hosp.*, 93 Ohio St. 3d 438, 442, 755 N.E.2d 874 (2001).

Overwhelming evidence demonstrates that the Governor's office and the Office of Attorney General are extensively involved in the operations of the Foundation. In fact, the Foundation has operated in almost every way like a conventional public body.

The Foundation is a creation of the state and local governments, which provided for its creation in the MOU. (See pp. HR0006 – 0014). That document mandates that the Foundation comply with the "Approved Purposes" set out in the MOU. (See p. HR0007). The MOU moreover dictates the makeup of the Foundation Board, and assigns to the Governor the power to appoint the Executive Director. (See pp. HR0010-11).

The MOU further dictates the method for allocating Foundation funds. (See p. HR 0012). The MOU also requires that Foundation "[m]eetings shall be open, and documents shall be public to the same extent they would be if the Foundation was a public entity." (See p. HR0013). The MOU required that this provision be made a part of the Foundation bylaws. (*Id.*) This extraordinary control by the government translates to effective control of day to day operations by the public entities that agreed to the MOU.

In addition, as recounted by the Affidavit of Dennis Cauchon, the state controlled the formation and initial meeting of the Foundation. The first of the Foundation's three

meetings was organized, coordinated, and directed by staff members of RecoveryOhio, an agency of the Governor's office staffed by public employees. The board's May 16 meeting was held in the Ohio Department of Public Safety building, a government building. The meeting was coordinated and directed by Aimee Shadwick, a public employee and interim director of RecoveryOhio. To ensure a quorum, Gov. Mike DeWine sent a letter to local elected officials across Ohio saying "We plan to convene the first meeting of the OneOhio Recovery Foundation..." When asked by Dennis Cauchon to discuss the Foundation, various board members responded that they were instructed to direct enquiries to Aimee Shadwick, further demonstrating the Governor's direct control of the Foundation's day-to-day operations. (See pp. HR0001-0005).

As demonstrated by the foregoing evidence, the extent of government involvement with the Foundation is so pervasive as to virtually preclude any argument to the contrary.

4. Creation of the Entity

The final prong of the functional equivalency test contemplates whether the Foundation was created by a government entity. *Oriana House*, 110 Ohio St. 3d 456 at ¶ 34.

The MOU provides that "[t]he Parties shall create a private 501(c)(3) foundation... for the purpose of receiving and disbursing Opioid Funds and other purposes as set forth both herein and in the documents establishing the Foundation. The Foundation will allow

Local Governments to take advantage of economies of scale and will partner with the State of Ohio to increase revenue streams.” (See p. HR0010). The MOU defines “the Parties” as the State of Ohio, the Local Governments, and other parties involved with the state in the opioid litigation that engendered the settlement funds. (See p. HR0006).

Notwithstanding the fact that the Foundation has failed to obtain 501(c)(3) status, this language clearly indicates that the Foundation was established entirely at the direction of the government actors. The announcement heralding the formation of OneOhio makes it clear that the formation of OneOhio was a government generated project. The very first line of the announcement states:

“Ohio Governor Mike DeWine and Ohio Attorney General Dave Yost announced today that local governments encompassing more than two-thirds of the state’s population have signed on to OneOhio, a plan to jointly approach settlement negotiations and litigation with the drug manufacturers and distributors of opioids.” (See p. HR0026).

The RecoveryOhio website similarly highlights the involvement of the government in establishing OneOhio. It states:

“OneOhio provides a mechanism for the distribution of any opioid settlement funds and outlines how the funds can be used.” (See p. HR0030).

That the Foundation is a creation of government cannot be seriously debated.

Proposition of Law No. II

Harm Reduction Ohio is entitled to an award of statutory damages, court costs, and its reasonable attorney’s fees.

1. Harm Reduction Ohio is entitled to an award of statutory damages if the Court orders the City to comply with the Request.

As of the date of the Request, R.C. 149.43(C)(2) provided:

If a requester transmits a written request by . . . electronic submission . . . to inspect or receive copies of any public record in a manner that fairly describes the public record or class of public records to the public office . . . except as otherwise provided in this section, the requester shall be entitled to recover the amount of statutory damages set forth in this division if a court determines that the public office or the person responsible for public records failed to comply with an obligation in accordance with division (B) of this section.

Mr. Cauchon sent the Request via email, i.e., “electronic submission,” to the Foundation, on June 19, 2022. The Foundation has since ignored the request.

Accordingly, if the Court orders the Foundation to produce the records requested, Harm Reduction Ohio requests that the Court award it \$100 per day from the date it filed its Complaint in this action.

2. Harm Reduction Ohio is entitled to its court costs if the Court orders the Foundation to produce the requested records.

R.C. 149.43(C)(3)(a) mandates an award of court costs to a Relator where the Court orders the public office to comply with the Act. Accordingly, if the Court orders the Foundation to produce the requested records, Harm Reduction Ohio is entitled to an award of fees.

3. The Court should award Harm Reduction Ohio its reasonable attorney’s fees pursuant to R.C. 149.43(C)(3)(b).

To recover an award of discretionary attorney's fees, Harm Reduction Ohio must show that it (1) made a proper request for public records pursuant to R.C. 149.43; (2) the requested records were not turned over in response to that request; and (3) the public office's refusal to produce the records compelled Harm Reduction Ohio to file a mandamus action to obtain the records. *State ex rel. Pennington v. Gundler*, 75 St.3d 171, 661 N.E.2d 1049 (1996).

Under R.C. 149.43(C)(3)(b), the Court may award a relator its reasonable attorney's fees if it renders a judgment ordering the public office to comply with the Act. The Court may not award attorney's fees if it finds that a "well-informed public office" would have believed that its conduct complied with the Act, and that a well-informed public office would reasonably believe that its conduct in relation to a request "would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct." R.C. 149.43(C)(3)(c).

With respect to the factors that require a denial of attorney's fees, neither applies. As demonstrated above, even if this Court deems the Foundation to be a private entity, it is still obligated to comply with the OPRA. Even more relevant to this analysis is the MOU language explicitly committing the Foundation to comply with the requirements of R.C. 149.43. Given this language, the Foundation cannot remotely assert that "a well-informed public office" would have believed it complied with the Act.

In determining whether to award discretionary fees, the Court has held that a court should consider the reasonableness of the public office's position, whether the public office acted in good faith, and any public benefit conferred by the relator's pursuit of the action. *State ex rel. Cincinnati Enquirer v. Sage*, 142 Ohio St. 3d 392, 2015-Ohio-974, 31 N.E.3d 616, ¶ 36.

To start, the public benefit from Harm Reduction Ohio's efforts to obtain these records is manifest. The requested records relate to the expenditure of hundreds of millions of dollars intended for the benefit of citizens and communities across the entire state. The public has an interest in how money intended for its own benefit will be spent. This request goes directly to that interest.

Furthermore, the Foundation can hardly argue the reasonableness of its decision. As previously noted, the Foundation's retained counsel informed members of the Foundation board of directors that it was not subject to the requirements of R.C. 149.43, despite the fact that this position directly contradicts the express provisions of the MOU. It hardly requires strenuous appeal to authority to conclude that deliberately disregarding obligations assumed by contract is not a reasonable decision. Additionally, the Foundation has no basis for asserting that it acted in good faith, considering it has not acted all. It simply ignored the request made by Harm Reduction Ohio.

As the factors supporting an award of attorney's fees are present in this case, Harm Reduction Ohio respectfully requests that if the Court renders judgment in its favor, that the Court award it its reasonable attorney's fees pursuant to R.C. 149.43(C)(3)(b).

IV. **CONCLUSION**

For the reasons set forth, Harm Reduction Ohio has a clear legal right to inspect and copy the records sought by the Request, and the Foundation has a clear legal duty to allow inspection and copying. Accordingly, Harm Reduction Ohio respectfully requests that the Court grant the relief requested in its Complaint for Writ of Mandamus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Hereby certify that on December 8, 2022, a copy of the foregoing Merit Brief of Relator was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated in the electronic filing receipt. Parties may access this filing through the court's system.

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