

**In the
Supreme Court of Ohio**

STATE, *ex rel.* HARM REDUCTION : Case No. 2022-0966
OHIO :
935 River Road Suite G :
Granville, OH 43023 :

Relator,

vs.

ONEOHIO RECOVERY :
FOUNDATION, INC. :
41 South High Street, Suite 2600 :
Columbus, OH 43215 :

Respondent.

REPLY BRIEF OF RELATOR

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I. INTRODUCTION

In response to overwhelming evidence that the OneOhio Recovery Foundation, Inc. (“The Foundation”) is fully funded by the State of Ohio, is run in large part by public officials and performs a public function, The Foundation attempts to distract and deflect this Court’s focus from where it belongs – enforcing the Ohio Public Records Act. The simple truth presented by this case is that OneOhio is the functional equivalent of a public body and its records are subject to the Public Records Act.

II. STATEMENT OF FACTS

The pertinent facts have been set forth in the parties’ briefs. 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. 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.

On June 19, 2022, Harm Reduction Ohio President Dennis Cauchon made a public records request to the Foundation board’s provisional Chairperson, Kathryn Whittington. The request sought “All 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).

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 that creation of the Foundation that the State considered it part and parcel of its strategy to address the opioid crises in the 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. 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 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. The Foundation asserts that it does not qualify as the functional equivalent of a public office, under any element of the four factor test. But in fact, each factor supports Relator's position.

1. The Foundation performs a Governmental Function

The Foundation makes the rather extreme argument that "Relator has not submitted sufficient evidence that OneOhio performs a traditional governmental function for purposes of the Public Records Act." But the Foundation literally allocates money received by state and local governments to abate a public health crisis. It is difficult to imagine what could be more of a public function.

Significantly, the Foundation quotes *State ex rel. Repository v. Nova Behavioral Health, Inc.*, 112 Ohio St.3d 338, 342, 2006-Ohio-6713, ¶ 28 for the notion that this Court will more likely conclude that a private entity is performing a governmental function where it is "presented with the situation in which a public agency transfers one of its own functions to [that] private entity." That is precisely the case here. The state and local governments have transferred their function – the allocation of public funds – to a private entity, which has the authority to spend the money within limits established by the MOU.

The Foundation makes much of the fact that the money is being paid by “private actors.” But that is of little consequence. The money paid by the private actors is paid to the state and local governments. It is surely a governmental function to determine how to allocate revenue, regardless of the source of that revenue see R.C. 117.01 (c) (“Public Money’ means any money received, collected by, or due a public official under color of office.....”) That unique governmental function has unequivocally been transferred to the Foundation.

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” as the state and local governments use when spending the settlement shares (15 percent and 30 percent, respectively) directly allocated to them. “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. 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." The MOU does not provide for any other mechanism by which the Foundation receives funding. To date, The Foundation's operational expenses have been paid for entirely by the Attorney General because no OneOhio settlement payments have been received. (HR0078) Accordingly, the Foundation receives **100 percent** of its funding from the government.

Again, having nothing to dispute these facts, the Foundation falls back on the fact that the opioid settlements come from private actors. But those private actors did not reach a settlement with the Foundation. They settled with the state and local governments, who agreed to fund the Foundation with that money. The source of the

government's revenue is not relevant. Rather, the question is whether the Foundation is funded by government funds. And it surely is.

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.

As set forth in Relator's brief, the MOU dictates the critical elements of the Foundation's operation and it provides for the appointment of an Executive Director by the Governor. The Foundation contends in its brief that "there is no evidence, or quite frankly, even a hint, that government officials control the day-to-day operations of OneOhio." In fact, the Foundation hired Ashtabula County Commissioner Kathryn Whittington as Executive Director on December 14, 2022, prior to the Foundation submitting its brief (December 28, 2022) but after the submission of evidence (November 29, 2022). Whittington will remain as Ashtabula County Commissioner, an elected office, while serving as paid Executive Director. Upon being hired, Whittington resigned as unpaid Foundation board chair.

In a nutshell, an elected official runs the day-to-day operations of the Foundation after being hired by a board composed almost entirely of government officials. (See pp. HR0073-0074). Government officials (mostly elected officeholders) account for 23 of 29 board members. The six other directors are two recently retired elected officials and four private citizens.

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.

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 Foundation attempts to equate itself with the private, not for profit entity at issue in *State ex rel. Repository v. Nova Behavioral Health, Inc.*, 112 Ohio St. 3d 388, 2006-Ohio-6713. But this is not an accurate comparison. That case involved the Stark County Community Mental Health Board and Nova Behavioral Health, Inc; a private entity. *Id.* at ¶7. The Stark County Community Mental Health Board (“Stark County CMHB”) was established in 1967 to serve as the community mental-health planning agency for Stark County. In 2004, the Stark County CMHB had \$30.1 million in revenue, approximately two-thirds of which was from state and local tax funding, with most of the remainder from federal subsidies. That same year, the Stark County CMHB disbursed \$23.8 million, or approximately 79 percent of its revenue, among organizations with which it had contracts for the provision of community mental-health services. Nova Behavioral Health, Inc. was one of 14 organizations with which Stark County CMHB had such contracts. *Id.*

The Foundation, which receives money from state and local governments and allocates that money within limits established by the state and local governments,

functions like the Stark County CMBH, rather than Nova. No one would argue that the Stark County CMBH was a private entity, and no one can credibly make that argument as to the Foundation.

But even if this court considered Nova as the equivalent of the Foundation, the result would be the same. In the *State Repository* case, the Supreme Court found that Nova provided a governmental function by providing mental health services to Stark County residents regardless of their ability to pay. It also found that Nova's funding – 92% of which came from the government – was “substantial.” *Id.* at ¶¶ 31-33.

Nova, however, was not controlled in any way by a government entity. The court noted “Nova maintained its own facilities, retirement plan, and accreditation surveys, and nothing in the records suggests that any of Nova's employees or board members were government employees or officials.” *Id.* at ¶35. Moreover, the court found that “Nova was not established by a governmental entity.” *Id.* at ¶37.

Based on the last two factors, the court found Nova was not the functional equivalent of a public entity. *Id.* at ¶38. But this very discussion demonstrates that Foundation is the functional equivalent of a public entity. In the first place, the Foundation's role is clearly a public function, as was Nova's. Second, the Foundation receives 100% of its funding from the government – more than Nova. Third, unlike Nova, the majority of the Foundation board are government officials. Finally, the Foundation was not a pre-existing private entity with whom the state entered a contract. It was

created by the MOU executed by the state and local governments. All of these factors establish the Foundation as a public entity. It is very much distinguishable from Nova.

Realizing the weakness of its position, the Foundation attempts to frighten this court with a discussion of the “unintended consequences” of a decision in favor of Relator. The primary unintended consequence is the “risk” that the IRS will, as a result of such a finding by this court, not grant the Foundation tax exempt status. But this is a distraction.

First, this court is charged with interpreting the law in the case before it. And the sole question is whether the Foundation is the functional equivalent of a public entity. If so, this court must so find, no matter the consequence.

Second, the Foundation does not cite to any authority for the proposition that this court finding that a private entity is the functional equivalent of a public entity for the purpose of the Ohio Public Records Act would trigger any adverse action by the IRS. It is at most, an unfounded concern.

The Foundation also makes a convoluted argument that a finding by this court would somehow make it more difficult for Foundation board members to fundraise. But whether or not the Foundation is deemed the functional equivalent of a public entity has no impact on the prospect of an elected official improperly using the “influence of his office” in fundraising efforts.

Finally, the status of the Foundation as a functional equivalent does not somehow put at risk the funds any more than they are currently. The 55% allocation of the opioid settlement funds are established by a Memorandum of Understanding between the state and local governments. There is nothing preventing the parties from modifying the MOU. And that situation exists regardless of this court's ruling in this case.

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 Foundation to comply with the Request.

As set forth in its Merit Brief, and pursuant to R.C. 149.43(C)(2), Harm Reduction Ohio has satisfied the conditions providing for the award of statutory damages. This court should award them. For the reasons set forth below, this court should not reduce those damages.

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. The Foundation does not seriously dispute this point.

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

Harm Reduction Ohio complied with all the conditions necessary for it to recover its attorney fees here. Harm Reduction Ohio has established 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).

The Foundation argues that Harm Reduction Ohio should not recover statutory damages or attorney fees because the Foundation apparently had a reasonable belief supporting its refusal to provide the requested records. The Foundation contends that because no prior case had been decided under the precise fact pattern presented here, it was free to ignore its duties under the OPRA.

But whether or not this precise fact pattern had come before the court previously, the law is clear that where a private entity satisfies the four factor functional

equivalence test, that entity is subject to the OPRA. As Harm Reduction Ohio has established, there can be little debate as to the fact that the Foundation satisfies each element of the four factor test. The question is not whether this court has ruled on an identical fact pattern previously, but rather how do the facts presented here fit within existing precedent? In this case, the facts so clearly support a finding of functional equivalency that it would be unreasonable to arrive at a different conclusion.

The Foundation also attempts to construct a standing argument regarding its duty under the MOU to make its records available “to the same extent they would be if the Foundation was a public entity.” The Foundation spends several pages in its brief arguing that Harm Reduction Ohio lacks standing to enforce the MOU provision. But this argument is misplaced.

Harm Reduction Ohio in this case is not asserting a claim under the MOU. Its claim arises under the OPRA, and it contends simply that the Foundation is the functional equivalent of a public entity that must comply with the OPRA. The MOU provision, which mandates that the Foundation comply with the OPRA, goes to the reasonableness of the Foundation’s insistence that it has no duty to make its records available to the public. Harm Reduction Ohio has standing to pursue this case, and to point out that the Foundation is acting unreasonably by ignoring a duty clearly spelled out in the MOU. It surely advances the policy underlying the OPRA to require the Foundation to live up to its promises.

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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