

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO
CIVIL DIVISION

Harm Reduction Ohio,	:	
Plaintiff,	:	Case No. 22CV-5401
v.	:	
OneOhio Recovery Foundation, Inc.,	:	Judge Serrott
Defendant.	:	

OPINION AND ORDER

ON MOTION FOR JUDGMENT ON THE PLEADINGS

I. Introduction

This matter is before the Court upon OneOhio Recovery Foundation’s (hereinafter the “Defendant” or “Foundation”) Motion for Judgment on the Pleadings pursuant to Civ. R. 12(C). Harm Reduction Ohio (hereinafter the “Plaintiff”) filed a complaint against the Defendant alleging three (3) counts. The three (3) counts are set forth in this opinion. The Defendant is a non-profit foundation formed by a Memorandum of Understanding (hereinafter “M.O.U.”) signed by Governor Dewine and Ohio Attorney General Yost. Many local and regional governments have also accepted the M.O.U. With regard to the composition and appointment of its members, the M.O.U. provides verbatim the following:

The Board will consist of twenty-nine (29) members comprising representation from four classes:

- **Six (6) members selected by the State (five selected by the Governor and one selected by the Attorney General);**
- **Four members drawn from the Legislature:**

- **One representative selected by the President of the Ohio Senate;**
- **One representative selected by the Ohio Senate Minority Leader;**
- **One representative selected by the Speaker of the Ohio House of Representatives; and**
- **One representative selected by the Ohio House Minority Leader**
- **Eleven (11) members with one member selected from each non-metropolitan Regions; and**
- **Eight (8) members with one member selected from each metropolitan Regions.**

The important public purpose of the Foundation is to distribute fifty-five percent (55%) of the opioid settlement proceeds resulting from local governments' and the State of Ohio's litigation against pharmaceutical companies that distributed opioids in astronomical numbers during the opioid crisis. The Foundation will play a critical and highly public role because the expected funds it will have available to distribute are estimated at five hundred million dollars.

The Government's intent in forming the Foundation was for it to be a "public entity." The M.O.U. explicitly mandates that the meetings of the Foundation "shall be open to the same extent as a public entity." The Governor and Attorney General considered the provision mandating open meetings for the Foundation so important that it required that provision to be incorporated in the bylaws. (Memorandum, Page 8, No. 12.) The M.O.U. at Point 12 provides the following verbatim:

"The Foundation, Expert Panel, and any other entities under the supervision of the Foundation shall operate in a transparent matter. Meetings shall be open, and documents shall be public to the same extent they would be if the Foundation was a public entity. All operations of the Foundation and all Foundation supervised entities shall be subject to audit. 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."

The Foundation has been formed and has had at least one or more meetings. The initial meeting was convened by Aimee Chadwick, a public employee employed by Governor Dewine.¹ The Governor also has the final authority to select the executive director of the Foundation (See M.O.U. Page 6, Paragraph 8).

The Plaintiff claims its representative was denied access to the meeting and thus filed the complaint in this case. The complaint alleges in Count I and Count II that the Defendant violated the public meetings statute R.C. 121.22(C) and requests an injunction to compel the Defendant to comply. Count III alleges that it is a third-party beneficiary to the alleged contract formed by the M.O.U. and therefore is entitled to enforce the contract.

The Defendant in response filed an answer and attached the M.O.U. and then filed this Rule 12(C) motion. The matter is fully briefed and ready for decision.

II. Legal Standard

Civ. R. 12(C) provides the following:

“After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.”

In ruling on the Defendant’s motion, the Court is required to have all the material allegations in the Plaintiff’s complaint with all reasonable inferences to be drawn therefrom, construed in Plaintiff’s favor as true. (*Peterson v. Teodosio* (1973), 34 Ohio St.2nd 161, 165-166.)

¹ All factual information set forth in this opinion is from the Plaintiff’s complaint which must be taken as true for purposes of ruling on the Defendant’s motion. *Fischer v. Morales*, 38 Ohio App.3d 110 (Tenth App. 1987)

The Defendant's motion requires the Court to make a legal determination as to whether the complaint should be dismissed as a matter of law. In construing the allegations in the complaint as true, the Court determines that the Defendant's motion to dismiss should be **DENIED** in its entirety. The reasons and analysis for denying the motion follow.

III. Applicable Law

A. R.C. 121.22

The core legal issue in the case is whether or not the Foundation constitutes a "public body" for purposes of the public meetings requirement of R.C. 121.22. If the Defendant is a public body, it must hold open meetings and conform to the statute's mandate. The statute in pertinent part states the following:

(B) "Public body" means any of the following:

(1) Any board, commission, committee, council or similar decision-making body of a state agency, institution, or authority..."

(2) Any committee or subcommittee of a body described in Division (B)(1)(a) of this section.

R.C. 121.22(B)(1)

The statute further expressly provides for an expansive liberal construction of its definitions and requirements. R.C. 121.22(A) states "This section shall be liberally construed..."

A review of the legal arguments and applicable precedent establish that the Foundation is acting as a public body and meets both the statutory criteria of R.C. 121.22 and the cases interpreting the statute.

B. Review of the Case Law and Plain Language of R.C. 121.22

The plain language of the statute provides that “any board, commission, committee, council, or similar decision-making body of a state agency, institution, or authority...” is a public body for purposes of the open meetings law. The definition of “public body” in the statute is broad in scope because the Legislature intended the statute to be broadly applied. The Foundation is a de facto “decision-making body” of the state which determines how state litigation proceeds will be spent. The State created the Foundation through the M.O.U. The M.O.U. was prepared by the Governor and the Attorney General and at least ten (10) members of the Board are selected by state officials. The Foundation was formed and created by the State’s authority pursuant to the express terms of the M.O.U. Without State action, the Foundation would not exist. The State is funding the Foundation and created the Foundation.

The argument that the Foundation is a private entity not subject to the public meeting statute ignores the reality of its creation and funding. The private entity argument is an illusion without substance much like the “Emperor’s new clothes.” The argument is disingenuous and defies logic. Case law also supports this conclusion especially given the required liberal construction of the statute.

C. A private entity can be a “public body” under R.C. 121.22

The Foundation first argues that it is a private entity and therefore not a “public body.” The plain language and the ordinary meaning of the words used in the statute mandate that the Foundation is a “public body.” *Wheeling Corp. v. Columbus*, 147 Ohio App.3d 460 (2001 Tenth District App.) (holding R.C. 121.22 is to be liberally construed and ruling a private selection committee comprised of appointed members tasked with

making recommendations to a Rail Commission was a public body.) In the *Wheeling* case, the selection committee members were selected by the Rail Commission and evaluated and reviewed proposals and made recommendations to the Commission for accepting the best proposals. The Commission argued the committee was not a public body because it was created on a temporary basis and merely made recommendations and thus was not a “decision-making” authority subject to R.C. 122.21.

The Court rejected this contention and held that the “recommendations” themselves were “decisions” especially given liberal construction of the statute. (Id. Paragraph 58.) In the *Wheeling* case, the Court also noted with approval a case ruling that a group could be a “public body” even if the group did not make decisions. (Id. Paragraphs 58-61.) Finally, the Court held that the fact the selection committee was not established by formal action of the Commission was immaterial (Id. Paragraph 62). The Court ruled the intent of R.C. 121.22 was to apply to such bodies regardless of how the body was formed to prevent governmental agencies or bodies to circumvent the statute by informally establishing a committee. (Id. Paragraph 62.)

Two additional appellate cases with similar issues both ruled “advisory” private committees formed to advise governmental agencies were subject to the public meeting requirements, *Thomas v. White*, 85 Ohio App.3d 410 (1992) and *The Cincinnati Enquirer v. Cincinnati*, 145 Ohio App.3d 355 (2001). Herein, the Foundation has express decision-making authority regarding distributing of up to a half a billion dollars generated by litigation brought by public officials acting on behalf of state and local governments. The Foundation has far more authority to make decisions than the Rail

Commission which only made “recommendations.” Therefore, a private entity like the Foundation can be subject to R.C. 121.22.

Foundation next argues that the Foundation was not created by formal legislation and therefore is not subject to R.C. 121.22. This argument is also without merit.

D. A public body subject to the Public Meetings Act need not be created by resolution, statute or by formal legislative action. *Weissfeld v. Akron Pub. Sch. Dist.* 94 Ohio App.3d 455 (1994)

In *Weissfeld*, The Court concluded that a building leadership team authorized under a contract (collective bargaining agreement) constituted a “public body.” The teams were established by local schools to help decide on-site management for each individual school (Id. 456). The Court emphasized that liberal construction of the statute compelled the result. The Court reasoned that the teams made decisions and despite being created by contract instead of some formal action the Court ruled the teams were a “public body” subject to the Public Meetings Act.

A children’s services advisory committee was also considered a public body under the Act. The advisory committee only made recommendations and was composed of private citizens. *Thomas v. White*, 85 Ohio App.3d 410 (1992). A statute provided that a Children Services Board had the discretion but not mandatory duty to appoint the committee. (Id. 412.) The appellate court determined even though comprised of private citizens the committee was subject to the act and that making recommendations or even electing a chairperson for the committee involved “decision-making” for purposes of R.C. 121.22. (Id. P. 411-412).

Further, as noted at Page 6 herein, the Tenth District specifically stated that the fact “a selection committee was established without formal action” was immaterial in

determining whether R.C. 121.22 applied (*Wheeling*, Supra, Paragraph 62). Therefore, the fact the Foundation was formed without formal action is immaterial.

In the case at bar, the Foundation has stronger characteristics establishing that it is a public body than the entities in the *Weissfeld* and *White* cases cited *supra*. The Foundation has express decision-making authority on spending enormous amounts of public funds and does not simply make “recommendations.” Further, the Foundation was created and initiated by government action in forming the M.O.U. contract. The case law does not require that the Foundation be created by statute or by formal legislative action.

The Foundation also contends that as a non-profit corporation it is not subject to the Act. This contention is also without merit.

E. A non-profit corporation functioning as a governmental equivalent is subject to the Act.

The Defendant argues that a private entity non-profit corporation is not subject to the Act citing *State ex. rel. Massie v. Lake County Bd. Of Comm’rs.*, 2021-Ohio-786. The Foundation also relies upon a 1994 Ohio Attorney General opinion for the proposition that if a board or commission is not created by a statute or ordinance the entity is not subject to the open meetings law. 1994 Op. Ohio Attorney General No. 94-096.

The *Massie* case is distinguishable from the case at bar and thus not applicable to the particular facts regarding the Foundation’s funding, purpose, and creation. In the *Massie* case, a visitors bureau which was a non-profit corporation was incorporated and established totally independent of any governmental agency or authority. The Court

specifically noted at Paragraph 38 that no county or governmental agency had the authority “to establish such an entity (a visitors bureau).” The Commissioners had nothing to do with the creation of the bureau and “simply recognized (the Bureau) as an eligible recipient of revenues pursuant to R.C. 5739.09” (Id. Paragraph 38).

Unlike the Bureau in the *Massie* case, here the Foundation was created by the government and is disbursing state funds that otherwise would have been paid to local and state governments. No statute establishes the Foundation as an “eligible recipient of funds.” The government created the Foundation to spend funds that otherwise would have gone into the general fund coffers of the state and local governments. The Foundation created by the government is spending discretionary funds that belong to the public. In the *Massie* case, the non-profit bureau was formed completely outside governmental involvement. In contradistinction, the Foundation was formed solely by government action. The *Massie* case in part relied on and cited the Attorney General opinion and thus that opinion is likewise distinguishable for all the above reasons. Moreover, an Attorney General opinion is not binding on this Court.

The Foundation also argues that no private entity is subject to R.C. 121.22 relying on a Supreme Court opinion. The Supreme Court of Ohio has stated in an analogous case that a private entity is generally not subject to the Public Records Act (“P.R.A.”) unless there is evidence the entity is the functional equivalent of a public office. (See *State ex. rel. Am. Civ. Liberties Union of Ohio v. Cuyahoga Cty. Bd. Of Commrs.*, 128 Ohio St.3d, 256 at 266, Paragraph 49.) The case is not totally on point because R.C. 121.22 does not require that an entity be a public office or public institution as does the P.R.A. R.C. 121.22 only requires the entity to be a “public body” as defined. However,

the ACLU case is instructive in determining whether the Foundation is the functional equivalent of a public body or governmental entity. The Court stated that if the entity performs a governmental function, is solely funded by the government, and government created, or the government is involved in its function, then the entity is subject to open meetings or public records (Id. Paragraph 50). The Foundation meets the functional equivalency test for the reasons outlined supra.

Moreover, this Court's interpretation of the statute and the M.O.U. creating the Foundation is consistent with the Tenth District's view of the statute. *State ex rel. Mason v. State Empl. Rels. Bd.* 133 Ohio App.3d. 213 (1999 Tenth District). In the *Mason* case, the Court explicitly approved an expansive, liberal construction of R.C. 121.22. Also, see *Wheeling Corp.*, cited supra, ruling a private selection committee established by the government was subject to R.C. 121.22

The Court believes the *Massie* case is distinguishable for the reasons outlined herein. However, to the extent, if any, that this Court's opinion conflicts with *Massie*, this Court declines to follow it. The *Massie* case is a Lake County decision (Eleventh District) and not binding in this Court. *Massie* is also an outlier in relationship to the cases cited herein.

This Court does recognize that the case law on this issue is not totally settled and the Supreme Court has never issued a definitive decision in a case on point with the unique issues herein. However, the majority of the decisions published support this Court's conclusion. In ambiguous cases when a body or entity is created by contract, or some means other than a statute or "formal" government action, and when it is unclear as to whether an entity is subject to R.C. 121.22, courts have applied a number of factors

to make the determination. A review of those factors further buttresses this Court's ultimate conclusion regarding the Foundation.

F. Review of factors applied by courts in similar cases establishes the Foundation is a public body under R.C. 121.22.

In ambiguous cases regarding entities created by contract or other non-statutory means, courts have applied the following tests to determine if the entity is subject to the Act:

- 1. The manner in which the entity was created;**
- 2. The name or official title of the entity;**
- 3. The membership composition of the entity;**
- 4. Whether the entity engages in decision-making;**
- 5. Who the entity advises or to whom it reports; and**
- 6. Source of funding and the purpose of the entity.**

(See *Wheeling Corp. Id, State ex rel. Mason v. State Emp. Relations Bd.*, 133 Ohio App.3d 213 (Tenth App. 1999); *White*, Supra; and *Cincinnati Enquirer*, Supra.) (And see generally the collection of cases in the Ohio Attorney General's 2022 Sunshine Law Handbook, Page 102, Notes 941-945.)

With regard to these factors, the following facts apply:

1. The Government created the Foundation and it would not exist without the M.O.U. which was drafted and executed by the Governor and Attorney General. The Foundation would have no means to pay for its operation and no funds to disburse without the one-half (1/2) billion dollars of public funds from governmental litigation given to it.

2. The Foundation's name does not lead to any concrete conclusion. However, it could be inferred that "One Ohio" relates to the state and local governments in Ohio uniting as one to form the Foundation, settle opioid cases, and spend the funds for "recovery" services for addicts.
3. The Foundation is composed in part by members who are elected public officials and the government appoints a number of its members.
Furthermore, the Governor has the final authority on selecting the executive director who executes the Foundation's decisions, establishes policies, and sets agendas, etc.
4. The Foundation is unquestionably a decision-making body and will be responsible for spending a half-billion dollars of public funds generated by governmental litigation.
5. The Foundation does not report to the government but is responsible and reports to its board. However, it is subject to audit and as noted state and local governments control appointment of the board. Further, a number of the current board members are public officials.
6. The Foundation's purpose is the expenditure of public funds and the source of the funds to operate the Foundation and pay expenses are totally public funds.

Thus, almost all of the above factors considered by all Ohio courts in ambiguous "public body" cases support this Court's conclusion that the Foundation is a "public body" subject to R.C. 121.22.

The ACLU case also supports the Court’s conclusion that the M.O.U. may have by its terms incorporated R.C. 121.22 mandating compliance with the statute, for an additional reason.

G. The M.O.U. expressly provides the Foundation “shall conduct public meetings and all documents shall be public as if the Foundation was a public entity.”

The Supreme Court of Ohio has indicated that a contract provision or an agreement establishing the entity can bind the entity and make it subject to R.C. 121.22 even if the entity would not normally be subject to the Act. (*State ex. rel. Am. Civ. Liberties Union of Ohio v. Cuyahoga Cty. Bd. Of Commrs.*, 128 Ohio St.3d 256 (2011)).

In the ACLU case, the Supreme Court noted that a charter or other provision relating to the creation of a body or entity could by implication incorporate R.C. 121.22 even if the provision does not expressly cite to R.C. 121.22. The Court at Paragraph 37 stated the following:

{¶ 37} R.C. 121.22 and 149.43 are also arguably incorporated by reference in the applicable provisions of the Cuyahoga County Charter regarding open meetings and public records. See Cuyahoga County Charter, Sections 12.05 (“All meetings of the Council and any committee, board, commission, agency or authority of the County, as well as any similar body created by this Charter or by the Council, shall be open to the public as provided by general law”) and 12.06 (“Records of the County shall be open to the public as provided by general law”).

In the case at bar, the M.O.U. explicitly mandates that the Foundation conduct open meetings “to the same extent they would be if the Foundation was a public entity.” This M.O.U. provision incorporates the provisions of R.C. 121.22 and is similar to the incorporation set forth in the ACLU case (*Id.* M.O.U. Page 8, Paragraph 12). Therefore, the Court finds that in addition to the Foundation meeting the criteria set forth in R.C.

121.22 as a public body, by incorporating the language in the M.O.U., it would be subject to the statute even if it did not meet the criteria set forth in the statute.

Thus, for all the reasons stated herein, the motion to dismiss is **DENIED** as it relates to Counts One and Two of the complaint alleging violations of R.C. 121.22. The Defendant is not entitled to judgment as a matter of law when taking all the factual allegations as true in these two counts.

H. Plaintiff's Count Three, the Third-Party Beneficiary Contract Claim.

The Plaintiff's third count claims it is a third-party beneficiary of the M.O.U. contract in that it is a recovery center that would benefit from distribution of opioid funds from the Foundation. Again, given the narrow scope of review on a Rule 12(C) motion, this Court cannot say as a matter of law that the Plaintiff is not a potential third-party beneficiary of the contract. Moreover, given the broad interpretation of R.C. 121.22, any member of the public could theoretically have an interest in the expenditure of one-half (1/2) billion dollars in government funds.

Therefore, at this stage of the litigation, the Defendant's motion as to Count Three is also **DENIED**.

IV. Conclusion

The Supreme Court has eloquently and succinctly addressed why R.C. 121.22 was enacted and that the important public policy mandating open government compels this Court to conclude the Foundation must conduct open meetings and comply with the law. (See *White v. Clinton Cty. Bd. of Commrs.* (1996) 76 Ohio St.3d 416, 418-421.) The

Court stated that the law prevents important decisions from being “made behind closed doors” and enables the public to observe and understand the actions of the government.

The Court referenced the founding fathers of our nation in the opinion:

“A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps, both. Knowledge will forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.” Id. At 419, quoting The Complete Madison, His Basic Writings (1998), 337 (Letter to W.W. Berry, August 4, 1822) (White, Id. Paragraph 419).

This Court endorses that policy and would rather err on the side of open meetings allowing the public to be informed of how its government operates and spends enormous amounts of money. This is especially true in the context of the thousands, if not more, of families tragically impacted by the death of loved ones from overdoses and the untold human wreckage caused by opioid addiction. The public deserves transparency and that the Foundation conduct open meetings.

IT IS SO ORDERED.

Copies to all Counsel electronically.