

OPINION NO. 95-001

Syllabus:

A PASSPORT administrative agency that is operated by a private not-for-profit agency pursuant to 14 Ohio Admin. Code 5101:3-31-03(A)(1) is a "public office" as defined at R.C. 149.011(A) for purposes of the public records law and a "public body" as defined at R.C. 121.22 for purposes of the open meetings law.

To: Judith Y. Brachman, Director, Ohio Department of Aging, Columbus, Ohio
By: Betty D. Montgomery, Attorney General, March 28, 1995

You have requested an opinion regarding "whether Ohio's thirteen PASSPORT Administrative Agencies are 'public agencies' under Ohio law regarding their operation of PASSPORT-related activities."

The PASSPORT program referred to in your question is established pursuant to R.C. 173.40, which states:

There is hereby created a program to be known as the preadmission screening system providing options and resources today program, or PASSPORT. Through the medical assistance program established under Chapter 5111. of the Revised Code, the program shall provide home and community-based services as an alternative to nursing facility placement for aged and disabled persons. The program shall be operated pursuant to a home and community-based waiver granted by the United States secretary of health and human services under section 1915 of the "Social Security Act," 49 Stat. 620 (1935), 42 U.S.C. 1396n, as amended. The department of aging shall administer the program. The department of aging shall enter into an interagency agreement with the department of human services regarding services provided under the program to recipients of medical assistance under Chapter 5111. of the Revised Code. The departments of aging and human services shall adopt rules in accordance with Chapter 119. of the Revised Code to implement the program.

Thus, PASSPORT is a statewide program operated pursuant to a federally approved Medicaid waiver for the purpose of providing home and community-based alternatives to nursing facility placements. Although the Department of Human Services is the state agency designated to administer the Medicaid program in Ohio, R.C. 5111.01, administrative authority over PASSPORT is vested in the Department of Aging acting under an interagency agreement with the Department of Human Services, R.C. 173.40. Both the Department of Aging and the Department of Human Services have authority to adopt administrative rules to implement PASSPORT.

PASSPORT administrative agencies are governed by 14 Ohio Admin. Code 5101:3-31-03 promulgated by the Department of Human Services, which states:

(A) The designated state administrative agency for home care¹ shall use the following criteria for designating a PASSPORT administrative agency [AA] for home care:

- (1) Be a public or private not-for-profit agency; and
- (2) Agree to offer PASSPORT administrative services in at least one county; and
- (3) Be designated an AA for home care by the director of [the Department of Human Services] or its designee.

(B) The role of a PASSPORT AA for home care is to organize and manage the delivery of PASSPORT home care services within a designated geographic area. Specific responsibilities of the PASSPORT AA for home care may include, but are not limited to:

- (1) Development of implementation procedures for carrying out program activities;
- (2) Budgeting for expenditure of funds;
- (3) Except as otherwise required by [the Department of Human Services] or its designee, development of procedures for claims processing, prior authorization, enrollment, disenrollment, notice of hearings, and third-party resource recovery;
- (4) Receipt, disbursement, and accounting of PASSPORT funds;
- (5) Fiscal and program reporting and recordkeeping;
- (6) Representing [the Department of Human Services] at hearings as required; and
- (7) Monitoring the quality of the services being delivered.

(Footnote added.) Additionally, the Department of Aging, as the designated state administrator for home care under R.C. 173.40, has promulgated 2 Ohio Admin. Code 173:3-1-02(K), which describes a PASSPORT administrative agency (PAA) as follows:

the local agency under contract with [the Department of Aging] and which—through the administrative functions and activities of screening, assessment, and case management—recommends or determines an appropriate level of care for enrollees, redetermines passport home care program eligibility, revises an enrollee's plan of care, arranges home care services for eligible enrollees, and monitors plan of care implementation. A PAA may be an area agency on aging² or other community health and social services agency serving a multi-county region that has experience with PASSPORT's target population and experience in the administrative functions of screening, assessment and case management.

¹ Pursuant to R.C. 173.40, the designated state administrative agency for home care is the Department of Aging.

² Area agencies on aging are public or private not-for-profit agencies that, pursuant to federal law, have been designated by the Department of Aging to carry out the purposes of the Older Americans Act on the local level. 42 U.S.C. § 3025(a)(2)(A) and (C) (1988 & Supp. V 1993); *see also* R.C. 173.01(A). Area agencies on aging develop and administer plans to provide a broad range of social, supportive and nutritional services to older adults in specified planning and service areas. 42 U.S.C. §§ 3025, 3026 (1988 & Supp. V 1993); *see also* 45 C.F.R. §§ 1321.53-.61 (1993); 2 Ohio Admin. Code 173:1-2-03.

(Footnote added.)

Pursuant to the above administrative rules, a PASSPORT administrative agency is a local agency under contract with the Department of Aging to administer the PASSPORT program within a designated geographic area of the state comprising one or more counties. Rule 173:3-1-02(K); rule 5101:3-31-03(B). A PASSPORT administrative agency is, in effect, a regional administrative office for the state PASSPORT program. The Department of Aging may contract with either a public or a private not-for-profit agency to perform this public function, rule 5101:3-31-03(A)(1), but also must specifically designate that agency as a PASSPORT administrative agency, rule 5101:3-31-03(A)(3). You relate that pursuant to the above rules, the Department of Aging has designated thirteen local agencies as PASSPORT administrative agencies throughout the state, eleven of which are offices or units within private not-for-profit corporations, and that ten of these private not-for-profit corporations are also designated area agencies on aging.

Federal Reimbursement Levels Linked to Status of PASSPORT Administrative Agencies as Public or Private Agencies

Your question regarding the public or private status of PASSPORT administrative agencies arises because the level of federal reimbursement to the state for certain costs associated with the PASSPORT program is greater when public agencies administer the program than when private agencies do so. Pursuant to 42 C.F.R. § 432.50(b)(1) (1993), a rate of seventy-five percent (75%) federal financial participation is available for "assessment" activity conducted by "skilled professional medical personnel and directly supporting staff of the Medicaid agency³ or of *other public agencies (as defined in § 432.2).*" (Emphasis and footnote added.) The "staff of other public agencies" is defined in 42 C.F.R. § 432.2 (1993) as "skilled professional medical personnel and directly supporting staff who are employed in State or *local agencies other than the Medicaid agency who perform duties that directly relate to the administration of the Medicaid program.*" (Emphasis added.)

The appropriate staff of a PASSPORT administrative agency would appear to meet the definitional requirements of 42 C.F.R. § 432.2, since, as described in rules 173:3-1-02(K) and 5101:3-31-03, a PASSPORT administrative agency is clearly a local agency other than the Medicaid agency and the duties of the staff are directly related to the administration of the PASSPORT Medicaid waiver program. In a series of communications with the Governor and the Department of Human Services, however, the Health Care Financing Administration (HCFA) has indicated that when a private not-for-profit corporation has been designated as a PASSPORT administrative agency, HCFA will not consider that PASSPORT administrative agency to be a public agency for purposes of federal financial participation under 42 C.F.R. § 432.50. HCFA based this determination, in part, on an assumption that a private not-for-profit corporation can never be a public agency under Ohio law. HCFA has since indicated that it will reconsider that determination if it is the opinion of the Ohio Attorney General that PASSPORT administrative agencies that are private not-for-profit corporations can be considered public agencies under Ohio law.

³ Pursuant to R.C. 5111.01, the Medicaid agency in Ohio is the Department of Human Services.

Private Corporation May Be a Public Agency for Certain Purposes Under Ohio Law

The fact that an entity is a private corporation is not solely determinative of the issue of whether that entity is public or private "under Ohio law." *See, e.g., State ex rel. Toledo Blade Co. v. University of Toledo Found.*, 65 Ohio St. 3d 258, 258, 602 N.E.2d 1159, 1160 (1992) (syllabus, paragraph one) ("a private nonprofit corporation that acts as a major gift-receiving and soliciting arm of a public university and receives support from public taxation is a 'public office' pursuant to R.C. 149.011(A), and is subject to the public records disclosure requirements of R.C. 149.43(B)"); *State ex rel. Fostoria Daily Review Co. v. Fostoria Hosp. Ass'n*, 40 Ohio St. 3d 10, 531 N.E.2d 313 (1988) (holding that a not-for-profit corporation operating a city hospital pursuant to a lease with the city is a public office under R.C. 149.011(A)); *State ex rel. Toledo Blade Co. v. Economic Opportunity Planning Ass'n*, 61 Ohio Misc. 2d 631, 582 N.E.2d 59 (C.P. Lucas County 1990) (holding that a private not-for-profit agency designated by the Department of Development as a community action agency pursuant to R.C. 122.68-.69 is a public body for purposes of the open meetings law, R.C. 121.22, and a public office for purposes of the public records law, R.C. 149.43).

The specific criteria for determining whether a particular entity is public or private, however, depends on the specific statutory purpose for which the determination is being made. Thus it is possible for the same entity to be public for one statutory purpose and private for another. *See, e.g., 1989 Op. Att'y Gen. No. 89-055* (syllabus, paragraph one) ("judicial determination that a particular entity is a public office under R.C. 149.011(A) for purposes of the public records law is not determinative of the question whether that entity is a public office under R.C. 117.01(D) for purposes of audit and regulation by the Auditor of State"). *Compare Ohio Historical Soc'y v. State Employment Relations Bd.*, 66 Ohio St. 3d 466, 613 N.E.2d 591 (1993) (Ohio Historical Society is not a "public employer" under R.C. 4117.01(B) governing collective bargaining) with *State ex rel. Fenley v. Ohio Historical Soc'y*, 64 Ohio St. 3d 509, 597 N.E.2d 120 (1992) (Ohio Historical Society concedes that it is a "public office" under R.C. 149.011(A) and is subject to the public records law).

PASSPORT Administrative Agencies Operated by Private Not-For-Profit Corporations Are Public Entities for Purposes of Public Records and Open Meetings Law

As the above discussion indicates, it is not possible to make a categorical statement regarding the status of PASSPORT administrative agencies for all purposes "under Ohio law." However, review of the *University of Toledo Foundation*, *Fostoria Hospital Ass'n*, and *Economic Opportunity Planning Ass'n* cases cited above indicates that a PASSPORT administrative agency operated by a private not-for-profit corporation is a "public office" for purposes of the public records law, R.C. 149.43 and related sections, and a "public body" for purposes of the open meetings law, R.C. 121.22.⁴ Each of these cases involved a privately incorporated not-for-profit

⁴ R.C. 149.011(A) defines the term "public office," for purposes of the public records law, as including "any state agency, public institution, political subdivision, or any other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government." R.C. 121.22(B)(1)(a) defines the term "public body," for purposes of the open meetings law, as "any board, commission, committee, or similar decision-making body of a state agency, institution, or authority, and any legislative authority or board,

entity acting pursuant to contract with a governmental entity. In *University of Toledo Foundation* and *Fostoria Hospital Ass'n*, although the duties of the private corporations that resulted from their relationships to governmental entities were not specifically prescribed by law, the court reasoned that the private corporations performed public functions supported by public tax money. Therefore, these private corporations were public offices for purposes of R.C. 149.43. *University of Toledo Found.*, 65 Ohio St. 3d at 263, 602 N.E.2d at 1163; *Fostoria Hosp. Ass'n*, 40 Ohio St. 3d at 13, 531 N.E.2d at 316. The *Economic Opportunity Planning Ass'n* case involved a privately incorporated agency that, pursuant to R.C. 122.69, had been specifically designated by the Department of Development as a community action agency. The duties and powers of a community action agency are defined by statute. See R.C. 122.70. The court reasoned as follows with respect to the fact that the agency was privately incorporated:

That R.C. 122.66(D) defines a community action agency as a private non-profit agency is immaterial for the purpose of determining the application of the Public Meetings Law [R.C. 121.22]. The statutory provision in question identifies the kind of agency that is subject to designation [as a community action agency]. It is that designation, not the private status of the agency prior to designation, that renders community action agencies public within the Public Meetings Law.

Economic Opportunity Planning Ass'n, 61 Ohio Misc. 2d at 640-41 n.4, 582 N.E.2d at 65 n.4. Similarly, the court held that statutory designation as a community action agency rendered the agency a public office for purposes of the public records law. *Id.* at 645, 582 N.E.2d at 68.

Pursuant to rules 173:3-1-02(K) and 5101:3-31-03(B), a PASSPORT administrative agency is the regional administrative office for the state PASSPORT program and thus performs a public function supported by public funds. In order to perform this public function, a private not-for-profit corporation must be specifically designated as a PASSPORT administrative agency, and its functions and duties in that capacity are assigned by law. Rule 173:3-1-02(K); rule 5101:3-31-03(A). See generally *Youngstown Sheet & Tube Co. v. Lindley*, 38 Ohio St. 3d 232, 234, 527 N.E.2d 828, 830 (1988) (properly promulgated administrative rules have the force of law). The fact that rule 5101:3-31-03(A) permits private not-for-profit agencies to be designated as PASSPORT administrative agencies does not make them private agencies for purposes of the public records or open meetings law. See *Economic Opportunity Planning Ass'n*, 61 Ohio Misc. 2d at 640-41, 582 N.E.2d at 65. Therefore, a private not-for-profit corporation acting pursuant to its designation as a PASSPORT administrative agency is a public office under R.C. 149.011(A) for purposes of the public records law and is also a public body under R.C. 121.22 for purposes of the open meetings law.

Thus, in two important contexts of Ohio law, PASSPORT administrative agencies are public entities, despite the fact that they also are or may be privately incorporated not-for-profit entities. Whether the status of PASSPORT administrative agencies as public entities under Ohio's public records law and open meetings law is sufficient to classify them as public agencies

commission, committee, agency, authority, or similar decision-making body of any county, township, municipal corporation, school district, or other political subdivision or local public institution."

for purposes of Medicaid reimbursement under federal law is, of course, a matter that must be determined by HCFA, and this opinion reaches no conclusion with respect to that issue.

Conclusion

It is, therefore, my opinion, and you are hereby advised that a PASSPORT administrative agency that is operated by a private not-for-profit agency pursuant to 14 Ohio Admin. Code 5101:3-31-03(A)(1) is a "public office" as defined at R.C. 149.011(A) for purposes of the public records law and a "public body" as defined at R.C. 121.22 for purposes of the open meetings law.