

**Subject:** Request for Determination - Is The Malden Community Fund Committee, Inc. (a.k.a. Malden Community Fund) a Public Entity for the Purposes of Public Records Law  
**Date:** Thursday, June 13, 2024 at 12:27:51 PM Eastern Daylight Time  
**From:** Commonwealth Transparency <info@opencommonwealth.org>  
**To:** pre@sec.state.ma.us <pre@sec.state.ma.us>, SEC-DL-PREWEB <SEC-DL-PREWEB@sec.state.ma.us>  
**CC:** maluise@boslaw.net <maluise@boslaw.net>  
**Priority:** High  
**Attachments:** 1. Request 6-12-2024 - Public Record Request under the Massachusetts Public Records Law M.G.L. c66, §§ 10-10A.pdf, 2. Attachment - 6-12-2024 - The Malden Community Fund Committee, Inc.pdf, EXHIBIT 1 - Surrounding Community Agreement - Malden.pdf, EXHIBIT 2 - The Malden Community Fund Committee, Inc.pdf, EXHIBIT 3 - VENDORHISTORY-CHECKS-SYSTEMON6\_11\_2024.PDF, EXHIBIT 4 - CASINOIMPACTFEE.PDF, EXHIBIT 5 - Host-Agreement-between-Everett-and-Wynn.pdf

Greetings:

On June 12, 2024 at 7:14 PM, the Attached PRR and attachment were served upon The Malden Community Fund Committee, Inc. ("The Fund") by serving same upon Ms. Maria Luise, the President and a Director of The Malden Community Fund Committee, Inc. via email at [maluise@boslaw.net](mailto:maluise@boslaw.net).

The very same evening, June 12, 2024 at 10:46PM, the following response was received:

**From:** Maria Luise <[mluise@CITYOFMALDEN.ORG](mailto:mluise@CITYOFMALDEN.ORG)>  
**Date:** Wednesday, June 12, 2024 at 10:46 PM  
**To:** Angelica, Nicole (SEC) <[Nicole.Angelica@sec.state.ma.us](mailto:Nicole.Angelica@sec.state.ma.us)>  
**Cc:** Commonwealth Transparency <[info@opencommonwealth.org](mailto:info@opencommonwealth.org)>, SEC-DL-PREWEB <[SEC-DL-PREWEB@sec.state.ma.us](mailto:SEC-DL-PREWEB@sec.state.ma.us)>  
**Subject:** Re: SPR24-1754 Appeal Acknowledgment

Dear Attorney Angelica,

The City FOIA response coordinator responded because it was unclear if the requestor was asking what records the City of Malden had, or was asking an organization that is not a public entity (The Malden Community Fund) to produce records under the Public Records Law. As such, out of an abundance of caution, the City responded with what the City of Malden would have as responsive, while clarifying that other records specific to the Malden Community Fund were not public records.

By way of background, the City of Malden receives funding annually from a surrounding community agreement with Encore Casino. That agreement called for the City to setup a separate committee to receive funds and to distribute them to worthwhile non profit entities. The Malden Community Fund was established with the Commonwealth of Mass for that purpose, with paperwork filed with the secretary of state. I would like to note that other cities such as Everett have setup a similar organization in order to handle these funds in compliance with municipal finance regulations. Funds are held in a bank account registered to the organization and without involvement of the City Treasurer. It is our position that the records of this organization are not subject to public records laws. If being the recipient of funds were to subject a legally organized entity to public meeting and record laws, the impact would extend to countless organizations. A good parallel is our local cable access channel, Urban Media Arts. They are of course closely associated with the City in many ways, and receive funding, but are a separate legal entity and not subject to public record or meeting laws.

Please let me if you have any other questions,

Maria Luise

**Maria Luise, Special Assistant to Mayor Gary Christenson**  
**City of Malden – Office of the Mayor**  
**215 Pleasant Street, Malden, MA 02148**  
**P: 781-397-7000 – Ext. 2005**

In her response, Ms. Luise clearly states **"It is our position that the records of this organization are not subject to public records laws."**

The Public Records Law:

The Public Records Law applies to all records; made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose, or any person, corporation, association, partnership or other legal entity which receives or expends public funds for the payment or administration of pensions for any current or former employees of the commonwealth or any political subdivision as defined in section 1 of chapter 32.

G. L. c. 4, § 7(26); The Public Records Law therefore applies to public entities, and does not apply to private entities who are not engaged in an agency or contractual relationship with a public entity.

## The Fund's Status as a Public Entity:

In its June 12, 2024 response, the Fund states that it "It is our position that the records of this organization are not subject to public records laws."

The Supreme Judicial Court has developed a five factor test to determine whether an organization is considered a "public entity" for purposes of the Public Records Law. See *Massachusetts Bay Transp. Auth. Retirement Bd. v. State Ethics Comm'n (Board I)*, 414 Mass. 582, 589-91 (1993) (outlining the multi-factor test); see also *Globe Newspaper Co. v. Massachusetts Bay Transp. Auth. Retirement Bd. (Board II)*, 416 Mass. 1007 (1993) (applying the test in the context of the Public Records Law). The five factors are as follows:

- 1) the means by which the entity was created;
- 2) whether the entity performs an essentially governmental function;
- 3) whether the entity receives or expends public funds;
- 4) the involvement of private interests; and
- 5) the extent of control and supervision exercised by government officials, agencies, or authorities over the entity. Board II at 1007; Board I at 587.

The five factors of this test are cumulative, and no one factor is dispositive. Board I at 587.

### 1. Creation of the Entity:

The first factor considered in this analysis is the means by which the entity was created. See Board I at 590. This factor requires the presence of some form of legislative action underpinning the creation of the entity. Id. at 587, 589.

While The Fund claims to be a private, non-profit private corporation, it's very creation was the result of direct legislative action formulating community agreements with casinos.

***Legislative Underpinning:*** The Expanded Gaming Act requires applicants for a gaming license to "provide to the commission a signed agreement between the host community and the applicant setting forth the conditions to have a gaming establishment located within the host community; provided, however, that the agreement shall include a community impact fee for the host community and all stipulations of responsibilities between the host community and the applicant, including stipulations of known impacts from the development and operation of a gaming establishment." Host communities may not hold a referendum on the operation of the gaming establishment until after a host community agreement is executed and an applicant makes a request that the community schedule the referendum.

Pursuant to the Commission's Phase 2 regulations, gaming applicants are required to forward a copy and summary of the executed host community agreement to the Commission for online posting. The regulations further specify that the posting will outline the process by which any community may request that it be added to a list of prospective surrounding communities to that gaming establishment. The list anticipated in the regulation will be used to ensure that gaming applicants provide important notices to communities that may be designated as surrounding communities. For example, the Commission's regulation specifies that applicants shall forward a copy of certain surrounding community related reports to communities on the list when applicants submit applications to the Commission. While the list will be used for certain notices, placement of a community on the list does not cause a community to be designated as a surrounding community, for the purposes of M.G.L. c. 23K and the Commission's regulations.

The City of Malden's Agreement is attached hereto (EXHIBIT 1 - Surrounding Community Agreement – Malden).

In the agreement, the relevant portions to The Fund are as follows:

- 6.2.A.  
An annual payment of One Hundred Thousand Dollars (\$100,000.00), which amount shall be due on or before the ninetieth (90th) day following the opening of the Project to the general public and on each annual anniversary thereof. The annual payment shall continue for as long as Wynn, or any parent, subsidiary or related entity, owns, controls or operates a commercial gaming facility at the Project site and shall increase by two and one-half percent (2.5%) per annum, with an additional adjustment on the fifth (5th) annual payment. See Appendix A for payment detail summary.
- 6.2.B.  
Malden agrees to establish a Committee or Board tasked with reviewing requests for assistance from qualified organizations and making determinations on the awarding of any portion of the Community Fund Payment.

Exhibit 2 attached hereto is the original filing with the Secretary of The Commonwealth where verbatim the purpose of the corporation is:

"The corporation is organized exclusively for charitable purposes including to financially assist, aid and support non-profit organizations and other programming based in the City of Malden by administering funds received through the Surrounding Community Agreement between the City of Malden and Encore Boston and/or funds received from any other individual, entity, or organization, whether public or private, nonprofit or for profit. The corporation shall award said funds to qualified organizations through an application process and develop criteria with the goal of enriching the community across a range of interests, including

but not limited to social justice, health and well-being, educational programming, arts and culture.”

Accordingly, an analysis of this factor weighs in favor of The Fund being a public entity.

## 2. Performance of an Essentially Governmental Function:

The second factor in this analysis concerns whether the entity performs an “essentially governmental function.” See id. at 590.

The agreement (Exhibit 1) clearly states that The City of Malden agrees to establish a Committee or Board tasked with reviewing requests for assistance from qualified organizations and making determinations on the awarding of any portion of the Community Fund Payment.

By contract and agreement the review and disbursement of funds received under Exhibit 1 is exclusively a governmental function, that of the City of Malden.

Accordingly, an analysis of this factor weighs in favor of The Fund being a public entity.

## 3. Receipt and Expenditure of Public Funds

The third factor examines whether the entity receives or expends public funds. Board I at 590. The Supreme Judicial Court has stated that “receipt by an entity of substantial funding from a State agency does not necessarily indicate that the entity is a public instrumentality.” Board I at 590. The Court has also stated that “analysis of this factor . . . should focus on the use of the public funds received by the entity in question, taking into consideration the private interests involved.” Board I at 591.

The attached Exhibit 3, clearly demonstrated that 100% of the funding for The Fund comes directly from the Office of the Treasurer of the City of Malden and by definition are public funds.

The attached Exhibit 4, further demonstrates that the funds are 100% public funds as the deposits from the casino and the disbursements made to The Fund are co-mingled with all other general fund monies of the City of Malden.

Accordingly, an analysis of this factor weighs in favor of The Fund being a public entity.

## 4/5) Involvement of Private Interests; Control and Supervision

The final two factors in this analysis relate to the extent of any involvement, control, or supervision exercised by governmental officials, agencies, or authorities over the entity. See Board I at 591; Board II at 1007.

The exclusive control of The Fund is and has always been under Government Officials of The City of Malden, specifically officials who directly report to the Mayor of Malden:

Name	The City of Malden -	The Fund
Maria Luise	Title: Special Assistant to the Mayor	Title: President & Director
Deborah Burke	Title: Director / Strategic Planning and Community Development	Title: Treasurer & Director
Ronald Hogan	Title: Chief Strategy Officer	Title: Clerk and Director

The Fund’s response attempts to equate itself to Everett, do and must fail.

The Host City of the Casino, where the attached agreement (Exhibit 5) specifically delineates community and non-governmental control and supervision and involvement :

### Section 7. Community Development

#### Everett Citizens Foundation

Upon the Commission's awarding of a category 1 license to Wynn and. Wynn commencing construction of the Project, Wynn agrees to fund an Everett Citizens Foundation ("Foundation") that will be in charge of supporting and promoting local groups, associations and programs with important City initiatives. The Foundation shall consist of 7 members, 4 of whom shall be appointed by the Mayor; 1 of whom shall be appointed by the City's State Representative; 1 of whom shall be appointed by the City's State Senator; and 1 of whom shall be appointment by the City Council. Wynn shall fund the Foundation with an annual payment of Two Hundred Fifty Thousand Dollars (\$250,000), the first such payment to be made on the date the payments under Section 1B commence and continue on each anniversary thereof for as long as Wynn (or any parent, subsidiary or related entity) owns, controls or operates a commercial gaming facility at the Project Site and shall increase by two and one-half percent (2.5%) per annum.

Malden has failed to share or relinquish any involvement, control, or supervision of The Fund to anyone except to the governmental officials who directly work for the Mayor.

Accordingly, where the “control and supervision” of The Fund is entirely in the hands of government officials, an analysis of this final factor strongly favors a determination that The Fund is a public entity.

**The Five Factors on Balance**

The Supreme Judicial Court has stated that the five factors of the public entity test are to be balanced, and no one factor is dispositive. Board I at 587.

On balance, where The Fund was conceived and created under The Expanded Gaming Act, it performs an important public function, it is exclusively funded with public funds, and its control and supervision is solely in the hands of government officials, all of these factors indicate that the Association is a public entity.

Wherefore, OpenCommonwealth requests that the SPR to apply the prescriptive five factor test to The Fund, find and Order that they are subject to Massachusetts public records laws and further Order them to perform a diligent search for all responsive records and provide all responsive records without delay and without charge as no legally conforming request for fees was provided within 10 business days as required by Massachusetts Public Records Law M.G.L. c66, §§ 10-10A:

Kindest Regards,

OpenCommonwealth.org