



OHIO ETHICS COMMISSION
THE ATLAS BUILDING
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July 10, 1992

Informal Opinion 1992-INF-0710

Charles R. Saxbe, Esquire
Chester, Hoffman, Willcox & Saxbe

Dear Mr. Saxbe:

In your letter to the Ethics Commission, you have asked whether the Ohio Ethics Laws and related statutes prohibit a company which is owned, controlled, and operated by Paul V. Voinovich, the brother of the Governor, from contracting with the State and its political subdivisions to perform construction management, architectural, engineering, and other construction and professional services related to jail facilities, penal institutions, hospitals, and other public buildings and facilities.

It must be noted initially that the provisions of the Ohio Ethics Law and related statutes include prohibitions against **public officials and employees** misusing their official position for their own personal benefit, or the benefit of their family members or business associates, or where there is otherwise a conflict of interest. Accordingly, with two exceptions, see R.C. 102.03 (F) and 2921.43 described below, the provisions of the Ethics Law and related statutes **do not** apply to Paul V. Voinovich since he does not hold public office or employment. However, as explained below, the Governor, all staff members and other public officials and employees of the Governor's Office, and all other public officials and employees, are subject to the prohibitions of the Ethics Law and related statutes.

You state that Paul V. Voinovich owns, controls, and operates the Voinovich Group which consists of business entities which perform construction management, architectural, engineering, and construction services. You also state that, before the Governor took office, the Voinovich Group had performed construction and other services for the State and its political subdivisions. You further state that Paul Voinovich and the Voinovich Group have no business relationship with the Governor. Your firm has also stated that the Governor has never had any financial interest in, or served as an officer or director of, the companies which comprise the Voinovich Group. You have also stated that all business relationships between Paul Voinovich or the Voinovich Group and members of the Governor's staff and other public officials and employees that had previously existed have been recently dissolved. As stated above, all staff members, other public officials and employees of the Governor's Office, and all other public officials

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and employes, are subject to the prohibitions of the Ethics Law and related statutes. Therefore, if these business relationships are resumed, or resumption of the relationships is contemplated, the conclusions of this advisory opinion will not apply. See Ohio Ethics Commission Advisory Opinion No. 90-011.

The Ethics Commission, when rendering advisory opinions, interprets pertinent statutory provisions and sets forth the criteria which must be observed to avoid a violation of the law. It cannot, however, determine whether those criteria have been met in a particular situation in the context of rendering an opinion. The opinion function of the Ethics Commission is not a fact-finding process, and the staff must rely upon the truth and completeness of facts set forth in request letters. See Advisory Opinion No. 75-037. In addition, the Ethics Commission cannot render an opinion with regard to facts which have already transpired. Id. The Commission renders advisory opinions only in response to hypothetical facts or prospective conduct. Id.

Divisions (A)(1), (A)(3), and (A)(4) of Section 2921.42 of the Revised Code read as follows:

- (A) No public official shall knowingly do any of the following:
 - (1) Authorize, or employ the authority or influence of his office to secure authorization of any public contract in which he, a member of his family, or any of his business associates has an interest;
 - . . .
 - (3) During his term of office or within one year thereafter, occupy any position of profit in the prosecution of a public contract authorized by him or by a legislative body, commission, or board of which he was a member at the time of authorization, and not let by competitive bidding or let by competitive bidding in which his is not the lowest and best bid;
 - (4) Have an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which he is connected.

The term "public official" is defined in R.C. 2921.01 (A) for purposes of R.C. 2921.42 to include any elected officer of the State. The Ethics Commission has never specifically addressed the prohibitions of the Ethics Law and related statutes as they affect the Office of the Governor of the State of Ohio. However, it is clear that the Governor is a "public official" for purposes of R.C. 2921.42 and is subject to its statutory prohibitions, since he exercises the supreme executive power of the State, see Ohio Const. art. III, § 5, is elected quadrennially, and holds office for a term of four years. See R.C. 107.01; See also Advisory Opinion No. 75-004.

"PUBLIC CONTRACT"

The term "public contract" is defined for purposes of Section 2921.42 in Division (E) of that Section, which reads:

- (E) As used in this section, "public contract" means any of the following:
 - (1) The purchase or acquisition, or a contract for the purchase or acquisition of property or services by or for the use of the state or any of its political subdivisions, or any agency or instrumentality of either;
 - (2) A contract for the design, construction, alteration, repair, or maintenance of any public property.

The purchase or acquisition, or a contract for the purchase or acquisition, of construction management, architectural, engineering, or other construction or professional services by or for the use of the State or a political subdivision constitutes a public contract as defined in R.C. 2921.42 (E)(1) for purposes of R.C. 2921.42. See Advisory Opinions No. 80-001, 85-004, and 85-010. Also, the Commission has held that the issuance of revenue obligations constitutes a public contract as defined in R.C. 2921.42 (E)(1) for purposes of R.C. 2921.42. See Advisory Opinions No. 78-003, 78-005, and 80-006. Furthermore, a contract for the design, construction, alteration, repair, or maintenance of public property constitutes a public contract as defined in R.C. 2921.42 (E)(2) for purposes of R.C. 2921.42.

The Ethics Commission has held that the purchase or acquisition of property or services by or for the use of the State or a political subdivision, or a contract therefor, constitutes a "public contract" for purposes of R.C. 2921.42 **regardless** of whether federal, state, or local funds are used to compensate the

contracting party. See Advisory Opinions No. 83-005, 84-011, 85-002, and 91-011. In the instant situation, the Voinovich Group's performance of construction management, architectural, engineering, or other construction or professional services related to jail facilities, penal institutions, hospitals, and other public buildings and facilities for the State or a political subdivision would constitute a "public contract" for purposes of R.C. 2921.42 **regardless** of the source of funds used by the State or a political subdivision to compensate the Voinovich Group for its services. Furthermore, the issuance of revenue obligations by the State or its political subdivisions in order to finance the design, construction, alteration, repair, or maintenance of facilities which the Voinovich Group desires to perform constitutes a public contract for purposes of R.C. 2921.42.

R.C. 2921.42 (A)(4) - HAVING AN INTEREST IN A PUBLIC CONTRACT

The prohibition imposed by Division (A)(4) of R.C. 2921.42 will be addressed first.

R.C. 2921.42 (A)(4) prohibits a public official from having an "interest" in a public contract entered into by or for the use of the political subdivision, governmental agency, or instrumentality with which he is connected. The Ethics Commission has held that an "interest" under R.C. 2921.42 must be definite and direct, and may be pecuniary or fiduciary in nature. See Advisory Opinions No. 78-005 and 81-008. An individual who holds an ownership interest in a business has a pecuniary interest in the contracts of the business for purposes of R.C. 2921.42. See Advisory Opinions No. 78-006, 81-008, and 92-006. See also Advisory Opinions No. 85-002 and 85-004 (a person who is a board member, officer, or partner in a business has an interest in the contracts of the business for purposes of R.C. 2921.42). Therefore, Paul V. Voinovich would have an "interest" in a public contract entered into between the Voinovich Group and the State or any of its political subdivisions. See Advisory Opinion No. 92-006. The issue becomes whether, for purposes of R.C. 2921.42 (A)(4), the Governor would have an "interest" in a public contract entered into between the Voinovich Group and the State or its political subdivisions.

The Ethics Commission has held that a public official is not generally considered to have a definite and direct interest in a public contract for purposes of R.C. 2921.42 (A)(4) merely because a member of his family has an interest in the public contract, absent facts indicating otherwise. See Advisory Opinions No. 85-003 and 88-007. However, if a public official himself would have a fiduciary interest in, or derive a definite and direct, pecuniary interest or benefit from, a public contract entered into between the public official's family member and the political subdivision, governmental agency, or instrumentality with which the

public official is connected, then R.C. 2921.42 (A)(4) would prohibit the public official's family member from contracting with that political subdivision, governmental agency, or instrumentality. See, e.g., Advisory Opinion No. 85-003. In the instant situation, you have stated that the Governor has no business interest in the Voinovich Group, and that the Governor has never had any financial interest in, or served as an officer or director of, companies which comprise the Voinovich Group. Absent the existence of a financial interest in, or other business relationship with, the Voinovich Group, from which the Governor would acquire a direct, pecuniary or fiduciary interest or benefit under a public contract entered into between the Voinovich Group and political subdivisions, governmental agencies, or instrumentalities, the Governor would not be deemed to have a definite and direct "interest" in a public contract entered into between the Voinovich Group and the State or any of its political subdivisions, and therefore, R.C. 2921.42 (A)(4) would not prohibit the Voinovich Group from contracting with the State or a political subdivision. However, R.C. 2921.42 (A)(4) would prohibit the Governor from having a definite and direct interest in any public contract entered into between the Voinovich Group and the political subdivisions, governmental agencies, or instrumentalities with which the Governor is connected.

R.C. 2921.42 (A)(3) - OCCUPYING A POSITION OF PROFIT IN A CONTRACT

Next, the prohibition imposed by Division (A)(3) of R.C. 2921.42 will be addressed.

R.C. 2921.42 (A)(3) prohibits a public official from occupying a "position of profit" in the prosecution of a public contract authorized by him, or by a legislative body, commission, or board of which he was a member at the time of authorization, where the public contract was not let by competitive bidding and where the contract from which he would profit was not the lowest and best bid. See generally Advisory Opinion No. 88-008 (describing situations where a public official with a business interest in a company occupies a position of profit in the company's public contracts). The issue becomes whether, for purposes of R.C. 2921.42 (A)(3), the Governor would be deemed to "occupy a position of profit" in a public contract entered into between the Voinovich Group and the State or its political subdivisions.

In the instant situation, you have stated that the Governor has no business interest in the Voinovich Group. Absent the existence of a business relationship, or other connection, from which the Governor would profit from a public contract entered into between the Voinovich Group and the State or any of its political subdivisions, the Governor would not be deemed to occupy a position of profit in the prosecution of a public contract entered into

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between the Voinovich Group and the State or any of its political subdivisions, and therefore, R.C. 2921.42 (A)(3) would not prohibit the Voinovich Group from contracting with the State or a political subdivision. However, R.C. 2921.42 (A)(3) prohibits the Governor, during his public service and for one year thereafter, from occupying a position of profit in a public contract between the Voinovich Group and the State and a political subdivision if the contract was authorized by him, or by a body of which he was a member at the time of authorization, and the contract was not let by competitive bidding or if let by competitive bidding was not the lowest and best bid.

R.C. 2921.42 (A)(1) - AUTHORIZING A PUBLIC CONTRACT OR USE OF AUTHORITY OR INFLUENCE

Thirdly, the prohibition imposed by Division (A)(1) of 2921.42 will be addressed.

R.C. 2921.42 (A)(1) prohibits a public official from authorizing, or using his authority or influence to secure authorization of, a public contract in which he, a member of his family, or any of his business associates has an interest. As explained above, the Governor himself has no definite and direct "interest" in the contracts of the Voinovich Group. The issue becomes whether the Voinovich Group or Paul V. Voinovich is a "business associate" of the Governor for purposes of R.C. 2921.42 (A)(1). "Business associates" are defined for purposes of R.C. 2921.42 (A)(1) as parties who are joined together in a relationship for business purposes or acting together to pursue a common business purpose or enterprise. See Advisory Opinions No. 85-004, 86-002, and 89-015. You state that the Voinovich Group and Paul V. Voinovich have no business relationship with the Governor. Therefore, the Voinovich Group and Paul V. Voinovich are not the Governor's "business associates" for purposes of R.C. 2921.42 (A)(1). However, Paul V. Voinovich is a member of the Governor's family for purposes of R.C. 2921.42 (A)(1). See Advisory Opinions No. 80-001 and 85-002. See also Advisory Opinions No. 81-004, 85-015, 86-010, 89-005, 89-008, 90-010, and 92-002.

As explained above, as the owner of the Voinovich Group, Paul V. Voinovich would have a definite and direct interest in a public contract entered into between the Voinovich Group and the State or a political subdivision. See Advisory Opinion No. 92-006. See also Advisory Opinions No. 78-006 and 81-008. As described above, R.C. 2921.42 (A)(1) prohibits a public official from authorizing, or using the authority or influence of his office to secure authorization of, a public contract in which a family member has an interest. It must be emphasized that R.C. 2921.42 (A)(1) **does not** require a public official to have an interest in, or occupy a position of profit in the prosecution of, a public contract, or that

the public contract be entered into by or for the use of the governmental agency or instrumentality with which he serves or is connected, in order for the public official to be subject to the prohibitions of Division (A)(1). Compare R.C. 2921.42 (A)(3) and (A)(4), set forth above. In this instance, the Governor is subject to the prohibitions imposed by R.C. 2921.42 (A)(1) despite the fact that he himself does not have a definite and direct "interest" in, or occupy a "position of profit" in the prosecution of, the Voinovich Group's contracts with the State and its political subdivisions. The Governor is prohibited by R.C. 2921.42 (A)(1) from authorizing, or using the authority or influence of his office to secure authorization of, a public contract for Paul V. Voinovich or the Voinovich Group. See Advisory Opinion No. 85-002.

The effect of the prohibition of R.C. 2921.42 (A)(1) on the ability of the Voinovich Group to enter into public contracts with the State and its political subdivisions must be further examined.

The Ethics Commission explained the prohibition of R.C. 2921.42 (A)(1) against a public official authorizing, or using his authority or influence to secure authorization of, a public contract in which a member of his family has an interest, in Advisory Opinion No. 90-010:

R.C. 2921.42 (A)(1) is not a "no relatives policy" which determines eligibility for . . . [entering into a public contract] on the basis of family relationships. . . . The purpose of R.C. 2921.42 (A)(1) is to prevent the possibility that a public official may show favoritism in the exercise of his discretionary, decision-making authority in authorizing a . . . [public] contract. (Emphasis in original.)

See also Advisory Opinion No. 80-001. Therefore, R.C. 2921.42 (A)(1) limits the exercise of the Governor's authority with regard to public contracts in which his brother has an interest. He is prohibited from "authorizing" a public contract in which his brother has an interest or from employing the "authority or influence of his office" to secure authorization of any public contract in which his brother has an interest.

AUTHORIZING A PUBLIC CONTRACT

The Ethics Commission has held that a public official will be deemed to have "authorized" a public contract for purposes of R.C. 2921.42 where the public contract could not have been awarded without the approval of the official. See Advisory Opinions No. 87-004, 88-008, 90-010, 91-007, and 92-008. R.C. 2921.42 (A)(1) prohibits a public official from approving matters or otherwise participating in decisions which would affect the ability of his

family member to enter into a public contract, the terms of the contract, enforcement of the contract, performance of the contract, and payments under the contract. See Advisory Opinion No. 90-010. This prohibition includes any action in a decision-making process which involves the award, funding, or supervision of a public contract in which a family member would have an interest. Some types of prohibited actions would include participation in an initial decision to award a public contract, the securing of funding for the contract, the authorization or approval of payments for services rendered under the public contract, and matters arising after a contract is awarded, such as a revision, alteration, or modification in the terms of the original contract, a renewal of the contract, enforcement of the contract, or supervision of the performance of the contract.

These actions are also prohibited by R.C. 102.03 (D) which prohibits a public official or employee from using the authority or influence of his position to secure a thing of value which could manifest a substantial and improper influence upon him with respect to his duties. The term "anything of value" is defined for purposes of R.C. 102.03 in R.C. 1.03 to include money and every other thing of value. See R.C. 102.01 (G). Moneys paid to compensate the Voinovich Group for services rendered to the State and its political subdivisions fall within the definition of "anything of value." See Advisory Opinions No. 89-010 and 90-003. The Ethics Commission has held that R.C. 102.03 (D) prohibits a public official from participating in a matter from which his family member would receive a definite and direct personal pecuniary benefit. See Advisory Opinions No. 89-008 and 90-004.

Therefore, R.C. 102.03 (D) and R.C. 2921.42 (A)(1) would prohibit the Governor from voting, discussing, deliberating, recommending, or otherwise authorizing or approving matters which would affect the award, funding, enforcement, performance, supervision, or payment of a public contract in which his brother would have an interest. See Advisory Opinion No. 89-008.

EMPLOYING THE AUTHORITY OR INFLUENCE OF HIS OFFICE

R.C. 2921.42 (A)(1) also prohibits a public official from employing the "authority or influence of his office" to secure authorization of any public contract in which a family member has an interest. The words "authority or influence" are not defined for purposes of R.C. 2921.42. It is a primary rule of statutory construction that words used in a statute which are not defined must be construed according to rules of grammar and common usage. See R.C. 1.42. The word "authority" is defined in Webster's New World Dictionary of the American Language as "power or influence resulting from knowledge, prestige, etc." Webster's New World Dictionary of the American Language 94 (2d College ed. 1970). The

word "influence" is defined as "the power of persons . . . to affect others, seen only in its effects" and "the ability of a person . . . to produce effects indirectly by means of power based on . . . high position." Webster's New World Dictionary of the American Language 722 (2d College ed. 1970). The General Assembly's use of the words "authority or influence" in R.C. 2921.42 (A)(1) specifically characterize a broader range of activity than that described by the word "authorize." See Dougherty v. Torrence, 2 Ohio St. 3d 69, 70 (1982) (effect must be given to words used in a statute); Dungan v. Kline, 81 Ohio St. 371, 380-81 (the presumption is that every word in a statute is designed to have effect); Advisory Opinion No. 74-001 ("it is to be assumed that the Legislature used the language contained in a statute advisedly and intelligently and expressed its intent by the use of the words found in the statute"). Therefore, R.C. 2921.42 (A)(1), by prohibiting a public official from employing the "authority or influence of his office," also prohibits the Governor from exercising the power and influence inherent in the position and prestige of the Office of Governor with respect to matters that would affect the award, funding, performance, enforcement, supervision, or payment of a public contract in which his brother would have an interest. This prohibition includes, but is not limited to, lobbying, discussing, recommending, or otherwise using the authority or influence of his office, either formally or informally, in matters affecting a public contract in which Paul V. Voinovich would have an interest.

R.C. 102.03 (D) also prohibits a public official from using the authority or influence of his office to secure anything of value of an improper character and prohibits an official from participating, in any way, in a matter from which his family member would receive a definite and direct personal pecuniary benefit. See Advisory Opinions No. 89-008 and 90-004. Therefore, R.C. 102.03 (D), as well as R.C. 2921.42 (A)(1), prohibits the Governor from acting, or otherwise using the authority or influence of his office, either formally or informally, in matters affecting a public contract in which Paul V. Voinovich would have an interest.

The issue becomes under what circumstances the Governor "authorizes" or is capable of using his "authority or influence . . . to secure authorization of" public contracts related to the construction, maintenance, and repair of jail facilities, penal institutions, hospitals, and other public buildings and facilities by the State and its political subdivisions. In order to address this issue, it is necessary to examine the Constitutional and statutory duties and authority exercised by the Governor.

GOVERNOR'S DUTIES

The Governor is deemed to exercise the supreme executive power of the State. Ohio Const. art. III, § 5. He is statutorily empowered to appoint the directors of the State administrative departments, with the advice and consent of the Senate, and may remove the directors at his pleasure. R.C. 121.03. The Governor also exercises the power of appointment over most State boards and commissions. See, e.g., R.C. 4723.01, 4731.01, and 4732.02. The Governor exercises supervision and control over the expenditures of the State, R.C. 126.05, and submits, to the General Assembly, a State biennial budget, showing budget estimates of revenues and expenditures for each State agency. R.C. 107.03 and 126.02. If he ascertains that the available revenue for the current fiscal year will be less than the appropriations, the Governor may issue orders that will prevent state agencies from making expenditures and issuing obligations in excess of the revenues. R.C. 126.05. The Governor may give the Lieutenant Governor any special assignment as the Governor considers in the interest of the State. R.C. 108.05 (B). The Governor may, by executive order, designate or create a state agency, commission, or advisory body, subject to his jurisdiction or otherwise, in order to qualify the State or a unit of local government to participate in a federal program or activity, and may act for the State in making any application, certification, identification, or other action, in order to qualify the State or a unit of local government for federal funding. See R.C. 107.18. Also, the Governor is statutorily required to serve upon various State agencies. See, e.g., R.C. 154.04 (the Public Facilities Commission) and R.C. 129.01 (the Board of Commissioners of the Sinking Fund).

The Ethics Commission is unaware of any specific constitutional or statutory provision which empowers the Governor to award a contract for the design, construction, repair, or maintenance of public property. However, the Governor does have specific statutory power which could directly relate to public construction projects in which the Voinovich Group is interested. For example, the Governor has the authority to qualify the State for federal funding, see R.C. 107.18, he serves as a member of the Public Facilities Commission, which helps finance public construction, see R.C. 154.04, and the Board of Commissioners of the Sinking Fund, which pays the interest on the bonded debt of the State, see R.C. 129.01 and 129.04, and he has the authority to approve the terms of any lease, grant, or conveyance of any interest in real property held in the name of State to the Ohio Building Authority which is necessary to carry out the purposes of the Authority, see R.C. 152.06. (Some of these powers are discussed in more detail below.) The Governor would be prohibited from exercising these powers, or any other specific constitutional or statutory authority, with respect to any project or public

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contract in which his brother would have an interest. If the Governor has specific authority with respect to matters affecting the funding, approval, supervision, or performance of a state or local public construction project, the Voinovich Group would be precluded from performing the construction project.

The question becomes whether the Governor's position as the highest executive authority of the State and the performance of his constitutional and statutory duties such as the power of appointment, general budgetary and oversight functions with respect to State departments, boards, and commissions, the direction, in part, of the activities of the Lieutenant Governor, and service as a member of certain statutorily created State agencies, constitutes the specific authorization of, or the exercise of the authority or influence of his position to secure authorization of, a public contract and related matters. In addressing this issue, it is necessary to consider not only the Governor's specific statutory or constitutional powers, such as those described above, which relate to contract matters involving public construction, but also the broader authority of the Office of Governor.

In State ex rel. The S. Monroe & Son Co. v. Baker, 112 Ohio St. 356 (1925), the Ohio Supreme Court addressed the issue "whether the Governor may control the discretion and judgment of the other executive officers of the state government." Id. at 363. In the Baker case, the Governor had issued several executive orders directing state administrative directors with respect to the rejection and awarding of state contracts and payment therefor.

In describing the Governor's relationship to the administrative heads, the court stated:

We are of the opinion that supreme executive authority means the highest authority; that is to say, that there is no other authority pre-eminent or of equal eminence. It does not mean that all executive authority is lodged in the Governor, neither does it mean that "supreme authority" is autocratic, absolute, despotic, or arbitrary. Such a construction would be inconsistent with the theory and the purposes of our republican institutions. It would be contrary to the traditions of American democracy. The Governor's authority is supreme in the sense that no other executive authority is higher or authorized to control his discretion, where discretion is lodged in him, and yet it is not supreme in the sense that he may dominate the course and dictate the action and control the discretion of other executive officers of inferior rank acting within the scope of the powers, duties, and authorities conferred upon them respectively. . . . It is the policy and the spirit of

our institutions that every executive officer is invested with certain powers and discretion, and within the scope of the powers granted and discretion conferred his dictum is supreme and his judgment is not subject to the dictation of any other officer. If he does not proceed according to law, or if he exceeds the power conferred, safeguards are in all instances provided for guiding or restraining his action.

. . . .

. . . State officials in the executive departments are not in any sense deputies of the Governor, but, on the contrary, possess powers and are charged with duties and have independent discretion and judgment entirely beyond his control, except in those instances, where it is otherwise provided. . . .

. . . .

. . . The Governor has such power as has been conferred by the Constitution and by the Legislature, and such incidental powers as may be necessary to carry into effect the powers expressly conferred, and all other executive officers of the state government likewise have powers and authority which have been conferred by the Constitution and by the Legislature, and each is independent of the other; and the Governor may not control the discretion and judgment of any other state officer within the limits of the power conferred upon such officer, unless the power of review or the requirement of approval has been imposed in the act which creates such other state officer and defines his powers.

112 Ohio St. at 366-68; 371. See also 1958 Ohio Op. Att'y Gen. No. 1868, p. 157.

The Attorney General relied on the Supreme Court's holding in Baker in Attorney General Opinion No. 83-034. In that opinion, the issue had arisen whether R.C. 3517.13 (J) prohibited the Director of Development from awarding a noncompetitively bid contract to a company where the spouse of an owner of the company had contributed over \$1000 to the Governor's political campaign. At the time Attorney General Opinion No. 83-034 was issued, R.C. 3517.13 (J) prohibited a State agency from awarding an unbid contract to a corporation if the owner thereof or his spouse had made campaign contributions in excess of \$1000 "to the holder of a public office having ultimate responsibility for the award of any such contract or to his campaign committee." The opinion held that, despite Ohio Const. art. III, § 5 and the Governor's power of appointment and

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removal over the Director of Development, the Governor did not have "ultimate responsibility" for all actions of the Director. See Ohio Op. Att'y Gen. No. 83-034, 2-128 through 2-130. Citing Baker, the Attorney General noted that the Director "has authority to enter into contracts on behalf of the Department without any participation by, or instruction from, the Governor," and "[g]iven that the Director of Development has authority to enter into contracts on behalf of the Department without the approval of the Governor, [the Attorney General was] unaware of any sense in which the Governor has 'responsibility' for the award of such contracts." Id. at 2-130. The opinion concluded that it was the Director of Development and not the Governor who had "ultimate responsibility" for the awarding of the Department's contract, and therefore, R.C. 3517.13 (J) did not apply to prohibit the Director from awarding the contract. The opinion notes that "[a] similar conclusion applies, of course, to other state departments which are granted the authority to enter into contracts without the participation or approval of the Governor." Id.

The General Assembly amended R.C. 3517.13 in 1986, and subsequently, to provide that "if a public officer who is responsible for the award of a contract is appointed by the governor, whether or not the appointment is subject to the advice and consent of the senate, excluding members of boards, commissions, committees, authorities, councils, boards of trustees, task forces, and other such entities appointed by the governor, the office of the governor is considered to have ultimate responsibility for the award of the contract." It is clear from the General Assembly's amendment of R.C. 3517.13, first in Am. Sub. H.B. 300, and in subsequent acts, that such action was necessary in order to carve an exception to the common law principle enunciated in Baker and Attorney General Opinion No. 83-034 that the Governor does not ordinarily exercise ultimate authority and control over other State executive officials. See Baker and Ohio Op. Att'y Gen. No. 83-034 (noting that the Governor is empowered to exercise ultimate authority only in those instances where he so empowered by the Constitution or General Assembly). Although the General Assembly indicated by its amendment that as a policy matter the Governor should be deemed to have the ultimate responsibility for awarding contracts awarded by State administrative departments in order to advance reform in the area of campaign finance, specific statutory action was necessary in order to achieve that narrow result, and the general principal remains that each executive office essentially exercises its own authority. See Ohio Op. Att'y Gen. No. 83-034 at 2-131 (inviting legislative action if the opinion's construction of R.C. 3517.13 was not desirable from a public policy standpoint). Furthermore, it must also be noted that the General Assembly did not see fit to vary the common law with respect to State boards and commissions. Although the structure and organization of boards and commissions vary, it may be stated

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as a general matter that they enjoy even more independence from the Governor's authority than the State administrative departments, since they are controlled by multi-person bodies, and such persons typically serve for terms fixed by statute and may be removed only for cause. See e.g., R.C. 4723.01, 4731.01, and 4732.02. In some instances legislative or judicial appointees also serve on such boards or commissions. See, e.g., R.C. 179.02, 3702.59.

As stated above, a thorough review of your question requires that the Ethics Commission examine not only the Governor's specific statutory and constitutional authority, but also the broader authority and influence of the Office of Governor. The fact that the Office of the Governor has attendant authority of position is not, in and of itself, sufficient to conclude that the Governor **authorizes** public contracts entered into by the State and/or a political subdivision with the use of State or other public funds. However, it is clear that the Governor is constitutionally and statutorily empowered to exercise broad executive and administrative powers with respect to the operations of the State and the distribution and expenditure of public funds, and that the Office of the Governor carries great influence. The Governor is prohibited, by R.C. 2921.42 (A)(1) and R.C. 102.03 (D), from employing this authority or influence of his position, formally or informally, to secure a contract in which Paul V. Voinovich would have an interest and from participating in related matters, as discussed above. It is clear that the Office of the Governor carries with it significant authority and influence; the Governor is prohibited by R.C. 2921.42 (A)(1) and R.C. 102.03 (D) from exercising this authority and influence in any way to secure any contracts or public funds for the Voinovich Group. As discussed above, the Governor is also prohibited from exercising any specific constitutional or statutory authority to authorize any matter related to a public contract in which his brother would have an interest. If the Governor has specific authority with respect to matters affecting the funding, approval, supervision, or performance of a state or local public construction project, the Voinovich Group would be precluded from performing the construction project.

The processes through which the State and its political subdivisions engage in projects related to the construction, maintenance, and repair of jail facilities, penal institutions, hospitals, and other public buildings and facilities require various agencies of the State and local political subdivisions to interact. In order to examine the prohibitions of R.C. 2921.42 (A)(1) and 102.03 (D) upon the actions of the Governor with regard to public contracts, it is necessary to identify the public agencies which are involved in the construction, maintenance, and repair of jail facilities, penal institutions, hospitals, and other public buildings and facilities.

It must be emphasized that to provide a detailed and exhaustive review of every method utilized by all state and local public agencies to finance and construct jail facilities, penal institutions, hospitals, and other public buildings and facilities, is beyond the resources of the Ethics Commission and would be unnecessarily broad. Your request for an advisory opinion asked very general questions and did not identify specifically the types of facilities (for example, whether the hospitals are state, county, or municipal hospitals), the methods of financing used to pay the costs of construction, or the specific state and local agencies involved in the projects in which the Voinovich Companies wishes to participate. Thus, the following analysis is not intended to provide an all-inclusive review, but rather to compare and contrast various agencies and procedures in order to provide examples of where the prohibitions imposed by R.C. 2921.42 (A)(1) will and will not apply. If a specific question cannot be answered from the discussions contained herein, then, prior to taking any action, you should contact the Ethics Commission and identify the specific facility, type of funding, and public agency involved. In the following discussion some state and local agencies which participate in the types of projects for which the Voinovich Group desires to perform services will be identified, their responsibilities explained, and examples of their interaction with one another provided.

If an agency of state government, or a political subdivision, decides that it requires the construction of any kind of facilities or buildings, other agencies of the State and political subdivisions must: (1) review the request for funds to construct and determine if the construction is necessary; (2) raise the necessary funds; (3) allocate and distribute the funds; and (4) supervise the project's construction.

RECIPIENT AGENCIES

The agencies or subdivisions that initially determine the need for facilities are the recipient agencies. These are the agencies that receive construction dollars or for whom facilities are constructed. Examples of recipient agencies include the Department of Youth Services, see R.C. 5139.23, Department of Rehabilitation and Corrections, see R.C. 5120.47, counties and municipalities seeking to construct jail facilities or workhouses, see R.C. 307.021, or hospitals, see, e.g., R.C. 339.14, and state universities, see R.C. 3345.07 and 3345.12.

REVIEWING AGENCIES

After a recipient agency has expressed a need for the construction of a public improvement or development, other state and local entities become involved to review the request and

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determine whether it constitutes a necessary expenditure of public funds. These agencies may be involved in the construction of public facilities for which the Voinovich Group desires to perform services.

Some examples of these agencies are the Office of Budget and Management, the Controlling Board, and the Certificate of Need Review Board. The Director of the Office of Budget and Management prepares a biennial capital plan that contains the Director's recommendations for the acquisition of real estate and the construction of "all public improvements." R.C. 126.03 (A). The capital plan extends for at least six years, and includes recommendations as to the projects which should take place in each fiscal year, and the estimated cost of all recommended projects. Id. As a part of this duty, the Director shall require biennial recommendations from the chief administrative authorities of affected state agencies as to construction of public improvements needed over the next six years. See R.C. 126.03 (B). The Director shall review the recommendations, and determine which recommendations will be included in the next biennial capital plan. R.C. 126.03 (B) and (C). The Director also has limited statutory authority to authorize the construction and repair of buildings or the making of any improvements. See R.C. 126.04.

The Controlling Board has the authority to consent to the construction or repair of any building or any other improvement by force account. See R.C. 127.16. The Certificate of Need Review Board, and the Director of the Department of Health, also have authority to regulate the construction of public facilities. If a public entity desires to construct a certain health care facility, then the public entity must be granted a certificate of need by the Director of Health. See R.C. 3702.52. The decision of the Director of the Department of Health may be appealed to the Certificate of Need Review Board. See R.C. 3702.60. Another example of an agency empowered to determine the need for public construction projects is the Board of Regents which must review the appropriation requests of public community colleges and state colleges and universities, and submit its recommendations with regard to the biennial higher education appropriations to the Office of Budget and Management, and the chairs of the House and Senate finance committees. See R.C. 3333.04.

The Small Government Capital Improvements Commission, and its Administrator, and the Public Works Commission, and its Director, are also involved in reviewing requests for funding and providing other assistance for some capital improvements at the local government level. See R.C. Chapter 164.

FUNDING AGENCIES

A number of State agencies are statutorily authorized to secure or provide funding for state and local construction projects. For example, the Ohio Building Authority and the Public Facilities Commission issue revenue obligations in order to fund capital facilities. See R.C. 152.09 (B) and R.C. 154.02 (A), respectively. State colleges and universities also have limited power to issue revenue obligations to fund construction of housing or academic facilities. See R.C. 3345.07, 3345.11, and 3345.12.

DISTRIBUTING AGENCIES

Examples of State and local agencies which are empowered to control the distribution of public funds for the projects for which the Voinovich Group desires to perform services will be provided next.

The Board of Regents has the authority to apply for, receive, and disburse federal grant money for the construction of higher educational academic facilities in the State. See R.C. 3333.06. No state agency may make an expenditure of any federal funds, unless the expenditures are made pursuant to a specific appropriation of the General Assembly, or are made pursuant to an Executive Order, see R.C. 107.17, and an allotment has been approved by the Office of Budget and Management. See R.C. 131.35 (A)(1). If the agency has received federal funds in excess of the amount of federal funds appropriated by the General Assembly, the Controlling Board may authorize the expenditure of such additional funds. See R.C. 131.35 (A)(3). The Office of Criminal Justice Services has the authority to apply for, allocate, disburse, and account for grants that are made from federal, state, or private sources, to improve criminal justice services in the State. See R.C. 122.22 (B)(9).

SUPERVISING AGENCIES

An example of a state agency which is empowered to supervise the construction of public facilities for which the Voinovich Group desires to perform services is the Division of Public Works of the Department of Administrative Services which is the primary agency which supervises construction projects involving state money, state bond money, or federal money which is awarded to the State. See generally R.C. 123.01. Public Works is also empowered to enter into contracts with engineers or architects to make plans, surveys, specifications, and other requirements for projects, and to make other contracts for construction in the State. See R.C. 123.01 (A) (1) and (3) and R.C. Chapter 153.

EXAMPLES

The interaction, and conversely the lack of interaction, between the Governor's Office and the agencies described above which raise, allocate, and distribute funds, award contracts, supervise the construction of public facilities, and determine the need for the facilities are described through the following examples.

Local Jail Facilities

The building of county, multi-county, and municipal jail facilities will be addressed first.

Local jail facilities are generally under the administration and control of county and municipal authorities. A board of county commissioners may provide a county jail whenever it deems that such a jail is necessary. See R.C. 307.01 (A). See also R.C. 307.02. The county sheriff has the responsibility to administer and operate a county jail. See R.C. 341.01. The boards of county commissioners of two or more adjacent counties may contract to jointly establish and operate a multi-county corrections center. See R.C. 307.93 (A). A municipal corporation may establish, erect, maintain, and regulate jails, workhouses, and prisons. See R.C. 715.16 (A) and 717.01 (F). A city and county may jointly construct and operate a city-county jail facility. See R.C. 153.61.

The General Assembly has stated that it is a public purpose and function of the State for the State to acquire, construct, and renovate county and municipal jail facilities by providing a method of financing county and municipal jail facilities through the Ohio Building Authority in order to achieve this goal. See R.C. 307.021. See also Ohio Building Authority v. Ferguson, Case No. 85CV-03-1500 (Franklin County C.P. May 7, 1985) and Ohio Op. Att'y Gen. No. 86-084. The Ohio Building Authority is statutorily authorized to issue revenue obligations to raise moneys in order to pay all or part of the cost of such facilities. See R.C. 152.33 and 307.021. See also R.C. 152.09. Moneys to be used by counties and municipalities for jail construction and renovation pursuant to R.C. 307.021 are administered by the Office of Criminal Justice Services which is statutorily authorized to apply for, allocate, disburse, account for, and audit grant activities of agencies, offices, organizations, and persons that receive funds from the Office of Criminal Justice Services to improve criminal justice services in the State. See R.C. 122.22 (B)(7) and (9). For example, where the office of Criminal Justice Services has grant involvement, it has reviewed architectural expenses related to local jail construction.

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While the State, through the Ohio Building Authority and the Office of Criminal Justice Services, provides aid to counties and municipalities for jail construction and renovation, the Governor has no direct authority over the local public officials who are responsible for deciding matters pertaining to the construction, administration, and operation of county and municipal jail facilities. These local officials are independently elected officers who, in some instances, may even exercise home rule powers. See Ohio Const. art. XVIII, § 3. See, e.g., R.C. 305.01 (county commissioner), R.C. 311.01 (county sheriff), and R.C. 731.01 (city council members). However, it becomes necessary to examine the Governor's duties in relation to the officials who serve upon the Ohio Building Authority and the Office of Criminal Justice Services. The Ohio Building Authority will be examined first.

The Ohio Building Authority is comprised of five members who are appointed by the Governor and confirmed by the Senate. See R.C. 152.01 (A). The Governor designates one of the members of the Building Authority to serve as chairman. See R.C. 152.01 (C). The members of the Building Authority serve without compensation but are reimbursed for their expenses. See R.C. 152.01 (B). The Governor may remove a member of the Building Authority for misfeasance, nonfeasance, or malfeasance in office. *Id.* Revenue obligations issued by the Building Authority must be signed by the chairman, vice-chairman, and secretary of the Building Authority. See R.C. 152.09 (C). Any department of the State, with the Governor's consent, may agree to permit the Ohio Building Authority to use the department's property for purposes of the Authority. See R.C. 152.05. Upon request of the Authority, any governmental entity may lease, grant, or convey to the authority any interest in real or personal property which is necessary or convenient to carry out the purposes of the Authority. See R.C. 152.06 (A). The lease, grant, or conveyance must be upon terms to which the Governor agrees if the title of the property is in the name of the State. *Id.*

The Office of Criminal Justice Services is a statutorily created office within the Department of Development which, as statutorily organized, is headed by the Director of the Office of Criminal Justice Services who serves in the unclassified civil service and is appointed by the Director of Development. The Director of Development is appointed by the Governor. The Director of Development is subject to removal at the pleasure of the Governor. See R.C. 121.03.

The Office of Criminal Justice Services has been known as the "Governor's Office of Criminal Justice Services." See Schroot v. Ohio Department of Development, Case No. 91-REM-01-0044 (State Personal Board of Review, September 6, 1991). In the previous

administration, the Director of the Office of Criminal Justice Services had policy-making and decision-making discretion and made policy recommendations to the Governor's Office; he exercised decision-making authority under the Director of Development regarding the setting of policy, administering the budget, awarding grants, and hiring personnel. Id. In the present administration, the Lieutenant Governor exercises responsibilities with regard to the Office of Criminal Justice Services' statutorily prescribed duties. See R.C. 108.05 (B) (the Governor may give the Lieutenant Governor any special assignment as the Governor considers in the interest of the State). See also Ohio Const. art. III, § 1b. However, it must be noted that there is no statutory requirement that the Lieutenant Governor exercise responsibilities with regard to the Office of Criminal Justice Services. See Ohio Const. art III, § 1b; R.C. Chapter 108.

Therefore, it is apparent that the Governor exercises the authority to appoint and assign, and in some cases remove, the public officials who decide matters involving the State's financing of county, multi-county, and municipal jail facilities. In reliance on the principles set forth in Baker and Attorney General Opinion No. 83-034, discussed above, the degree of decision-making authority the Governor exercises with regard to the State's financing of county, multi-county, and municipal jail facilities by virtue of his being the appointing authority for the members of the Ohio Building Authority and the Director of Development, who in turn appoints the Director of the Office of Criminal Justice Services, or the fact that he has assigned the Lieutenant Governor responsibilities with regard to the Office of Criminal Justice Services, and that these officials are responsible for matters involving the State's financing of jail facilities, does not rise to a level sufficient to determine that the Governor "authorizes" the State's financing of these facilities for purposes of R.C. 2921.42 (A)(1). The Governor would, however, be prohibited by R.C. 2921.42 (A)(1) and R.C. 102.03 (D) from authorizing, or using the authority or influence of his position as Governor, in any way, to secure contract matters with any state institution or organization, or political subdivision, if his brother would have an interest in the contract. See discussion above. For example, the Governor would be prohibited from approving the terms of any lease, grant, or conveyance, entered into by the Ohio Building Authority in order to construct a local jail facility, if his brother were to enter into a contract to construct the facility. See R.C. 152.06. This would preclude the Voinovich Group from contracting to provide construction or other services on a project where the Governor must approve the lease, grant, or conveyance of property. The Governor is the only official who can exercise this power, and the Governor cannot abstain from exercising this power to approve or disapprove the terms of a lease, grant, or conveyance, entered into by the Ohio Building Authority in order to construct a local jail

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facility. See R.C. 152.06. See also Ohio Op. Att'y Gen. No. 90-055. The Governor is also prohibited from using the authority or influence which is inherent in the prestige and power of the Office of Governor to secure public contract matters in which his brother would have an interest.

State Penal Institutions

The Ohio Building Authority and the Office of Criminal Justice Services, including the Lieutenant Governor, are also involved in the funding which the Department of Rehabilitation and Corrections receives for the construction of facilities for state penal institutions. As explained above, the Office of Criminal Justice Services has the authority to apply for, allocate, disburse, and account for grants that are made from federal, state, or private sources, to improve the State's criminal justice services. See R.C. 122.22 (A)(9). The Department of Rehabilitation and Corrections leases capital facilities constructed, reconstructed, and otherwise approved or financed by the Ohio Building Authority pursuant to R.C. Chapter 152. for the use by the Department and is statutorily authorized to enter into any agreements with the Building Authority ancillary to the construction, or reconstruction of such facilities including agreements required by the applicable bond proceedings. See R.C. 5120.47. The Department of Administrative Services also has responsibility to contract for and supervise construction by the Department of Rehabilitation and Corrections. See R.C. 123.01 (A). See also R.C. 5120.18 and 5120.24.

The Director of Rehabilitation and Corrections (Director) is the executive head of the Department of Rehabilitation and Corrections. See R.C. 5120.01. The Director is appointed by the Governor and is subject to removal at the pleasure of the Governor. See R.C. 121.03 (S). See also R.C. 5120.34 (the Governor may remove the Director for exerting his influence, directly or indirectly, to induce any other officer or employee to adopt his political views, or to favor any particular person, issue, or candidate for office). The Governor and the Director interact in some matters pertaining to the operation of state penal institutions. For example, the Governor's approval is necessary for the Director to change the purpose for which any institution or place under the control of the Department is being used. See R.C. 5120.03. The Governor is required to approve leases of real-estate under the control of the Department entered into by the Director for the extraction of oil and gas. See R.C. 5120.12. The Governor approves rules adopted by the Department for the governing of prisoners. See R.C. 5145.03. The Governor is required to approve the assignment of prisoners to perform labor on any public work of the State. See R.C. 5120.04. Also, the Governor may request the Director to prepare a population and cost impact statement for any

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bill introduced in the General Assembly. See R.C. 5120.51. Furthermore, the Governor receives a departmental budget which is compiled by the Director, with the assistance of the Chief of the Division of Business Administration, containing proposals made by the chiefs of the divisions within Rehabilitation and Corrections. See R.C. 5120.09 (A).

However, it appears that the Governor has no statutory authority to become directly involved in the construction of facilities used by state penal institutions beyond his appointment authority and his authority to approve the Director's decision to change the purpose for which an institution is being used or lease real-estate under the control of the Department. As discussed above, the Governor's control over the contracts of a state entity, where he exercises the power of appointment and only general administrative oversight, does not rise to the level of "authorization" for purposes of R.C. 2921.42 (A)(1). Therefore, in reliance on the principles set forth in Baker and Attorney General Opinion No. 83-034, the degree of decision-making authority the Governor exercises with regard to the State's financing of and control over the Department of Rehabilitation and Correction's construction of facilities for the use of state penal institutions by virtue of his being the appointing authority for public officials who decide matters involving such financing and control, or the fact that he has assigned the Lieutenant Governor responsibilities with regard to the Office of Criminal Justice Services, does not rise to a level sufficient to determine that the Governor "authorizes" the State's financing and control of these facilities for purposes of R.C. 2921.42 (A)(1). The Governor would, however, be prohibited by R.C. 2921.42 (A)(1) and R.C. 102.03 (D) from authorizing or using the authority or influence of his position as Governor, in any way, to secure public contract matters with any state agency, if his brother has an interest in the contract. See discussion above. For example, the Governor would be prohibited from approving a decision of the Director of Rehabilitation and Corrections to change the purpose for which an institution or place under the control of the Department is being used if the change is a prerequisite for construction which his brother contracted to perform. See R.C. 5120.03. This would preclude the Voinovich Group from contracting to provide services on a project where the Governor must act. The Governor is the only official who can exercise this power, and the Governor cannot abstain from exercising this power to approve a decision of the Director of Rehabilitation and Corrections to change the purpose for which an institution or place under the control of the Department is being used. Id. See also Ohio Op. Att'y Gen. No. 90-055. The Governor is also prohibited from using the authority or influence which is inherent in the prestige and power of the Office of Governor to secure public contract matters in which his brother would have an interest.

Construction at State Universities

Another example of public construction is construction of facilities at state universities. The Legislature has determined that state universities have the authority to construct housing and dining facilities, and auxiliary facilities. See R.C. 3345.07, 3345.11, and 3345.12 (setting forth authority and defining "housing and dining facilities" and "auxiliary facilities").

In order to construct these facilities, universities have limited authority to issue bond obligations. R.C. 3345.07, 3345.11, and 3345.12. Any land acquired pursuant to these sections is titled in the name of the state. R.C. 3345.12 (P). But see R.C. 3345.16 (property purchased by the board of trustees of a university, as an investment, and held in the university's endowment portfolio, shall be held in trust by the board). The authority of universities to issue bond obligations is "cumulative" with the authority of the Public Facilities Commission to issue bond obligations for the construction of university facilities. R.C. 3345.12 (O) and 154.21. The Public Facilities Commission may authorize and issue bond obligations for the construction of capital facilities for state-supported and state-assisted institutions of higher education, subject to authorization by the General Assembly. R.C. 154.21. In connection with capital facilities financed by the Public Facilities Commission pursuant to authorization by the General Assembly, the Commission may, in addition to other duties: acquire, hold, lease, and dispose of property; acquire, purchase, construct, reconstruct, equip, furnish, improve, alter, enlarge, remodel, renovate, rehabilitate, maintain, repair, and operate facilities for various enumerated purposes; and contract for the services of financial consultants, appraisers, consulting engineers, architects, construction and accounting experts, attorneys, and other consultants and independent contractors. R.C. 154.06

The Board of Regents is also involved in distributing funds to a university for facility construction. As discussed above, the Board of Regents is charged with the responsibility for establishing a state education plan and doing any other necessary acts for participation in federal acts relative to the construction of higher educational academic facilities. R.C. 3333.06. If a university construction project involves federal funds, the institution shall submit the project to the Board of Regents. Id. The Board of Regents shall recommend to the United States secretary of education, in order of priority the Board establishes, projects relating to the construction of higher educational academic facilities. Id. The Board shall receive federal grant money, and provide methods for disbursement of, and accounting for, the federal funds paid to the Board. Id. The General Assembly is also involved in the appropriation and expenditure of federal funds.

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See R.C. 131.35.

The Ohio Board of Regents is composed of nine members who are appointed by the Governor with the advice and consent of the Senate. R.C. 3333.01. In addition to these nine appointed members, the chairmen of the education committees of the Senate and House of Representatives are ex officio members of the Board without a vote. Id.

Construction of capital improvements for state universities, where the construction is financed with state bond money, money appropriated by the General Assembly, or federal funds which have been disbursed by the State, is generally supervised by the Division of Public Works in the Department of Administrative Services (Public Works). Revised Code Section 123.01 (A)(2) and (A)(3) provide that Public Works has the authority to make contracts for and supervise the construction of any projects or improvements or the construction or repair of buildings under the control of a state agency, and over the inspection of materials prior to their incorporation into the project. Pursuant to R.C. 123.01 (A)(3) and (C), Public Works does not have jurisdiction over contracts for the repair of buildings of educational institutions under the management and control of boards of trustees, such as state universities. The contracts for the repair of buildings under the supervision of these institutions shall be made and entered into by the boards of trustees of those institutions. See R.C. 123.01 (A)(3). In addition, the budget appropriations bill may permit universities to supervise construction of university facilities if expenditures do not exceed an established amount.

The Director of the Department of Administrative Services is also the Superintendent of the Division of Public Works. R.C. 123.04. The Director is appointed by the Governor, and has the responsibility to make annual reports of the Department's transactions and proceedings. R.C. 121.03, 121.18, and 149.01. The Governor must also approve the purchase of real or personal property that is necessary in the maintenance or improvement of public works. R.C. 123.04.

If construction at a state university is financed through bonds issued by the university itself, or through money appropriated by the General Assembly, or federal money disbursed by the General Assembly and the Board of Regents, and construction is supervised by Public Works, the Governor's involvement in the construction is limited in much the same manner as described relative to jail construction. The Governor has the authority to appoint the director of the Department of Administrative Services, who serves as the superintendent of Public Works, and to appoint the nine voting members of the Board of Regents. See R.C. 121.03 and 3333.01. The Governor is also empowered to appoint the members

of the boards of trustees of state universities. See, e.g., R.C. 3335.02. The Governor also is required, as set forth above, to approve the purchase of real or personal property, rights, or privileges necessary, in the judgment of the Director of the Department of Administrative Services, for the maintenance or improvement of the public works. See R.C. 123.04. It appears that the Governor has no direct involvement in construction projects of this type beyond his appointment authority and his authority to approve the purchase of property for the maintenance and improvements of public works. As discussed above, the Governor's control over the contracts of a state entity, where he exercises the power of appointment and general administrative oversight does not rise to the level of "authorization" for purposes of R.C. 2921.42 (A)(1). Therefore, in reliance on the principles set forth in Baker and Attorney General Opinion No. 83-034, the degree of decision-making authority the Governor exercises with regard to the state's financing of and control over construction at state universities by virtue of his being the appointing authority for public officials who decide matters involving such financing and control, does not rise to a level sufficient to determine that the Governor "authorizes" the state's financing and control of these facilities for purposes of R.C. 2921.42 (A)(1). The Governor would, however, be prohibited from authorizing, or using the authority or influence of his position as Governor, in any way, to secure any public contract matter with any state institution or agency, if his brother would have an interest in the contract. See discussion above. As mentioned above, the Governor must also approve the purchase of real or personal property rights or privileges necessary, in the judgment of the Director of the Department of Administrative Services for the maintenance or improvement of the public works. See R.C. 123.04. The Governor is the only official who can exercise this statutory power. See generally Advisory Opinion No. 92-008. See also Ohio Op. Att'y Gen. No. 90-055. Therefore, under these circumstances, the Governor cannot abstain from the exercise of this power to approve or disapprove purchases made pursuant to R.C. 123.04. See Ohio Op. Att'y Gen. No. 90-055. If the Governor must act to approve the purchase of property as a prerequisite of a contract to improve or maintain a particular public work, his action would preclude the Voinovich Group from performing the contract. The Governor is also prohibited from using the authority or influence which is inherent in the prestige and power of the Office of Governor to secure public contract matters in which his brother would have an interest.

If the state university construction project involves, in any way, the Public Facilities Commission, the circumstances are, again, different. The Governor serves as the chairman of the Public Facilities Commission. R.C. 154.04. The other members of the Public Facilities Commission are the Treasurer of State,

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Auditor of State, Secretary of State, Attorney General, and Director of Budget and Management. R.C. 154.01 (A), 154.04. Four members of the Commission shall constitute a quorum, and the affirmative vote of four commissioners is necessary for any action taken by vote of the Commission. R.C. 154.04.

A revenue obligation, such as a revenue bond, has been defined by the Ethics Commission as a public contract for purposes of R.C. 2921.42. See Advisory Opinions No. 78-003, 78-005, and 80-006. The Governor is prohibited, by R.C. 2921.42 (A)(1), from authorizing a public contract in which a member of his family has an interest. See Advisory Opinion No. 85-002. The issue thus becomes whether the Governor "authorizes" a bond obligation issued by the Public Facilities Commission of which the Governor is the Chairman.

In Advisory Opinion No. 92-008, the Ethics Commission was asked if a township clerk could serve as an employee of a bank which is a depository of township funds, and if a township trustee could serve as a member of the board of directors of a bank which is a depository of township funds. The deposit of public funds is a public contract for purposes of R.C. 2921.42. See Advisory Opinions No. 85-007 and 92-008. R.C. 2921.42 (A)(1) prohibits the township clerk from performing any duties of her office which would secure the deposit of township funds with the bank which is her employer. R.C. 2921.42 (A)(1) also prohibits a township trustee from performing any of the duties of his office to secure the deposit of township funds with the bank he serves as a member of the board of directors.

Contrasting the two positions, the Ethics Commission observed that the township clerk, as an independent elected office-holder, is the only township official empowered to perform the duties of her office, while the township trustee serves as a member of a board of officials, and the board is the governmental entity actually empowered to act. See Advisory Opinion No. 92-008. With regard to the clerk, the Commission concluded that an individual would be prohibited, by R.C. 2921.42 (A)(1) and R.C. 102.03 (D), from serving in the position of township clerk if her outside employer was a bank which is a depository of township funds, because the township clerk has significant duties relative to township funds, and it would be impossible for her to withdraw from performing the actions and decisions statutorily imposed upon her office and transfer that authority to another party. See Advisory Opinion No. 92-008.

With regard to the township trustee, by contrast, the Ethics Commission concluded that a township trustee could serve as a member of the board of directors of a bank which was a depository of township funds. The Ethics Commission distinguished between the

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authority of an individual trustee and the authority of the board of township trustees:

[A] township trustee is prohibited from serving as a director of a depository of township funds, **unless he withdraws from participation in all decisions and proceedings of the township relating to the investment and administration of the deposits of township funds.** See generally Advisory Opinion No. 89-006. (Emphasis added.) It should be noted that, unlike the township clerk, the township trustee can abstain from the proceedings of the township which affect the bank he serves as a director, since the board of township trustees is the governmental authority empowered by the Uniform Depository Act to act thereunder. The other township trustees can act on behalf of the township if one trustee is unable to participate. If a township trustee does serve as a director of a bank which is a depository of township funds, he must abstain from participating in all matters which would affect the interests of the bank. (Emphasis in original.)

Advisory Opinion No. 92-008. Unlike the township clerk, who is unable to withdraw from decision making because she is the only official empowered to act, the township trustee is merely one member of a governmental body. Therefore, the trustee could serve as both a township trustee and a director of a bank, so long as he is able to withdraw from consideration, as a township trustee, of all matters involving the bank he serves as a trustee. Id.

The Governor is an independent elected officer-holder. The powers of the Office of Governor, the chief executive officer of the State, can ordinarily be performed only by the individual who holds that office. Where the Governor is invested with constitutional or statutory power, and he alone may exercise that power, the Voinovich Group would be prohibited from contracting to provide services on projects involving the exercise of gubernatorial power. See, e.g., R.C. 123.04, 152.06, and 5120.03 (discussed above). Such powers cannot be delegated or assigned, by the Governor, to a subordinate official or employee. See discussion below.

However, in his role as chairman of the Public Facilities Commission, the Governor is one member of a governmental body. The Public Facilities Commission, and not its individual members, is the governmental entity empowered by Chapter 154. to issue revenue obligations. Notes and obligations of the Commission are executed by "such members and officers of the commission as are designated in the bond proceedings" and not specifically by the chairman of the Commission. R.C. 154.08 (C) (a similar provision applies to

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coupons of the Commission). The Governor does have some specific duties, which are enumerated in Chapter 154., relative to the Public Facilities Commission. The Governor is the chairman of the Commission and is responsible for calling the first meeting of the Commission and providing written notice of the meeting to the other members of the Commission. R.C. 154.04. The Commission must make an annual report of the proceedings of the Commission to the Governor and to the General Assembly. R.C. 154.05. The Governor must also approve any agreements allowing the Commission to use property of other governmental entities, if the title to the property is in the name of the state, and must approve the terms of any leases or conveyances of property titled in the name of the state to the Commission. R.C. 154.15 and 154.16 (the Governor must also perform any other duties of his office of Governor relative to the leases). Except for these enumerated duties, the Governor's duties as chairman of the Public Facilities Commission, with regard to the issuance of revenue obligations, are no different from the duties of any other member of the Commission.

As discussed extensively above, R.C. 2921.42 (A)(1) prohibits the Governor from authorizing any public contract in which his brother has an interest. The Governor must abstain as a member of the Public Facilities Commission from any discussions, deliberations, votes, or other proceedings of the Commission with regard to any bond or revenue obligation, or other contract, in which his brother's company has an interest. See Advisory Opinion No. 90-010. Additionally, as discussed above, the Governor cannot perform any specific duties which are statutorily reserved to him with respect to any project in which his brother has an interest. See, e.g., R.C. 154.15 and 154.16. If the Governor's approval of agreements allowing the Commission to use property of other governmental entities or approval of the terms of any leases or conveyances of property titled in the name of the State to the Commission, see R.C. 154.15 and 154.16, is a prerequisite to construction, the Voinovich Group would be unable to enter into a contract to perform the construction.

In addition to being required to abstain from any formal action of the Public Facilities Commission, the Governor is prohibited by R.C. 2921.42 (A)(1) and R.C. 102.03 (D), as described above, from using the authority or influence which is inherent in the prestige and power of the Office of Governor to secure public contract matters in which his brother would have an interest.

R.C. 154.04 provides that each member of the Public Facilities Commission may designate an employee or officer of his office or department to attend meetings when he is absent or unable to attend meetings, and that the designee may vote and participate in all proceedings and actions of the Commission, and shall be counted to determine a quorum of the Commission. The statute further

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provides, however, that the designee shall not execute or cause a facsimile of his signature to be applied to any obligation of the Commission, or execute any trust agreement or indenture of the Commission. R.C. 154.04. If the Governor designates a member of his staff to attend meetings in his stead, the prohibitions of R.C. 2921.42 (A)(1) and R.C. 102.03 (D) would also restrict the designee from participating formally or informally in any action which would affect the interests of the Governor's brother.

In Advisory Opinion No. 89-006, the Ethics Commission was asked if an employee of the Department of Mental Health could hold outside employment with a university which received grants from ODMH. A grant is a public contract for purposes of R.C. 2921.42 (A)(1). See Advisory Opinions No. 87-003 and 89-006. The Ethics Commission stated that the ODMH employee is prohibited, by R.C. 2921.42 (A)(1), from authorizing a grant to a university with whom the ODMH employee holds outside private employment. See Advisory Opinion No. 89-006 (a university with which an ODMH employee has outside employment is the ODMH employee's "business associate" for purposes of R.C. 2921.42 (A)(1)). Among other restrictions, the Ethics Commission further stated:

If a subordinate of an ODMH employee who provides training or teaching services at a recipient college or university participates in the process in which grants are awarded to colleges and universities, then R.C. 2921.42 (A)(1) would prohibit the ODMH employee from exercising his authority or influence, including supervision or general oversight, over a subordinate on a proposal submitted by his employing college or university. The subordinate's action must be reviewed independently by an ODMH official or employee who is not under the supervision of the ODMH official or employee providing teaching or training services, and who is not employed by the college or university that has submitted a proposal for, or has received, an ODMH/OET grant. (Emphasis in original.)

Advisory Opinion No. 89-006. See also Advisory Opinion No. 89-015.

Applying the reasoning in Advisory Opinion No. 89-006, the actions of a designee employee or officer of the Governor's Office, with respect to matters affecting the interests of the Governor's brother, would have to be reviewed by an official of the Governor's Office who is not under the supervision of the Governor. All employees of the Governor's Office are under the supervision of the Governor. See generally Advisory Opinion No. 89-015. Accordingly, any official or employee designated by the Governor to serve on the Public Facilities Commission would be prohibited from acting in any way in any matter where the interests of the Governor's brother

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would be affected. Indeed, the prohibitions of R.C. 2921.42 (A)(1) and R.C. 102.03 (D) would apply to any employee or official to whom the Governor has delegated authority to exercise any power or duty actually attributed to the Governor.

CONCLUSIONS

Generally, in the instant situations, R.C. 2921.42 (A)(1) and R.C. 102.03 (D) prohibit the Governor from authorizing, deliberating, participating in discussions, recommending, or otherwise using the authority or influence of his office, either formally or informally, to secure a public contract, or any distribution or allocation of State funds, for the Voinovich Group. These activities would include the raising and distribution of funds by the State or its political subdivisions in order to finance projects for which the Voinovich Group will perform services. Additionally, the prohibitions would apply to any employee or official of the Governor's Office to whom the Governor delegated authority to perform powers or duties actually attributed to the Governor. If the Governor has specific statutory authority to participate in matters affecting any funding, approval, supervision, or performance of a state or local public construction project, the Voinovich Group would be unable to perform the construction project. The Governor is also prohibited from using the authority or influence of which is inherent in the prestige and power of the Office of Governor to secure public contract matters in which his brother would have an interest.

The above enumerated examples represent only a small sampling of the mosaic of combinations of facts and circumstances which could result if the Voinovich Group enters into public contracts with the State and its political subdivisions to perform construction management, architectural, engineering, and other construction and professional services related to jail facilities, penal institutions, hospitals, and other public buildings and facilities. If you have a specific question which cannot be answered from the above examples, you should contact the Ethics Commission and identify the specific facility, type of funding, and public agency or agencies involved.

ADDITIONAL PROHIBITIONS

In addition to the prohibitions discussed above relative to public contracts, the Governor is subject to R.C. 102.03 (B) which reads:

No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by him in the course of his official duties which is confidential because of statutory

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provisions, or which has been clearly designated to him as confidential when such confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business.

R.C. 102.03 (B) prohibits the Governor from using or disclosing to his brother or any other party without proper authorization, any confidential information acquired in the course of his official duties. No time limit exists for this prohibition and it is effective while he serves and after he leaves office. See Advisory Opinion No. 88-009.

As stated above, Paul V. Voinovich and the Voinovich Group are subject to two statutes under the Ethics Commission's jurisdiction, R.C. 102.03 (F) and R.C. 2921.43 (A).

R.C. 102.03 (F) reads as follows:

No person shall promise or give to a public official or employee anything of value that is of such a character as to manifest a substantial and improper influence upon him with respect to his duties.

R.C. 2921.43 (A) provides:

- (A) No public servant shall knowingly solicit or accept and no person shall knowingly promise or give to a public servant either of the following:
 - (1) Any compensation, other than as allowed by divisions (G), (H), and (I) of section 102.03 of the Revised Code or other provisions of law, to perform his official duties, to perform any other act or service in the public servant's public capacity, for the general performance of the duties of the public servant's public office or public employment, or as a supplement to the public servant's public compensation;
 - (2) Additional or greater fees or costs than are allowed by law to perform his official duties.

The Ethics Commission has held that R.C. 102.03 (F) prohibits a party that is doing business with or seeking to business with, interested in matters before, or regulated by, a state or local public agency, from promising or offering "anything of value" to an

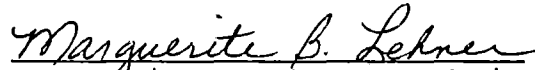
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official or employee connected with that public agency. See Advisory Opinion No. 90-001. R.C. 2921.43 (A) prohibits any person from promising or giving to any public servant, which includes a public official, any compensation for the performance of his official duties other than as allowed by law. Id. If you have specific questions concerning the application of these prohibitions, you should contact the Ethics Commission for further guidance.

This advisory opinion was approved by the Ethics Commission at its meeting on July 10, 1992. The opinion is based on the facts presented and is limited to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code and does not purport to interpret other laws or rules.

If you have any questions, please feel free to contact this Office again.

Sincerely,


Marguerite B. Lehner, Chair
Ohio Ethics Commission