

OHIO ETHICS COMMISSION

Merom Brachman
Commission Chair

David E. Freel
Executive Director



8 East Long Street, 10th Floor
Columbus, Ohio 43215
Telephone: (614) 466-7090
Fax: (614) 466-8368

Website: <http://www.ethics.state.oh.us>

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Informal Opinion 2001-INF-0510-3

Anthony F. Panzino
Executive Director
Ohio Commission on Fatherhood

Dear Mr. Panzino:

In a letter received by the Ohio Ethics Commission on March 21, 2001, you have asked the Ethics Commission to issue an advisory opinion addressing the question of whether members of the Ohio Commission on Fatherhood, and individuals who may serve on advisory committees for the Commission on Fatherhood but who are not Commission members, are required to file financial disclosure statements. You have also asked whether Commission members and non-Commission committee members may actively participate in Commission business if they remove themselves from any deliberation and vote on matters that might impact the various entities by which they are employed.

Opinion Summary

Based on the statutory authority of the Commission on Fatherhood, the members of the Commission, and the non-Commission committee members that you described, are not subject to the provisions of R.C. Chapter 102. and R.C. 2921.42. In addition, the members of the Commission on Fatherhood and the non-Commission committee members that you described are not required to file financial disclosure statements based on their service with the Commission or the committees.

Because the Commission and committee members are not public officials, the provisions of the Ethics Law and related statutes that would otherwise place restrictions on the members of the Commission in their participation in matters affecting the outside public or private entities they serve do not apply to the Commission and committee members. There is nothing in the Ethics Law or related statutes that prohibits the Commission from adopting, by rule or Commission policy, guidelines that limit the participation of Commission and committee members in matters where public or private entities they serve have an interest.

Statutory Authority of the Commission on Fatherhood

Before addressing your specific questions concerning financial disclosure and conflict of interest, it is first necessary to review the statutory authority of the Commission on Fatherhood and determine whether members of the Commission on Fatherhood are subject to the Ethics Law and related statutes by virtue of their position with the Commission.

The Commission on Fatherhood was created in the Department of Job and Family Services. See R.C. 51034(A). The Commission consists of the following members: four members of the House of Representatives and two members of the Senate; the Governor, or the Governor's designee; one representative of the judicial branch of government; the directors of health, job and family services, rehabilitation and correction, and youth services, and the superintendent of public instruction, or their designees; one representative of the Ohio Family and Children First Cabinet Council created under R.C. 121.37; and five representatives of the general public appointed by the Governor. Id.

The powers and duties of the Commission on Fatherhood are set forth in R.C. 5101.342, which provides the following:

The Ohio Commission on fatherhood shall do both of the following:

- (A) Organize a state summit on fatherhood every four years;
- (B)(1) Prepare a report each year that identifies resources available to fund fatherhood related programs and explores the creation of initiatives to do the following:
 - (a) Build the parenting skills of fathers;
 - (b) Provide employment-related services for low-income, noncustodial fathers;
 - (c) Prevent premature fatherhood;
 - (d) Provide services to fathers who are inmates in or have just been released from imprisonment in a state correctional institution, as defined in section 2967.01 of the Revised Code, so that they are able to maintain or reestablish their relationships with their families;
 - (e) Reconcile fathers with their families;
 - (f) Increase public awareness of the critical role fathers play.
- (2) The commission shall submit each report prepared pursuant to division (B)(1) of this section to the president and minority leader of the senate,

speaker and minority leader of the house of representatives, governor, and chief justice of the supreme court. The first report is due not later than one year after the last of the initial appointments to the commission is made under section 5101.341 of the Revised Code.

In addition to the duties set forth in R.C. 5101.342, R.C. 5101.341 provides that the Commission on Fatherhood "may accept gifts, grants, donations, contributions, benefits, and other funds from any public agency or private source to carry out any or all of the commission's duties."

In a conversation with staff, you have explained that the Ohio Legislature designated five million dollars in Temporary Assistance for Needy Families (TANF) funds to go towards fatherhood initiatives in the state. You have explained that \$300,000 of that amount is set aside to cover operating expenses of the Commission, and that the remaining 4.7 million is to be expended, by the Department of Job and Family Services (ODJFS), to support programs devoted to achieving the goals of the Commission on Fatherhood. The Ethics Commission understands that the Commission on Fatherhood is to make recommendations to ODJFS regarding the award of the TANF funds. You have explained that organizations with which Commission members, or volunteers who serve on committees to the Commission, are affiliated, may apply to ODJFS for grants from the TANF funds.

Individuals Subject to the Provisions of the Ethics Law

The Ethics Commission is empowered to administer, interpret, and help enforce Chapter 102. and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code, which are known as the Ethics Law and related statutes. See R.C. 102.02, 102.06, and 102.08. The Ethics Commission has advised that the Ohio Ethics Law and related statutes are general laws that, as part of the criminal code, establish a uniform standard of conduct for all persons who serve as public officials and employees on the state and local levels. See Ohio Ethics Commission Advisory Opinions No. 83-004 and 89-014; State v. Nipps, 66 Ohio App.2d 17 (Franklin County 1979). Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code include definitions that determine whether an individual is subject to the prohibitions imposed by the Ethics Law and related statutes. See R.C. 102.01(B) and (C), and 2921.01(A) and (B), described below. Because these statutory definitions differ, some individuals performing a public role may not be subject to all of the prohibitions imposed by Chapter 102. and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code. See Adv. Ops. No. 74-004, 77-005, and 93-013.

Some of the statutes found in Chapter 102. apply to "public officials and employees." See R.C. 102.03(A) through (J). Another statute found in Chapter 102., R.C. 102.04, imposes a prohibition upon persons who are appointed to an office of, or employed by, the state. See R.C. 102.04(A) and (B). R.C. 2921.42 imposes prohibitions upon "public officials." The term "public official" includes an elected or appointed officer, employee, or agent of the state or any political subdivision. R.C. 2921.43 imposes prohibitions upon "public servants." The term "public servant" includes a person who is a "public official" for purposes of R.C. 2921.42, as well as others "performing ad hoc governmental function."

The first issue to be addressed is whether a member of the Commission on Fatherhood falls within the statutory definition of "public official or employee" as defined in R.C. 102.01(B).

Definition of Public Agency

R.C. 102.01(B) defines the term "public official or employee" for purposes of Chapter 102. as "any person who is elected or appointed to an office or is an employee of any public agency" (emphasis added). R.C. 102.01(C) defines the term "public agency" as:

[T]he general assembly, all courts, any department, division, institution, board, commission, authority, bureau or other instrumentality of the state, a court, city, village, township, and the five state retirement systems, or any other governmental entity. "Public agency" does not include a department, division, institution, board, commission, authority, or other governmental entity that functions exclusively for cultural, educational, historical, humanitarian, advisory, or research purposes; does not expend more than ten thousand dollars per calendar year, excluding salaries and wages of employees; and whose members are uncompensated. (Emphasis added.)

Accordingly, a governmental entity is not a "public agency" for purposes of Chapter 102., when the governmental entity: (1) functions exclusively for cultural, educational, historical, humanitarian, advisory, or research purposes; (2) does not expend more than ten thousand dollars per calendar year, excluding salaries and wages of employees; and, (3) does not compensate its members. The Commission on Fatherhood meets the third prong of the exception in that its members are uncompensated. See R.C. 5101.34(B). Also, it appears that the Commission meets the first prong of the exception under its duties as presently defined by statute. In particular, R.C. 5101.342, as set forth above, does not provide the Commission with any powers and duties that are beyond those that are advisory and educational in nature. Further, the authority of the Commission, as you have explained it, is to make recommendations regarding the award of grants by ODJFS. The Commission on Fatherhood has not authority, under statute or otherwise, to issue grants itself.

The question becomes whether the Commission on Fatherhood expends less than ten thousand dollars per calendar year, excluding salaries and wages of employees. From the information you have provided, it is not possible for the Ethics Commission to determine whether the Commission on Fatherhood will expend more than ten thousand dollars per year, exclusive of salaries and wages of employees, to perform its statutory functions. If the Commission does not expend more than ten thousand dollars per year, exclusive of salaries and wages of employees, then the Commission is not a "public agency" for purposes of Chapter 102., and its members are not public officials for purposes of that Chapter.

If the Commission does expend more than ten thousand dollars per year, exclusive of salaries and wages of employees, then the Commission is a "public agency" for purposes of the definition of "public official or employee" as set forth in R.C. 102.01(B). In that case, it is necessary to determine whether its members are subject to the law set forth in Chapter 102.

Person Appointed to an Office

If the Commission on Fatherhood is a "public agency," then its members are subject to Chapter 102. of the Revised Code if its members are "appointed to an office." The Ethics Commission has recognized factors that established a test to determine whether one is "appointed to an office." These are, whether the person: (1) is appointed; (2) has a title; (3) exercises a function of government concerning the public; (4) exercises the sovereign power of government; and (5) is not subject to a contract of employment. The Commission emphasized that no one of these indicators controls, and combinations of factors will determine whether a person is deemed to hold an office. Adv. Op. No. 75-004.

The statutory duties of the Commission of Fatherhood as set forth in R.C. 5101.342 are advisory and educational in nature. However, R.C. 5101.341 enables the Commission to accept gifts, grants, donations, contributions, benefits, and other funds from any public agency or private source to carry out any or all of the Commission's duties. The question is whether the statutory authority set forth in R.C. 5101.341 is sufficient to find that members of the Commission on Fatherhood exercise sovereign authority and are therefore "appointed to an office" of a public agency.

One of the indicia of sovereign power is where the appointee is invested with independent power in the disposition of public property. Where the Commission would use the funds that it receives under R.C. 5101.341, to carry out any or all of its duties, the Commission would be disposing of public property. See R.C. 117.01(C) ("[p]ublic money means any money received, collected by, or due a public official under color of office, as well as any money collected by any individual on behalf of a public office or as a purported representative or agent of the public office") and 1.59(E) ("[p]roperty means real and personal property"). See also 1987 Op. Att'y Gen. No. 87-027 (moneys received by a state commission in connection with its official duties in order to carry out the statutory purposes of the commission are public moneys). However, the Commission on Fatherhood is limited, in its use of these funds, to carrying out "any or all of [its] duties."

According to R.C. 5101.341(B), the Commission does not exercise final discretionary decision-making authority on matters involving the police powers of the state and it does not render decisions in situations where the public is required to act through a governmental body such as obtaining a grant, license, or regulatory decision. Therefore, members of the Commission on Fatherhood are not "appointed to an office" of a public agency. See Adv. Op. No. 92-001 (members of the Ohio Grape Industries Committee do not exercise sovereign power when the Committee expends funds to advance its limited principal statutory duty because it neither exercises final discretionary decision-making authority on matters involving the police powers of the state nor renders decisions in situations where the public is required to act through a governmental body). Further, members of the Commission on Fatherhood are not employed by a public agency since they receive no compensation for the performance of their duties, they serve a limited term, and they are generally appointed based on their outside employment or interests. *Id.* Therefore, members of the Commission on Fatherhood are not subject to the prohibitions of R.C. Chapter 102.

**Individuals Subject to the Public Contract and Supplemental Compensation Prohibitions—
R.C. 2921.01(A) and (B)**

Next, it must be determined whether members of the Commission on Fatherhood are subject to the public contract and supplemental compensation prohibitions of R.C. 2921.42 and 2921.43, respectively. The term “public official,” as used in the various public contract prohibitions of R.C. 2921.42, is defined, in R.C. 2921.01(A), as follows:

Public official means any elected or appointed officer, or employee, or agent of the state or any political subdivision, whether in a temporary or permanent capacity, and includes, but is not limited to legislators, judges, and law enforcement officers.

The term “public servant,” as used in the supplemental compensation prohibitions of R.C. 2921.43, is defined, in R.C. 2921.01(B), as follows:

- (B) “Public servant” means any of the following:
- (1) Any public official;
 - (2) Any person performing ad hoc a governmental function, including, but not limited to, a juror, member of a temporary commission, master, arbitrator, advisor, or consultant;

Based on the overlap in the definition of “public official,” as set forth in R.C. 2921.01(A), and “public servant,” as set forth in R.C. 2921.01(B), an individual who is a public official subject to R.C. 2921.42 would also be subject to R.C. 2921.43.

As stated above, members of the Commission on Fatherhood are not “appointed to an office” for purposes of R.C. 102.01(B). Under Ohio law, a person who holds an “office” is an “officer.” See Muskingum County Democratic Executive Committee v. Burrier, 31 Ohio Op. 570 (Muskingum County 1945). Therefore, members of the Commission on Fatherhood are not “appointed officer(s)” for purposes of R.C. 2921.01(A). Further, as discussed above, members of the Commission on Fatherhood are not employees of any public agency.

It is important to recognize, however, that R.C. 2921.01(A) includes “agents” of the state, as well as officers and employees, within the definition of “public official” for purposes of R.C. 2921.42 and 2921.43. Therefore, even though members of the Commission on Fatherhood are not officers or employees simply by virtue of their service on the Commission, the question remains whether a member of the Commission is an “agent” of the state for purposes of R.C. 2921.42 and 2921.43.

An agency relationship is succinctly explained by the court in Funk v. Hancock, 26 Ohio App.3d 107 (Fayette County 1985), as follows:

An "agency relationship" is a consensual fiduciary relationship . . . where the agent has the power to bind the principal by his actions, and the principal has the right to control the actions of the agent.

A person is an agent of the state for purposes of R.C. 2921.42 when the state has delegated to the person or his public agency authority to act on the state's behalf, and bind the state. See Adv. Op. No. 85-005. See also Hanson v. Kynast, 24 Ohio St.3d 171 (1986) (in an agency relationship one party exercises the right of control over the actions of another, and those actions are directed toward the attainment of an objective which the former seeks). Furthermore, when an agent acts outside the scope of his authority, the principal may elect to ratify the agent's unauthorized action and thus become bound. See State v. Executor of Buttles, 3 Ohio St. 309 (1854) (agents of the state entered into a contract beyond the scope of their authority; however, since the state could have lawfully made the contract at the time the agents acted, the state became bound to the contract when it ratified the action of the agents).

The Commission on Fatherhood has no statutory authority to enter into contracts or otherwise bind the state. Further, the money the Commission receives under R.C. 5101.341(B) is to be used "solely to support the operations of the commission." There is no indication that the commission has the authority to use the funds to provide grants to public or private entities. Also, the Department of Job and Family Services provides staff and support services for the Commission on Fatherhood under R.C. 5101.341(A). Therefore, the members of the Commission do not have hiring authority or any other authority involving personnel matters. Based on these factors, members of the Commission on Fatherhood are not agents of the State and therefore are not subject to the prohibitions of R.C. 2921.42.

You should be aware, however, that any person who is subject to R.C. 2921.42, and any person performing ad hoc a governmental function, is subject to R.C. 2921.43. Therefore, members of the Commission on Fatherhood are subject to R.C. 2921.43 since they are created within the Department of Job and Family Services and exercise a function of government in providing education and advice on "fatherhood" issues. In addition, as stated below, the thirteen members of the Commission on Fatherhood who hold other public positions are subject to R.C. Chapter 102., and R.C. 2921.42 and 2921.43 by virtue of the other public positions that they hold.

Application of Ohio Ethics Law and Related Statutes

In your letter to the Ethics Commission, you have asked whether the Ethics Law prohibits members of the Commission on Fatherhood from participating in Commission business if they remove themselves from any deliberation and vote on matters that might impact the entity in which they are employed. You should note that since the Commission members are not subject to R.C. Chapter 102. and R.C. 2921.42 based on the statutory authority of the Commission, the provisions of the Ethics Law and related statutes that otherwise place restrictions on the members of the Commission in their participation, as Commission members, in matters affecting the outside public or private entities they serve, or that may affect the ability of any members of the Commission, who may also be affiliated with certain outside public or private entities that

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acquire property or services from the Commission, to serve on the Commission, cannot be applied to your question. As stated above, the only provision of law under the Ethics Commission's jurisdiction to which the members of the Commission on Fatherhood are subject is R.C. 2921.43, which is not applicable to the question you have presented to the Commission. Therefore, the Ethics Law and related statutes do not prohibit any members of the Commission, who may also be affiliated with certain outside public or private entities that acquire property or services from the Commission, from serving on the Commission. Further, the Ethics Law and related statutes do not place restrictions on the members of the Commission in their participation in matters affecting the outside public or private entities they serve.

While the Ethics Law does not restrict the activities of Commission members with respect to public or private entities with which they are connected, the Commission may wish to impose such limits on its own members. There is nothing in the Ethics Law and related statutes that would prohibit the Commission from adopting policies to limit the actions of Commission members in matters where public or private entities with which they are connected are interested.

You have also asked whether persons who are not Commission members, but who may serve on advisory committees for the Commission, are subject to the Ethics Law. As stated above, the members of the Commission on Fatherhood are not public officials subject to the Ohio Ethics Law and related statutes because their powers and duties are solely advisory, and they do not exercise sovereign authority. Individuals who serve on any committees formed by the Commission on Fatherhood would have equal or lesser authority than that exercised by members of the Commission on Fatherhood. Individuals who would serve on these committees under these circumstances would not be subject to R.C. Chapter 102. and R.C. 2921.42. While these individuals may be subject to R.C. 2921.43, R.C. 2921.43 does not prohibit them from participating in matters before the committees that may have an impact on the entities by which they are employed. Again, there is nothing to prohibit the Commission on Fatherhood from imposing limits on these committee members with respect to matters involving public or private entities with which they are connected.

Financial Disclosure Filing Requirement

You have also asked the Commission to address the question of whether members of the Commission on Fatherhood, or members of the committees that assist the Commission on Fatherhood, are required to file financial disclosure statements. Pursuant to R.C. 102.02(B) and OAC 102-5-01 and 102-5-02, the Ethics Commission is empowered to examine various statutorily created state boards, commissions, agencies, institutions, bureaus, councils, and other instrumentalities of the State to determine whether the members and chief administrative officer (in this case, the Executive Director) of these public entities hold positions that involve "a substantial and material exercise of administrative discretion in the formulation of public policy, expenditure of public funds, enforcement of laws and rules of the state or a county or city, or the execution of other public trusts." If the Commission determines that the officials do exercise such discretion, the Commission may require the officials to file annual financial disclosure statements reflecting their financial interests in the complete preceding calendar year. In making

the determination regarding the exercise of administrative discretion by any board or its staff, the Ethics Commission analyzes the statutory and regulatory authority of each board or commission.

As stated above, the power and authority of the Commission on Fatherhood, as set forth in R.C. 5101.342, is advisory and educational in nature. However, as also stated above, the Commission on Fatherhood may, under R.C. 5101.341, accept gifts, grants, donations, contributions, benefits, and other funds from any public agency or private source to carry out any or all of the commission's duties. The ability to accept funds from public and private sources is not, however, in and of itself enough to find that a state board or commission exercises substantial and material administrative discretion. Further, the Commission on Fatherhood must use the funds to carry out any or all of the Commission's duties under R.C. 5101.342. Also, the Commission on Fatherhood does not have any regulatory functions. Based on all of these factors, the Ethics Commission finds that the members of the Commission on Fatherhood do not exercise substantial and material administrative discretion for purposes of R.C. 102.02(B), and individuals who serve as members and employees of the Commission on Fatherhood are not required to file financial disclosure statements based on their service with the Commission. Further, since the authority of the committee members could not extend beyond that which has been provided to the Commission on Fatherhood by statute, the Ethics Commission finds that the members of the committees that you described would not exercise substantial and material administrative discretion in the performance of their duties on the committees and therefore would not be required to file financial disclosure statements as a result of their service on the committees.

Application of Ethics Law and Related Statutes to Board Members Serving in Other Public Positions

Based on the statutorily mandated composition of the Commission on Fatherhood, thirteen members of the Commission on Fatherhood hold other public positions for which they are required to file financial disclosure statements. The Ethics Commission's finding in this Advisory Opinion that the members and employees of the Commission on Fatherhood are not required to file financial disclosure statements because of their positions on the Commission on Fatherhood does not affect the filing requirements of members of the Commission who file financial disclosure statements because of the other public positions that they hold. In addition, the thirteen members of the Commission who hold other public positions are subject to, and governed by, the Ethics Law and related statutes in the performance of their duties in their other public positions.

Opinion Based on Current Statutory Authority of the Commission on Fatherhood

As a final note, it is important to emphasize that the conclusions provided herein are based on the authority of the Commission on Fatherhood, as set forth in the statutes examined above. Changes in the statutory authority of the Commission on Fatherhood may change the conclusions provided herein.

Conclusion

As explained above, based on the statutory authority of the Commission on Fatherhood, the members of the Commission, and the non-Commission committee members that you described, are not subject to the provisions of R.C. Chapter 102. and R.C. 2921.42. In addition, the members of the Commission on Fatherhood and the non-Commission committee members that you described are not required to file financial disclosure statements based on their service with the Commission or the committees.

Because the Commission and committee members are not public officials, the provisions of the Ethics Law and related statutes that would otherwise place restrictions on the members of the Commission in their participation in matters affecting the outside public or private entities they serve do not apply to the Commission and committee members. There is nothing in the Ethics Law or related statutes that prohibits the Commission from adopting, by rule or Commission policy, guidelines that limit the participation of Commission and committee members in matters where public or private entities they serve have an interest.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on May 10, 2001. The opinion is based on the facts presented and is limited to questions arising under Chapter 102. and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code and does not purport to interpret other laws or rules. If you have any questions or desire additional information, please contact this Office again.

Sincerely,



Timothy L. Gates
Staff Attorney