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April 27, 2010

Informal Opinion 2010-INF-0427-1

Julie S. Henahan, Executive Director  
Ohio Arts Council

Dear Ms. Henahan:

On December 3, 2009, the Ohio Ethics Commission received your letter requesting an advisory opinion. You asked whether the Ethics Law and related statutes prohibit an organization from applying for or receiving grant funds awarded by the Ohio Arts Council ("Council") if an officer, board member, or employee of the organization serves as a Council member. You also asked if the law prohibits a university or college from applying for or receiving grant funds if an employee of the university or college serves on the Council. Finally, you asked what, if any, changes the Council should make so that its conflict of interest rule (Ohio Administrative Code 3379-9-02) is compatible with the Ohio Ethics Law.

### Brief Answer

As explained more fully below, the Ethics Law and related statutes do not prohibit an organization, college, or university with which a Council member is affiliated from applying for or being awarded a Council grant. However, the Law prohibits the Council members from: (1) authorizing or taking any action to secure authorization of any grant or funding awards to organizations with which they are affiliated; (2) having financial or fiduciary interests in grants or other funding awarded by the Council, unless the Council members meet an exception to the Law; and (3) occupying a position of profit in a grant awarded by the Council, even if they do not participate in the award.

Council members who serve as officers or board members of organizations will have a prohibited *fiduciary* interest in any Council awards to the organization. Council members who serve as employees of organizations or educational institutions may have a prohibited *financial or fiduciary* interest in a grant the Council awards to their employers. If a Council member has an interest in a grant awarded by Council, the Council member must meet an exception to the public contract law or the Council member will potentially be subject to criminal liability and the grant will be void and unenforceable.

### **Facts**

In your letter, you explained that the mission of the Council is to support quality arts experiences to strengthen Ohio Communities culturally, educationally, and economically. With funds from the Ohio Legislature and the National Endowment for the Arts, the Council provides financial assistance, primarily in the form of grant awards, to arts and nonprofit organizations, and colleges and universities that provide arts programming for their communities. You explained that, while grant review panels consisting of individuals with broad knowledge of the arts, art education, and community development review grant applications from organizations and make funding recommendations, only the Council has the authority to approve or disapprove grant awards.

You stated that the Council has a thirty-year-old administrative rule regarding conflicts of interest. You explained that Ohio Administrative Code Section 3379-9-02 permits organizations, that have volunteer board members or employees who are also Council members, to apply for and receive grant awards provided that the Council member takes no part in the application process, does not participate in deliberations concerning the application, and does not receive any remuneration from the grant award. You explained that there are at least three current Council members that are affected by this rule. In particular, while a grant application submitted by one non-profit organization was pending, the organization's president and CEO became a Council member. The Council's grant review panels reviewed the application and recommended it to the Council which gave the final approval to award grant funds to the organization. The Council member in question took no part in the deliberation process. You stated that the Council is holding the grant award in abeyance until it receives this opinion.

### **Purpose of an Advisory Opinion**

As you explained in your letter, the Council has been operating under the guidelines of Ohio Adm.Code 3379-9-02 for thirty years. R.C. 102.08 statutorily authorizes the Ohio Ethics Commission to render advisory opinions with regard to questions concerning ethics, conflict of interest, or financial disclosure under Revised Code Chapter 102., and Sections 2921.42 and 2921.43. Generally, the Ethics Commission issues advisory opinions in response to questions that are either hypothetical or prospective. Ohio Ethics Commission Advisory Opinion No. 75-037. The Commission has explained that the rendering of an advisory opinion is not a fact-finding process and it cannot, in rendering an advisory opinion, determine whether a public official or employee has violated a provision of the law that has criminal sanctions. *Id.* Rather, an advisory opinion serves to explain the prohibitions within the Ethics Law and related statutes and sets forth the standards and criteria that a public official or employee must observe in order to avoid violating the law in a given set of circumstances. Adv. Ops. No. 75-037, 90-013, and 92-015.

The Ethics Commission has issued advisory opinions in limited instances, such as the one you have described, where the practice at issue appears to have existed for many years, and public officials and employees have relied on past practice without the guidance of precise and uniform legal precedent to address the specific issue. See, e.g., Adv. Ops. No. 85-015, 89-014, 91-007, 91-

010, 92-015, and 94-002. This advisory opinion addresses only the prospective matters you have described and does not reach any conclusions regarding matters that may have already occurred.

**Having an Interest in a Council Grant—R.C. 2921.42(A)(4)**

Members of the Council are “public officials” subject to R.C. 2921.42(A)(4), which provides that no public official shall knowingly:

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 the public official is connected.

The term “public contract” includes any purchase or acquisition of property or services “by or for the use of” the state. R.C. 2921.42(I)(1)(a). The Ethics Commission has held that, when a public agency sponsors grants, loans, land reutilization programs, tax abatements, and other similar programs, and acquires community improvement services in return, the grants, loans, and other programs are “public contracts” regardless of whether they are funded through state, federal, or other moneys. See, e.g., Adv. Ops. No. 2009-06, 2001-02, 92-014, and 87-004; *State v. Lordi*, 140 Ohio App.3d 561, 568 (2000), discretionary appeal not allowed, 91 Ohio St.3d 1523, 91 Ohio St.3d 1526, 91 Ohio St.3d 1536, motion for reconsideration denied, 92 Ohio St.3d 1422 (2001).

You have stated that the Council has the authority to provide financial assistance, usually in the form of grants, to non-profit and arts organizations, colleges, and universities that provide arts and programming for their communities. Any grant or other form of funding awarded by the Council falls within the definition of public contract.

The determination of whether a public official has an interest in a public contract entered into by his political subdivision or governmental agency depends on the facts and circumstances of each particular situation. Adv. Ops. No. 84-009 and 89-006.

You have indicated that Ohio Adm.Code 3379-9-02 prohibits a Council member from receiving any *remuneration* from a Council grant. There is a similar restriction in the Ethics Law; 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 the public board on which the official serves even if the public official does not participate in the authorization of the contract. (Discussed below.) However, R.C. 2921.42(A)(4) prohibits a public official from having a definite and direct *financial or fiduciary* interest in a public contract. Adv. Ops. No. 81-008 and 88-001.

In other words, a violation of R.C. 2921.42(A)(4) can occur in situations where the public official has a fiduciary connection to an organization that has a contract authorized by the agency the official services even if the official does not receive any remuneration from the contract.

### **Fiduciary Interest—Officer or Board Member of Organization**

An officer, chief administrative official, or member of the board of an organization has a fiduciary interest in the contracts of the organization *even if* the individual is not compensated for the service. Adv. Ops. No. 92-004 and 96-005. Council members who serve as officers or board members of organizations that are awarded Council grants would have prohibited fiduciary interests in the grants.<sup>1</sup> A person could meet the exception discussed below (R.C. 2921.42(C)) or resign from the officer or board position on the organization in order for it to receive Council grants that are not void pursuant to R.C. 2921.42(H).

### **Fiduciary or Financial Interest—Employee of an Organization or Educational Institution**

An employee of an organization or institution does not always have an interest in the contracts of their employers. An employee will be deemed to have an “interest” in contracts entered into by his employer, for purposes of R.C. 2921.42, if *any* of the following circumstances apply: (1) The employee has an *ownership* interest in, or is a director, trustee, or officer of his employer; (2) The employee takes part in contract negotiations or the bid or proposal process; (3) The employee’s salary is based or dependent upon, or is paid from, the proceeds of the contract; (4) The employee receives a share of the contract’s proceeds in the form of a commission or fee; (5) The employee’s responsibilities include participation in the administration or execution of the contract or he has the responsibility to oversee execution or administration of the contract; (6) The employee’s employer receives most or all of its funding from the contract, such that its establishment or operation is dependent upon receipt of the contract; or (7) The employee depends upon his employer receiving the award of the contract to ensure the creation or continuation of his employment. See Adv. Ops. No. 89-006, 89-008, and 92-002. See also *State v. Urbin*, (2002), 148 Ohio App. 3d 293, ¶¶ 13-16 (An appeals court concluded that a jury, relying on Adv. Op. No. 92-002, was justified in finding that a mayor’s brother had an interest in his employer’s contracts because the brother acted as manager and participated in the administration and execution of the contracts) and *State v. Urbin* (2003), 100 Ohio St. 3d 1207, ¶¶ 13-14.

Employees of nonprofit organizations, colleges, or universities do not have ownership interests in their employing organizations. However, Council members who are employees of nonprofit organizations, colleges, or universities would have an interest in Council grants awarded to their employers if, as employees of the organizations, colleges, or universities, the Council members are directors or officers of the employer, or their salaries or employment positions are based on or dependent upon the proceeds of the grants. Council members who are employed by organizations, colleges, or universities that are awarded Council grants would also have prohibited interests in the grants if their employment responsibilities include participation in the negotiation, execution, or administration of the grants. Finally, council members who are employed by organizations, colleges, or universities that are awarded Council grants would have

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<sup>1</sup> It should be noted that Council members are required to file annual financial disclosure statements with the Ohio Ethics Commission. Among other things, filers are required to disclose the name of every corporation, trust, business trust, or association in which the person “holds any office or has a fiduciary relationship.”

prohibited interests in the grants if, as employees, they receive commissions or fees from the grants or if their employers receive all or most of their funding from Council grants.

### **Application of Restriction**

A Council member who has a prohibited interest in a grant awarded by the Council must meet an exception to the public contract law if the Council member wishes to continue to serve on the Council while the organization receives the grant. A Council member with a prohibited interest in a public contract is subject to possible criminal liability and a contract entered into in violation of R.C. 2921.42 will be void and unenforceable. R.C. 2921.42(E) (violation of R.C. 2921.42(A)(4) is a misdemeanor of the fourth degree) and R.C. 2921.42(H).

The Commission notes that Ohio Adm.Code 3379-9-02(C) and (D) permit a Council member to participate in Council funded activities undertaken by organizations that they serve provided that they are not compensated from Council funds. However, R.C. 2921.42(A)(4) prohibits a Council member from participating in the negotiation, execution, or administration of a grant awarded by the Council regardless of whether the Council member is paid from Council funds for those activities, unless the exception can be met.

### **Exception to R.C. 2921.42(A)(4)—R.C. 2921.42(C)**

When a public official can meet the following four requirements of R.C. 2921.42(C), R.C. 2921.42(A)(4) does not apply to the public official:

- (1) The subject of the public contract is necessary supplies or services for the political subdivision or governmental agency or instrumentality involved;
- (2) The supplies or services are unobtainable elsewhere for the same or lower cost, or are being furnished to the political subdivision or governmental agency or instrumentality as part of a continuing course of dealing established prior to the public official's becoming associated with the political subdivision or governmental agency or instrumentality involved;
- (3) The treatment accorded the political subdivision or governmental agency or instrumentality is either preferential to or the same as that accorded other customers or clients in similar transactions;
- (4) The entire transaction is conducted at arm's length, with full knowledge by the political subdivision or governmental agency or instrumentality involved, of the interest of the public official, member of the public official's family, or business associate, and the public official takes no part in the deliberations or decision of the political subdivision or governmental agency or instrumentality with respect to the public contract.

Each of the provisions in the Division (C) exception is a question of fact which, when applied to the circumstances of the individual case, will determine whether a particular transaction fits within the exception.<sup>2</sup> Adv. Ops. No. 80-003 and 88-008. The criteria of Division (C) are strictly construed against the public official, and the official must show compliance with all four requirements in the exception. Adv. Ops. No. 83-004, 84-011, and 88-008. The Commission has held that the application of this exception must be consistent with the principle underlying R.C. 2921.42 that public officials should not have interests in public contracts with their governmental entities unless the contracts are the best or only alternatives available to the governmental entities. Adv. Op. No. 84-011.

R.C. 2921.42(C)(1) requires that the services provided under the contract are necessary. Provided that the grant in which the Council member has an interest is awarded and administered to carry out the statutory mandate and purpose of Council, as provided by R.C. 3379.04, the services the Council would acquire through these grant awards would be considered necessary. R.C. 3379.04. Adv. Ops. No. 85-002, 88-006, and 2001-02. In that case, the Council member would be able to meet this requirement.

R.C. 2921.42(C)(2) requires that the supplies or services are “unobtainable elsewhere for the same or lower cost.”<sup>3</sup> With respect to grants that are awarded by the Council to organizations or institutions in which the Council member is connected, the “unobtainable elsewhere” requirement can be met in one of two ways. Council members meet this requirement where either: (1) all qualified and interested applicants for Council grants have received grants and funds remain to provide grants to those organizations and institutions to which Council members are connected; or (2) the Council accepts applications for grants on an ongoing first-come, first-served basis, in a fair and open application process in which all interested and qualified applicants receive funding, and where there has historically been enough money to fund all qualified grant applications. See Adv. Op. No. 93-008 and 2001-02. The purpose of this requirement is to require a demonstration that grant funds are distributed fairly, without a Council member’s position influencing decision makers.

According to the Ohio Arts Guidelines for 2010/2011, the grant application review process is competitive and not all applications are funded. Grant review panels, made up of individuals with broad knowledge of the arts, art education, and community development evaluate and vote on each application to determine if the application will advance to the scoring

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<sup>2</sup> There is another exception to the prohibitions of R.C. 2921.42(A)(4). The Ethics Commission has held that a public official *can* serve on the board of directors of a non-profit organization, or otherwise participate in the decision-making of a non-profit, with which his public agency has a contract, *if* the official serves as a representative of his public agency. Adv. Ops. No. 83-010, 84-001, and 93-012. See also 2008 Ohio Atty.Gen.Ops. No. 2008-03. R.C. 2921.42(B) and (D) also provide exceptions to the prohibition of R.C. 2921.42(A)(4). However, these exceptions are not applicable to the situation you have presented.

<sup>3</sup> The criterion of R.C. 2921.42(C)(2) can also be met if the services under the public contract are being furnished as part of a continuing course of dealing established prior to the time the individual takes public office. However, because your question involves individuals serving on Council prior to the award of a grant to their affiliated organizations, this requirement is not applicable to your question.

round. Applications not voted into the scoring round will not be funded. If an application moves to the scoring round, it will be given a score based on how well it meets four weighted criteria categories—Artistic/Educational/Cultural Value (25 points), Community Participation and Accessibility (35 points), Planning and Evaluation (20 points), and Organizational and Financial Management (20 points). A cutoff point in the scores may be determined so that applications below a certain score are not funded. The score and the applicant's request are used by the panel when making funding recommendations to the Council. The Council makes all final funding decisions.

If an organization in which a Council member has an interest can meet the eligibility and scoring requirements necessary to receive a grant, based on the independent review of a grant review panel, and there are still funds available after all other eligible applicants have received grants, the organization can meet the "unobtainable elsewhere for the same or lower cost" requirement in R.C. 2921.42(C)(2). It must be clear, however, that the organization is reviewed under the same level of scrutiny as all other applicants and is not given any favorable treatment or advantage over the other applicants being considered. If a cutoff score is established, all applicants above the cutoff score would need to be considered for funding before an award is made to the Council member's organization.

The third requirement, R.C. 2921.42(C)(3), is that the organization or institution in which the Council member has an interest treats the Council either better than or the same as it would treat other customers or clients in similar transaction. In situations like this one, where the contract involves a grant program, the Commission has explained that organizations that wish to participate in the programs have no "customers or clients in similar transactions." Adv. Ops. No. 84-011 and 2001-02. Therefore, Council members who have an interest in a grant awarded to an organization or institution with which they serve would be able to meet this exception.

Finally, R.C. 2921.42(C)(4) requires that the entire transaction is conducted at arm's length, that the Council has full knowledge that its board members have an interest in the grants awarded to the organizations they serve, and that the Council members with such an interest take no part in the decision of the Council regarding the grant. In an arm's length transaction: (1) both the Council member and the Council act voluntarily, without compulsion or duress; (2) the transaction occurs in an open market; and (3) both the Council member and the Council act in their own self-interest. *Walters v. Knox Cty. Bd. of Rev.* (1989), 47 Ohio St.3d 23, 25. With respect to the criteria set forth in Division (C)(4), the Commission has concluded that, if the public agency's procedure for determining whether to provide financing for a particular project, notice to prospective funding recipients, and selection of qualified projects is fair and objective with no preference given to organizations connected with public officials or employees, it will significantly help a public official to demonstrate compliance. Adv. Op. No. 84-011.

If the Council members are able to meet all four parts of the exception in R.C. 2921.42(C), they would not have an unlawful interest in Council grants awarded to organizations and institutions with which they are connected. However, they must comply with other provisions of the Ethics Law that will condition their conduct.

**Prohibition Imposed by R.C. 2921.42(A)(3)—Position of Profit**

Your attention is directed to R.C. 2921.42(A)(3), which provides that no public official shall knowingly:

During the public official's term of office or within one year thereafter, occupy any position of profit in the prosecution of a public contract authorized by the public official or by a legislative body, commission, or board of which the public official was a member at the time of authorization, unless the contract was let by competitive bidding to the lowest and best bidder.

The Commission has explained that a public official occupies a "position of profit" in the prosecution of a public contract when the official receives some financial gain or benefit that is *definitely and directly* related to carrying out and completing a contract that the official authorized or that was authorized by a board on which the official serves. Adv. Op. No. 2009-05. It should be noted that Ohio Adm.Code 3379-9-02(C) also states that Council members who serve with organizations that receive Council funds will not receive remuneration those grants.

If a public official participates, in any way, in the authorization of any public contract of the agency, including voting, signature, recommendation, review, advice, or supervision of agency staff related to the contract authorization, the official is prohibited from occupying a "position of profit" in the prosecution of the contract. Adv. Ops. No. 92-013 and 2009-05. This restriction also applies if the official served on a board at the time it authorized the contract, even if the official did not participate in the board's action.

In Advisory Opinion No. 92-013, the Ethics Commission explained that the General Assembly's use of the words "occupy any position of profit in the prosecution of a public contract" in R.C. 2921.42(A)(3) specifically distinguishes a different type of situation than having "an interest in the profits or benefits of a public contract" as prohibited by R.C. 2921.42(A)(4). The Commission explained that the word "profit" means "to obtain financial gain or other benefit."

A public official will be deemed to "occupy [a] position of profit" in a public contract whenever the official receives a fee or compensation that would be paid from, or is dependent upon, the contract, or the official would receive some other profit or benefit from the contract. Adv. Ops. No. 88-008 and 95-007. A "position of profit" that is prohibited under Division (A)(3) must be definite and direct in nature. Id. See also Adv. Op. No. 93-008 (a school board member does not "occupy a position of profit" in the board's employment of his minor child for purposes of Division (A)(3) if the board member does not exercise his statutory right to his minor child's earnings).

A Council member who also serves as a board member of an organization, but receives no compensation or other financial benefit as a result of such service, does not occupy a position of profit in any Council grants awarded to the organization. However, Council members who are



employees of organizations, colleges, or universities that receive Council grants would occupy a position of profit in the grants if their compensation includes a financial benefit that is definitely and directly attributable to the grant. For example, if the Council member were to receive a fee or commission paid from the grant, a portion of the grant is earmarked to defray some portion of the person's salary, or the person receives some other personal benefit that was directly related to the grant, the Council member would be deemed to occupy a "position of profit" in a public contract. In that case, the prohibition in R.C. 2921.42(A)(3) would apply and the organization, college, or university could not receive the grant without a violation of the law even if the exception provided by Division (C) of R.C. 2921.42 has been met. See Adv. Op. No. 88-006 (the exception in R.C. 2921.42(C) does not apply to R.C. 2921.42(A)(3)).

Provided that a Council member's salary is *not* definitely and directly attributable to a Council grant, the Council member does not occupy a position of profit in the grant. Even if the Council member holds an executive position with the organization, the organization deposits the proceeds of the grant into its general operating fund, and the salaries for all employees are drawn from that fund, the Council member would not occupy a definite and direct position of profit in the grant. Further, in order to avoid any question of whether the employee profits from a particular grant the organization receives, the organization could state in its grant application or stipulate in its grant agreement that the Council's grant proceeds will *not* be used to compensate or otherwise directly benefit the employee who is a Council member. The organization must also be careful not to use the proceeds in any of these ways.

### **Other Considerations**

In your letter, you indicated that Ohio Adm.Code 3379-9-02 prohibits Council members who are affiliated with organizations that receive Council grants from taking part in the application process and deliberations concerning the application for their grant award. R.C. 2921.42(A)(1) also prohibits a public official from authorizing, or employing the authority or influence of office to secure authorization of, any public contract in which the official, or any of the official's family members or business associates, has an interest. Council members who have a fiduciary or financial interest in an organization's grants would be prohibited from exercising the authority or influence of their public offices to secure funding for the organization from the Council. The Council members would be prohibited from voting, discussing, deliberating, recommending, or otherwise using their authority or influence, including their authority over other Council officials or employees, to affect the decision-making process regarding any financial assistance for the organization. See generally Adv. Op. No. 87-003.

Furthermore, the Council members would be prohibited from participating, after the financing has been awarded to the organization, in any matter or decision that would affect the continuation, implementation, or terms and conditions of the funding. See Adv. Op. No. 87-003. These matters and decisions include, but are not limited to, the authorization or approval of payments of the funding, and the renewal, modification, termination, or renegotiation of the funding terms. Adv. Op. No. 92-012.

Council members are also subject to R.C. 102.03(D) and (E), which prohibit them from using their positions to secure, or from soliciting, anything of value, including grants or financial assistance, for the organizations they serve. Adv. Op. No. 91-011. For example, R.C. 102.03(D) would prohibit Council members from recommending or directing the actions of any Council official or employee regarding matters related to the organization, or using their positions in any way, formally or informally, to secure any greater or different benefit than that available to other parties seeking or receiving funding.

R.C. 102.04(A) prohibits a public official or employee from receiving compensation, other than from the agency with which the official or employee serves, for representing any person on any matter before the agency. Therefore, Council members who are board members, officers, or employees of organizations, colleges, and universities would be prohibited from accepting compensation to represent the interests of the organizations, colleges, or universities before the Council. See generally Adv. Op. No. 93-004. Again, the existing Council rule acknowledges that Council members will not submit applications or other reports for the organizations they serve. Ohio Adm.Code 3379-9-02(B).

Finally, R.C. 102.03(B) prohibits Council members from disclosing or using, without appropriate authorization, any confidential information that they acquired in the course of their official duties as a member of the Council. No time limitation exists for this prohibition. Adv. Op. No. 88-009. Council members would be prohibited from using any confidential information they acquired during their board service to assist organizations with which they are affiliated regarding their applications for financial assistance from the Council.

Provided that the Council members can comply with the restrictions discussed above, the Ethics Law would not prohibit organizations, colleges, or universities with which they are connected from seeking or receiving grant funding from the Council. The Commission would be happy to assist the Council or individual Council members if they have questions about the application of these restrictions to any specific situation.

#### **Application of Restrictions to Specific Example**

In your letter, you described a specific example of a Council member to whom the restrictions in the law may apply. You explained that, while a grant application submitted by one non-profit organization was pending, the organization's president became a Council member. The Council's grant review panels reviewed the application and recommended it to the Council which gave the final approval to award grant funds to the organization. The Council member in question took no part in the deliberation process.

You stated that the Council is holding the grant award in abeyance until it receives this opinion. Because the grant was in process before the Council member was appointed, the Ethics Law does not prohibit the Council from funding the grant, provided that the member does not represent the organization's interests before the Council or its employees, or use the Council position to secure any additional benefits for the organization.

In order to assist the Council by providing an example of how the restrictions could apply to a Council member in a future grant application, the Commission has applied them to the specific individual you described in your letter:

- As president and CEO of the organization, the Council member would have a fiduciary interest in any Council grant awarded to the organization, regardless of whether the Council member participated in the Council's decision;
- If the Council member can meet the exception in R.C. 2921.42(C), the interest in the grant is not prohibited by R.C. 2921.42(A)(4). The Council member can meet the exception if the following is shown:
  - The grant awarded to the organization will carry out the statutory mandate and purpose of the Council (R.C. 2921.42(C)(1));
  - The organization, based on the independent review of a grant review panel using the same level of scrutiny for all other applicants, met the eligibility and scoring requirements necessary to receive a Council grant and, after all other eligible applicants have received grants, sufficient funds remain for the grant. If a cutoff score has been established, all other applicants at or above that score must be considered for funding before an award is made to the Council member's organization (R.C. 2921.42(C)(2));
  - The organizations or institutions that receive grants funds from the Council do not have "clients or customers in similar transactions" (R.C. 2921.42(C)(3));
  - The grant transaction is at arm's length, the Council has full knowledge of the Council member's fiduciary interest in grants to the organization, and the Council member does not vote, discuss, deliberate, recommend, lobby other Council member's or staff, or otherwise participate in the Council's decision regarding the grant to the organization. The Council member will be assisted in demonstrating these requirements if the Council's procedure for notifying the arts community of grant availability and selection of qualified projects for grants is fair and open with no preference given to organizations connected with its members (R.C. 2921.42(C)(4)).
- Provided that the employee's salary is not definitely and directly related to the grant, even if grant funds are used by the organization for its general operation, the employee will not be deemed to occupy a position of profit in the grant in violation of R.C. 2921.42(A)(3). In order to avoid any appearance of profit in the future, the organization could include a clear statement, in its grant application, that it will not use the proceeds of any Council grant it receives to compensate or otherwise benefit the organization's employee who is a Council member.

- R.C. 2921.42(A)(1) prohibits the Council member from voting, discussing, deliberating about, recommending, or taking any other action, formally or informally, to secure the grant or payments under the grant. R.C. 102.03(D) and (E) prohibit the Council member from soliciting or using the Council position to secure grant funds or other benefits for the organization, including formally or informally lobbying Council members or staff regarding a grant application or the organization's use of awarded funds.
- If the organization were to apply for grant funding in the future, R.C. 102.04(A) would prohibit the Council member who is an employee of the organization from performing any compensated job duties involving the grant, including appearing before the Council, communicating with Council staff, or otherwise representing the interests of the organization on the grant.
- R.C. 102.03(B) would prohibit the Council member from disclosing or using confidential information acquired through public service. For example, if the Council member were privy to confidential information about the status of pending applications, the official would be prohibited from using that information, or disclosing it to any other person, for any reason.

### **Ohio Administrative Code 3379-9-02**

Ohio Administrative Code 3379-9-02 permits Council members to have an interest in, or be employed by and participate in the activities of, an organization that is eligible for Council support, provided that the Council members disclose the interest and nature of their participation, do not submit the organization's application or reports to Council, do not receive any remuneration from Council funds, and do not participate in discussions or votes before Council regarding the organization. A public agency cannot create a policy or rule that is less restrictive than the criminal prohibitions of the Ethics Law. You have asked what changes, if any, Council should make to Ohio Adm.Code Section 3379-9-02 so that is compliance with the Ethics Laws.

The Commission suggests that any changes the Council makes to its rules should include a general statement that the Council members shall comply with the Ethics Law and related statutes as interpreted by the Ohio Ethics Commission and Ohio Courts. To assist the Council with these changes, the Commission will send a separate letter with suggested language for the new rule. The Commission is happy to continue to work with the Council on its rule revision.

### **Conclusion**

As explained more fully above, the Ethics Law and related statutes do not prohibit an organization, college, or university with which a Council member is affiliated from applying for or being awarded a Council grant. However, the Law prohibits the Council members from: (1) authorizing or taking any action to secure authorization of any grant or funding awards to organizations with which they are affiliated; (2) having financial or fiduciary interests in grants

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or other funding awarded by the Council, unless the Council members meet an exception to the Law; and (3) occupying a position of profit in a grant awarded by the Council, even if they do not participate in the award.

Council members who serve as officers or board members of organizations will have a prohibited *fiduciary* interest in any Council awards to the organization. Council members who serve as employees of organizations or educational institutions may have a prohibited *financial or fiduciary* interest in a grant the Council awards to their employers. If a Council member has an interest in a grant awarded by Council, the Council member must meet an exception to the public contract law or the Council member will potentially be subject to criminal liability and the grant will be void and unenforceable.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on April 22, 2010. The opinion is based on the facts presented. It 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 or desire additional information, please feel free to contact this Office again.

Sincerely,

A handwritten signature in black ink, appearing to read "Jennifer A. Hardin". The signature is fluid and cursive, with a large initial "J" and "H".

Jennifer A. Hardin  
Chief Advisory Attorney