



OHIO ETHICS COMMISSION

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

June 30, 1997

Informal Opinion 1997-INF-0630-1

Fred J. Milligan, Jr.



Dear Mr. Milligan:

You have asked the Ethics Commission whether the members of the board of trustees of the Ohio Historical Society (Society) are subject to the Ohio Ethics Law and related statutes.

As explained below, a member of the Society's Board of trustees: (1) is not subject to the provisions of Chapter 102. of the Revised Code because a member is not an officer or employee of the state; (2) is a "public official" for purposes of R.C. 2921.42 and subject to the provisions thereof; (3) is a "public servant" for purposes of Section 2921.43 of the Revised Code and subject to the provisions thereof; and, (4) is not required to file a financial disclosure statement.

The Ohio Historical Society

The Society is a nonprofit corporation created pursuant to the Ohio Nonprofit Corporation Act. The Society is governed by a Constitution that has been adopted by its members. The Constitution provides that the Society is governed by a board of trustees comprised of eighteen members; nine members are appointed by the Governor and nine members are selected by the Society's membership. The Constitutional provision that grants the Governor the power to appoint nine board members may be removed by the Society's membership at any time. The Society's board of trustees appoints a director who serves at the pleasure of the board.

R.C. 149.30 provides statutorily authority to the Society to perform public functions for the state and its political subdivisions. Generally, the Society's public functions involve promoting the knowledge of history and archaeology and maintaining the archives of the state and its political subdivisions. See R.C. 149.30-149.31. The Society is involved in the care and preservation of state memorials, historical sites, structures, earthworks, and monuments. Id. The Society operates museums, publishes books and other information, and provides educational materials to schools and the public. Id.

The Society is authorized by statute to receive appropriations from the state to perform its public functions. R.C. 149.30. The Society's acceptance of the state's appropriations constitutes an agreement by the Society to perform its public functions in accordance with the terms of the appropriation and to use the funds only for their intended purposes. Id. You state that, pursuant to R.C. 149.30, the relationship between the state and the society exists by the mutual consent of the

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state and the Society. You stress that the state has no obligation to utilize the Society for the performance of the statutorily prescribed public functions and the Society has no obligation to accept the state's appropriations or to agree to perform the public functions. You also stress that the Society's Constitution and the Ohio Nonprofit Corporation Act, rather than R.C. 149.30, govern the conduct of all of the board members.

The Society receives funds from sources other than the state. The Ohio Supreme Court, in Ohio Historical Society v. State Employment Relations Bd., 66 Ohio St. 3d 466 (1993), recounts information about the Society's funding that originally appeared in a document that the Society prepared for the Governor and the General Assembly entitled Ten Year Plan of the Historical Society (June 1974). The document provides that the state's appropriations comprise sixty-five to seventy percent of the Society's funding. Ohio Historical Society, 66 Ohio St. 3d at 473.

Sources of funding for the Society, other than the state, include retail sales, admission fees, membership dues, and private donations. The Society also has created a nonprofit corporation, the Ohio Historical Foundation, for the purpose of soliciting and receiving charitable donations that support the Society's activities. The Foundation is governed by a board of trustees whose members are appointed by the Society's board of trustees. Despite the fact that some of the Society's funds are derived from sources other than state appropriations, the Auditor of State is required to audit all of the Society's funds and fiscal records. R.C. 149.30.

In addition to its audit of the Society's funds and fiscal records, the state has other significant connections with the Society. The state has given the Society the authority to promulgate administrative rules prescribing guidelines for archaeological investigations of public lands, archaeological preserves, and sites listed in the state registry of archaeological landmarks. R.C. 149.54. See also OAC Chapter 149-1. Also, the state has given the Society's employees the ability to participate in the Public Employees Retirement System. R.C. 149.30 (Q). See also R.C. 145.01. Furthermore, the state requires the Society to submit an annual report to the Governor detailing its activities, programs, and operations. R.C. 149.30 (Q).

Jurisdiction of the Ethics Commission

The Ethics Commission administers, interprets, and enforces the Ohio Ethics Law and related statutes, Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code. R.C. 102.02, 102.06, and 102.08. The Ohio Ethics Laws and related statutes seek to protect the public by prohibiting all public officials and employees from using their official position for their own personal benefit or the benefit of their family members or business associates and by requiring some public officials and employees to disclose personal financial information to protect against conflicts of interest. These statutes contain definitions that determine whether an individual is subject to their prohibitions. Because these definitions differ, an individual may be subject to some, but not all, of the prohibitions found in R.C. Chapter 102. and R.C. Sections 2921.42 and 2921.43. Ohio

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Ethics Commission Advisory Opinion No. 93-017 (stating that a teacher, instructor, professor, or other kind of educator who does not perform administrative duties is subject to R.C. 102.04 and R.C. 2921.42, and R.C. 2921.43, but is not subject to the provisions in R.C. Chapter 102. that impose prohibitions upon "public officials and employees").

Protections to the Public Imposed Upon "Public Officials and Employees"

The prohibitions in R.C. Chapter 102. that are imposed upon "public officials and employees" will be addressed first. See R.C. 102.03 (A) to (E), (H), (I), and (J).

R.C. 102.01 (B) defines the term "public official or employee" for purposes of Chapter 102. of the Revised Code as "any person who is elected or appointed to an office or is an employee of any public agency." 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 county, city, village, township, and the five state retirement systems, or any other governmental entity.

The issue is whether the Society falls within the definition of "public agency" so that the members of its board of trustees are subject to the provisions of R.C. Chapter 102. that are imposed upon "public officials and employees."

The Ethics Commission has addressed the issue of whether the Ohio Ethics Laws and related statutes apply to persons who are members of the board of trustees of a nonprofit corporation. Ad. Ops. No. 75-013 and 75-019. In Advisory Opinion No. 75-013, the Ethics Commission held:

The provisions of Chapter 102 of the Revised Code apply to "public officials and employees" and "persons elected or appointed to an office or employed by" an agency of the state, county, township, municipal corporation or other governmental entity. The governmental or public agencies referred to in Chapter 102 of the Revised Code are entities created by the Constitution or legislative bodies of the state, county, township, or municipal corporation.

Nonprofit corporations formed under Section 1702.04 of the Revised Code can be distinguished from these public or governmental agencies in that the nonprofit corporations, by virtue of Section 1702.04 of the Revised Code are created by:

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“(A) Any person, singly or jointly with others, and without regard to residence, domicile or state of incorporation, may form a corporation by signing and filing with the secretary of state articles of incorporation, . . .”

Thus, although the activities and functions of a nonprofit corporation may be of a public nature, the [nonprofit] corporation is not a governmental agency for purposes of Chapter 102 of the Revised Code.

The prohibitions of Chapter 102 of the Revised Code, therefore, do not apply to persons participating through nonprofit corporations in services to their community. (Emphasis added.)

As explained above, R.C. Chapter 149. defines the relationship between the state and the Society. However, R.C. Chapter 149. does not create the Society, rather, as stated above, the Society is a nonprofit charitable corporation organized under the Ohio Nonprofit Corporation Act. The Society is not a department, division, institution, board, commission, authority, bureau, or other instrumentality of the state, or a political subdivision, or other governmental entity. Because the Society is not an entity created by the Constitution, or a legislative body of the state, county, township, or municipal corporation, it is not a “public agency” for purposes of R.C. Chapter 102. Therefore, the prohibitions of Chapter 102. of the Revised Code that impose restrictions upon “public officials and employees” do not apply to the members of the Society’s board of trustees.

It must be noted, however, that any member of the Society’s board of trustees who is otherwise a public official or employee is subject to the provisions of Chapter 102. due to his or her position as a public official or employee, but not due to his or her membership on the Society’s board of trustees.

Prohibition Against Influence Peddling Imposed by R.C. 102.04

R.C. 102.04 (A) and (B) impose prohibitions against representing clients in certain situations, and selling goods and services to state agencies, upon “[a] person elected or appointed to an office of or employed by the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts.”

The issue becomes whether a member of the Society's board of trustees is "appointed to an office of or employed by . . . any department, division, institution, instrumentality, board, commission, or bureau of the state" for purposes of R.C. 102. 04 (A) and (B).

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As explained above, R.C. Chapter 149. defines the relationship between the state and the Society. However, as stated above, R.C. Chapter 149. does not create the Society, rather, the Society is a nonprofit charitable corporation. As previously discussed, the Society is not a “department, division, institution, instrumentality, board, commission, or bureau of the state.” Because the Society does not fall within the definition of the entities enumerated in R.C. 102.04 (A) and (B), the prohibitions of R.C. 102.04 (A) and (B) do not apply to the members of the Society’s board of trustees.

It must be noted, once again, that any member of the Society’s board of trustees who is otherwise a public official or employee is subject to the provisions of R.C. 102.04 due to his or her position as a public official or employee, but not due to his or her membership on the Society’s board of trustees.

Prohibition Providing Public Contract Protections and Imposed by R.C. 2921.42

Am. H.B. 1040, 111th Gen. A. (1976) (eff. August 27, 1976) vested the Ethics Commission with the authority to interpret R.C. 2921.42. See R.C. 102.08. R.C. 2921.01 (A) contains definitions that determine whether an individual is subject to the prohibitions imposed by R.C. 2921.42. Because the definitions found in R.C. 2921.01 (A) are more inclusive than the definitions found in R.C. Chapter 102., an individual may be subject to R.C. 2921.42, but not subject to the prohibitions found in R.C. Chapter 102. Ad. Op. No. 93-017 (stating that a teacher, instructor, professor, or other kind of educator who does not perform administrative duties is subject to R.C. 102.04 and R.C. 2921.42, and R.C. 2921.43, but is not subject to the provisions in R.C. Chapter 102. that impose prohibitions upon “public officials and employees”).

R.C. 2921.01 (A) defines the term "public official" for purposes of R.C. Chapter 2921. as:

[A]ny elected or appointed officer, or employee, or agent of the state or any political subdivision thereof, whether in a temporary or permanent capacity, and including without limitation legislators, judges and law enforcement officers. (Emphasis added.)

As described above, the members of the Society’s board of trustees are officers of a not-for-profit corporation. They are not officers of a “public agency,” which as set forth above, includes the state and its political subdivisions. Accordingly, the members of the Society’s board of trustees are neither officers nor employees of the state.

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Agents of the State

However, R.C. 2921.01 includes "agents of the state," as well as officers and employees, within the definition of "public official" for purposes of R.C. 2921.42. The issue remains therefore, whether a member of the Society can be considered an "agent" of the state for purposes of R.C. 2921.42.

Because the word "agent" is not statutorily defined for purposes of R.C. 2921.42, the Ethics Commission has applied the definition of the word "agent" that has been used in judicial decisions. The Ethics Commission has held that an individual is an "agent" of the state when the state has empowered him, or the board upon which he serves, to act on the state's behalf and to bind the state. Ad. Ops. No. 85-005, 92-001, and 92-007. In Advisory Opinion No. 92-001, the Ethics Commission held:

A person is an "agent of the state," and thus, a "public official" as defined in Division (A) of Section R.C. 2921.01 of the Revised Code, when: (a) the person has the power to act on behalf of and bind the state by his actions; (b) the state has the right to control the actions of the person; and (c) the actions of the person are directed toward the attainment of an objective sought by the state.

An agreement creating the agency relationship may be express or implied. Ross v. Burgan, 163 Ohio St. 211 (1955).

The relationship between the state and the members of the Society's board of trustees is statutorily established. As stated above, the majority of the Society's funds are secured from the state for the performance of public functions that the state, acting through the General Assembly, has specified in R.C. 149. The State, by enacting these statutes, has empowered the Society to act on behalf of and bind the state with regard to promoting the knowledge of history and archaeology and maintaining the archives of the state and its political subdivisions, including the care and preservation of state memorials, historical sites, structures, earthworks, and monuments, and the operation of museums, the publishing of books and other information, and provision of educational materials to schools and the public.

The state exercises control over the Society's operations in a number of ways. The state has a degree of fiscal oversight and control over the Society. As stated above, R.C. 149.30 requires the Auditor of State to examine the Society's funds and fiscal records. This financial oversight and control is also illustrated by the first issue the Ethics Commission considered and recently answered from your request. The question that you posed to the Commission pertained to the construction of a historic church building at a reconstructed 19th-century village, known as Ohio Village, that the Society operates. In that instance, you stated that the Society was required to seek a waiver of

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competitive bidding from the State Controlling Board, allowing the Society to authorize an extensive contract with a construction firm that has a family connection with a member of the board of trustees of the Ohio Historical Foundation, in order to accommodate the offer of an in-kind donation of overhead and profit from the construction firm.

In addition, the state has granted the Director of the Society the authority to promulgate administrative rules, on specified matters, pursuant to the procedures found in R.C. Chapter 119. The procedure for the promulgation of administrative rules imposes the General Assembly's oversight and control over the actions of the rule-making entity. For example, Division (I) of R.C. 119.03 requires that the Joint Committee on Agency Rule Review (JCARR) review all proposed rules and enables the General Assembly to invalidate a proposed rule. Under R.C. 119.03 (I), JCARR may recommend that the General Assembly "adopt a concurrent resolution" to invalidate all or part of a proposed rule if it either exceeds the rule-making entity's statutory authority, conflicts with another rule adopted by the same rule-making entity, conflicts with the legislative intent in the entity's enabling statutes, or does not have been submitted with a summary and fiscal analysis of the proposed rule.

OAC 149-1-01 also states that the promulgation of a rule does not change the status of the Society as a private, nonprofit organization. The issue is not whether the Society is changed into a public entity because it performs public functions, but rather whether the Society, as a nonprofit corporation acts as an agent of the state.

The question of the status of the Society, with respect to its relationship to the state, has also been judicially considered. In Saxbe v. The Ohio Historical Society, Franklin County Court of Common Pleas (No. 217076 unreported), the Court held:

The Ohio Historical Society is not a state institution, department, board, or commission within the meaning of Section 131.01, Revised Code, or a collector or receiver of revenue of the state within the meaning of Section 131.07, Revised Code, but is a private corporation nonprofit organized under the laws of Ohio, and has been acting as an agent of the state for the purpose of preserving, maintaining, and managing certain parks and memorial sites of the state, or in which the state has an interest, which purposes are found by this Court to be public purposes. (Emphasis added.)

Because of the factors explained above, the relationship between the state and the Society is clearly one of principal and agent as that term has been judicially defined. As stated above, the majority of the Society's funds are secured from the state for the performance of public functions that the state, acting through the General Assembly, has specified in R.C. 149.30-149.31.

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Therefore, the state has empowered the Society to receive and expend public funds to act on behalf of and bind the state in matters pertaining to promoting the knowledge of history and archaeology and maintaining the archives of the state and its political subdivisions, including the care and preservation of state memorials, historical sites, structures, earthworks, and monuments, and the operation of museums, the publishing of books and other information, and provision of educational materials to schools and the public. Also, because of its fiscal oversight and control over the Society and its oversight of the Society's functioning as a rule-making entity, the state has the ability to control the activity of the Society. Furthermore, the Society's statutorily prescribed actions are designed to attain objectives that the state seeks. Accordingly, a member of the Society's board of trustees is an agent of the state and subject to the prohibitions imposed by R.C. 2921.42.

Prohibition Against the Receipt of Improper Compensation Imposed by R.C. 2921.43

R.C. 2921.43 generally prohibits public servants from receiving improper compensation for their public duties. R.C. 2921.43 also falls within the Ethics Law and this statute applies to "public servants." R.C. 2921.01 (B) defines the term "public servant" as used in R.C. 2921.43 as: any public official as defined in R.C. 2921.01 (A) and, "[a]ny person performing ad hoc a governmental function, including, but not limited to, a juror, member of a temporary commission, master, arbitrator, advisor, or consultant." A member of the Society's Board of trustees is, as discussed above, a "public official" under the definition set forth in Division (A) of Section 2921.01, and accordingly, a "public servant" for purposes of R.C. 2921.43. Also, by performing the public functions described above, the members of the Society's Board of trustees are performing governmental functions.

R.C. 2921.43 (A) prohibits a public servant from accepting compensation, other than as allowed by law, to perform her official duties. R.C. 2921.43 (A) also prohibits a person, including an individual, corporation, partnership, association or other similar entity, see R.C. 1.59, from promising or giving to a public servant any compensation, other than allowed by law, to perform her official duties. See generally Adv. Ops. No. 89-012, 89-014, and 90-001.

In the instant situation, R.C. 2921.43 (A) prohibits members of the Society's Board of trustees from accepting, and prohibits private parties from promising or giving to members of the Society's Board of trustees, any compensation other than allowed by law, for the performance of the official duties statutorily entrusted to the Society by the state as a part of the principal/agent relationship between the Society and the state. Those duties, discussed more fully above, include receiving and expending public funds to act on behalf of and bind the state in matters pertaining to promoting the knowledge of history and archaeology and maintaining the archives of the state and its political subdivisions, including the care and preservation of state memorials, historical sites, structures, earthworks, and monuments, and the operation of museums, the publishing of books and other information, and provision of educational materials to schools and the public. R.C. 2921.43

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(B) and (C) also prohibit a public servant from soliciting or accepting anything of value, or coercing a campaign contribution, in consideration of an appointment to a public position, or other kind of action material to any aspect of a public position.

Financial Disclosure

The issue remains whether members of the Society's board of trustees are subject to Ohio's financial disclosure law, found in R.C. 102.02. The financial disclosure law requires some public officials and employees to complete annual financial disclosure statements on which the filer reports sources of income, investments, real estate holdings, and other financial interests. The purpose of the financial disclosure law is to remind public officials of those financial interests that might impair their judgment on behalf of the public, inform the public of the financial interests of the officials who serve them, and assist in instilling confidence in the actions of public officials. Section 102.02 of the Revised Code does not use the term "public official or employee" as defined in R.C. 102.01 (B) and (C) to determine the scope of its applicability, but rather uses different standards in setting forth who is subject to its requirement.

R.C. 102.02 (A) requires individuals who are elected to state, county, and city offices, individuals elected to school board office in large school districts, candidates and appointees for these elective offices, school district superintendents, treasurers, and business managers, specified upper level state officials, and state employees who are paid according to Schedule "C" of R.C. Section 124.15 and Schedule "E-2" of R.C. 124.152 to file a financial disclosure statement with the Ohio Ethics Commission. The members of the Society's board of trustees do not fall within any of these categories of officials who are required to file a financial disclosure statement under R.C. 102.02 (A).

R.C. 102.02 (B) provides in pertinent part:

The Ohio ethics commission, . . . using the rule-making procedures of Chapter 119. of the Revised Code, may require any class of public officials or employees under its jurisdiction and not specifically excluded by this section whose positions 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, to file an annual statement on or before the fifteenth day of April under division (A) of this section. (Emphasis added.)

Thus, while Division (A) of R.C. 102.02 does not use the term "public official or employee," as defined in R.C. 102.01 (B) and (C), to determine the scope of its applicability, Division (B) of R.C. 102.02 does use the term. As explained above, the provisions of Chapter 102. of the Revised Code that pertain to "public officials and employees" do not apply to the members of the Society's board

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of trustees. Accordingly, the Ethics Commission cannot use the rule-making procedures of Chapter 119. of the Revised Code to require members of the Society's board of trustees to file an annual financial disclosure statement under R.C. 102.02 (A) despite the fact that the board members' duties in performing its public functions on behalf of the state 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 the execution of other public trusts.

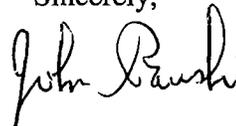
Therefore, members of the Society's board of trustees are not required to file a financial disclosure statement with the Ohio Ethics Commission. Of course, any member of the Society's board of trustees who is otherwise a public official or employee, in a position for which a filing is required, must file a financial disclosure statement.

Therefore, as explained above, a member of the Society's Board of trustees: (1) is not subject to the provisions of Chapter 102. of the Revised Code because a member is not an officer or employee of the state; (2) is a "public official" for purposes of R.C. 2921.42 and subject to the provisions thereof; (3) is a "public servant" for purposes of Section 2921.43 of the Revised Code and subject to the provisions thereof; and, (4) is not required to file a financial disclosure statement.

Because R.C. 2921.42 and 2921.43 exist to protect the public against interests a public servant may have in purchases or contracts, or improper compensation, the Ohio Ethics Commission offers to you and members of the Society's board any information or discussion or training regarding the operation or application of these statutes to your unique mission.

This informal staff advisory opinion was approved by the Ethics Commission at its meeting on June 30, 1997. 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. It interprets the Ohio Ethics Law and related statutes and does not purport to interpret other laws or rules. Please contact me if you have any questions or wish to request a formal advisory opinion from the Ethics Commission.

Sincerely,



John Rawski
Staff Attorney