

OHIO ETHICS COMMISSION

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March 26, 1999

Informal Opinion 1999-INF-0326-2

Gordon Proctor, Interim Director
Ohio Department of Transportation

Dear Mr. Proctor:

I am writing in response to a letter from C. Kathleen Barber, Acting Human Resources Administrator for the Ohio Department of Transportation, inquiring whether the members of the Transportation Review Advisory Council (TRAC) are required to file financial disclosure statements (FDSs) pursuant to R.C. 102.02. Ms. Barber also asked whether the Ohio Department of Transportation (ODOT) would have to pay their filing fees.

In accordance with R.C. 102.02(B) and OAC 102-5-01 and 102-5-02, each member of TRAC, who is not already required to file an FDS, will be required to file an annual FDS beginning in calendar year 1999. Members of TRAC will be required to file within ninety days of the date of the Commission's decision, on or before June 24, 1999. Members who are appointed after June 24, 1999, will have filing deadlines that are dependent upon their appointment dates.

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 officers (in this case, the Director of Transportation) 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 FDSs. In making the determination about the exercise of administrative discretion by any board or its staff, the Ethics Commission analyzes the statutory and regulatory authority of each board.

The Transportation Review Advisory Council was created pursuant to R.C. 5512.07. TRAC is composed of nine members, one of whom is the Director of Transportation. The Director of Transportation is the chairperson of TRAC. Of the eight remaining members, one is appointed by the Speaker of the House of Representatives and one is appointed by the President of the Senate. The other six members are appointed by the Governor with the advice and consent of the Senate.

The statutory authority of TRAC is detailed in Chapter 5512 of the Revised Code. R.C. 5512.03, for example, states:

Upon completing the written project selection process for the prioritization of new transportation capacity projects, the director of transportation shall submit it to the transportation review advisory council. The council shall review the process, and approve it or make revisions.

R.C. 5512.04 states that:

At least once every two years, the director of transportation shall prepare a fiscal forecast predicting or indicating the amount of funding expected to be available for construction of new transportation capacity projects during the period of the forecast. The forecast shall be consistent with the biennial budget approved by the general assembly. The transportation review advisory council shall develop and approve a list of projects that will not cause spending to significantly exceed the funding predicted to be available by the fiscal forecast.

R.C. 5512.05 also states that:

In performing its duty to develop the project selection process, and list of projects, the transportation review advisory council shall conduct no more than six public hearings per year at various locations around the state. At the hearings, the council shall accept public comment related to the project selection process, and on the merits of major new transportation projects. Members of the council shall attend the hearings in person.

The powers and duties of TRAC are to develop a project selection process for new transportation capacity projects, to review nominated projects, and to approve a prioritized list of projects to be funded. Based on its statutory authority, TRAC has developed written policies and processes for selecting major new capacity projects. These policies and processes are available for review in TRAC's Website.

According to these written policies and processes, TRAC's process of prioritizing projects begins with the nomination of the projects. Projects may be nominated by ODOT, metropolitan planning organizations, county engineers, transit authorities, county commissions, and others. ODOT's Division of Multi-Modal Planning conducts technical analysis of projects to provide TRAC with recommended transportation scores. According to TRAC's written policies and processes, the Ohio Department of Development and ODOT's Office of Economic Development jointly provide TRAC with recommended economic development scores. These scores are a means to help TRAC generally prioritize and rank projects in order of their transportation and economic development benefits. TRAC is the final arbiter of any disputes regarding transportation or economic development scores and makes the final decision as to these scores. TRAC, however, can consider additional facts beyond a project's scores, and can select a project for funding regardless of its scores.

TRAC holds up to six public hearings and other working meetings to review nominated projects. TRAC has several options after it reviews a project. It may agree to fund the project, may agree to share funding of the project with another entity, or may agree to fund some phase of project development. TRAC may also ask the staff to provide a more in-depth feasibility analysis, may ask the project sponsor to scale back the project and re-submit the project in a lesser form, or may reject the request for funding.

Based upon the powers and duties of TRAC to develop a project selection process for new transportation projects and to approve and prioritize a list of projects to be funded, the Ohio Ethics Commission finds that the members of TRAC hold positions that exercise the kind of discretion described in OAC 102-5-01 and 102-5-02. As such, the members of TRAC are required to file annual financial disclosure statements with the Ethics Commission.

The Commission understands, from conversations with the Chief Legal Counsel at ODOT, that ODOT participated in the creation of TRAC, and that the purpose for TRAC was to establish an independent and objective process for the ranking of transportation projects in the state. Further, the Commission understands that the Department concurs in its conclusion that TRAC exercises sovereign authority and that, while the Director can determine that certain projects should be given precedence, this is a rare occurrence.

Finally, the Commission notes that R.C. 5512.07, the enabling language for TRAC, provides:

Appointed members shall have no conflict of interest with the position and shall be capable of performing the duties of the council with impartiality. For purposes of this section, conflicts of interest may include, but are not limited to, employment by or on behalf of, affiliation with, or public advocacy of a new highway capacity project under consideration for possible approval by the council.

The clearly stated legislative intent is that TRAC members should exercise their authority free from conflicts of interest. The process of completing Financial Disclosure Statements will assist council members in meeting this stated objective by providing them with an annual opportunity to review and consider their private financial interests. Once again, this is consistent with ODOT's understanding of TRAC's authority and mandate.

You serve as the Director of Transportation and also as the chairperson of TRAC. As the director, you are already required to file an FDS. This decision by the Ethics Commission that TRAC members must file FDSs does not require you to file an additional FDS. Any other member of TRAC who is already required to file an annual FDS, because of some other public office or employment, is not required to file more than one FDS per calendar year. These individuals should indicate all of their filing capacities on each year's filing, or contact the Ethics Commission for assistance in completing the FDSs, to assure that there is no administrative problem in recognizing that the individuals hold more than one filing position.

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Financial Disclosure Statements filed by members of state boards and commissions who receive compensation for their service are available for public inspection. There is a provision in the statutory language that empowers TRAC that sets compensation for TRAC members. According to R.C. 5512.08, and the information you have provided, TRAC members currently receive \$5,000.00 for service between July 1, 1998 and June 30, 1999. TRAC members also receive necessary travel and other expenses related to their service on the council, except that the combined amount of their compensation and expenses cannot exceed \$15,000.00 in any year. Thus, TRAC members are compensated for their service and their filings will be considered public records, in accordance with R.C. 102.02(B).

You have also asked whether ODOT would have to pay the filing fees for members of TRAC. R.C. 102.02(E)(4) provides:

For any public official who is appointed to a nonelective office of the state and for any employee who holds a nonelective position in a public agency of the state, the state agency that is the primary employer of the state official or employee shall pay the fee required under division (E)(1) or (F) of this section.

TRAC members are public officials appointed to a nonelective office of a state commission. Therefore, the state agency that is their primary employer is required to pay their filing fees and any late fees. If a TRAC member files solely as a member of TRAC, ODOT, as his primary employer, would be required to pay his filing fee and any late fee. ODOT may also be required to pay a TRAC member's filing fee even if he also files in another capacity, depending on what his other filing capacity is. Please contact the Ethics Commission for more information regarding any official who serves with any public agency in addition to TRAC.

This informal advisory opinion was reviewed and approved by the Ohio Ethics Commission at its March 26, 1999 meeting. The Ethics Commission will proceed to amend the list of agencies required to file annual financial disclosure statements under OAC 102-5-02, to include TRAC. Effective March 26, 1999, the Ethics Commission will expect to receive a 1998 FDS from any member of TRAC, appointed on or before that date, by June 24, 1999. Any member of TRAC appointed, in 1999, after March 26, 1999, will be required to file an FDS within 90 days of the date of his appointment.

If you have any questions about the financial disclosure filing requirements, the information to be disclosed, or the process followed, please contact Donna Skaggs, Financial Disclosure Analyst, for assistance.

Sincerely,



Laura Evans Nolan
Staff Attorney

cc: C. Kathleen Barber, Acting Human Resources Administrator