

OHIO ETHICS COMMISSION

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September 16, 2003

Informal Opinion 2003-INF-0916

Marlo B. Tannous
Chief Legal Counsel
Department of Development
[REDACTED]

Dear Ms. Tannous:

In a letter received by the Ohio Ethics Commission on August 22, 2003, you have asked whether the members of the Third Frontier Advisory Board are subject to Chapter 102. and Sections 2921.42 and 2921.43 of the Ohio Revised Code.

Brief Answer

As set forth more fully below, the members of the Third Frontier Advisory Board (Board) are not subject to Chapter 102. and Section 2921.42 of the Ohio Revised Code. However, Board members are "public servants," and therefore subject to supplemental compensation provisions in R.C. 2921.43.

Because of the specific statutory requirement in R.C. 184.03(G), Board members are required to file financial disclosure statements. The Commission supports the protections to the public resulting from financial disclosure, as applied by the General Assembly to the members of the Board, because the members are not otherwise subject to the conflict of interest provisions in the Ethics Law and related statutes.

Facts

By way of history, you have explained that the Board was created pursuant to R.C. 184.03. The Board is composed of sixteen members selected for their knowledge of and experience in science and technology matters. R.C. 184.03(A). The Governor appoints fourteen members. Id. The Speaker of the House of Representatives and the President of the Senate each appoints one of the remaining two members. Id.

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According to R.C. 184.03(A), the Board shall, upon request of the Third Frontier Commission, "provide general advice" to the commission on various items including, but not limited to:

- (1) Strategic planning for programs administered by the commission;
- (2) Budget and funding priorities, funding processes, request-for-proposal criteria, and other aspects of the management and coordination of programs administered by the commission;
- (3) Metrics and methods of measuring the progress and impact of programs administered by the commission; and
- (4) Studies to be conducted to collect and analyze data relevant to advancing the goals of programs administered by the commission.

Members of the Board serve without compensation, but receive necessary and reasonable expenses.

The Ohio Ethics Law and Related Statutes—Purpose and Definitions

The Ohio Ethics Law and related statutes consist of Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code. See R.C. 102.06 and 102.08. These statutes generally protect against direct personal, family, and business conflicts of interest, and also prohibit public officers and employees from misusing the authority or influence with which they are entrusted by the public.

R.C. 102.01(B) defines the term "public official or employee" for purposes of R.C. Chapter 102. as "any person who is elected or appointed to an office or is an employee of any public agency." In effect, the restrictions in R.C. Chapter 102., regarding ethics or public officers, apply to any elected, appointed, or employed person serving a municipality, county, state agency, or other public agency.

R.C. Chapter 2921. sets forth offenses against justice and public administration, which apply to "public officials" (such as unlawful interest in a public contract, dereliction of duty, and theft in office) or "public servants" (such as supplemental compensation, bribery, and interfering with civil rights). Two of the provisions in R.C. Chapter 2921. are within the jurisdiction of the Ohio Ethics Commission—R.C. 2921.42 (unlawful interest in a public contract) and 2921.43 (supplemental compensation). The definitions of "public official," for purposes of R.C. 2921.42, and "public servant," for purposes of R.C. 2921.43, are broader than the definition of "public official or employee," for purposes of Chapter 102.

Chapter 102.—"Public Official or Employee"

As noted above, R.C. 102.01(B) defines the term "public official or employee" for purposes of R.C. Chapter 102. 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 "public agency":

"Public agency" means the 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. "Public agency" does not include a department, division, institution, board, commission, authority, or other instrumentality of the state or a county, municipal corporation, township, 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.

In order to be excluded from the definition of "public agency," a board must meet three requirements. The board must: (1) function exclusively for advisory purposes; (2) not expend more than ten thousand dollars per calendar year, excluding salaries and wages of employees; and (3) have no compensated members.

It is clear, from the statutory provisions that enable the Board, that the Board falls within the exclusion from the definition of "public agency." Based on R.C. 184.03, it is apparent that the purpose of the Board is to provide "general advice" to the Third Frontier Commission. The Board has no other statutory function. Therefore, the Board functions exclusively for advisory purposes.

R.C. 184.03(J) provides that Department of Development will furnish office space and facilities for the Board. You have explained that the Department will also pay the travel expenses incurred by the Board members, pursuant to R.C. 184.03(H). There is no other provision for budget for the Board. Therefore, the Board does not expend more than ten thousand dollars per calendar year.

Finally, it is clear that the members of the Board are uncompensated. R.C. 184.03(H) provides that Board members are not compensated for their service on the Board.

Because the Board is not a "public agency," for purposes of R.C. 102.01(B), the members of the Board are not within the definition of "public official or employee," for purposes of the provisions in R.C. Chapter 102. Therefore, the Board members are not subject to the restrictions set forth in that Chapter.

R. C. 102.04—Elected or Appointed to an Office

R.C. 102.04 does not use the term “public official or employee” for purposes of determining who is subject to its prohibitions. R.C. 102.04(A) and (B) impose prohibitions 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.”

Even though the Third Frontier Advisory Board is not a “public agency,” for purposes of R.C. 102.01(C), it is a “board” of the state. As noted above, Board members are not compensated for their service on the Board and are not “employees” of the Board. Further, Board members are not elected to their positions. Therefore, the question is whether Board members are “appointed to an office of” the Board.

In Advisory Opinion No. 85-005, the Ethics Commission determined that members of a public agency that functions exclusively for advisory purposes and does not exercise the sovereign powers of government are not deemed to be “appointed to an office” or “officers.” As noted above, the Board functions exclusively for advisory purposes. The statutes that establish and define the duties of the Board do not confer upon its members the power to exercise final decision-making authority. Therefore, the Board does not exercise the sovereign power of the state. Accordingly, the members of the Board are not appointed to an office of the Board, and are not subject to the restrictions discussed in R.C. 102.04(A) and (B).

“Public Official” Definition of R.C. 2921.01—Officer, Employee, or Agent of the State

The protections to the public contained in R.C. 2921.42 apply to any “public official.” The term “public official” is defined in R.C. 2921.01(A) as:

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

As explained above, Board members are not officers, and do not serve as employees, of the state. However, as set forth above, the definition of the term “public official” includes “agents” of the state.

Because the word “agent” is not statutorily defined for purposes of R.C. 2921.42, the Ethics Commission has relied upon judicial interpretation of the word “agent.” The Commission has held that an individual is an “agent” of the state when the state has empowered him, or the board that he serves, to act on the state’s behalf and to bind the state. Adv. Ops. No. 85-005, 92-001, and 92-007. In Advisory Opinion No. 92-001, the Ethics Commission stated:

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.

As described above, the Board's only statutorily defined duty is to provide advice to the Third Frontier Commission. Therefore, because the Board is not empowered to act on behalf of the Commission or the Department of Development, the Board members are not "agents," and are not subject to the public contract provisions set forth in R.C. 2921.42.

"Public Servant" Definition of R.C. 2921.01—Performing Ad Hoc Governmental Functions

R.C. 2921.43 also falls within the jurisdiction of the Ethics Commission. R.C. 2921.43(A) prohibits a "public servant" from accepting compensation, other than as allowed by law, to perform his official duties. R.C. 2921.43(A) also prohibits a "person," which is defined in R.C. 1.59 to include an individual, corporation, partnership, association, or other similar entity, from promising or giving to a public servant any compensation, other than as allowed by law, to perform any act in his public capacity or generally perform the duties of his public position. Adv. Ops. No. 89-012, 89-013, and 90-001.

R.C. 2921.01(B) defines the term "public servant," as used in R.C. 2921.43, to include "[a]ny person performing ad hoc a governmental function, including without limitation a juror, member of a temporary commission, master, arbitrator, advisor, or consultant."

In the instant situation, the Board members are performing a governmental function by acting as advisors to the Third Frontier Commission regarding: (1) strategic planning for programs administered by the commission; (2) budget and funding priorities, funding processes, request-for-proposal criteria, and other aspects of the management and coordination of programs administered by the commission; (3) metrics and methods of measuring the progress and impact of programs administered by the commission; and (4) studies to be conducted to collect and analyze data relevant to advancing the goals of programs administered by the commission. Because the Board members are performing a governmental function, they are "public servants" subject to the prohibitions in R.C. 2921.43.

Board members are prohibited from accepting any compensation that is provided to them for performing their duties as members of the Third Frontier Advisory Board, and any payments for expenses, except as provided by law. R.C. 2921.43(B) and (C) also prohibit a Board member from soliciting or accepting anything of value, or coercing a campaign contribution, in consideration of an appointment to a public position or use of authority to prefer or maintain the status of a public employee.

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Financial Disclosure

As noted above, members of the Board are not "public officials or employees," for purposes of the Ethics provisions in Chapter 102. As a result, the Board members would not normally fall within the class of individuals who are required to file financial disclosure statements. However, you should note R.C. 184.03(G), which specifically requires that members of the Board file annual financial disclosure statements with the Ohio Ethics Commission.

The Commission supports the protections to the public resulting from financial disclosure, as applied by the General Assembly to the members of the Board, because the Board members are not otherwise subject to the conflict of interest provisions in the Ethics Law and related statutes. R.C. 184.03(G) requires that the Board members file statements as described in R.C. 102.02(B), which are confidential statements.

Conclusion

As set forth more fully above, the members of the Third Frontier Advisory Board are not subject to Chapter 102. and Section 2921.42 of the Ohio Revised Code. However, Board members are "public servants," and therefore subject to supplemental compensation provisions in R.C. 2921.43.

Because of the specific statutory requirement in R.C. 184.03(G), Board members are required to file financial disclosure statements. The Commission supports the protections to the public resulting from financial disclosure, as applied by the General Assembly to the members of the Board, because the members are not otherwise subject to the conflict of interest provisions in the Ethics Law and related statutes.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on September 10, 2003. The Commission commends you for requesting guidance on this matter.

The opinion is based on the facts presented. It 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,



Jennifer A. Hardin
Chief Advisory Attorney