

OHIO ETHICS COMMISSION

Merom Brachman, *Chair*
Sarah M. Brown, *Vice Chair*



8 East Long Street, 10th Floor
Columbus, Ohio 43215
Telephone: (614) 466-7090
Fax: (614) 466-8368
Web site: www.ethics.ohio.gov

David E. Freel, *Executive Director*

INFORMATION SHEET: ADVISORY OPINION NO. 2005-01 **DISCLOSURE OF INCOME AND INVESTMENTS IN TRUST**

What is the question addressed in the opinion?

Does the Ethics Law require a financial disclosure filer who is a beneficiary of a trust to disclose the sources of income to, and investments held by, the trust?

What is the answer in the opinion?

The Ethics Law requires a financial disclosure filer to disclose all sources of income, as described in the statute, received by the filer or by any other person for the filer's use or benefit. When a financial disclosure filer is a beneficiary of the trust, the income earned by the trust is earned for the beneficiary's use or benefit, and the filer is required to disclose, as sources of income, the trust and sources of income to the trust received during the preceding calendar year.

The Ethics Law also requires a financial disclosure filer to disclose the name of every corporation, trust, business trust, partnership, or association, within certain parameters, in which the filer or any other person for the filer's use or benefit had an investment of over one thousand dollars. Because the trustee invests the assets of a trust for the use or benefit of the beneficiary, a filer who is a beneficiary of a trust is required to disclose, as investments, the trust and investments within the trust.

To whom does this opinion apply?

This opinion applies to any public official or employee who is required to file a financial disclosure statement.

When will the conclusions in this opinion apply?

The conclusions in the opinion will apply to financial disclosure filings made for calendar year 2005 and subsequent years.

For More Information, Please Contact:

David E. Freel, Executive Director, **or**
Jennifer A. Hardin, Chief Advisory Attorney

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Advisory Opinion
Number 2005-01
June 2, 2005

Syllabus by the Commission:

- (1) Financial disclosure provisions contained in Revised Code Sections 102.02 and 102.022 of the Ohio Ethics Law require that a public official or employee who files a financial disclosure statement must disclose all sources of *income*, over the applicable statutory threshold, received during the preceding calendar year by the filer in his or her own name and by any other person for the filer's use or benefit;
- (2) Financial disclosure provisions contained in Revised Code Sections 102.02 and 102.022 require that a public official or employee who files a financial disclosure statement must disclose the name of every corporation, trust, business trust, partnership, or association, within the parameters of the Law, in which, during the preceding calendar year, the filer or any other person for the filer's use and benefit, had an *investment* of over one thousand dollars;
- (3) A public official or employee who is required to file a financial disclosure statement, and who is a settlor and beneficiary of a trust, must disclose the trust, and sources of income received by the trust, as sources of *income*, and must disclose the trust, and investments in the trust, as *investments*;
- (4) The conclusions in this opinion apply to financial disclosure filings made for calendar year 2005 and subsequent years.

* * *

The Ohio Ethics Commission has been asked whether the Ohio Ethics Law requires a public official or employee who files a financial disclosure statement to disclose income from, and investments that are held by, trusts established for his or her use and benefit. While the question presented involves an individual who established a trust, the conclusions of this opinion would apply to any public official or employee who is a beneficiary of a trust, regardless of whether he or she is also the settlor of the trust.

Facts

This opinion addresses a situation where a public official who is required to file a financial disclosure statement is also the settlor and beneficiary of a revocable trust and an individual retirement trust. A “settlor” of a trust is the person who creates, or invests money in, the trust fund.

In the question before the Commission, a bank in Ohio is the trustee of both trusts. The bank has full investment powers. The public official does not direct the investments within the trusts, but is empowered to withdraw funds from the trusts. The bank provides the public official with monthly statements from the trusts that indicate investment activity. The public official reports the gain or loss from all investment transactions of the revocable trust on income tax returns.

Disclosure of Income—R.C. 102.02(A)(2) and 102.022(A)

The General Assembly has set forth separate disclosure requirements related to income for different categories of disclosure filers. For most filers with the Ohio Ethics Commission, R.C. 102.02(A)(2)(a) requires:

[I]dentification of every source of income, other than income from a legislative agent identified in division (A)(2)(b) of this section, received during the preceding calendar year, in the person’s own name or by any other person for the person’s use or benefit, by the person filing the statement, and a brief description of the nature of the services for which the income was received. (Emphasis added.)

The General Assembly determined that a small group of filers, including any officer or employee of a political subdivision who receives less than \$16,000 a year for serving in that position and any state college or university trustee, should disclose income at a different level. That separate disclosure level, set forth in R.C. 102.022(A), requires:

[I]dentification of every source of income over five hundred dollars received during the preceding calendar year, in the officer’s or employee’s own name or by any other person for the officer’s or employee’s use or benefit, by the person filing the statement, and a brief description of the nature of the services for which the income was received. (Emphasis added.)

For purposes of Chapter 102., the General Assembly defined “income” as including “gross income as defined and used in the ‘Internal Revenue Code of 1986,’ 100 Stat. 2085, 26 U.S.C. 1, as amended, interest and dividends on obligations or securities of any state or of any political subdivision or authority of any state or political subdivision, and interest or dividends on obligations of any authority, commission, or instrumentality of the United States.

The Internal Revenue Code defines “gross income” in Section 61 of 26 U.S.C. 1 as:

[A]ll income from whatever source derived, including (but not limited to) the following items: (1) Compensation for services, including fees, commissions, fringe benefits, and similar items; [and] . . . (15) Income from an interest in an estate or trust.

Therefore, “income” that is required to be disclosed for purposes of R.C. 102.02 includes, among other things, compensation for services and income received from an interest in a trust.

Both R.C. 102.02(A)(2) and R.C. 102.022 exclude certain items from this income disclosure requirement. See R.C. 102.02(A)(2)(b) and 102.022(A) (individual items of income from a business or profession are generally not disclosed) and R.C. 102.02(A)(2)(c) and 102.022(A) (names of clients or patients are generally not disclosed). Except as provided in these sections, filers in each category must disclose all of the described sources of income.

As set forth above, R.C. 102.02(A) and R.C. 102.022(A) require a filer to disclose sources of income received either by the filer or “any other person for the [filer’s] use or benefit.” Thus, it must be determined whether the income received by a trust, where a filer is the trust beneficiary, is received by a person other than the filer “for the use or benefit” of the filer.

The Ohio Revised Code does not provide a statutory definition of what constitutes a trust. However, the Ohio Supreme Court has defined a trust as, “[t]he right, enforceable in equity, to the beneficial enjoyment of property, the legal title to which is in another.” Ulmer v. Fulton (1935), 129 Ohio St. 323, 339. The trustee holds legal title to property that is held in trust; however, the trust beneficiary retains an equitable interest in the property held in the trust. See In the Matter of the Estate of Bicknell (1958), 108 Ohio App. 51. In Hill v. Irons (1953), 160 Ohio St. 21, 26, the Ohio Supreme Court stated:

A trust, as the term is used in the Restatement of this subject . . . is a fiduciary relationship with respect to property, subjecting the person by whom the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it.

. . .

A trust may be defined as a fiduciary relationship in which one person holds a property interest, subject to an equitable obligation to keep or use that interest for the benefit of another. (Emphasis added).

See also Black's Law Dictionary, (rev. 4th ed. 1968) at 1680 (defining "trust" as "[a] right of property, real or personal, held by one party for the benefit of another"). A settlor of a trust can also be a beneficiary of the trust. Dumas v. Estate of Dumas (1994), 68 Ohio St.3d 405, 411.

Thus, a trust is a fiduciary relationship whereby one person holds property for the benefit of another. Where the trust is a revocable trust, as in the situation before the Commission, the settlor relinquishes ownership and control of the trust assets, but retains the right to revoke, amend, or modify the trust agreement. Where the trust is irrevocable, the settlor relinquishes both the ownership and control of the trust assets and the right to revoke, amend, or modify the trust agreement.

Whether the trust is revocable or irrevocable, the trustee is holding property for the public official who is filing the financial disclosure statement. The trustee is empowered to hold the public official's property and direct the investments in the trusts, but the public official is the beneficiary of the investment decisions made by the trustee. Therefore, in the instant situation, the trustee is a person holding the public official's property "for the use or benefit" of the beneficiary. In this case, income received by the trust is received for the use or benefit of a public official who is the trust beneficiary.¹

Shortly after the Ethics Law was enacted, the Ethics Commission was asked whether a public official is required to disclose the sources of her spouse's income. Ohio Ethics Commission Advisory Opinion No. 75-036. The Commission stated that the test in determining whether R.C. 102.02(A) requires disclosure of income "is whether the income is received for the use and benefit of the councilwoman, or received by her husband for whatever purpose he desires." The Commission explained:

To fall within the disclosure requirement, income when received must be clearly designated for the use and benefit of the filer. An example of income received by a third person which must be disclosed would be income received through a trust, by a trustee, for the sole use and benefit of the person required to file a financial disclosure statement since, at the time the income is received by the trustee, it is clearly designated for the use and benefit of the filer. (Emphasis added.)

¹ Where a public official has merely a remainder interest in the assets held in a trust, such that he or she has no access the trust, earnings under the trust, or trust assets until the trust terminates, the trust and assets are not held for the use or benefit of the official. In that case, the official is not required to disclose the trust or its assets as long as the interest is a remainder interest.

Thus, the Commission has previously recognized that R.C. 102.02(A) requires a public official to disclose, on the official's financial disclosure statement, income that is received through a trust by a trustee for the official's use or benefit.

The Financial Disclosure Law compels the open disclosure of the financial interests of public officials and employees subject to the law. The purpose of open disclosure is twofold: (1) to remind public officials and employees of their holdings and assist them in avoiding conflicts of interest related to those holdings; and (2) to make information about public officials' and employees' interests available to the public in order to assist the public and the Ethics Commission to monitor conflicts of interest. See State v. Morgan (May 28, 1987), Clark App. No. 2294, 1987 Ohio App. LEXIS 7221, and Adv. Op. No. 89-001.

The mere disclosure of the trust itself, without identification of the sources of income received by the trust for the filer's use or benefit, does not fully identify and describe those sources of income which the General Assembly decided could give rise to a conflict of interest for the filer and is, therefore, insufficient to meet the statutory requirement. If a public official were not required to disclose individual items of income received by the trust, then the intent of the Financial Disclosure Law to assure transparency could be circumvented by placing assets in a trust. Indeed, the General Assembly's decision to require the disclosure of both income received by the filer, and all income received by any other person "for the use or benefit" of the filer indicates that the General Assembly specifically contemplated the disclosure of assets received by others for a filer, including assets held in trust. See Dougherty v. Torrence (1982), 2 Ohio St.3d 69, 70 (effect must be given to words used in a statute); and Dungan v. Kline (1910), 81 Ohio St. 371, 380-81 (there is a presumption that every word in a statute is designed to have some effect).

As noted above, the General Assembly has listed those specific sources of income exempted from disclosure. See R.C. 102.02(A)(2)(b), 102.02(A)(2)(c), and 102.022(A). Because the General Assembly specifically excluded some items of income from disclosure, it must be assumed that all other items of income must be disclosed. See generally State v. Droste (1998), 83 Ohio St.3d 36, 39 ("Under the general rule of statutory construction *expressio unius est exclusion alterius*, the expression of one or more items of a class implies that those not identified are to be excluded."). Trusts, and assets held in trusts, are not among the items of income exempted from disclosure.

The trustee, for the use and benefit of the public official or employee, holds the assets of a public official's or employee's trust. Therefore, a public official who is the beneficiary of a trust must disclose the sources of trust income received by the trustee.²

² It should also be noted that there is no provision in Ohio that recognizes or provides for the creation of "blind trusts." Consequently, the Ethics Law does not recognize a method by which blind trusts, and their assets, can be disclosed in a manner that is consistent with the purpose in creating a blind trust. Contrast 5 C.F.R. §2634.310, 2634.401, and 2634.403 (setting forth guidelines for the creation of, and disclosure related to, trusts and blind trusts).

A public official or employee subject to R.C. 102.02(A)(2)(a) must disclose all sources of trust income, regardless of amount, received by a trustee for the use or benefit of the official or employee. A public official or employee subject to R.C. 102.022(A) must disclose sources of trust income over five hundred dollars received by the trustee for the use or benefit of the official or employee.

Disclosure of Investments—R.C. 102.02(A)(3)

R.C. 102.02(A)(3) requires that all filers shall disclose:

The name of every corporation on file with the secretary of state that is incorporated in this state or holds a certificate of compliance authorizing it to do business in this state, trust, business trust, partnership, or association that transacts business in this state in which the person filing the statement or any other person for the person's use and benefit had during the preceding calendar year an investment of over one thousand dollars at fair market value as of the thirty-first day of December of the preceding calendar year, or the date of disposition, whichever is earlier . . . and a description of the nature of the investment. (Emphasis added.)

A filer must disclose all corporations incorporated in Ohio, or holding a certificate of compliance to do business in Ohio, and any trust, business trust, partnership, or association that transacts business in Ohio, in which the filer, "or any other person for the [filer's] use and benefit," had an investment of over one thousand dollars during the preceding calendar year. The investment must be disclosed if the investment was over one thousand dollars in value as of December 31 or at the time the investment was disposed, if earlier in the year.

A filer who is a beneficiary of a trust must disclose the name of the trust, if the trust transacts business in Ohio, and if the public official had an investment of over one thousand dollars in the trust. Adv. Op. No. 76-011. However, despite the fact that R.C. 102.02(A)(3) specifically requires disclosure of "trusts," a mere disclosure of the trust by a public official, without reference to the individual investments within the trust, is not sufficient to meet the requirement in R.C. 102.02(A)(3).

In response to a similar question, early in the construction of the financial disclosure requirements, the Ethics Commission considered whether an official must disclose, on his financial disclosure statement, real property owned by a partnership in which he is a general partner, as well as his individual interest in the partnership. Adv. Op. No. 76-012. The Commission explained that an official who has an investment of over one thousand dollars in a partnership that transacts business in Ohio is required to disclose the name of the partnership and describe the nature of the investment pursuant to R.C. 102.03(A)(3). Id. The official is also required to disclose real property owned by the partnership because he has a beneficial interest in the partnership property, even though he does not hold legal title to the real property as an

individual. *Id.* Therefore, the Commission has recognized the General Assembly's intent that an official is required to disclose his or her personal financial interest in a separate legal entity, and in addition, is required to disclose the assets held by that entity if he or she has a beneficial interest in the property that is held by the entity.

Therefore, a filer who is a beneficiary of a trust is required to disclose the names of corporations and other entities specified in R.C. 102.02(A)(3) in which the trustee invests the trust assets.³ In other words, the filer must disclose any investment in the trust in a corporation that is incorporated in, or holds a certificate of compliance authorizing it to do business in, Ohio, and in any trust, business trust, partnership, or association that transacts business Ohio, if the value of the investment exceeded one thousand dollars on the date of disposition or at the end of the previous calendar year. In the instant situation, the bank provides the public official with monthly statements that indicate trust investment activity, which will assist the public official to provide the necessary information on his annual financial disclosure statement.

Conclusion

As explained more fully above, a public official who is a beneficiary of a trust, and who receives income from the trust, is required to disclose the trust, and the income received by the trust for the use or benefit of the filer, as sources of income. A public official who is a beneficiary of a trust is required to disclose the trust and the investments held by the trustee for the use or benefit of the filer, as investments. A public official who is a beneficiary of a trust is required to disclose the debtors and creditors of the trust.

The Commission has not considered this issue previously. Therefore, it recommends that this opinion be applied prospectively and that its conclusions do not apply to a financial disclosure made prior to filings for calendar year 2005. Beginning with filings for calendar year 2005, financial disclosure filers will be required to disclose trust-related income and investments as explained in this opinion.

This advisory 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.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that: (1) Financial disclosure provisions contained in Revised Code Sections 102.02 and 102.022 of the Ohio Ethics Law require that a public official or employee who files a financial disclosure statement must disclose all sources of *income*, over the applicable statutory threshold, received during the preceding calendar year by the filer in his or her own name and by any other person for the filer's use or benefit; (2) Financial disclosure provisions contained in Revised Code

³ As more fully explained in footnote 1, a filer who has merely a remainder interest in the assets held in a trust is not required to disclose the trust or its assets as investments.

Sections 102.02 and 102.022 require that a public official or employee who files a financial disclosure statement must disclose the name of every corporation, trust, business trust, partnership, or association, within the parameters of the Law, in which, during the preceding calendar year, the filer or any other person for the filer's use and benefit, had an *investment* of over one thousand dollars; (3) A public official or employee who is required to file a financial disclosure statement, and who is a settlor and beneficiary of a trust, must disclose the trust, and sources of income received by the trust, as sources of *income*, and must disclose the trust, and investments in the trust, as *investments*; and (4) The conclusions in this opinion apply to financial disclosure filings made for calendar year 2005 and subsequent years.



Merom Brachman, Chair
Ohio Ethics Commission