

Merom Brachman, *Chairman*
Michael A. Flack, *Vice Chairman*
Bruce E. Bailey
James C. Evans
Elizabeth E. Tracy



OHIO ETHICS COMMISSION
William Green Building
30 West Spring Street, L3
Columbus, Ohio 43215-2256
Telephone: (614) 466-7090
Fax: (614) 466-8368

Paul M. Nick
Executive Director

www.ethics.ohio.gov

April 3, 2015

Cindy Marx
1587 Grace Avenue
Lakewood, Ohio 44107

Sam O'Leary
12650 Detroit Avenue
Lakewood, Ohio 44107

Dear Ms. Marx and Mr. O'Leary:

On April 2, 2015, the Ohio Ethics Commission received your letter requesting an advisory opinion. You asked questions involving the actions of the Mayor and two council members of the City of Lakewood (city) who serve on the Governing Board of the Lakewood Hospital Association (LHA) in their official capacities. You provided detailed information describing the history of the LHA and specific legal provisions in existing and proposed agreements involving the city, the LHA, and the Cleveland Clinic.

This office is unable to provide an advisory opinion to you in response to your request. Your letter questions the past actions of persons other than yourselves. The purpose of an Ohio Ethics Commission advisory opinion is to provide guidance to a public official or employee upon which he or she can rely **before** engaging in an action that is governed by the Ethics Law. The Commission can render an advisory opinion only in response to a hypothetical question or a question that involves the prospective conduct of the person who requests the opinion.¹

In addition, the Commission has explained that its function in rendering an advisory opinion is not a fact-finding process and it cannot, in an advisory opinion, determine whether a public official or employee has violated a criminal law.² The only way the Commission can determine whether a public official or employee has violated the Ethics Law is by conducting an investigation of that person's actions pursuant to its confidential investigative authority. In conducting an investigation, the Ethics Commission would examine all pertinent facts. If you would like the Commission to consider conducting an investigation into actions of city officials, you may call the Commission at (614) 466-7090 and ask to speak to a Special Investigator.

Finally, the authority of the Ethics Commission is limited to issues that arise under Ohio Revised Code Chapter 102. and Sections 2921.42 and 2921.43. The Commission does not have the authority to interpret legal provisions in a city charter, ordinance, lease, or agreement.

However, this letter can provide general information on the issues that you described.

Definition of a Public Contract

The term "public contract" is defined as the purchase or acquisition, or a contract for the purchase or acquisition of property or services by or for the use of a political subdivision or any of its agencies or instrumentalities. A public contract is created whenever a political subdivision either purchases services from a provider or acquires services as part of the contractor's responsibility under the contract.³

Past Precedent

The Ethics Commission stated in Advisory Opinion No. 93-012 that an agreement between a city and a hospital that involved the city providing a payment to a hospital in exchange for a permanent interest in the hospital and its management, and sub-leasing property to the hospital was a public contract because the city was purchasing or acquiring hospital services for the benefit of its residents. I have enclosed a copy of Advisory Opinion No. 93-012 for your reference.

Official Capacity

Advisory Opinion No. 93-012 explained that the prohibition of R.C. 2921.42 (A)(4) does not apply whenever a public official of a political subdivision that has entered into a public contract with a non-profit corporation serves on the board of directors of the non-profit corporation in his "official capacity" as a representative of his political subdivision in order to represent its interests. The Ethics Commission set forth four criteria which must be met in order for a public official to be deemed to serve in his official capacity:

- (1) The governmental entity must create or be a participant in the non-profit corporation;
- (2) Any public official or employee connected with the jurisdiction ... may be designated to serve on the non-profit corporation, but the elected legislative authority or the appointing governing body must formally designate the office or position to represent the governmental entity;

- (3) The public official or employee must be formally instructed to represent the governmental entity and its interests; and
- (4) There must be no other conflict of interest on the part of the designated representative.

The Commission stated in Advisory Opinion No. 93-012 that because of the agreement between the city and a hospital that involved the city providing a payment to a hospital in exchange for a permanent interest in the hospital and its management, R.C. 2921.42(A)(4) did not prohibit the mayor and president of council from serving on the hospital's board of directors in their "official capacity" to represent the city's interest in the hospital and its management.

It is the prerogative of the appropriate city officials, and ultimately the city's electorate, to determine whether a particular public contract or agreement is in "the city's interests." The Ethics Commission cannot judge whether city officials have negotiated the most advantageous terms in a contract or agreement.

Requirement No. 4--No Other Conflict

You specifically referred to requirement number 4 of the "official capacity" exception that there must be no other conflict of interest on the part of the designated representative.

In an informal advisory opinion to Cathy C. Godshall that the Commission approved on February 11, 1997, it was explained that an official serving a non-profit organization in his or her official capacity would have a conflict of interest if they, their family members, or their business associates have a definite and direct **personal**, pecuniary, or fiduciary interest in the public contract. In that opinion the Commission stated:

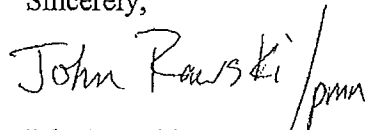
For example, . . . the employee [serving the non-profit Foundation in his official capacity] who works for the City parks department is not prohibited from participating in the consideration of a grant from the Foundation that might benefit the parks department, however, he would be prohibited from participating in the award of the grant to the parks department if he knew that the grant would fund the parks department's purchase of services from a company that was owned by a family member.

Therefore, an official serving in his or her official capacity would **not** have a conflict of interest if either he or she, or a family member or business associate does not have a definite and direct **personal**, pecuniary or fiduciary interest in the public contract. I have enclosed a copy of the opinion to Cathy C. Godshall for your reference.

Cindy Marx
Sam O'Leary
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This letter is limited to questions arising under Revised Code Chapter 102. and Sections 2921.42 and 2921.43 and does not purport to interpret other laws or rules. This letter is not an advisory opinion. It serves only to provide you with general information about the Ethics Law and Commission precedent and does not reach any conclusions as to the specific facts in the situations that you have set forth. Please contact this office again if you have any further questions or need additional information regarding the Ohio Ethics Law.

Sincerely,



John Rawski
Staff Advisory Attorney

Enclosures: Formal Advisory Opinion No. 93-012.
Informal Advisory Opinion issued to Cathy C. Godshall (February 11, 1997).

Opinions referenced in this letter are available on the Commission's Web site:
www.ethics.ohio.gov

¹ Ohio Ethics Commission Advisory Opinions No. 75-037 and 94-002.

² Adv. Op. No. 94-002.

³ R.C. 2921.42 (G)(1)(a); Adv. Ops. No. 91-011, 93-009, and 93-012.



OHIO ETHICS COMMISSION
THE ATLAS BUILDING
8 EAST LONG STREET, SUITE 1200
COLUMBUS, OHIO 43215-2940
(614) 466-7090

Advisory Opinion
Number 93-012
July 16, 1993

Syllabus by the Commission:

- (1) Division (B) of Section 102.03 of the Revised Code does not prohibit a public official or employee from disclosing information which is a "public record" as defined in Division (A)(1) of Section 149.43 of the Revised Code;
- (2) Division (B) of Section 102.03 of the Revised Code prohibits a public official or employee from disclosing information which is not a "public record" as defined in Division (A)(1) of Section 149.43 of the Revised Code only if a statute affirmatively makes the information confidential or if the information has been clearly designated as confidential when such designation is warranted and necessary for the proper conduct of government business;
- (3) An organization which has entered into a public contract with a city and holds information to which a public official or employee is privy due to the official's or employee's service with the organization in his official capacity may not impose the prohibitions of Division (B) of Section 102.03 of the Revised Code upon the official or employee with regard to that information by designating, in the interests of the organization, the information as confidential.

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In your letter to the Ethics Commission, you have asked several questions concerning the application of the Ohio Ethics Law and related statutes to issues arising out of a contractual relationship between a city and a hospital which is a non-profit corporation.

You state that in 1949, the city entered into an "agreement" with the hospital under which the city provided \$900,000 to the hospital for the construction of facilities. In consideration for providing this money, the hospital granted the city a permanent interest in the hospital and its management. The 1949 agreement requires the hospital to furnish an annual financial report to the city. In May of 1975, the hospital issued revenue bonds with the assistance of the city as issuer. As a result of this financing, the hospital's real property was deeded to the city and leased back to the hospital. On January 1, 1992, the city conveyed the hospital property back to the hospital as part of a bond refinancing. Presently, the hospital leases this property to the city and the city sub-leases it back to the hospital.

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The hospital is managed by a board of directors. Under the terms of the 1949 agreement, the mayor and president of council serve on the board of directors "by virtue of their office." The terms of the mayor and president of council on the board of directors coincide with the terms of their respective city offices. The other board members serve terms which have been determined by the board of directors. The board of directors nominates replacement members; however, pursuant to the 1949 agreement, city council must ratify and approve the nominees.

Your first question is whether the Ohio Ethics Law and related statutes prohibit city officials from serving on the hospital's board of directors.

A mayor and president of council are prohibited by Division (A)(4) of Section 2921.42 of the Revised Code from having an "interest in the profits or benefits of a public contract entered into by or for the use of" the city with which they serve. See R.C. 2921.01(A). See Ohio Ethics Commission Advisory Ops. No. 85-002 and 91-002. A member of a board of directors of a non-profit corporation has a definite and direct fiduciary interest in the contracts of the corporation. See Advisory Op. No. 81-008.

The term "public contract" is defined for purposes of R.C. 2921.42 in Division (F)(1) of that Section to include the purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of a political subdivision. The Ethics Commission has held that a public contract exists whenever a political subdivision purchases property or services with money flowing from the political subdivision to the provider of the property or services or whenever the political subdivision acquires services as part of the contractor's responsibilities under the contract. See Advisory Ops. No. 91-011 and 93-009. In the instant situation, the agreement between the city and the hospital is a "public contract" for purposes of R.C. 2921.42 since, by initially providing \$900,000 to the hospital in exchange for a permanent interest in the hospital and its management, serving as issuer of the hospital's bonds, and sub-leasing property to the hospital, the city is purchasing or acquiring hospital services for the benefit of its residents. See Advisory Ops. No. 91-011 and 93-009.

Therefore, initially, it appears that the mayor and president of council have a prohibited interest in a public contract with the city for purposes of R.C. 2921.42 (A)(4) since they serve on the hospital's board of directors. However, the Ethics Commission has held that the prohibition of R.C. 2921.42 (A)(4) does not apply whenever a public official of a political subdivision that has entered into a public contract with a non-profit corporation, serves on the board of directors of the non-profit corporation in his "official capacity" as a representative of his political subdivision

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in order to represent its interests. See Advisory Ops. No. 82-004, 83-010, and 84-001. See also Advisory Op. No. 92-002. In such an instance, the Commission has explained that "there would not be a dual interest in which private considerations would distract from [the public official] serving the public interest." Advisory Op. No. 84-001. Also, in Advisory Opinion No. 84-001, the Ethics Commission set forth four criteria which must be met in order for a public to be deemed to serve in his official capacity:

(1) the governmental entity must create or be a participant in the non-profit corporation; (2) any public official or employee connected with the jurisdiction . . . may be designated to serve on the non-profit corporation, but the elected legislative authority or the appointing governing body must formally designate the office or position to represent the governmental entity; (3) the public official or employee must be formally instructed to represent the governmental entity and its interests; and (4) there must be no other conflict of interest on the part of the designated representative.

As explained above, in 1949, the city provided \$900,000 to the hospital in consideration for a permanent interest in the hospital and its management. Therefore, R.C. 2921.42 (A)(4) does not prohibit the mayor and president of council from serving on the hospital's board of directors in their "official capacity" to represent the city's interest in the hospital and its management.

You have also asked whether R.C. 102.03 (B) prohibits the mayor and president of council from disclosing information to which they are privy due to their service on the hospital's board of directors and which the legal counsel for the hospital board of directors has designated as "confidential." You state that the hospital desires to terminate the city's permanent interest in the hospital and affiliate with another hospital. You state that a group of city residents has formed an organization in order to oppose the termination of the city's interest in the hospital and has requested that the mayor and president of council furnish them with the hospital's monthly financial statements. As stated above, the agreement between the city and hospital requires the hospital to furnish the city with an annual financial report; however, there is no provision in the agreement that requires the hospital to furnish the city with a monthly report.

Division (B) of Section 102.03 of the Revised Code reads:

No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by him in the course of his official duties which is confidential because of statutory provisions, or which has been clearly designated to him as

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confidential when such confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business. (Emphasis added).

The mayor and president of council are "public official[s] or employee[s]" for purposes of R.C. 102.03 (B) and are subject to the statute's prohibitions. See generally Advisory Op. No. 89-008. Thus, R.C. 102.03 (B) prohibits them from disclosing or using, without proper authorization, information acquired by them in the course of their official duties that either is confidential by statutory provision or has been clearly designated to them as confidential when such designation is warranted and necessary for the proper conduct of government business.

Since the mayor and president of council serve on the hospital's board of directors in their official capacity to represent the city's interest in the hospital and its management, the monthly reports are information which has been "acquired by [them] in the course of [their] official duties." However, the issue remains whether the monthly reports are considered "confidential" for purposes of R.C. 102.03 (B).

You state that the city law director advised the mayor and council president that hospital records are subject to disclosure under R.C. 149.43, the Public Records Act. You also state that the hospital's legal counsel has advised the mayor and president of council that: (1) the hospital's monthly financial statements are confidential; (2) the disclosure of the monthly statements would breach their oath as hospital directors and subject them to personal liability; and (3) the monthly statements are not "public records" required to be disclosed under the Public Records Act.

R.C. 149.43 (B) provides, in part, that "[a]ll public records shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours." R.C. 149.43 (A)(1) defines "public record" as "any record that is kept by any public office, including, but not limited to, state, county, city, village, township, and school district units" However, R.C. 149.43 (A)(1) also enumerates six specific categories of information which are not considered to be "public records." For example, medical records and records the release of which is prohibited by state or federal law are not considered public records. See generally State, ex rel. Fostoria Daily Review Co. v. Fostoria Hosp. Assn., 40 Ohio St. 3d 10 (1988) (holding that a public hospital that renders a public service to residents and is supported by public taxation is required to disclose its public records).

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The Ethics Commission's advisory authority is limited to interpreting Chapter 102. and Sections 2921.42 and 2931.43 of the Revised Code; it cannot determine whether the hospital's monthly statements are "public records" for purposes of R.C. 149.43. See R.C. 102.08. As stated above, the hospital's legal counsel and the city law director have provided conflicting advice to the mayor and president of council on the issue whether the monthly reports are public records subject to disclosure under R.C. 149.43. A judicial decision may be required to ultimately determine this issue.

If the hospital's monthly reports are found to be public records, then R.C. 102.03 (B) would not prohibit the mayor and president of council from disclosing the hospital's monthly financial statements since such records would be required to be made available to the public pursuant to R.C. 149.43, and could not be considered "confidential" for purposes of R.C. 102.03 (B). However, the issue remains whether R.C. 102.03 (B) prohibits the mayor and president of council from disclosing information to which they are privy due to their service, in their official capacity, on the hospital's board of directors, if the monthly reports are not public records. If the monthly reports are not public records, then R.C. 102.03 (B) would prohibit the mayor and president of council from disclosing the hospital's monthly financial statements only if a statute affirmatively makes them confidential or if the monthly reports have been clearly designated to the city's officials as confidential when such designation is warranted and necessary for the proper conduct of government business. The issue thus becomes whether one of the elements for establishing confidentiality under Division (B) has been met in this instance.

Whenever a state or federal statute mandates that certain information is confidential, the terms of that statute control the circumstances under which public officials and employees may release information to which they have been entrusted. See Op. Att'y Gen. No 90-007. There are statutory provisions found throughout the Revised Code that forbid the disclosure of certain information by a public agency. See also R.C. 149.43 (medical records are one exception to the Public Records Act). It is assumed that the monthly reports are not confidential due to statutory provisions. Therefore, the issue becomes whether the monthly reports have been clearly designated to the mayor and president of council as confidential and such designation is warranted and necessary for the proper conduct of government business.

R.C. 102.03 (B) does not state who must designate the information as "confidential." In this instance, the hospital's legal counsel has designated the monthly reports as confidential. However, as stated above, the hospital's legal counsel based his determination that the reports were confidential partially on the fact that the mayor and president of council, as members of the hospital board of directors, have a fiduciary relationship to the

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hospital and would breach their oath of office as directors if they released the information. It is true that the mayor and president of council, as directors, have a fiduciary relationship to the hospital and this relationship may be considered by the hospital's legal counsel in advice which he provides to them; however, such advice does not impose the prohibition of R.C. 102.03 (B). R.C. 102.03 (B) requires that a confidential designation be applied to information only in circumstances where "preserving its confidentiality is necessary to the proper conduct of government business."

While the hospital's legal counsel may determine that preserving the confidentiality of the monthly reports is in the best interests of the hospital, such a determination does not establish that preserving the confidentiality of the reports is necessary for the proper conduct of government business. An organization which has entered into a public contract with a city and holds information to which a public official is privy due to his service with the organization in his official capacity may not impose the prohibitions of R.C. 102.03 (B) upon the official with regard to that information by designating, in the interests of the organization, the information as "confidential."

It is apparent that in this instance, the city may designate information as confidential where such designation is warranted and necessary for the proper conduct of government business, and thus bind its public officials and employees to the prohibition imposed by R.C. 102.03 (B). In this instance, the issue has been made one for the determination of the city law director. The law director must follow the standard of R.C. 102.03 (B) in making a determination of confidentiality for purposes of that section. Again, it must be stressed that a determination of confidentiality for purposes of R.C. 102.03 (B) needs to be made only if the information is found not to be a public record as defined in R.C. 149.43.

Accordingly, the designation of the monthly reports as "confidential" by the hospital's legal counsel does not in this instance bind the mayor and council president to the prohibition imposed by R.C. 102.03 (B). However, even if the law director determines that the monthly reports are not "confidential" for purposes of R.C. 102.03 (B), there is nothing in R.C. 102.03 (B) which would require the officials to release the reports.

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) Division (B) of Section 102.03 of the Revised Code does not prohibit a public official or employee from disclosing information which is a "public record" as defined in

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Division (A)(1) of Section 149.43 of the Revised Code; (2) Division (B) of Section 102.03 of the Revised Code prohibits a public official or employee from disclosing information which is not a "public record" as defined in Division (A)(1) of Section 149.43 of the Revised Code only if a statute affirmatively makes the information confidential or if the information has been clearly designated as confidential when such designation is warranted and necessary for the proper conduct of government business; and (3) An organization which has entered into a public contract with a city and holds information to which a public official or employee is privy due to the official's or employee's service with the organization in his official capacity may not impose the prohibitions of Division (B) of Section 102.03 of the Revised Code upon the official or employee with regard to that information by designating, in the interests of the organization, the information as confidential.


Jack Paul DeSario, Chair
Ohio Ethics Commission



OHIO ETHICS COMMISSION

8 East Long Street, 10th Floor

Columbus, Ohio 43215

Telephone: (614) 466-7090

Fax: (614) 466-8368

February 11, 1997

Cathy C. Godshall
Buckingham, Doolittle & Burroughs
50 South Main Street
P.O. Box 1500
Akron, Ohio 44309-1500

Dear Ms. Godshall:

In your letter to the Ethics Commission, you have asked several questions concerning the application of the Ethics Laws and related statutes to issues arising out of a contractual relationship between the City of Barberton (City) and the Barberton Community Foundation (Foundation). The Foundation was created to provide a variety of benefits to the City's citizens. The City funded the Foundation by transferring the proceeds from the sale of the Barberton City Hospital (Hospital) to the Foundation.

As explained below, the Foundation is not a "public agency" for purposes of Chapter 102. Members of its board of trustees are not, solely as a result of their membership on the Foundation's board of trustees, officers or employees of the state or a political subdivision for purposes of the application of Chapter 102, or Section 2921.42 of the Revised Code. Members of the Foundation's board of trustees who do not otherwise hold public positions for the City, the City School District, or the City Health District, or any other public agency, are therefore not subject to the ethics-related statutes under the jurisdiction of the Ohio Ethics Commission. The relationship between the Foundation and the City, the City School District, and the City Health District, and the grants the Foundation provides to public agencies, however, are public contracts for purposes of R.C. 2921.42. A public official who holds a position or employment with the City, the City School District, and the City Health District, or any other public agency, and who concurrently wishes to serve on the Foundation's board of trustees must therefore serve in his "official capacity" as a designated representative of his political subdivision, as further described below, in order to represent his political subdivision's interests. A public official who serves in his "official capacity," is not required to recuse himself from the consideration of a grant that might benefit his public agency but is prohibited from participating in the authorization of a public contract if he, a family member, or a business associate has a definite and direct personal, pecuniary, or fiduciary interest in the public contract.

Before addressing your specific questions, the City's former relationship with the Hospital must be examined.

The Barberton City Hospital

You state that in 1949, pursuant to Section 4022 of the General Code, the City entered into an agreement with the Barberton City Hospital. See R.C. 749.02 (authorizing a municipality's city council to enter into an agreement with a not-for-profit corporation organized for charitable purposes to provide hospital services for the municipality's residents.) Under the terms of the agreement, the City provided \$900,000 to the Hospital for the construction of facilities. In consideration for providing its funding, the Hospital granted the City a permanent interest in the Hospital and its management. Under the agreement, if the Hospital was sold, then all the assets, both real and personal, of the Hospital would revert to the City. The agreement required that the mayor and president of council serve on the board of directors "by virtue of their office." The terms of the mayor and council president coincided with the terms of their respective city offices. The other board members served terms that were determined by the Hospital's board of directors. The Hospital's board of directors nominated replacement members, but city council had the authority to ratify and approve the nominees.

The 1949 agreement was supplemented several times. In 1951, the City provided an additional \$750,000 to the Hospital for construction of facilities. In May 1975, the City assisted the Hospital in issuing revenue bonds. As a result of this financing, the Hospital deeded its real property to the City, and the City leased the property back to the Hospital. On January 1, 1992, the City conveyed the Hospital property back to the Hospital as part of a bond refinancing. As part of the same bond refinancing, the Hospital leased the Hospital property to the City, and the City subleased the property back to the Hospital. As explained below, the Ethics Commission held in Advisory Opinion No. 93-012 that the relationship between the City and the Hospital was a public contract for purposes of R.C. 2921.42.

The Barberton Community Foundation

In 1996, a for-profit company purchased substantially all of the Hospital's assets, including the Hospital's real property. Under the terms of the 1949 agreement, the proceeds from the sale of the Hospital's property would have reverted to the City. But the City desired to use the proceeds from the sale to provide for the long-term education, health, safety, recreation, cultural enrichment, and welfare of its citizens. Accordingly, the City passed an Ordinance that directed the sale's proceeds to be paid to the Barberton Community Foundation instead of reverting to the City. In the November 6, 1996 general election, the City's residents voted to approve the transfer of the Hospital sale proceeds to the Foundation instead of having the Hospital's property revert to the City. The sale of the Hospital to the for-profit company closed on December 4, 1996.

The Foundation's mission is stated in its Articles of Incorporation (Articles). The Articles state that the Foundation is to operate "exclusively for the charitable, education, public health, public recreation or other public purposes by conducting or supporting activities and facilities exclusively for the benefit of the City, the City School District, the City Health District and the citizens of the City." The Foundation is to accomplish these goals by providing, through

its resources, grants for facilities and services that will lessen the burdens carried by the City, the City School District, and the City Health District. In addition to the Articles, the Foundation is governed by a Code of Regulations (Regulations).

The Articles provide that the Foundation is governed by a board of trustees. The board members are not compensated for their services but may be reimbursed for reasonable expenses. The City mayor and president of council serve as voting *ex officio* members of the board. The Articles name thirteen individuals as members of the board of trustees in addition to the mayor and president of council. All thirteen individuals were approved by the City Council. Two of these board members are City employees. One is the City safety director and the other is an hourly employee of the City parks department. The superintendent of the City school district is also named as a board member. These three board members do not serve as *ex officio* members. The other board members are either employees of private firms or are retired. The Articles establish the term of office for each initial board member. These terms are staggered so that the terms of roughly one third of the board members, other than the mayor and president of council, will expire each year.

The Foundation's Articles and Regulations give the City council direct involvement in the Foundation's operation. As stated above, City council approved all thirteen members of the original board of trustees who are named in the Articles. When the board members' terms end and new appointments are made to the board, City council must approve individuals who are candidates for board membership prior to their election to the board. Also, seventy-five percent of the membership of City council must approve the board's decision to expend money that is in excess of the Foundation's income in any calendar year. The Regulations provide that seventy-five percent of the membership of City council must approve the alteration, amendment, or repeal of the Regulations or the adoption of a new Code of Regulations. The Articles require that seventy-five percent of the membership of City council approve the repeal, modification, or amendment of the Articles. Furthermore, three-quarters of City council must approve the liquidation or dissolution of the Corporation and the merger, consolidation, or transfer of "substantially all the assets of the Corporation." Finally, the Articles provide that upon dissolution of the Foundation, all of its assets will revert to the City provided that the City is, at that time, a government unit, as described in the Internal Revenue Code. In such an instance the City will hold and distribute the assets exclusively for public purposes. The Ohio Ethics Commission should be consulted if changes in the Articles are contemplated that would provide board members compensation for their services or a share of the assets of the Foundation upon its dissolution.

The Application of the Ethics Laws to a "Public Agency"

You ask whether the Foundation is a "public agency." Presumably you ask this question in order to determine whether the provisions of the Ohio Ethics Law and related statutes affect the membership or activities of the Foundation.

The provisions of the Ohio Ethics Law and related statutes include prohibitions against public officials and employees misusing their official position for their own personal benefit, the benefit of their family members or business associates, or where there is otherwise a conflict of interest. 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. "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.

R.C. 2921.42 applies to any "public official" and R.C. 2921.43 applies to any public servant which, pursuant to R.C. 2921.01 (B), includes any public official, as well as any person performing *ad hoc* a governmental function, including a juror, member of a temporary commission, master, arbitrator, advisor, or consultant. 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, whether in a temporary or permanent capacity, and including without limitation legislators, judges, and law enforcement officers. (Emphasis added).

The Foundation is organized as nonprofit charitable corporation under the Ohio Nonprofit Corporation Act. It is not a department, division, institution, board, commission, authority, bureau or other instrumentality of the City, or any other governmental entity. The Ethics Commission has held that the Ohio Ethics Law and related statutes do not apply to persons who are members of the board of trustees of a non-profit corporation. Advisory Ops. No. 75-013 and 75-019. See also 90-002. In Advisory Opinion No. 75-013, the Ethics Commission held: "[A]lthough the activities of a non-profit corporation may be of a public nature, the corporation is not a governmental agency for purposes of Chapter 102 of the Revised Code."

Therefore, the Foundation is not a "public agency" for purposes of Chapter 102. Also, the members of the Foundation's board of trustees are not officers or employees of a political subdivision for purposes of Section 2921.42. Members of the Foundation's board of trustees who do not otherwise hold public positions or employment with the City, the City school district, or the City Health District, are not subject to the statutes under the Ethics Commission's jurisdiction that impose restrictions upon public officials and employees.

You ask whether the Ethics Law prohibits the Foundation from contracting with private firms if any of the members of the Foundation's board have a pecuniary or fiduciary interest in the firm.

As explained above, the provisions of the Ohio Ethics Law and related statutes include prohibitions against public officials and employees misusing their official position for their own personal benefit, the benefit of their family members or business associates, or where there is otherwise a conflict of interest. Accordingly, the provisions of the Ethics Law and related statutes do not apply to members of the Foundation's board of trustees who do not hold public office or employment. Please note that even though the provisions of Ohio's Ethics Law do not apply to members of the Foundation's Board who do not otherwise serve in public positions, this does not preclude the Foundation from adopting conflict of interest protections, which do not conflict with state law, or otherwise operating under appropriate standards for a non-profit organization.

You ask whether the relationship between the Foundation and the City, City School District, and City Health District constitutes a "public contract" for purposes of R.C. 2921.42.

Restrictions Imposed by R.C. 2921.42 (A)(4)

R.C. 2921.42 (A)(4) reads:

- (A) No public official shall knowingly do any of the following:
- ...
- (4) 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 he is connected.

R.C. 2921.01 (A) defines the term "public official" for purpose of R.C. 2921.42 as any elected or appointed officer, employee, or agent of any political subdivision of the state. In the instant situation, the City's mayor, president of council, safety service director, parks department employee, and the superintendent of the City School District are "public officials" for purposes of R.C. 2921.42.

R.C. 2921.42 (A)(4) prohibits a public official from having an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision with which they serve or are employed. Advisory Op. No. 89-008. An interest that is prohibited under R.C. 2921.42 (A)(4) must be definite and direct and may be either pecuniary or fiduciary. Advisory Ops. No. 78-005 and 81-003. A member of the board of directors of a non-profit corporation has a definite and direct fiduciary interest in the corporation's contracts. Advisory Ops. No. 81-008 and 93-012.

R.C. 2921.42 (G)(1)(a) defines the term "public contract" as the purchase or acquisition, or a contract for the purchase or acquisition of property or services by or for the use of a political subdivision or any of its agencies or instrumentalities. A public contract is created whenever a political subdivision either purchases services from a provider or acquires services as part of the contractor's responsibility under the contract. Advisory Ops. No. 91-011, 93-009, and 93-012.

Official Capacity

As stated above, the Ethics Commission held in Advisory Opinion No. 93-012 that the agreement between the City and the Hospital was a public contract for purposes of R.C. 2921.42. In that opinion, the Commission held:

[T]he agreement between the city and the hospital is a "public contract" for purposes of R.C. 2921.42 since, by initially providing \$900,000 to the hospital in exchange for a permanent interest in the hospital and its management, serving as issuer of the hospital's bonds, and sub-leasing property to the hospital, the city is purchasing or acquiring hospital services for the benefit of its residents.

But the Commission held in Advisory Opinion No. 93-013, that "R.C. 2921.42 (A)(4) does not prohibit the Mayor and President of Council from serving on the Hospital's board of directors in their 'official capacity' to represent the city's interest in the hospital and its management."

In the instant situation, the relationship between the Foundation and the City, the City School District, and City Health District is a public contract for purposes of R.C. 2921.42. As explained above, the City's provision of the proceeds from the sale of the Hospital to the Foundation made the establishment of the Foundation possible. The City, the City School District, and City Health District will acquire, from the Foundation, facilities and services that will benefit the City's citizens. Also, the City has direct involvement in the Foundation's operation because the Mayor and President of Council serve as voting *ex officio* members of the Foundation's board of trustees and the City council must, by a three-quarters percent majority, approve changes in the Articles, the liquidation or dissolution of the Corporation, and the merger, consolidation, or transfer of "substantially all the assets" of the Corporation. Finally, upon dissolution of the Foundation, all its assets will revert to the City if the City is, at that time, a government unit as described in the Internal Revenue Code. Accordingly, the relationship between the City and the Foundation is a "public contract" for purposes of R.C. 2921.42.

The issue becomes whether the public officials who serve on the Foundation's board of trustees have a prohibited interest in a public contract for purposes of R.C. 2921.42 (A)(4).

At first glance, it would appear that all of the public officials who serve as members of the Foundation's board of trustees would have a prohibited interest in a public contract with their respective political subdivision for purposes of R.C. 2921.42 (A)(4). However, the Ethics Commission has held that the prohibition of R.C. 2921.42 (A)(4) does not apply to a public official

of a political subdivision who serves on the board of directors of a non-profit agency that contracts with the political subdivision, provided that he serves on the board in his "official capacity" as a designated representative of his political subdivision, in order to represent his political subdivision's interests. Advisory Ops. No. 82-004, and 93-012. See also Advisory Op. No. 92-002.

The Ethics Commission has explained that whenever a public official serves on the board of directors of a non-profit corporation in his official capacity, "there would not be a dual interest in which private considerations would distract from his serving the public interest." Advisory Op. No. 84-001. In Advisory Opinion No. 84-001, the Commission established four criteria that must be met in order for a public official to be deemed to serve in his official capacity:

- (1) the governmental entity must create or be a participant in the non-profit corporation;
- (2) any public official or employee connected with the jurisdiction ... may be designated to serve on the non-profit corporation, but the elected legislative authority or the appointing governing body must formally designate the office or position to represent the governmental entity;
- (3) the public official or employee must be formally instructed to represent the governmental entity and its interests;
- (4) there must be no other conflict of interest on the part of the designated representative.

See also Att'y Gen. Ops. No. 91-007 and 96-007.

In the instant situation, the City participated in the Foundation's creation. Also, the requirement in the Articles that the Mayor and President of Council serve as *ex officio* members of the Foundation's board evidences a desire that they represent the City's interest in the Foundation and its management. Accordingly, R.C. 2921.42 (A)(4) would not prohibit the Mayor and the President of Council from serving on the Foundation's board of trustees, provided that they are: (1) designated to represent the City; (2) formally instructed to represent the City and its interests; and (3) not otherwise subject to a conflict of interest. See Advisory Op. No. 93-012 (holding that the Mayor and the President of Council served the Barberton City Hospital in their "official capacity").

In order for the City safety director, the employee of the City parks department, and the superintendent of the City school district to serve the Foundation, they must do so in their "official capacity." The appropriate authority of their respective political subdivision must designate them to represent their political subdivision and formally instruct them to represent their political subdivision and its interests. Also, they must not otherwise be subject to a conflict of interest.

You ask whether the City safety director, the employee of the City parks department, and the superintendent of the City school district must recuse themselves from the consideration of a grant from the Foundation that might benefit their public agency.

As stated above, when a public official serves in his "official capacity," the official has been designated by the appropriate authority of his political subdivision to represent his political subdivision and its interests. The Ethics Commission held in Advisory Opinion No. 84-001 that under such circumstances, "there would not be a dual interest in which private considerations [of the official] would distract from his serving the public interest." Accordingly, a public official who serves in his "official capacity," is not required to recuse himself from the consideration of a grant that might benefit his public agency. In the instant situation, all of the public officials who serve the City, the City School District, and the City Health District must serve in their "official capacity." In this capacity, they are designated representatives of their respective public agencies and are obliged to serve their public agency's interests when they participate in consideration of a grant from the Foundation that might benefit their public agency.

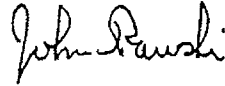
However, it must be stressed that R.C. 2921.42 (A)(1) prohibits a public official from authorizing, or using his authority or influence to secure authorization of, a public contract in which he, a family member, or a business associate has an interest. R.C. 2921.42 (A)(1) prohibits all public officials, including those who serve on the board of a corporation in their "official capacity," from participating in the authorization of a public contract if they, their family members, or business associates have a definite and direct personal, pecuniary or fiduciary interest in the public contract. For example, in the instant situation, the employee who works for the City parks department is not prohibited from participating in the consideration of a grant from the Foundation that might benefit the park department, however, he would be prohibited from participating in the award of the grant to the parks department if he knew that the grant would fund the parks department's purchase of services from a company that was owned by a family member.

Conclusion

Therefore, as explained above, the Foundation is not a "public agency" for purposes of Chapter 102. Also, the members of its board of trustees are not officers or employees of the state or a political subdivision for purposes of Section 2921.42. The members of the Foundation's board of trustees who do not serve the City, the City School District, or the City Health District are not subject to the statutes under the Ethics Commission's jurisdiction. The relationship between the Foundation and the City, the City School District, and the City Health District and the grants that the Foundation provides to public agencies are public contracts for purposes of R.C. 2921.42. A public official of the City, the City School District, and City Health District who serves on the Foundation's board of trustees must serve in his "official capacity" as a representative of his political subdivision in order to represent his political subdivision's interests. A public official who serves in his "official capacity," is not required to recuse himself from the consideration of a grant that might benefit his public agency, but is prohibited from participating in the authorization of a public contract if he, a family member, or a business associate has a definite and direct personal, pecuniary or fiduciary interest in the public contract.

This informal advisory opinion was approved by the Ethics Commission at its meeting on February 11, 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, and does not purport to interpret other laws or rules. If you have any further questions, please feel free to contact this Office again.

Very truly yours,

A handwritten signature in cursive script, appearing to read "John Rawski".

John Rawski
Staff Attorney