

OPINION NO. 2012-010**Syllabus:**

2012-010

1. A prosecuting attorney may institute a civil action under R.C. 117.28 when the Auditor of State files an audit report with the prosecuting attorney concluding that public money has been expended in violation of R.C. 9.03(C). A prosecuting attorney may institute a civil action under R.C. 309.12 when the prosecuting attorney is satisfied that funds of the county or public moneys in the hands of the county treasurer have been expended in violation of R.C. 9.03(C).
2. A prosecuting attorney may file a criminal action under R.C.

2921.41 when the prosecuting attorney, in the exercise of his discretion, believes that the evidence related to an expenditure of public funds in violation of R.C. 9.03(C) also supports a criminal charge under R.C. 2921.41.

3. A prosecuting attorney shall exercise discretion in determining whether to institute a civil action under R.C. 117.28 or R.C. 309.12 or file a criminal action under R.C. 2921.41 when it is alleged that public funds have been expended in violation of R.C. 9.03(C).
4. A prosecuting attorney may institute a civil action under R.C. 117.28 or R.C. 309.12 for an expenditure of public funds in violation of R.C. 9.03(C) against the governing body of a political subdivision; individual members of the governing body of a political subdivision; other governmental entities or public officials who were responsible for, or that ordered or participated in the ordering of, such an expenditure; and private persons who received the public funds expended in violation of R.C. 9.03(C).
5. A prosecuting attorney may file a criminal action under R.C. 2921.41 against a public official, as defined in R.C. 2921.01(A), when the prosecuting attorney is satisfied that there is sufficient evidence indicating that the public official has violated R.C. 2921.41 based on an expenditure of public funds in violation of R.C. 9.03(C).

To: D. Andrew Wilson, Clark County Prosecuting Attorney, Springfield, Ohio
By: Michael DeWine, Ohio Attorney General, March 29, 2012

You have requested an opinion regarding the enforcement of R.C. 9.03. We have restated your questions as follows: ¹

1. Does a prosecuting attorney have the authority to seek a remedy for an alleged violation of R.C. 9.03?
2. If a prosecuting attorney has the authority to seek a remedy for an alleged violation of R.C. 9.03, what form of court action, or other action, is available for enforcement?
3. If a prosecuting attorney has the authority to seek a remedy for an alleged violation of R.C. 9.03, does a prosecuting attorney have a

¹ You also ask several questions regarding the authority of the Attorney General, Auditor of State, city law directors, village solicitors, other county officers, and private citizens to seek a remedy for an alleged violation of R.C. 9.03. Pursuant to R.C. 109.14, the Attorney General provides legal advice to a county prosecuting attorney in all matters relating to his official duties. *See, e.g.*, 1999 Op. Att’y Gen. No. 99-028, at 2-184. Because these questions are not related directly to a prosecuting attorney’s statutory duties, this opinion does not address them. *See* 2001 Op. Att’y Gen. No. 2001-032, at 2-189 n.1; 1989 Op. Att’y Gen. No. 89-095, at 2-462 n.2.

duty to take action when he obtains information that would lead him to believe that a violation of R.C. 9.03 has taken place?

4. If a prosecuting attorney has the authority to seek a remedy for an alleged violation of R.C. 9.03, against which entities, officers, or employees may he proceed?

Expenditure of Public Funds under R.C. 9.03 to Communicate about a Political Subdivision's Plans, Policies, and Operations

R.C. 9.03 provides general authority for the governing body of a political subdivision to make expenditures of public funds to communicate information about the political subdivision. R.C. 9.03(B) authorizes the governing body of a political subdivision to use "public funds" "to publish and distribute newsletters, or to use any other means, to communicate information about the plans, policies, and operations of the political subdivision to members of the public within the political subdivision and to other persons who may be affected by the political subdivision."

With certain limited exceptions,² division (C) of R.C. 9.03 explicitly prohibits the use of public funds by the governing body of a political subdivision to communicate certain other kinds of information:

[N]o governing body of a political subdivision³ shall use public funds to do any of the following:

² R.C. 9.03(C) excepts expenditures of public funds made under R.C. 340.03(A)(7) and R.C. 340.033(A)(12). R.C. 340.03(A)(7) and R.C. 340.033(A)(12) permit a board of alcohol, drug addiction, and mental health services to "recruit and promote" financial support for mental health programs and for drug addiction programs, respectively.

³ For purposes of R.C. 9.03, "political subdivision" is defined as follows:

(A) As used in this section, "political subdivision" means any body corporate and politic, except a municipal corporation that has adopted a charter under Section 7 of Article XVIII, Ohio Constitution, and except a county that has adopted a charter under Sections 3 and 4 of Article X, Ohio Constitution, to which both of the following apply:

(1) It is responsible for governmental activities only in a geographic area smaller than the state.

(2) It is subject to the sovereign immunity of the state.

The term "governing body," as used in R.C. 9.03, is left undefined. We therefore apply the common meaning of this term. R.C. 1.42. In common usage, a governing body is "[a] group of . . . officers or persons having ultimate control." *Black's Law Dictionary* 764 (9th ed. 2009); see also 2009 Op. Att'y Gen. No. 2009-013, at 2-108 to 2-109 (defining a "governing board" as "the group of officers or persons having ultimate control of an entity"). For example, prior opinions have recognized that a board of township trustees, see 2002 Op. Att'y Gen. No. 2002-

(1) Publish, distribute, or otherwise communicate information that does any of the following:

- (a) Contains defamatory, libelous, or obscene matter;
- (b) Promotes alcoholic beverages, cigarettes or other tobacco products, or any illegal product, service, or activity;
- (c) Promotes illegal discrimination on the basis of race, color, religion, national origin, handicap, age, or ancestry;
- (d) Supports or opposes any labor organization or any action by, on behalf of, or against any labor organization;
- (e) Supports or opposes the nomination or election of a candidate for public office, the investigation, prosecution, or recall of a public official, or the passage of a levy or bond issue.

(2) Compensate any employee of the political subdivision for time spent on any activity to influence the outcome of an election for any of the purposes described in division (C)(1)(e) of this section. Division (C)(2) of this section does not prohibit the use of public funds to compensate an employee of a political subdivision for attending a public meeting to present information about the political subdivision's finances, activities, and governmental actions in a manner that is not designed to influence the outcome of an election or the passage of a levy or bond issue, even though the election, levy, or bond issue is discussed or debated at the meeting. (Footnote added.)

See also 2008 Op. Att'y Gen. No. 2008-035, at 2-362 (R.C. 9.03 addresses the use of public funds "to support or oppose ballot issues in certain circumstances"); 2007 Op. Att'y Gen. No. 2007-036 (syllabus, paragraph 1) (the board of health of a general health district is prohibited from using public funds to conduct a campaign to support the passage of a tax levy pursuant to R.C. 9.03(C) but may use public funds to conduct a program to provide information about the health district's finances, activities, and governmental actions "in a manner that is not designed to influence the passage of the levy"); 2002 Op. Att'y Gen. No. 2002-001 (syllabus, paragraph 2) (a board of township trustees is prohibited from using public funds to support or oppose a candidate for public office, a recall effort, or a levy or bond issue); 1999 Op. Att'y Gen. No. 99-030, at 2-202 ("in general, a political subdivision is permitted to expend public funds to communicate information but is not permitted to expend public funds to support or oppose the passage of a levy or bond issue").

001, at 2-2, and the board of health of a general health district, *see* 2007 Op. Att'y Gen. No. 2007-036, at 2-367, are governing bodies of a political subdivision for purposes of R.C. 9.03. In other contexts, the governing body of a political subdivision includes a board of county commissioners, *see* 1986 Op. Att'y Gen. No. 86-051, at 2-273, and a board of education of a school district, *see* 1990 Op. Att'y Gen. No. 90-063, at 2-269.

A Prosecuting Attorney May Seek a Civil Remedy or Pursue Criminal Charges for a Violation of R.C. 9.03(C)

Your first two questions ask whether a prosecuting attorney has the authority to seek a remedy for an alleged violation of R.C. 9.03(C) and, if so, what form of court action, or other action, is available for enforcement. A violation of R.C. 9.03(C) occurs where public funds have been expended for one or more of the proscribed purposes enumerated in R.C. 9.03(C)(1) or (2). As noted in your opinion request, no provision in R.C. 9.03 or elsewhere in R.C. Chapter 9 identifies a mechanism for enforcing R.C. 9.03(C)'s prohibitions.

A prosecuting attorney has only those powers conferred by statute, either expressly or by necessary implication. *See State ex rel. Finley v. Lodwich*, 137 Ohio St. 329, 29 N.E.2d 959 (1940) (syllabus, paragraph 1) (duties of prosecuting attorney are proscribed by statute); 2009 Op. Att'y Gen. No. 2009-045, at 2-325. Further, "[i]t is well settled 'in Ohio that absent a specific statute authorizing a prosecuting attorney to institute . . . a civil action, he has no such authority.'" 2006 Op. Att'y Gen. No. 2006-016, at 2-134 (quoting 1973 Op. Att'y Gen. No. 73-089, at 2-337). Therefore, whether a prosecuting attorney may seek a remedy for a violation of R.C. 9.03(C) depends on whether a statute confers such authority upon the prosecuting attorney. For the reasons discussed below, we conclude that a prosecuting attorney may seek a remedy for an alleged violation of R.C. 9.03(C) by filing a civil action brought under R.C. 117.28 or R.C. 309.12. A prosecuting attorney also may file criminal charges for a violation of R.C. 9.03(C) under R.C. 2921.41.

A. Authority to Institute a Civil Action under R.C. 117.28

R.C. 117.28 expressly authorizes a prosecuting attorney to institute a civil action when the Auditor of State conducts an audit under R.C. 117.10-.27 and determines, as a result of the audit, that public money has been illegally expended.⁴ As part of the duty to conduct audits of public offices under R.C. 117.10, the Auditor of State is required to determine "whether any public money has been illegally expended." R.C. 117.24; *see also Police and Firemen's Disability and Pension Fund v. City of Akron*, 149 Ohio App. 3d 497, 2002-Ohio-4863, 778 N.E.2d 68, at ¶¶18-19 (Summit County); 2007 Op. Att'y Gen. No. 2007-010, at 2-78 to 2-79; 1994 Op. Att'y Gen. No. 94-048, at 2-242 to 2-243. The term "illegally expended," as used in R.C. Chapter 117, has been construed to require that an expenditure "violate an identifiable existing law." *Mahoning Valley Sanitary Dist. ex rel. Montgomery v. Gilbane Bldg. Co.*, No. C-2-98-785, 2001 U.S. Dist. LEXIS 25772, at *20 (S.D. Ohio Oct. 17, 2001); *see also* 2009 Op. Att'y Gen. No. 2009-033, at 2-228. In other words, "[a] constitutional, statutory or administrative provision must be violated by an expenditure in order for the expenditure to be illegal under R.C. 117.28." 2009 Op. Att'y Gen. No. 2009-033, at 2-228. Thus, an expenditure of public money for one or more of the proscribed purposes enumerated in R.C. 9.03(C) constitutes an "illegal expenditure" for purposes of R.C. Chapter 117.

⁴ R.C. 9.03 refers to the expenditure of "public funds," while R.C. Chapter 117 uses the term "public money." We use the terms interchangeably for the purpose of this opinion.

Once the Auditor of State determines that public money has been illegally expended, the Auditor incorporates that finding in an audit report. R.C. 117.25; *see also Police and Firemen's Disability and Pension Fund*, at ¶19. The Auditor files a certified copy of the audit report with “the officer required by state law, municipal or county charter, or municipal ordinance to act as legal counsel to the officers of the public office.” R.C. 117.27. If no officer is designated to act as legal counsel, the Auditor files the certified copy of the audit report “with the prosecuting attorney of the county within which the fiscal office of the public office is located.” *Id.* Thus, a prosecuting attorney may receive an audit report on behalf of any public office for which he acts as legal counsel and on behalf of any public office in the county that does not have an officer designated to act as legal counsel.

When a prosecuting attorney receives an audit report determining that public money has been illegally expended, R.C. 117.28 authorizes him to institute a civil action to recover the illegally expended public money.⁵ This statute provides, in pertinent part, that:

Where an audit report sets forth that any public money has been illegally expended, . . . the officer receiving the certified copy of the report pursuant to [R.C. 117.27] may, within one hundred twenty days after receiving the report, institute civil action in the proper court in the name of the public office to which the public money is due or the public property belongs for the recovery of the money or property and prosecute the action to final determination.

R.C. 117.28.⁶ *See also* 1976 Op. Att’y Gen. No. 76-017, at 2-52 (“[t]he clear thrust of R.C. 117.10 [(now R.C. 117.28)] is to provide a mechanism for recovery of illegally expended public funds”). R.C. 117.28 is a remedial statute and must be “liberally construed in order to effect [its] manifest purpose.” *State ex rel. Smith v. Maharry*, 97 Ohio St. 272, 276, 119 N.E. 822 (1918) (considering G.C. 286, now R.C. 117.28). The purpose of the statute is “to protect and safeguard public property and public moneys.” *Id.*

Because an expenditure of public funds in violation of R.C. 9.03(C) constitutes an illegal expenditure for purposes of R.C. Chapter 117, a prosecuting at-

⁵ R.C. 117.28 also provides a cause of action when the audit report sets forth “that any public money collected has not been accounted for, or that any public money due has not been collected, or that any public property has been converted or misappropriated.”

⁶ The term “civil action” is not defined in R.C. Chapter 117. According to *Black’s Law Dictionary* 34 (9th ed. 2009), a civil action means “[a]n action brought to enforce, redress, or protect a private or civil right; a noncriminal litigation.” *See also* R.C. 2307.01 (defining an “action” as “an ordinary proceeding in a court of justice, involving process, pleadings, and ending in a judgment or decree, by which a party prosecutes another for the redress of a legal wrong, enforcement of a legal right, or the punishment of a public offense”); Ohio R. Civ. P. 2 (“[t]here shall be only one form of action, and it shall be known as a civil action”).

torney may institute a civil action under R.C. 117.28 when the Auditor of State files an audit report with the prosecuting attorney concluding that public money was spent in violation of R.C. 9.03(C). *See Mahoning Valley Sanitary Dist. ex rel. Montgomery*, at *10 (a finding by the Auditor of State of an illegal expenditure of public money “is a prerequisite for recovery” under R.C. 117.28); *Police and Firemen’s Disability and Pension Fund*, at ¶17 (“[t]he plain language of the statute dictates that before a civil action may be instituted under [R.C. 117.28] for the recovery of funds, the [audit] report must set forth that public money has been illegally expended”); 1994 Op. Att’y Gen. No. 94-048, at 2-243 (“[i]f an audit report sets forth that any public money has been illegally expended, the legal officer receiving the report may institute a civil action for the recovery of the money”).

B. Authority to Institute a Civil Action under R.C. 309.12

Alternatively, a prosecuting attorney may, under R.C. 309.12, seek a remedy for an alleged violation of R.C. 9.03(C) through a civil action to recover public funds misapplied or illegally drawn from the county treasury. R.C. 309.12 provides, in pertinent part, the following:

Upon being satisfied that funds of the county, or public moneys in the hands of the county treasurer or belonging to the county, are about to be or have been misapplied, or that any such public moneys have been illegally drawn or withheld from the county treasury . . . the prosecuting attorney may, by civil action in the name of the state, apply to a court of competent jurisdiction, to restrain such contemplated misapplication of funds . . . or to recover, for the use of the county, all public moneys so misapplied or illegally drawn or withheld from the county treasury.

Like R.C. 117.28, the purpose of R.C. 309.12 is to protect public moneys and public property. *State ex rel. Maher v. Baker*, 88 Ohio St. 165, 180, 102 N.E. 732 (1913) (construing G.C. 2921, now R.C. 309.12, “so that the power of the prosecuting attorney in reference to public moneys, property, contracts, and the like, may be construed in the spirit in which the statute was enacted, to-wit, the full and complete protection of the people’s property, the people’s contracts, [and] the people’s moneys”).

Unlike R.C. 117.28, R.C. 309.12 does not require an audit report from the Auditor of State. As explained by one Ohio court:

R.C. 117.10 [(now R.C. 117.28)] provides for an action when there is an auditor’s report finding public funds illegally spent, while a prosecutor, within R.C. 309.12, may bring an action “upon being satisfied” that public funds have been illegally withdrawn. Both statutes establish identical actions by the prosecutor, except that R.C. 309.12 is not categorically restricted to cases involving an auditor’s report.

Bd. of County Comm’rs of Allen County v. Andrews, 50 Ohio App. 2d 375, 379, 363 N.E.2d 746 (Allen County 1976); *see also State ex rel. Smith v. Maharry*, 97 Ohio

St. at 278-79 (neither G.C. 2921 (now R.C. 309.12) nor G.C. 286 (now R.C. 117.28) are exclusive—“[p]ublic authorities have their option as to which sections they will utilize in protecting public money and public property”); 1995 Op. Att’y Gen. No. 95-035, at 2-189 to 2-190 (prosecuting attorney may bring an action to recover county funds pursuant to R.C. 309.12 or, in the alternative, pursuant to R.C. 117.28). Rather, a prosecuting attorney may institute a civil action under R.C. 309.12 if the prosecuting attorney is “satisfied” that funds have been misapplied.⁷ *Bd. of County Comm’rs of Allen County*, at 379. The term “misapplied,” as used in R.C. 309.12, has been construed to include money that is illegally expended. 1962 Op. Att’y Gen. No. 2850, p. 158, at 162 (an audit report that sets forth that township moneys have been illegally expended comes within the term “misapplied” for purposes of R.C. 309.12).

A civil action under R.C. 309.12 may be filed to recover “funds of the county” or “public moneys in the hands of the county treasurer.” The term “funds of the county” may refer to any money belonging to the county, including, for example, money received, collected by, or due the county treasurer under color of office, and to any of the funds established by the county pursuant to R.C. 5705.09, including, for example, the county general fund. The term “public moneys in the hands of the county treasurer” refers to, among other things, public moneys held by a county treasurer as a custodian. *See, e.g.*, R.C. 340.03(C) (county treasurer acts as custodian of funds of an alcohol, drug addiction, and mental health services board); R.C. 1545.22(B)(1) (county treasurer acts as custodian of funds of a board of park commissioners); R.C. 3709.10 (county treasurer acts as custodian of funds when two or more general health districts have been combined into a single district).

Thus, a prosecuting attorney may institute a civil action under R.C. 309.12 to recover funds for a board of county commissioners when those funds have been expended in violation of R.C. 9.03(C)’s proscriptions because the board’s funds constitute “funds of the county.” Additionally, R.C. 309.12 authorizes a prosecuting attorney to institute a civil action to recover funds for a park district created pursuant to R.C. Chapter 1545 when those funds have been expended in violation of R.C. 9.03(C)’s proscriptions because the park district’s funds constitute “public moneys in the hands of the county treasurer.” 1962 Op. Att’y Gen. No. 2850, p. 158, at 160-61. Although such a park district is a political subdivision separate from the county, the funds of such a district are held by the county treasurer as the statutory custodian. R.C. 1545.22(B)(1); 1962 Op. Att’y Gen. No. 2850, p. 158, at 160. Accordingly, a prosecuting attorney may institute a civil action under R.C. 309.12 when he believes that funds of the county or public moneys in the hands of the county treasurer have been expended in violation of R.C. 9.03(C).

C. Authority to File Criminal Charges under R.C. 2921.41

A prosecuting attorney also may be able to file a criminal charge under R.C.

⁷ In addition, if an expenditure in violation of R.C. 9.03(C) has been authorized, but public funds have not yet been paid, R.C. 309.12 states that a prosecuting attorney may “apply to a court of competent jurisdiction . . . to restrain such contemplated misapplication of funds.”

2921.41 when public funds have been expended in violation of R.C. 9.03(C)'s prohibitions if the facts disclose that such an expenditure also meets the elements set forth in R.C. 2921.41 for "theft in office." R.C. 2921.41 defines the criminal offense of theft in office and declares, in pertinent part, as follows:

(A) No public official . . . shall commit any theft offense, as defined in [R.C. 2913.01(K)], when either of the following applies:

(1) The offender uses the offender's office in aid of committing the offense or permits or assents to its use in aid of committing the offense;

(2) The property . . . involved is owned by this state, any other state, the United States, a county, a municipal corporation, a township, or any political subdivision, department, or agency of any of them.

Thus, a prosecuting attorney may file criminal charges under R.C. 2921.41 when, in the exercise of his discretion, he believes that the evidence related to an expenditure made in violation of R.C. 9.03(C) also supports a criminal charge under R.C. 2921.41.⁸

In order to establish a theft in office case, R.C. 2921.41(A) requires that a public official commit a "theft offense" as defined in R.C. 2913.01(K). R.C. 2913.01(K) declares, in relevant part, as follows:

(K) "Theft offense" means any of the following:

(1) A violation of section 2911.01, 2911.02, 2911.11, 2911.12,

⁸ Legislation pending in the General Assembly proposes to amend R.C. 9.03 and impose a criminal penalty for certain violations of the statute. Am. Sub. H.B. 326, 129th Gen. A. (2011) (as passed by the House of Representatives Dec. 6, 2011). This legislation seeks to add division (D) to R.C. 9.03 to prohibit any person from "knowingly" using public funds to publish, distribute, or otherwise communicate information that supports or opposes the nomination or election of a candidate for public office or the passage of a levy or bond issue, or to compensate an employee of a political subdivision for time spent on any activity to influence the outcome of an election for these purposes. Am. Sub. H.B. 326, section 1. The legislation further provides, by means of an amendment to R.C. 3599.40, that "whoever violates [R.C. 9.03(D)] is guilty of a misdemeanor of the first degree." *Id.*

R.C. 117.29 authorizes a prosecuting attorney to institute criminal proceedings if an audit report of the Auditor of State "sets forth any malfeasance or gross neglect of duty on the part of any public official for which a criminal penalty is provided." *See also* R.C. 117.01(E); R.C. 117.24-.25. Therefore, if Am. Sub. H.B. 326 is enacted, thereby providing a criminal penalty for certain violations of R.C. 9.03, a prosecuting attorney will be able to bring criminal charges against a public official under R.C. 117.29 if an audit report filed with the prosecuting attorney states that there is malfeasance or gross neglect of duty on the part of that official with respect to an expenditure prohibited by R.C. 9.03(C).

2911.13, 2911.31, 2911.32, 2913.02, 2913.03, 2913.04, 2913.041 . . . ,
 2913.05, 2913.06, 2913.11, 2913.21, 2913.31, 2913.32, 2913.33,
 2913.34, 2913.40, 2913.42, 2913.43, 2913.44, 2913.45, 2913.47,
 2913.48, former section 2913.47 or 2913.48, or section 2913.51, 2915.05,
 or 2921.41 of the Revised Code;

. . . .

(4) A conspiracy or attempt to commit, or complicity in committing, any offense under division (K)(1) . . . of this section.

The majority of the offenses enumerated in R.C. 2913.01(K) are not likely to be applicable when a violation of R.C. 9.03(C) is alleged. Several of the listed offenses come within R.C. Chapter 2911, which addresses offenses including robbery, burglary, trespass, and safecracking. Also included in R.C. 2913.01(K)(1) as a theft offense is a violation of R.C. 2915.05, which defines the gambling offenses of cheating and corrupting sports. It is difficult to imagine a situation in which an expenditure of public funds in violation of R.C. 9.03(C) would also constitute a violation of R.C. 2915.05 or the provisions of R.C. Chapter 2911 enumerated in R.C. 2913.01(K)(1).

The remaining statutory provisions enumerated in R.C. 2913.01(K)(1) come within R.C. Chapter 2913, which addresses theft and fraud. Many of the theft and fraud offenses of R.C. Chapter 2913 are not likely to be applicable when an expenditure has been made in violation of R.C. 9.03(C). *See, e.g.*, R.C. 2913.03 (unauthorized use of a vehicle); R.C. 2913.041 (possession or sale of unauthorized cable television device); R.C. 2913.40 (Medicaid fraud). Conversely, situations may arise in which an expenditure of public funds in violation of R.C. 9.03(C) also constitutes a violation of one or more of the provisions of R.C. Chapter 2913 enumerated in R.C. 2913.01(K)(1). For example, R.C. 2913.02 defines the offense of “theft.” A person is guilty of theft if, among other things, the person, “with purpose to deprive the owner of property or services,” knowingly obtains or exerts control over the property or services without the consent of the owner or person authorized to give consent, beyond the scope of the consent, by deception, by threat, or by intimidation. R.C. 2913.02. A member of a governing body of a political subdivision may commit a “theft” offense if the public funds expended in violation of R.C. 9.03(C) were obtained without consent or by deception, theft, or intimidation, or if the public funds were expended beyond the scope of consent.

An expenditure of public money made in violation of R.C. 9.03(C) also may involve forgery as defined in R.C. 2913.31. R.C. 2913.31(A) prohibits a person from, among other things, forging “any writing of another without the other person’s authority” or from forging “any writing so that it purports to be genuine when it actually is spurious, or to be the act of another who did not authorize the act.” A member of a governing body of a political subdivision may commit “forgery,” as defined in R.C. 2913.31, if public funds expended in violation of R.C. 9.03(C) were obtained by any of the actions prohibited by R.C. 2913.31(A). Therefore, a prosecutor may file a theft in office charge under R.C. 2921.41 when he believes that an expenditure of public funds made in violation of R.C. 9.03(C) also

satisfies the elements of an offense listed in R.C. 2913.01(K) as well as the other elements listed in R.C. 2921.41.⁹

The Decision to Seek a Remedy for a Violation of R.C. 9.03(C) is Left to the Discretion of the Prosecuting Attorney

You also ask whether a prosecuting attorney has a duty to take action when he obtains information that leads him to believe that a violation of R.C. 9.03(C) has occurred. It is well established that a prosecuting attorney has the discretion to determine which cases to pursue. “A prosecuting attorney will not be compelled to prosecute a complaint except when the failure to prosecute constitutes an abuse of discretion. Consequently, the decision whether to prosecute is discretionary and not normally subject to judicial review.” *Mootispaw v. Eckstein*, 76 Ohio St. 3d 383, 385, 667 N.E.2d 1197 (1996) (citation omitted); *see also Huber v. Auglaize County Bd. of Elections*, No. 3:06 CV 1968, 2007 U.S. Dist. LEXIS 68510, at *9 (N.D. Ohio Sept. 17, 2007) (“[t]he prosecuting attorney is an elected official vested with the power to prosecute all public offenses in her or his county on behalf of the people”). Thus, the prosecuting attorney has a duty to exercise his discretion in determining whether to pursue a particular case. *See, e.g., Pengov v. White*, 146 Ohio App. 3d 402, 406, 766 N.E.2d 228 (Lorain County 2001) (“[t]he duty of the prosecuting attorney is to *exercise his discretion* in determining, on a case by case basis, whether to prosecute particular individuals for alleged criminal offenses”); *see also State ex rel. Sartini v. Trumbull Twp. Volunteer Fire Dep’t*, 163 Ohio App. 3d 603, 2005-Ohio-4903, 839 N.E.2d 938, at ¶20 (Ashtabula County) (discretion whether to pursue a quo warranto case against an Ohio corporation “lies solely with the prosecutor”); 2004 Op. Att’y Gen. No. 2004-032, at 2-294 (like any other public officer, “the prosecuting attorney must determine the manner in which to carry out the various duties and obligations of the office”); 2001 Op. Att’y Gen. No. 2001-030, at 2-180 n.1. Accordingly, a prosecuting attorney shall exercise discretion in determining whether to file a criminal action under R.C. 2921.41 for an alleged violation of R.C. 9.03(C).

In keeping with the notion of prosecutorial discretion, R.C. 117.28 and R.C. 309.12 each state that a prosecuting attorney “may” institute a civil action to recover public moneys that have been illegally expended. Generally, the word “may” is construed as permissive. *Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (syllabus, paragraph 1); *see also Dennison v. Dennison*, 165 Ohio St. 146, 149, 134 N.E.2d 574 (1956) (“‘may’ denotes the granting of discretion”). Further, the Attorney General has concluded that “[a]n officer receiving such a certified report [from the Auditor of State] does not have a mandatory

⁹ R.C. 2921.41(C)(2) provides for restitution of “all of the property . . . that is the subject of the offense.” *See also State v. Hupp*, Clark App. No. 2009-CA-43, 2010-Ohio-2136, at ¶39. If an expenditure made in violation of R.C. 9.03(C) is the basis of a guilty plea or conviction under R.C. 2921.41, the court imposing a sentence must order the public official to make restitution for the illegally expended funds to the political subdivision, “in addition to the term of imprisonment and any fine imposed.” R.C. 2921.41(C)(2).

duty to institute civil action thereon, but may refrain from bringing action if he feels that such is not warranted under the particular facts concerned.” 1962 Op. Att’y Gen. No. 3062, p. 428 (syllabus, paragraph 2) (construing R.C. 117.10, now R.C. 117.28). Therefore, a prosecuting attorney shall exercise discretion in determining whether to institute a civil action under R.C. 117.28 or R.C. 309.12 for an alleged violation of R.C. 9.03(C)’s prohibitions.

A Prosecuting Attorney May File a Civil or Criminal Action against a Governmental Entity, Public Official, or Private Person to Enforce the Proscriptions of R.C. 9.03(C)

Your final question asks, if a prosecuting attorney is able to seek a remedy for an alleged violation of R.C. 9.03(C), against which entities, officers, or employees may he proceed.¹⁰ In order to determine whether a prosecuting attorney may pursue a cause of action, either civil or criminal, against a particular entity or person for an alleged violation of R.C. 9.03(C), we first look at the language of the relevant statutes.

Neither R.C. 117.28 nor R.C. 309.12 specifies the entities or individuals against whom a prosecuting attorney may institute a civil action for an alleged violation of R.C. 9.03(C). R.C. 9.03(C) explicitly prohibits “the governing body of a political subdivision” from using public funds to communicate certain kinds of information. Therefore, if the facts indicate that the governing body of a political subdivision has expended public funds for one or more of the proscribed purposes enumerated in R.C. 9.03(C), a prosecuting attorney may institute a civil action against the governing body under R.C. 117.28 or R.C. 309.12.

A prosecuting attorney may be able to institute a civil action under R.C. 117.28 or R.C. 309.12 for an alleged violation of R.C. 9.03(C) against the individual members of the governing body of a political subdivision. As explained by prior Attorney General opinions, “civil actions [under R.C. 117.28] may be initiated against the public officers who were responsible for the illegal expenditure.” 1994 Op. Att’y Gen. No. 94-048, at 2-245; 1976 Op. Att’y Gen. No. 76-017 (syllabus, paragraph 2) (R.C. 117.10, now R.C. 117.28, authorizes civil actions “against state officers . . . who were responsible for [an] illegal expenditure”). Attorney General opinions also have concluded that, pursuant to R.C. 117.28, “where any public officer orders or participates in the ordering of the expenditure of public funds, which expenditure is not authorized by law, such officer is personally liable for the amount of the funds so expended.” 1952 Op. Att’y Gen. No. 1713, p. 559, at 566 (construing G.C. 286, now R.C. 117.28); *accord* 1976 Op. Att’y Gen. No. 76-017, at 2-53.

¹⁰ It is beyond the scope of this opinion to describe all the circumstances in which a public officer’s conduct may be alleged to have violated R.C. 9.03, or to identify each public officer whose conduct may contravene the expenditure proscriptions of R.C. 9.03. For the purpose of your inquiry, therefore, we shall limit our examination to those persons to whom R.C. 9.03 makes explicit reference and several other groups of public officers that may bear responsibility for facilitating or participating in an expenditure otherwise prohibited by R.C. 9.03.

Although these opinions specifically addressed civil actions brought under R.C. 117.28, the same rationale and conclusions equally apply to R.C. 309.12.

Governmental entities other than the governing body of a political subdivision or public officials other than, or in addition to, the members of the governing body of a political subdivision also may be liable for facilitating an expenditure of public funds in violation of R.C. 9.03(C). A county auditor may be held liable pursuant to R.C. 117.28 or R.C. 309.12 “where she fails to exercise her statutory duties [under R.C. 319.16] by acting reasonably and prudently in issuing a warrant in payment of an expenditure that violates an existing constitutional, statutory, or administrative provision.” 2009 Op. Att’y Gen. No. 2009-033, at 2-228 to 2-229. Thus, for example, if a county auditor issues a warrant in payment of an expenditure by the board of county commissioners (the governing body of a political subdivision for purposes of R.C. 9.03) and that expenditure violates R.C. 9.03(C), the prosecuting attorney may determine that the auditor is liable for the expenditure if the auditor failed to act “reasonably and prudently.” *See id.* A similar determination might be made by a prosecuting attorney regarding other public officials who play a role in expenditures of the governing body of a subdivision. These public officials include fiscal officers of political subdivisions.

Finally, a prosecuting attorney may determine to institute a civil action against private persons if those persons are the recipients of the illegally expended public funds. Private persons may be held liable for any public funds wrongfully received. *See State ex rel. Smith v. Maharry*, 97 Ohio St. at 278; *State v. McKelvey*, 12 Ohio St. 2d 92, 232 N.E.2d 391 (1967) (syllabus, paragraph 4) (R.C. 309.12 “is to be construed to permit suit against the ultimate wrongful recipient” of misapplied county funds); 1976 Op. Att’y Gen. No. 76-017, at 2-52 (civil action may be initiated under R.C. 117.10, now R.C. 117.28, against private individuals for the recovery of illegally expended public funds); *see also* 1987 Op. Att’y Gen. No. 87-074, at 2-482 (employees of county sheriff who were incorrectly paid their accrued, unused sick and vacation leave benefits are liable to the county for such payments). *Cf. Cordray v. Int’l Preparatory Sch.*, Cuyahoga App. No. 91912, 2009-Ohio-2364, at ¶50 (recognizing “recovery actions concerning private individuals who have received public monies,” but also stating that the individual must have had a role in procuring the illegal expenditure).

Therefore, a prosecuting attorney may institute a civil action under R.C. 117.28 or R.C. 309.12 for an expenditure made in violation of R.C. 9.03(C) against the governing body of a political subdivision; individual members of the governing body of a political subdivision; other governmental entities or public officials who are responsible for, or that order or participate in the ordering of, such an expenditure; and private persons who receive the public funds expended in violation of R.C. 9.03(C).

R.C. 2921.41 explicitly defines who may be criminally charged under its provisions. R.C. 2921.41 prohibits a “public official” from committing a theft offense as defined therein. “Public official,” as used in this statute, means “any elected or appointed officer, or employee, or agent of the state or any political

subdivision, whether in temporary or permanent capacity.” R.C. 2921.01(A). Whether a particular public official shall be criminally charged for an alleged violation of R.C. 2921.41 must be determined on a case-by-case basis by the prosecuting attorney exercising his prosecutorial discretion. *See, e.g., State v. LaMar*, 95 Ohio St. 3d 181, 2002-Ohio-2128, 767 N.E.2d 166, at ¶43 (“[t]he decision whether to prosecute a criminal offense is generally left to the discretion of the prosecutor”); *Dowdy v. Jones*, Columbiana App. No. 10-CO-21, 2011-Ohio-3168, at ¶19 (“the decision whether or not to file criminal charges and prosecute a criminal offense is solely up to the prosecutor’s discretion”). Thus, a prosecuting attorney may file a criminal action under R.C. 2921.41 against a public official, as defined in R.C. 2921.01(A), when the prosecuting attorney is satisfied that there is sufficient evidence indicating that the public official has violated R.C. 2921.41 based on an expenditure in violation of R.C. 9.03(C)’s prohibitions.

Conclusions

Based on the foregoing, it is my opinion, and you are hereby advised as follows:

1. A prosecuting attorney may institute a civil action under R.C. 117.28 when the Auditor of State files an audit report with the prosecuting attorney concluding that public money has been expended in violation of R.C. 9.03(C). A prosecuting attorney may institute a civil action under R.C. 309.12 when the prosecuting attorney is satisfied that funds of the county or public moneys in the hands of the county treasurer have been expended in violation of R.C. 9.03(C).
2. A prosecuting attorney may file a criminal action under R.C. 2921.41 when the prosecuting attorney, in the exercise of his discretion, believes that the evidence related to an expenditure of public funds in violation of R.C. 9.03(C) also supports a criminal charge under R.C. 2921.41.
3. A prosecuting attorney shall exercise discretion in determining whether to institute a civil action under R.C. 117.28 or R.C. 309.12 or file a criminal action under R.C. 2921.41 when it is alleged that public funds have been expended in violation of R.C. 9.03(C).
4. A prosecuting attorney may institute a civil action under R.C. 117.28 or R.C. 309.12 for an expenditure of public funds in violation of R.C. 9.03(C) against the governing body of a political subdivision; individual members of the governing body of a political subdivision; other governmental entities or public officials who were responsible for, or that ordered or participated in the ordering of, such an expenditure; and private persons who received the public funds expended in violation of R.C. 9.03(C).
5. A prosecuting attorney may file a criminal action under R.C. 2921.41 against a public official, as defined in R.C. 2921.01(A),

when the prosecuting attorney is satisfied that there is sufficient evidence indicating that the public official has violated R.C. 2921.41 based on an expenditure of public funds in violation of R.C. 9.03(C).