May 13, 2011

The Honorable John L. Detty
Jackson County Prosecuting Attorney
295 Broadway Street, Suite 100
Jackson, Ohio 45640

SYLLABUS: 2011-014

The funds of an enhanced 9-1-1 system may not be used to establish and maintain a countywide community notification system to inform county residents of a public emergency.

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OPINION NO. 2011-014

The Honorable John L. Detty
Jackson County Prosecuting Attorney
295 Broadway Street, Suite 100
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Dear Prosecutor Detty:

Your predecessor requested an opinion whether the funds of an enhanced 9-1-1 system may be expended to establish and maintain a countywide community notification system. The purpose of the system will be to inform county residents of a public emergency.[1]

R.C. 4931.40-.70 authorize a county to establish and maintain a countywide 9-1-1 system. A countywide 9-1-1 system is "a system through which individuals can request emergency service using the telephone number 9-1-1." R.C. 4931.40(A). A countywide 9-1-1 system "may be a basic or enhanced 9-1-1 system, or a combination of the two, and shall be for the purpose of providing both wireline 9-1-1 and wireless 9-1-1."[2] R.C. 4931.41(B).

As used in R.C. 4931.40-.70, "basic 9-1-1" and "enhanced 9-1-1" mean the following:

> (B) "Basic 9-1-1" means a 9-1-1 system in which a caller provides information on the nature of and the location of an emergency, and the personnel receiving the call must determine the appropriate emergency service provider to respond at that location.
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> (C) "Enhanced 9-1-1" means a 9-1-1 system capable of providing both enhanced wireline 9-1-1 and wireless enhanced 9-1-1.

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[1] Your predecessor informed us that the countywide community notification system will be a reverse 9-1-1 system that is capable of initiating telephone calls to county residents who have wireline telephone service when there is a public emergency. *See* R.C. 4931.49(F)(5); 11B Ohio Admin. Code 4901:1-8-01(K), (L); 11B Ohio Admin. Code 4901:1-8-06.

[2] "Wireless 9-1-1" is "the emergency calling service provided by a 9-1-1 system pursuant to a call originating in the network of a wireless service provider." R.C. 4931.40(H). "Wireline 9-1-1" is "the emergency calling service provided by a 9-1-1 system pursuant to a call originating in the network of a wireline service provider." R.C. 4931.40(I).

R.C. 4931.40.

With respect to enhanced 9-1-1 service, R.C. 4931.40 defines the terms "enhanced wireline 9-1-1" and "wireless enhanced 9-1-1" as follows:

> (D) "Enhanced wireline 9-1-1" means a 9-1-1 system in which the wireline telephone network, in providing wireline 9-1-1, automatically routes the call to emergency service providers that serve the location from which the call is made and immediately provides to personnel answering the 9-1-1 call information on the location and the telephone number from which the call is being made.
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> (E) "Wireless enhanced 9-1-1" means a 9-1-1 system that, in providing wireless 9-1-1, has the capabilities of phase I and, to the extent available, phase II enhanced 9-1-1 services as described in 47 C.F.R. 20.18(d) to (h).[3] (Footnote added.)

Pursuant to R.C. 4931.40, the purpose of an enhanced 9-1-1 system is to provide a communications system whereby a person may use the telephone number 9-1-1 to obtain emergency service from an emergency service provider.[4] 1998 Op. Att'y Gen. No. 98-032 at 2-180. Such a system is also used to dispatch the appropriate emergency service provider to the location of the emergency. *Id.* An enhanced 9-1-1 system thus is a telecommunications system that may be utilized by the public "to contact and obtain the services of an emergency service provider" during emergencies.[5] *Id.* *See generally* R.C. 4931.49(E) ("[n]o person shall knowingly use a 9-1-1 system for a purpose other than obtaining emergency service").

Funding for the operation of an enhanced 9-1-1 system may be derived from a multitude of sources. *See* 2000 Op. Att'y Gen. No. 2000-044 at 2-269 and 2-270. For example, moneys for the operation of such a system may come from charges on improved realty, *see* R.C. 4931.51, monthly charges to telephone bills, *see* R.C. 4931.52-.53, proceeds from a tax levied on real property, *see* R.C. 5705.19(BB), proceeds from a sales and use tax, R.C. 5739.021; R.C. 5739.026; R.C. 5741.021; R.C. 5741.023, moneys disbursed from the wireless 9-1-1 government assistance fund, *see* R.C. 4931.63-.651, and moneys from the general fund of a political subdivision, *see* R.C. 5705.04(B); R.C. 5705.05;

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[3] 47 C.F.R. 20.18(d)-(h) describe "phase I enhanced 911 services," "phase II enhanced 9-1-1 service," "phase-in for network-based location technologies," "phase-in handset-based location technologies," and "phase II accuracy."

[4] For purposes of R.C. 4931.40-.70, "emergency service" means "emergency law enforcement, firefighting, ambulance, rescue, and medical service" and "emergency service provider" means "the state highway patrol and an emergency service department or unit of a subdivision or that provides emergency service to a subdivision under contract with the subdivision." R.C. 4931.40(N), (O).

[5] An enhanced 9-1-1 system is equipped with an automatic number identification system that identifies the calling party and provides a call back number in order to assist emergency providers responding to a 9-1-1 call for emergency service. *See* R.C. 4931.40(C)-(D).

R.C. 5705.09(A).[6] *See State ex rel. DiFrangia v. Trumbull County Bd. of Comm'rs*, 99 Ohio App. 3d 569, 651 N.E.2d 447 (Trumbull County 1994); 2009 Op. Att'y Gen. No. 2009-031; 2000 Op. Att'y Gen. No. 2000-044 (syllabus, paragraph 1); 1998 Op. Att'y Gen. No. 98-032 at 2-181 n.2. When moneys are collected or appropriated for use in the operation of an enhanced 9-1-1 system, the moneys may be used for only that purpose. *See* R.C. 4931.51(A), (F); R.C. 4931.52(D); R.C. 4931.53(D); R.C. 4931.65-.651; 2000 Op. Att'y Gen. No. 2000-009 at 2-43; 1998 Op. Att'y Gen. No. 98-032 at 2-181 and 2-182. *See generally State ex rel. Walton v. Edmondson*, 89 Ohio St. 351, 363-64, 106 N.E. 41 (1914) (where the expenditure of public moneys is limited by statute, the moneys may only be spent in accordance with the statutory provisions). Accordingly, the moneys that comprise the funds of an enhanced 9-1-1 system must be used to maintain, upgrade, and improve services that enable the public to contact and obtain the services of an emergency service provider during an emergency.[7] *See* 1998 Op. Att'y Gen. No. 98-032 at 2-180 through 2-182.

As explained earlier, a countywide community notification system initiates telephone calls to county residents who have wireline telephone service for the purpose of informing such residents of a public emergency. The system, unlike an enhanced 9-1-1 system, does not receive telephone calls from the public and dispatch an emergency service provider to the location of an emergency. A countywide community notification system and an enhanced 9-1-1 system thus serve different purposes. The service provided by a countywide community notification system is not one that enables the public to contact and obtain the services of emergency service providers during an emergency. Accordingly, the funds of an enhanced 9-1-1 system may not be used to establish and maintain this type of notification system.

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[6] Each telephone company that is a wireline service provider participating in an enhanced 9-1-1 system may charge the company's recurring rates for the maintenance and operation of the company's portion of the wireline telephone network used in the enhanced 9-1-1 system to its customers served by the enhanced 9-1-1 system. R.C. 4931.47(A)-(B); *see* 2000 Op. Att'y Gen. No. 2000-044 at 2-271 n.6. The telephone company's nonrecurring charges for its portion of the wireline telephone network of an enhanced 9-1-1 system and its nonrecurring charges for updating or modernization of the company's portion of the wireline telephone network used in an enhanced 9-1-1 system may be recovered through the credit authorized by R.C. 5733.55. R.C. 4931.47(C); *see also* 2000 Op. Att'y Gen. No. 2000-044 at 2-271 n.6.

[7] Funds of an enhanced 9-1-1 system may be used to establish, equip, furnish, operate, maintain, and staff public safety answering points; acquire, install, and upgrade computer hardware and software; train personnel; and pay other costs of providing enhanced 9-1-1 service. *See* R.C. 4931.51(A), (F); R.C. 4931.52(D); R.C. 4931.53(D); R.C. 4931.65-.651. *See generally* R.C. 4931.40(P) (for purposes of R.C. 4931.40-.70, a "public safety answering point" is "a facility to which 9-1-1 system calls for a specific territory are initially routed for response and where personnel respond to specific requests for emergency service by directly dispatching the appropriate emergency service provider, relaying a message to the appropriate provider, or transferring the call to the appropriate provider").

In an analogous situation the Attorney General concluded that (1) a countywide 9-1-1 system may not be expanded into a countywide public safety communications system and (2) the proceeds of a tax levied pursuant to R.C. 5705.19(BB) to fund a countywide 9-1-1 system may not be used to fund a countywide public safety communications system.[8] 1998 Op. Att'y Gen. No. 98-032. In reaching the first conclusion, the Attorney General explained:

> [C]ountywide 9-1-1 systems and countywide public safety communications systems serve different purposes. A countywide 9-1-1 system is used by the citizens of the county to contact and obtain the services of an emergency service provider, while a countywide public safety communications system is used to provide immediate field exchange of police, fire, and emergency medical services information between the county and other political subdivisions…. Accordingly, use of a countywide 9-1-1 system to provide immediate field exchange of police, fire, and emergency medical services information between the county and other subdivisions would be for a purpose not contemplated by the General Assembly when it enacted R.C. 4931.40-.53…. Finally, county moneys that are intended to be used to finance a countywide 9-1-1 system would be used for a purpose other than to dispatch the appropriate emergency service provider to a location.
>
> … [A] county thus lacks statutory authority to use a countywide 9-1-1 system to perform the functions of a countywide public safety communications system. (Citations omitted.)

Id. at 2-180 and 2-181.

With regard to the reasoning supporting the second conclusion, the Attorney General stated that the proceeds of a tax levied pursuant to R.C. 5705.19(BB) for the establishment and operation of a countywide 9-1-1 system must be credited to a special fund that is used solely to fund the 9-1-1 system. *Id*. at 2-181. Because a countywide public safety communications system is separate and distinct from a countywide 9-1-1 system, the proceeds of a tax levied pursuant to R.C. 5705.19(BB) may not be used to fund a countywide public safety communications system. *Id*. at 2-180 through 2-182.

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[8] A "countywide public safety communications system" is a "system of communications facilities, equipment, and services that helps to provide immediate field exchange of police, fire, and emergency medical services information between the county and participating states, political subdivisions, and other public entities, without regard to which jurisdiction holds title to real or personal property used in the system or employs the persons responsible to dispatch emergency personnel using the system." R.C. 307.63(A); *see also* 1998 Op. Att'y Gen. No. 98-032 at 2-179 n.1 ("a countywide public safety communications system enables police, fire, and emergency medical services personnel of either the same or different political subdivisions to have direct communications with each other for the purpose of coordinating their provision of emergency aid or assistance").

As in 1998 Op. Att'y Gen. No. 98-032, if an enhanced 9-1-1 system is used to fund a countywide community notification system to initiate telephone calls to county residents who have wireline telephone service to inform the residents of a public emergency, the 9-1-1 system would be used for a purpose not contemplated by the language of R.C. 4931.40-.70. *See* R.C. 4931.40; R.C. 4931.49(E). Additionally, the funds of the enhanced 9-1-1 system would be expended in a manner not authorized by law. *See* R.C. 4931.51(A), (F); R.C. 4931.52(D); R.C. 4931.53(D); R.C. 4931.65-.651; 2000 Op. Att'y Gen. No. 2000-009 at 2-43; *see also* R.C. 4931.40; R.C. 4931.49(E). *See generally State ex rel. Smith v. Maharry*, 97 Ohio St. 272, 119 N.E. 822 (1918) (syllabus, paragraph 1) ("[a]ll public property and public moneys … constitute a public trust fund…. Said trust fund can be disbursed only by clear authority of law"); *State ex rel. Locher v. Menning*, 95 Ohio St. 97, 99, 115 N.E. 571 (1916) ("[t]he authority [of a public official or entity] to act in financial transactions must be clear and distinctly granted"); 2008 Op. Att'y Gen. No. 2008-003 at 2-24 ("[a]ny doubt as to the authority to expend public funds must be resolved against the grant of authority to make the expenditure"). For these reasons, the funds of an enhanced 9-1-1 system may not be used to establish and maintain a countywide community notification system to inform county residents of a public emergency.

This conclusion is also in accord with R.C. 4931.49(F)(5). Pursuant to this statute, the Public Utilities Commission of Ohio (PUCO) has authority over "access to a data base given by a telephone company that is a wireline service provider to a state and local government in warning of a public emergency, as determined by the [PUCO]." *See In the Matter of the Implementation of Rules Concerning Wireless Enhanced 9-1-1 Pursuant to H.B. 361*, Case No. 06-915-TP-ORD, 2006 Ohio Puc. LEXIS 646, at *6 (Nov. 1, 2006). This grant of authority includes establishing the "charge, terms, and conditions" regarding the implementation and use of an "outbound emergency notification messaging system" by a county to inform its residents of a public emergency.[9] R.C. 4931.49(F)(5); *see* 11B Ohio Admin. Code 4901:1-8-06; *see also In the Matter of the Application of AT&T Ohio to Introduce Outbound Emergency Notification Data Serv.*, Case No. 07-1027-TP-EMG, 2007 Ohio

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[9] In order to implement R.C. 4931.49(F)(5), the Public Utilities Commission of Ohio has adopted and promulgated rule 4901:1-8-06. For purposes of this rule, "outbound emergency notification message" and "outbound emergency notification messaging system" have the following meanings:

> (K) "Outbound emergency notification message" means the outbound telephonic notification alert distributed to wireline end users, which relates details regarding a public emergency event in the affected geographically defined area.
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> (L) "Outbound emergency notification messaging system" means a system which performs an outbound emergency notification message to wireline telephone end users, utilizing information obtained from a database that holds end user records supplied by a wireline telephone company and serves the [public safety answering point] of a 9-1-1 system established under [R.C. 4931.40-.70].

Rule 4901:1-8-01.

Puc. LEXIS 691 (Oct. 17, 2007) (granting a telephone company the authority to (1) provide 9-1-1 database access to state and local governmental entities for use in outbound emergency notification messaging during a public emergency and (2) file a tariff to pay for the cost of such service); *In the Matter of the Application of Cincinnati Bell Tel. Co. to Offer Emergency Serv. Provider Database Serv.*, Case No. 07-17-TP-EMG, 2007 Ohio Puc. LEXIS 397 (May 24, 2007) (same as the previous parenthetical); *In the Matter of the Application of United Tel. Co. of Ohio d/b/a Embarq to Offer Reverse Notification Tel. Number Database Serv.*, Case No. 07-316-TP-EMG, 2007 Ohio Puc. LEXIS 399 (May 24, 2007) (same as the first parenthetical). *See generally* R.C. 4909.18 ("[a]ny public utility desiring to establish any rate, joint rate, toll, classification, charge, or rental, or to modify, amend, change, increase, or reduce any existing rate, joint rate, toll, classification, charge, or rental … shall file a written application with the [PUCO]").

The PUCO thus is responsible for establishing the monthly charge paid to a telephone company by county residents who have wireline telephone service when a county establishes a countywide community notification system to inform such residents of a public emergency. *See generally In the Matter of the Implementation of Rules Concerning Wireless Enhanced 9-1-1 Pursuant to H.B. 361*, Case No. 06-915-TP-ORD, 2007 Ohio Puc. LEXIS 34, at *14 (Jan. 17, 2007) (the PUCO "maintains that all tariffs filed [by telephone companies] regarding access to the 9-1-1 database, [including the payment of outbound emergency notification messaging service,] should be held at cost"). Therefore, insofar as the PUCO has explicit statutory authority to provide for the payment of the costs of a countywide community notification system, it follows that the funds of an enhanced 9-1-1 system may not be used to establish and maintain such a notification system. *See generally* 1998 Op. Att'y Gen. No. 98-032 at 2-182 (the proceeds of a tax levied under R.C. 5705.19(BB) to establish and operate a countywide 9-1-1 system may not be used to fund a countywide public safety communications system since such a system may be funded through a tax levied pursuant to R.C. 5705.19(KK)).

In conclusion, it is my opinion, and you are hereby advised that the funds of an enhanced 9-1-1 system may not be used to establish and maintain a countywide community notification system to inform county residents of a public emergency.

Respectfully,

MICHAEL DEWINE
Ohio Attorney General