October 28, 1993

OPINION NO. 93-029

Nancy Chiles Dix, Director
Ohio Department of Commerce
77 South High Street
Columbus, Ohio 43266-0544

Dear Director Dix:

You have asked the following questions concerning the State Private Investigator and Security Guard Provider Advisory Commission:

1. Are the duties of the members of the State Private Investigator and Security Guard Provider Advisory Commission to provide advice to the Director of Commerce on matters which the Director brings to the attention of the members, or may members insist on reviewing the internal policies, procedures, and decisions, including enforcement decisions, of the Director?

2. Are members of the State Private Investigator and Security Guard Provider Advisory Commission public officers or employees?

3. What liabilities does a member of the State Private Investigator and Security Guard Provider Advisory Commission face as a result of the performance of the member's duties?

4. If a member is sued because of good faith actions taken while serving on the State Private Investigator and Security Guard Provider Advisory Commission,
   (a) What immunities, privileges, or other defenses are available to the individual?
   (b) Under what circumstances will the Attorney General provide legal representation of the member in the suit?
   (c) If the Attorney General provides legal representation, how will conflicts in representation be resolved, *e.g.*, a conflict between the interests of two members, or a conflict between the interests of a member and the State or the Commission?
   (d) May a member designate counsel other than the Attorney General? If so, who is responsible for payment of the counsel?

Duties of State Private Investigator and Security Guard Provider Advisory

Commission

Your first question concerns the scope of the duties of the State Private Investigator and Security Guard Provider Advisory Commission (hereinafter the Commission). The functions of the Commission are prescribed by R.C. 4749.02(D), as follows: "The commission shall advise the director of commerce on all matters related to the regulation of private investigators, the business of private investigation, security guard providers, and the business of security services." Thus, the Commission is responsible for providing advice to the Director of Commerce specifically concerning those matters enumerated in the above-quoted portion of R.C. 4749.02(D).

It is well settled that, "[w]here authority is given to do a specified thing, but the precise mode of performing it is not prescribed, the presumption is that the legislature intended the party might perform it in a reasonable manner." *Jewett v. Valley Railway Co.*, 34 Ohio St. 601, 608 (1878). Thus, in advising the Director of Commerce concerning "the regulation of private investigators, the business of private investigation, security guard providers, and the business of security services," R.C. 4749.02(D), the Commission may do so in any reasonable manner. *See generally State ex rel. Kahle v. Rupert*, 99 Ohio St. 17, 122 N.E. 39 (1918) (a public officer is required to exercise an intelligent discretion in the performance of his official duty).

Cooperation Between the Commission and the Department of Commerce

From the wording of your question, it appears that there is some disagreement as to the extent of the Commission's advisory responsibilities in relation to the duties of the Department of Commerce and its Director with respect to the regulation of private investigators, security guard providers, and those businesses. In this regard, the remainder of R.C. 4749.02(D), quoted in part above, states: "The department of commerce shall *administer* [R.C. Chapter 4749], and for that purpose, the director may appoint such employees and establish such rules as he considers necessary." (Emphasis added.) Thus, the Department of Commerce, under the guidance of its administrative department head, the Director of Commerce, R.C. 121.03(B), is charged with the administration of R.C. Chapter 4749, which means that the Department is responsible for implementing and supervising the regulation of private investigators, security guard providers, and those businesses, as provided in that chapter. The Commission's responsibility is to advise the Director of Commerce with respect to those implementation and supervisory functions. *Cf.* 1981 Op. Att'y Gen. No. 81-089 (syllabus, paragraph one) (the authority of the Ohio Public Defender Commission to generally supervise the functioning of the public defender system in Ohio pursuant to R.C. 120.01 does not extend to "the management, supervision, and control of the daily operations of the State Public Defender's Office"). Nothing in R.C. 4749.02(D) expressly empowers the Commission to insist on reviewing the internal policies, procedures, and decisions of the Director apart from this responsibility, nor is there language from which such authority on the part of the Commission may be implied. Thus, the Commission's authority to review such internal policies, procedures, and decisions is limited to situations where this review is a reasonable component of the Commission's performance of its explicit responsibility to advise the Director of Commerce on the aforementioned subjects.

The focus of your first question appears to be the extent to which the Commission may act on its own initiative to advise the Director of Commerce. It is not possible to delineate distinct areas of responsibility between the Commission and the Department of Commerce in carrying out their respective duties under R.C. Chapter 4749. Rather, as stated in 1987 Op. Att'y Gen. No. 87-039 at 2-264:

> Persons involved in the controversy should...weigh the interests on both sides and seek a workable arrangement. *See generally ... State ex rel. Krakowski v. Stokes*, 16 Ohio App. 3d 62, 66, 474 N.E.2d 695, 699-70 (Cuyahoga County 1984) (stating that the administrative judge and the clerk of courts "should work together in order that each may efficiently carry out his duties" and "should rise above their differences, however engendered, and should be motivated to follow the spirit of [an applicable rule] in the interest of the public"); 1986 Op. Att'y Gen. No. 86-057 at 2-317 (stating that the township trustees and township clerk "should work together to establish a system which permits the township books to be maintained safely and made available to the public, while allowing both the board of trustees and the clerk to perform their duties in an efficient manner").

Thus, the Commission and the Department of Commerce should strive to reach a mutually agreeable and workable arrangement pursuant to which the Department and the Commission will be able to function together in executing their respective duties under R.C. Chapter 4749.

Civil Immunity, Indemnification, and Legal Representation of Commission Members

According to a member of your staff, your remaining questions concern potential liability of Commission members for acts performed in the course of their service on the Commission and their eligibility for representation in such matters by the Attorney General. Because of the interrelation of these issues, those questions will be addressed together.

A. Civil Immunity

Civil immunity of state officers and employees is governed by R.C. 9.86, which states:

> Except for civil actions that arise out of the operation of a motor vehicle and civil actions in which the state is the plaintiff, no *officer or employee* shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.
>
> This section does not eliminate, limit, or reduce any immunity from civil liability that is conferred upon an officer or employee by any other provision of the Revised Code or by case law. This section does not affect the liability of the state in an action filed against the state in the court of claims pursuant to [R.C. Chapter 2743]. (Emphasis

added.)

Thus, pursuant to R.C. 9.86, where the acts of a state officer or employee are not manifestly outside the scope of his employment or official responsibilities, he is not liable in a civil action under state law, except in a civil action arising out of the operation of a motor vehicle,[1] or in an action in which the state is the plaintiff, for damages or injury caused in the performance of his duties, unless he acted "with malicious purpose, in bad faith, or in a wanton or reckless manner."[2] Thus, if a member of the Commission is an "officer or employee," for purposes of R.C. 9.86, the member qualifies for the immunity provided for such officers and employees by that section.

B. Indemnification

R.C. 9.87 provides indemnification for certain officers and employees, stating in part:

> (A) The state shall, except as provided in division (B) of this section, indemnify an *officer or employee* from liability incurred in the performance of his duties by paying any judgment in, or amount negotiated in settlement of, any civil action arising under federal law, the law of another state, or the law of a foreign jurisdiction....
> (B) The state shall not indemnify an *officer or employee* under any of the following circumstances:
> (1) To the extent the officer or employee is covered by a policy of insurance for civil liability purchased by the state;
> (2) When the officer or employee acts manifestly outside the scope of his employment or official responsibilities, with malicious purpose, in bad faith, or in a wanton or reckless manner;
> (3) For any portion of a judgment that represents punitive or exemplary damages;
> (4) For any portion of a consent judgment or settlement that is unreasonable.
> ....
> (D) This section does not affect any of the following:
> (1) The waiver arising under [R.C. 2743.02(A)];
> (2) Any defense that would otherwise be available in an action alleging personal liability of an officer or employee;
> (3) The operation of [R.C. 9.83]. (Emphasis added.)

Accordingly, R.C. 9.87(A) establishes the general rule for the indemnification of an officer or employee by the state from liability incurred in the performance of his duties in a civil action arising under federal law, the law of another state, or the law of a foreign jurisdiction. R.C. 9.87(B)

---

[1] *See generally* R.C. 9.83 (concerning insurance for public officers and employees against liability arising out of the operation of a motor vehicle, aircraft, or watercraft "in the course of their employment or official responsibilities").

[2] *See generally* R.C. 2743.02 (concerning the state's waiver of immunity from liability).

further establishes exceptions and limitations to the indemnification provided under R.C. 9.87(A). As with R.C. 9.86, if the members of the Commission are officers or employees for purposes of R.C. 9.87, they are entitled to indemnification by the state as provided for therein.

C. Representation by the Attorney General

You are also concerned about the possible representation of members of the Commission by the Attorney General. In this regard, R.C. 109.361 states, in pertinent part: "Upon the receipt of a written request by any officer or employee, the attorney general, except as provided in [R.C. 109.362], except under the circumstances described in R.C. 120.06(E),and except for civil actions in which the state is the plaintiff, shall represent and defend the *officer or employee* in any civil action instituted against the officer or employee." (Emphasis added.) Thus, except as provided in R.C. 120.06(E)[3] and R.C. 109.362[4] and except for civil actions in which the state is the plaintiff, an

---

[3] R.C. 120.06(E) authorizes the State Public Defender to contract for private legal counsel to represent certain state officers and employees and certain attorneys in specified malpractice and civil actions.

[4] R.C. 109.362 states in part:

> (A) Prior to undertaking any defense under [R.C. 109.361], the attorney general shall conduct an investigation of the facts to determine whether the requirements of this section have been met. If the attorney general determines that any officer who holds an elective state office was acting manifestly outside the scope of his official responsibilities or that any other officer or employee was acting manifestly outside the scope of his employment or official responsibilities, with malicious purpose, in bad faith, or in a wanton or reckless manner, the attorney general shall not represent and defend the officer or employee....
> (B) The attorney general shall also deny a request for representation upon a determination that the requesting officer or employee is covered by a policy of insurance purchased by the state requiring the insurer to provide counsel in the action and that the amount of the claim against the officer or employee is not in excess of the amount of coverage under the policy of insurance. If the amount of the claim against the officer or employee is in excess of the amount of coverage under the policy of insurance, the state is not the plaintiff, and the officer or employee is not otherwise prohibited by this section from being represented and defended by the attorney general, the attorney general shall represent and defend the officer or employee for the amount of the claim in excess of the amount of coverage.
> (C) If the attorney general denies representation to an employee or officer who makes a request in accordance with the provisions of [R.C. 109.361], the attorney general shall notify the requesting officer or employee in writing of the denial setting forth the reasons for the denial within a reasonable time after the attorney general's receipt of the written request from the officer or employee.

officer or employee is entitled to be represented by the Attorney General in a civil action instituted against the officer or employee.

D. Commission Members as Officers or Employees for Purposes of R.C. 9.86, R.C. 9.87, and R.C. 109.361

Pursuant to R.C. 9.85(A), for purposes of R.C. 9.86 and R.C. 9.87, the phrase "officer or employee" has the same meaning as in R.C. 109.36(A), which defines that phrase also as used in R.C. 109.361-.366. Thus, if the members of the Commission qualify as officers or employees, as defined in R.C. 109.36(A), they are entitled to the civil immunity prescribed by R.C. 9.86, indemnification in accordance with R.C. 9.87, and representation by the Attorney General as set forth in R.C. 109.361.

R.C. 109.36(A) defines "officer or employee" as meaning:

> any person who, at the time a cause of action against him arises, is serving in an elected or *appointed office* or position *with the state*; is employed by the state; or is rendering medical, nursing, dental, podiatric, optometric, physical therapeutic, psychiatric or psychological services pursuant to a personal services contract with a department, agency, or institution of the state. Officer or employee does not include any person elected, appointed, or employed by any political subdivision of the state. (Emphasis added.)

R.C. 109.36(B) defines "state," as used in R.C. 109.36, as meaning: "*the state of Ohio*, including but not limited to, the general assembly, the supreme court, the offices of all elected state officers, *and all* departments, boards, offices, *commissions*, agencies, institutions, and other instrumentalities of the state of Ohio. _State_ does not include political subdivisions." (Emphasis added.)

R.C. 4749.02, governing the creation of the Commission, states in pertinent part:

> (A) There is hereby created the state private investigator and security guard provider advisory commission, consisting of the director of commerce[5] or a departmental employee designated by him, and seven members appointed by the governor, of whom two shall be active licensed private investigators, two shall be active licensed security guard providers, one shall be a municipal police officer ranking as captain or higher, one shall be a county sheriff, and one shall be an officer or employee of the bureau of criminal identification and investigation....
> (B) Terms of office of appointed members shall be for four years, commencing on the first day of January and ending on the thirty-first day of December. Each member shall hold office from the date of his appointment until the end of the term

[5] The office of Director of Commerce is filled by appointment by the Governor, with the advice and consent of the Senate. R.C. 121.03(B).

> for which he was appointed. Vacancies shall be filled by appointment by the governor. Any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall hold office for the remainder of such term. Any appointed member shall continue in office subsequent to the expiration date of his term until his successor takes office, or until a period of sixty days has elapsed, whichever occurs first. (Footnote added.)

Thus, pursuant to R.C. 4749.02(A), in addition to the Director of Commerce who serves *ex officio*, the members of the Commission are appointed by the Governor.

The description of the position held by a member as an "office" and the references to each member's service for a "term" in R.C. 4749.02(B) indicate the General Assembly's intent that the members of the Commission be considered officers. *See* 1989 Op. Att'y Gen. No. 89-093 at 2-449 (concluding that members of the Emergency Medical Services Board are officers for purposes of R.C. 109.36(A)). Further, R.C. 4749.02 creates the State Private Investigator and Security Guard Provider Advisory Commission as a commission of the state. It follows, therefore, that since a member of the State Private Investigator and Security Guard Provider Advisory Commission is serving in an "appointed office...with the state," each member constitutes an "officer or employee," as defined in R.C. 109.36(A). The members of the Commission are, therefore, entitled to civil immunity as provided in R.C. 9.86, indemnification under R.C. 9.87, and representation by the Attorney General as provided in R.C. 109.361.

Part of your fourth question is whether a member may designate counsel other than the Attorney General. In this regard, R.C. 109.02 states:

> The attorney general is the chief law officer for the state and all its departments and shall be provided with adequate office space in Columbus. Except as provided in [R.C. 120.06(E)], *no state officer or board, or head of a department or institution of the state shall employ, or be represented by, other counsel or attorneys at law.* The attorney general shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested. When required by the governor or the general assembly, he shall appear for the state in any court or tribunal in a cause in which the state is a party, or in which the state is directly interested. Upon the written request of the governor, he shall prosecute any person indicted for a crime. (Emphasis added.)

Accordingly, with one exception not here applicable, R.C. 109.02 *prohibits* a state officer or state board from being represented by, or employing, counsel other than the Attorney General. A member of the Commission may not, therefore, be represented in his official capacity by counsel other than the Attorney General.

Finally, your opinion request asks: "If the Attorney General provides legal representation, how will conflicts in representation be resolved, *e.g.*, a conflict between the interests of two members, or a conflict between the interests of a member and the State or the Commission?" It is

not possible to answer this question in the abstract, since resolution of any conflict could be made only after evaluation of the particular circumstances involved.

Conclusion

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

1. Pursuant to R.C. 4749.02(D), the State Private Investigator and Security Guard Provider Advisory Commission has a duty to advise the Director of Commerce on matters related to the regulation of private investigators, the business of private investigation, security guard providers, and the business of security service in any reasonable manner.

2. A member of the State Private Investigator and Security Guard Provider Advisory Commission is an "officer or employee," as defined in R.C. 109.36(A), and is, therefore, entitled to the civil immunity provided by R.C. 9.86, indemnification in accordance with R.C. 9.87, and representation by the Attorney General as specified in R.C. 109.361.

3. Pursuant to R.C. 109.02, a member of the State Private Investigator and Security Guard Provider Advisory Commission may not be represented by, or employ, legal counsel other than the Attorney General.

Respectfully,

LEE FISHER
Attorney General

October 28, 1993

Nancy Chiles Dix, Director
Ohio Department of Commerce
77 South High Street
Columbus, Ohio 43266-0544

SYLLABUS: 93-029

1. Pursuant to R.C. 4749.02(D), the State Private Investigator and Security Guard Provider Advisory Commission has a duty to advise the Director of Commerce on matters related to the regulation of private investigators, the business of private investigation, security guard providers, and the business of security service in any reasonable manner.

2. A member of the State Private Investigator and Security Guard Provider Advisory Commission is an "officer or employee," as defined in R.C. 109.36(A), and is, therefore, entitled to the civil immunity provided by R.C. 9.86, indemnification in accordance with R.C. 9.87, and representation by the Attorney General as specified in R.C. 109.361.

3. Pursuant to R.C. 109.02, a member of the State Private Investigator and Security Guard Provider Advisory Commission may not be represented by, or employ, legal counsel other than the Attorney General.