

May 9, 2003

The Honorable John W. Baker
Knox County Prosecuting Attorney
117 E. High Street, Suite 234
Mt. Vernon, Ohio 43050

SYLLABUS:

2003-014

1. The most recent federal decennial census must be used to establish a county's population for purposes of determining the annual compensation of the elected officers of that county under the classification and compensation schedules set forth in R.C. Chapter 325. (1982 Op. Att'y Gen. No. 82-047 (syllabus, paragraph 1) and 1999 Op. Att'y Gen. No. 99-033, approved and followed.)
2. The results of a federal decennial census are effective as of the date on which the Governor receives the completed tabulations of population from the U.S. Secretary of Commerce pursuant to 13 U.S.C. § 141(c). (1982 Op. Att'y Gen. No. 82-047 (syllabus, paragraph 2), approved and followed.) The results of the most recent federal decennial census, the 2000 Census, were received by the Governor, and thus became effective, on March 16, 2001.
3. The statistically adjusted figures from the 2000 Census, published by the U.S. Secretary of Commerce in December 2002, do not represent the official results of the 2000 Census, and thus do not constitute a county's population for purposes of R.C. Chapter 325.
4. If a county successfully challenges its March 16, 2001 population count under the U.S. Census Bureau's Census 2000 Count Question Resolution Program, the revised Census 2000 population count issued by the Bureau in response thereto constitutes the county's population for purposes of R.C. Chapter 325.
5. Annual population estimates, conducted by the U.S. Census Bureau pursuant to 13 U.S.C. §181 for the years between decennial censuses, do not constitute a county's population for purposes of R.C. Chapter 325. (1999 Op. Att'y Gen. No. 99-033, approved and followed.)



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OPINION NO. 2003-014

The Honorable John W. Baker
Knox County Prosecuting Attorney
117 E. High Street, Suite 234
Mt. Vernon, Ohio 43050

Dear Prosecutor Baker:

You have requested an opinion concerning whether the compensation of Knox County elected officials may be adjusted in light of possible changes in the county's population, as shown by three independent developments.

Compensation Scheme for County Officials — R.C. Chapter 325

By way of background, we will briefly set forth the statutory scheme governing the compensation of elected county officers. R.C. Chapter 325 establishes a "classification and compensation schedule" for each elected county officer.¹ The schedule groups counties into classes, based on population size, and assigns an "annual compensation" figure to each class for each specified calendar year. Under the current statutory scheme for officers who took office after December 8, 2000, there are 8 classes based on population range.² For example, a county engineer with a private practice who serves a county with a population of between 35,001 and 55,000 (Class 3) was entitled to an annual salary of \$52,411 in calendar year 2001, with annual, automatic cost of living increases for calendar years 2002 through 2008. R.C. 325.14(A); R.C. 325.18(C). A county engineer with a private practice who serves a county with a population of between 55,001 and 95,000 (Class 4) was entitled to an annual salary of \$56,521 in calendar year 2001 with automatic cost of living increases for years 2002 through 2008. *Id.*

¹ See R.C. 325.03 (county auditor); R.C. 325.04 (county treasurer); R.C. 325.06 (county sheriff); R.C. 325.08 (clerk of the court of common pleas); R.C. 325.09 (county recorder); R.C. 325.10 (county commissioners); R.C. 325.11 (county prosecuting attorney); R.C. 325.14 (county engineer); R.C. 325.15 (county coroner). See also R.C. 325.18 (additional annual salary increases through calendar year 2008).

² See 1999-2000 Ohio Laws, Part IV, 7756 (Sub. H.B. 712, eff. Dec. 8, 2000). See also Am. Sub. H.B. 129, 124th Gen. A. (2002) (eff. June 3, 2002).

Determination of Population

Also by way of background, we will summarize previous opinions explaining how a county's population is to be determined for purposes of ascertaining the class in which the county falls under R.C. Chapter 325, and thus, the compensation to which the county's elected officers are entitled.

As used in the Revised Code, the term "population" is defined to be "that shown by the most recent regular federal census," unless another definition is specifically provided. R.C. 1.59(D). Interpreting R.C. 1.59(D) in relation to R.C. Chapter 325, 1999 Op. Att'y Gen. No. 99-033 concluded that the federal decennial census, that is required by 13 U.S.C. § 141(a) to be taken as of the first day of April, beginning in 1980 and every ten years thereafter, is currently the *only* "regular federal census" for purposes of R.C. 1.59(D). Accordingly, the most recent federal decennial census "must be used to establish the population of a county for purposes of determining the compensation of the officers compensated in accord with the classification and compensation schedules of R.C. Chapter 325." *Id.* at 2-220.³ *See also* 1957 Op. Att'y Gen. No. 1440, p. 765 (syllabus) ("[u]nder the provisions of Chapter 325., Revised Code, the sole basis for determining the compensation of county officers elected at the general election of 1956 is the population of the county as determined by the census of 1950").⁴

³ 13 U.S.C. § 141(a) states: "The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the 'decennial census date.'" (The Bureau of the Census (Bureau) is located within the U.S. Department of Commerce, and the Secretary of Commerce is charged with performing functions and duties relating to the Bureau as are imposed upon him by law. 13 U.S.C. §§ 1, 2, 4. The Bureau is headed by a Director of the Census, who is appointed by the President. 13 U.S.C § 21.)

⁴ At the time 1957 Op. Att'y Gen. No. 1440, p. 765 was issued, the salary provisions of R.C. Chapter 325 referred to the population of the county "as shown by the federal census next preceding [an officer's] election." 1955-1956 Ohio Laws 194 (Am. Sub. S.B. 219, eff. Oct. 11, 1955). In interpreting this language, the opinion rejected the argument that a special federal census taken in 1954 of a village within the county, that showed a significant increase in population, could be used to demonstrate the same increase in the county's population for purposes of R.C. Chapter 325.

The salary provisions of R.C. Chapter 325 were amended by 1964 Ohio Laws, Part II, 44-53, 355 (Sub. H.B. 15, eff. Dec. 18, 1964) to describe the county population as that "ascertained by the latest federal census of the United States." This phrase was struck in 1975-1976 Ohio Laws, Part II, 2997 (Am. Sub. H.B. 784, eff. Dec. 6, 1976). By then, R.C. 1.59(D) had been enacted, defining "population" for purposes of the entire Revised Code. 1971-1972 Ohio Laws, Part II, 2108 (Am. H.B. 607, eff. Jan. 3, 1972).

As explained in 2001 Op. Att’y Gen. No. 2001-001, “[n]either federal nor state law, however, fixes a date or specifies an event upon which the population figures from the decennial census become effective or final.” *Id.* at 2-3. Previous opinions of the Attorney General, after extensive discussion of the possible options for determining the effective date of the decennial census, have concluded that the population figures shown by the federal decennial census become effective as of the date the Governor receives the official tabulations from the U.S. Secretary of Commerce pursuant to 13 U.S.C. § 141(c).⁵ *See* 1982 Op. Att’y Gen. No. 82-047 (syllabus, paragraph 2) (“[f]or the purposes of those sections of R.C. Chapter 325 that provide for the compensation of county officers based upon population, the population figures as shown by the 1980 [then the most recent] federal decennial census were effective as of the date on which the Governor received the completed basic population tabulations transmitted by the Secretary of Commerce”). *See also* 2001 Op. Att’y Gen. No. 2001-001; 1992 Op. Att’y Gen. No. 92-035; 1991 Op. Att’y Gen. No. 91-057.

The most recent census conducted pursuant to 13 U.S.C. § 141(a) was taken as of April 1, 2000, and became effective on March 16, 2001, the date on which the Governor received the official tabulations from the U.S. Secretary of Commerce pursuant to 13 U.S.C. § 141(c). The March 2001 release showed the population of Knox County to be 54,500. Pursuant to this count, therefore, Knox County falls within Class 3 of the classification and compensation schedules set forth in R.C. Chapter 325. *See* note 1, *supra*. You posit, however, that the population of Knox County is, in fact, in excess of 55,000, and thus, the county falls within Class 4 of the classification and compensation schedules such that its elected officeholders are entitled to a higher rate of compensation than they are receiving under Class 3. You have mentioned three events occurring after March 16, 2001 that support your position. Two relate to inaccuracies in the March 2001 count and the third relates to population growth in Knox County. *See* note 12, *infra*. We will examine each in turn.

⁵ 13 U.S.C. § 141(c) requires that tabulations of population for purposes of the intrastate legislative apportionment or redistricting of each State be completed by the Secretary of Commerce “as expeditiously as possible after the decennial census date and reported to the Governor of the State involved and to the officers or public bodies having responsibility for legislative apportionment or districting of such State,” except that tabulations of population “shall in any event, be completed, reported, and transmitted to each respective State within one year after the decennial census date.” Thus, the effective date of any federal decennial census for purposes of R.C. 1.59(D) will be no later than one year following the April 1st decennial census date. *Cf.* 13 U.S.C. § 141(b) (requiring the Secretary of Commerce to tabulate and report the total population by State to the President of the United States within nine months of the decennial census date for purposes of apportioning the U.S. House of Representatives).

2000 Decennial Census Counts—Adjusted and Unadjusted Data

First, you have pointed to information released by the Bureau of the Census (Bureau) in December 2002 indicating that the tabulations released in March 2001 were an undercount of the nation's population. We note initially that, even if the December 2002 count were used for purposes of R.C. Chapter 325, it shows the population of Knox County as 54,652.⁶ Thus, Knox County would remain in Class 3 under the December 2002 release. *See also* note 11, *infra*. We will, however, continue with an explanation of the discrepancy between the March 2001 and December 2002 tabulations in the interest of completeness, and for the benefit of any county whose December 2002 figure would result in a change of classification if used as the population "shown by the most recent regular federal census."

The discrepancy between the March 2001 and December 2002 population figures are due to the March 2001 counts being "unadjusted" data, while the figures disclosed in December 2002 are "statistically adjusted" data. The Secretary of Commerce is required to use statistical sampling, "if he considers it feasible," to determine the population for purposes of the redistricting reports issued to the states pursuant to division (c) of 13 U.S.C. § 141 and other official purposes,⁷ except apportionment of the U.S. House of Representatives. 13 U.S.C. § 195.

⁶ We wish to express our appreciation to Dr. George Warheit for his efforts in obtaining for our consideration the adjusted data for Knox County that were compiled by the Bureau in the A.C.E. process, and to the Institute for Social Science Research, University of California Los Angeles, for their assistance.

⁷ The reason for such provision is explained in *Carter v. United States Department of Commerce*, 307 F.3d 1084, 1086 (9th Cir. 2002):

It is generally accepted that the decennial census results in a net undercount of the population, particularly with respect to minority and disadvantaged groups. The federal government recognizes that the undercount has significant consequences for affected communities. Thus, the Bureau of Census ("Bureau"), an agency of DOC, has endeavored to obtain more accurate population estimates for purposes of intra-state redistricting and allocation of federal funds by generating adjusted census figures through statistical extrapolation based on targeted surveys of representative population blocks. (Footnotes omitted.)

See also Department of Commerce v. United States House of Representatives, 525 U.S. 316 (1999).

As further explained by the court in *Carter*: "'Unadjusted data' refers to the 'initial enumeration,' 'initial count,' or 'initial headcount;' it is compiled primarily based on information obtained through mail-in surveys and personal visits. However, unadjusted data embody some

See 13 U.S.C. § 141(b). See also *Department of Commerce v. United States House of Representatives*, 525 U.S. 316 (1999).

For Census 2000, the Bureau tabulated the results of its initial enumeration,⁸ and then statistically adjusted this “headcount” through a process called “Accuracy and Coverage Evaluation,” or A.C.E. The Secretary ultimately decided, however, to release the unadjusted data to the states for redistricting purposes pursuant to 13 U.S.C. § 141(c) due to concerns over the reliability of the A.C.E. results and the need to meet the one-year deadline. See 66 Fed. Reg. 14520. See also note 5, *supra*. The Bureau subsequently decided that the unadjusted data should be used for other official purposes as well, including the establishment of a basis for calculating population estimates for the years between the decennial censuses, as described below. 66 Fed. Reg. 56006. (See also “Statement of Acting Census Bureau Director William Barron Regarding the Adjustment Decision,” dated October 17, 2001.)

While the Bureau initially agreed to make public, on an unofficial basis, the statistically adjusted numbers tabulated for the national level showing an undercount of 3.26 million, it refused to disclose the adjusted data for the state and local levels. Suit was filed, and in October 2002, a federal court of appeals held that the Bureau was required under the federal freedom of information act, 5 U.S.C. § 552, to disclose all data adjusted under A.C.E. for each of the jurisdictions covered by the 2000 census. *Carter v. United States Department of Commerce*, 307 F.3d 1084 (9th Cir. 2002). This “adjusted” data was ultimately released in December 2002.

It is important to note that, while the court in *Carter* ordered the *disclosure* of the adjusted data under the federal freedom of information act, it did *not* order that the adjusted data be substituted for the March 2001 figures as the official results of the 2000 decennial census. The Bureau has continued to maintain that the A.C.E. data are unreliable, warning in a disclaimer issued with the release of the data that, “the adjusted estimates were determined to be so severely flawed that all potential uses of these data would be inappropriate. Accordingly, the Department of Commerce deems that these estimates should not be used for any purpose that legally requires use of data from the decennial census and assumes no responsibility for the accuracy of the data for any purpose whatsoever. The Department, including the U.S. Census Bureau, will provide no assistance in the interpretation or use of these numbers.” The Bureau

statistical adjustment through imputation of demographic characteristics of neighboring households when census takers are unable to obtain information about a household.” *Id.* at 1086 n.4. See also *Utah v. Evans*, 536 U.S. 452 (2002).

⁸ As summarized in *Carter*, for the 2000 Census, the Bureau “made intensified efforts to obtain an accurate initial enumeration by involving local governments in the process of building address lists; designing a simplified questionnaire; developing a multi-step mailing strategy; implementing a paid advertising campaign; and restructuring the pay scale for temporary workers.” *Id.* at 1086-87.

subsequently issued a statement on March 12, 2003, that it has conducted further research as part of a program called A.C.E. Revision II, which revealed that, rather than an estimated net undercount of 3.26 million persons nationwide, there was an estimated net overcount of 1.3 million persons, although certain groups were undercounted. (“Statement of Census Bureau Director C. Louis Kincannon on Accuracy and Coverage Evaluation Revision II,” dated March 12, 2003.) Indeed, A.C.E. Revision II shows the population of Knox County to be 53,528 rather than 54,500. Regardless of these developments, however, the unadjusted numbers released in March 2001 remain the official Census 2000 count.⁹

Census 2000 Count Question Resolution Program — Knox County Challenge

Secondly, you argue that the Bureau revised the population count of Knox County after the County filed an administrative challenge to the March 2001 count. According to “Census 2000 Informational Memorandum No. 100,” dated April 26, 2001, from the Chief of the Bureau’s Decennial Management Division, local and tribal governmental entities may, under the Bureau’s Census 2000 Count Question Resolution (CQR) program, challenge the “housing unit” and “group quarter counts” released in March 2001, although the local entities are limited to alleging certain types of possible errors. If a challenge is successful, the revised count is used by the Bureau in making “postcensal estimates” beginning in December 2002, although the “base files for the census will remain unrevised so that none of the standard Census 2000 data products will reflect the corrections,” and the data remains unchanged for apportionment and redistricting purposes. However, the Bureau “will issue a revised official Census 2000 population and housing unit counts” for the governmental entity, and the “new official census counts” may be used by the jurisdiction “for all programs requiring official Census 2000 data.”¹⁰

Knox County did submit a challenge under the CQR program, which was successful. The Bureau’s Certification Letter showing the corrected counts states: “This is an official statement of the revised Census 2000 population and housing unit counts for Knox County, Ohio, including corrections made through December 19, 2002.” The Certification Letter further reads: “According to the official returns of the TWENTY-SECOND DECENNIAL CENSUS OF THE UNITED STATES, on file in the U.S. Census Bureau, the counts as of April 1, 2000, for Knox County, Ohio” are 54,503 population and 21,794 housing units.

⁹ In documenting its decision to continue to use for intercensal population estimates the unadjusted data, or “the official Census 2000 results,” rather than the results of the A.C.E. Revision II process, the Bureau states that “several technical concerns remain” with the methodology of A.C.E. Revision II. “Decision on Intercensal Population Estimates,” March 12, 2003, at p. 1.

¹⁰ The Bureau makes clear that the CQR program “is not intended to create a mechanism or process to challenge the March 6, 2001 decision of the Secretary of Commerce to release unadjusted Census 2000 redistricting data.” The program ends on September 30, 2003.

Although the revised count was not issued in time to be used for apportionment or redistricting purposes, it does stand as a correction to the March 2001 count and thus may be otherwise considered an “official” Census 2000 population count for Knox County. Thus, the revised count, 54,503, stands as the population of Knox County, as determined by “the most recent regular federal census,” for purposes of R.C. 1.59(D) and R.C. Chapter 325. However, Knox County remains in Class 3 under the revised count.¹¹

Intercensal Estimates

Thirdly, you contend that the population of Knox County has increased since the 2000 Census was conducted, as shown by a 2001 population estimate provided by the state Department of Development Office of Strategic Research. The document you provided from DOD shows the 2001 estimate of population for Knox County to be 55,521, which would place it in Class 4 rather than Class 3.¹²

We note initially, that a census or other count taken by a state or local government does not comply with a statutory requirement for the use of a federal census. *Murray v. State ex rel. Nestor*, 91 Ohio St. 220, 110 N.E. 471 (1915); 1999 Op. Att’y Gen. No. 99-033 at 2-218 n.4.

¹¹ Even if the three persons added to Knox County’s population under the CQR program were added to the A.C.E. figure of 54,652 for Knox County, the population of Knox County would still fall within Class 3.

¹² Ohio Const. art. II, § 20 prohibits any change, whether an increase or decrease, in a public officer’s salary or compensation during his existing term, and is applicable to elected county officers. *See State ex rel. Parsons v. Ferguson*, 46 Ohio St. 2d 389, 348 N.E.2d 692 (1976); 1999 Op. Att’y Gen. No. 99-033. Ohio Const. art. II, § 20 “forbids the granting of in-term salary increases to officers when such changes are the result of direct legislative action on the section(s) of the Revised Code which are the basis of the officers’ salaries.” *Schultz v. Garrett*, 6 Ohio St. 3d 132, 135, 451 N.E.2d 794 (1983).

If, however, a statutory scheme tying the compensation of a public officer to an external factor, such as population, is in effect prior to the commencement of an officer’s term, and the officer’s compensation level is automatically increased during his term due to a change in the population or other external factor, he would not be prohibited by Ohio Const. art. II, § 20 from receiving the increase during his existing term. *State ex rel. Mack v. Guckenberger*, 139 Ohio St. 273, 39 N.E.2d 840 (1942). *See also Schultz v. Garrett*. Therefore, a county officer is not prohibited by Ohio Const. art. II, § 20 from receiving an in-term increase in compensation that results from a population increase placing his county in a higher classification, so long as the schedule was in effect prior to the commencement of his term. *See* 2002 Op. Att’y Gen. No. 2002-006 at 2-30 n.8; 1999 Op. Att’y Gen. No. 99-033; 1982 Op. Att’y Gen. No. 82-047.

The population information provided by DOD is, however, actually data from the Bureau of the Census, estimating the population for Knox County as of July 1, 2001.

13 U.S.C. § 181(a) requires, “to the extent feasible,” that the Secretary of Commerce, “[d]uring the intervals between each census of population required under section 141 of this title ... annually produce and publish for each State, county, and local unit of general purpose government which has a population of fifty thousand or more, current data on total population and population characteristics.” The data “may be produced by means of sampling or other methods, which the Secretary determines will produce current, comprehensive, and reliable data.” *Id.* As explained on its web site, the Bureau “produces July 1 estimates for years after the last published decennial census,” using “[d]ata series for births, deaths, and domestic and international migration ... to update the decennial census base counts.”¹³ With each succeeding annual release of estimates, the estimates for preceding years dating back to the last census are revised, and “[p]reviously published estimates are superseded and archived.”

While an intercensal estimate is more current than, and based upon, the results of the most recent decennial census, *see* note 9, *supra*, it is not itself a census. *See State ex rel. Brubaker v. Brown*, 163 Ohio St. 241, 246, 126 N.E.2d 439 (1955) (a census is “an ‘enumeration’ of the persons living in a particular locality”); 1999 Op. Att’y Gen. No. 99-033 at 2-219 (a “regular federal census” is “an enumeration of inhabitants that the federal government is required by law to make at a stated time”). 1999 Op. Att’y Gen. No. 99-033 considered whether a population estimate compiled pursuant to 13 U.S.C. § 181(a) constituted a “regular federal census” for purposes of R.C. 1.59(D) and R.C. Chapter 325, and concluded that, “because the estimates published by the Bureau of Census pursuant to 13 U.S.C.A. § 181(a) as ‘current data’ are merely rough or approximate calculations, they do not qualify as ‘censuses’ as that term is understood for purposes of Ohio law.” *Id.* at 2-220.

1999 Op. Att’y Gen. No. 99-033 specifically rejected the use of any census or index other than the most recent federal decennial census merely because a more current index “would be advantageous to officers in those counties that have been experiencing rapid population growth.” *Id.* at 2-218. By choosing the most recent regular federal census as the determiner of population for purposes of the Revised Code, rather than an indicator that would be adjusted more frequently, the General Assembly obviously recognized, and found acceptable, the significant lapse of time between decennial censuses, with the inevitable population changes and resulting, ever-increasing obsolescence of the results. The most recent regular, or decennial, federal census, however, provides a well-recognized and definite event upon which to base a population count, and is used pursuant to statute to make a variety of significant determinations. *See, e.g.*, Ohio Const. art. XI, § 2 (apportionment of the State for members of the General Assembly); R.C. 3354.02 (creation of community college district); R.C. 4117.01(B) (application of the

¹³ As also explained on the Bureau’s web site, “[e]stimates usually are for the past, while projections are estimates of the population for future dates.”

public employees collective bargaining act to municipalities and townships). In instances where the General Assembly has deemed a different indicator to be desirable or necessary, it has so provided. *See, e.g.*, R.C. 703.02 (if a preliminary federal census shows that a population decrease will cause a city to become a village, the legislative authority may direct the city auditor to make an enumeration); *State ex rel. Brubaker v. Brown* (the phrase, “any federal census,” as used in R.C. 703.01 and R.C. 703.06 relating to the classification of municipalities, includes statistical compilations and surveys conducted by the Bureau under 13 U.S.C. § 8(b)). *See also* R.C. 715.17 (authorizing a municipal corporation to “take and authenticate a census”).

Thus, annual population estimates, conducted by the U.S. Census Bureau pursuant to 13 U.S.C. §181 for the years between decennial censuses, do not constitute a county’s population for purposes of R.C. Chapter 325. The 2001 estimate of 55,521 for Knox County does not represent the county’s population as “shown by the most recent regular federal census,” and may not be used to fix the compensation of the county’s elected officials.

Conclusions

Therefore, it is my opinion, and you are advised:

1. The most recent federal decennial census must be used to establish a county’s population for purposes of determining the annual compensation of the elected officers of that county under the classification and compensation schedules set forth in R.C. Chapter 325. (1982 Op. Att’y Gen. No. 82-047 (syllabus, paragraph 1) and 1999 Op. Att’y Gen. No. 99-033, approved and followed.)
2. The results of a federal decennial census are effective as of the date on which the Governor receives the completed tabulations of population from the U.S. Secretary of Commerce pursuant to 13 U.S.C. § 141(c). (1982 Op. Att’y Gen. No. 82-047 (syllabus, paragraph 2), approved and followed.) The results of the most recent federal decennial census, the 2000 Census, were received by the Governor, and thus became effective, on March 16, 2001.
3. The statistically adjusted figures from the 2000 Census, published by the U.S. Secretary of Commerce in December 2002, do not represent the official results of the 2000 Census, and thus do not constitute a county’s population for purposes of R.C. Chapter 325.
4. If a county successfully challenges its March 16, 2001 population count under the U.S. Census Bureau’s Census 2000 Count Question Resolution Program, the revised Census 2000 population count issued by the Bureau

in response thereto constitutes the county's population for purposes of R.C. Chapter 325.

5. Annual population estimates, conducted by the U.S. Census Bureau pursuant to 13 U.S.C. §181 for the years between decennial censuses, do not constitute a county's population for purposes of R.C. Chapter 325. (1999 Op. Att'y Gen. No. 99-033, approved and followed.)

Respectfully,

A handwritten signature in black ink, appearing to read "Jim Petro", written in a cursive style.

JIM PETRO
Attorney General