October 21, 1997

OPINION NO. 97-048

Richard G. Ward
Inspector General
Rhodes State Office Tower
30 East Broad Street, Suite 1820
Columbus, Ohio 43266-0820

Dear Inspector General Ward:

You have requested an opinion on the following question: "Does the jurisdiction of the Ohio Inspector General extend to the employees, staff, officers and trustees of the Ohio Historical Society?"

The powers and duties of the Inspector General are prescribed by R.C. 121.41-.50. The specific investigative responsibilities of the Inspector General are set forth in R.C. 121.42, which states in pertinent part:

> The inspector general shall do all of the following:
> (A) Investigate the management and operation of *state agencies* on his own initiative in order to determine whether wrongful acts and omissions have been committed or are being committed by state officers or state employees.
> (B) Receive complaints under [R.C. 121.46][1] alleging wrongful acts and omissions,

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[1] R.C. 121.46 states:

> Any person who knows or has reasonable cause to believe that a state officer or state employee has committed, or is in the process of committing, a wrongful act or omission may prepare and file with the inspector general, a complaint that identifies the person making the report and the state officer or state employee who allegedly committed or is committing the wrongful act or omission, describes the wrongful act or omission, and explains how the person reporting knew or came to his reasonable cause to believe that the state officer or state employee committed or is in the process of committing the wrongful act or omission. The preparation and filing of the complaint described in this section is in addition to any other report of the wrongful

> determine whether the information contained in those complaints allege facts that give reasonable cause to investigate, and, if so, *investigate to determine if there is reasonable cause to believe that the alleged wrongful act or omission has been committed or is being committed by a state officer or state employee....* (Footnote and emphasis added.)

Thus, pursuant to R.C. 121.42(A), the Inspector General is required, on his own initiative, to investigate the management and operation of state agencies for the purpose of determining whether wrongful acts or omissions have been or are being committed by state officers or state employees. Additional investigative duties arise under R.C. 121.42(B), which establishes the Inspector General's duty to receive complaints and to determine whether such complaints establish reasonable cause to investigate. If the Inspector General finds reasonable cause, R.C. 121.42(B) requires him to "investigate to determine if there is reasonable cause to believe that the alleged wrongful act or omission has been committed or is being committed *by a state officer or state employee*." (Emphasis added.)

You specifically ask about the Inspector General's jurisdiction over the employees, staff, officers, and trustees of the Ohio Historical Society.[2] We must, therefore, focus on R.C. 121.42(B), which requires the Inspector General to investigate allegations of wrongful acts or omissions by either "state officers," as defined in R.C. 121.41(F), or "state employees" as defined in R.C. 121.41(E).[3] Only if the employees, officers, or trustees of the Ohio Historical Society are "state officers" or "state employees" do they come within the jurisdiction of the Inspector General under R.C. 121.42(B).

> act or omission the person is required by law to make.
> The inspector general shall prescribe a form for complaints under this section. The inspector general shall provide a blank copy of the form to any person, free of charge. No complaint is defective, however, because it is not made on the form prescribed by the inspector general.

[2] Your opinion request refers to "staff" members, as well as to employees, officers, and trustees. Because it is not clear that the relationship between staff members and the Society differs from that between employees and the Society, this opinion will refer to both categories simply as "employees" of the Society.

[3] In contrast to R.C. 121.42(A), which concerns the Inspector General's investigative power with respect to the management and operation of certain entities, specifically "state agencies," R.C. 121.42(B) defines the duties of the Inspector General to respond to complaints alleging wrongdoing or omissions by certain persons -- state officers and state employees.

Pursuant to R.C. 121.41(F), a person must be "elected or appointed to a *public office* in a *state agency*" (emphasis added) in order to be a "state officer." As used in R.C. 121.41(F), the term "state agency" has the same meaning as in R.C. 1.60, with specific exceptions not applicable to the Ohio Historical Society. R.C. 121.41(D). According to R.C. 1.60, the term "state agency" includes "every organized body, office, or agency *established by the laws of the state* for the exercise of any function of state government." (Emphasis added.) Thus, in order to fall within this definition of "state agency," an entity must possess all of the following characteristics -- (1) the entity must be established by the laws of the state; (2) the entity must be an organized body, office, or agency; *and* (3) "the entity must be established to act on the state's behalf for the exercise of a function of state government," 1996 Op. Att'y Gen. No. 96-064 at 2-259 (emphasis added).

The first element of the definition requires that an entity be established by the laws of the state. The meaning of this requirement was explained in 1992 Op. Att'y Gen. No. 92-034 at 2-130 n. 2, as follows: "the use of the phrase _established by the laws of the state_ in R.C. 1.60 requires the body, office, or agency in question be brought into existence by direct legislative action of the General Assembly, and not simply _in accordance with_ or _pursuant to_ other provisions of the Revised Code."

In examining whether the Ohio Historical Society was "established by the laws of the state," it is useful to refer to *Ohio Historical Society v. State Employment Relations Bd.*, 66 Ohio St. 3d 466, 613 N.E.2d 591 (1993). The *Ohio Historical Society* court was asked to determine whether the Ohio Historical Society is a "public employer" subject to the collective bargaining provisions of R.C. Chapter 4117. At the time, the term "public employer" was defined in R.C. 4117.01(B) as including, among others, "the state or any political subdivision of the state located entirely within the state ... any *state agency*, authority, commission, or board, or other branch of public employment." *See* 1987-1988 Ohio Laws, Part II, 3771, 3778 (Am. H.B. 439, eff. March 17, 1989) (emphasis added). In deciding that the Ohio Historical Society is neither a "public employer" nor a "state agency" for purposes of R.C. Chapter 4117, the court set forth the following conclusions:

> [T]he Society is not public; it was neither created by the state nor is it subject to state control. The Society is a private, not-for-profit corporation. *It was created by a group of individuals, in their capacities as private citizens*, "[t]o promote a knowledge of archaeology and history, especially in Ohio * * *." Section 1, Article II, Constitution of the Ohio Historical Society. The SERB hearing officer found that the Society is governed by a constitution written and adopted by its members; the constitution may be amended by a simple majority of votes cast by Society members. A board of trustees ("board") runs the Society. The corporate constitution, not a state statute, provides that half of the trustees are elected from the Society's membership and half are appointed by the Governor of Ohio. The board elects corporate officers to operate the Society and these officers report directly to the board. The Society is, in short, not a public or government entity. *It was neither created by the state* nor is it subject to state control. In both form and substance *the Society is a private corporation*. (Emphasis added.)

66 Ohio St. 3d at 476-77, 613 N.E.2d at 599. It is clear, therefore, that the Society was established as a private, not-for profit corporation, by persons acting in their capacities as private citizens. Thus, although the relationship between the state and the Society is described, in part, in R.C. 149.30,[4] the Society was not "established by the laws of the state" for purposes of R.C. 1.60, but was instead established as a private corporation by private citizens for purposes beyond the performance of the functions described in R.C. 149.30.

Because the Ohio Historical Society was not "established by the laws of the state," it is not necessary to consider whether the Society possesses the remaining two characteristics of a "state agency," as defined by R.C. 1.60. The fact that the Society was not established by the laws of the state, in itself, compels the conclusion that, for purposes of R.C. 121.42, the Ohio Historical Society is not a "state agency." *See Ohio Historical Society v. State Employment Relations Bd.*, 66 Ohio St. 3d at 477, 613 N.E.2d at 599 ("[t]he [Ohio Historical] Society is not ... a state agency [for purposes of R.C. 4117.01(B)]").

Accordingly, because the Ohio Historical Society is not a state agency, its officers[5] are not

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[4] The unique relationship between the state and the Ohio Historical Society is described primarily in R.C. 149.30, which states in pertinent part:

> The general assembly may appropriate money to the Ohio historical society each biennium to carry out the public functions of the society as enumerated in this section. An *appropriation* by the general assembly to the society constitutes an *offer to contract* with the society *to carry out those public functions for which appropriations are made*. An acceptance by the society of the appropriated funds constitutes an acceptance by the society of the offer and is considered an agreement by the society to perform those functions in accordance with the terms of the appropriation and the law and to expend the funds only for the purposes for which appropriated. The governor may request on behalf of the society, and the controlling board may release, additional funds to the society for survey, salvage, repair, or rehabilitation of an emergency nature for which funds have not been appropriated, and acceptance by the society of such moneys constitutes an agreement on the part of the society to expend such funds only for the purpose for which released by the controlling board. (Emphasis added.)

In addition, R.C. 149.30 sets forth specific public functions that the Ohio Historical Society shall perform for the state.

[5] R.C. 1702.34(A) describes the "officers" of a nonprofit corporation, in part as follows: "The officers of a corporation shall consist of a president, a secretary, a treasurer, and, if desired, a chairman of the board, one or more vice-presidents, and such other officers and assistant officers as may be deemed necessary, each of whom may be designated by such other titles as may be provided in the articles, the regulations, the by-laws, or resolutions of the trustees."

"state officers" within the meaning of R.C. 121.41(F). Similarly, the trustees of the Society who, pursuant to R.C. 1702.28, are also officers of the Society, are not "state officers" within the meaning of R.C. 121.41(F).

The remaining portion of your question concerns the authority of the Inspector General to investigate alleged wrongdoings or omissions of the employees of the Ohio Historical Society. For purposes of R.C. 121.42(B), the term "state employee," includes "any person who is an employee of a state agency or any person who does business with the state." R.C. 121.41(E). Again, because the Ohio Historical Society is not a "state agency," a Society employee is not an "employee of a state agency" within the meaning of R.C. 121.41(E). *See generally* R.C. 149.30 (making employees of the Ohio Historical Society "public employees" for the sole purpose of R.C. Chapter 145, governing the Public Employees Retirement System).

The definition of "state employee," however, also includes any person who "does business with the state." R.C. 121.41(E). As stated in the *Ohio Historical Society* case, "[t]he Society's relationship with the state is based on contract." *Id*. at 477, 613 N.E.2d at 599. Because the Ohio Historical Society's constitution vests the government of the Society in its board of trustees, *id*. at 472, 613 N.E.2d at 596, it is the board of trustees that contracts on behalf of the Society with the state.[6] Thus, we can find no basis for concluding that the employees of the Ohio Historical Society are themselves doing business with the state within the meaning of R.C. 121.41(E). Similarly, because the Ohio Historical Society acts only through the collective action of its board of trustees, the individual trustees are not doing business with the state within the meaning of R.C. 121.41(E).

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[6] *See generally* R.C. 1702.30(A) (stating in pertinent part, "[e]xcept where the law, the articles, or the regulations require that action be otherwise authorized or taken, all of the authority of a corporation shall be exercised by or under the direction of its trustees").

Based on the foregoing, it is my opinion, and you are hereby advised that, because the trustees, officers, and employees of the Ohio Historical Society are not "state officers" or "state employees," as those terms are defined in R.C. 121.41(F) and (E), respectively, R.C. 121.42(B) does not authorize the Inspector General to investigate whether such persons have committed wrongful acts or omissions.

Respectfully,

BETTY D. MONTGOMERY
Attorney General

October 21, 1997

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SYLLABUS: 97-048

Because the trustees, officers, and employees of the Ohio Historical Society are not "state officers" or "state employees," as those terms are defined in R.C. 121.41(F) and (E), respectively, R.C. 121.42(B) does not authorize the Inspector General to investigate whether such persons have committed wrongful acts or omissions.