

**OPINION NO. 99-028****Syllabus:**

A nonprofit corporation that is recognized by a board of county commissioners as a convention and visitors' bureau and receives public funds from a county hotel lodging excise tax levied pursuant to R.C. 5739.024(A), but that is not organized and controlled by the county, is not a "county board" that is entitled to legal advice or representation from a county prosecuting attorney under R.C. 309.09(A).

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**To: Larry E. Beal, Hocking County Prosecuting Attorney, Logan, Ohio**

**By: Betty D. Montgomery, Attorney General, March 23, 1999**

You have requested an opinion on several issues involving a nonprofit corporation that functions as a convention and visitors' bureau. Your initial question is this: Does a county prosecuting attorney have a duty to represent a nonprofit corporation that functions as a convention and visitors' bureau and is funded primarily by revenues from a county hotel lodging excise tax levied pursuant to R.C. 5739.024(A)?

You have also presented questions regarding the legal obligations imposed on such a corporation by the Ohio public records law, R.C. 149.43, by the Ohio open meetings law, R.C. 121.22, and by the corporation's own regulations. The authority of the Attorney General to advise a county prosecuting attorney, however, extends only to matters related to the official duties of that officer. R.C. 109.14; 1990 Op. Att'y Gen. No. 90-076 at 2-326; 1988 Op. Att'y Gen. No. 88-008 at 2-25. For the reasons set out below, we conclude, in response to your first question, that a county prosecuting attorney has no duty to represent or provide legal advice to an organization such as you have described. Accordingly, we will not address your additional questions.

Based on your letter and additional information you have provided, we understand the facts to be as follows. Pursuant to R.C. 5739.024(A), the board of county commissioners of Hocking County levied a county excise tax, commonly known as a bed tax, on transactions by which lodging is furnished by a hotel to transient guests. The resolution levying the bed tax provides that a specified percentage of the revenue is to be distributed to the "Convention and Visitors Bureau of Hocking County, Ohio, as recognized and approved by this Board." You have indicated, without further elaboration, that the organization "recognized and approved" in that capacity is the Hocking County Tourism Association (HCTA).

The HCTA is a nonprofit corporation, incorporated in 1988 under the provisions of R.C. Chapter 1702.<sup>1</sup> The HCTA is governed by a board of trustees that is selected in

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<sup>1</sup> R.C. Chapter 1702 provides for the creation, merger, consolidation, and dissolution of a nonprofit corporation. R.C. 1702.01(C) defines a "[n]onprofit corporation" as

a corporation that is not formed for the pecuniary gain or profit of, and whose net earnings or any part of them is not distributable to, its members, trustees, officers, or other private persons, except that the payment of reasonable compensation for services rendered and the

accordance with HCTA's code of regulations.<sup>2</sup> *See generally* R.C. 1702.10 (adoption of regulations); R.C. 1702.11 (contents of regulations); R.C. 1702.26 (election of trustees); R.C. 1702.30 (authority of trustees). Its purpose is to provide leadership and assistance in developing tourism in Hocking County. The HCTA is composed of private individuals and organizations who support that purpose. Approximately fifteen percent of the HCTA's budget is provided by membership fees paid by these individuals and organizations. The remainder of the HCTA's budget is funded primarily by revenues from the county bed tax. Among its activities, the HCTA operates a "welcome center," which was given to it by the State of Ohio and is located on land leased from the State.

In determining the duty of a county prosecuting attorney to represent an organization such as the HCTA, we look first at the provisions of R.C. 309.09. Pursuant to R.C. 309.09(A), the county prosecuting attorney is designated as legal adviser of "the board of county commissioners, board of elections, and all other county officers and boards." The

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distribution of assets on dissolution as permitted by [R.C. 1702.49] is not pecuniary gain or profit or distribution of net earnings. In a corporation all of whose members are nonprofit corporations, distribution to members does not deprive it of the status of a nonprofit corporation.

A nonprofit corporation may be formed by any person, singly or jointly with others, signing and filing with the Secretary of State articles of incorporation. R.C. 1702.04. The articles of incorporation must include the name of the corporation, the place in Ohio where the principal office of the corporation is to be located, the purpose or purposes for which the corporation is formed, and the names and addresses of not less than three natural persons who are to be initial trustees of the corporation. R.C. 1702.04(A)(1)-(4). Additional information relating to initial members of the corporation, qualifications for membership, classification of members, and certain other matters may also be included in the articles of incorporation. R.C. 1702.04(B)(1)-(7). The legal existence of the corporation commences upon the filing of the articles of incorporation and, unless the articles provide otherwise, its existence shall be perpetual. R.C. 1702.04(D).

The authority of a nonprofit corporation and the functions it may perform are described in R.C. 1702.12, and are, in large part, the same as those permitted a corporation for profit under the general corporation law, *see* R.C. 1701.13. R.C. 1702.03 further provides that a nonprofit corporation "may be formed for any purpose or purposes for which natural persons lawfully may associate themselves, provided that when there is a special provision in the Revised Code for the formation thereunder of a designated class of [nonprofit] corporations, a [nonprofit] corporation of such class shall be formed thereunder."

<sup>2</sup> Article III of the code of regulations of the Hocking County Tourism Association (HCTA) states that the "corporate powers, property and supervision of affairs of the corporation shall be exercised and controlled by a Board of Trustees," and that the "Board of Trustees shall be composed of two (2) elected members plus members appointed as outlined" therein. Article III(a)-(g) provide for the appointment of nine persons and Article III(h) provides for the election of two persons to serve as members of the board of trustees. Members who serve by appointment are appointed by the board of county commissioners, the Logan-Hocking Chamber of Commerce, and several other private organizations that are engaged in the tourism industry in Hocking County. The two members who serve by election are elected at the annual conference of the HCTA. Eight persons also serve as ex officio members of the board of trustees.

county prosecuting attorney is required to provide those officers and boards with legal advice in matters connected with their official duties and to prosecute and defend suits and actions which they direct or to which they are parties. *Id.* The issue presented by your question, therefore, is whether a nonprofit corporation such as you have described constitutes a "county board" for purposes of R.C. 309.09(A).

Although the term "county board" is not defined by statute, it has been interpreted, for purposes of R.C. 309.09, by numerous opinions of the Attorneys General. These opinions have consistently limited the meaning of "county board" to entities that are "essentially a subdivision of the county or a subordinate department of the county." 1993 Op. Att'y Gen. No. 93-050 at 2-243 (quoting 1961 Op. Att'y Gen. No. 2383, p. 366, at 369); 1984 Op. Att'y Gen. No. 84-099 at 2-335; 1981 Op. Att'y Gen. No. 81-059 at 2-237; 1975 Op. Att'y Gen. No. 75-014 at 2-55; 1950 Op. Att'y Gen. No. 1970, p. 446, at 449. In determining whether a particular entity is "essentially a subdivision of the county or a subordinate department of the county," the opinions have considered three factors: (1) whether the boundaries of the entity are coextensive with the boundaries of the county; (2) whether the county is responsible for the organization, operation, or supervision of the entity; and, (3) whether the entity is funded by or through the county. *See* 1993 Op. Att'y Gen. No. 93-050 at 2-243; 1992 Op. Att'y Gen. No. 92-060 at 2-247; *see also* 1996 Op. Att'y Gen. No. 96-052 at 2-2-2 (adopting same factors for purposes of determining what constitutes a "county office" under R.C. 307.84).

With respect to the first factor, it is well established that an entity whose boundaries exceed those of the county cannot be a "county board" for purposes of R.C. 309.09. *See, e.g.*, 1994 Op. Att'y Gen. No. 94-082 at 2-407 (multicounty regional transit authority); 1989 Op. Att'y Gen. No. 89-102 at 2-492 (joint solid waste management district); 1979 Op. Att'y Gen. No. 79-019 at 2-69 (multicounty felony bureau); 1958 Op. Att'y Gen. No. 2736, p. 567, at 570 (regional planning commission). Rather, its territory must be coextensive with or contained within the territory of the county. *See* 1989 Op. Att'y Gen. No. 89-001 at 2-7; 1958 Op. Att'y Gen. No. 2736, p. 567, at 570.

The fact that the territory of an entity does not exceed that of the county, however, does not, in and of itself, establish that the entity is a county board. If an entity satisfies the territorial factor, it then is necessary to examine further whether the county is responsible by law for the organization or supervision of that entity. *See, e.g.*, 1996 Op. Att'y Gen. No. 96-052 at 2-202 to 2-203 (soil and water conservation district which is coextensive with county but not organized or managed by the county is not a county office); 1989 Op. Att'y Gen. No. 89-001 at 2-7 (local emergency planning committees established by executive order of the Governor and supervised by a state commission in accord with federal law are not county boards, despite boundaries coextensive with those of counties); 1984 Op. Att'y Gen. No. 84-099 at 2-337 (private industry council established by federal law to work in conjunction with local governments, rather than under their supervision, is not a county board); 1950 Op. Att'y Gen. No. 1970, p. 446, at 449 (board of trustees of a county library district is not a county board, because district is established under state law as a separate "body politic and corporate" with management and control vested primarily in its board of trustees); 1931 Op. Att'y Gen. No. 3015, vol. I, p. 341 (county agricultural society organized as a private corporation that controls its own internal affairs is not a county board).

Similarly, the fact that an entity receives public funds from or through the county is not sufficient, standing alone, to establish that the entity is a county board for purposes of R.C. 309.09. Although the receipt of county funds weighs in favor of an entity being a county board, *see, e.g.*, 1993 Op. Att'y Gen. No. 93-050 at 2-244, (county funding supported finding that local cluster for services to youth was a county board); 1992 Op. Att'y Gen. No. 92-060

at 2-248 (same with respect to a county solid waste management district), the pivotal factor again becomes whether the entity is organized or supervised by the county, *see, e.g.*, 1950 Op. Att'y Gen. No. 1970, p. 446, at 449 (fact that county levied taxes in support of county library district not determinative).

This analysis is supported by the reasoning in *Ohio Historical Society v. State Employment Relations Board*, 66 Ohio St. 3d 466, 613 N.E.2d 591 (1993), in which the court considered whether the Ohio Historical Society was a "public employer" for purposes of R.C. Chapter 4117 (public employees' collective bargaining). The court determined that a "public employer," as defined by R.C. 4117.01(B), must be "in fact a government entity." 66 Ohio St. 3d at 476, 613 N.E.2d at 599. The Ohio Historical Society, however, is a private, nonprofit corporation, governed by its own constitution and board of trustees. As a result of this form of organization, the court determined that the Society is not subject to direct state control, even though the Society receives public funds and, pursuant to its constitution, the Governor of Ohio appoints half of the trustees. *Id.* at 476-77, 613 N.E.2d at 599. The court stated that "[s]imply because a large portion of the Society's budget is derived from public funds does not render it a state agency. The fact that the Society has a close relationship with the state does not make it an arm of the state." *Id.* at 477, 613 N.E.2d at 599. *See also Dunn v. Agricultural Soc'y*, 46 Ohio St. 93, 98-99, 18 N.E. 496, 498-99 (1888) (county agricultural society was a private corporation; the fact, *inter alia*, that it received county tax funds did not make it an agency of the state for purposes of sovereign immunity), *cited in* 1931 Op. Att'y Gen. No. 3015, vol. I, p. 341, at 341-42 (county agricultural society is not a county board for purposes of representation by the county prosecuting attorney).

With respect to the organization you have described, we note first that the HCTA satisfies the first and third factors considered in determining whether an entity is a county board. Its service area is the county and it is funded primarily with public revenues from the county bed tax. Therefore, we must proceed to an examination of the second factor - whether the HCTA is organized and controlled by the county - in order to determine whether it is a county board.

The HCTA is eligible to receive public funds in its capacity as a "convention and visitors' bureau." *See* R.C. 5739.024(A)(1) (providing that after specified allocations, revenue arising from the bed tax "shall be spent solely to make contributions to the convention and visitors' bureau operating within the county"); R.C. 5739.024(A)(2).<sup>3</sup> The term "convention and visitors' bureau," however, is not defined in R.C. 5739.024 or elsewhere in the Revised Code. There are no statutes that provide specifically for the creation, organization, or operation of a convention and visitors' bureau. *See* 1981 Op. Att'y Gen. No. 81-093 at 2-357; *accord* 1983 Op. Att'y Gen. No. 83-054 at 2-214. Thus, a county has no statutory duty to establish, operate, or supervise such an entity as a component of county government. Nor does it appear that in your case the county has taken any discretionary action which could be construed as establishing or supervising a convention and visitors' bureau as an arm of county government.<sup>4</sup> The board of county commissioners has simply "recognized" a nonprofit corporation, the HCTA, as an eligible recipient of revenues under R.C. 5739.024(A).

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<sup>3</sup> Also, R.C. 307.693 permits a board of county commissioners to appropriate moneys from the general fund "to convention and visitors' bureaus operating within the county." You have not indicated that any appropriations under R.C. 307.693 are involved, however.

<sup>4</sup> Discretionary authority to establish and operate a convention and visitors' bureau as a county agency may be inferred from the terms of R.C. 5739.024(A), which authorize the contribution of a portion of the bed tax revenues solely to a convention and visitors' bureau,

As a nonprofit corporation established under R.C. Chapter 1702, the HCTA has a legal identity that is separate and independent from that of the county. Like the Ohio Historical Society and county agricultural societies that were analyzed in *Ohio Historical Society v. State Employment Relations Board*, *Dunn v. Agricultural Society*, and 1931 Op. Att'y Gen. No. 3015, vol. I, p. 341, the HCTA is supervised by its own board of trustees and is governed by its own code of regulations. See note two, *supra*. The HCTA, by serving as a convention and visitors' bureau, performs a public purpose that the General Assembly deems worthy of public financial support, but the HCTA is not required to do so by law and no statute governs the manner in which this service is to be performed. The county exercises no authority or control over the HCTA, except that which accrues indirectly from the power to grant or withhold the funds available under R.C. 5739.02(A). Therefore, consistent with the authorities analyzing analogous organizations, we conclude that a nonprofit corporation that is recognized by a board of county commissioners as a convention and visitors' bureau and receives public funds from a county hotel lodging excise tax levied pursuant to R.C. 5739.024(A), but that is not organized and controlled by the county, is not a "county board" that is entitled to legal advice or representation from a county prosecuting attorney under R.C. 309.09(A).

We are aware that in some situations, publicly-funded nonprofit organizations have been held to be public offices or public bodies subject to the Ohio public records law, R.C. 149.43 and the Ohio open meetings law, R.C. 121.22. See, e.g., *State ex rel. Dist. 1199, Health Care and Soc. Serv. Union v. Lawrence County Gen. Hosp.*, 83 Ohio St. 3d 351, 699 N.E.2d 1281 (1998) (public hospital that renders service to county residents and is supported by taxation is a "public office" under the public records law); *State ex rel. Freedom Communications, Inc. v. Elida Community Fire Co.*, 82 Ohio St. 3d 578, 697 N.E.2d 210 (1998) (private, nonprofit corporation that contracts with a county to provide firefighting and emergency services and that is supported by tax revenues is a "public office" under the public records law); *State ex rel. Strothers v. Wertheim*, 80 Ohio St. 3d 155, 684 N.E.2d 1239 (1997) (private, nonprofit corporation that receives public funds and performs the public service of resolving complaints against agencies of county government is a "public office" under the public records law); *State ex rel. Toledo Blade Co. v. Economic Opportunity Planning Ass'n*, 61 Ohio Misc. 2d 631, 582 N.E.2d 59 (C.P. Lucas County 1990) (nonprofit agency designated as a community action agency under R.C. 122.69, that receives public funds and performs services subject to statutory regulation, is both a "public body" for purposes of the open meetings law and a "public office" for purposes of the public records law); see also *State ex rel. Toledo Blade Co. v. University of Toledo Found.*, 65 Ohio St. 3d 258, 602 N.E.2d 1159 (1992); *State ex rel. Fostoria Daily Review Co. v. Fostoria Hosp. Ass'n*, 40 Ohio St. 3d 10, 531 N.E.2d 313 (1988); *State ex rel. Fox v. Cuyahoga County Hosp. System*, 39 Ohio St. 3d 108, 529 N.E.2d 443 (1988); *Sabo v. Hollister Water Ass'n, Inc.*, No. 93CA1582, 1994 Ohio App. LEXIS 33 (Ct. App. Athens County Jan. 12, 1994); 1995 Op. Att'y Gen. No. 95-001. These cases are not controlling for purposes of determining what constitutes a county board for purposes of R.C. 309.09, however.

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but do not specify the manner of establishing such a bureau. "It is axiomatic that when legislation confers the authority or duty to perform a task, but does not specify the manner of performance, the responsible public officer has the 'implied authority to determine, in the exercise of a fair and impartial official discretion, the manner and method of doing the thing commanded.'" 1994 Op. Att'y Gen. No. 94-076 at 2-385 (quoting *State ex rel. Hunt v. Hildebrandt*, 93 Ohio St. 1, 12, 112 N.E. 138, 141 (1915), *aff'd sub nom. State ex rel. Davis v. Hildebrandt*, 241 U.S. 565 (1916)).

The determination of “whether a particular entity is public or private ... depends on the specific statutory purpose for which the determination is being made.” 1995 Op. Att’y Gen. No. 95-001 at 2-4. For purposes of the public records law and the open meetings law, the terms “public office” and “public body” have express statutory definitions. See R.C. 149.011(A); R.C. 121.22(B)(1). These definitions have been construed expansively and are not limited to entities that are actual government agencies. See *State ex rel. Freedom Communications, Inc.*, 82 Ohio St. 3d at 579, 697 N.E.2d at 212 (“[a]n entity need not be operated by the state or a political subdivision thereof to be a public office under R.C. 149.011(A)”). Because of this difference in the scope of the definitions, even though the Ohio Historical Society had conceded that it was a public office for purposes of Ohio’s public records law in the case of *State ex rel. Fenley v. Ohio Historical Society*, 64 Ohio St. 3d 509, 597 N.E.2d 120 (1992), this did not preclude the court in the later case of *Ohio Historical Society v. State Employment Relations Board* from finding that the Society was not a state agency or an arm of the state for purposes of the public employees’ collective bargaining law. Case law addressing the public records and open meetings laws indicates that it would be prudent for a nonprofit organization that receives public funds to seek legal advice with respect to its legal obligations under these statutes. Nothing in that case law or in R.C. 309.09, however, authorizes a county prosecuting attorney to provide that advice.

Therefore, it is my opinion, and you are hereby advised that a nonprofit corporation that is recognized by a board of county commissioners as a convention and visitors’ bureau and receives public funds from a county hotel lodging excise tax levied pursuant to R.C. 5739.024(A), but that is not organized and controlled by the county, is not a “county board” that is entitled to legal advice or representation from a county prosecuting attorney under R.C. 309.09(A).