OPINION NO. 76-048

Syllabus:

In the absence of express statutory authorization, the Ohio Arts Council, created by R.C. 3379.02, may not properly purchase insurance to cover damage, theft or other calamity which might befall works of art not owned by the state, while under the control of the Council as part of its touring exhibition or transportation of art works programs.

To: James L. Edgy, Jr., Director, Ohio Arts Council, Columbus, Ohio
By: William J. Brown, Attorney General, June 25, 1976

I have before me your request for my opinion as to whether or not the Ohio Arts Council may lawfully purchase insurance to cover damage, theft, loss or other calamity which may befall works of art not owned by the State, but in the control of the Council as part of its services in presenting touring art exhibitions and in transporting art works between museums and galleries.

Questions concerning the authority of the state and the instrumentalities and political subdivisions thereof to purchase various forms of insurance have arisen frequently. My predecessors and I have addressed this issue in a number of opinions, including

1943 Op. Atty. Gen. No. 5949; 1952 Op. Atty. Gen. No. 1214; 1960 Op. Atty. Gen. No. 1489; 1967 Op. Atty. Gen. No. 67-008; 1971 Op. Atty. Gen. No. 71-008; 1971 Op. Atty. Gen. No. 71-028; 1971 Op. Atty. Gen. No. 71-034; 1972 Op. Atty. Gen. No. 72-076; 1972 Op. Atty. Gen. No. 72-090; 1974 Op. Atty. Gen. No. 74-098; 1976 Op. Atty. Gen. No. 76-008.

Prior to the enactment of R.C. Chapter 2743 in 1974, the power of an instrumentality of the state to purchase liability insurance to cover itself and its employees had been uniformly denied. In the absence of a statute expressly conferring liability, it was held that a purchase of this type amounted to a gift of public funds to an insurance company. With the enactment of Am. Sub. H.B. 800 in 1974, which created R.C. Chapter 2743, however, the General Assembly created a comprehensive system of adjudicating claims against the state through the Court of Claims. As discussed in 1974 Op. Atty. Gen. No. 74-098, this enactment altered the proposition that an instrumentality of the state could not purchase liability insurance because it could not be held liable. My conclusion in Opinion No. 74-098, supra, however, was that the intent of the General Assembly, in enacting Am. Sub. H.B. 800, was to do more than merely authorize suits against the state; the enactment of R.C. Chapter 2743 set forth a comprehensive procedural scheme regulating every aspect of suits brought against the state. The thrust of these provisions is that the state is to be a self-insurer. I concluded in Op. No. 74-098, supra, that in light of these provisions, an instrumentality of the state could not properly purchase liability insurance even though liability might now be imposed.

I am not unmindful that, prior to the enactment of Am. Sub. H.B. 800, the authority of a governmental unit to purchase insurance has, in special circumstances, been recognized as an exception to the general rule that public funds may not be expended to purchase liability or other insurance in the absence of specific statutory authorization. As recognized in 1960 Op. Atty. Gen. No. 1489 and 1952 Op. Atty. Gen. No. 1214, the authority to protect against the loss of a public building through the purchase of insurance coverage against fire and windstorm has been implied from express statutory authority to construct, maintain and operate a public building. Further, one of my predecessors, in 1952 Op. Atty. Gen. No. 1214, concluded that an exception to the general rule was justified in a situation where a car dealership and an automobile association made available to a school system privately owned automobiles for use in the school's driver education program. Noting that the use of such vehicles was a sufficient consideration for the expenditure of public funds, my predecessor concluded that a school system may properly purchase insurance to cover such vehicles when required to do so by private owners, even though no liability existed on the part of the school system.

The factual situation presented in 1952 Op. Atty. Gen. No. 1214, p. 187, appears similar to that presented in your letter. My conclusion, however, must vary due to the enactment of Am. Sub. H.B. 800 and its effect upon instrumentalities of the state.

R.C. 2743.01, as enacted by Am. Sub. H.B. 800, defines "state" in the following terms:

> "State" means the state of Ohio, including, without limitation, its departments, boards, offices, commissions, agencies, institutions and other instrumentalities. It does not include political subdivisions.

Thus while the reasoning set forth in Op. No. 1214, supra, might well apply to a political subdivision which is excluded from the operation of R.C. 2743.01, et seq., it is clear that it has no bearing upon an instrumentality of the state, such as the Ohio Arts Council. As an instrumentality of the state created pursuant to R.C. 3379.02, it is subject to the statutory provisions regulating adjudication of claims against the state. Since the thrust of R.C. Chapter 2743 is that the state is to be a self-insurer, I must conclude that no instrumentality of the state may properly purchase insurance of the type you describe in the absence of specific statutory authority to do so.

It is, therefore, my opinion, and you are so advised that, in the absence of express statutory authorization, the Ohio Arts Council created by R.C. 3379.02 may not properly purchase insurance to cover damage, theft or other calamity which might befall works of art not owned by the state, while under the control of the Council as part of its touring exhibition or transportation of art works programs.