Note from the Attorney General's Office:

1976 Op. Att'y Gen. No. 76-062 was modified by
1978 Op. Att'y Gen. No. 78-059.

OPINION NO. 76-062

Syllabus:

The board of trustees of a Comprehensive Mental Health Center, which is a private, non-profit corporation, does not constitute a public body for purposes of R.C. 121.22.

To: Richard E. Bridwell, Muskingum County Pros. Atty., Zanesville, Ohio
By: William J. Brown, Attorney General, September 8, 1976

I have before me your request for an opinion which inquires as to whether or not the governing body of a Comprehensive Community Mental Health Care Center is bound by the provisions of Ohio's open meeting law.

R.C. 121.22, as amended by Am. Sub. S.B. No. 74, which is popularly known as the "Sunshine Law," provides in part as follows:

> "(B) As used in this section:
>
> (1) 'Public body' means any board, commission, committee, or similar decision-making body of a state agency, institution or authority, and any legislative authority or board, com-

> mission, committee, agency, authority, or similar decision-making body of any county, township, municipal corporation, school district, or other political subdivision or local public institution.
>
> . . .
>
> "(C) All meetings of any public body are declared to be public meetings open to the public at all times.
>
> . . ."

Unlike some open-meeting statutes which expressly extend to all bodies established by law to serve a public purpose, e.g., Hawaii Rev. Laws §92-2 (1968), or to those bodies which receive and expend tax revenue, e.g., Ill. Ann. Stat. Ch. 102 §42 (Supp. 1975), the Ohio Statute provides no clear standard of applicability. It is necessary to determine, therefore, whether or not the Mental Health Center in question qualifies as a "local public institution" as that term appears in R.C. 121.22.

The problem of classifying the institution in question is complicated by the fact that it possesses certain features that are suggestive of both public and private institutions. I understand that the Center receives funds for its maintenance and operation from a local tax levy. Moreover, inasmuch as it provides mental health services to area residents, it is clear that the Center serves a public purpose. Yet, the Center is, in essence, a private, non-profit corporation. It was created neither by statute nor by an act of a local legislative authority. The powers of the Center are defined not by statute, but by its articles of incorporation.

It has been held that the true nature of an institution may be determined by the authority which created it and the purpose for which it exists. In the case of The Bank of Toledo v. Bond, 1 Ohio St. 622 (1853) the Court stated at 643 as follows:

> "Private institutions are those which are created or established by private individuals for their own private purposes. Public institutions are those which are created and exist by law or public authority. Some public benefits or rights may result from the institutions of private individuals or associations. So also some private individuals or rights may arise from public institutions. The only sensible distinction between public and private institutions is to be found in the authority by which, and the purpose for which they are created and exist."

See, also Mannington v. Hocking Val. Ry. Co., 183 F. 133, 153 (S.D. Ohio, 1910).

Thus, an institution such as the one under consideration, which was privately created for a public purpose, cannot be easily categorized as either a private or a public institution.

Perhaps the best indication of the intended scope of R.C. 121.22 is provided by its introductory provision which reads as follows:

> "(A) This section shall be liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in open meetings, unless the subject matter is specifically excepted by law.
> . . ."
>
> (Emphasis added.)

Thus, the General Assembly apparently intended the statute to apply to all bodies which are comprised of public officials. Conversely, a body comprised of individuals who are not public officers would not fall within the purview of the statute.

The meaning of the term public officer is often contextual and courts have given it different meanings in various circumstances. The chief and decisive characteristic of a public office, however, is the quality of the duties attaching to the office. Thus, it has been held that a public office is one invested by law with some portion of the sovereign power of the state. State, ex rel. Milburn v. Pethel, 153 Ohio St. 1 (1950). In the case of Herbert v. Ferguson, 142 Ohio St. 496 (1944), the Court discussed what constitutes appointment to a public office and stated at 501 as follows:

> ". . . a position is a public office when it is created by law, with duties cast upon the incumbent which involve the exercise of some portion of the sovereign power and in the performance of which the public is concerned, and which also are continuing in their nature and are not occasional or intermittent."

Thus, a public office must be created by law and the duties thereof defined by law. Moreover, those duties must involve some exercise of the sovereign power.

It is clear, on the basis of the foregoing, that an individual sitting on the board of trustees of the Comprehensive Mental Health Center does not qualify as a public officer. Such a position is not created by law, the authority of the position is derived from the corporate articles of the institution and not from any statute or ordinance. The management of a private, non-profit corporation does not involve the exercise of any portion of the sovereign power of the state.

In answer to your question it is my opinion and you are advised that the board of trustees of a Comprehensive Mental Health Center, which is a private, non-profit corporation, does not constitute a public body for purposes of R.C. 121.22.