

**OPINION NO. 91-014****Syllabus:**

1. Members of the Emergency Response Commission who have been appointed under R.C. 3750.02 and members of a local emergency planning committee who have been appointed pursuant to R.C. 3750.03 are entitled to immunity from criminal prosecutions, civil suits, and actions for removal from office or employment for violations of R.C. Chapter 102, R.C. 2921.42, or R.C. 2921.43 in the circumstances prescribed by R.C. 102.08.
2. The appointed members of the State Emergency Response Commission, established by R.C. 3750.02, are entitled to the immunity conferred upon officers and employees by R.C. 9.86.
3. Members of a local emergency planning committee, established by R.C. 3750.03, are entitled to the immunity afforded public officers and employees as prescribed by R.C. Chapter 2744.
4. Persons who voluntarily render advice to the Emergency Response Commission or to local emergency planning committees in an emergency situation are entitled to immunity from civil liability under those circumstances prescribed by R.C. 2305.232.

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**To: Gerry Ioannides, Ph.D., Chairman, State Emergency Response Commission,  
Columbus, Ohio**

**By: Lee Fisher, Attorney General, March 12, 1991**

I have before me the opinion request of your predecessor concerning the potential personal liability of members of the State Emergency Response Commission created by R.C. 3750.02, members of a local emergency planning committee appointed pursuant to R.C. 3750.03, and of boards of county commissioners and advisors, when acting under R.C. Chapter 3750 or the Emergency Planning and Community Right-To-Know Act. As noted in the opinion request, the General Assembly enacted 1987-1988 Ohio Laws, Part I, 1321 (Sub. S.B. 367, eff. Dec. 14, 1988), as stated in part in the Act, "to establish the Emergency Response Commission and local emergency planning committees and districts to implement, administer, and enforce, in conjunction with the Environmental Protection Agency and local fire departments, the federal 'Emergency Planning and Community Right-To-Know-Act of 1986' in this state...."

I will begin my discussion with an examination of the Emergency Response Commission. Pursuant to R.C. 3750.02, the Commission consists of various state officials who serve as members ex-officio, two non-voting legislative members, and ten persons appointed by the Governor with the advice and consent of the Senate.<sup>1</sup> Concerning the public nature of these positions, R.C. 3750.02(A) states:

Except for the purposes of [R.C. Chapter 102, R.C. Chapter 2921, R.C. 9.86, and R.C. 109.36-.366], serving as an appointed member of the commission does not constitute holding a public office or position of employment under the laws of this state and does not constitute grounds for removal of public officers or employees from their offices or positions of employment.

Thus, a member of the Commission who is appointed by the Governor is not considered to hold a public office or position of employment under state law, except

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<sup>1</sup> For purposes of this opinion, since the service of the members, other than those appointed by the Governor, is part of their service in other public offices, I will confine my discussion to those members whose potential liability in carrying out their functions under R.C. Chapter 3750 arises through their service as appointed members of the Commission.

for purposes of R.C. Chapter 102, R.C. Chapter 2921, R.C. 9.86, and R.C. 109.36-.366.

Your predecessor also questioned the potential personal liability of members of local emergency planning committees. Pursuant to R.C. 3750.03(B), the Emergency Response Commission has a duty to appoint the members of the local emergency planning committee of each emergency planning district. Concerning the nature of service rendered by members of local emergency planning committees, R.C. 3750.03(B) states in part: "Except for the purposes of [R.C. Chapters 102, 2744, and 2921], serving as a member of a committee does not constitute holding a public office or position of employment under the laws of this state and does not constitute grounds for removal of public officers or employees from their offices or positions of employment." Thus, only for purposes of R.C. Chapters 102, 2744, and 2921 will a member of a local emergency planning committee be considered a public officer or employee under state law.

By statute, therefore, the positions of appointed member of the Emergency Response Commission and member of a local emergency planning committee share common characteristics in that both have been deemed to constitute public offices or positions of employment for purposes of R.C. Chapter 102 and R.C. Chapter 2921. Turning first to R.C. Chapter 102, I note that the General Assembly has set forth various ethics considerations for persons in public service. Pursuant to R.C. 102.06: "The appropriate ethics commission<sup>2</sup> shall receive, and may initiate, complaints against persons subject to [R.C. Chapter 102] concerning conduct alleged to be in violation of this chapter, [and R.C. 2921.42-.43]." (Footnote added.) Pursuant to R.C. 102.08, "[t]he Ohio ethics commission, the board of commissioners on grievances and discipline of the supreme court, and the house and senate legislative ethics committees may recommend legislation relating to ethics, conflicts of interest, and financial disclosure, and render advisory opinions with regard to questions concerning these matters for persons for whom it is the appropriate ethics commission."

The effect of having the appropriate ethics commission render an advisory opinion is stated in R.C. 102.08, as follows:

When the appropriate ethics commission renders an advisory opinion relating to a special set of circumstances involving ethics, conflict of interest, or financial disclosure under [R.C. Chapter 102, R.C. 2921.42, or R.C. 2921.43], the person to whom the opinion was directed or who was similarly situated may reasonably rely upon such opinion and shall be immune from criminal prosecutions, civil suits, or actions for removal from his office or position of employment for a violation of [R.C. Chapter 102, R.C. 2921.42, or R.C. 2921.43] based on facts and circumstances covered by the opinion, if the opinion states there is no violation of [R.C. Chapter 102, R.C. 2921.42, or R.C. 2921.43].

Thus, pursuant to R.C. 102.08, an appointed member of the Emergency Response Commission or a member of a local emergency planning committee may acquire immunity "from criminal prosecutions, civil suits, or actions for removal from his

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<sup>2</sup> As used in R.C. Chapter 102, the term "appropriate ethics commission," is defined in R.C. 102.01(F) as meaning:

(1) For matters relating to members of the general assembly, employees of the general assembly, and candidates for the office of member of the general assembly, the house or senate legislative ethics committee, depending on the house of which he is a member, by which he is employed, or for which he is a candidate;...

....  
(3) For matters relating to all other persons, the Ohio ethics commission.

office or position of employment for a violation of" R.C. Chapter 102, R.C. 2921.42, or R.C. 2921.43,<sup>3</sup> in the manner set forth in R.C. 102.08.

At the same time, however, service as a member of the Emergency Response Commission or as a member of a local emergency planning committee constitutes holding a public office or position of employment for purposes of R.C. Chapter 2921 which, in addition to the provisions of R.C. 2921.42 and R.C. 2921.43 discussed above, defines various offenses against justice and public administration. R.C. Chapter 2921 sets forth, among other things, certain activities in which a public official, as defined in R.C. 2921.01(A), or public servant, as defined in R.C. 2921.01(B), may not engage.

R.C. 2921.01(A) defines the term "public official," as used in R.C. 2921.01-.45, as meaning, "*any elected or appointed officer, or employee, or agent of the state or any political subdivision thereof, whether in a temporary or permanent capacity, and including without limitation legislators, judges, and law enforcement officers.*" (Emphasis added.) The term "public servant," as defined in R.C. 2921.01(B), includes, among others, any public official. Thus, as a public officer or employee for purposes of R.C. Chapter 2921, a member of the Emergency Response Commission or of a local emergency planning committee is a "public official," as well as a "public servant," as those terms are used in R.C. Chapter 2921.

As stated above, R.C. Chapter 2921, in part, proscribes certain conduct by public officials and public servants. For example, R.C. 2921.41 states in part:

(A) No public official...shall commit any theft offense, as defined in [R.C. 2913.01(K)], when either of the following applies:

(1) The offender uses his office in aid of committing the offense, or permits or assents to its use in aid of committing the offense;

(2) The property or service involved is owned by this or any other state or the United States, a county, municipal corporation, or township, or any political subdivision, department, or agency of any of them, or is owned by a political party, or is part of a political campaign fund.

(B) Whoever violates this section is guilty of theft in office, a felony of the third degree.

(C)(1) A public official...who is convicted of, or pleads guilty to, theft in office is forever disqualified from holding any public office, employment, or position of trust in this state.

Pursuant to R.C. 2921.41, a member of the Emergency Response Commission or of a local emergency planning committee who engages in any of the activities described in R.C. 2921.41(A) may be found guilty of theft in office and be subject to the penalties set forth in R.C. 2921.41, including permanent disqualification from holding any public office, employment, or position of trust in the state, R.C. 2921.41(C). No statute of which I am aware provides a member of the Emergency Response Commission or of a local emergency planning committee immunity from prosecution for violation of R.C. 2921.41.

Thus, although a member of the Emergency Response Commission or of a local emergency planning committee is considered a public officer or employee for purposes of R.C. 102.08, which, as set forth above, provides such member immunity from criminal prosecution, civil suits, or actions for removal from his office or employment for a violation of R.C. 2921.42 and R.C. 2921.43 when the member, or a person similarly situated, has obtained an advisory opinion from the appropriate ethics commission in the manner prescribed by R.C. 102.08, such member, as a public official or public servant for purposes of R.C. 2921.01-.45, may be subject to criminal prosecution under other provisions of R.C. Chapter 2921.

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<sup>3</sup> R.C. 2921.42 prohibits a public official from having an unlawful interest in a public contract. R.C. 2921.43, in part, prohibits a public servant from soliciting or accepting improper compensation.

Returning to R.C. 3750.02(A) which concerns appointed members of the Emergency Response Commission, I note that such a member is considered a public officer or employee also for purposes of R.C. 9.86, which states in pertinent part:

Except for civil actions that arise out of the operation of a motor vehicle and civil actions in which the state is the plaintiff, no officer or employee shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

The terms of R.C. 9.86, therefore, establish the nonliability of officers and employees in civil actions arising under state law for damage or injury caused in the performance of the person's duties, subject to the limitations stated in the statute. Thus, as officers or employees for purposes of R.C. 9.86, an appointed member of the Emergency Response Commission is entitled to the immunity afforded by R.C. 9.86, and shall not be liable in a civil action, with the stated exceptions, arising under state law for damage or injury caused in the performance of his duties, unless his actions were manifestly outside the scope of his employment or official responsibilities, or unless he acted with malicious purpose, in bad faith, or in a wanton or reckless manner.<sup>4</sup>

Similar provision is made for members of local emergency planning committees under R.C. 3750.03(B) which provides, in part, that a member of a local emergency planning committee may be considered a public officer or employee for purposes of R.C. Chapter 2744 which establishes the scope of tort liability for the entities defined in R.C. 2744.01(F) as political subdivisions. Expressly included within the definition of a "political subdivision," for purposes of R.C. Chapter 2744, is an "emergency planning district and joint emergency planning district designated under [R.C. 3750.03], [and a] joint interstate emergency planning district established by an agreement entered into under that section." R.C. 2744.01(F).

R.C. 2744.03, in part, sets forth the defenses and immunities which are available to establish nonliability "[i]n a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to persons or property allegedly caused by any act or omission in connection with a governmental or proprietary function...." R.C. 2744.03(A). The immunity and defenses of employees under R.C. Chapter 2744 are set forth in R.C. 2744.03(A), as follows:

- (6) In addition to any immunity or defense referred to in division (A)(7)<sup>5</sup> of this section and in circumstances not covered by that division, the employee is immune from liability unless one of the following applies:
- (a) His acts or omissions were manifestly outside the scope of his employment or official responsibilities;
  - (b) His acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;
  - (c) Liability is expressly imposed upon the employee by a section of the Revised Code. (Footnote added.)

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<sup>4</sup> Pursuant to R.C. 3750.02(A), an appointed member of the Emergency Response Commission is considered a public officer or employee also for purposes of R.C. 109.36-.366, which establishes the circumstances in which an officer or employee is entitled to representation by the Attorney General in a civil action instituted against that officer or employee.

<sup>5</sup> R.C. 2744.03(A)(7), in part, lists various public officers, not including members of a local emergency planning committee, to whom any defense or immunity established at common law or by statute is available.

Thus, pursuant to R.C. 2744.03, a member of a local emergency planning committee is immune from liability in a civil action brought against the local emergency planning district or against the member himself to recover damages for injury, death, or loss to persons or property allegedly caused by any act or omission in connection with the functions of the local emergency planning district,<sup>6</sup> unless the member's acts or omissions were manifestly outside the scope of his employment or official responsibilities or were carried out with malicious purpose, in bad faith, or in a wanton or reckless manner, or unless liability is expressly imposed upon him by statute.

Your predecessor also asked about the potential personal liability of members of the boards of county commissioners and volunteer advisors to committees of either the Emergency Response Commission or a local emergency planning committee. Upon examination of R.C. Chapter 3750, I have found no duties to have been imposed upon the various boards of county commissioners, other than under R.C. 3750.03, which requires the county commissioners to submit a list of recommendations from which the Emergency Response Commission selects members of certain local emergency planning districts. In the absence of any functions being imposed upon the boards of county commissioners by R.C. Chapter 3750, I need not address the commissioners' potential liability.

Turning to the last group about which was asked, that of volunteer advisors, the opinion request states that such persons might be covered by R.C. 2305.232 which states in part:

(A) No person who gives aid or advice in an emergency situation relating to the prevention of an imminent release of hazardous material, to the clean-up or disposal of hazardous material that has been released, or to the related mitigation of the effects of a release of hazardous material, nor the public or private employer of such a person, is liable in civil damages as a result of the aid or advice if all of the following apply:

(1) The aid or advice was given at the request of:

(a) A sheriff, the chief of police or other chief officer of the law enforcement agency of a municipal corporation, the chief of police of a township police district, the chief of a fire department, the state fire marshal, the director of environmental protection, the chairman of the public utilities commission, the superintendent of the state highway patrol, the state director of the emergency management agency, the chief executive of a municipal corporation, or the authorized representative of any such official, or the legislative authority of a township or county; or

(b) The owner or manufacturer of the hazardous material, an association of manufacturers of the hazardous material, or a hazardous material mutual aid group;

(2) The person giving the aid or advice acted without anticipating remuneration for himself or his employer from the government official, authority, or agency that requested the aid or advice;

(3) The person giving the aid or advice was specially qualified by training or experience to give the aid or advice;

(4) Neither the person giving the aid or advice nor the public or private employer of the person giving the aid or advice was responsible for causing the release or threat of release nor would otherwise be liable for damages caused by the release;

(5) The person giving the aid or advice did not engage in willful, wanton, or reckless misconduct or grossly negligent conduct in giving the aid or advice;

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<sup>6</sup> As stated in R.C. 2744.02(A)(1), for purposes of R.C. Chapter 2744, the functions of political subdivisions are classified as either governmental or proprietary functions for which the defenses and immunities as prescribed by R.C. 2744.03 are available.

(6) The person giving the aid or advice notified the emergency response section of the environmental protection agency prior to giving the aid or advice.

R.C. 2305.232 thus establishes immunity from civil liability for a person who gives aid or advice in an emergency situation relating to the prevention of an imminent release of hazardous material, to the cleanup or disposal of hazardous material that has already been released, or to the related mitigation of the effects of a release of hazardous material, so long as the person meets all six criteria set forth in R.C. 2305.232(A). As stated in the opinion request, the persons about whom your predecessor inquired render their advice on a voluntary basis, and, therefore, presumably meet the requirement of R.C. 2305.232(A)(2). In order to be entitled to the immunity afforded by R.C. 2305.232, however, a person who renders aid or advice in an emergency situation related to the matters set forth in the statute must meet all the criteria established by R.C. 2305.232(A).

Based upon the foregoing, it is my opinion, and you are hereby advised, that:

1. Members of the Emergency Response Commission who have been appointed under R.C. 3750.02 and members of a local emergency planning committee who have been appointed pursuant to R.C. 3750.03 are entitled to immunity from criminal prosecutions, civil suits, and actions for removal from office or employment for violations of R.C. Chapter 102, R.C. 2921.42, or R.C. 2921.43 in the circumstances prescribed by R.C. 102.08.
2. The appointed members of the State Emergency Response Commission, established by R.C. 3750.02, are entitled to the immunity conferred upon officers and employees by R.C. 9.86.
3. Members of a local emergency planning committee, established by R.C. 3750.03, are entitled to the immunity afforded public officers and employees as prescribed by R.C. Chapter 2744.
4. Persons who voluntarily render advice to the Emergency Response Commission or to local emergency planning committees in an emergency situation are entitled to immunity from civil liability under those circumstances prescribed by R.C. 2305.232.