

June 16, 2017

The Honorable Keller J. Blackburn  
Athens County Prosecuting Attorney  
1 South Court Street  
Athens, Ohio 45701

SYLLABUS:

2017-018

1. Personal property purchased by a county prosecuting attorney or a county sheriff with furtherance of justice moneys, law enforcement trust fund moneys, or moneys collected from mandatory drug fines constitutes county property.
2. When, in the reasonable exercise of discretion, a county prosecuting attorney or a county sheriff determines that specifically itemizing covert law enforcement equipment in an annual inventory compiled pursuant to R.C. 305.18 will pose a risk of harm or danger to a person or property, or will frustrate the purpose for which the equipment was purchased, the county prosecuting attorney or county sheriff shall describe the nature of the covert law enforcement equipment in general terms in the annual inventory. The county prosecuting attorney or county sheriff shall also prepare an affidavit attesting to the need to preserve confidentiality with respect to the equipment and setting forth the general nature of the expenditure.
3. A county prosecuting attorney or a county sheriff may not use furtherance of justice moneys, law enforcement trust fund moneys, or moneys collected from mandatory drug fines to provide a per diem allowance to cover the cost of an employee's meals while travelling on official business.



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June 16, 2017

OPINION NO. 2017-018

The Honorable Keller J. Blackburn  
Athens County Prosecuting Attorney  
1 South Court Street  
Athens, Ohio 45701

Dear Prosecutor Blackburn:

You have requested an opinion about the expenditure of furtherance of justice moneys, law enforcement trust fund moneys, and moneys collected from mandatory drug fines. Specifically, you ask the following questions:

1. Whether property purchased by a county prosecuting attorney or a county sheriff with furtherance of justice moneys, law enforcement trust fund moneys, or moneys collected from mandatory drug fines<sup>1</sup> constitutes property of the county prosecuting attorney or county sheriff who authorized the purchase or property of the county?
2. Whether covert law enforcement equipment purchased by a county prosecuting attorney or a county sheriff with furtherance of justice moneys, law enforcement trust fund moneys, or moneys collected from mandatory drug fines shall be included in an annual inventory created pursuant to R.C. 305.18?<sup>2</sup>

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<sup>1</sup> Your letter refers to a “Major Drug Fund,” but does not identify the source of the moneys credited to that fund. For the purpose of this opinion, we understand your use of the term “Major Drug Fund” to refer to a fund consisting of moneys collected from mandatory drug fines levied in relation to a violation of R.C. 2925.03(A) (drug trafficking offenses) and distributed to a county law enforcement agency pursuant to R.C. 2925.03(F).

<sup>2</sup> In your letter, your second question asks, “Does covert law enforcement equipment purchased by a county prosecutor’s office or a county sheriff’s office by funds from the [furtherance of justice fund, law enforcement trust fund, and Major Drug Fund] need to be listed as a capital asset pursuant to R.C. 305.18 or any other applicable provision, on the county’s asset list?” As is explained in further detail below, R.C. 305.18 requires a county prosecuting attorney or a county sheriff to compile an inventory of “all the materials, machinery, tools, and other county supplies under the jurisdiction” of

3. May a county prosecuting attorney or a county sheriff use furtherance of justice moneys, law enforcement trust fund moneys, or moneys collected from mandatory drug fines to provide a per diem allowance to cover the cost of an employee's meals while travelling on official business? If a county prosecuting attorney or a county sheriff may do so, what accounting method shall the county prosecuting attorney or county sheriff use?

**Ownership of Property Purchased with Furtherance of Justice Moneys, Law Enforcement Trust Fund Moneys, and Moneys Collected from Mandatory Drug Fines**

To answer your first question, it is helpful to first explain the nature of the moneys identified in your letter and the purposes for which those moneys may be used. We begin with furtherance of justice moneys. A county prosecuting attorney and a county sheriff each shall receive an annual allowance from the county general fund for expenses incurred in the performance of the official duties of the office and in the furtherance of justice. R.C. 325.071 (county sheriff); R.C. 325.12 (county prosecuting attorney). The discretion to determine whether a particular expenditure is incurred in carrying out the duties of the office and in the furtherance of justice, and is, therefore, an appropriate expenditure of furtherance of justice moneys, lies with the county prosecuting attorney or the county sheriff. *See* 1988 Op. Att'y Gen. No. 88-100, at 2-495.

We next consider law enforcement trust fund moneys. A law enforcement trust fund shall be created by a county prosecuting attorney and a county sheriff for the purpose of receiving a portion of moneys acquired from the sale of contraband or instrumentalities that have been forfeited in accordance with R.C. Chapter 2981. R.C. 2981.13(C)(1). Moneys deposited in a law enforcement trust fund shall be expended in accordance with the agency's written internal control policy and only

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the county prosecuting attorney or county sheriff and to file a copy of the inventory with the board of county commissioners and the county auditor. Insofar as your question asks about an inventory compiled pursuant to R.C. 305.18, we have rephrased your second question to be consistent with the language of R.C. 305.18.

2A Ohio Admin. Code 117-2-02(D)(4)(c) (2016-2017 Supplement) requires each local public office to maintain capital asset records that include "such information as the original cost, acquisition date, voucher number, the asset type (land, building, vehicle, etc.), asset description, location, and tag number." If personal property purchased with furtherance of justice moneys, law enforcement trust fund moneys, or moneys collected from mandatory drug fines is under the jurisdiction and control of a county prosecuting attorney or a county sheriff, the property should be included in that office's capital asset record, even if the property constitutes county property. To require property that is under the control or jurisdiction of another county office to be included on that county office's capital asset record as well as on the county's capital asset record is redundant.

for the following purposes:

- (i) To pay the costs of protracted or complex investigations or prosecutions;
- (ii) To provide reasonable technical training or expertise;
- (iii) To provide matching funds to obtain federal grants to aid law enforcement, in the support of DARE programs or other programs designed to educate adults or children with respect to the dangers associated with the use of drugs of abuse;
- (iv) To pay the costs of emergency action taken under [R.C. 3745.13] relative to the operation of an illegal methamphetamine laboratory if the forfeited property or money involved was that of a person responsible for the operation of the laboratory;
- (v) For other law enforcement purposes that the superintendent of the state highway patrol, department of public safety, attorney general, auditor of state, prosecutor, county sheriff, legislative authority, department of taxation, Ohio casino control commission, board of township trustees, or board of park commissioners determines to be appropriate.

R.C. 2981.13(C)(2)(a). Moneys deposited in the law enforcement trust fund of a county prosecuting attorney or a county sheriff “shall not be used to meet the operating costs of the agency [or] office ... that are unrelated to law enforcement.” R.C. 2981.13(C)(2)(c). A law enforcement trust fund may be established in any bank and need not be established in the county treasury. 1992 Op. Att’y Gen. No. 92-030, at 2-114. Accordingly, moneys in the law enforcement trust fund of a county prosecuting attorney or county sheriff “are ... held and controlled, in the first instance, by the county prosecuting attorney or county sheriff that has received such moneys or proceeds.” *Id.* at 2-114 to 2-115. A county prosecuting attorney and a county sheriff may exercise reasonable discretion in determining whether a particular expenditure of moneys deposited in their respective law enforcement trust fund constitutes a law enforcement purpose. *See* 2012 Op. Att’y Gen. No. 2012-015 (syllabus).

Finally, we consider moneys collected from mandatory drug fines. Mandatory fines that have been imposed for a violation of R.C. 2925.03(A) (drug trafficking offenses) and that are collected by a clerk of court may be paid to law enforcement agencies that “primarily were responsible for or involved in making the arrest of, and in prosecuting, the offender.” R.C. 2925.03(F)(1).<sup>3</sup> A law enforcement agency that receives moneys collected as mandatory fines for drug trafficking offenses shall use the moneys “to subsidize the agency’s law enforcement efforts that pertain to drug offenses, in accordance with the written internal control policy adopted by the recipient agency under [R.C. 2925.03(F)(2)].” R.C. 2925.03(F)(1). The law enforcement agency that receives moneys collected

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<sup>3</sup> The offices of county prosecutors constitute “law enforcement agencies” for the purpose of R.C. 2925.03(F). R.C. 2925.03(F)(3)(a).

from mandatory drug fines is vested with the discretion to determine whether a proposed expenditure is consistent with the agency's internal control policy and furthers a law enforcement effort that pertains to drug offenses. 1998 Op. Att'y Gen. No. 98-023, at 2-123 to 2-124; 1992 Op. Att'y Gen. No. 92-030, at 2-114 to 2-115 (mandatory drug fine moneys "are to be held and controlled, in the first instance, by the county prosecuting attorney or county sheriff that has received such moneys"); 1989 Op. Att'y Gen. No. 89-090 (syllabus, paragraph 1) (modified on other grounds by 1990 Op. Att'y Gen. No. 90-022) ("[a] county prosecutor may expend mandatory drug fines ... for those expenses determined by him to be consistent with the activities of his office that pertain to drug offenses").

Expenditures of furtherance of justice moneys, law enforcement trust fund moneys, or moneys collected from mandatory drug fines are initiated by a county prosecuting attorney or a county sheriff based upon the particular county officer's determination that the expenditures are appropriate under the pertinent statutes and written internal control policies. It follows, therefore, that personal property purchased with those moneys is under the jurisdiction or control of the particular county officer that initiated the purchase. That an individual county office has jurisdiction or control over an item of personal property, however, does not determine whether that property is property of the individual county office.

"The board of county commissioners is the body – the *quasi* corporation – in whom is vested by law the title of all the property of the county." *Carder v. Bd. of Comm'rs of Fayette Cnty.*, 16 Ohio St. 354, 369 (1865). The Ohio Supreme Court has recognized that even though statutes may require personal property to be acquired by and to remain in the custody of another county officer, the board of county commissioners holds title to all property owned by the county. *Christy v. Comm'rs of Ashtabula Cnty.*, 41 Ohio St. 711, 717 (1885) ("county commissioners may take and hold *title* to anything that a county may hold or own, although in the actual custody or expenditure the county must, under some statute, act by an officer, or officers, other than its commissioners"). Expanding upon that principle, prior Attorney General opinions have concluded that personal property purchased by or for the benefit of county offices or agencies constitutes county property, rather than property of the individual county office or agency. 1996 Op. Att'y Gen. No. 96-038, at 2-148 ("the ownership of the gasoline purchased for the use of the county engineer's office, although funds appropriated specifically to that office may have been used for the purchase, is vested in the county commissioners, acting as the county"); 1984 Op. Att'y Gen. No. 84-054, at 2-181 ("personal property under the jurisdiction of a county board of mental retardation and developmental disabilities is county property"); *cf.* 2008 Op. Att'y Gen. No. 2008-026, at 2-280 to 2-281 (insofar as a general health district is a political subdivision and is not a county office, property owned by a general health district is not county property); *see also* Auditor of State Circular No. 81-07, at 2 (advising that "equipment or personal property purchased with [furtherance of justice] funds becomes and remains the property of the county"). Accordingly, personal property purchased by a county prosecuting attorney or a county

sheriff with furtherance of justice moneys, law enforcement trust fund moneys, or moneys collected from mandatory drug fines constitutes county property.

### **Inclusion of Covert Law Enforcement Equipment on Annual Inventory**

Your second question asks whether covert law enforcement equipment<sup>4</sup> purchased by a county prosecuting attorney or a county sheriff with furtherance of justice moneys, law enforcement trust fund moneys, or moneys collected from mandatory drug fines shall be included in an annual inventory created pursuant to R.C. 305.18.<sup>5</sup> A member of your office has explained that you are concerned that including covert law enforcement equipment in an inventory that is a public record may compromise ongoing investigations conducted by a law enforcement agency.

R.C. 305.18 provides:

Each county officer or department head shall make an inventory, on the second Monday in January of each year, of all the materials, machinery, tools, and other county supplies under the jurisdiction of such county officer or department head. Such inventory shall be a public record, made in duplicate, and one copy shall be filed with the clerk of the board of county commissioners and one copy with the county auditor.

An “inventory” is “an itemized list or catalog of goods, property, etc.[.]” *Webster’s New World College Dictionary* 764 (5th ed. 2014); *see id.* at 773-74 (defining “itemize” as “to specify the items of; set down, item by item ... 2 to specify (the individual items in a group or list)”). Thus, R.C. 305.18 requires materials, machinery, tools, and other county supplies under the jurisdiction of a county officer to be included on an itemized list that is filed annually with the clerk of the board of county commissioners and with the county auditor.

R.C. 305.18 does not contain an exception for materials, machinery, tools, and other county supplies under the jurisdiction of a county law enforcement agency that are used in ongoing, covert investigations. Consequently, insofar as covert law enforcement equipment constitutes “materials, machinery, tools, and other county supplies” for the purpose of R.C. 305.18, it appears that covert law enforcement equipment purchased with furtherance of justice moneys, law enforcement trust fund moneys, or moneys collected from mandatory drug fines shall be included in an annual inventory compiled pursuant to R.C. 305.18.

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<sup>4</sup> We understand the term “covert law enforcement equipment” to mean equipment that is used in ongoing, covert law enforcement investigations.

<sup>5</sup> Insofar as you have asked about covert law enforcement equipment, we presume that you are not asking about the use of moneys from a furtherance of justice fund, a law enforcement trust fund, or moneys collected from mandatory drug fines to pay confidential informants or for other services.

Although R.C. 305.18 requires that items be individually identified in an annual inventory, R.C. 305.18 does not specify the degree of detail with which the items included in the inventory shall be described. For example, it is possible to comply with R.C. 305.18 by individually identifying each patrol car used by a county sheriff's office by make, model, year, and vehicle identification number. It is also possible to comply with R.C. 305.18 by using the broad category descriptor of "patrol car" and then identifying the number of patrol cars used by the county sheriff's office. While the difference between the two ways of describing the patrol cars is of little consequence with respect to patrol cars, the difference in detail may have significant consequence when dealing with law enforcement equipment that is used in ongoing, covert investigations.

It is well established that when a statute commands an officer to do a certain act, but does not describe the means by which that act shall be completed, the officer may exercise reasonable discretion to determine the manner in which he shall perform the act required of him. *State ex rel. Kahle v. Rupert*, 99 Ohio St. 17, 19, 122 N.E. 39 (1918) ("[e]very officer of this state or any subdivision thereof not only has the authority but is required to exercise an intelligent discretion in the performance of his official duty"); *State ex rel. Hunt v. Hildebrant*, 93 Ohio St. 1, 112 N.E. 138 (1915) (syllabus, paragraph 4) ("[w]here an officer is directed by ... a statute ... to do a particular thing, in the absence of specific directions covering in detail the manner and method of doing it, the command carries with it the implied power and authority necessary to the performance of the duty imposed"); *Jewett v. Valley Ry. Co.*, 34 Ohio St. 601, 608 (1878) ("[w]here authority is given to do a specified thing, but the precise mode of performing it is not prescribed, the presumption is that the legislature intended the party might perform it in a reasonable manner"). Therefore, in carrying out the obligation to compile an annual inventory pursuant to R.C. 305.18 that includes covert law enforcement equipment, a county prosecuting attorney and a county sheriff may exercise reasonable discretion in determining the level of detail with which covert law enforcement equipment shall be described in the inventory.

In Auditor of State Circular No. 81-07, the Auditor of State provided guidance regarding the manner in which a county prosecuting attorney or a county sheriff shall account for the expenditure of furtherance of justice moneys. The Auditor of State concluded that each expenditure of furtherance of justice moneys shall be documented with a receipt or invoice and itemized. *Id.* at 2. The Auditor of State further concluded that equipment and personal property purchased with furtherance of justice moneys shall be included in an inventory filed in accordance with R.C. 305.18. *Id.* When furtherance of justice moneys have been used for "confidential expenditures,"<sup>6</sup> the purchases shall be documented as follows, if practicable:

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<sup>6</sup> The Auditor of State explained:

An expenditure is "confidential" if disclosure of the event or the identity of the recipient or of the nature of the expenditure would tend to frustrate the purpose for which it is made or would tend to expose any person to intimidation or danger of physical harm, to himself or his property.

When the case or investigation is finally concluded, an officer, employee or agent with firsthand knowledge of the necessary information shall furnish a report indicating, the item or items purchased, the date of the report, the date of the purchase, the amount expended, the check number, if applicable, the quantity and type of materials purchased, and the disposition thereof.

*Id.* at 3. If a county prosecuting attorney or a county sheriff determines that documenting a confidential expenditure of furtherance of justice moneys in a report would “increase the risk of exposure of any person to intimidation or danger of physical harm to himself or his property, or would frustrate the purpose for which a confidential expenditure is made[.]” the county prosecuting attorney or county sheriff “shall prepare an affidavit setting forth the amount of the expenditure and the check number, if any, related to the expenditure and the general nature of the expenditure (e.g., purchase, informant payment, maintenance expense or travel for undercover agent).” *Id.* at 4. That procedure was reiterated in Auditor of State Bulletin No. 97-014, at 4, which provides:

The documentation requirements do not apply in those situations where it is determined that maintenance of the required documentation would increase the risk of danger of physical harm or intimidation or would frustrate the purpose for which the confidential expenditure is made. It is within the county prosecutor or county sheriff’s exercise of reasonable discretion to determine whether this exception applies. A necessary requirement to this exception is an affidavit executed by the officer setting forth the amount of the expenditure and either the check number or the receipt number related to the expenditure as well as a statement of a general nature of the expenditure.... Please note that a mere assertion by the officer that an expenditure is confidential is not sufficient to negate the documentation requirements.

Accordingly, when a county prosecuting attorney or county sheriff determines that documenting specific individual expenditures would pose a danger to a person or frustrate the purpose for which the expenditure was made, the county prosecuting attorney or county sheriff shall instead prepare an affidavit, which includes a statement that confidential expenditures were made, a determination that maintaining documentation will pose a danger to a person or frustrate the purpose for which the expenditure was made, and a description of the nature of the expenditure in general terms. For example, a confidential expenditure may be described as “[p]ayment of travel expense for confidential investigation” or “[m]iscellaneous meal expense of informant in the course of confidential investigation.” Auditor of State Circular No. 81-07, Exhibit A.

We believe that Auditor of State Circular No. 81-07 and Auditor of State Bulletin No. 97-014 present a reasonable method of describing covert law enforcement equipment purchased with furtherance of justice moneys, law enforcement trust fund moneys, or moneys collected from

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Auditor of State Circular No. 81-07, at 2.



mandatory drug fines in an annual inventory compiled in accordance with R.C. 305.18.<sup>7</sup> If including details about covert law enforcement equipment in an inventory that is a public record reveals the conduct of an ongoing, covert investigation, the purpose for which the equipment was purchased and intended to be used may be frustrated. A county prosecuting attorney or county sheriff should be able to take measures to maintain a degree of confidentiality with respect to those ongoing investigations. Therefore, when, in the reasonable exercise of discretion, a county prosecuting attorney or a county sheriff determines that specifically itemizing covert law enforcement equipment in an annual inventory compiled pursuant to R.C. 305.18 will pose a risk of harm or danger to a person or property, or will frustrate the purpose for which the equipment was purchased, the county prosecuting attorney or county sheriff shall describe the nature of the covert law enforcement equipment in general terms in the annual inventory. The county prosecuting attorney and county sheriff shall also prepare an affidavit attesting to the need to preserve confidentiality with respect to the equipment and setting forth the general nature of the expenditure.<sup>8</sup>

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<sup>7</sup> It is important to note that R.C. 2925.03(F)(2) mandates that a written internal control policy addressing the use of moneys collected from mandatory drug fines “shall not provide for or permit the identification of any specific expenditure that is made in an ongoing investigation.” Following the procedure described in Auditor of State Circular 81-07 and Auditor of State Bulletin 97-014, and identifying an expenditure for covert law enforcement equipment in general terms in an R.C. 305.18 inventory, are consistent with R.C. 2925.03(F)(2) in that the description of the purchase is in general terms and does not result in the identification of a specific expenditure in an ongoing investigation.

<sup>8</sup> In addition to the annual inventory required by R.C. 305.18, a county prosecuting attorney and a county sheriff are required to provide an itemized statement to the county auditor demonstrating how furtherance of justice moneys have been spent. R.C. 325.071 (“[t]he sheriff annually ... shall file with the county auditor an itemized statement, verified by the sheriff, as to the manner in which the fund provided by this section has been expended during the current year”); R.C. 325.12(E) (“[t]he prosecuting attorney shall, annually, ... file with the auditor an itemized statement, verified by the prosecuting attorney, as to the manner in which the fund provided by this section has been expended during the current year”). Upon a determination that providing greater detail or specificity regarding a purchase of covert law enforcement equipment will pose a risk of harm or danger to a person or property, or will frustrate the purpose for which the purchase was made, a county prosecuting attorney or a county sheriff may describe the general nature of covert law enforcement equipment in the itemized statement filed with the county auditor pursuant to R.C. 325.071 and R.C. 325.12(E), and prepare an affidavit attesting to the need to preserve confidentiality with respect to the equipment and setting forth the amount of the expenditure, the check number, if there is one, and the general nature of the expenditure.

R.C. 2981.13(C)(3)(a) requires a county sheriff or county prosecuting attorney to file, with the county auditor, “a report ... verifying that the moneys [in the county officer’s law enforcement trust fund] were expended only for the purposes authorized by [R.C. 2981.13] or other relevant statute and specifying the amounts expended for each authorized purpose[.]” While R.C. 2981.13(C)(3)(a)

R.C. 305.18 states that an inventory compiled in accordance with R.C. 305.18 is a public record. As a public record, the inventory is subject to public disclosure in accordance with R.C. 149.43. However, an R.C. 305.18 inventory, like other public records, may contain information that is exempt from public disclosure and that may be redacted from the record. *See* R.C. 149.43(B)(1) (“[i]f a public record contains information that is exempt from the duty to permit public inspection or to copy the public record, the public office or the person responsible for the public record shall make available all of the information within the public record that is not exempt”). Information that constitutes a confidential law enforcement investigatory record is not a public record and may be redacted from a public record. R.C. 149.43(A)(1)(h); *State ex rel. Beacon Journal Publ’g Co. v. Kent State Univ.*, 68 Ohio St. 3d 40, 43-44, 623 N.E.2d 51 (1993); *see also* 1990 Op. Att’y Gen. No. 90-101, at 2-446. R.C. 149.43(A)(2) defines a “confidential law enforcement investigatory record” as:

any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, but only to the extent that the release of the record would create a high probability of disclosure of any of the following:

- (a) The identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised;
- (b) Information provided by an information source or witness to whom confidentiality has been reasonably promised, which information would reasonably tend to disclose the source’s or witness’s identity;
- (c) Specific confidential investigatory techniques or procedures or specific investigatory work product;
- (d) Information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source.

To redact the identification of covert law enforcement equipment from an annual inventory compiled in accordance with R.C. 305.18 on the basis that the information is a confidential law enforcement investigatory record, the description of the equipment in the inventory has to be specific enough as to create a high probability of disclosing one of the four items identified in R.C. 149.43(A)(2)(a)-(d). If the nature of the covert law enforcement equipment is identified in the annual inventory in general terms, it is unlikely to rise to the level of specificity required to constitute a confidential law enforcement investigatory record.

### **Per Diem Allowance**

Your third question asks whether a county prosecuting attorney or a county sheriff may use furtherance of justice moneys, law enforcement trust fund moneys, or moneys collected from mandatory drug fines to provide a per diem allowance to cover the cost of an employee’s meals while

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requires the filing of a report, it differs from R.C. 325.071 and R.C. 325.12(E) in that it does not require an itemization of the expenditures.

travelling on official business. If a per diem allowance is permissible, you ask us to determine what accounting procedures should be used.

A “per diem” allowance is “[a] monetary daily allowance, [usually] to cover expenses; [specifically], an amount of money that a worker is allowed to spend daily while on the job, [especially] on a business trip[.]” *Black’s Law Dictionary* 1317 (10th ed. 2014). Thus, providing a per diem allowance for meals means that a county employee will receive a fixed dollar amount per day to cover the cost of meals purchased by the employee while travelling on official business, as opposed to a reimbursement payment that is based upon the actual cost the employee incurred to purchase meals. The distinction between a per diem allowance and a reimbursement payment is that it is possible for a per diem allowance to be greater than the actual expense incurred by the employee. Unless the office’s policy requires that the employee refund any unused portion of the per diem allowance, the moneys could end up being used for a purpose unrelated to purchasing meals.<sup>9</sup>

A county prosecuting attorney and a county sheriff may use furtherance of justice moneys, law enforcement trust fund moneys, or moneys collected from mandatory drug fines to reimburse employees for meals purchased while travelling on official business so long as the reimbursement is in accordance with the statutes applicable to the particular type of moneys and the office’s internal control policy. Thus, to use furtherance of justice moneys, a county prosecuting attorney or county sheriff shall determine that the expense is an expense he incurs in the performance of his official duties and in the furtherance of justice. R.C. 325.071; R.C. 325.12(A) and (B); *see also State v. Kelly*, 4th Dist. No. 15CA11, 2016-Ohio-8582, at ¶17 (“[m]eals are considered proper expenses for a sheriff’s office’s [furtherance of justice moneys]”); 1988 Op. Att’y Gen. No. 88-100 (syllabus) (“[u]nder R.C. 325.071, a county sheriff may expend funds for expenses, including meals for staff and retirement mementos, which are incurred by him in the performance of his official duties and which he determines are in the furtherance of justice”). To use law enforcement trust fund moneys, a county prosecuting attorney or a county sheriff shall determine that the expense is incurred in relation to a purpose identified in R.C. 2981.13(C)(2)(a)(i)-(v) and is paid in accordance with R.C. 2981.13 and the office’s written internal control policy. R.C. 2981.13(C)(2)(a). Likewise, to use moneys collected from mandatory drug fines, a county prosecuting attorney or a county sheriff shall determine that the expense pertains to the office’s law enforcement efforts related to drug offenses and is in accordance with the office’s written internal control policy. R.C. 2925.03(F)(1) and (2).

The determination of whether the cost of an employee’s meals while travelling on official business constitutes an appropriate expenditure of moneys from particular sources is factually based and is beyond the scope of an Attorney General opinion. *See* 1993 Op. Att’y Gen. No. 93-066, at 2-

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<sup>9</sup> We question whether a county prosecuting attorney or a county sheriff would implement a per diem allowance program that requires an employee to refund any unused portion of the allowance. This is because the oversight necessary to effectively monitor and enforce such a program makes the program, from a practical standpoint, nearly identical to a policy providing for a reimbursement payment.

312. Although a county prosecuting attorney and a county sheriff have a great deal of discretion in regard to the expenditure of furtherance of justice moneys, law enforcement trust fund moneys, and moneys collected from mandatory drug fines, to be a valid exercise of discretion, it shall be reasonable and not manifestly arbitrary. 2012 Op. Att’y Gen. No. 2012-015, at 2-126 and 2-128; 2003 Op. Att’y Gen. No. 2003-029, at 2-248 (“[t]he determination of whether an expenditure constitutes a proper public purpose lies in the first instance with the agency adopting the policy and undertaking the expenditure, but the agency may not, in making this determination, abuse its discretion”); 1989 Op. Att’y Gen. No. 89-090, at 2-429 (modified, on other grounds, by 1990 Op. Att’y Gen. No. 90-022); 1988 Op. Att’y Gen. No. 88-100, at 2-495. For the purpose of this opinion, we presume that a county prosecuting attorney or a county sheriff has determined that paying the expense of an employee’s meals while travelling on official business is a lawful and appropriate expenditure of furtherance of justice moneys, law enforcement trust fund moneys, or moneys collected from mandatory drug fines.

Once a county prosecuting attorney or a county sheriff has determined that paying the expense of an employee’s meals while travelling on official business is a lawful expenditure of furtherance of justice moneys, law enforcement trust fund moneys, or moneys collected from mandatory drug fines, the manner in which the county prosecuting attorney or county sheriff may pay that expense remains to be determined. When determining the manner in which a county prosecuting attorney or a county sheriff may reimburse or pay an employee’s cost of meals purchased while travelling on official business, we are guided by two well-established principles. The first is that a county prosecuting attorney and a county sheriff are creatures of statute and have only those powers provided expressly by statute or necessarily implied therein. 2010 Op. Att’y Gen. No. 2010-013, at 2-91; 1994 Op. Att’y Gen. No. 94-051, at 2-254. The second principle is that “[t]he authority to act in financial transactions must be clear and distinctly granted, and, if such authority is of doubtful import, the doubt is resolved against its exercise in all cases where a financial obligation is sought to be imposed upon the county.” *State ex rel. Locher v. Menning*, 95 Ohio St. 97, 99, 115 N.E. 571 (1916).

The General Assembly has authorized per diem allowances for expenses incurred by public officials or employees in limited circumstances. *See, e.g.*, R.C. 124.33 (per diem allowance shall be paid for living expenses when classified employee is permanently transferred); R.C. 3709.17 (employee of a board of health of a city or general health district “shall be reimbursed for travel [outside the district] and per diem expenses incidental to such travel”). No statute expressly authorizes a county prosecuting attorney or a county sheriff to use furtherance of justice moneys, law enforcement trust fund moneys, or moneys collected from mandatory drug fines to provide a per diem allowance to an employee to cover the cost of meals while travelling on official business. Although the authority to pay, under appropriate circumstances, the cost of meals purchased by employees of a county prosecuting attorney or a county sheriff while travelling on official business may be found in R.C. 325.071, R.C. 325.12, R.C. 2925.03, and R.C. 2981.13, we do not believe those statutes necessarily imply the authority to provide a per diem allowance for that cost.

As stated earlier, a per diem allowance may be greater than the actual expense incurred by an employee for the cost of meals and could end up being used for a purpose unrelated to purchasing

meals. Given that the authority to act in a financial transaction shall be clear and distinctly granted and that the governing statutes require furtherance of justice moneys, law enforcement trust fund moneys, and moneys collected from mandatory drug fines to be expended for specific purposes, it is inappropriate to find that R.C. 325.071, R.C. 325.12, R.C. 2925.03, and R.C. 2981.13 imply authority to provide a per diem allowance for expenses. The General Assembly has expressly authorized per diem allowances for expenses in certain situations, but not with respect to the use of furtherance of justice moneys, law enforcement trust fund moneys, and moneys collected from mandatory drug fines to cover the cost of meals purchased by employees while travelling on official business. This indicates that the General Assembly does not intend that those moneys be used for a per diem allowance. *See generally Metro. Sec. Co. v. Warren State Bank*, 117 Ohio St. 69, 76, 158 N.E. 81 (1927) (“[h]aving used certain language in the one instance and wholly different language in the other, it will rather be presumed that different results were intended”); *Lake Shore Elec. Ry. Co. v. P.U.C.O.*, 115 Ohio St. 311, 319, 154 N.E. 239 (1926) (if the General Assembly intended a certain result, “it would not have been difficult to find language which would express that purpose”). Therefore, we conclude that a county prosecuting attorney or a county sheriff may not use furtherance of justice moneys, law enforcement trust fund moneys, or moneys collected from mandatory drug fines to provide a per diem allowance to cover the cost of an employee’s meals while travelling on official business. Insofar as we have concluded that a per diem allowance is not permissible, it is unnecessary for us to address the second part of your third question.

### **Conclusions**

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

1. Personal property purchased by a county prosecuting attorney or a county sheriff with furtherance of justice moneys, law enforcement trust fund moneys, or moneys collected from mandatory drug fines constitutes county property.
2. When, in the reasonable exercise of discretion, a county prosecuting attorney or a county sheriff determines that specifically itemizing covert law enforcement equipment in an annual inventory compiled pursuant to R.C. 305.18 will pose a risk of harm or danger to a person or property, or will frustrate the purpose for which the equipment was purchased, the county prosecuting attorney or county sheriff shall describe the nature of the covert law enforcement equipment in general terms in the annual inventory. The county prosecuting attorney or county sheriff shall also prepare an affidavit attesting to the need to preserve confidentiality with respect to the equipment and setting forth the general nature of the expenditure.
3. A county prosecuting attorney or a county sheriff may not use furtherance of justice moneys, law enforcement trust fund moneys, or moneys collected from

mandatory drug fines to provide a per diem allowance to cover the cost of an employee's meals while travelling on official business.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive style with a prominent initial "M" and a long, sweeping tail.

MICHAEL DEWINE  
Ohio Attorney General