

OPINION NO. 76-076**Syllabus:**

To the extent the Highway Safety Fund and the Highway Operating Fund contain moneys subject to the provisions of Article XII, Section 5a, Constitution of Ohio, they may not be included in the "total operating fund" established by Am. Sub. H.B. No. 1546, effective October 7, 1976.

To: William W. Wilkins, Director, Office of Budget and Management, Columbus, Ohio

By: William J. Brown, Attorney General, November 10, 1976

I have before me your request for my opinion concerning provisions of Amended Substitute House Bill 1546, which became effective on October 7, 1976. Specifically, you are interested in R.C. 126.01 (D), as enacted by the Bill, which creates a "total operating fund", and includes as part of such fund the Highway Operating Fund and the Highway Safety Fund.

As Director of the Office of Budget and Management you are required by R.C. 126.02(E) to prescribe the manner of certifying that funds are available and adequate to meet contracts and obligations, and you have inquired as follows:

- (1) Is the use of the Highway Operating Fund and Highway Safety Fund in the "total operating fund" established by Amended Substitute House Bill 1546 an attempt to do indirectly what Attorney General Opinion No. 75-088 prohibited doing directly; to wit, the direct transfer of funds pursuant to Section 115.31 of the Revised Code?

- (2) Is there any legal impediment to the inclusion of the Highway Operating Fund and Highway Safety Fund within the "total operating fund" if Highway Operating Fund monies and Highway Safety Fund monies are used to pay general obligations of the State (Fund 11)?

For the reasons set forth in the following analysis, I am of the opinion that, notwithstanding any provisions of Am. Sub. H.B. 1546, effective October 7, 1976, Article XII, Section 5a, Constitution of Ohio, prohibits the use of the Highway Safety Fund and the Highway Operating Fund for any purposes inconsistent with that constitutional provision. For this reason, to the extent that these and other funds are subject to Article XII, Section 5a, they may not be included in the "total operating fund" for the purpose of certifying the availability of moneys to meet General Revenue Fund obligations.

Amended Substitute House Bill 1546 establishes a "total operating fund". R.C. 126.01(D), which creates the fund, reads as follows:

(D) As used in chapters 113., 115., 125., and 126. of the Revised Code, "total operating fund" means the consolidated total cash balances, revenues, disbursements, and transfers of the general revenue fund, departmental rotary fund, federal revenue sharing fund, highway operating fund, liquor control rotary fund, and state lottery fund.

All orders and invoices shall specify the appropriation account from which they are payable.

This section is an interim section effective until July 1, 1977, at which time the section shall become effective in its immediately prior existing form.

(Emphasis added.)

It is my understanding that the establishment of the "total operating fund", represents a partial attempt to solve Ohio's immediate General Revenue Fund "cash flow" problem by consolidating all of the funds mentioned in R.C. 126.01(D) and using the consolidated funds for the purpose of determining whether or not sufficient funds are available in the state treasury to pay any obligation accruing against the General Revenue Fund. Thus, any cash balance shown in the "total operating fund", regardless of how it is attributed to the several separate funds making up the "total operating fund", is available to support payment of an obligation of the General Revenue Fund, which is one of the funds consolidated into the "total operating fund". It is my understanding, however, that the ledgers showing the amounts contained in the various individual funds comprising the "total operating fund" will not reflect any change in an individual fund unless a specific expenditure has been certified from that particular fund.

To illustrate the way the "total operating fund" operates, as you have explained it, assume that the consolidated fund consists of three individual funds, A, B and C. If Fund A contains \$100, Fund B, \$50, and Fund C, \$25, the "total operating fund" would show a balance of \$175. If an obligation of \$75 arose to be paid from Fund A, the balances would then look as follows:

Fund A	\$25	(\$100-\$75)
Fund B	\$50	
Fund C	\$25	
Total Operating Fund \$100 (\$175-\$75)		

Note that the balances reflected in Funds B and C have not changed. Further, if another obligation of \$75 became payable from Fund A, such obligation would be paid since there is a balance in the "total operating fund" sufficient to cover the obligation and the balances of the funds would look as follows:

Fund A	(\$50) or - \$50
Fund B	\$50
Fund C	\$25
Total Operating Fund \$25 (\$100-\$75)	

It is clear then that while there would be enough money in the "total operating fund" to certify the availability of funds for the \$75 expenditure, in fact \$50 has come from Funds B and C, to pay the obligation arising from Fund A. The individual balance of these funds, however, does not reflect the fact that money has been taken from them. On the contrary, the balance of Fund A merely shows a negative balance of \$50. Given this background your specific questions concern the inclusion of the Highway Safety Fund and the Highway Operating Fund in the "total operating fund", as provided for by Amended Substitute House Bill 1546.

The Highway Safety Fund is established by R.C. 4501.06, which provides in pertinent part:

The taxes, fees, and fines levied, charged, or referred to in sections 4501.07, 4503.07, 4503.09, 4503.10, 4503.14, 4503.15, 4503.17, 4503.18, 4503.181 [4503.18.1], 4503.182, [4503.18.2], 4503.19, 4503.26, 4503.27, 4503.31, 4503.33, 4505.061 [4505.06.1], 4505.09, 4505.10, 4505.12, 4505.13, 4505.14, 4507.13, 4507.23, 4507.25, 4508.05, 4509.05, 4517.04, and 4517.05 of the Revised Code, unless otherwise designated by law, shall be deposited by the treasurer of state in a fund to be known as the "state highway safety fund" and shall, * * *, be used, subject to appropriation by the general assembly, for the purpose of enforcing and paying the expenses of administering the law relative to the registration and operation of motor vehicles on the public roads or highways and for the purpose of enforcing and paying the expenses of administering the law to provide reimbursement for hospitals on account of the expenses for the care of indigent persons injured in motor vehicle accidents.

Article XII, Section 5a of the Ohio Constitution was adopted in 1947 and provides:

No moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on public highways, or to fuels used for propelling such vehicles, shall be expended for other than costs of administering such laws, statutory refunds and adjustments provided therein, payment of highway obligations, costs for construction, reconstruction, maintenance and repair of public highways and bridges and other statutory highway purposes, expense of state enforcement of traffic laws, and expenditures authorized for hospitalization of indigent persons injured in motor vehicle accidents on the public highways."

It appears from a reading of the sections set out in R.C. 4501.06 that revenues which are collected pursuant thereto are subject to the restrictions imposed by this constitutional amendment. On this point see also 1973 Op. Att'y. Gen. No. 73-019, in which I noted that the language found in R.C. 4501.06 controlling the disposition of the revenues collected was compelled by Article XII, Section 5a.

It is my understanding pursuant to conversations between this office and yours that the Highway Operating Fund represents a consolidation of the State Highway Maintenance Fund and Repair Fund (R.C. 5503.04), the Gasoline Excise Tax Fund (R.C. 5735.23), the Supplementary Highway Construction Fund (R.C. 5735.291), as well as funds apportioned by the Federal government for highway purposes, General Revenue Fund transfers for the cost of operating the Division of Aviation and subsidies to local governments for mass transportation.

R.C. 5735.23 and R.C. 5735.291 provide for the distribution of revenue from gasoline excise taxes levied by R.C. 5735.05 and R.C. 5735.29 on the use, distribution or sale of fuel. It appears clear then that the Highway Operating Fund does contain moneys which are subject to the restrictions of Article XII, Section 5a. supra. Therefore, to the extent that these and other moneys in the Highway Operating Fund are covered by Article XII, Section 5a, supra, that Fund must be viewed as subject to those constitutional restrictions.

I had occasion to discuss a situation very similar to the instant case in 1975 Op. Att'y. Gen. No. 75-088. In that opinion, it was held that moneys in the Auto Registration Distribution Fund, which were subject to the restrictions of Section 5a, may not constitutionally be temporarily transferred to the General Revenue Fund to pay obligations of that fund. In so concluding I recognized that, for reasons discussed in 1975 Op. Att'y. Gen. No. 75-087, a temporary transfer of funds could not be made unless such a temporary transfer or "loan" was included as one of the authorized purposes of the fund. I further noted that Article XII, Section 5a of Ohio Constitution is quite specific for what purposes moneys subject to it may be expended, and the temporary transfer of such funds to meet deficiencies in the General Revenue Fund, is not included among those purposes.

The instant case is analogous. The inclusion of the Highway Safety Fund and the Highway Operating Fund in the "total operating fund" operates as an indirect transfer of such moneys to the General Revenue Fund to the extent that the General Revenue Fund is permitted

to develop a negative balance pursuant to R.C. 126.01 et seq. since in the absence of sufficient General Revenue Fund dollars to support a General Revenue Fund disbursement it is clear that some amount of dollars must have been disbursed from other funds even if the ledgers do not reflect such a situation. I must conclude, therefore, for the reasons discussed above and in 1975 Op. Att'y. Gen. No. 75-087 and 75-088 that funds subject to Article XII, Section 5a, supra, may not be included in the "total operating fund" for the purpose of certifying the availability of funds under R.C. 126.02.

In answer to your questions it is, therefore, my opinion and you are so advised that to the extent the Highway Safety Fund and the Highway Operating Fund contain moneys subject to the provisions of Article XII, Section 5a, Constitution of Ohio, they may not be included in the "total operating fund" established by Am. Sub. H.B. No. 1546, effective October 7, 1976.