

**OPINION NO. 81-063****Syllabus:**

1. The filing of a complaint with the Ohio Ethics Commission does not commence a prosecution for the purposes of the statute of limitations, R.C. 2901.13.
  
2. R.C. 2945.71 does not apply to proceedings before the Ohio Ethics Commission.

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**To: Stephen W. Stover, Executive Director, Ohio Ethics Commission, Columbus, Ohio**  
**By: William J. Brown, Attorney General, October 28, 1981**

I have before me your predecessor's request for my opinion with regard to two questions concerning the relationship between proceedings before an appropriate

ethics commission<sup>1</sup> and the speedy trial and statute of limitations provisions applicable to criminal prosecutions.

Before addressing the specific questions presented by this request, I believe it would be useful to set forth the procedure followed by the Ohio Ethics Commission when dealing with potential violations of Ohio's ethics laws. This procedure, discussed in the following paragraphs, is set forth in R.C. 102.06<sup>2</sup> and is supplemented by the administrative rules adopted by the Ethics Commission. [1980-1981 Monthly Record] Ohio Admin. Code 102-1-01 to 102-7-15 at 833-37.

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<sup>1</sup>The term "appropriate ethics commission" is defined in R.C. 102.01(F) as follows:

(F) "Appropriate ethics commission" means:

(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; for employees of the legislative reference bureau and legislative service commission, the senate legislative ethics committee;

(2) For matters relating to judicial officers and employees, and candidates for judicial office, the board of commissioners on grievances and discipline of the supreme court;

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

It is my understanding that you are concerned only with the proceedings before the Ohio Ethics Commission. For the purposes of this opinion, therefore, I will speak only of the Ohio Ethics Commission.

<sup>2</sup> The appropriate ethics commission shall receive, and may initiate, complaints against persons subject to Chapter 102. of the Revised Code concerning conduct alleged to be in violation of this chapter. All complaints except those by the commission shall be by affidavit made on personal knowledge, subject to the penalties of perjury. Complaints by the commission shall be by affidavit, based upon reasonable cause to believe that a violation has occurred.

The commission shall investigate complaints and may investigate charges presented to it and may request further information, including the specific amount of income from a source, from any person filing with the commission a statement required by section 102.02 of the Revised Code, if the information sought is directly relevant to a complaint or charges received by the commission pursuant to this section. Such information is confidential. The person so requested shall furnish the information to the commission, unless within fifteen days from the date of the request the person files an action for declaratory judgment challenging the legitimacy of the request in the court of common pleas of the county of his residence, of his place of employment, or of Franklin county. The requested information need not be furnished to the commission during the pendency of the judicial proceedings. Proceedings of the commission in connection therewith, shall be kept confidential except as otherwise provided by this section. Before the commission proceeds to take any formal action against a person

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who is the subject of an investigation based on charges presented to the commission, a complaint shall be filed against the person. If the commission finds that a complaint is not frivolous, and there is reasonable cause to believe that the facts alleged in a complaint constitute a violation of section 102.02, 102.03, 102.04, or 102.10 of the Revised Code, it shall hold a hearing. If the commission does not so find, it shall dismiss the complaint. The person against whom the complaint is directed shall be given reasonable notice by certified mail of the date, time, and place of the hearing, a statement of the charges and the law directly involved, and shall be given the opportunity to be represented by counsel, to have counsel appointed for him if he is unable to afford counsel without undue hardship, to examine the evidence against him, to produce evidence and to call and subpoena witnesses in his defense, to confront his accusers, and to cross-examine witnesses. The commission shall have a stenographic record made of the hearing. The hearing shall be closed to the public.

If upon the basis of the hearing, the commission finds based upon a preponderance of the evidence that the facts alleged in the complaint are true and constitute a violation of section 102.02, 102.03, 102.04, or 102.10 of the Revised Code, it shall report its findings to the appropriate prosecuting authority for proceedings in prosecution of violations of Chapter 102. of the Revised Code and to the appointing or employing authority of the accused.

If the commission does not find based upon a preponderance of the evidence that the facts alleged in the complaints are true and constitute a violation of section 102.02, 102.03, 102.04, or 102.10 of the Revised Code, or if the commission has not scheduled a hearing within ninety days after the complaint is filed or has not finally disposed of the complaint within six months after it has been heard, it shall dismiss the complaint and, upon the request of the accused person, make a public report of the finding, but in such case all evidence and the record of the hearing shall remain confidential unless the accused person also requests that the evidence and record be made public. Upon request by the accused person, the commission shall make the evidence and the record available for public inspection.

The commission, or a member of the commission, may administer oaths, and the commission may issue subpoenas to any person in the state compelling the attendance of witnesses and the production of relevant papers, books, accounts, and records. The commission shall issue any such subpoena upon the request of an accused person. Section 101.42 of the Revised Code shall govern the issuance of such subpoenas insofar as applicable. Upon refusal of any person to obey a subpoena or to be sworn or to answer as a witness, the commission may apply to the court of common pleas of Franklin county under section 2705.03 of the Revised Code. The court shall hold proceedings in accordance with Chapter 2705. of the Revised Code. The commission or the accused person may take the depositions of witnesses residing within or without the state in the same manner as prescribed by law for the taking of depositions in civil actions in the court of common pleas.

All papers, records, affidavits, and documents upon any complaint, inquiry, or investigations relating to the proceedings of the commission shall be sealed and are private and confidential, except as otherwise provided in this section.

The investigation of a possible violation of the ethics laws begins with the filing of a complaint with the Ethics Commission. "A complaint shall be considered filed when it is received at the offices of the commission." Rule 102-7-05(D). A complaint may be filed by any private individual or by the Ethics Commission itself. R.C. 102.06; Rule 102-7-05(A). The Commission must investigate all complaints which are filed with it, Rule 102-7-04, and if the Commission finds that a particular complaint "is not frivolous, and there is reasonable cause to believe that the facts alleged in [the] complaint constitute a violation of [R.C. 102.02, 102.03, 102.04, or 102.10, the Commission] shall hold a hearing." R.C. 102.06. The alleged wrongdoer must then be given notice of the "date, time, and place of the hearing, a statement of the charges and the law directly involved," and must be informed that he shall be given the opportunity to be represented by counsel. R.C. 102.06; Rule 102-7-05(H). The individual whose actions are being questioned must also be given the right to present evidence, cross-examine witnesses, and examine the evidence against him. If, after the hearing, the Commission finds by a preponderance of the evidence that "the facts alleged in the complaint are true and constitute a violation of [R.C. 102.02, 102.03, 102.04, or 102.10], it shall report its findings to the appropriate prosecuting authority for proceedings in prosecution of violations of [R.C. Chapter 102] and to the appointing or employing authority of the accused." R.C. 102.06; Rule 102-7-12(D). The Commission itself does not have the authority to impose fines or jail sentences for violations of Ohio's ethics laws.

The first question presented by your predecessor's letter asks whether the filing of a complaint with the Ethics Commission commences a prosecution for the purposes of R.C. 2901.13. I note at the outset that the request asks only about the filing of a complaint. This analysis will, therefore, address only the complaint and will not attempt to determine whether any other step in the proceedings before the Ethics Commission commences a prosecution within the meaning of R.C. 2901.13.

R.C. 2901.13 sets forth the time periods within which a prosecution must be commenced. This section reads, in pertinent part, as follows:

(A) Except as otherwise provided in this section, a prosecution shall be barred unless it is commenced within the following periods after an offense is committed:

. . . .

(2) For a misdemeanor other than a minor misdemeanor, two years;

. . . .

(C) If the period of limitation provided in division (A) of this section has expired, prosecution shall be commenced for an offense involving misconduct in office by a public servant as defined in section 2921.01 of the Revised Code, at any time while the accused remains a public servant, or within two years thereafter.

. . . .

Pursuant to R.C. 102.99, a violation of the Ohio ethics provisions constitutes a misdemeanor of either the first or fourth degree. Thus, under R.C. 2901.13, a prosecution is barred if not commenced within two years or, if the allegations involve misconduct in public office, if not commenced while the individual remains in public office or within two years after that person's departure from public office.

It is obvious from the above description of the process set forth in R.C. 102.06 that the filing of a complaint triggers the beginning of an investigation by the Ethics Commission which may ultimately lead to a conviction for a violation of Ohio's ethics laws. This is true particularly since the Commission is under a statutory mandate to investigate all complaints which are filed with it. It would, therefore, without more, be possible to argue that a complaint filed with the Commission should be considered to be a part of the prosecution. However, the

fact that the filing of a complaint begins an investigatory process on the part of the Commission does not necessarily mean that it commences a criminal prosecution for the purposes of R.C. 2901.13. The General Assembly, in enacting R.C. 2901.13, set out with precision the events which commence a prosecution for the purposes of the statute of limitation and the analysis of your question must operate within the confines of that definition. R.C. 2901.13(E), the relevant section, provides that:

A prosecution is commenced on the date an indictment is returned or an information filed, or on the date a lawful arrest without a warrant is made, or on the date a warrant, summons, citation, or other process is issued, whichever occurs first. A prosecution is not commenced by the return of an indictment or the filing of an information unless reasonable diligence is exercised to issue and execute process on the same. A prosecution is not commenced upon issuance of a warrant, summons, citation or other process, unless reasonable diligence is used to execute the same. (Emphasis added.)

The resolution of your question, therefore, turns on whether the filing of a complaint by affidavit with the Ethics Commission falls within the definition of commencement found in R.C. 2901.13(E).

In analyzing this issue, it is first necessary to understand the exact nature of a complaint filed pursuant to R.C. 102.06. It is my understanding, based on conversations between a member of my staff and your office and on the provisions of R.C. 102.06, that the type of complaint about which you have inquired consists of a statement of the facts and circumstances which are alleged by the complainant to constitute a violation of the ethics provisions. Such a complaint is either addressed to the attention of or instituted by the Ethics Commission, rather than being addressed to the alleged wrongdoer. The complaint must be made by means of an affidavit based on the personal knowledge of the affiant or, if made by the Commission, must be by affidavit, based upon reasonable cause to believe that a violation has occurred. A complaint is a prerequisite to any formal action on the part of the Ethics Commission and, if not frivolous, shall be the basis of a hearing by the Commission. R.C. 102.06. From this description, it is clear that a complaint, as that term is used in R.C. 102.06, serves as a means of bringing acts which may be violations of Ohio's ethics laws before the Ethics Commission for formal consideration by that Commission.

When examined in the light of R.C. 2901.13(E), it is apparent that the filing of a complaint with the Ethics Commission does not commence a prosecution for the purposes of R.C. 2901.13. A complaint is not an indictment or an information. While it is true that a complaint, like an indictment or an information, brings a particular factual situation before an official body for its formal consideration, there are several important distinctions between a complaint and an indictment or information. An indictment is required to be returned by a grand jury, R.C. 2941.03(B). A complaint, on the other hand, may be filed by either a private citizen or by the Commission itself. Neither a private citizen nor the Commission has been impaneled as a grand jury pursuant to R.C. Chapter 2939. Consequently, a complaint filed with the Ethics Commission is not filed by a grand jury and is not, therefore, an indictment.

An information must be presented by a prosecuting attorney. R.C. 2941.021. Neither the Ethics Commission nor a private citizen is a prosecuting attorney. Moreover, an information must be presented to a court. See, e.g., R.C. 2941.03(B); R.C. 2941.021. As was previously discussed, the complaint in question is filed with the Ethics Commission. In the title to 1973 Ohio Laws 1160 (Am. Sub. H.B. 55, eff. Jan. 1, 1974), which created the Ohio Ethics Commission, the General Assembly stated that the bill was designed "[t]o enact sections 102.01 to 102.09 and 102.99 and new section 101.34 of the Revised Code relative to a code of ethics and the

establishment of a commission of ethics for public officers and employees, and to require financial disclosure by such persons" (emphasis added). It must be noted that the legislature referred to the entity being created as a "commission" rather than as a "court." A commission is "an administrative agency of the government with quasi-judicial and quasi-legislative powers" (emphasis added). Webster's New World Dictionary 285 (2nd ed. 1978). The administrative nature of the Ethics Commission is to be contrasted with the judicial nature of a court which has, as one of its chief characteristics, the power to impose justice. Todd v. United States, 158 U.S. 278, 284 (1895) ("[a] court is defined to be a place in which justice is judicially administered"). While it is true that the Ethics Commission has the power to hold hearings, this power is not judicial in nature due to the fact that the Commission does not possess the authority to administer punishment. At most, it can, pursuant to R.C. 102.06, turn a particular case over to "the appropriate prosecuting authority" for further action.

Moreover, I note that members of the Ethics Commission are appointed by the governor with the advice and consent of the Senate, R.C. 102.05, unlike judges, who are elected rather than appointed.<sup>3</sup> See Ohio Const. art. IV, §6 (provides for the election of the chief justice and justices of the supreme court, judges of the courts of appeals and judges of the courts of common pleas); R.C. 1901.07 (municipal judges elected for six year terms); R.C. 1907.051 (election of county court judges). The Ohio Supreme Court in Hilton v. State ex rel. Bell, 108 Ohio St. 233, 238, 140 N.E. 681, 682 (1923), stated that:

[the] entire spirit [of Ohio Const. art. IV] breathe[s] antagonism to an appointed judiciary. . . . It is clear that the Legislature of the state cannot create a court and appoint its members, except under Section 22 [21] of the judicial article, which provides for the appointment by the Governor of a Supreme Court Commission.

Thus, it is clearly the opinion of the Ohio Supreme Court that judges must be elected rather than appointed.

Due to the fact that the General Assembly has characterized the Ethics Commission as an administrative body, the fact that it lacks the power to administer justice and the fact that the members are appointed rather than elected, I conclude that the Ethics Commission is not a court. A complaint filed with the Commission is not, therefore, presented to a court and cannot be considered to be an information.

It is equally obvious that a complaint is in no way related to an arrest without a warrant. An arrest involves taking the alleged wrongdoer into physical custody. State v. Darrah, 64 Ohio St. 2d 22, 412 N.E.2d 1328 (1980); Alter v. Paul, 101 Ohio App. 139, 135 N.E.2d 73 (Franklin County 1955), while the complaint simply makes allegations of facts which may ultimately be found to constitute a violation of Ohio's ethics laws.

The only remaining category, therefore, consists of "a warrant, summons, citation or other process." Although these terms are not defined for the purposes of R.C. Chapter 2921, they do have commonly accepted meanings. Black's Law Dictionary 1421 (5th ed. 1979) defines a "warrant" as "[a] written order which is made on behalf of the state and is based upon a complaint. . . which commands law enforcement officer[s] to arrest a person and bring him before magistrate." Unlike a warrant, a complaint filed with the Ethics Commission is simply a statement of facts. It does not direct any law enforcement officer to arrest a particular individual. In fact, it is beyond the power of the Commission to order such an arrest. Moreover, a warrant is based upon a complaint. It does not constitute the

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<sup>3</sup> A vacancy in a judicial office may be filled by means of an appointment by the governor. However, the appointee serves only "until a successor is elected and has qualified." Ohio Const. art. IV, §13.

complaint itself. I conclude, therefore, that a complaint filed with the Commission is not a warrant for purposes of R.C. 2901.13(E).

A "summons" is defined as a "[w]rit or process directed to the sheriff or other proper officer, requiring him to notify the person named that an action has been commenced against him in the court from where the process issues, and that he is required to appear, on a day named, and answer the complaint in such action." Black's Law Dictionary 1287 (5th ed. 1979). Unlike a summons, the complaint does not, in itself, require any officer to notify the alleged wrongdoer of the charges which have been made against him. Rather, the Commission must make a preliminary determination that the complaint is not frivolous prior to the time the individual is given notice. It is the determination made by the Ethics Commission that the facts merit a hearing, not the existence of the complaint itself, which necessitates the giving of notice to the person against whom the complaint is directed. Moreover, since at the time a complaint is filed there is no action pending before a court, there can be no compulsion to appear before such a body. A complaint, therefore, is not a summons for purposes of R.C. 2901.13(E).

A "citation" is said to be "[a] writ issued out of a court of competent jurisdiction, commanding a person therein named to appear on a day named. . . . An order, issued by the police, to appear before a magistrate or judge at a later date." Black's Law Dictionary 221 (5th ed. 1979). As has already been established, the Ethics Commission does not constitute a court, and there can be no doubt that the Ethics Commission does not fall within the term "police." In like manner, a private individual would not be considered to be a court or a police officer. More importantly, a complaint, as a simple narration of facts, does not order anyone to appear before a court or magistrate. The complaint itself does not even order anyone to appear before the Ethics Commission. Consequently, a complaint is not a citation for purposes of R.C. 2901.13(E).

The Ethics Commission does have subpoena power and must ultimately give notice to the alleged wrongdoer of any hearing which is to be held before it, R.C. 102.06; however, the device of a complaint is not used for either of those functions. Consequently, a complaint cannot be said to be a warrant, summons, or citation within the meaning of R.C. 2901.13(E).

R.C. 2901.13(E) also uses the term "other process." The term "process" is a catch-all, defined to include "any means used by court to acquire or exercise its jurisdiction over a person or over specific property." Black's Law Dictionary 1084 (5th ed. 1979). While the filing of a complaint does require the Ethics Commission to investigate the charges contained therein, it alone does not give the Ethics Commission the power to exercise its authority over any person. Rather, before the Commission may proceed to take formal action, it must make a determination that the complaint is not frivolous and, prior to any hearing, must send notice to the person against whom the complaint is directed. Moreover, as has been previously discussed, the Ethics Commission is not a court. The Ethics Commission does not have the statutory power to impose punishment but, rather, may only recommend that further action be taken by the proper prosecuting authority. A complaint filed before the Ethics Commission is not, therefore, a device used by a court to gain jurisdiction over a person or property. Thus, such a complaint does not fall with the term "other process" for purposes of R.C. 2901.13(E).

Further support for the conclusion that a complaint does not constitute "other process" can be derived from the principle of eiusdem generis. Under this principle, the term "other process" is assumed to have those characteristics shared by a warrant, summons and citation. See generally State v. Aspell, 10 Ohio St. 2d 1, 225 N.E.2d 226 (1967). The issuance of a warrant, summons or citation provides for the notification of the person accused that an official inquiry into his actions is underway. This notice may take the form of a physical seizure of the person of the accused, the delivery of notice by a sheriff or written notice given by a court or police officer; however, the ultimate effect is the same: the accused is made aware of the existence of charges against him. Thus, to qualify as "other process,"

the device in question must result directly or indirectly in the giving of notice to the person accused of the charges being brought against him. "The basic purpose of service of process is to give notice to a person that an action has been brought against him." Sours v. Director of Highways, 172 Ohio St. 242, 244, 175 N.E.2d 77, 78 (1961). A complaint filed with the Ethics Commission does not serve this notice-giving function. Rather, the filing of a complaint simply brings certain facts to the attention of the Ethics Commission. Whether notice is ultimately given is dependent on a further determination by the Ethics Commission that the facts alleged warrant a formal hearing, not on the filing of a complaint.

The language of R.C. 102.06 itself indicates that the filing of a complaint with the Ethics Commission is an event separate from the actual prosecution. R.C. 102.06 provides that if the Commission finds by a preponderance of the evidence that a violation of R.C. Chapter 102 has occurred, it shall "report its findings to the appropriate prosecuting authority for proceedings in prosecution. . ." (emphasis added). Thus, R.C. 102.06 apparently assumes that the prosecution begins, if at all, after the conclusion of the Ethics Commission proceedings. The filing of a complaint with the Ethics Commission is not, therefore, a part of the prosecution.

Due to the fact that a complaint is not an indictment, information or arrest, or a "warrant, summons, citation or other process" within the meaning of R.C. 2901.13(E) and the fact that R.C. 102.06 indicates that a prosecution begins only after the Ethics Commission proceedings have ended, I am constrained to conclude that the filing of a complaint filed with the Ethics Commission does not commence a prosecution for the purposes of R.C. 2901.13.

Your predecessor's second question raises the issue of whether the "speedy-trial" statute, R.C. 2945.71, is triggered by the institution of proceedings before the Ohio Ethics Commission pursuant to R.C. 102.06. Based upon the information in the request and on conversations between a member of my staff and your office, it is my understanding that your concern is primarily with the question of whether the proceedings before the Ethics Commission bring the "speedy-trial" provisions of R.C. 2945.71(B) into play, or whether the time period set forth in R.C. 2945.71(B) does not commence until an arrest is made or summons issued by the prosecuting authority to whom the matter is referred by the Commission.

As has been previously discussed, violations of R.C. Chapter 102 constitute misdemeanors of either the first or fourth degree. R.C. 102.99. R.C. 2945.71(B), which applies to such misdemeanors, reads in pertinent part:

(B) A person against whom a charge of misdemeanor, other than a minor misdemeanor, is pending in a court of record, shall be brought to trial:

(1) Within forty-five days after his arrest or the service of summons, if the offense charged is a misdemeanor of the third or fourth degree. . . .

(2) Within ninety days after his arrest or the service of summons, if the offense charged is a misdemeanor of the first or second degree. . . . (Emphasis added.)

I note at the outset that the time limits of R.C. 2945.71(B) apply only to a person against whom a "charge. . . is pending in a court of record." "In this state we may define a court of record to be one, the history of whose proceedings is perpetuated in writing." Adair's Adm'r v. Roger's Adm'r, Wright 428, 429 (1833). Pursuant to R.C. 102.06, the Ethics Commission does keep a transcript of its proceedings. Consequently, the question becomes whether the Commission can be considered to be a court.

As discussed in answer to your first question, because the Ethics Commission is an administrative rather than a judicial body, and because it lacks the power to impose fines or sentences, it cannot be considered a court. Thus, the Ethics Commission also cannot be termed "a court of record." It is clear, therefore, that



the time period set forth in R.C. 2945.71(B) does not begin to run while the Ethics Commission exercises its jurisdiction over the complaint.

Support for this conclusion may be found in the statutes which govern the proceedings before the Ethics Commission. Pursuant to R.C. 102.06, the Ethics Commission must schedule a hearing "within ninety days after the complaint is filed," and must dispose of the case "within six months after it has been heard." This provision incorporates a requirement for timely action into the procedures which must be followed by the Commission. Had the General Assembly intended for the proceedings of the Ethics Commission to invoke the time periods set forth in R.C. 2945.71(B), it would have been unnecessary to create a separate time requirement in R.C. 102.06. Moreover, the time periods found in R.C. 2945.71(B) and those in R.C. 102.06 are not consistent. The Ethics Commission has, under R.C. 102.06, a total of ninety days from the time a complaint is filed to schedule a hearing and six months from the end of the hearing until the matter must be finally resolved. R.C. 2945.71(B), however, permits only forty-five days "after his arrest or service of summons" before a trial must begin on a charge of a fourth degree misdemeanor and ninety days from the arrest or summons on a charge of a misdemeanor of the first degree. Additionally, it is a long established principle of statutory construction that a specific law prevails over a more general law. State ex rel. Steller v. Zangerle, 100 Ohio St. 414, 126 N.E. 413 (1919). Thus, the provisions of R.C. 102.06 which expressly set forth the time periods applicable to the Ethics Commission would take precedence over the more general requirements of R.C. 2945.71(B) with regard to the time periods applicable to the Commission. I conclude, therefore, that the requirements of R.C. 2945.71(B) are not triggered by any stage in the proceedings before the Ethics Commission.

Therefore, it is my opinion, and you are advised, that:

1. The filing of a complaint with the Ohio Ethics Commission does not commence a prosecution for the purposes of the statute of limitations, R.C. 2901.13.
2. R.C. 2945.71 does not apply to proceedings before the Ohio Ethics Commission.