

**OPINION NO. 75-079****Syllabus:**

1. The Bureau of Inspection and Supervision of Public Offices of the Office of the Auditor has the authority pursuant to R.C. 117.01 and R.C. 117.10 to inspect and audit the accounts of development funds operated by or under the control of the boards of trustees of the state colleges and trustees of the state colleges and universities in Ohio.
2. Moneys received by university development funds pursuant to R.C. 3345.16 may be expended and applied for any general or special use of the university unless otherwise directed in the donation or bequest.

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**To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio**  
**By: William J. Brown, Attorney General, October 31, 1975**

I have your request for my opinion, which reads as follows:

State university and college development funds, such as The Ohio State University Development Fund, were created to allow state universities and colleges to accept private gifts, grants, and testamentary and inter vivos donations while at the same time providing for programs and financial needs which state appropriations could not meet. In 1961, the General Assembly enacted R. C. 3345.16 granting boards of trustees specific authority to receive private gifts and hold them in trust for the benefit of the university or college. The development funds operating under R. C. 3345.16 are a creature of the universities and colleges. The funds are a vehicle to receive private gifts which are not specifically earmarked and can be used at the discretion and under the direction of the board of trustees to further the

highest and broadest aims of the universities and colleges.

Since the funds collected, invested and administered by these development funds were apparently private funds although under the ultimate control and supervision of the boards of trustees of the state colleges and universities, the Bureau of Inspection and Supervision of Public Offices of the Auditor's Office has not audited the books and accounts in the past. Certain questions now are being raised about the status of these funds, especially concerning the collection of these funds "under the color of office" as defined in the Statutes (O.R.C. 117.10). The Bureau of Inspection now seeks a clarification of the status of the Bureau's obligation and responsibility to audit and inspect the accounts of these development funds.

As State Auditor, I am requesting your opinion on the following question:

"Does the Bureau of Inspection of Public Offices have the authority to inspect and audit the accounts of university and college development funds operated under the supervision of the boards of trustees of state colleges and universities?"

At the outset, I think it important to note that your question requests an opinion regarding not only the Ohio State Development Fund but also all other development funds which operate under the ultimate control of state colleges and universities in Ohio. This opinion is limited to those college and university development funds supervised by and operated under the authority of the boards of trustees governing these various state colleges and universities. This opinion does not necessarily apply to development funds maintained and controlled by a private entity, such as an alumni association.

For the reasons discussed below, it is my opinion that the Bureau of Inspection of Public Offices has the authority to inspect and audit the accounts of state colleges and university development funds, such as the Ohio State University Development Fund, which are operated pursuant to R.C. 3345.16 under the supervision and ultimate control of the boards of trustees of the state colleges and universities in Ohio. Specifically stated, it is my opinion that the assets held in these funds constitute public moneys within the definition of R.C. 117.10.

In 1961, the Ohio legislature enacted R.C. 3345.16 granting the boards of trustees of all state colleges and universities specific statutory authority to accept donations, bequests, and devises. R.C. 3345.16 provides as follows:

The board of trustees of a state college or university may receive, and hold in trust, for the use and benefit of the college or university, any grant or devise of land, and donation or bequest of money or other personal property, to be applied to the general or special use of the college or university including use for student loan and scholar-

ship purposes, unless otherwise directed in the donation or bequest.

The board of trustees of a state college or university may utilize trust funds to invest in property, real and personal, as a portion of the holdings in the endowment portfolio under the trust powers imparted to said board of trustees. Such property, real and personal, acquired for investment purposes shall be managed by the board of trustees in the same manner as are other investments in the college's or university's endowment portfolio. The board of trustees may lease, lease back, or otherwise contract for the use of such property in such manner as to provide earning power for the college or university investment portfolio. Sections 123.01, 123.04, 123.15, 123.18, 123.19, 123.47, 123.63, and 123.65 of the Revised Code shall not apply to properties, real and personal, held under the provisions of this section as earning-power properties in the college or university endowment portfolio.

Notwithstanding any provision of the Revised Code to the contrary, the title in properties, real and personal, purchased by a board of trustees as an investment, and held in the college's or university's endowment portfolio shall not be vested in the state, but shall be held in trust by the board.

The enactment of R.C. 3345.16 was not intended to replace pre-existing development funds operated and supervised by state colleges and universities. Rather, R.C. 3345.16 expressly demonstrates the intent of the General Assembly to grant the boards of trustees of state colleges and universities the express authority to accept donations and bequests, in whatever form, and utilize them for those purposes designated by the particular donor or for the general or special use of the university. Moreover, this section authorizes the state university boards of trustees to invest and reinvest moneys so collected.

Turning to the specific question at hand, R.C. Chapter 117, in my opinion, authorizes the Bureau of Inspection to inspect and audit all moneys received by the boards of trustees of state colleges and universities under the authority of R.C. 3345.16. R.C. 117.01 provides in pertinent part that

"[T]he bureau of inspection and supervision of public offices, in the office of the auditor of state . . . shall inspect and supervise the accounts and reports of all state offices as provided in sections 117.01 to 117.19, inclusive, of the Revised Code, including every state educational . . . institution . . . ."

R.C. 117.10 describes the procedures for filing and enforcing reports of Examinations made by the Bureau of Inspection. In addition, this section defines the term "public money" as utilized within R.C. Chapter 117 to include "all money received or collected under color of office, whether in accordance with or under authority of any law, ordinance, order, or otherwise . . . ."

It appears clear that funds such as those received by the Ohio State Development Fund and other such funds under the control of the boards of trustees are collected "in accordance with or under authority of . . . law." A contrary interpretation would render the entirety of R.C. 3345.16 meaningless. With the enactment of the provisions of R.C. 3345.16, the General Assembly specifically authorized the receipt and investment of moneys from private sources by the state college and university boards of trustees. To interpret R.C. 3345.16 as not granting "authority of law" would be to disregard the plain meaning of the statutory language and thereby breach a cardinal rule of statutory interpretation. See Mutual Bldg. & Co. v. Efros, 152 Ohio St. 369, 89 N.E.2d 648 (1949).

It is helpful to trace the statutory history of the term "public money" in order to understand its parameters as utilized in R.C. Chapter 117. The term appeared in the predecessor of R.C. 117.01 et seq., namely G.C. 274 et seq. which was enacted in 1910 (101 Ohio Laws 382). In that same year, the Supreme Court held, in Loe v. State, ex rel. Platt, 82 Ohio St. 73 (1910), that a fund assessed and collected pursuant to statutory authorization from adjacent property owners for the purpose of constructing a county ditch was not "public money" for the purposes of G.C. 2921. That section authorized prosecuting attorneys to initiate civil actions to restrain the misapplication "of funds of the county, or public money in the hands of the county treasurer or belonging to the county." As a result of the court's definition of "public money" in Loe, the scope of the term "public money" found within G.C. 286 was judicially narrowed, contrary to the intent of the General Assembly.

Consequently, in 1913 the General Assembly amended G.C. 286 (now R.C. 117.10), 103 Ohio Laws 506, to reestablish the broad definition of "public money" as was originally intended by the General Assembly with the enactment of G.C. 274 et seq. in 1910. "Public money" was defined to include any funds in the possession of a public official raised through special assessments against local property owners. With the intent of the General Assembly then expressly clarified, the Supreme Court overruled the Loe decision in State ex rel. Maher v. Baker, 88 Ohio St. 165 (1913).

In a later case, State ex rel. Smith v. Maharry, 97 Ohio St. 272 (1918), the Supreme Court indicated that G.C. 274 and 286 (now R.C. 117.01 and 117.10), creating the Bureau of Inspection and Supervision of Public Offices and defining its powers, were remedial statutes which should be liberally construed and applied to affect their clear and controlling purpose to protect and safeguard public property and public moneys. In Maharry, the Supreme Court interpreted these sections to authorize the audit and inspection of public money misappropriated by private persons as well as public money unlawfully paid to or misappropriated by a public officer.

Later decisions indicate that the provisions of G.C. 274 and 286 (now R.C. 117.01 and 117.10) apply to funds to which the state has no property right but which are nonetheless held by a public official. For example, in 1937 Op. Att'y. Gen. 496, my predecessor determined that moneys received by the clerk of courts and probate judges for witness fees and deposits for costs and by the sheriff in partition proceedings are subject to inspection as provided by G.C. 286 (R.C. 117.10). The following portion of the opinion, at 803, persuasively argues that G.C. 286 (now R.C. 117.10) subjects private money held in trust by a public

official to audit by the Bureau of Inspection and Supervision of Public Offices:

[I]n the enactment of Section 286, the General Assembly sought to label all moneys coming into the hands of public officers under color of office as public moneys in so far as the Bureau of Inspection and Supervision of Public Offices was concerned [so] that the Bureau by reason of the law that all such moneys were public moneys, could make findings relative to all such moneys and actions could be maintained for their recovery.

Unclaimed witness fees in civil actions, unclaimed deposits for costs and unclaimed distributive shares in partition proceedings are not public moneys in fact, Section 286, General Code, to the contrary notwithstanding, as they are not within its contemplation except to the extent that the Bureau is authorized to make findings relative thereto and the proper officer maintain actions to recover moneys coming into the hands of public officers in any manner, without regard to how they were received, who paid them to the officers, or to whom they rightfully belonged. The state has no property right in these moneys, never did have and never will have. . . .

. . . .

I grant you that these moneys are paid to the clerk, sheriff or probate judge of the county and are received by them under color of office, but they are so received as a matter of convenience and not because the state has any right of property in the money. These officers are merely the conduits through which the moneys pass on their way to get into the hands of the person who are entitled to them as a matter of right. These officers are, as I take it, trustees of the money for those ultimately entitled to receive it.

See also State ex rel. Hudson v. Kelley, 55 Ohio App. 314, 319 (1936), wherein the court held that unclaimed money of a deceased person held in the hands of a sheriff is "public money" as defined by G.C. 286 (now R.C. 117.10), which should be retained as a trust fund until claimed by the lawful owner.

Finally, any doubt as to whether The Ohio State University Development Fund and other such funds are subject to audit pursuant to R.C. 117.01 and R.C. 117.10 should be resolved by the decision in State ex rel. Robusky v. Chicko, 117 Ohio St. 2d 1 (1969). In this case, the Supreme Court was presented with a situation in which a county sheriff for a fee made available to lawyers and insurance agents copies of accident reports and deposited such fees in an "Equipment Fund". The court was squarely presented with the question of whether said fund was included in the term "public money" as provided in R.C. 117.10. Although the Sheriff had no statutory authorization to charge such fees, the Supreme Court concluded that funds received for the accident reports most certainly came into his possession "under color of office" and were therefore subject to audit. Id. at 3.

One of the significant aspects of the Chicko case is the

fact that the payments made for the accident reports were, in a sense, voluntary. Unlike an assessment or tax, private individuals paid into the fund only if they desired to purchase a report. In an analogous, voluntary fashion, donations and bequests are given to the Ohio State University Development Fund and other such funds. Accordingly, in my opinion such funds are "moneys received or collected under color of office, whether in accordance with or under authority of any law, ordinance, order, or otherwise."

Although the enactment of R.C. 117.01 et seq. long preceded the enactment of R.C. 3345.16, it cannot be maintained that the general provisions of R.C. 117.01 and R.C. 117.10 are superceded by the provisions of R.C. Chapter 3345 with respect to the auditing of university funds. Stated otherwise, it cannot be said that when the General Assembly enacted R.C. 3345.16 in 1961, without making a specific provision for audit of such funds by the Bureau of Inspection and Supervision of Public Offices, it intended to make an exception to the general powers of the Bureau as provided in R.C. 117.01 and R.C. 117.10. It is a fundamental rule of statutory construction that the General Assembly is assumed to be acquainted with all existing legislation and that continuity of legislative policy is intended except where change is clearly and affirmatively indicated, Warner v. Ohio Edison Co., 152 Ohio St. 303, 89 N.E.2d 463 (1949) 2A Sutherland, Statutory Construction §56.02 (4th ed. 1973). The history of R.C. 117.01 and R.C. 117.10 strongly indicates a legislative intent to subject all funds in the hands of public officials to audit by the Bureau. Nothing in R.C. 3345.16 discloses an intent to alter this policy.

An issue quite similar to yours was encountered by one of my predecessors in an informal opinion of the Attorney General No. 556, dated July 20, 1956. The question considered was whether trust funds accrued in connection with the construction and operation of facilities acquired under the special financial plan provided for in R.C. 3345.11 were subject to audit by the Bureau of Inspection and Supervision of Public Offices. The opinion advised that if the trustee of the funds were the governing board of the university then the administration of the trust would be a proper subject of examination and audit by the Bureau, but if the trustee were an alumni association or other private entity, then the funds would not be subject to audit until paid over to the university authorities. I concur in this opinion. The enactment of R.C. 3345.16 in 1961 does not affect my predecessor's conclusion.

It must be noted, however, that the expenditure of private funds obtained pursuant to R.C. 3345.16 is not limited to the purposes set forth in R.C. 3345.05 or any other section of the code. The first paragraph of R.C. 3345.16 expressly provides that funds donated pursuant to the Section may be "applied to the general or special use of the college or university including use for student loan and scholarship purposes, unless otherwise directed in the donation or bequest." This language is sufficiently broad that the Board of Trustees of The Ohio State University may expend moneys from the Development Fund for any purpose which is related in a general way to the operation of the University. Naturally, the same would hold true for the boards of trustees of other state colleges and universities which supervise their own development funds.

At least two cases support the position that funds received by a public office from a private source may be expended not only pursuant to statutory or constitutional authority but for any proper purpose of the recipient. In Van Wert County Law Library v. Stuckey, 42 Ohio Op. 1, 8 (1949) (Common Pleas), the court held:

If the law library association receives private donations, in respect to such monies it is like any other private association and may use such private funds for any proper purpose of the association, even though it is prohibited by law from expending funds received from a public source for such purposes.

To the same effect, see Carrel v. State ex rel. Brown, 11 Ohio App. 281 (1919), wherein the court held that the directors of the University of Cincinnati could expend money from trust funds for purposes which would not be authorized with respect to money received from taxation.

It follows from an analysis of these cases and the language of R.C. 3345.16 that in auditing and inspecting the accounts of the O.S.U. Development Fund and other such funds, the Bureau of Inspection must apply the broad standard found within the provisions of R.C. 3345.16 in determining whether development fund moneys are being properly utilized for the general or special use of the university. The statutory restrictions in the Revised Code applying to funds from public sources specifically do not apply to university development funds.

In conclusion, it is my opinion and you are so advised that:

1. The Bureau of Inspection and Supervision of Public Offices of the Office of the Auditor has the authority pursuant to R.C. 117.01 and R.C. 117.10 to inspect and audit the accounts of development funds operated by or under the control of the boards of trustees of the state colleges and trustees of the state colleges and universities in Ohio.
2. Moneys received by university development funds pursuant to R.C. 3345.16 may be expended and applied for any general or special use of the university unless otherwise directed in the donation or bequest.