

December 30, 1994

OPINION NO. 94-096

The Honorable Kevin J. Baxter
Erie County Prosecuting Attorney
2900 Columbus Ave.
Sandusky, Ohio 44870

Dear Prosecutor Baxter:

You have requested an opinion regarding the application of R.C. 121.22, the open meetings law, to certain advisory committees that have been formed in connection with various state and federal grants administered by the general health district in your county. As presented in your request and further developed through discussion between members of our staffs, the pertinent facts about these grant advisory committees are as follows. You indicate that you have not been able to identify any state or federal statutes governing the various grant programs involved that pertain specifically to advisory committees. In at least one instance, however, the formation of an advisory committee is expressly required by the terms of the grant agreement. Because the recommendations of this advisory committee proved valuable in the administration of the grant involved, similar advisory committees for other grant programs have been formed by action of the general health district board of health or by the administrator of the general health district. *See generally* R.C. Chapter 3709 (governing the structure and powers of various types of health districts).

Regardless of their origin, these committees share certain general characteristics. As advisory bodies, the committees have no actual power or decision-making authority. Their purpose is to review and make recommendations regarding various aspects of their respective grant programs. Members of the advisory committees are appointed by the health district administrator and not by the general health district board of health. The committee members are primarily private citizens and members of various public bodies who are interested in or have some expertise in the subject matter of the grant. Although members or employees of the general health district board of health may serve on an advisory committee, they do not constitute either a majority or quorum of any committee. Your request suggests that these characteristics may operate to remove the grant advisory committees from the open meetings requirements of R.C. 121.22.

The Open Meetings Requirements of R.C. 121.22

R.C. 121.21(C) mandates that all meetings of any public body be "public meetings open to the public at all times," except as expressly provided in that provision or another provision of law. A public body also is required to comply with certain notice requirements with respect to its regular and special meetings. R.C. 121.22(F). Any formal action taken by a public body in violation of the requirements of R.C. 121.22 is invalid, including in particular, any "formal action adopted in an open meeting that results from deliberations in a meeting not open to the public." R.C. 121.22(H). Additionally, R.C. 121.22(A) states that "[t]his section shall be liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in open meetings, unless the subject matter is specifically excepted by law." R.C. 121.22 thus requires "that not only formal actions of public bodies, but also the deliberations preceding those actions, take place in sessions open to the public." *Matheny v. Frontier Local Bd. of Educ.*, 62 Ohio St. 2d 362, 365, 405 N.E.2d 1041, 1044 (1980).

The term public body is defined by R.C. 121.22(B), as follows:

(1) "Public body" means either of the following:

- (a) Any board, commission, committee, or similar decision-making body of a state agency, institution, or authority, and any legislative authority or board, commission, committee, agency, authority, or similar decision making body of any county, township, municipal corporation, school district, or other political subdivision or local public institution;
- (b) Any committee or subcommittee of a body described in division (B)(1)(a) of this section.

Application of R.C. 121.22 to an Advisory Committee Appointed by the Administrator of a General Health District Pursuant to the Terms of a Grant

The definition of "public body" at R.C. 121.21(B)(1) expressly includes a "committee." Your letter and at least one grant document involved refer to the bodies in question as committees. Additionally, as described in your letter, these committees conform to the commonly understood meaning of the term "committee." *See generally Random House Dictionary of the English Language* 296 (unabridged ed. 1973) ("a person or a group of persons elected or appointed to perform some service or function, as to investigate, report on, or act upon a particular matter"); *accord Black's Law Dictionary* 273 (6th ed. 1990). Accordingly, both by name and function, the bodies described in your request are committees within the meaning of R.C. 121.22(B)(1).

Additionally, a general health district is a political subdivision, which also is one of the specific entities named in R.C. 121.22(B)(1). *See generally* 1975 Op. Att'y Gen. No. 75-036 (concluding that general and city health districts are political subdivisions for purposes of sovereign immunity). Pursuant to R.C. 3709.01, the entire state is divided into general health districts, city health districts, or various combinations thereof. A general health district consists of the townships and villages in a county, R.C. 3709.01, and is governed by a board of health, R.C. 3709.02. The board of health of a general health district has authority within the territorial boundaries of the district to "make such orders and regulations as are necessary for its own government, for the public

health, the prevention or restriction of disease, and the prevention, abatement, or suppression of nuisances." R.C. 3709.21. Thus, a general health district is a political subdivision in its own right, separate and distinct from other political subdivisions that exist within its boundaries. Op. No. 75-036 at 2-143 ("[i]t is this territorial division of responsibility for governmental functions which is the essence of political subdivisions"); cf. *State ex rel. Mowrer v. Underwood*, 137 Ohio St. 1, 5, 27 N.E.2d 773, 775 (1940) (explaining, with respect to city health districts, that the legislation enacting what is now R.C. 3709.01 was intended "to withdraw from municipalities the powers of local health administration previously granted to them, and to create in each city a health district which is to be a separate political subdivision of the state").¹

Since a general health district is a political subdivision, any committee of the general health district or any committee of the board of a general health district will be a public body as defined by R.C. 121.22(B)(1). Therefore, unless the factors mentioned in your letter operate to remove the grant advisory committees you have described from the scope of the definition of public body, the committees will be subject to the open meetings requirements of R.C. 121.22. Your letter suggests that the grant advisory committees may not be public bodies under R.C. 121.22 because they have no decision-making authority or, alternatively, because their origin and composition precludes them from being committees "of" the general health district or its board.

Several court decisions and attorney general opinions have considered the decision-making powers of a body, in analyzing whether that body is a "public body" for purposes of R.C. 121.22. In *Stegall v. Joint Township Dist. Memorial Hosp.*, 20 Ohio App. 3d 100, 102-03, 484 N.E.2d 1381, 1383-84 (Auglaize County 1985), the court stated that "[i]t is implied that the board must be a decision-making body," and noted additionally that "the legislature could have, but did not, limit the scope of the decisions involved." *Accord* 1978 Op. Att'y Gen. No. 78-059 at 2-146 ("[t]here is, however, nothing in the language of R.C. 121.22 that would suggest that the scope of the statute is limited to entities authorized to render final decisions the decisions made by the committee, however provisional or removed from the rights of the parties involved are, nonetheless, decisions").

¹ The court goes on to state that by virtue of its independence from the city, "the city health district becomes an agency of the state and is governed by the laws of the state." *State ex rel. Mowrer v. Underwood*, 137 Ohio St. 1, 5, 27 N.E.2d 773, 775 (1940). As a result, some court decisions and Attorney General opinions subsequent to *Mowrer* have described both city and general health districts as "state agencies." See 1975 Op. Att'y Gen. No. 75-036 at 2-142. As explained by Op. No. 75-036, however, the term "state agency," when read in the context of those particular authorities, was not intended to define the status of a health district as something other than a political subdivision; rather, the term was used simply to emphasize that health districts "derive their authority directly from the state" and are "a separate part of state government and not a branch of municipal or county government as they had been prior to the Hughes and Griswold Acts." *Id.* The analysis of Op. No. 75-036 remains pertinent to more recent cases that have used the term "state agency" to describe health districts. See, e.g., *Harrison v. Judge*, 63 Ohio St. 3d 766, 768, 591 N.E.2d 704, 706 (1992); *Johnson's Markets, Inc. v. New Carlisle Dept. of Health*, 58 Ohio St. 3d 28, 33, 567 N.E.2d 1018, 1023-24 (1991).

Neither the *Stegall* case nor Op. No. 78-059 involved entities whose functions were solely advisory. The same broad construction of the term "decision-making" has been applied in court decisions and Attorney General opinions dealing with advisory committees, however, and these authorities have generally found advisory committees to be decision-making bodies because such committees necessarily make decisions in the process of formulating their advice. *See, e.g., Thomas v. White*, 85 Ohio App. 3d 410, 412, 620 N.E.2d 85, 86 (Summit County 1992) (a citizens advisory committee of a children's services board is a decision-making body for purposes of R.C. 121.22 because "each of its duties involves decisions as to what will be done");² 1992 Op. Att'y Gen. No. 92-077 at 2-324 n.2 (advisory committee created by resolution of board of county commissioners to make recommendations regarding a proposed new jail is a public body for purposes of R.C. 121.22); 1992 Op. Att'y Gen. No. 92-065 (county housing advisory board whose statutory duties are to review development plans and advise the county regarding such plans meets the decision-making standard); *see also* 1979 Op. Att'y Gen. No. 79-061 at 2-205. (concluding that the term "decision-making" is not helpful in defining the characteristics of a public body because "[a] simple recommendation, however tentative and far removed from the legal rights of others, is the result of decision-making any collective body is, in this sense, involved in the process of decision making"). *But see* 1979 Op. Att'y Gen. No. 79-110 at 2-365 ("[w]hile advisory committees of state agencies may make some decisions in a very general sense, it seems unlikely that they can, in a strict sense, be considered decision-making bodies"). The weight of authority indicates that the term "decision-making," as used in R.C. 121.22(B)(1), is to be construed broadly, and does not exclude any entity that otherwise meets the definition of public body on the grounds that its function is solely advisory. Accordingly, the grant advisory committees you have described are "decision-making bodies" for purposes of R.C. 121.22(B)(1).

The alternative analysis suggested by your letter is that the grant advisory committees are not public bodies for purposes of R.C. 121.22(B)(1) because of their origin or composition. Many of the boards and committees considered in the authorities cited above were comprised of members who were private citizens, or officers of public agencies other than the parent body of the committee or board. *See, e.g., Thomas* (citizen's advisory council of a county children's services board); Op. No. 92-077 (jail advisory committee of a board of county commissioners). Thus, the fact that members or employees of a general health district board of health comprise neither a majority nor a quorum of the grant advisory committees is not relevant to a determination of whether the committees are public bodies for purposes of R.C. 121.22.

A number of court decisions and Attorney General opinions, however, have considered the nature of the authority creating and establishing the duties of a particular body in determining the status of that body under R.C. 121.22. In *Beacon Journal Publishing Co. v. City of Akron*, 3 Ohio St. 2d 191, 209 N.E.2d 399 (1965), the court found that various boards, committees, and

² The court initially stated that "a strict reading of R.C. 121.22(B)(1) leads us to the conclusion that a committee need not be a decision-making body in order to be a public body." *Thomas* at 412, 620 N.E.2d at 86. Nonetheless, the court proceeded to expressly hold that the citizens advisory committee in question was a decision-making body.

commissions of the City of Akron that were established by charter, ordinance, or statute were public bodies subject to either the state or city open meetings law, regardless of whether city council or the mayor appointed the members of these various bodies. Where no statute or ordinance was involved, however, and a board or commission was created solely by executive action of the mayor or chief administrator, the board or commission was not subject to any open meetings law. *Id.* at 196, 209 N.E.2d at 403.

Subsequent opinions of the Attorney General concluded that an entity could not be a public body for purposes of R.C. 121.22, unless that body was authorized by statute and its duties statutorily defined. *Compare* Op. No 79-110 at 2-365 (safety codes committee of the Industrial Commission was not a public body because, *inter alia*, its functions and duties were derived from a resolution of the Commission and not from any statute) *with* 1978 Op. Att'y Gen. No. 78-059 (internal security committee of the Industrial Commission was a public body because it was created by statute and had expressly defined statutory functions).

More recent analyses, however, indicate that specific enabling legislation is not an essential feature of a public body for purposes of R.C. 121.22. In *Weissfeld v. Akron Pub. Sch. Dist.*, 94 Ohio App. 3d 455, 640 N.E.2d 1201 (Summit County 1994), for example, the court of appeals held that the open meetings law applies to bodies created by contract, as well as bodies created by legislative action. In *Weissfeld*, a parent was denied access to a meeting of the building leadership team (BLT) of his child's school. BLTs were a form of site-based management authorized by the school district collective bargaining agreement. Under the agreement, individual schools could choose to form a BLT, through which the teachers and principal made management decisions at the building level. The court of appeals expressly rejected the finding of the trial court that R.C. 121.22 only applied to statutory bodies, and held that "the [school] board expressly allowed for the creation of decisionmaking committees at the building level when it agreed to the BLT provisions in the collective bargaining agreement, and these decisionmaking committees fit within the definition of public body under R.C. 121.22(B)." *Id.* at 457, 640 N.E.2d at 1203.

The rationale for concluding that bodies without an express statutory basis, such as the BLTs in *Weissfeld*, are public bodies for purposes of R.C. 121.22(B) is articulated most clearly in Op. No. 92-077. That opinion, as noted previously, concludes that a committee created by resolution of a board of county commissioners to advise the board about a proposed jail is a public body under R.C. 121.22(B). The opinion notes first that a board of county commissioners is itself a public body for purposes of R.C. 121.22, and then states:

It follows, therefore, that R.C. 121.22 requires a committee created by the board of county commissioners for the purpose of advising the board about matters which the board itself could discuss only in an open meeting, also to deliberate and formulate its advice about such matters only in public. To conclude otherwise would allow a public body to circumvent the requirements of R.C. 121.22 merely by assigning to an advisory body those portions of its deliberations of the public business which it seeks to shield from public scrutiny; such a result would be clearly contrary to the legislative intent expressed in R.C. 121.22(A).

Op. No. 92-077 at 2-325. *Cf. State ex rel. Vindicator Printing Co. v. Fuda*, No. 91-T-4531 (Ct. App. Trumbull County Dec. 6, 1991) (slip op.) (holding that a citizens committee, formed by certain candidates for public office and other interested persons to advise city council on a sewer rate increase, was not subject to the open meetings law in the absence of any evidence that the committee was formed by either direct or indirect action of the city council).

The general health district board of health involved in your question is a public body subject to the open meetings law. The administration of various grant programs is part of the public business of that board. It follows that committees formed by action of the board of health of the general health district for the purpose of advising the board with respect to those grants are also public bodies subject to the open meetings law. *See generally Beacon Journal*; Op. No. 92-077. The action of the board of health in entering into a grant agreement that requires an advisory committee is sufficient board action to constitute that committee a public body under R.C. 121.22. *See generally Weissfeld*. However, the administrator of the general health district is not a public body as defined in R.C. 121.22(B)(1). If, therefore, a grant advisory committee is established solely pursuant to the executive authority of the administrator, and is not required or authorized by the terms of the grant or any action of the general health district board of health, such a grant advisory committee is not a public body for purposes of R.C. 121.22(B)(1), and is not subject to the requirements of the open meetings law. *See generally Beacon Journal; Fuda*.

Conclusion

It is, therefore, my opinion and you are hereby advised that:

1. A committee of private citizens and various public officers or employees that is established by the board of health of a general health district for the purpose of advising the board on matters pertaining to the administration of a state or federal grant program is a public body subject to the requirements of R.C. 121.22, the open meetings law.
2. When the board of health of a general health district enters into a state or federal grant agreement that requires the establishment of a committee of private citizens and other public officers and employees and whose purpose is to provide advice to the board pertaining to the administration of the grant, such an advisory committee is a public body subject to the requirements of R.C. 121.22, the open meetings law.
3. When a committee of private citizens and various public officers or employees is established solely pursuant to the executive authority of the administrator of the general health district for the purpose of providing advice pertaining to the administration of a state or federal grant, and the establishment of the committee is not required or authorized by the terms of the grant or any action of the general health district board, such a committee is not a public body for purposes of R.C. 121.22(B)(1) and is not subject to the requirements of the open meetings law.

Respectfully,

LEE FISHER
Attorney General

December 30, 1994

The Honorable Kevin J. Baxter
Erie County Prosecuting Attorney
2900 Columbus Ave.
Sandusky, Ohio 44870

SYLLABUS

94-096

1. A committee of private citizens and various public officers or employees that is established by the board of health of a general health district for the purpose of advising the board on matters pertaining to the administration of a state or federal grant program is a public body subject to the requirements of R.C. 121.22, the open meetings law.
2. When the board of health of a general health district enters into a state or federal grant agreement that requires the establishment of a committee of private citizens and other public officers and employees and whose purpose is to provide advice to the board pertaining to the administration of the grant, such an advisory committee is a public body subject to the requirements of R.C. 121.22, the open meetings law.
3. When a committee of private citizens and various public officers or employees is established solely pursuant to the executive authority of the administrator of the general health district for the purpose of providing advice pertaining to the administration of a state or federal grant, and the establishment of the committee is not required or authorized by the terms of the grant or any action of the general health district board, such a committee is not a public body for purposes of R.C. 121.22(B)(1) and is not subject to the requirements of the open meetings law.