Note from the Attorney General's Office:

1988 Op. Att'y Gen. No. 88-042 was overruled in part by 2005 Op. Att'y Gen. No. 2005-036.

OPINION NO. 88-042

Syllabus:

1. An institution of the Department of Youth Services that belongs to the state and is used exclusively for a public purpose is, pursuant to R.C. 5709.08, exempt from taxation and, in particular, is not subject to a tax levied by a township under R.C. 505.39.

2. An institution of the Department of Youth Services that is located within a township that provides fire and rescue services throughout its territory is entitled to receive such services.

3. Absent express statutory authority to do so, a board of township trustees may not impose upon an institution operated by the Ohio Department of Youth Services a charge for providing fire or ambulance services to that institution.

4. Charges for ambulance and emergency medical services established by a board of township trustees under the authority of R.C. 505.84 may not be collected from an institution operated by the Ohio Department of Youth Services.

5. Under R.C. 9.60, an institution operated by the Ohio Department of Youth Services may enter into a contract with a board of township trustees, which is not obligated to provide fire and rescue services within the part of the township in which the institution is located, pursuant to which the township will provide the institution with fire protection, including ambulance, emergency medical, and rescue services.

To: Geno Natalucci-Persichetti, Director, Ohio Department of Youth Services, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, June 21, 1988

I have before me your letter concerning a situation in which an institution of the Department of Youth Services is located within a township and receives fire and rescue protection from the township. Trustees of the township have requested that the Department pay for the fire and rescue services so provided. You have indicated that the money for fire and rescue protection is obtained by a tax levied under R.C. 505.39 upon taxable property within the township, and that it is the position of the Department that the institution in question is, pursuant to R.C. 5709.08, exempt from that tax, because it is state property used exclusively for a public purpose. You have asked for an opinion on the question whether the institution is exempt from a tax levied pursuant to R.C. 505.39 and also on the question whether the institution is in any other way financially liable for the fire and emergency protection provided by the township.

As your request indicates, R.C. 505.39 authorizes a township to levy a tax to pay for fire services. R.C. 505.39 states:

> The board of township trustees may, in any year, levy a sufficient tax upon all taxable property in the township or in a fire district, to provide protection against fire, to provide and maintain fire apparatus and appliances, buildings and sites for apparatus and appliances, sources of water supply, materials for such water supply, lines of fire-alarm telegraph, and to pay permanent, part-time, or volunteer fire-fighting companies to operate such equipment.

It has been found that the tax levied under this provision may also be used for ambulance or rescue services. *See* R.C. 505.37; 1969 Op. Att'y Gen. No. 69-123 (overruled on other grounds by 1978 Op. Att'y Gen. No. 78-014, which was subsequently overruled by 1979 Op. Att'y Gen. No. 79-072); 1962 Op. Att'y Gen. No. 332, p. 793; 1953 Op. Att'y Gen. No. 2416, p. 114. Because you have indicated that the fire and rescue services in question are paid for by a levy under R.C. 505.39, I am assuming that your question relates to such ambulance or rescue services as may be provided with such funds. *See generally* R.C. 9.60 (authorizing a township to contract for fire protection, including ambulance, emergency medical, and rescue services); R.C. 505.44 (authorizing a township to contract for ambulance or emergency medical services); R.C. 5705.19(I) (authorizing a township to submit to the voters a tax levy for fire services or ambulance or emergency medical services operated by a fire department or fire fighting company); R.C. 5705.19(J) (authorizing a township to submit to the voters a tax levy for police services or ambulance or emergency medical services operated by a police department); R.C. 5705.19(U) (authorizing a township to submit to the voters a tax levy for providing ambulance or emergency medical services); 1983 Op. Att'y Gen. No. 83-069; 1982 Op. Att'y Gen. No. 82-037; Op. No. 79-072; 1969 Op. Att'y Gen. No. 69-038.

It is clear, as indicated in your request, that any property tax used to provide fire or rescue services may be levied only upon taxable property. *See* R.C. 505.39; *see also* R.C. 319.28; R.C. 5705.49; R.C. 5709.01; R.C. 5713.08. You have set forth the position of the Department that the institution in question is exempt from taxation pursuant to R.C. 5709.08, which states:

> Real or personal ***property belonging to the state*** or United States ***used exclusively for a public purpose***, and public property used exclusively for a public purpose, ***shall be exempt from***

> *taxation*....This exemption from taxation shall not apply to such real and personal property until the current and delinquent taxes thereon have been paid, or are such delinquent taxes, interest, and penalties as are remittable by the tax commissioner under section 5713.08 of the Revised Code. (Emphasis added.)

If the institution in question belongs to the state and is used exclusively for a public purpose, it is, pursuant to R.C. 5709.08, exempt from taxation. You have indicated that, as an institution of the Department of Youth Services, the property in question is owned by the state. Its use as an institution is in accordance with the statutory authority granted to the Department by the General Assembly, and thus appears to serve a public purpose. *See, e.g.*, R.C. 5139.01; R.C. 5139.03; R.C. 5139.031; R.C. 5139.06; R.C. 5139.13; R.C. 5139.19; R.C. 5139.25-.26.

Determinations as to whether particular property is entitled to tax exemption under R.C. 5709.08 are made by the Tax Commissioner pursuant to R.C. 5715.27, *see also* R.C. 5713.08, and are subject to appeal under R.C. Chapter 5717, *see, e.g.*, R.C. 5717.02; R.C. 5717.04. There is no statutory authority for the Attorney General, by means of the opinion-rendering process, to make a determination as to whether particular property is entitled to tax exemption. For purposes of this opinion I assume, therefore, that you are correct in the statement that the institution in question is owned by the state and is used exclusively for a public purpose. It follows from these assumptions that the property is tax exempt and, in particular, that it is not subject to a tax levied by a township under R.C. 505.39.

I turn now to the issue of whether a state institution that is exempt from taxation has any obligation to pay for fire and rescue services provided by the township in which it is located. A township is not required to provide fire or rescue services, *see* 1987 Op. Att'y Gen. No. 87-040; 1979 Op. Att'y Gen. No. 79-042, but may, if it chooses, provide fire and rescue services throughout the township, *see* R.C. 505.37(A), or, by the creation of a fire district consisting of "any portions of the township that it considers necessary," provide fire and rescue services to the portions of the township that are within the district, *see* R.C. 505.37(C). If a fire district is created, expenses of the district are borne by the district and services are provided to the territory within the district. *See* R.C. 505.37(C); R.C. 505.39; R.C. 505.40; R.C. 5705.01; R.C. 5705.19; R.C. 5705.191; Op. No. 87-040; 1976 Op. Att'y Gen. No. 76-057;[1] 1944 Op. Att'y Gen. No. 6682, p. 53; 1943 Op. Att'y Gen. No. 5798, p. 44. Services of such a district may be extended beyond the district pursuant to contract. *See* R.C. 9.60. Fire and rescue services may be provided either directly by the township or the fire district or by contract with a firefighting agency or fire company. *See* R.C. 9.60; R.C. 505.37.

It has been concluded, as a general rule, that if a township provides fire and rescue services without the creation of a taxing district with a limited territorial area, the township must provide such services to all territory within the township. *See* Op. No. 87-040 (syllabus) ("[a] township that chooses to provide fire protection without the creation of one or more fire districts cannot exclude portions of the township from the area to which fire protection is provided"); 1966 Op. Att'y Gen. No. 66-114 at 2-206 ("[w]hen fire protection is available in a township or a fire district pursuant to [R.C. 505.37]...it must be furnished to all on an equal basis. This should be true notwithstanding that the one benefiting from the fire protection may not be a taxpayer in the township or fire district..."); *see also* 1944 Op. No. 6682.

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1 In 1987 Op. Att'y Gen. No. 87-040, at 2-267 n. 2, I stated:

> I am aware that, in 1976 Op. Att'y Gen. No. 76-057, my predecesor stated that, without the establishment of a fire district, a board of township trustees could exclude from fire protection a metropolitan park district located within the township. I disagree with that statement.

I confirm that statement, and I hereby overrule Op. No. 76-057 on that point.

See generally 1985 Op. Att'y Gen. No. 85-059. More particularly, it has been concluded that state facilities "come within the general rule that they are entitled to such fire protection services as are provided generally within the area in which they are located." Op. No. 87-040 at 2-269 to 2-270. It follows that an institution of the Department of Youth Services that is located within a township that provides fire and rescue services throughout its territory is entitled to such services. There remains the question whether the institution may be required to pay for such services.

R.C. 9.60 authorizes a township to provide a state agency with fire and rescue services, either pursuant to contract or in the absence of a contract, as follows:

> (A) As used in this section:
> (1) *"Firefighting agency" means a* municipal corporation, *township*, township fire district, joint ambulance district, or joint fire district.
> ....
> (4) *"Fire protection" includes the provision of ambulance, emergency medical, and rescue service* by the fire department of a firefighting agency or by a private fire company and the extension of the use of firefighting apparatus or firefighting equipment.
> (B) *Any firefighting agency* or private fire company *may contract with any state agency or instrumentality*, county, or political subdivision of this state or with a governmental entity of an adjoining state *to provide fire protection*, whether on a regular basis or only in times of emergency, upon the approval of the governing boards of the counties, firefighting agencies, political subdivisions, or private fire companies or the administrative heads of the state agencies or instrumentalities that are parties to the contract.
> (C) *Any* county, political subdivision, or *state agency or instrumentality may contract with a firefighting agency* of this state, a private fire company, or a governmental entity of an adjoining state *to obtain fire protection*, whether on a regular basis or only in times of emergency, upon the authorization of the governing boards of the counties, firefighting agencies, political subdivisions, or private fire companies or administrative heads of the state agencies or instrumentalities that are parties to the contract.
> (D) *Any firefighting agency* of this state or any private fire company *may provide fire protection to any state agency or instrumentality*, county, or political subdivision of this state, or to a governmental entity of an adjoining state, *without a contract to provide fire protection*, upon the approval of the governing board of the firefighting agency or private fire company and upon authorization of an officer or employee of the firefighting agency providing the fire protection designated by title of their office or position pursuant to the authorization of the governing board of the firefighting agency. (Emphasis added.)

It is, thus, clear that a state agency or instrumentality may enter into a contract under which a township will provide the state entity with fire and rescue services. It does not, however, appear that there has been a contract in the situation with which you are concerned, or, indeed, there is any need for such a contract, since the state entity is located within a township that provides fire and rescue services and the entity is, by virtue of its location, entitled to receive such services. Rather, as was stated in Op. No. 87-040, at 2-270, "[a] contract for the provision of fire protection would appear to be...appropriate if all or a portion of a [state facility] were excluded from local fire protection (as, for example, through the creation of one or more fire districts that did not include the territory containing the [facility]) or if the fire protection provided locally did not adequately serve the operations of the [state facility]."

I assume, accordingly, that you are concerned with a situation in which there is no contract and the township simply provides fire and rescue services throughout its territory. No statute authorizes a township to charge recipients for fire services

rendered in such circumstances. *Cf.* Op. No. 87-040 at 2-265 n. 1 (declining to consider the propriety of billing the owners of property for fire services rendered for the protection of that property). The township trustees are, therefore, without authority to charge for such services. *See* 1977 Op. Att'y Gen. No. 77-053 (overruled by 1981 Op. Att'y Gen. No. 81-023 on the basis of the enactment of R.C. 505.84) (finding that, since no statute expressly authorized a township to assess a service charge against persons using the ambulance service provided by the township, the township could not assess such a charge); *cf.* 1986 Op. Att'y Gen. No. 86-058 at 2-321 (citing 1962 Op. Att'y Gen. No. 3066, p. 437, in support of the conclusion that a board of township trustees is not permitted to charge a fee for providing water to meet the emergency needs of its citizens); 1962 Op. No. 3066 at 441 (concluding that a board of township trustees might, in an emergency situation, furnish water of the township fire department to private citizens to protect their property and lives but stating: "I find no authority for the board to charge for its services in meeting any such emergencies, and must conclude that it may not so charge"). *See generally* 1971 Op. Att'y Gen. No. 71-045.

In contrast, R.C. 505.84 authorizes the township to charge for ambulance or emergency medical services, as follows:

> ***A board of township trustees may establish reasonable charges for the use of ambulance or emergency medical services.*** Charges collected under this section shall be kept in a separate fund designated as "the ambulance and emergency medical services fund," and shall be appropriated and administered by the board. Such funds shall be used for the payment of the costs of the management, maintenance, and operation of ambulance and emergency medical services in the township. If the ambulance and emergency medical services are discontinued in the township, any balance remaining in the fund shall be paid into the general fund of the township. (Emphasis added.)

See generally 1984 Op. Att'y Gen. No. 84-048. R.C. 505.84 does not, however, expressly authorize the township to charge a state institution for ambulance or emergency medical services.

It is a general rule that a charge may not be made against a state agency except pursuant to clear statutory authority. *See, e.g.*, 1986 Op. Att'y Gen. No. 86-026 (syllabus, paragraph two) ("[a]bsent express statutory authorization, local governmental entities may not assess the Adjutant General fees for permits required by the terms of local zoning, building, and fire codes"); 1985 Op. Att'y Gen. No. 85-098 at 2-416 ("in the absence of statutory authorization, a municipality may not require a governmental entity to pay a fee as a condition precedent to the governmental entity's compliance with a state statute"); 1985 Op. Att'y Gen. No. 85-082 at 2-329 ("in the absence of express statutory authorization, a political subdivision has no power to levy or collect a special assessment upon property of the State of Ohio"); 1955 Op. Att'y Gen. No. 5110, p. 182 (syllabus) ("[a] board of county commissioners is without authority to...exact an inspection fee under county regulations for the inspection of buildings constructed by the Ohio Turnpike Commission and owned by the State of Ohio"). *See generally City of East Cleveland v. Board of County Commissioners*, 69 Ohio St. 2d 23, 430 N.E.2d 456 (1982); *Niehaus v. State ex rel. Board of Education*, 111 Ohio St. 47, 144 N.E. 433 (1924).

R.C. 505.84 is phrased in terms of reasonable charges "for the use of" ambulance or emergency medical services, and does not specify which persons may be so charged. It is, however, evident that, when the General Assembly has intended that public entities be subject to charges for services, it has expressly so stated. For example, R.C. 343.08(A) authorizes a board of county commissioners to charge certain political subdivisions for the availability of garbage and refuse disposal services. It provides, in pertinent part, as follows:

> The board of county commissioners of a county garbage and refuse disposal district and the board of directors of a joint garbage and refuse disposal district ***may fix reasonable rates or charges to be paid by every person, board of township trustees, or board of education*** that owns premises to which the collection or disposal of

> garbage and refuse, refuse recycling, or resource recovery service is made available, and may change such rates or charges whenever it considers it advisable. (Emphasis added.)

It is clear that governmental entities that are not named in this portion of R.C. 343.08 are not subject to rates or charges imposed thereunder. *See, e.g., State ex rel. Williams v. Glander*, 148 Ohio St. 188, 74 N.E.2d 82, *cert. denied*, 332 U.S. 817 (1947) (syllabus, paragraph five) ("[u]nless the state is expressly named or referred to therein, it is not bound by the terms of a general statute"); *see also* R.C. 135.16 ("[n]o service charge shall be made against any active deposit or collected from or paid by any treasurer unless such service charge is the same as is customarily imposed by institutions receiving money on deposit subject to check, in the municipal corporation in which the public depository of such deposit is located, in which event the treasurer may pay such charge"); *Cuyahoga Metropolitan Housing Authority v. City of Cleveland*, 342 F. Supp. 250, 257 (N.D. Ohio 1972), *aff'd*, 474 F.2d 1102 (6th Cir. 1973) ("[i]t is a fundamental principle of law that a municipal legislative authority cannot subject the state, or any of its agencies, to the municipality's laws in the absence of express statutory authority granted by the state legislature"); *Village of Willoughby Hills v. Board of Park Commissioners*, 3 Ohio St. 2d 49, 51, 209 N.E.2d 162, 163 (1965) ("[w]e do not find any statutory provision that authorizes a municipality to impose a collection and remittance of an excise tax upon a governmental agency. The authority of the municipality to levy an admission tax is derived from the state Constitution (Section 3, Article XVIII) but it cannot interfere with a [political] subdivision of the state. To permit this would be tantamount to permitting a municipality to levy an excise tax against the state"); 1986 Op. Att'y Gen. No. 86-072 (syllabus) ("[t]he State of Ohio is not subject to the provisions of R.C. Chapter 971, so that the State is not required to share in the expense of constructing and maintaining a partition fence"); Op. No. 85-082 at 2-329 (citing authority in support of the proposition that, "in the absence of express statutory authorization, a political subdivision has no power to levy or collect a special assessment upon property of the State of Ohio" and concluding that "a municipality has no power, in the absence of express statutory authority, to levy an assessment against state property for the planting and maintenance of shade trees"); 1982 Op. Att'y Gen. No. 82-011 (syllabus, paragraph one) ("[i]f a service is performed for a public office by an office of county government, whether on a mandatory or discretionary basis, a board of county commissioners may not charge the office receiving such service unless there is express statutory authorization for such charge or authority implied from an express power"); 1962 Op. Att'y Gen. No. 3388, p. 870; *cf.* R.C. 505.29 ("the board of any township which has provided or contracted for the collection or disposal of garbage or refuse on behalf of the township or any district may, by resolution, establish equitable charges of rents to be paid such township, for the use and benefit of such service, by every person, firm, or corporation whose premises are so served"). In the absence of clear indication that the General Assembly intended that state institutions be subject to such charges, I must decline to find that they are so subject.

I am aware that, in *Brownfield v. State*, 63 Ohio St. 2d 282, 407 N.E.2d 1365 (1980), *overruled, in part, on other grounds in Racing Guild of Ohio v. Ohio State Racing Commission*, 28 Ohio St. 3d 317, 503 N.E.2d 1025 (1986), the Ohio Supreme Court rejected the argument that a state-owned facility was absolutely immune from local zoning laws, stating: "We believe that the correct approach in these cases where conflicting interests of governmental entities appear would be in each instance to weigh the general public purposes to be served by the exercise of each power, and to resolve the impasse in favor of that power which will serve the needs of the greater number of our citizens." 63 Ohio St. 2d at 285, 407 N.E.2d at 1367. The *Brownfield* case thus supports the conclusion that a governmental entity is not absolutely immune from local regulations, but that a balancing test should be applied to determine to what extent the entity must comply with local provisions. Further, in *City of East Cleveland v. Board of County Commissioners*, the court found that a county is not absolutely immune from municipal building and fire codes, but that a balancing test must be applied, and stated generally that "the trial court erred in holding that the county was absolutely immune from local regulations." 69 Ohio St. 2d at 29, 430 N.E.2d at 461. The *East Cleveland* case also considered whether a municipality had the authority to charge a county a fee for the review of plans and specifications for a county project by the municipal building department and concluded that it did not, based on the fact that there was

no statute expressly granting a municipality the right to charge such a fee of any entity, whether public or private.[2] In Op. No. 86-026, I considered whether local governmental entities may assess the Adjutant General fees for permits required by the terms of local zoning, building, and fire codes and determined that they may not, absent express statutory authorization. In Op. No. 85-098, I similarly concluded that, absent express statutory authorization, a village may not require a board of education of a local school district to pay a fee in order to erect signs that the board is required by statute to post. In accordance with Op. No. 86-026 and Op. No. 85-098, I conclude that general authority granted by R.C. 505.84 to establish charges for the use of ambulance or emergency medical services does not constitute the express statutory authority required for a township to impose a fee against a state institution, and that the requirement of such express statutory authority is not inconsistent with the *Brownfield* and *East Cleveland* cases.

R.C. 9.30 authorizes the appropriate public officer of the state or another public body or institution to acquire the service, product or commodity of a public utility at the schedule of rates and charges on file with the PUCO, or the applicable charge established by a utility operating its property not for profit, at any location where the service, product, or commodity is not available from alternate public utilities, without the necessity of advertising to obtain bids. *See also* R.C. 307.04. It has been found that a county is authorized to pay penalty charges on overdue payments for utility services purchased from a municipality, where the municipal ordinances establishing rates for the services provide for such penalty charges. 1981 Op. Att'y Gen. No. 81-084. Op. No. 81-084 states, at 2-331:

> [S]o long as the penalty charges in question are set out in the ordinances, the board of county commissioners, by accepting services from the municipal utility, has implicitly agreed to pay for the services at the established rates and, thus, to pay late charges on overdue payments. *See Pfau [v. City of Cincinnati*, 142 Ohio St. 101, 105, 50 N.E.2d 172, 174 (1943)] (by maintaining utility service, plaintiff held to have implicitly accepted the terms set out in ordinance).

See also 1983 Op. Att'y Gen. No. 83-079. It might, similarly, be argued that, by making use of a township's rescue services, a state institution is subjecting itself to the charges lawfully established for such services. In the situation with which you are concerned, however, ambulance service is provided by the township as a public service, and does not constitute a public utility. The institution in question is not required to contract to obtain the service but is, by virtue of its location within the township, entitled to such ambulance service as is generally provided within the township. While R.C. 505.84 indicates that the township may charge for the use of the service, it does not clearly indicate that the charge may be imposed against the state, and, as discussed above, the authority to make such a charge may not be implied.

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

1. An institution of the Department of Youth Services that belongs to the state and is used exclusively for a public purpose is, pursuant to R.C. 5709.08, exempt from taxation and, in particular, is not subject to a tax levied by a township under R.C. 505.39.

2. An institution of the Department of Youth Services that is located within a township that provides fire and rescue services throughout its territory is entitled to receive such services.

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2 R.C. 3781.102(C), enacted subsequent to the *East Cleveland* case, *see* 1983-1984 Ohio Laws, Part II, 3403 (Am. Sub. H.B. 300, eff. Sept. 25, 1984), now authorizes the political subdivision associated with each certified municipal, township, or county building department to prescribe fees for the acceptance and approval of plans and specifications and for the making of inspections. *See generally* 1986 Op. Att'y Gen. No. 86-079 at 2-449 n. 2.

3. Absent express statutory authority to do so, a board of township trustees may not impose upon an institution operated by the Ohio Department of Youth Services a charge for providing fire or ambulance services to that institution.

4. Charges for ambulance and emergency medical services established by a board of township trustees under the authority of R.C. 505.84 may not be collected from an institution operated by the Ohio Department of Youth Services.

5. Under R.C. 9.60, an institution operated by the Ohio Department of Youth Services may enter into a contract with a board of township trustees, which is not obligated to provide fire and rescue services within the part of the township in which the institution is located, pursuant to which the township will provide the institution with fire protection, including ambulance, emergency medical, and rescue services.