

April 6, 2016

The Honorable Dave Yost
Auditor of State
88 East Broad Street
Columbus, Ohio 43215

SYLLABUS:

2016-013

1. The determination of whether a public college or university foundation is subject to audit by the Auditor of State pursuant to R.C. 117.10(A) depends upon facts related to the nature, purpose, and operation of the foundation.
2. A public college or university foundation established as a private nonprofit corporation in accordance with R.C. Chapter 1702, the primary purpose of which is to solicit and receive, on behalf of a state college or university, gifts, donations, and bequests made for the benefit or use of the state college or university, and which is responsible for keeping records of donations for the state college or university constitutes a “public office” pursuant to R.C. 117.01(D).
3. Once determined to be a public office, the public college or university foundation is subject to audit by the Auditor of State pursuant to R.C. 117.10(A), and moneys received, collected by, or due an officer or employee of the public college or university foundation in the course of the performance of that employee’s or officer’s duties, are public money as defined in R.C. 117.01(C).



MIKE DEWINE

★ OHIO ATTORNEY GENERAL ★

Opinions Section
Office 614-752-6417
Fax 614-466-0013

30 East Broad Street, 15th Floor
Columbus, Ohio 43215
www.OhioAttorneyGeneral.gov

April 6, 2016

OPINION NO. 2016-013

The Honorable Dave Yost
Auditor of State
88 East Broad Street
Columbus, Ohio 43215

Dear Auditor Yost:

You have requested an opinion whether a private nonprofit corporation, “the primary purpose of which is to act as a major gift-receiving and soliciting arm of the public college or university, the assets of which inure to the benefit of and are primarily expended for the public college or university, and which is responsible for keeping records of donations for the public college or university,” is subject to audit by the Auditor of State pursuant to R.C. 117.10(A).¹ You further inquire whether such a private nonprofit corporation constitutes a “public office” as defined in R.C. 117.01(D) and whether moneys donated to the nonprofit corporation for the benefit of a public college or university and held or received by the private nonprofit corporation are “public moneys” as defined in R.C. 117.01(C).

Your letter explains that all, or nearly all, the state colleges and universities in Ohio are supported by foundations established as private nonprofit corporations under R.C. Chapter 1702.² A “foundation” is a “[a] fund established for charitable, educational, religious, research, or other benevolent purposes; an endowment[.]” *Black’s Law Dictionary*, 771 (10th ed. 2014). “Private, non-profit foundations created by public colleges and universities have grown to become multi-million-dollar entities supported by private donations and distributed for a multitude of university purposes.”

¹ We understand your use of the phrase “public college or university” to mean a “state college or university.” For the purpose of this opinion, we use the phrase “state college or university” to mean the state universities defined in R.C. 3345.011 and the Northeast Ohio Medical University. *See* R.C. 3345.12(A)(1) (defining “state university or college”). Each of the following is a “state university” pursuant to R.C. 3345.011: University of Akron, Bowling Green State University, Central State University, University of Cincinnati, Cleveland State University, Kent State University, Miami University, Ohio University, Ohio State University, Shawnee State University, University of Toledo, Wright State University, and Youngstown State University.

² It is our understanding that a separate foundation exists for the Northeast Ohio Medical University and each of the state universities identified in R.C. 3345.011.

Scott Reinardy, Charles N. Davis, *A Real Home Field Advantage: Access to Public University Foundation Records*, 34 J.L. & Educ. 389, 390 (2005). Moneys collected by the foundations may be distributed to “provide financial assistance to campus construction projects and student scholarship funds,” and the foundations “coordinate fund-raising activities and provide other appropriate and beneficial tasks in support of the institution.” *Id.*

The Auditor of State is mandated to audit “all public offices[.]” R.C. 117.10(A). The Auditor of State has discretion to audit “the specific funds or accounts of private institutions, associations, boards, and corporations into which has been placed or deposited public money from a public office[.]” *Id.* The other funds and accounts of a private institution, association, board, or corporation that are not comprised of any public money may be audited

only if one or more of the following applies:

- (1) The audit is specifically required or authorized by the Revised Code;
- (2) The private institution, association, board, or corporation requests that the auditor of state audit some or all of its other funds or accounts;
- (3) All of the revenue of the private institution, association, board, or corporation is composed of public money;
- (4) The private institution, association, board, or corporation failed to separately and independently account for the public money in its possession, in violation of [R.C. 117.431];
- (5) The auditor of state has a reasonable belief that the private institution, association, board, or corporation illegally expended, converted, misappropriated, or otherwise cannot account for the public money it received from a public office and that it is necessary to audit its other funds or accounts to make that determination.

R.C. 117.10(A). Accordingly, the Auditor of State may conduct an audit of a public college or university foundation that constitutes a “public office.” Alternatively, the Auditor of State may audit the funds and accounts of the foundation as a private corporation if public moneys from a public office have been deposited into those funds or accounts. The Auditor of State may further audit other funds and accounts of a foundation if one or more of the criteria identified in R.C. 117.10(A)(1) through (5) have been met.

We first consider whether a public college or university foundation constitutes a “public office” for the purpose of R.C. 117.10(A). R.C. 117.01(D) defines a “public office” as, except as otherwise provided, “any state agency, public institution, political subdivision, [or] other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government.” It is evident from R.C. 117.01(D) that the determination of whether a public college or university foundation constitutes a “public office” depends upon facts related to the nature, purpose, and operation of the foundation. The relationship of a public college or university foundation that is associated with one state college or university may vary from the relationship of one associated with a different state college or university. Additionally, while one foundation that is associated with a state college or university may constitute a “public office” for the purpose of R.C. 117.10(A), other foundations or nonprofit entities associated with the same state college or university may not.

Therefore, the Attorney General cannot state definitively in an opinion that all public college or university foundations are “public offices” under R.C. 117.01(D). Consequently, for the purpose of this opinion, we rely upon your letter’s description of a public college or university foundation as a private nonprofit corporation, the primary purpose of which is to solicit and receive, on behalf of a state college or university, gifts, donations, and bequests made for the benefit or use of the state college or university, and which is responsible for keeping records of donations for the state college or university.³

We begin with a consideration of whether a public college or university foundation is an organized body or entity established by the laws of this state for the exercise of a governmental function. R.C. 117.01(D). You have explained that a public college or university foundation with which you are concerned is established and organized as a nonprofit corporation in accordance with R.C. Chapter 1702, which authorizes the establishment of nonprofit corporations in Ohio. Nonprofit corporations established under R.C. Chapter 1702 are organized bodies or entities as those terms are commonly used. *Merriam-Webster’s Collegiate Dictionary*, 138 (11th ed. 2005) (defining “body” as “a group of individuals organized for some purpose”); *id.* at 417 (defining “entity” as “an organization (as a business or governmental unit) that has an identity separate from those of its members”); *see also* 1992 Op. Att’y Gen. No. 92-034, at 2-130.

We next consider whether a public college or university foundation is established by the laws of this state. No statute expressly establishes a public college or university foundation. In other contexts, Attorney General opinions have concluded that “established by the laws of this state” requires “direct legislative action of the General Assembly[.]” 2006 Op. Att’y Gen. No. 2006-037, at 2-344 n.7 (“[i]n other statutory contexts [Attorneys General] have advised that the phrase ‘established by the laws of this state’ requires an entity be brought into existence by direct legislative action of the General Assembly”); 1992 Op. Att’y Gen. No. 92-034, at 2-130 n.2 (“the use of the phrase ‘established by the laws of the state’ in R.C. 1.60 requires the body, office, or agency in question be brought into existence by direct legislative action of the General Assembly, and not simply ‘in accordance with’ or ‘pursuant to’ other provisions of the Revised Code”). However, in the context of R.C. 149.011(A) (definition of “public office” for the purpose of R.C. Chapter 149) and R.C. 149.43 (disclosure of public records), the phrase “established by the laws of this state” in the definition of “public office” has been construed “to include private entities that have been established ‘in accordance with’ or ‘pursuant to’ a provision of the Revised Code.” 2006 Op. Att’y Gen. No. 2006-037, at 2-344 (footnote omitted). The rationale for this reading of “established by the laws of this state” has been explained as follows:

³ When the phrase “public college or university foundation” is used in this opinion, we refer to the type of foundation that possesses the characteristics identified in the opinion. The phrase is not intended to refer to every foundation or nonprofit corporation associated with a state college or university regardless of its nature, purpose, or operation.

insofar as “doubts as to the ‘public’ status of any entity should be resolved in favor of finding it subject to the disclosure statute[.]” *State ex rel. Toledo Blade Co. v. Univ. of Toledo Found.*, 65 Ohio St. 3d 258, 261, 602 N.E.2d 1159 (1992), the phrase “established by the laws of this state” should be interpreted liberally when determining whether an entity is a “public office” for purposes of R.C. 149.43.

2006 Op. Att’y Gen. No. 2006-037, at 2-344 n.7.

The same canon of interpretation applies to the provisions of R.C. Chapter 117. “Statutes authorizing the State Auditor to audit the use of public funds should be liberally construed and applied” to accomplish the purposes behind the audit provisions of R.C. Chapter 117. *Oriana House, Inc. v. Montgomery*, 108 Ohio St. 3d 419, 2006-Ohio-1325, 844 N.E.2d 323, at ¶13; accord 2008 Op. Att’y Gen. No. 2008-003, at 2-41; see also *State ex rel. Smith v. Maharry*, 97 Ohio St. 272, 119 N.E. 822 (1918) (syllabus, paragraph 3) (predecessors of R.C. 117.01, R.C. 117.09, and R.C. 117.10 are “remedial statutes, and therefore should be liberally construed and applied to effect their clear and controlling purpose”). In light of this policy encouraging a liberal construction of the provisions of R.C. Chapter 117, we conclude that it is reasonable to interpret the phrase “established by the laws of this state” in R.C. 117.01(D) to mean established in accordance with or pursuant to a statutory provision. Therefore, insofar as the public college or university foundations with which you are concerned are established in accordance with the provisions of R.C. Chapter 1702, it is reasonable to conclude that the foundations are established by the laws of this state for the purpose of R.C. 117.01(D).

The final consideration is whether the public college or university foundations described in your letter are established for the exercise of a function of government. A public college or university foundation, the primary purpose of which is to solicit and receive, on behalf of a state college or university, gifts, donations, and bequests made for the benefit or use of the state college or university, and which is responsible for keeping records of donations for the state college or university is an entity established for the exercise of a function of government. In *State ex rel. Toledo Blade Co. v. Univ. of Toledo Found.*, 65 Ohio St. 3d 258, 263, 602 N.E.2d 1159 (1992), the Ohio Supreme Court held that “the solicitation and receipt of donations for the [University of Toledo], and keeping records of that activity, are government functions.” The performance of those government functions was part of the court’s basis for holding that the University of Toledo Foundation is a public office under R.C. 149.011(A). *State ex rel. Toledo Blade Co. v. Univ. of Toledo Found.*, 65 Ohio St. 3d at 262-63; see also *Hall v. Med. Coll. of Ohio at Toledo*, 742 F.2d 299, 305 (6th Cir. 1984) (“[p]roviding facilities and opportunities for the pursuit of higher education is a long-recognized governmental function”).

We recognize that “[a] judicial determination that a particular entity is a public office under R.C. 149.011(A) ... is not determinative of the question whether that entity is a public office under R.C. 117.01(D)[.]” 1989 Op. Att’y Gen. No. 89-055 (syllabus, paragraph 1). However, in light of the

similarity in the definitions of “public office” in R.C. 117.01(D) and R.C. 149.011(A),⁴ we discern no logical basis for concluding that “the solicitation and receipt of donations for [a state college or university], and keeping records of that activity” are not also the performance of government functions for the purpose of R.C. Chapter 117. *See* 1989 Op. Att’y Gen. No. 89-055, at 2-236 (“[i]n adopting and implementing [a] definition [of “public office”], [the Auditor of State] may consider the interpretation that has been given by courts to similar definitions appearing elsewhere in the Revised Code”).

Therefore, we conclude that a public college or university foundation established as a private nonprofit corporation under R.C. Chapter 1702, the primary purpose of which is to solicit and receive, on behalf of a state college or university, gifts, donations, and bequests made for the benefit or use of the state college or university, and which is responsible for keeping records of donations for the state college or university, is an entity established by the laws of this state for the exercise of a function of government, and is, therefore, a public office under R.C. 117.01(D) that is subject to audit by the Auditor of State pursuant to R.C. 117.10(A).⁵ Having determined that a public college or university foundation that possesses the foregoing attributes is a “public office” under R.C. 117.01(D) as an organized body or entity that is established by the laws of this state for the exercise of a function of government, it is unnecessary to determine whether such a foundation is a “state agency” or a “public institution” as understood by R.C. 117.01(D), or whether, pursuant to R.C. 117.10(A), the Auditor of State may audit the funds or accounts of the foundation as a private corporation that has received public money.

In reaching our conclusion, we emphasize the Auditor of State is authorized to exercise a reasonable discretion to determine whether an entity is a public office pursuant to R.C. 117.01(D). The role of the Auditor of State with respect to his duties under R.C. Chapter 117 has been explained as follows:

The responsibility of implementing the provisions of R.C. Chapter 117 has been placed by the General Assembly upon the Auditor of State. It is your duty, as Auditor of State, to interpret and apply the provisions of R.C. Chapter 117. In order to carry out such duty, you have discretion to adopt and implement an interpretation of “public office” that is consistent with R.C. 117.01(D) and with general provisions of statutory construction. In adopting and implementing that definition, you may

⁴ R.C. 149.011(A) defines “public office,” for the purpose of R.C. Chapter 149 (documents, reports, records), and except as otherwise provided, as “includ[ing] any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government.”

⁵ This opinion does not determine whether a public college or university foundation that solicits and receives, on behalf of a state college or university, gifts, donations, and bequests made for the benefit or use of the state college or university as one of its purposes, but not as its primary purpose, constitutes a “public office” pursuant to R.C. 117.01(D).

consider the interpretation that has been given by courts to similar definitions appearing elsewhere in the Revised Code.... You may ... also consider such factors as the language of R.C. Chapter 117 and the history of its provisions, prior administrative interpretation, and the purposes that R.C. Chapter 117 seeks to attain. It may, further, be necessary for you to make findings of fact regarding a particular situation in order to apply the definition of public office to that situation.

1989 Op. Att’y Gen. No. 89-055, at 2-236 (citations omitted).

Thus, the Auditor of State shall determine which aspects of R.C. 117.01(D) apply to a particular entity and which aspects of R.C. 117.10(A) permit an audit of the entity or the funds and accounts of the entity. Those determinations depend upon factual circumstances such as the nature of the entity, the purpose of the entity, the manner in which the entity interacts with a state college or university, and the circumstances in which the entity receives or holds moneys for the benefit or use of a state college or university. Insofar as those factual circumstances may differ among foundations, the Auditor of State should make a determination of whether a public college or university foundation is a public office or subject to audit on a case-by-case basis. In exercising his discretion in this regard, the Auditor of State shall act reasonably and consistently with the provisions of R.C. Chapter 117.

We now address your remaining question, whether moneys received and held by a state college or university foundation that are to be used for the benefit or use of a state college or university constitute “public money” pursuant to R.C. 117.01(C). R.C. 117.01(C) defines “public money” as “any money received, collected by, or due a public official under color of office,⁶ as well as any money collected by any individual on behalf of a public office or as a purported representative or agent of the public office.”⁷ (Footnote added.) For the purpose of R.C. Chapter 117, a “public official” is “any officer, employee, or duly authorized representative or agent of a public office.” R.C. 117.01(E).

We have already concluded that a public college or university foundation established as a nonprofit corporation in accordance with R.C. Chapter 1702, the primary purpose of which is to solicit and receive, on behalf of a state college or university, gifts, donations, and bequests made for the benefit or use of the state college or university, and which is responsible for keeping records of donations for the state college or university is a public office under R.C. 117.01(D). Thus, an officer or employee of such a public college or university foundation is a “public official” as defined in R.C. 117.01(E). Accordingly, moneys received, collected by, or due an officer or employee of a public

⁶ For the purpose of R.C. Chapter 117, “[c]olor of office’ means actually, purportedly, or allegedly done under any law, ordinance, resolution, order, or other pretension to official right, power, or authority.” R.C. 117.01(A).

⁷ R.C. 117.01(C) has two exclusions from the definition of “public money,” neither of which is relevant here.

college or university foundation in the course of the performance of that employee's or officer's duties are public money as defined in R.C. 117.01(C).⁸

If, based upon the unique circumstances of a particular public college or university foundation, the Auditor of State concludes that the foundation is not a public office under R.C. 117.01(D), the Auditor of State may determine that moneys donated for the benefit or use of a state college or university and received and held by the public college or university foundation constitute public money pursuant to R.C. 117.01(C). A state college or university is defined as a public institution in R.C. 3345.011. We understand the term "public institution" in R.C. 3345.011 to have the same meaning as "public institution" in R.C. 117.01(D). Therefore, a state college or university constitutes a "public office" pursuant to R.C. 117.01(D). Moneys collected by an officer or employee of a public college or university foundation on behalf of a state college or university or as a purported representative or agent of a state college or university are "public money" as defined in R.C. 117.01(C).

Whether moneys collected by a public college or university foundation that are donated from private sources for the benefit of, or to be held in trust for, a state college or university are collected on behalf of the state college or university or as a purported agent of the state college or university is a factual determination that shall be made on a case-by-case basis. The articles of incorporation or the regulations of the foundation, as well as regulations adopted by the particular state college or university, may indicate whether moneys that are collected by or held by a public college or university foundation are collected on behalf of a state college or university or are collected by the foundation as a purported agent of the state college or university. *See generally* R.C. 1702.04(A)(3) (the articles of incorporation of a nonprofit corporation shall specify "the purpose or purposes for which the corporation is formed"). For example, the Youngstown State University regulations declare that, "[i]n order to assist in the mission of the university, the board of trustees authorizes the Youngstown state university foundation ('YSU foundation') to *accept, manage, and invest philanthropic gifts on behalf of the university in accordance with this policy and all applicable laws and agreements between the university and the YSU foundation.*" [2015-2016 Monthly Record] Ohio Admin. Code 3356-5-09(A), at p. 2-505 (rule by reference) (emphasis added).

If a purpose of the public college or university foundation is to solicit or receive donations that are made for the benefit or use of a state college or university, it is reasonable to conclude that the foundation receives those moneys on behalf of the state college or university or that the foundation acts as a representative or agent of the state college or university. *See* 2008 Op. Att'y Gen. No. 2008-003, at 2-42 ("because the purpose of the nonprofit corporation as prescribed by R.C. 183.061 is to raise money to aid the [Ohio Tobacco Use Prevention and Control] Foundation in the conduct of its duties, money collected by the nonprofit corporation must be collected on behalf of the Foundation

⁸ Our conclusions that a foundation described in your letter constitutes a "public office" and that such a foundation's officers and employees constitute "public officials" are limited to the meaning of those terms as they are used in R.C. Chapter 117.

(which is a public office) or by the nonprofit corporation as a representative or agent of the Foundation and will be considered public money under R.C. 117.01(C)”). Moneys collected by a public college or university foundation on behalf of a state college or university or by the foundation as a purported representative or agent of a state college or university constitute public money pursuant to R.C. 117.01(C).

R.C. 117.10(A) authorizes the Auditor of State to “audit the specific funds or accounts of private institutions, associations, boards, and corporations into which has been placed or deposited public money from a public office[.]” In addition, the Auditor of State may

audit some or all of the other funds or accounts of a private institution, association, board, or corporation that has received public money from a public office only if one or more of the following applies:

- (1) The audit is specifically required or authorized by the Revised Code;
- (2) The private institution, association, board, or corporation requests that the auditor of state audit some or all of its other funds or accounts;
- (3) All of the revenue of the private institution, association, board, or corporation is composed of public money;
- (4) The private institution, association, board, or corporation failed to separately and independently account for the public money in its possession, in violation of [R.C. 117.431];
- (5) The auditor of state has a reasonable belief that the private institution, association, board, or corporation illegally expended, converted, misappropriated, or otherwise cannot account for the public money it received from a public office and that it is necessary to audit its other funds or accounts to make that determination.

R.C. 117.10(A). Thus, the scope of an audit conducted by the Auditor of State of a public college or university foundation in its capacity as a private corporation, as opposed to a public office, is limited to the specific funds or accounts of the foundation into which public money *from a public office* has been deposited. To reach the other funds or accounts, one of the criteria in R.C. 117.10(A)(1) through (5) shall be met.⁹

⁹ Prior to the enactment of Am. S.B. 67, 130th Gen. A. (2013) (eff. Sept. 4, 2013), R.C. 117.10(A) stated in pertinent part, that “[t]he auditor of state also may audit the accounts of private institutions, associations, boards, and corporations *receiving public money for their use*[.]” (Emphasis added.) Am. S.B. 67 amended R.C. 117.10(A) to provide, in pertinent part, that “[t]he auditor of state also may audit the *specific funds* or accounts of private institutions, associations, boards, and corporations *into which has been placed or deposited public money from a public office*[.]” (Emphasis added.) Am. S.B. 67 also added the provisions authorizing an audit of other funds and accounts of a private institution, board, or corporation that are not comprised of public money.

It is possible that, for the purpose of R.C. Chapter 117, a public college or university foundation receives public money from a public office. For example, the third paragraph of the September 29, 1970 Amendment to Articles of Incorporation of the Youngstown State University Foundation provides that one of the purposes of the foundation is “[t]o receive, hold and use the assets transferred to the Corporation by the Youngstown [State] University[.]” Assuming that the “assets transferred to” the foundation from the university constitute public money as defined in R.C. 117.01(C), then the funds and accounts into which those moneys are deposited may be audited by the Auditor of State pursuant to R.C. 117.10(A). Those assets are public money under R.C. 117.01(C) insofar as the moneys are received or collected by a public official of the state college or university. *See generally* R.C. 117.01(E) (defining “public official” as “any officer, employee, or duly authorized representative or agent of a public office”). The other funds and accounts of the foundation may be subject to audit pursuant to R.C. 117.10(A)(3), for example, if the Auditor of State determines that all of the revenue of the foundation constitutes public money as defined in R.C. 117.01(C).

Therefore, if the Auditor of State determines that a particular public college or university foundation does not constitute a public office pursuant to R.C. 117.01(D), moneys donated for the benefit or use of a state college or university and received and held by a public college or university foundation constitute public money pursuant to R.C. 117.01(C), provided the moneys are collected by the foundation on behalf of the state college or university or as a purported representative or agent of the state college or university.¹⁰ Pursuant to R.C. 117.10(A), the Auditor of State may audit, in its capacity as a private corporation, the funds or accounts of a public college or university foundation into which has been deposited public money from a public office. The remaining funds or accounts of the foundation are subject to audit if at least one of the five criteria delineated in R.C. 117.10(A)(1)-(5) is met.

Based upon the foregoing, it is my opinion, and you are hereby advised that:

1. The determination of whether a public college or university foundation is subject to audit by the Auditor of State pursuant to R.C. 117.10(A) depends upon facts related to the nature, purpose, and operation of the foundation.
2. A public college or university foundation established as a private nonprofit corporation in accordance with R.C. Chapter 1702, the primary purpose of which is to solicit and receive, on behalf of a state college or university, gifts, donations, and bequests made for the benefit or use of the state college or

¹⁰ The determination of whether moneys have been collected by a public college or university foundation on behalf of a state college or university or as a purported representative or agent of the state college or university is dependent upon the facts and circumstances in which the moneys were solicited and received. Factors relevant to that determination may include the intent of the donor, any restrictions made upon the gift or donation, and any representations made by the officers or employees of the foundation when soliciting or receiving the moneys.

university, and which is responsible for keeping records of donations for the state college or university constitutes a “public office” pursuant to R.C. 117.01(D).

3. Once determined to be a public office, the public college or university foundation is subject to audit by the Auditor of State pursuant to R.C. 117.10(A), and moneys received, collected by, or due an officer or employee of the public college or university foundation in the course of the performance of that employee’s or officer’s duties, are public money as defined in R.C. 117.01(C).

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE
Ohio Attorney General