

As Introduced

132nd General Assembly

Regular Session

2017-2018

H. B. No. 668

Representative Patton

A BILL

To enact sections 168.01, 168.02, 168.03, 168.04, 1
168.05, 168.06, 168.07, 168.08, 168.09, 168.10, 2
168.11, 168.12, 168.13, 168.14, and 168.15 of 3
the Revised Code to authorize state agencies, 4
state institutions of higher education, 5
counties, townships, municipal corporations, 6
school districts, community schools, STEM 7
schools, and college-preparatory boarding 8
schools to enter into public-private initiatives 9
with a private party through a public-private 10
agreement regarding public facilities. 11

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That sections 168.01, 168.02, 168.03, 168.04, 12
168.05, 168.06, 168.07, 168.08, 168.09, 168.10, 168.11, 168.12, 13
168.13, 168.14, and 168.15 of the Revised Code be enacted to 14
read as follows: 15

Sec. 168.01. "Affected jurisdiction" means any unit of 16
government within the state in which all or part of a facility 17
is located or any other public entity directly affected by the 18
facility. 19

"Contracting authority" means the director or chief executive officer in the case of a state agency, the board of trustees in the case of a state institution of higher education, the legislative authority in the case of a political subdivision, the board of education in the case of a school district, the governing authority in the case of a community school, the governing body in the case of a STEM school, and the board of trustees in the case of a college-preparatory boarding school.

"Facility" means any existing or new public building, public improvement, or public infrastructure, or part of such building, improvement, or public infrastructure, that is used or will be used by a public body or the public at large, or is used in support of a public purpose or for the delivery of services to the public.

"Force majeure" means an uncontrollable force or natural disaster not within the power of the operator or the public body.

"Maintenance" includes routine maintenance, major maintenance, and any other categories of maintenance that may be designated by the public body.

"Material default" means any failure of an operator to perform any duties under a public-private agreement that jeopardizes delivery of adequate service to the public and remains unsatisfied after a reasonable period of time and after the operator has received written notice from the public body of the failure.

"Operate" means any action to maintain, repair, improve, equip, or modify a facility.

"Operator" means a private entity that has entered into a public-private agreement under sections 168.01 to 168.15 of the Revised Code. 49
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"Political subdivision" means a county, township, or municipal corporation. 52
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"Private entity" means any natural person, corporation, general partnership, limited liability company, limited partnership, joint venture, business trust, public benefit corporation, nonprofit entity, or other business entity. 54
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"Public body" means a state agency, state institution of higher education, political subdivision, or public school. 58
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"Public-private agreement" means the agreement between a private entity and the public body that relates to the design, build, financing, operation, or maintenance of a facility subject to sections 168.01 to 168.15 of the Revised Code. 60
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"Public-private initiative" means an arrangement between the public body and one or more private entities, the terms of which are stated in a public-private agreement, that provides for both of the following: 64
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(A) Sharing of resources and the means of providing a project or service for a facility; 68
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(B) Cooperation in researching, developing, and implementing projects or services for a facility. 70
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"Public school" means a school district created under Chapter 3311., community school created under Chapter 3314., STEM school created under Chapter 3326., or college-preparatory boarding school created under Chapter 3328. of the Revised Code. 72
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"State agency" has the meaning defined in section 1.60 of 76

the Revised Code but does not include the department of 77
transportation. 78

"State institution of higher education" has the meaning 79
defined in section 3345.011 of the Revised Code. 80

"Utility" means a privately, publicly, or cooperatively 81
owned line, facility, or system for producing, transmitting, or 82
distributing communications, cable television, power, 83
electricity, light, heat, gas, oil, crude products, water, 84
steam, waste, storm water not connected with highway drainage, 85
alternative or renewable energy sources such as wind or solar, 86
or any other similar commodity, including a fire or police 87
signal system or street lighting system that directly or 88
indirectly serves the public. 89

Sec. 168.02. A facility subject to a public-private 90
agreement under sections 168.01 to 168.15 of the Revised Code 91
shall be owned by the public body unless the public body, in its 92
discretion, elects to provide for ownership of the facility by 93
the private party through a lease agreement that is part of the 94
public-private agreement. Notwithstanding any provision of the 95
Revised Code, the lease agreement shall provide for the lease of 96
all or a portion of the facility to, or ownership by, the 97
private party for a term of up to forty years. In consideration 98
therefor, the agreement shall provide for complete reversion of 99
the facility, in good or better condition, to the public body at 100
the expiration of the lease. 101

Sec. 168.03. (A) A public body may solicit, receive, 102
consider, evaluate, and accept a proposal for a public-private 103
initiative. 104

(B) In soliciting and selecting a private entity with 105

<u>which to enter into a public-private initiative, the public body</u>	106
<u>shall use one or both of the following:</u>	107
<u>(1) Sealed bidding;</u>	108
<u>(2) Selection of proposals, with or without negotiations,</u>	109
<u>based on qualifications, best value, or both.</u>	110
<u>(C) (1) The public body shall consider the following</u>	111
<u>factors in evaluating and selecting a bid or proposal to enter</u>	112
<u>into a public-private initiative:</u>	113
<u>(a) The ability of the facility to serve a public purpose;</u>	114
<u>(b) The proposed cost of and financial plan for the</u>	115
<u>facility;</u>	116
<u>(c) The general reputation, qualifications, industry</u>	117
<u>experience, and financial capacity of the private entity;</u>	118
<u>(d) The proposed design, operation, and feasibility of the</u>	119
<u>facility;</u>	120
<u>(e) Comments from local citizens and affected</u>	121
<u>jurisdictions;</u>	122
<u>(f) Benefits to the public and the affected facility;</u>	123
<u>(g) The safety record of the private entity;</u>	124
<u>(h) The inclusion of a teaming agreement in the bid or</u>	125
<u>proposal that identifies the primary designer of record or</u>	126
<u>design firm representing not less than thirty per cent of the</u>	127
<u>estimated design fee, the primary construction contractor</u>	128
<u>representing not less than thirty per cent of the estimated</u>	129
<u>construction dollar value amount, and the primary financier</u>	130
<u>representing not less than fifty per cent of the total project</u>	131
<u>cost;</u>	132

<u>(i) Any other criteria that the public body considers</u>	133
<u>appropriate.</u>	134
<u>(2) The public body may consider the following factors in</u>	135
<u>evaluating and selecting a bid or proposal to enter into a</u>	136
<u>public-private initiative:</u>	137
<u>(a) The bidder's estimates of capital expenditures and</u>	138
<u>operating expenses for the proposed facility;</u>	139
<u>(b) The schedule for completion of the proposed facility;</u>	140
<u>(c) Whether user fees, lease payments, or other charges</u>	141
<u>will be collected for use of the proposed facility over the term</u>	142
<u>of the public-private agreement;</u>	143
<u>(d) The proposed length of time before ownership of the</u>	144
<u>facility reverts to the public body.</u>	145
<u>(D) The public body may select multiple private entities</u>	146
<u>with which to enter a public-private agreement for a facility if</u>	147
<u>it is in the public interest to do so.</u>	148
<u>(E) The public body shall select a private entity or</u>	149
<u>entities for a public-private initiative on a competitive basis.</u>	150
<u>(F) Any materials or data submitted to, made available to,</u>	151
<u>or received by the contracting authority, to the extent that the</u>	152
<u>materials or data consist of trade secrets, as defined in</u>	153
<u>section 1333.61 of the Revised Code, are confidential and are</u>	154
<u>not public records for the purposes of section 149.43 of the</u>	155
<u>Revised Code. Financial information received by the contracting</u>	156
<u>authority that is related to a proposal is confidential and not</u>	157
<u>a public record for purposes of section 149.43 of the Revised</u>	158
<u>Code until such time as a proposal is selected. Before</u>	159
<u>submission of a solicited proposal, a private entity may request</u>	160

a review by the public body of information that the private 161
entity has identified as confidential, to determine whether such 162
information would be subject to disclosure under section 149.43 163
of the Revised Code. 164

(G) (1) The public body may reimburse one or more private 165
entities for a portion of the actual costs each entity incurred 166
in submitting a proposal for a public-private initiative that 167
was solicited by the public body under this section. When 168
considering the reimbursement of such costs, the contracting 169
authority shall describe in the request for proposals for a 170
specific public-private initiative the specific terms and 171
conditions for reimbursing one or more private entities. The 172
contracting authority may include in the terms and conditions a 173
requirement that each private entity execute an agreement to 174
transfer to the public body the rights to the use of the work 175
product contained in the proposal in exchange for receiving the 176
reimbursement. 177

(2) The contracting authority shall make all decisions 178
related to the reimbursement of a specific private entity and 179
related to the maximum amount of the reimbursement. However, the 180
public body shall not reimburse a private entity if that entity 181
enters into the public-private agreement that is the subject of 182
the solicited proposal, except as set forth in the request for 183
proposals or in the public-private agreement. The reimbursement 184
of costs under division (G) of this section is exempt from any 185
competitive bidding required by law. 186

(3) If the public body, pursuant to division (G) (1) of 187
this section, includes a reimbursement provision in a request 188
for proposals and the public body subsequently terminates the 189
solicitation before the solicitation expiration date, the public 190

body shall prorate the amount of the reimbursement that is to be 191
paid to each private entity participating in the solicitation on 192
the date the public body terminates the solicitation. The public 193
body shall calculate the proration percentage by determining the 194
number of days from the date the solicitation first was offered 195
until the date the public body terminated the solicitation and 196
dividing that number by the number of days of the original 197
solicitation period. 198

(4) Except as otherwise provided in writing by the public 199
body, if, pursuant to division (G)(1) of this section, the 200
public body includes a reimbursement provision in a request for 201
proposals and subsequently enters into negotiations based on the 202
selection of a desired proposal and the public body elects to 203
terminate those negotiations for the convenience of the public 204
body and through no fault of the proposer, the proposer is 205
entitled to the full reimbursement amount. 206

Sec. 168.04. (A) The public body may receive, consider, 207
evaluate, and accept an unsolicited proposal for a public- 208
private initiative if the proposal meets all of the following: 209

(1) Is independently originated and developed by the 210
proposer; 211

(2) Benefits the public; 212

(3) Is prepared without public body supervision; 213

(4) Includes sufficient detail and information for the 214
public body to evaluate the proposal in an objective and timely 215
manner, including the conceptual design or plan for the proposed 216
facility, project costs, and a schedule for starting and 217
completing the facility; 218

(5) Is made by a private entity that is not prohibited 219

from making an unsolicited proposal under section 3517.13 of the 220
Revised Code. 221

(B) Within ninety days after receiving an unsolicited 222
proposal, the public body shall undertake a preliminary 223
evaluation of the unsolicited proposal to determine if the 224
proposal complies with the requirements of division (A) of this 225
section. 226

(C) Any materials or data submitted to, made available to, 227
or received by the contracting authority under this section, to 228
the extent that the materials or data consist of trade secrets, 229
as defined in section 1333.61 of the Revised Code, are 230
confidential and are not public records for the purposes of 231
section 149.43 of the Revised Code. Financial information 232
received by the contracting authority that is related to a 233
proposal is confidential and not a public record for purposes of 234
section 149.43 of the Revised Code until the public body accepts 235
or rejects the proposal. Before submission of an unsolicited 236
proposal or a competing proposal, a private entity may request a 237
review by the public body of information that the private entity 238
has identified as confidential to determine whether such 239
information would be subject to disclosure under section 149.43 240
of the Revised Code. 241

(D) If the unsolicited proposal does not comply with 242
division (A) of this section, the public body shall return the 243
proposal without further action. 244

(E) If the unsolicited proposal complies with division (A) 245
of this section, the public body may continue to evaluate the 246
proposal in accordance with this section. 247

(F) (1) If the unsolicited proposal complies with division 248

(A) of this section, the public body shall advertise the 249
unsolicited proposal for the purpose of receiving competitive 250
proposals for the proposed facility. 251

(2) The advertisement shall outline the general nature and 252
scope of the unsolicited proposal, including the location of the 253
facility and the work to be performed on or in connection with 254
the facility and shall specify an address to which a competing 255
proposal may be submitted. 256

(3) The advertisement shall specify a reasonable time 257
period by which competitors must submit a competing proposal to 258
the public body. 259

(G) The public body shall charge a reasonable fee to cover 260
its costs to process, review, and evaluate an unsolicited 261
proposal and any competing proposals. 262

(H) Upon receipt of any competing proposals, the public 263
body shall do all of the following: 264

(1) Determine if any competing proposal is comparable in 265
nature and scope to the original unsolicited proposal; 266

(2) Evaluate the original unsolicited proposal and any 267
comparable competing proposal; 268

(3) Conduct any good faith discussions and, if necessary, 269
any negotiations concerning each qualified proposal. 270

(I) The public body shall evaluate an unsolicited proposal 271
and any comparable competing proposal using the following 272
factors: 273

(1) Novel methods, approaches, or concepts demonstrated by 274
the proposal; 275

<u>(2) Scientific, technical, or socioeconomic merits of the proposal;</u>	276
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<u>(3) Potential contribution of the proposal to the public body's mission;</u>	278
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<u>(4) Capabilities, related experience, facilities, or techniques of the private entity or unique combinations of these qualities that are integral factors for achieving the proposal objectives;</u>	280
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<u>(5) Qualifications, capabilities, and experience of the proposed principal investigator, team leader, or key personnel, who are critical to achieving the proposal objectives;</u>	284
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<u>(6) How the proposal benefits the public;</u>	287
<u>(7) Any other factors appropriate to a particular proposal.</u>	288
	289
<u>(J) After evaluating the unsolicited proposal and any competing proposals, the public body may do any of the following:</u>	290
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<u>(1) Accept the unsolicited proposal and reject any competing proposals;</u>	293
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<u>(2) Reject the unsolicited proposal and accept a comparable competing proposal if the public body determines that the comparable competing proposal is the most advantageous to the jurisdictions served by the public body;</u>	295
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<u>(3) Accept both an unsolicited proposal and a competing proposal if accepting both proposals is advantageous to the jurisdictions served by the public body;</u>	299
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<u>(4) Reject the unsolicited proposal and any competing</u>	302

<u>proposals.</u>	303
<u>Sec. 168.05. (A) After selecting a solicited or</u>	304
<u>unsolicited proposal for a public-private initiative, the public</u>	305
<u>body shall enter into a public-private agreement for a facility</u>	306
<u>with the selected private entity or any configuration of private</u>	307
<u>entities. An affected jurisdiction may be a party to a public-</u>	308
<u>private agreement entered into by the public body and a selected</u>	309
<u>private entity or combination of private entities.</u>	310
<u>(B) (1) A public-private agreement under this section shall</u>	311
<u>provide for all of the following:</u>	312
<u>(a) Planning, acquisition, financing, development, design,</u>	313
<u>construction, reconstruction, replacement, improvement,</u>	314
<u>maintenance, management, repair, leasing, or operation of a</u>	315
<u>facility;</u>	316
<u>(b) Term of the public-private agreement;</u>	317
<u>(c) Type of property interest, if any, the private entity</u>	318
<u>will have in the facility;</u>	319
<u>(d) A specific plan to ensure proper maintenance of the</u>	320
<u>facility throughout the term of the agreement and a return of</u>	321
<u>the facility to the public body, if applicable, in good</u>	322
<u>condition and repair;</u>	323
<u>(e) Compliance with applicable federal, state, and local</u>	324
<u>laws;</u>	325
<u>(f) Grounds for termination of the public-private</u>	326
<u>agreement by the public body or operator;</u>	327
<u>(g) Disposition of the facility upon completion of the</u>	328
<u>agreement;</u>	329

<u>(h) Procedures for amendment of the agreement;</u>	330
<u>(i) If the agreement contains a construction services component, a contract performance bond executed by a surety authorized by the department of insurance to write surety bonds in an amount specified by the contracting authority, conditioned upon the private entity or contractor performing the construction services portion of the work in accordance with the agreed upon terms, within the time prescribed;</u>	331 332 333 334 335 336 337
<u>(j) If the agreement contains a construction services component, a payment bond executed by a surety authorized by the department of insurance to write surety bonds in an amount specified by the contracting authority, conditioned upon the payment for all labor, work performed, and materials furnished in connection with the construction services portion of the work.</u>	338 339 340 341 342 343 344
<u>(2) As used in divisions (B)(1)(i) and (j) of this section, "construction services" means design-build, construction, reconstruction, replacement, improvement, or repair services.</u>	345 346 347 348
<u>(C) A public-private agreement under this section may provide for any of the following:</u>	349 350
<u>(1) Review and approval by the public body of the operator's plans for the development and operation of the facility;</u>	351 352 353
<u>(2) Inspection by the public body of construction of or improvements to the facility;</u>	354 355
<u>(3) Maintenance by the operator of a policy of liability insurance or self-insurance;</u>	356 357

(4) Filing by the operator, on a periodic basis, of 358
appropriate financial statements in a form acceptable to the 359
public body; 360

(5) Filing by the operator, on a periodic basis, of 361
reports as determined by the public body in a form acceptable to 362
the public body; 363

(6) Financing obligations of the operator and the public 364
body; 365

(7) Apportionment of expenses between the operator and the 366
public body; 367

(8) Rights and duties of the operator, the public body, 368
and other state and local governmental entities with respect to 369
use of the facility; 370

(9) Rights and remedies available in the event of default 371
or delay; 372

(10) Terms and conditions of indemnification of the 373
operator by the public body; 374

(11) Assignment, subcontracting, or other delegation of 375
responsibilities of the operator or the public body under the 376
agreement to third parties, including other private entities and 377
other public bodies; 378

(12) Sale or lease to the operator of private property 379
related to the facility. 380

(D) (1) The contracting authority may include in any 381
public-private agreement under sections 168.01 to 168.15 of the 382
Revised Code a provision authorizing a binding dispute 383
resolution method for any controversy subsequently arising out 384
of the contract. The binding dispute resolution method may 385

proceed only upon agreement of all parties to the controversy. 386
If all parties do not agree to proceed to a binding dispute 387
resolution, a party having a claim against the public body shall 388
exhaust its administrative remedies specified in the public- 389
private agreement before filing any action against the public 390
body in the court of claims. 391

No appeal from the determination of a technical expert 392
lies to any court, except that the court of common pleas of 393
Franklin county may issue an order vacating such a determination 394
upon the application of any party to the binding dispute 395
resolution if any of the following applies: 396

(a) The determination was procured by corruption, fraud, 397
or undue means. 398

(b) There was evidence of partiality or corruption on the 399
part of the technical expert. 400

(c) The technical expert was guilty of misconduct in 401
refusing to postpone the hearing, upon sufficient cause shown, 402
or in refusing to hear evidence pertinent and material to the 403
controversy, or of any other misbehavior by which the rights of 404
any party have been prejudiced. 405

(2) As used in this division, "binding dispute resolution" 406
means a binding determination after review by a technical expert 407
of all relevant items, which may include documents, and by 408
interviewing appropriate personnel and visiting the project site 409
involved in the controversy. "Binding dispute resolution" does 410
not involve representation by legal counsel or advocacy by any 411
person on behalf of any party to the controversy. 412

(E) No public-private agreement entered into under this 413
section shall be construed to transfer to a private entity the 414

contracting authority's authority to appropriate property under 415
Chapter 163. of the Revised Code or otherwise provided under the 416
Revised Code. 417

(F) Money collected by the public body pursuant to an 418
agreement entered into under this section shall be deposited 419
into a fund created for this purpose or as otherwise determined 420
by the public body or as specified in the agreement. 421

(G) Any provision of law requiring competitive bidding 422
does not apply to public-private agreements under sections 423
168.01 to 168.15 of the Revised Code. 424

Sec. 168.06. In the event of termination of the public- 425
private agreement, the authority and duties of the operator 426
cease, except for any duties and obligations that extend beyond 427
the termination as provided in the public-private agreement, and 428
the facility reverts to the public body and shall be dedicated 429
to the public body for public use. 430

Sec. 168.07. (A) Upon the occurrence and during the 431
continuation of material default by an operator, not related to 432
an event of force majeure, the public body may do the following: 433

(1) Elect to take over the facility, including the 434
succession of all right, title, and interest in the facility, 435
subject to any liens on revenues previously granted by the 436
private entity; 437

(2) Terminate the public-private agreement and exercise 438
any other available rights and remedies. 439

(B) In the event that the public body elects to take over 440
a facility, the public body shall collect and pay any revenues 441
that are subject to lien to satisfy any obligation and may do 442
the following: 443

(1) Develop and operate the facility and comply with any 444
service contracts; 445

(2) Solicit proposals for the maintenance and operation of 446
the facility under section 168.03 of the Revised Code. 447

Sec. 168.08. A public body having authority to issue 448
obligations may issue, in accordance with that authority, 449
obligations for the purpose of providing funds to carry out 450
sections 168.01 to 168.15 of the Revised Code with respect to 451
the development or financing of a facility. 452

Sec. 168.09. (A) For the purposes of carrying out sections 453
168.01 to 168.15 of the Revised Code, the public body may do all 454
of the following: 455

(1) Accept, subject to applicable terms and conditions, 456
available funds from the United States or any of its agencies, 457
whether the funds are made available by grant, loan, or other 458
financial assistance; 459

(2) Enter into agreements or other arrangements with the 460
United States or any of its agencies as may be necessary; 461

(3) For the purpose of completing a facility under an 462
agreement, accept from any source any grant, donation, gift, or 463
other form of conveyance of land, money, other real or personal 464
property, or other item of value made to the public body. 465

(B) Any facility may be financed in whole or in part by 466
contribution of any funds or property made by any private entity 467
or affected jurisdiction that is party to a public-private 468
agreement under sections 168.01 to 168.15 of the Revised Code. 469

(C) The public body may use federal, state, local, and 470
private funds to finance a facility under sections 168.01 to 471

168.15 of the Revised Code and shall comply with any 472
requirements and restrictions governing the use of the funds, 473
including maintaining the funds separately when necessary. 474

Sec. 168.10. A facility and any tangible personal property 475
used exclusively with a facility that is owned by the public 476
body and leased, licensed, financed, or otherwise conveyed to an 477
operator, or that is acquired, constructed, or otherwise 478
provided by an operator on behalf of the public body, is exempt 479
from all ad valorem property taxes and special assessments 480
levied against property by the state or any political 481
subdivision of the state. Building and construction materials 482
that will be incorporated into a facility pursuant to a public- 483
private agreement are exempt from the taxes imposed under 484
Chapters 5739. and 5741. of the Revised Code. 485

As used in this section, "political subdivision" means a 486
county, township, municipal corporation, or any other body 487
corporate and politic that is responsible for government 488
activities in a geographic area smaller than that of the state. 489

Sec. 168.11. The public body may acquire property, rights- 490
of-way, or other rights in property for public use in connection 491
with projects that are part of a public-private initiative in 492
accordance with Chapter 163. of the Revised Code. If the public 493
body proposes to acquire property, rights-of-way, or other 494
rights in property for such public use at the request of a 495
private entity, the acquisition shall be by the public body, in 496
accordance with Chapter 163. of the Revised Code, and only if 497
the contracting authority first makes a finding that the 498
acquisition is for a public use and serves the public purposes 499
of sections 168.01 to 168.15 of the Revised Code; the 500
contracting authority also shall require the private party to 501

pay the costs of the acquisition. 502

Sec. 168.12. All law enforcement officers of the state and 503
of an affected local jurisdiction shall have the same powers and 504
jurisdiction within the limits of the facility as they have in 505
their respective areas of jurisdiction and access to the 506
facility at any time for the purpose of exercising such powers 507
and jurisdiction. 508

Sec. 168.13. An operator under sections 168.01 to 168.15 509
of the Revised Code and any utility whose facility is to be 510
crossed or relocated shall cooperate fully in planning and 511
arranging the manner of the crossing or relocation of the 512
utility facility. 513

Sec. 168.14. Nothing in sections 168.01 to 168.15 of the 514
Revised Code shall be construed or deemed to affect any waiver 515
of the sovereign immunity of the public body or any officer or 516
employee of the public body with respect to the participation in 517
or approval of all or any part of the facility or its operation. 518

Sec. 168.15. A state agency may adopt rules under Chapter 519
119. of the Revised Code, a county or township may adopt 520
resolutions, a municipal corporation may adopt ordinances, a 521
state institution of higher education may adopt rules, and a 522
public school may adopt resolutions to carry out sections 168.01 523
to 168.15 of the Revised Code. 524