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INFORMATION SHEET: ADVISORY OPINION NO. 2009-06
OHIO ETHICS LAW AND STIMULUS FUNDS

What is the question addressed in the opinion?

Do the Ohio Ethics Law and related statutes apply to public officials and employees who are involved in the allocation and use of the American Recovery and Reinvestment Act (Stimulus Bill) funds?

What is the answer in the opinion?

Yes. Expenditures of Stimulus Bill funds by state and local public agencies in Ohio are public contracts and things of value. For that reason, R.C. 2921.42(A)(1) and R.C. 102.03(D) and (E) apply to expenditures of funds in Stimulus Bill programs.

The Ethics Law and related statutes prohibit public officials and employees from authorizing, using their positions to secure the authorization of, or otherwise participating in, any allocation of Stimulus Bill funds to their family members and their business associates.

To whom does this opinion apply?

The conclusions in this draft apply to <u>all</u> individuals who are elected or appointed to, or employed by, any public agency, including but not limited to any state agency, county, city, township, school district, public library, and regional authority, regardless of whether the person is: (1) compensated or uncompensated; (2) serving full time or part time; or (3) serving in a temporary or permanent position.

When did the conclusions in this opinion become effective?

The opinion became effective when rendered by the Commission at its meeting on October 30, 2009.

For More Information, Please Contact:

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Advisory Opinion
Number 2009-06
October 30, 2009

Syllabus by the Commission:

(1) For purposes of the Ethics Law and statutes that govern conflicts of interest in public contracting, purchases and payments made pursuant to the federal Stimulus Bill (American Recovery and Reinvestment Act) are public contracts and constitute substantial things of value;

(2) Public contract restrictions contained in Revised Code Section 2921.42 and conflict of interest restrictions contained in Divisions (D) and (E) of Revised Code Section 102.03 prohibit public officials and employees from authorizing, using their positions to secure the authorization of, or otherwise participating in, any allocation of Stimulus Bill funds to the officials or employees or their family members or business associates.

* * * *

The Commission has been asked whether the Ohio Ethics Law and related statutes apply to public officials and employees who are involved in the allocation and use of the American Recovery and Reinvestment Act (Stimulus Bill) funds.

The federal government has allocated more than eight billion Stimulus Bill dollars to agencies in the state under the American Recovery and Reinvestment Act. The allocations provide funding in six categories—Crime and Public Safety, Education, Infrastructure, Healthcare, Energy and Environment, Work, Opportunity, and Poverty. Different federal agencies will decide who will receive award grants and contracts. Money can be given to state agencies, or directly to schools, hospitals, contractors, and other organizations.

Public officials and employees at every level of government in Ohio should be aware that Stimulus Bill funds are public funds. The direct allocation of Stimulus Bill funds, or the use of Stimulus Bill funds to purchase goods, services, or property, are governed by the Ohio Ethics Law and related statutes, in addition to numerous safeguards and protections against waste, fraud, and abuse contained within the act and state law.[1]

[1] Organizations and officials at both the state and federal level have authority over the use and allocation of Stimulus Bill funds. In addition to the Ohio Ethics Commission, allocations in Ohio are overseen by the Ohio Inspector General, the Ohio Auditor, the U.S. Recovery Accountability and Transparency Board, and the Inspectors General of all federal agencies.

Brief Answer

As explained more fully below, the Ethics Law prohibits all public officials and employees from authorizing, or using their public positions to secure authorization, of any allocation or award of funding, to the officials or employees, their family members, or their business associates. R.C. 102.03(D) and (E) prohibits officials and employees from soliciting, or using their public positions to secure, Stimulus Bill funding for their family members or business associates, and from reviewing or auditing their family members' or business associates' use or allocation of the funds.

Relevant Statutes

The question before the Commission raises issues under both the public contract and conflict of interest laws. The most directly applicable section of the public contract law is set forth in R.C. 2921.42(A)(1), and provides that no public official or employee shall knowingly:

> Authorize, or employ the authority or influence of the public official's office to secure authorization of any public contract in which the public official, a member of the public official's family, or any of the public official's business associates has an interest.

R.C. 2921.42(H) provides that any public contract entered into in violation of R.C. 2921.42 is void and unenforceable.[2] A violation of R.C. 2921.42(A)(1) is a felony of the fourth degree.

Who is Subject to this Restriction?

Nearly every person who is in public service in any role is subject to this restriction. A "**public official**" is "any elected or appointed officer, or employee, or agent of the state or any political subdivision, whether in a temporary or permanent capacity." R.C. 2921.01(A) Therefore, a "public official" subject to R.C. 2921.42(A)(1) includes *any person* who is elected or appointed to, or employed by, any public agency, including but not limited to any state agency, county, city, township, school district, public library, and regional authority. The restrictions apply regardless of whether the official or employee is serving in a position that is: (1) compensated or uncompensated; (2) full time or part time; or (3) temporary or permanent.

For example, the "public officials" serving a city include but are not limited to the mayor, council members, other elected officers, city manager and other administrators, all full-time and part-time employees (regardless of their job duties and level of compensation), and all members of decision-making boards and commissions (such as zoning commissions and civil service commissions, even if the members are uncompensated).

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[2] Other sections in the Ethics Law prohibit a public official from profiting from or having an interest in a contract entered into by an agency with which he or she is connected. R.C .2921.42(A)(3) and (4). Violations of these sections of R.C. 2921.42 are misdemeanors. These restrictions are discussed on page 8 of this opinion.

What is a Public Contract?

Almost any expenditure of public funds by a public agency, for any purpose and in any form, is a public contract. The definition of "**public contract**" is:

(a) The purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of the state, any of its political subdivisions, or any agency or instrumentality of either, including the employment of an individual by the state, any of its political subdivisions, or any agency or instrumentality of either.

(b) A contract for the design, construction, alteration, repair, or maintenance of any public property.

R.C. 2921.42(I)(1)(a). A public contract can be a bid or unbid, written or oral agreement. Adv. Op. No. 87-002. "Public contract" includes employment or any purchase of service. The Ethics Commission has held, and courts have agreed, that a political subdivision's purchase or acquisition of community and economic development services, or urban revitalization services, through the use of loans, grants, tax exemptions, land reutilization programs, revenue bonds, or other similar programs or incentives, constitutes a "public contract" regardless of whether services are funded through local or federal money. Adv. Ops. No. 84-011, 85-002, 89-008. See State v. Lordi, 140 Ohio App.3d 561, 569 (2000), discretionary appeal not allowed, 91 Ohio St.3d 1523, 91 Ohio St.3d 1526, 91 Ohio St.3d 1536, motion for reconsideration denied, 92 Ohio St.3d 1422 (2001).

Stimulus Bill funds may be allocated in a variety of ways, including grants, loans, rebates, tax refunds, and other payments and benefits. Any allocation of Stimulus Bill funds, regardless of the form of the allocation, would be a public contract, because of either the immediate objective of the allocation (for example, to repair a public structure) or the ultimate objective of the allocation (for example, to modernize and invest in new infrastructure). Public contracts involving Stimulus Bill funds can exist between a public agency and: (1) a private company or individual; (2) a non-profit organization; or (3) another public agency.

Other Definitions

A "**member of the public official's family**" includes but is not limited to the official's spouse, children and step-children, whether dependent or not, parents and step-parents, siblings, grandparents, and grandchildren, regardless of where these relatives live. See Adv. Ops. No. 80-001; 90-010; and 2008-03. Also included is any *other* person related to the official by blood or marriage who resides in the same household as the official. Id.

A **"business associate"** includes any individuals, companies, or organizations with which the official is acting together to pursue a common business purpose. Adv. Op. No. 93-001. Examples of a public official's business associates include, but are not limited to, the official's: (1) partners in a partnership; (2) co-owners of a business; (3) outside employer; and (4) co-members of an LLC.

Public officials **authorize or use their public positions to secure authorization** of public contracts, under Division (A)(1), if they vote on, deliberate on, recommend, formally or informally lobby for, or take any other official action on the contracts. Adv. Op. No. 88-008. A prohibited "**interest**" in a public contract is a definite and direct interest that can be of either a financial or fiduciary nature. Adv. Ops. No. 81-008 and 88-001.

<u>Authorizing or Securing Authorization of Stimulus Bill Allocations</u>

R.C. 2921.42(A)(1) prohibits public officials from authorizing, or using their positions to secure the authorization of, the allocation of Stimulus Bill contracts, grants, loans, jobs, or other related payments or benefits to themselves, their family members, or their business associates. For example, if an official, or the official's family member or business associate, applies for a contract or an allocation of funding under a Stimulus Bill program, the official is prohibited from taking any of these actions:

a. participating in the review or consideration of the application or contract;
b. participating in the review or consideration of any applications directly competing for contracts or allocations of the same funds;
c. voting or recommending the award of the contract or funds;
d. lobbying for the award of funds; and
e. using the official's public position and the authority and influence inherent in it to secure the award of the contract or funds.

A public official would also be prohibited from recommending or authorizing the employment of the official, or a family member or business associate, in a public or private job assisting in the administration or implementation of Stimulus Bill-funded programs or activities.

For example, if a public agency considers hiring additional employees to assist with the implementation of Stimulus Bill programs, R.C. 2921.42(A)(1) prohibits officials of the agency from using their public position to secure jobs for their family members or business associates. Also, if a public agency considered the award of Stimulus Bill funds to a private business or non-profit organization, a public official is prohibited from using the authority and influence of the official's public position to secure employment with the business or organization related to the funding for a family member or business associate.

<u>Soliciting or Using Position to Secure a Thing of Value</u>

R.C. 102.03(D) and (E) provide:

> (D) No public official or employee shall use or authorize the use of the authority or influence of office or employment to secure anything of value or the promise or offer of anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.

(E) No public official or employee shall solicit or accept anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.

Who is Subject to this Restriction?

Nearly every person who is in public service in any way is subject to this restriction. A **"public official or employee"** is "any person who is elected or appointed to an office or is an employee of any public agency." R.C. 102.01(B).[3] A "**public agency**" is "the general assembly, all courts, any department, division, institution, board, commission, authority, bureau or other instrumentality of the state, a county, city, village, or township, the five state retirement systems, or any other governmental entity." R.C. 102.01(C).

Therefore, a "public official or employee" subject to R.C. 102.03 is any person who is elected or appointed to, or employed by, any public agency, including but not limited to any state agency, county, city, township, school district, public library, and regional authority. The restrictions apply regardless of whether the official or employee is serving in a position that is: (1) compensated or uncompensated; (2) full time or part time; or (3) temporary or permanent.

For example, the "public officials and employees" serving a school district include but are not limited to the members of the board of education, superintendent, treasurer, all administrative employees such as principals, assistant principals, and counselors, and all service and other employees *except teachers* (who *remain* subject to R.C. 2921.42).[4]

What is "Anything of Value"?

The term "**anything of value**" is defined to include money and every other thing of value. R.C. 102.03(G); 1.03. Any allocation of Stimulus Bill funds from a public agency would be within the definition of anything of value.

Matter Affecting the Official

R.C. 102.03(D) prohibits public officials or employees from using their authority or influence to secure anything of value where the thing of value could impair their objectivity and independence of judgment. Adv. Ops. No. 87-006, 89-006, and 90-013. This provision applies when decisions on a matter that is before the officials would provide a definite and direct financial benefit or detriment to their private interests. Adv. Op. No. 88-004.

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[3] Teachers, instructors, and other educators are excluded from the prohibitions set forth in R.C. 102.03(D) and (E) provided that they do not perform or have any authority to perform supervisory or administrative functions. See Adv. Op. No. 2001-04. Teachers *remain* subject to other provisions of the Ethics Law, including R.C. 2921.42 (discussed above).

[4] See footnote three (above).

In such situations, the things of value are of such a character that they could bias the discretion and judgment of public officials and employees if they were to participate in the matters. Id. As a result, public officials and employees are required to refrain from participating in discussions, deliberations, or otherwise using their public positions, formally or informally, with regard to any matter before the public agency that will directly affect their private financial interests. Id. The officials and employees cannot make decisions that affects their own interests, and cannot delegate their decision-making authority on the matters to subordinate officials or employees.

R.C. 102.03(E) prohibits public officials and employees from soliciting or merely accepting anything of value for themselves, even if the officials or employees do not misuse the authority or influence of their public positions to secure it, if the thing of value is of such a character as to have a substantial or improper influence on the officials or employees. Therefore, a public official may be prohibited from simply accepting or asking for a thing of value depending on the specific facts.

Matter Affecting Family Member or Business Associate

The Commission has held that R.C. 102.03(D) and (E) also prohibit public officials and employees from using their public positions to secure, and from soliciting, anything of value for any individuals with whom the public officials or employees have close family or business relationships. See Adv. Ops. No. 98-003 and 2009-02. See State v. Lordi, 140 Ohio App.3d 561, 569 (2000), discretionary appeal not allowed, 91 Ohio St.3d 1523, 91 Ohio St.3d 1526, 91 Ohio St.3d 1536, motion for reconsideration denied, 92 Ohio St.3d 1422 (2001). The prohibition applies regardless of whether the official or employee receives a personal benefit from the matter. Adv. Op. No. 2009-02. See also Ohio Sup.Ct., Bd Comm'rs on Grievances and Discipline, CPR Op. 91-23 (1991) (The prohibition in R.C. 102.03(D) "would apply to value accruing to a family member or business associate, even though the public official does not benefit personally.").

Public officials or employees have used the authority or influence of their public positions in a matter if the officials or employees have voted on, recommended, deliberated about, or taken any other action within the scope of their public authority on the matter. Adv. Op. No. 88-005. When a matter before a public agency will result in a definite and direct benefit for, or the avoidance of a detriment to, an official's or employee's family member or business associate, the official or employee is prohibited from taking any of these actions on the matter because their objectivity and independence of judgment when reviewing the matter will be impaired. Adv. Op. No. 89-009. The law applies whenever matters before an official affects the official or a close family members or business associates. See generally Adv. Ops. No. 79-008 (spouse), 88-005 (children), 98-002 (siblings), and 88-005 (business associates).

R.C. 102.03(E) prohibits the official or employee from merely soliciting anything of value for the official's or employee's family members or business associates if the thing of value is of such a character as to have a substantial or improper influence on the official. Therefore, a public official is prohibited from simply asking for a thing of value for his family members or business associates.

Application to Stimulus Bill Allocations

If the public official or employee, or a family member or business associate of the official or employee, might lawfully otherwise be a direct beneficiary of a Stimulus Bill program before the public agency of the official or employee, R.C. 102.03(D) prohibits the official or employee from voting on, recommending, reviewing, deliberating about, or taking any other formal or informal action, within the scope of their public authority, on the application. Officials and employees are prohibited from using their positions to secure quicker or more favorable consideration of these applications for funding. The official or employee cannot process the application, access the applications using the equipment of the public agency, or use access to other applications in order to more favorably position the application.

If Stimulus Bill contracts or funds may otherwise be awarded to their family members or business associates, officials or employees are prohibited from reviewing, assessing, or evaluating affected contracts or the use of the funds to determine whether program guidelines have been met. The officials or employees are prohibited from discussing the use of these funds with other official's or employee's of the agency.

If the business associate or family member, has submitted an application for, or has a definite and direct interest in a contract with, a Stimulus Bill program administered by the official's or employee's agency, the official or employee is prohibited from soliciting the award of the funds. The official or employee is also prohibited from soliciting any other kind of benefit, related to Stimulus Bill-funded programs, from the public agency to his or her family members or business associates.

Even after the Stimulus Bill funds have been allocated, or related contracts have been awarded, the official is prohibited from participating in matters that would affect the continuation, implementation, or terms and conditions of the contracts, their funding, or the programs. See generally Adv. Ops. No. 82-003, 89-005, and 92-012. These matters and decisions include, but are not limited to, the authorization or approval of payments of the funding, and the renewal, modification, termination, or renegotiation of the funding terms. Adv. Op. No. 92-012. For example, the official or employee would be prohibited from discussing, reviewing, assessing, or otherwise evaluating the recipient's use of the funds to determine whether he or she complied with the funding guidelines or qualify for additional funds.

Also, a public official or employee is prohibited from taking any action to secure any benefits for the official or employee, or a family member or business associate, related to Stimulus Bill allocations to another person or entity. For example, if an agency awards Stimulus Bill funds to a private corporation or organization, an official or employee of the agency cannot use the official's or employee's position in any way to secure employment or contracts for a family member or business associate from the award recipient.

Family Member or Business Associate Applying for or Receiving Stimulus Bill Funds

Provided that a public official or employee complies with all of the restrictions under R.C. 2921.42(A)(1) and 102.03(D) and (E) that are described above and takes absolutely no action, formally or informally, to secure any contract or other benefit related to the Stimulus Bill for a family member or business associate, the Ethics law and public contract restrictions do not prohibit the family member or business associate of the official or employee from applying for or receiving funds from a Stimulus Bill program, in a similar manner as any other person, administered by the agency he or she serves. See Adv. Op. No. 2009-05.

If a public official were to have any definite and direct interest in Stimulus Bill funds or contracts awarded to a family member or a business associate, additional restrictions apply to the official. R.C. 2921.42(A)(4) prohibits a public official from having a definite and direct interest in any contract for the purchase or acquisition of property or services by or for a public agency with which he or she is connected. (R.C. 2921.42(C) contains limited exceptions to this restriction.) R.C. 2921.42(A)(3) prohibits a public official from profiting from a contract authorized by the official or by any board, commission, or body of which the official was a member at the time of authorization. For example, if an official is a member of an LLC and the LLC applies for Stimulus Bill funds, the official would have an interest in the award even if he or she did not prepare or sign the LLC's application. All of the provisions in R.C. 2921.42 are criminal laws with criminal sanctions.

Any official with questions about these restrictions should contact the Commission for additional guidance.

Disclosure or Use of Confidential Information—R.C. 102.03(B)

Finally, all public officials should also be aware that R.C. 102.03(B) prohibits a present or former public official from disclosing or using, without appropriate authorization, any confidential information acquired in the course of the official's duties. No time limitation exists for this prohibition, and it is effective while a person serves in a public position and after leaving public service. Adv. Op. No. 88-009. This provision prohibits a public official from using any confidential information that was acquired through public service to secure Stimulus Bill funds. For example, if the official is privy to confidential information about the agency's consideration of a benefit, and use of the information would make a family member's or business associate's application more favorably received, the official is prohibited from sharing the information with the family member or business associate.

Conclusion

This advisory opinion is based on the facts described in the opinion. It is limited to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code, and does not purport to interpret other laws or rules.

Therefore, it is the opinion of the Ohio Ethics Commission, and the Commission advises all public officials and employees that: First, for purposes of the Ethics Law and statutes that govern conflicts of interest in public contracting, purchases and payments made pursuant to the federal Stimulus Bill (American Recovery and Reinvestment Act) are public contracts and constitute substantial things of value. Also, public contract restrictions contained in Revised Code Section 2921.42 and conflict of interest restrictions contained in Divisions (D) and (E) of Revised Code Section 102.03 prohibit public officials and employees from authorizing, using their positions to secure the authorization of, or otherwise participating in, any allocation of Stimulus Bill funds to the officials or employees or their family members or business associates.

By my signature below, I certify that Advisory Opinion No. 2009-06 was rendered by the Ohio Ethics Commission at it meeting on October 30, 2009.

Ben Rose, Chair
Ohio Ethics Commission