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Public-Private Partnerships: Ethics Commission Information Sheet #11

To: Private Companies
Nonprofit Organizations
All Interested Individuals

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I. Introduction

The Ohio Ethics Law and related statutes¹ prohibit public officials and employees from misusing their official positions for their own personal benefit or the benefit of their family members or business associates. The law protects the public by ensuring that public decisions are impartial and objective, rather than influenced by the personal or business interests of public officials or employees.

In the face of increasing fiscal challenges, government agencies are exploring new ways to provide services to citizens in an economical and efficient manner. In increasing numbers, public agencies are forming cooperative partnerships with private corporations, nonprofit organizations, and other entities. Such beneficial collaborations give public agencies access to the expertise and resources in the private sector and allow private sector entities to make contributions of money and efforts to the communities in which they prosper. However, cooperative arrangements can also give rise to conflicts of interest.

II. Purpose of this Information Sheet

The Ohio Ethics Commission was created to administer, apply, and assist in the enforcement of the Ethics Law for all public officials in the state.² In addition, private entities that have business and regulatory dealings with public agencies are also subject to provisions of the Ethics Law.³

The Ethics Commission prepared this information sheet to make **all** public and private sector parties involved in doing public business, performing public contracts, or exploring partnership arrangements aware of the application of the Ethics Law. The benefits of partnership can be compromised or destroyed if the public loses confidence in a public agency because of a perceived or actual loss of the independence or impartiality of the agency's officials and employees.

For clarity, this information sheet uses "public official" to mean any person who is an elected or appointed official, public employee, or member of a public board. It is not intended to provide advice on specific facts. Any person with specific questions about the application of the law should contact the Ethics Commission.

III. Summary

This information sheet discusses the following topics about the interactions between public agencies and private businesses or organizations:

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- A. Public economic aid to private businesses and organizations;
- B. Public agencies acquiring services from nonprofit organizations;
- C. Public officials serving on nonprofit boards in their official capacity;
- D. Private parties providing things of value to public officials;
- E. Private parties making donations to public agencies;
- F. Providing supplemental compensation to public servants;
- G. Private sector recruitment of public officials; and
- H. Public officials soliciting or accepting private sector employment.

IV. Public Agency Relationships with Private Sector Entities

A. Public Economic Aid to Private Business

One method public agencies have used to promote economic and community development is to support private businesses in their efforts to develop or redevelop property, construct facilities, or make other improvements. Violations of the Ethics Law can arise if an official of a public agency has a connection with a private organization seeking aid from the agency.

R.C. 2921.42(A)(4), a section of the “Public Contract” law, prohibits public officials from having definite and direct interests in the contracts of the public agencies they serve. R.C. 2921.42(A)(1) prohibits public officials from authorizing, or using their position to secure authorization of, any public contracts in which the officials, their business associates, or their family members have an interest.

A “public contract” is created whenever a public agency purchases or acquires goods or services. Therefore, a grant, loan, tax abatement, or other form of economic aid from a public agency is a “public contract” because the agency acquires services in return for the aid.⁴

An “interest” in a public contract must be definite and direct, but can be either financial or fiduciary.⁵ An employee of a company that seeks a grant, loan, tax abatement, or other form of economic aid from a public agency the employee also serves has an “interest” in the aid if:

1. The official is a director, trustee, or officer of, or has an ownership interest in, the company;
2. The official’s responsibilities at the company include preparing, submitting, or negotiating the request for the economic aid to the public agency or involve the administration or execution of the company’s obligations under the agreement to receive aid;
3. The official’s tenure, compensation, or other benefits received from the company would be based or directly dependent on the granting of the aid; or
4. The official would otherwise have a definite and direct financial or fiduciary interest in the granting of aid as a result of employment with the company.⁶

If a public official has any of these interests in the contracts of an employer, that company is effectively prohibited from seeking economic aid from the public agency, unless the official can meet the exceptions in the law.

Exception: If the official or employee would have an interest in the aid, the company can apply only if the official or employee can meet the four requirements in the exception. R.C. 2921.42(C). The most important requirement is that the benefits the agency would receive by granting aid are unobtainable elsewhere for the same or lower cost. There are two methods for a public official to demonstrate compliance with this requirement:

1. There are sufficient funds available so that all of the other qualified applicants have received aid and the funds will lapse if not used within a specified period of time;⁷ or
2. Applications for economic aid are considered in a fair and open process and it can be reasonably projected that the aid program can and will fully support financing of all interested and qualified applicants.⁸

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R.C. 2921.42(A)(1), noted above, prohibits officials from participating in any decisions of their public agencies that affect their private employers' participation in an economic incentive program.⁹ Public officials are also prohibited from using their relationships with other public officials to affect, formally or informally, their decisions regarding the companies that employ them.¹⁰ See also R.C. 102.03(D) and (E) (discussed below).

Example of Restriction

A member of a port authority board is prohibited from receiving a definite and direct profit or benefit if the company for which the board member works is participating in a port authority bond program. The company can participate in the program provided that the board member meets the exception described above and does not take any action to approve the company's participation or otherwise secure benefits for the company.¹¹

B. Public Agency Acquiring Services from Nonprofit Organizations

Many public officials are active in their communities in other ways, including serving on the boards of nonprofit organizations. While the Ethics Law does not generally prohibit such community involvement, it does recognize that a public official serving a nonprofit agency can face conflicts of interest if the governmental entity directly regulates or does business with the nonprofit agency. Officers, board members, or executives of nonprofit organizations have a fiduciary interest in the contracts of the corporations and, if compensated, also have a financial interest.¹²

R.C. 2921.42(A)(4) prohibits a public official from serving as a board member of a nonprofit organization if the nonprofit organization receives a contract, including a grant or loan, from the public agency the official serves.¹³

R.C. 2921.42(A)(1) prohibits public officials from authorizing, or using their positions to secure authorization of, public contract, grant,

or loan for nonprofit organization they serve as board members.¹⁴

R.C. 102.03(D) and (E) prohibits public officials from soliciting, or using the authority or influence of their public positions to secure, for themselves or others with whom they have close family, business, or economic relationships, anything of value that could manifest an improper influence upon the officials.¹⁵ The proceeds of a contract, grant, or loan fall within the definition of anything of value.¹⁶

R.C. 102.03(D) and (E) prohibit a public official from soliciting, or participating in any matter that would result in, any benefit to an organization of which the official is a board member, trustee, or employee.¹⁷

Example of Restriction

A member of the Ohio Children's Trust Fund Board is prohibited from serving as a trustee or officer of a nonprofit organization that receives a grant awarded by the Board, and from using the Board position in any way to secure a grant for the nonprofit organization.¹⁸

C. Public Official Serving on Nonprofit Board in Official Capacity

In some cases, a public agency either creates or participates in the creation of a nonprofit organization. The public agency can have an official or employee of the agency serve on the board of directors of the nonprofit organization as a representative of the agency.

A public official who is serving on the board of directors of a nonprofit organization as a representative of the public agency is serving in an "official capacity," and does not have an unlawful interest in any contracts, grants, or loans awarded by the public agency to the organization.¹⁹ An official serving on the board of a nonprofit organization in an official capacity continues to pursue the interests of the public agency. In that case, the public official does not have a conflict of interest where the official's private concerns distract the official from serving the public interest.²⁰

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A public official who serves with a nonprofit organization in an official capacity, as a representative of a public agency, is not prohibited, by R.C. 2921.42(A)(1) or R.C. 102.03(D) and (E), from participating in the decisions of the public agency affecting the organization.²¹

A public official serves on a nonprofit board in an official capacity when these four criteria can be shown:

1. The public agency either creates or is a participant in the nonprofit organization;
2. The agency's governing board formally appoints an official of the agency to the organization's board as its representative;
3. The agency's governing board formally instructs the official to represent the agency's interest; and
4. There is no other conflict of interest on the part of the public official who is the designated representative.²²

Example of "Official Capacity"

The law does not prohibit an employee of a county board of mental retardation and developmental disabilities from serving as the executive officer, in an official capacity, of a nonprofit organization created by the board to serve clients of the board.²³

V. Private Sector Relationships with Public Agencies

A. *Companies and Private Organizations Providing Things of Value to Public Official*

R.C. 102.03(F) prohibits a person that is interested in matters before, regulated by, or doing or seeking to do business with a public agency from promising or giving anything of substantial value to an official or employee of the agency.²⁴ A "person" is "an individual, corporation, business trust, Memorandum on Public-Private Partnerships estate, trust, partnership, and association."²⁵ A company, nonprofit organization, or governmental agency is a "person."

R.C. 102.03(D) and (E) prohibit public officials from accepting, soliciting, or using their public positions to secure anything of substantial value from a party with business or regulatory ties to the public agencies they serve.²⁶

Public officials who are required to file financial disclosure statements should also note that, if they accept gifts valued at over \$75, from anyone other than family members, must disclose the source of the gifts on their annual financial disclosure statements.²⁷

"Anything of value" is defined, for purposes of R.C. 102.03(D), (E), and (F), to include money, goods and chattels, promissory notes, warrants, and checks, and every other thing of value.²⁸

Examples of substantial things of value include consulting fees and payments for services,²⁹ personal entertainment such as golf outing,³⁰ gifts,³¹ and travel, meals, and lodging.³²

Example of Restriction

A city official is prohibited from accepting season tickets to the games of a professional sports team from the team's owner because the value of the tickets is substantial and the team is regulated by the city.³³

B. *Companies and Private Organizations Making Donations to Public Agencies*

A private entity may wish to help a public agency to perform necessary services by giving or donating an item the agency would be unable to purchase.

R.C. 102.03(F) prohibits a person, company, organization, or other party with business or regulatory ties to a public agency from promising or giving anything of substantial value directly to the benefit of an official or employee of the agency.³⁴

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A gift or donation falls within the definition of “anything of value” for purposes of R.C. 102.03(D), (E), and (F).³⁵ Examples of substantial things of value include donations of training equipment or goods.³⁶

R.C. 9.20 authorizes public agencies to “receive by gift, devise, or bequest moneys, lands, or other properties.” Therefore, R.C. 102.03 does not prohibit a private entity from donating items to a public agency to ease the functioning of the public agency in fulfilling its responsibility to provide services to the public.³⁷

In order for the donation to be permissible, no public official can benefit personally as a result of the donation.³⁸

Example of Donations

A private company is not prohibited from donating industrial and safety equipment to a state agency, provided that the donation is voluntary and no agency official benefits personally from the donation.³⁹

However, a private company would be prohibited from giving travel expenses, or conference fees, to a public official, even though the payment benefits the public agency by relieving it of paying the expenses, because a personal benefit accrues to the individual official or employee.⁴⁰

C. Providing Supplemental Compensation to Public Servants

Public agencies sometimes believe that the most qualified and experienced candidates for essential public positions are discouraged from seeking public employment because of the comparatively small salaries that are available to public servants. Private companies and other entities may want to augment the salaries or benefits that are offered in order to attract these more qualified candidates to vital public service positions.

A public servant is prohibited from soliciting or accepting any compensation, other than as allowed by law. Any person, which

includes an individual, business, or entity, is prohibited from promising or giving to a public servant any supplemental compensation, other than as allowed by law.⁴¹

A “public servant” is a public official, employee, or agent, or any person performing, ad hoc, a governmental function.⁴²

“Compensation” is a payment provided to the public servant: (1) for performing a duty, act, or service required in an official capacity as a public servant; (2) for the general performance of public duties; or (3) as a supplement to the public servant’s public compensation.⁴³

A private organization is prohibited, regardless of its motivation, from augmenting or supplementing the salary of a public official or employee. Even though a private organization may wish to assist a public entity to attract an experienced candidate for a public position, such compensation is prohibited.

Public servants are prohibited from accepting compensation from any source other than the public agency they serve, as provided by law.

Payment to a public servant from any source other than the public agency he or she serves may give rise to divided loyalties and motivate the public servant to make decisions that benefit the source of the supplemental compensation to the detriment of the citizens served.⁴⁴ Citizens should be secure in the conviction that their elected, appointed, and employed public servants are endeavoring to serve their interests, and not the interests of private parties.

Example of Restriction

Coaches and other school district officials are prohibited from accepting compensation for performing duties related to their district employee from anyone other than the district. Coaches are prohibited from accepting any payment or other benefit for the performance of their job duties from a booster group.⁴⁵

VI. Recruitment of Public Officials

A. *Private Sector Recruitment*

Private sector entities that have regulatory or business ties with public agencies work with public officials who are very knowledgeable about the business in which the private entity is engaged. Private entities may wish to recruit these qualified and experienced public employees for their positions in their own organizations.

R.C. 102.03(F) prohibits any person from promising or giving public officials “anything of value” that could manifest an improper influence upon the officials with respect to their duties. The “promise of future employment” is within the definition of anything of value.⁴⁶

R.C. 102.03(F) prohibits a private organization from promising or giving the promise of future employment to a public official or employee who is engaged in contractual, regulatory, or other activity regarding the private organization.

B. *Public Official Soliciting or Accepting Private Sector Employment*

R.C. 102.03(D) and (E) prohibit public officials from soliciting, or using their authority or influence to secure, “anything of value,” including private employment, which could have a substantial and improper influence on the officials. Public officials are prohibited from soliciting, or using their positions to secure, employment from parties that have contractual, regulatory, or other activity with their public agencies.

C. *Withdrawal Exception*

If a public official is able to withdraw completely from consideration of any matter involving the party who is promising or giving the official employment, the official may be able to consider and accept the offer.⁴⁷

Withdrawal can be accomplished only when it does not impede public officials’ performance of their assigned duties. If public officials are

required to perform duties related to the source of employment, their employing agencies must approve the official’s withdrawal.⁴⁸

VII. Additional Restrictions

A. A public official should avoid taking any action that endorses or appears to endorse any private corporation or organization.⁴⁹

B. Many public officials are required to disclose sources of income, gifts, real estate, investments, and other financial interests under law.⁵⁰ Disclosure does not replace statutory restrictions on what can be accepted.

C. Public officials are prohibited from disclosing, without appropriate authorization, confidential information to any party, including private organizations that have partnered with the public agencies they serve.⁵¹

VIII. Common-sense Summary

A. *Public Agency Relationships with Private Sector*

The Ethics Law prohibits a public official from having an interest in a contract, grant, or loan between the official’s agency and private employer, and from authorizing any contract, grant, or loan to a private employer.

The law prohibits a public official from serving as an officer or trustee of a nonprofit organization that has a contract with, or receives a grant or loan from, the public agency.

A public official is not prohibited from serving as an officer or trustee of a nonprofit organization, if service is in an “official capacity” representing the public agency.

B. *Private Sector Relationships with Public Agencies*

The law prohibits giving consulting fees, gifts, personal entertainment (golf outings), travel, meals and lodging, and other things of substantial value to a public official.

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The law does not prohibit voluntary donations to a public agency, as long as no individual official benefits personally.

The law prohibits any person from providing any level of compensation to a public official for the performance of the official's duties.

C. *Recruitment of Public Officials*

The law prohibits a private sector entity from promising or giving the offer of employment to a public official who is engaged in regulatory, business, or other activity regarding the private entity.

The law prohibits a public official from soliciting or using a public position to secure employment from a party with a nexus to the public agency.

A public official may be able to withdraw from regulatory, business, or other duties related to a private entity in order to seek or accept employment from the party.

IX. Other Considerations

Any public official is welcome to contact the Ethics Commission for guidance on any of the matters discussed in this information sheet. Officials should also check with legal counsel for their agencies to determine whether there are any agency rules, guidelines, or policies on these matters. A public agency cannot create a policy that is less restrictive than the Ethics Law but may have a policy that is more restrictive provided that it does not conflict with general state law.⁵²

X. Penalties

The Ethics Law and related statutes are criminal laws. If a person is convicted of violating an ethics law, that person may receive a jail sentence and/or have a fine levied against the official.

XI. Conclusion

This information sheet was prepared by the Ohio Ethics Commission for informational guidance only. It is not an advisory opinion and does not provide the immunity of an advisory opinion. Please visit the Commission's Web site at www.ethics.ohio.gov or contact the Commission if you have questions about this information sheet or the Ohio Ethics Laws. A reference list of Ohio Revised Code sections and Ohio Ethics Commission opinions cited in this information sheet is attached. Copies of the Commission's formal advisory opinions and other information about the Commission and the law can be obtained from:

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Endnotes:

¹ R.C. Chapter 102. and Sections 2921.42 and 2921.43

² Two other state agencies have jurisdiction over ethics issues: The Joint Legislative Ethics Committee (JLEC) for members and employees of the General Assembly and the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court for judges and judicial employees.

³ [Ohio Ethics Commission Advisory Opinions No. 2008-01](#) and [2009-01](#).

⁴ [Adv. Ops. No. 82-004](#) and [89-008](#). State v. Lordi, 140 Ohio App.3d 561, 568 (2000), disc. appeal not allowed, 91 Ohio St.3d 1523, 91 Ohio St.3d 1526.

⁵ [Adv. Op. No. 81-008](#).

⁶ [Adv. Ops. No. 82-003](#), [89-006](#), and [89-008](#).

⁷ [Adv. Op. No. 84-011](#).

⁸ [Adv. Op. No. 2001-02](#).

⁹ [Adv. Op. No. 2001-02](#).

¹⁰ Id.

¹¹ [Adv. Op. No. 2001-02](#).

¹² [Adv. Ops. No. 85-009](#) and [86-005](#).

¹³ [Adv. Op. No. 87-003](#).

¹⁴ [Adv. Op. No. 87-003](#).

¹⁵ [Adv. Op. No. 2009-06](#).

¹⁶ R.C. 102.01(G); 1.03.

¹⁷ [Adv. Op. No. 88-005](#).

¹⁸ [Adv. Op. No. 87-003](#).

¹⁹ [Adv. Ops. No. 83-010](#) and [84-001](#).

²⁰ [Adv. Op. No. 84-001](#).

²¹ [Adv. Op. No. 96-005](#).

²² [Adv. Op. No. 84-001](#).

²³ [Adv. Op. No. 96-005](#).

²⁴ [Adv. Ops. No. 90-001](#), [95-001](#), and [2001-03](#).

²⁵ R.C. 1.59; [Adv. Op. No. 2009-01](#).

²⁶ [Adv. Ops. No. 79-002](#), [86-011](#), and [2001-03](#).

²⁷ R.C. 102.02(A)(7). (City officials and school board members who receive less than \$16,000 annually for their public service, and college and university trustees, are required to disclose sources of gifts valued at over \$500.)

²⁸ R.C. 102.01(G); 1.03.

²⁹ [Adv. Op. No. 86-008](#).

³⁰ [Adv. Op. No. 2001-03](#).

³¹ [Adv. Op. No. 2001-04](#).

³² [Adv. Ops. No. 89-013](#) and [90-001](#).

³³ [Adv. Op. No. 95-001](#).

³⁴ [Adv. Op. No. 90-001](#).

³⁵ [Adv. Op. No. 89-002](#).

³⁶ Id.

³⁷ [Adv. Ops. No. 89-002](#) and [92-015](#).

³⁸ [Adv. Op. No. 89-002](#).

³⁹ [Adv. Op. No. 89-002](#).

⁴⁰ [Adv. Op. No. 89-013](#).

⁴¹ [Adv. Op. No. 2008-01](#).

⁴² R.C. 2921.01(B).

⁴³ [Adv. Op. No. 2008-01](#).

⁴⁴ [Adv. Op. No. 92-015](#) and [2008-01](#).

⁴⁵ [Adv. Op. No. 2008-01](#).

⁴⁶ R.C. 102.01(G); 1.03(H).

⁴⁷ [Adv. Ops. No. 91-009](#) and [92-005](#).

⁴⁸ [Adv. Op. No. 96-004](#).

⁴⁹ [Adv. Op. No. 96-004](#).

⁵⁰ R.C. 102.02.

⁵¹ R.C. 102.03(B)

⁵² Section 3, Article XVIII, Constitution; *Struthers v. Sokol* (1923), 108 Ohio St. 263 (an ordinance is in conflict with a general law if it permits or licenses activity that is forbidden or prohibited by general law, or visa versa); *Niles v. Howard* (1984), 12 Ohio St.3d 162, 165 (a local ordinance is in conflict with general law if it changes the character of an offense).