



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
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Advisory Opinion Number 93-012
July 16, 1993

Syllabus by the Commission:

- (1) Division (B) of Section 102.03 of the Revised Code does not prohibit a public official or employee from disclosing information which is a "public record" as defined in Division (A)(1) of Section 149.43 of the Revised Code;
- (2) Division (B) of Section 102.03 of the Revised Code prohibits a public official or employee from disclosing information which is not a "public record" as defined in Division (A)(1) of Section 149.43 of the Revised Code only if a statute affirmatively makes the information confidential or if the information has been clearly designated as confidential when such designation is warranted and necessary for the proper conduct of government business;
- (3) An organization which has entered into a public contract with a city and holds information to which a public official or employee is privy due to the official's or employee's service with the organization in his official capacity may not impose the prohibitions of Division (B) of Section 102.03 of the Revised Code upon the official or employee with regard to that information by designating, in the interests of the organization, the information as confidential.

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In your letter to the Ethics Commission, you have asked several questions concerning the application of the Ohio Ethics Law and related statutes to issues arising out of a contractual relationship between a city and a hospital which is a non-profit corporation.

You state that in 1949, the city entered into an "agreement" with the hospital under which the city provided \$900,000 to the hospital for the construction of facilities. In consideration for providing this money, the hospital granted the city a permanent interest in the hospital and its management. The 1949 agreement requires the hospital to furnish an annual financial report to the city. In May of 1975, the hospital issued revenue bonds with the assistance of the city as issuer. As a result of this financing, the hospital's real property was deeded to the city and leased back to the hospital. On January 1, 1992, the city conveyed the hospital property back to the hospital as part of a bond refinancing. Presently, the hospital leases this property to the city and the city sub-leases it back to the hospital.

The hospital is managed by a board of directors. Under the terms of the 1949 agreement, the mayor and president of council serve on the board of directors "by virtue of their office." The

terms of the mayor and president of council on the board of directors coincide with the terms of their respective city offices. The other board members serve terms which have been determined by the board of directors. The board of directors nominates replacement members; however, pursuant to the 1949 agreement, city council must ratify and approve the nominees.

Your first question is whether the Ohio Ethics Law and related statutes prohibit city officials from serving on the hospital's board of directors.

A mayor and president of council are prohibited by Division (A)(4) of Section 2921.42 of the Revised Code from having an "interest in the profits or benefits of a public contract entered into by or for the use of" the city with which they serve. See R.C. 2921.01(A). See Ohio Ethics Commission Advisory Ops. No. 85-002 and 91-002. A member of a board of directors of a non-profit corporation has a definite and direct fiduciary interest in the contracts of the corporation. See Advisory Op. No. 81-008.

The term "public contract" is defined for purposes of R.C. 2921.42 in Division (F)(1) of that Section to include the purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of a political subdivision. The Ethics Commission has held that a public contract exists whenever a political subdivision purchases property or services with money flowing from the political subdivision to the provider of the property or services or whenever the political subdivision acquires services as part of the contractor's responsibilities under the contract. See Advisory Ops. No. 91-011 and 93-009. In the instant situation, the agreement between the city and the hospital is a "public contract" for purposes of R.C. 2921.42 since, by initially providing \$900,000 to the hospital in exchange for a permanent interest in the hospital and its management, serving as issuer of the hospital's bonds, and sub-leasing property to the hospital, the city is purchasing or acquiring hospital services for the benefit of its residents. See Advisory Ops. No. 91-011 and 93-009.

Therefore, initially, it appears that the mayor and president of council have a prohibited interest in a public contract with the city for purposes of R.C. 2921.42 (A)(4) since they serve on the hospital's board of directors. However, the Ethics Commission has held that the prohibition of R.C. 2921.42 (A)(4) does not apply whenever a public official of a political subdivision that has entered into a public contract with a non-profit corporation, serves on the board of directors of the non-profit corporation in his "official capacity" as a representative of his political subdivision in order to represent its interests. See Advisory Ops. No. 82-004, 83-010, and 84-001. See also Advisory Op. No. 92-002. In such an instance, the Commission has explained that "there would not be a dual interest in which private considerations would distract from [the public official] serving the public interest." Advisory Op. No. 84-001. Also, in Advisory Opinion No. 84-001, the Ethics Commission set forth four criteria which must be met in order for a public to be deemed to serve in his official capacity:

- (1) the governmental entity must create or be a participant in the non-profit corporation;
- (2) any public official or employee connected with the jurisdiction . . . may be designated to serve on the non-profit corporation, but the elected legislative authority or the appointing governing body must formally designate the office or position to represent the governmental entity;
- (3) the public official or employee must be formally instructed to

represent the governmental entity and its interests; and (4) there must be no other conflict of interest on the part of the designated representative.

As explained above, in 1949, the city provided \$900,000 to the hospital in consideration for a permanent interest in the hospital and its management. Therefore, R.C. 2921.42 (A)(4) does not prohibit the mayor and president of council from serving on the hospital's board of directors in their "official capacity" to represent the city's interest in the hospital and its management.

You have also asked whether R.C. 102.03 (B) prohibits the mayor and president of council from disclosing information to which they are privy due to their service on the hospital's board of directors and which the legal counsel for the hospital board of directors has designated as "confidential." You state that the hospital desires to terminate the city's permanent interest in the hospital and affiliate with another hospital. You state that a group of city residents has formed an organization in order to oppose the termination of the city's interest in the hospital and has requested that the mayor and president of council furnish them with the hospital's monthly financial statements. As stated above, the agreement between the city and hospital requires the hospital to furnish the city with an annual financial report; however, there is no provision in the agreement that requires the hospital to furnish the city with a monthly report.

Division (B) of Section 102.03 of the Revised Code reads:

No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by him in the course of his official duties which is confidential because of statutory provisions, or which has been clearly designated to him as confidential when such confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business. (Emphasis added).

The mayor and president of council are "public official[s] or employee[s]" for purposes of R.C. 102.03 (B) and are subject to the statute's prohibitions. See generally Advisory Op. No. 89-008. Thus, R.C. 102.03 (B) prohibits them from disclosing or using, without proper authorization, information acquired by them in the course of their official duties that either is confidential by statutory provision or has been clearly designated to them as confidential when such designation is warranted and necessary for the proper conduct of government business.

Since the mayor and president of council serve on the hospital's board of directors in their official capacity to represent the city's interest in the hospital and its management, the monthly reports are information which has been "acquired by [them] in the course of [their] official duties." However, the issue remains whether the monthly reports are considered "confidential" for purposes of R.C. 102.03 (B).

You state that the city law director advised the mayor and council president that hospital records are subject to disclosure under R.C. 149.43, the Public Records Act. You also state that the hospital's legal counsel has advised the mayor and president of council that: (1) the hospital's monthly financial statements are confidential; (2) the disclosure of the monthly statements would

breach their oath as hospital directors and subject them to personal liability; and (3) the monthly statements are not "public records" required to be disclosed under the Public Records Act.

R.C. 149.43 (B) provides, in part, that "[a]" public records shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours." R.C. 149.43 (A)(1) defines "public record" as "any record that is kept by any public office, including, but not limited to, state, county, city, village, township, and school district units" However, R.C. 149.43 (A)(1) also enumerates six specific categories of information which are not considered to be "public records." For example, medical records and records the release of which is prohibited by state or federal law are not considered public records. See generally State, ex rel. Fostoria Daily Review Co. v. Fostoria Hosp. Assn., 40 Ohio St. 3d 10 (1988) (holding that a public hospital that renders a public service to residents and is supported by public taxation is required to disclose its public records).

The Ethics Commission's advisory authority is limited to interpreting Chapter 102. and Sections 2921.42 and 2931.43 of the Revised Code; it cannot determine whether the hospital's monthly statements are "public records" for purposes of R.C. 149.43. See R.C. 102.08. As stated above, the hospital's legal counsel and the city law director have provided conflicting advice to the mayor and president of council on the issue whether the monthly reports are public records subject to disclosure under R.C. 149.43. A judicial decision may be required to ultimately determine this issue.

If the hospital's monthly reports are found to be public records, then R.C. 102.03 (B) would not prohibit the mayor and president of council from disclosing the hospital's monthly financial statements since such records would be required to be made available to the public pursuant to R.C. 149.43, and could not be considered "confidential" for purposes of R.C. 102.03 (B). However, the issue remains whether R.C. 102.03 (B) prohibits the mayor and president of council from disclosing information to which they are privy due to their service, in their official capacity, on the hospital's board of directors, if the monthly reports are not public records. If the monthly reports are not public records, then R.C. 102.03 (B) would prohibit the mayor and president of council from disclosing the hospital's monthly financial statements only if a statute affirmatively makes them confidential or if the monthly reports have been clearly designated to the city's officials as confidential when such designation is warranted and necessary for the proper conduct of government business. The issue thus becomes whether one of the elements for establishing confidentiality under Division (B) has been met in this instance.

Whenever a state or federal statute mandates that certain information is confidential, the terms of that statute control the circumstances under which public officials and employees may release information to which they have been entrusted. See Op. Att'y Gen. No 90-007. There are statutory provisions found throughout the Revised Code that forbid the disclosure of certain information by a public agency. See also R.C. 149.43 (medical records are one exception to the Public Records Act). It is assumed that the monthly reports are not confidential due to statutory provisions. Therefore, the issue becomes whether the monthly reports have been clearly designated to the mayor and president of council as confidential and such designation is warranted and necessary for the proper conduct of government business.

R.C. 102.03 (B) does not state who must designate the information as "confidential." In this instance, the hospital's legal counsel has designated the monthly reports as confidential. However, as stated above, the hospital's legal counsel based his determination that the reports were confidential partially on the fact that the mayor and president of council, as members of the hospital board of directors, have a fiduciary relationship to the hospital and would breach their oath of office as directors if they released the information. It is true that the mayor and president of council, as directors, have a fiduciary relationship to the hospital and this relationship may be considered by the hospital's legal counsel in advice which he provides to them; however, such advice does not impose the prohibition of R.C. 102.03 (B). R.C. 102.03 (B) requires that a confidential designation be applied to information only in circumstances where "preserving its confidentiality is necessary to the proper conduct of government business."

While the hospital's legal counsel may determine that preserving the confidentiality of the monthly reports is in the best interests of the hospital, such a determination does not establish that preserving the confidentiality of the reports is necessary for the proper conduct of government business. An organization which has entered into a public contract with a city and holds information to which a public official is privy due to his service with the organization in his official capacity may not impose the prohibitions of R.C. 102.03 (B) upon the official with regard to that information by designating, in the interests of the organization, the information as "confidential."

It is apparent that in this instance, the city may designate information as confidential where such designation is warranted and necessary for the proper conduct of government business, and thus bind its public officials and employees to the prohibition imposed by R.C. 102.03 (B). In this instance, the issue has been made one for the determination of the city law director. The law director must follow the standard of R.C. 102.03 (B) in making a determination of confidentiality for purposes of that section. Again, it must be stressed that a determination of confidentiality for purposes of R.C. 102.03 (B) needs to be made only if the information is found not to be a public record as defined in R.C. 149.43.

Accordingly, the designation of the monthly reports as "confidential" by the hospital's legal counsel does not in this instance bind the mayor and council president to the prohibition imposed by R.C. 102.03 (B). However, even if the law director determines that the monthly reports are not "confidential" for purposes of R.C. 102.03 (B), there is nothing in R.C. 102.03 (B) which would require the officials to release the reports.

This advisory opinion is based on the facts presented. 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 you are so advised, that: (1) Division (B) of Section 102.03 of the Revised Code does not prohibit a public official or employee from disclosing information which is a "public record" as defined in Division (A)(1) of Section 149.43 of the Revised Code; (2) Division (B) of Section 102.03 of the Revised Code prohibits a public official or employee from disclosing information which is not a "public record" as defined in Division (A)(1) of Section 149.43 of the Revised Code only if a statute

affirmatively makes the information confidential or if the information has been clearly designated as confidential when such designation is warranted and necessary for the proper conduct of government business; and (3) An organization which has entered into a public contract with a city and holds information to which a public official or employee is privy due to the official's or employee's service with the organization in his official capacity may not impose the prohibitions of Division (B) of Section 102.03 of the Revised Code upon the official or employee with regard to that information by designating, in the interests of the organization, the information as confidential.


Jack Paul DeSario, Chair
Ohio Ethics Commission