



OHIO ETHICS COMMISSION

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August 11, 1995

Informal Opinion 1995-INF-0811-4

Mary Ann Schenk, Law Director
City of Mount Healthy

Dear Ms. Schenk:

You have asked whether the prohibitions that the Ohio Ethics Laws and related statutes impose upon public officials preclude a legal publishing company and a utility company from selling goods or services to the City of Mt. Healthy (City) in light of the fact that the mayor, the president of council, and a member of council have business connections with the companies. The mayor is the president and a stockholder of the legal publishing company; the member of council is an employee of the legal publishing company; and the president of council is a stockholder of the utility company.

As explained below, R.C. 2921.42 (A)(4) precludes the legal publishing company from selling goods or services to the City, unless the mayor and the member of council meet the exception which is provided by R.C. 2921.42 (C). R.C. 2921.42 (A)(3) prohibits the council member from profiting from a contract entered into between the City and the legal publishing company unless the contract is made pursuant to competitive bidding and the publishing company has submitted the lowest and best bid. R.C. 2921.42 (A)(1) and R.C. 102.03 (D) prohibit the mayor and member of council from participating, formally or informally, in any action involving the company's sale of goods or services to the City.

In addition, as explained below, R.C. 2921.42 (A)(4) precludes the utility company from selling goods or services to the City, unless the president of council can meet the requirements of either Division (B) or (C) of R.C. 2921.42. As a stockholder with no other business connections to the utility company, the president of council may be able to readily meet the exemption that is provided by R.C. 2921.42 (B). If he cannot meet the exemption provided by R.C. 2921.42 (B), then he must meet the exception provided by R.C. 2921.42 (C).

THE PUBLISHING COMPANY

You have provided this Office with information concerning the three City officers, the two companies, and the contracts between the companies and the City. The issues concerning the legal publishing company will be addressed first.

In summary, the legal publishing company sells ordinance codification update services to municipalities. The City has contracted with the company for the updating of its ordinances since the early 1970's. The mayor's situation will be addressed first.

The Mayor

The mayor is the president of the company. He is also a stockholder but owns less than two percent of the company's outstanding shares. The mayor's connection with the publishing company began in July of 1979 when he became an employee of the company. At that time, he was not a city officer. In January 1980, he took office as the elected law director for the City. In 1984, he was elected to city council and became president of the company. He was elected mayor in 1988 and was re-elected in 1992. It is significant to note that while holding these City offices, you assure that the mayor has never been involved in any City action regarding the City's purchase of codification update services from the legal publishing company.

Prohibition Imposed by R.C. 2921.42 (A)(4)

Division (A)(4) of Section 2921.42 of the Revised Code reads as follows:

- (A) No public official shall knowingly do any of the following:
- (4) Have an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which he is connected.

The term "public official" is defined for purposes of Section 2921.42 in Section 2921.01 (A) to include any elected official or employee of a political subdivision. The mayor of a city is a "public official" who is subject to the prohibitions of Section 2921.42. See Ohio Ethics Commission Advisory Op. No. 85-002.

The term "public contract" is defined for purposes of Section 2921.42 in Division (E) 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 City's purchase of codification update services from the legal publishing company is a public contract for purposes of Section 2921.42.

An "interest" which is prohibited must be definite and direct, and may be pecuniary or fiduciary in nature. See Advisory Ops. No. 81-003 and 81-008. An individual who has an ownership interest in a company and who serves the company as an officer has a definite and direct pecuniary and fiduciary interest in the company's contracts. See Advisory Ops. No. 78-006, 81-008, 86-005, 89-006, and 89-008. Therefore, in the instant situation, the mayor, as president of the company and as a stockholder, has a definite and direct pecuniary and fiduciary interest in the legal publishing company's contracts. Accordingly, the prohibition which R.C. 2921.42 (A)(4) imposes upon the mayor precludes the company from selling goods or services to the City.

Exception Provided by R.C. 2921.42 (B)

Divisions (B) and (C) of R.C. 2921.42 provide exceptions to the prohibition imposed by R.C. 2921.42 (A)(4).

In order to meet the exception provided by R.C. 2921.42 (B), the public official's interest must be limited to owning and controlling shares of a corporation and the ownership interest must be less than five percent of the corporation's outstanding shares of stock. See Advisory Op. No. 93-001. In the instant situation, the mayor owns less than five percent of the publishing company's outstanding shares, however, he also serves as president of the company. Therefore, the mayor cannot meet the exception provided by R.C. 2921.42 (B).

Exception Provided by R.C. 2921.42 (C)

Division (C) of Section 2921.42 provides an additional exception to the prohibition imposed by Division (A)(4), if all of the following apply:

- (1) The subject of the public contract is necessary supplies or services for the political subdivision or governmental agency or instrumentality involved;
- (2) The supplies or services are unobtainable elsewhere for the same or lower cost, or are being furnished to the political subdivision or governmental agency or instrumentality as part of a continuing course of dealing established prior to the public official's becoming associated with the political subdivision or governmental agency or instrumentality involved;
- (3) The treatment accorded the political subdivision or governmental agency or instrumentality is either preferential to or the same as that accorded other customers or clients in similar transactions;
- (4) The entire transaction is conducted at arm's length, with full knowledge by the political subdivision or governmental agency or instrumentality involved, of the interest of the public official, member of his family, or business associate, and the public official takes no part in the deliberations or decision of the political subdivision or governmental agency or instrumentality with respect to the public contract.

Advisory Opinion No. 87-003 summarizes the criteria of Division (C) as follows:

The requirements of Division (C) are factual determinations, and whether a particular transaction meets the criteria of Division (C) depends upon the facts and circumstances of each individual case. See Advisory Opinion No. 78-001. These criteria are strictly applied against the public official, and the burden is on the official to demonstrate that he is in compliance with the exemption. See Advisory Opinions No. 84-011 and 83-004.

In addressing the exemption provided by Division (C), it must be noted that the Ethics Commission's function in rendering advisory opinions is not a fact-finding process. Advisory Ops. No. 75-037 and 90-013. An advisory opinion explains the prohibitions imposed by the Ethics Law and related statutes and sets forth the standards and criteria that must be observed in order to avoid a violation of the law. Advisory Op. No. 90-013. An advisory opinion cannot determine whether certain facts exist, but must rely on the accuracy and completeness of the facts presented in the request for an opinion. However, an advisory opinion can explain the application of the Ethics Law and related statutes to a given set of circumstances. Id. Therefore, this advisory opinion cannot determine whether the exception of Division (C) has been established, factually and as a matter of law in this instance, but will provide the standards which must be met in order for the exception to be established.

Division (C)(2) - Continuing Course of Dealing

Division (C)(2) is of particular note, and requires that the supplies or services be furnished as part of a "continuing course of dealing" or be "unobtainable elsewhere for the same or lower cost."

You have stated that the legal publishing company has sold codification update services to the City since the early 1970's and that this precedes the mayor's earliest public service with the City. However, this fact does not establish the "continuing course of dealing" exception provided by Division (C)(2).

In order for the "continuing course of dealing" exception to apply with respect to a specific contract, the current contract between the City and the legal publishing company must have been in place, prior to the mayor becoming a City officer. The Ethics Commission has held that material changes in a pre-existing contract such as modifications, alterations, or renewals, alter the original understanding of the parties and thereby fall outside the limited portion of the exception of Division (C)(2). See Advisory Ops. No. 82-007, 84-006, 88-008, and 90-003. Therefore, in order to meet the exception of Division (C)(2) by showing a "continuing course of dealing" between the City and the publishing company, the contract that was in place between the City and the company in 1980 when the mayor first became a City officer, must not have been modified, altered, renewed, or undergone any material changes.

You have stated that, when the mayor was the City's law director, the decision to use the publishing company was under the control of the former mayor and the safety-service director, and when he became mayor this matter was transferred to the law director's budget to avoid the mayor being required to make decisions regarding the purchase of the company's services. You also state that, while he served as a council member, the mayor did not vote on ordinances regarding code updates. You further state that, as mayor, he did not sign ordinances approving the code updates. Therefore, it appears that the contract between the City and the company has, to some degree, been modified, altered, renewed, or materially changed since the mayor's first service with the City fifteen years ago.

Division (C)(2) - Unobtainable Elsewhere

In the absence of a showing that the services provided by the legal publishing company comply with the application of the continuing course of dealing exception, the criterion of (C)(2) can still be met if the services which the company provides to the City are "unobtainable elsewhere for the same or lower cost" and this fact can be demonstrated by some objective standard. See Advisory Ops. No. 83-004, 84-006, and 90-003. As the Ethics Commission stated in Advisory Opinion No. 84-011:

[A] public official should not have an interest in a public contract with the governmental entity with which he serves unless the contract is the best or only alternative available to the governmental entity. . . . The criterion that the goods or services be "unobtainable for the same or lower cost" requires that a public official or employee be at a disadvantage when attempting to do business with his governmental entity, and that an equally qualified applicant who is not a [public official] must receive preference. (Emphasis in original.)

If it can be objectively shown that the codification update services provided by the legal publishing company are "unobtainable elsewhere for the same or lower cost," then the mayor may meet the requirement of Division (C)(2). See Advisory Ops. No. 87-003 and 88-007. An open and fair competitive process under which the legal publishing company submits the lowest bid or proposal is one manner in which this requirement may be met. Advisory Ops. No. 83-004, 86-002, and 88-001. See also R.C. 2921.42 (A)(3) (set forth below). The City must make every reasonable effort to open the selection process to all interested and qualified parties and award the contract to the party that will provide the services at the lowest cost, and may not draw specifications and requirements to favor any particular party. Advisory Ops. No. 83-004, 88-001, and 89-004. It must be noted that the criterion of this portion of R.C. 2921.42 (C)(2) is determined exclusively by the cost of the goods or services and does not, as is the case of R.C. 2921.42 (A)(3), require that the contract be competitively bid and be the lowest and best bid.

Divisions (C)(1) and (C)(3)

The other criteria of Division (C) must also be met in order for the mayor to establish the exemption available under that Division.

Division (C)(1) requires that the City reasonably and objectively demonstrate that the codification update services provided by the company are a necessary service for the city. Division (C)(3) requires that the treatment which the legal publishing company accords the City be either preferential to, or the same as, that accorded to other parties to which the legal publishing company sells services. Division (C)(4) requires that the City's award of a contract to the legal publishing company be conducted at arm's length, that the City know of the mayor's position with the legal publishing company and that the mayor refrain from taking part in the all deliberations or decisions of City officers and employees with respect to the contract. See also R.C. 2921.42 (A)(1) (discussed below.)

Prohibition Imposed by R.C. 2921.42 (A)(1)

Your attention is also directed to Division (A)(1) of Section 2921.42 of the Revised Code reads as follows:

- (A) No public official shall knowingly do any of the following:
 - (1) Authorize, or employ the authority or influence of his office to secure authorization of any public contract in which he, a member of his family, or any of his business associates has an interest.

The pertinent elements of this provision are: (1) a public official; (2) is prohibited from authorizing, or employing the authority or influence of his office to secure authorization; (3) of any public contract; (4) in which he, a member of his family, or any of his business associates; (5) has an interest. See Advisory Ops. No. 78-002, 85-015, and 92-008, respectively.

As explained above, the mayor, as president of the company and as a stockholder, has a definite and direct pecuniary and fiduciary interest in the legal publishing company's contracts. Because a public official's private employer is considered to be his business associate for purposes of R.C. 2921.42 (A)(1), the publishing company is also the mayor's business associate. See Advisory Ops. No. 78-006, 81-001, and 89-008.

If the burden of establishing that the codification update services provided by the legal publishing company are 'unobtainable elsewhere for the same or lower cost' can be met, then R.C.

2921.42 (A)(1) would prohibit the mayor from authorizing a contract between the legal publishing company and the City or using the authority or influence of his position to secure the contract.

Authorization of a Public Contract

The Ethics Commission has held that a public official will be deemed to have authorized a public contract, for purposes of R.C. 2921.42, where the contract could not have been awarded without the official's approval. Advisory Ops. No. 87-004 and 88-003. You have stated that, when the mayor was the City's law director, the decision to use the publishing company was in control of the former mayor and the safety-service director, and that when he became mayor, this matter was transferred to the law director's budget to avoid the mayor being required to make decisions regarding the purchase of the company's services. You also have stated that, while he served as a council member, the mayor did not vote on ordinances regarding code updates. You further state that, as mayor, he did not sign ordinances approving the code updates. Therefore, it is apparent that steps have been taken to avoid the mayor being placed in a position where he would be required to authorize a public contract between the City and the legal publishing company.

Use of Authority or Influence

However, R.C. 2921.42 (A)(1), in addition to prohibiting a public official from authorizing a contract in which a business associate has an interest, prohibits a public official from employing the "authority or influence of his office" to secure authorization of a public contract in which he or a business associate has an interest. The words "authority or influence" are not defined for purposes of R.C. 2921.42. However, the Ethics Commission has held that this prohibition of R.C. 2921.42 (A)(1) characterizes a broader range of activity than that described by the word "authorize." See Advisory Op. No. 95-004.

Therefore, R.C. 2921.42 (A)(1), by prohibiting a public official from employing the "authority or influence of his office," also prohibits the mayor from exercising the power and influence inherent in his position to secure a public contract for the publishing company. R.C. 2921.42 (A)(1) prohibits the mayor from any formal or informal participation with City officers and employees regarding matters that would affect the award, funding, performance, enforcement, supervision, or payment of a public contract between the City and the publishing company. This prohibition includes, but is not limited to, lobbying, discussing, recommending, or otherwise using the authority or influence of his office, either formally or informally, in matters affecting the City's purchase of codification update services from the company.

R.C. 102.03 (D) also prohibits a public official from using the authority or influence of his office to secure anything of value of a substantial and improper character, and prohibits an official from

participating, in any way, in a matter from which his business associate would receive a definite and direct personal pecuniary benefit. Advisory Ops. No. 89-008 and 89-015.

Prohibition Imposed by R.C. 2921.42 (A)(3)

Finally with regard to the mayor, R.C. 2921.42 (A)(3) prohibits a public official, during his term of office and for one year thereafter, from occupying a position of profit in the prosecution of a contract which was authorized by him, or by his legislative body, commission, or board, while he was a member, unless the contract was competitively bid and was the lowest and best bid.

Because you have stated that the mayor is not in a position where he would be required to authorize a public contract between the City and legal publishing company, and since the mayor is not a member of a legislative body, commission, or board, the prohibition imposed by R.C. 2921.42 (A)(3) does not apply to the mayor. However, R.C. 2921.42 (A)(3) is applicable to the council member and is set forth and fully addressed further below.

The Council Member

The council member is a salesman for the legal publishing company. He was appointed to council prior to his becoming a company employee. At the date of your request for an advisory opinion, the issue of renewing the contract with the company had not arisen during the council member's term. However, you stated that a renewal was anticipated in the near future and the council member would abstain from voting on a renewal of the contract.

Prohibition Imposed by R.C. 2921.42 (A)(4)

As stated above, a public official who has an ownership interest in a company has a pecuniary interest in the company's contracts for purposes of R.C. 2921.42. However, the Ethics Commission has held that, generally, a public official who is an employee of a company with no ownership interest in the company does not have a pecuniary interest a public contract between his public agency and private employer unless: (1) he is a director, trustee, or officer of the company; (2) he takes part in the company's contract negotiations; (3) his salary is based or dependent on the proceeds of the contract between his public agency and private employer; (4) he receives a share of the contract's proceeds in the form of a commission or fee; (5) his employment responsibilities include participation in the administration or execution of the contract between his public agency and private employer or he serves in a management position, with the responsibility to oversee the execution or administration of the contract; (6) the establishment or operation of the company is dependent upon receipt of the contract; or (7) the creation or continuation of the employee's position is dependent upon his employer receiving the award of such contract. See Advisory Ops. No. 78-006, 81-008, 82-003, 86-005, and 89-006, 89-008, and 89-011. See also Advisory Opinions No. 82-007, 84-008, 87-003, and 88-001 (a

public official is prohibited from having an interest in any subcontract entered into under a general public contract, as well as in the general public contract).

If the council member, as an employee of the publishing company, falls within any of the conditions described above, then the council member will be deemed to have an interest in the public contract between the City and the publishing company for purposes of R.C. 2921.42 (A)(4). If he is deemed to have an interest in the public contract between the City and the publishing company, then he is required to meet the exception provided by R.C. 2921.42 (C), as described above in order for the City to contract with the publishing company. See also R.C. 2921.42 (A)(3), (described below.) If he does not meet the conditions described above, then he will not be deemed to have an interest in a public contract with his own political subdivision and the prohibition imposed by R.C. 2921.42 (A)(4) will not apply.

Prohibition Imposed by R.C. 2921.42 (A)(1)

Regardless of whether the council member is deemed to have an interest in the public contract between the City and the publishing company, he is still subject to the prohibition imposed by R.C. 2921.42 (A)(1).

As explained above, R.C. 2921.42 (A)(1) prohibits the council member from participating, formally or informally in any issue regarding the renewal of the contract with the company. R.C. 2921.42 (A)(1) bars the council member from any formal or informal participation with City officers and employees regarding matters that would affect the award, funding, performance, enforcement, supervision, or payment of a public contract between the City and the publishing company.

Prohibition Imposed by R.C. 102.03 (D)

In addition to R.C. 2921.42 (A)(1), R.C. 102.03 (D) also prohibits the council member from participating in any matter which would affect the legal publishing company. See Advisory Ops. No. 88-005 and 89-008. In advisory Opinion No. 89-008, the Ethics Commission held:

A city council member who is in the position of making an official decision regarding the pecuniary interests of his private employer would have an inherent conflict of interest impairing the council member's objectivity and independence of judgment.

Prohibition Imposed by R.C. 2921.42 (A)(3)

Furthermore, the council member is subject to Division (A)(3) of Section 2921.42 which provides that no public official shall knowingly:

During his term of office or within one year thereafter, occupy any position of profit in the prosecution of a public contract authorized by him or by a legislative body, commission, or board of which he was a member at the time of authorization, and not let by competitive bidding or let by competitive bidding in which his is not the lowest and best bid.

It is crucial to note that R.C. 2921.42 (A)(3) does not speak in terms of a public official having an "interest" in a public contract, but rather prohibits a public official from occupying a "position of profit" in the prosecution of a public contract under specific circumstances. See Advisory Op. No. 92-013 (explaining the distinction between an "interest" and a "position of profit" in a public contract). Therefore, Division (C) of R.C. 2921.42 does not provide an exemption to the prohibition of Division (A)(3) of R.C. 2921.42. Advisory Op. No. 92-002.

R.C. 2921.42 (A)(3) prohibits a public official, during his term of office and for one year thereafter, from occupying a position of profit in the prosecution of a public contract that was authorized by him, or by the legislative body upon which he serves, unless the contract was competitively bid and was the lowest and best bid. The Ethics Commission has held that a public contract will be deemed to have been "authorized" by a public official, legislative body, board, or commission for purposes of R.C. 2921.42 (A)(3), where the public contract could not have been awarded without the public official's or entity's approval. Advisory Ops. No. 87-004, 88-006, and 89-008.

The Ethics Commission has held that a public official will be deemed to profit from a public contract which is awarded to the company which employs him, where: (1) the establishment or operation of his employing organization is dependent upon receipt of the contract; (2) the creation or continuation of the public official's position with his employer is dependent upon the award of the contract; (3) the contract proceeds would be used by his employer to compensate the public official or as a basis for his compensation; or (4) the public official would otherwise profit from the award of the contract. Advisory Ops. No. 87-004, 88-008, 92-002, and 92-008. Accordingly, R.C. 2921.42 (A)(3) prohibits the council member from profiting, as described above, from a contract entered into between the City and the legal publishing company unless the contract is made pursuant to competitive bidding and the publishing company has submitted the lowest and best bid.

The council member is bound by the prohibition imposed by R.C. 2921.42 (A)(3) regardless of the fact that he abstains from deliberating, voting upon, or otherwise authorizing the public contract. See Advisory Ops. No. 87-004, 87-008, 88-006, 88-008 and 89-008. See also R.C. 2921.42 (A)(1) and R.C. 102.03 (D) (discussed above). The council member is bound by the prohibition imposed by R.C. 2921.42 (A)(3) during his public service and for one year thereafter. Advisory Ops. No. 87-004, 87-008, 88-006, 88-008 and 89-008.

THE UTILITY COMPANY

You have provided this Office with information concerning the president of council and the utility company. The City purchases utility service from the company.

The President of Council

The president of council had held office as mayor before taking his present office. The president of council is a stockholder of the utility company but owns less than two percent of the utility company's outstanding shares. The president of council is a former employee of the utility company but is now retired. The City's use of the utility company for the provision of services pre-dates the service of the president of council as a city officer.

Prohibition Imposed by R.C. 2921.42 (A)(4)

As explained above, a public official who has an ownership interest in a company is considered to have an "interest" in the company's contracts for purposes of R.C. 2921.42. The Ethics Commission has held that a stockholder in a company is considered to have an interest in the company's contracts for purposes of R.C. 2921.42 (A)(4). See Advisory Ops. No. 92-005 and 93-001. Therefore, in the instant situation, the president of council, as a stockholder, has a definite and direct pecuniary interest in the utility company's contracts. Accordingly, the prohibition which R.C. 2921.42 (A)(4) imposes upon the president of council precludes the utility company from selling services to the City, subject to the exemption of Division (B).

Exemption Provided by R.C. 2921.42 (B)

However, as explained above, Division (B) provides a limited exemption to the prohibition of R.C. 2921.42 (A)(4). Division (B) provides that, in the absence of bribery or fraud, a public official shall not be considered to have an interest in a public contract with his own political subdivision when all of the following elements are met: (1) the interest of the public official is limited to owning or controlling shares of a corporation; (2) the amount owned or controlled does not exceed five percent of the outstanding shares of the corporation; and, (3) the public official, prior to the time the public contract is entered into, files with his political subdivision an affidavit giving his status with the organization. See Advisory Ops. No. 78-001, 78-002, 89-011, 90-005, and 93-001.

The Ethics Commission has held that the requirements of Division (B) are factual determinations, and whether the exemption can be met depends upon the facts and circumstances of each individual situation. Advisory Op. No. 93-001. The criteria necessary to meet the exemption provided by Division (B) are strictly applied against the public official, and the burden is on the official to demonstrate that he is in compliance with the exemption. Id.

In the instant situation, you have stated that the relation which the president of council has with the utility company is limited to owning two percent of the company's outstanding shares of stock.

R.C. 2921.42 (B)(3) requires that a public official file an affidavit with his political subdivision before the corporation and the political subdivision contract. Therefore, the Ethics Commission has held that the exception of Division (B) is not available to a public official who acquires an ownership interest in a corporation which is, at the time he acquires the ownership interest, providing goods or services to the political subdivision with which he serves. See Advisory Ops. No. 92-004 and 93-001. Therefore, in the instant situation, the president of council could meet the exemption of Division (B) provided his stockholding in the utility company was acquired prior to his becoming a City official. Division (B)(3) would require him to file the proper affidavit with the City identifying his status with the organization.

However, as explained above, the Ethics Commission's function in rendering an advisory opinion is not a fact-finding process. Thus, the Ethics Commission and its staff relies upon the accuracy and completeness of the facts that are presented to the Commission in the request for an advisory opinion. See Advisory Ops. No. 75-037, 90-013, 92-003, and 93-001.

If the president of council cannot meet the exemption of Division (B), he would have to meet the exception provided by Division (C) as set forth above in order for the utility company to sell utility services to the City.

Prohibition Imposed by R.C. 2921.42 (A)(1)

In addition, as explained above, R.C. 2921.42 (A)(1) prohibits a public official from authorizing, or using the authority or influence of his office to secure a public contract in which he or his business associates have an interest. The Ethics Commission has held that a person whose sole relationship to a corporation is that of a stockholder is not a "business associate" for purposes of R.C. 2921.42. Advisory Op. No. 93-001. If the president of council must meet the requirements of Division (C) in order to be exempted from the prohibition imposed by R.C. 2921.42 (A)(4), it must be noted that Division (C)(4) would require that the president of council take no part in any deliberations or decisions with regard to the contract for utility services.

Prohibition Imposed by R.C. 102.03 (D)

R.C. 102.03 (D) does not speak in terms of either a public official's or employee's "interest" or position of profit" in a public contract. Rather, R.C. 102.03 (D) prohibits a public official or employee from taking any action, formally, or informally, to secure a thing of value for himself or any party, if the thing of value could manifest a substantial and improper influence upon him with respect to his official duties. See Advisory Ops. No. 88-004, 91-004, and 93-001.

The facts and circumstances of each individual circumstance will determine whether a thing of value could manifest a substantial and improper influence upon a public official or employee. Advisory Op. No. 87-008 and 88-004. The Ethics Commission has held that if the facts and circumstance establish that a public official's or employee's stock ownership in a corporation could impair the official's or employee's independence of judgment and thus manifest a substantial and improper influence upon him with respect to his official duties, then R.C. 102.03 (D) would prohibit the official or employee from participating in matters that affect the corporation. See Advisory Ops. No. 88-004 and 93-001.

However, because you have stated that the president of council has not, and will not, take part in deliberations or decision-making relating to the City's contract with the utility company, the prohibition imposed by R.C. 102.03 (D) need not be addressed further. The Ethics Commission has recognized that, even if R.C. 102.03 (D) does not prohibit a public official or employee from participating in a matter, the public official or employee avoids the appearance of impropriety by not participating in a matter that could secure a thing of value for himself or a corporation in which he owns stock. Advisory Op. No. 93-001.

Prohibition Imposed by R.C. 2921.42 (A)(3)

As explained above, the Ethics Commission has held that a person with an ownership interest in a business occupies a position of profit in the contracts of that business for purposes of R.C. 2921.42 (A)(3). Advisory Op. No. 90-003 and 93-001. Because a stockholder of a corporation has an ownership interest in the corporation, the Ethics Commission has held that a public official who owns stock in a corporation will be deemed to profit from the contracts of the corporation. Advisory Op. No. 93-001 (the profitability of a corporation's business transactions will definitely and directly affect a stockholder's return on his invested capital).

The Ethics Commission has noted that R.C. 2921.42 (A)(3) does not delineate an amount of profit under which its prohibition will not apply. Advisory Ops. No. 90-005 and 93-001. Thus, a stockholder who owns any amount of stock in a corporation will be deemed to occupy a position of profit from the corporation's contract. Advisory Op. No. 93-001.

The issue becomes whether the president of council is in position where he "authorizes" public contracts for purposes of Division (A)(3).

R.C. 733.09 establishes the duties of the president of council of a statutory city. Pursuant to R.C. 733.09, the president of council is elected to office for a term of either two or four years. R.C. 733.09 further provides that the president of council presides at all meetings of the city's legislative authority but has no vote therein except in the case of a tie. R.C. 733.01 enumerates a statutory city's executive officers and includes the president of council. Therefore, the president of council is not

considered to be a member of council but rather serves in the executive branch of city government. See also State ex rel. Roberts v. Snyder, 149 Ohio St. 333 (1948); Att'y Gen. Op. 90-063; 1946 Att'y Gen. Op. No. 744; and Ohio Ethics Commission Op. No. 91-007.

Therefore, the only situation in which the president of council would be required to abide by the provisions of Division (A)(3) is if he authorized the contract between the City and the utility company by voting in the case of a tie. In such a situation, R.C. 2921.42 (A)(3) prohibits the president of council from profiting, as described above, from a contract entered into between the City and the utility company unless the contract is made pursuant to competitive bidding and the utility company has submitted the lowest and best bid. The president of council is bound by the prohibition of Division (A)(3) during his public service and for one year thereafter. See Advisory Ops. No. 87-004, 87-008, 88-006, 88-008 and 89-008.

Use of Confidential Information

Your attention is directed to R.C. 102.03 (B), which 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.

R.C. 102.03 (B) prohibits a public official or employee from disclosing confidential information which he acquired in his public position. The mayor, member of council, and president of council are prohibited from disclosing confidential information acquired in the course of their official duties to any person, or using such information, without appropriate authorization. Advisory Op. No. 89-006. This limitation is applicable during their public service, and after, and remains in effect as long as the information remains confidential. Id.

Other Restrictions

As a final matter, your attention is directed to other statutory restrictions against City officers having an interest in a public contract with their own political subdivision. R.C. 731.02 provides, in pertinent part:

Each member of the legislative authority shall be an elector of the city . . . and shall not be interested in any contract with the city.

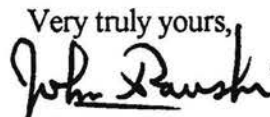
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Also, R.C. 733.72 provides for the removal from public office of municipal officers for being interested, "directed or indirectly, in the profits of a contract, job, work, or service" with their own municipality.

The Ethics Commission does not have advisory jurisdiction over R.C. 731.02 and R.C. 733.72. The Attorney General, however, in Att'y Gen. Op. No. 82-008 interpreted R.C. 2921.42 in conjunction with a similar statute, R.C. 511.13, which prohibits township trustees from having any interest in a contract with their township. The Attorney General declined to apply the exemption of R.C. 2921.42 (C) to R.C. 511.13. The Attorney General held that R.C. 2921.42 is part of the Criminal Code, and exemptions exist as the legislature did not wish to impose penal sanctions for dealings in which the public official's personal interest would be very remote or clearly aboveboard. In contract, the Attorney General held, in Att'y Gen Op. No. 82-008, that R.C. 511.13 is a remedial statute that safeguards the public interest by introducing a regulation conducive to the public good, and that the surest means to prevent favoritism and fraud is to prohibit all contracts between a public official and his political subdivision. See also Ohio Ethics Commission Advisory Op. No. 84-006. The issue of whether R.C. 731.02 and R.C. 733.72 apply in the instant situation is for your determination as Law Director for the City of Mount Healthy.

This advisory opinion was approved by the Ethics Commission at its meeting on August 11, 1995. It is based on the facts presented and 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. The Commission apologizes for the delay in responding to your request, and regrets any inconvenience this delay may have caused.

If you have any questions, or wish to request a formal advisory opinion, please feel free to contact this Office again.

Very truly yours,

John Rawski
Staff Attorney