

OHIO ETHICS COMMISSION

Santiago Feliciano, Jr.
Commission Chair

David E. Freel
Executive Director



8 East Long Street, 10th Floor
Columbus, Ohio 43215
Telephone: (614) 466-7090
Fax: (614) 466-8368
Website: <http://www.ethics.state.oh.us>

April 14, 2000 Informal Opinion 2000-INF-0414-4

The Honorable Kevin J. Baxter
Prosecuting Attorney of Erie County

Dear Prosecutor Baxter:

In a letter received by the Ethics Commission on January 26, 2000, you asked whether the Ohio Ethics Law and related statutes prohibit a company in which you are a managing partner and have a thirty percent ownership interest from receiving federal grant money awarded pursuant to an application submitted by your client, the Erie County Commission.

As more fully explained below, R.C. 2921.42(A)(4) would prohibit a company in which you are a managing partner and have a thirty percent ownership interest from receiving federal grant money awarded pursuant to an application submitted by your client, the Erie County Commission, unless you can demonstrate compliance with each of the four requirements in the exception to the prohibition. R.C. 2921.42(A)(1) and R.C. 102.03(D) would prohibit you from discussing, deliberating, or otherwise using your authority or influence as the county prosecuting attorney, either formally or informally, to secure for that company the award of the grant. R.C. 102.03(D) and (E) and R.C. 102.04(C) would prohibit you from receiving compensation for representing that company on a grant application before Erie County Commission or another Erie County agency or instrumentality. Finally, R.C. 102.03(B) would prohibit you from disclosing confidential information to that company or to any party, or using such confidential information, without appropriate authorization.

Facts

You are the Prosecuting Attorney for Erie County. In 1997, you and Duane Ohly founded Island Express Boat Lines, Ltd. (Island Express), a limited liability company that owns and operates high speed ferries that run to and from downtown Sandusky and the Lake Erie Islands. You stated that there are twenty investors in the company and four managing partners. You stated that you are a managing partner and own about thirty percent of the company.

You stated that one of Island Express' competitors is Jet Express, a company located in Ottawa County. You stated that Jet Express was the beneficiary of federal grant moneys as a result of the Ottawa County Commission's submission of a grant application. You stated that this grant will allow Jet Express to expand its operations by purchasing an additional high-speed vessel. You have further stated that Duane Ohly, partner and co-founder of Island Express, has approached the Erie County Commission with regard to filing a similar grant application for the benefit of Island Express. You have stated that the Erie County Commission is considering this matter.

You have indicated that this situation presents an ethical dilemma, because, as Prosecuting Attorney for Erie County, the Erie County Commission is your client. You have stated your intention to recuse yourself and members of your office from any involvement in the Erie County Commission's consideration of this matter. You have stated that you intend to instruct the Erie County Commission to seek outside counsel with reference to the application process. You have stated that the Erie County Commission is aware of your interest in this matter. You have asked for guidance for yourself and for the Erie County Commission with regard to this matter to avoid any conflict of interest or appearance of impropriety.

Prohibited Interest in a Public Contract—R.C. 2921.42(A)(4)

Your question implicates Division (A)(4) of Section 2921.42 of the Revised Code, which 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.

A county prosecuting attorney is a public official for purposes of R.C. 2921.42 and is subject to its prohibitions. See R.C. 2921.01(A); Ohio Ethics Commission Advisory Opinion No. 90-007. R.C. 2921.42(G)(1) defines a "public contract" for purposes of R.C. 2921.42 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 or any agency or instrumentality of a political subdivision. The Commission has held that a political subdivision's purchase or acquisition of community and economic development services, or urban renewal or revitalization services through the use of grants, loans, land reutilization programs, and other similar programs constitutes a "public contract" for purposes of R.C. 2921.42. See Adv. Ops. No. 83-005, 85-002, 88-006, and 89-008.

R.C. 2921.42(A)(4) prohibits a public official from having an interest in the profits or benefits of a public contract entered into by a political subdivision or governmental agency or instrumentality with which he is "connected." The Ethics Commission has held that to be "connected with" something is to be related to, or associated with, that entity. See Adv. Op. No. 87-002. The county prosecuting attorney is related to, or associated with, the county commission that he represents, and is therefore, "connected with" that county commission for purposes of R.C. 2921.42(A)(4). See Adv. Op. No. 90-007 (a county prosecutor is "connected" with a public body for which he is statutorily required to serve as legal counsel).

An "interest" which is prohibited under R.C. 2921.42 must be definite and direct, and may be either pecuniary or fiduciary in nature. See Adv. Op. No. 89-004. The Ethics Commission has held that a public official who has an ownership interest in, or serves as an officer of, a business has an interest in the contracts of that business for purposes of R.C. 2921.42. See Adv. Op. No. 89-008. As a managing partner with a thirty percent ownership interest in Island Express, you have an "interest" in its contracts for purposes of R.C. 2921.42(A)(4). See Adv. Op. No. 93-001.

Thus, R.C. 2921.42(A)(4) would prohibit you, as the county prosecutor, from having an "interest" in a federal grant awarded pursuant to an application submitted by the county commission that you represent. Because of your prohibited interest, R.C. 2921.42(A)(4) would prohibit Island Express from receiving the grant at issue, unless you can demonstrate compliance with the requirements in the applicable exception to the prohibition of R.C. 2921.42(A)(4).

Exception Provided by R.C. 2921.42(C)

The only applicable exception to the prohibition of R.C. 2921.42(A)(4) in the instant situation is R.C. 2921.42(C), which provides as follows:

- (C) This section does not apply to a public contract in which a public official, member of his family, or one of his business associates has an interest, when 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.

These criteria are strictly construed against the public official and the burden is on the public official to demonstrate compliance with the exception. See Adv. Ops. No. 84-011, 87-003, and 91-011. Therefore, in order for Island Express to receive the grant, all four parts of the exception provided by Division (C) of Section 2921.42 must be met. See Adv. Ops. No. 84-011 and 91-011.

The Ethics Commission has held that, with regard to the first and third criteria of Division (C), community development services that are provided by participants in a public agency's community development program are "necessary services" for the community, and public officers and employees who wish to participate in the programs would have no "customers or clients in similar transactions." See Adv. Ops. No. 84-011 and 91-011. The Commission has also held that a transaction would be conducted at "arm's length" for purposes of the fourth criterion of Division (C), where the public officer or employee is not responsible for determining who is eligible to be a participant in the program, or otherwise employed in a decision-making role with regard to the program, and the public agency has full knowledge of the officer's or employee's participation. Id. The Commission has also held that the agency's procedure for designating the need to be served by community development, the notice to prospective applicants, and the selection of qualified applicants must be fair and objective with no preference given to public officers or employees. Id.

Depending on the facts and circumstances of your situation, you may be able to demonstrate compliance with Divisions (C)(1), (C)(3), and (C)(4). The most difficult requirement for you to comply with may be the one set forth in R.C. 2921.42(C)(2). Division (C)(2) requires that a public official show that the supplies or services he is offering to his governmental agency are "unobtainable elsewhere for the same or lower cost" or that the contract is part of a "continuing course of dealing" established prior to him becoming associated with the governmental agency. See Adv. Ops. No. 84-011 and 88-008, respectively. You cannot meet the "continuing course of dealing" portion of Division (C)(2) because the proposed grant is not part of a "continuing course of dealing" established prior to your association with Erie County. Thus, in order to comply with the requirement of Division (C)(2), you must demonstrate by some objective criteria that the services Island Express is offering the county through its participation in the grant program are "unobtainable elsewhere for the same or lower cost."

The Commission explained the "unobtainable elsewhere for the same or lower cost" requirement in Advisory Opinion No. 84-011 as follows:

The criterion that the goods or services be “unobtainable elsewhere 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 city employee must receive preference. Thus, it is only when all qualified persons who are not city employees have received grants or loans and funds are still available that the rehabilitation of the city employee’s property is “unobtainable elsewhere for the same or lower cost.” (Emphasis in original.)

The Commission explained in Advisory Opinion No. 84-011 that the requirements of Division (C)(2) were met in a city’s federally funded program which provided grants or loans for housing rehabilitation where: (1) there were sufficient funds available; (2) all of the qualified applicants in the target area had received grants or loans, except the city employee; and, (3) the funds would have lapsed if not used in the target area within a specified period of time. The Commission also noted in Advisory Opinion No. 84-011 that the city employee met the criteria for the grant and would have been unable to rehabilitate his property without the grant, so that the city would have been unable to achieve its goal of rehabilitating all qualified homes in the target area, unless the city employee received the grant.

Therefore, the general principle in applying the exception of Division (C)(2) to the participation of a public officer or employee in a community development and revitalization program is that if the demand by persons who are not public officers or employees for the resources furnished by the public agency exceeds supply, then the “unobtainable elsewhere” exception of Division (C)(2) cannot be met by a public officer or employee. Adv. Op. No. 91-011. However, if the supply of resources furnished by the public agency exceeds demand, then the “unobtainable elsewhere” exception provided by Division (C)(2) may be met and a public officer or employee may participate if all other requirements of Division (C) have been met. Id.

The issue becomes whether the “unobtainable elsewhere” requirement of Division (C)(2) may be met in the instant situation. Island Express may be eligible to receive the grant pursuant to this exception if all other persons who are interested in, and eligible for, the grant have received grant moneys, and sufficient funds are available, and the funds will lapse if not used in the target area within a specified period of time. In a telephone conversation with Commission staff, you have stated that Island Express is the only high speed ferry company in Erie County, and that it may be the only company in the county that qualifies for the particular kind of grant involved. As you have also stated, the County Commissioners are aware of your financial interest in this company, and they will seek outside counsel with reference to the application and the issues considered by the Ethics Commission herein. As mentioned previously, the facts and circumstances of each particular situation will determine whether the exception of Division (C) has been met. See Adv. Op. No. 84-011. The burden is on you to demonstrate compliance with the requirement in R.C. 2921.42(C)(2), as discussed above, and the other requirements in the exception. See Adv. Op. No. 91-011.

It must be noted that the Ethics Commission has held that its function in rendering advisory opinions is not a fact-finding process. Adv. Ops. No. 75-037, 90-013, and 92-013. The Ethics Commission cannot determine in an advisory opinion whether certain facts exist, but must rely on the accuracy and completeness of the facts presented in the request for an opinion. Adv. Op. No. 75-037. 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. Adv. Ops. No. 75-037 and 90-013. Therefore, while this advisory opinion can determine that grant applicants may be eligible for the exception provided by Division (C) of R.C. 2921.42, it cannot determine whether all of the criteria described within the exception of Division (C) are established factually and as a matter of law for any applicant and in any particular situation.

Authorizing a Public Contract—R.C. 2921.42(A)(1)

Your question also implicates Division (A)(1) of Section 2921.42, which provides that:

- (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.

As discussed previously, as a thirty percent owner and managing partner of Island Express, you have an interest in the contracts of Island Express. Furthermore, Island Express is considered to be your “business associate” for purposes of R.C. 2921.42(A)(1). See Adv. Op. No. 85-004.

You have stated that neither you, nor anyone in your office, will participate in the Erie County Commission’s consideration of the proposed grant. You have also stated that you will instruct the Erie County Commission to seek outside counsel with reference to the grant application process. As a county prosecutor who is a thirty percent owner and managing partner of a company that is seeking federal grant money through the county commission that he represents, you are prohibited by R.C. 2921.42(A)(1) from discussing, deliberating, or otherwise using your authority or influence as the county prosecuting attorney, either formally or informally, to secure for that company the award of the grant. See generally Adv. Op. No. 92-012. Furthermore, you are also prohibited from participating in any matter or decision that would affect the continuation, implementation, or terms and conditions of a grant that has been awarded to Island Express. See generally Adv. Ops. No. 89-005 and 92-012.

Conflict of Interest and Representation Prohibitions—R.C. 102.03(D) and (E) and R.C. 102.04(C)

Your question also implicates Divisions (D) and (E) of Section 102.03 of the Revised Code, which provide as follows:

- (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.

A "public official or employee" is defined for purposes of Chapter 102. to include any person who is elected to an office of a county. See R.C. 102.01(B) and (C). A county prosecutor is a "public official or employee" for purposes of R.C. 102.03. See R.C. 309.01; Adv. Op. No. 90-007. The term "anything of value" is defined for purposes of R.C. 102.03 in R.C. 1.03 to include money and every other thing of value. See R.C. 102.01(G). Therefore, a grant of federal moneys awarded pursuant to an application submitted by a county commission falls within the definition of "anything of value."

R.C. 102.03(D) prohibits a public official from using the authority or influence of his office to secure anything of value for himself, or for another person, business, or other entity if the thing of value could manifest a substantial and improper influence upon the official with respect to his duties. See Adv. Ops. No. 88-004, 88-005, and 89-005. A grant for a company in which a public official has a thirty percent ownership interest and is a managing partner is a thing of value that is of such character as to manifest a substantial and improper influence upon the public official with respect to his duties. See Adv. Op. No. 88-004. A grant is a substantial thing of value which could affect a county prosecutor's ability to perform the duties of his office with respect to the grant. This would be true whether the grant is received by the prosecutor directly or by his business associate. Thus, R.C. 102.03(D) would prohibit you from deliberating, participating in discussions, or otherwise using your official position, either formally or informally, with regard to an application for a grant to be submitted by a county commission that is your client.

In a telephone conversation with Commission staff, you have stated that you will not "represent" Island Express at any point in its grant application. You should be aware that R.C. 102.03(D) and (E), and R.C. 102.04(C), would also prohibit you from receiving compensation for representing Island Express on an application for a grant before the Erie County Commission or another Erie County agency or instrumentality. See Adv. Ops. No. 89-008 and 93-004. (See also R.C. 102.03(A), which generally prohibits a public official, during his public service or for twelve months thereafter, from representing any person before any public agency on any matter in which he personally participated as a public official.).

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

As a final matter, Division (B) of Section 102.03 reads:

No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by the public official or employee in the course of the public official's or employee's official duties that is confidential because of statutory provisions, or that has been clearly designated to the public official or employee as confidential when that 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.

Thus, you would be prohibited from disclosing confidential information to Island Express, or to any other party, or using such confidential information, without appropriate authorization. No time limitation exists for this prohibition. Adv. Op. No. 88-009. It is effective while you serve in a public position and after you leave public service. Id.

Conclusion

As explained more fully above, R.C. 2921.42(A)(4) would prohibit a company in which you are a managing partner and have a thirty percent ownership interest from receiving federal grant money awarded pursuant to an application submitted by your client, the Erie County Commission, unless you can demonstrate compliance with each of the four requirements in the exception to the prohibition. R.C. 2921.42(A)(1) and R.C. 102.03(D) would prohibit you from discussing, deliberating, or otherwise using your authority or influence as the county prosecuting attorney, either formally or informally, to secure for that company the award of the grant. R.C. 102.03(D) and (E) and R.C. 102.04(C) would prohibit you from receiving compensation for representing that company on a grant application before Erie County Commission or another Erie County agency or instrumentality. Finally, R.C. 102.03(B) would prohibit you from disclosing confidential information to that company or to any party, or using such confidential information, without appropriate authorization.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on April 14, 2000. The opinion is based on the facts presented and is limited to questions arising under Chapter 102. and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code and does not purport to interpret other laws or rules.

Sincerely,



Laura Evans Nolan
Staff Attorney