

OHIO ETHICS COMMISSION

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September 28, 2001

Informal Opinion 2001-INF-0928

Richard Sheir



Dear Mr. Sheir:

In a letter received by the Ohio Ethics Commission on March 27, 2001, you have asked whether the Ethics Law and related statutes prohibit you, as a former employee of the Ohio Department of Job and Family Services (ODJFS), from doing business with ODJFS and county human service agencies within one year of the date you left your employment with ODJFS.

Opinion Summary

As explained more fully below, based solely on the specific facts that you have provided in your letter to the Ethics Commission, and assuming that these facts are complete and accurate, and further provided that you adhere to the other restrictions of the Ethics Law and related statutes as described herein, R.C. 102.03(A)(1) does not prohibit you, within one year of the date you left your employment with ODJFS, from engaging in the private business activity that you describe in your letter to the Ethics Commission.

R.C. 2921.42(A)(3) prohibits you from profiting, within one year of leaving your position with ODJFS, from any contract that you authorized during the course of your public employment.

Also, R.C. 102.03(B) prohibits you from disclosing or using, without appropriate authorization, any information that you acquired in the course of your official duties at ODJFS that is confidential because of statutory provisions or that has properly been designated as confidential.

Facts

In your letter to the Ethics Commission, you explain that you resigned from your position with ODJFS on November 4, 2000. You further explain that you would like to do business with ODJFS and county human service agencies within one year of leaving your position with ODJFS.

You state that you were the section chief of the four-person Performance Standards section of the Bureau of Performance Management of the Office of Research, Assessment and Accountability. You state that your unit prepared statistical reports and a monthly database that provided counties with a query file that detailed the roster of public assistance recipients including demographics and details on monthly work activities. You further state that your section was also responsible for providing direct program support for Andersen Consulting on a statewide Decision Support System project that was eventually abandoned.

You explain that when the deputy in charge of the Office of Research, Assessment and Accountability disbanded the Bureau of Performance Management, you were assigned to work as one of two state employees who provided full-time program support for numerous consultants working on a data warehouse project. You state that you were assigned to draft an acceptance plan for the testing of the veracity of the data prior to a rollout. You explain that the plan that you worked on was scheduled to commence in August 2000, but that, as of the date of your letter, no acceptance testing has begun.

You further provide that after you had completed the principle draft of the acceptance test for the project described above, you were assigned to work with colleagues in the Labor Market Information Division on the High Performance Bonus, a program that generated seven numbers a quarter from wage records for the use of the U.S. Department of Health and Human Services.

You state that in July 2000, you and your wife sent a suggestion to Jacqueline Romer-Sensky, who was then the Director of ODJFS, asking that the agency establish a sheltered workshop for public assistance recipients that would help the state enforce R.C. 4141.044.¹ You further state that former Director Romer-Sensky's response indicated that the agency had addressed R.C. 4141.044. You also state that, from the former Director's perspective, your suggestion would be have been duplicative of the agency's efforts at that time. You explain that you believe that your suggested approach to R.C. 4141.044 never received serious consideration.

You explain that you have spent months preparing to vend a product called "Job Leads" (Ohio TM). You state that "Job Leads" helps one-stop staff in all program streams to assist their clients in self-directed job search. For example, as you indicate, public assistance recipients who are working are asked when they update their employment records whether their current employer is hiring. The information provided in response to this inquiry then goes to an

¹ R.C. 4141.044 provides the following:

Any person or corporation contracting to do business with the state of Ohio shall provide a listing of all available job vacancies within the person's or corporation's power to fill to the director of job and family services, who shall attempt to fill such job vacancies with persons registered with the director. This section shall not apply to job vacancies which a person or corporation proposes to fill from within the person's or corporation's own organization or to job vacancies which a person or corporation proposes to fill pursuant to a customary and traditional employer-union hiring arrangement, except that once a person or corporation considers applicants outside of the person's or corporation's own organization or customary and traditional employer-union hiring arrangement, this exclusion shall not apply.

employment supervisor and the veterans' representative to coordinate job development for other clients. You further state that "Job Leads" will provide a list of all new business startups to county staff, and that it will also provide projected staffing patterns for those businesses.

You explain that "Job Leads" will include a list of all Ohio employers within a county who are on the state's vendor list. Subscription slots would be offered to "ohioprocurement.com," a Web site that would provide detailed information on state procurement and thus help businesses to better understand state procurement from the individual purchase perspective and better target their efforts toward markets that have past experience purchasing a similar product.

You state that there is nothing in either the "Job Leads" program or ohioprocurement.com that was discussed while you were an employee at ODJFS. You explain that it is a copyrighted product that is unique from anything in the market. You state that no other state has ever attempted to use information access for its procurement vendor list as an inducement to get employers to interview and hire those on entitlements.

Based on the specific facts of your situation, as outlined above, you have asked whether the Ethics Law and related statutes prohibit you from working on and marketing "Job Leads" and related programs that you described in your letter.

Post Employment Restrictions of the Ethics Law

Your question implicates several provisions of the Ohio Ethics Law and related statutes that impose post-employment restrictions upon former state employees. These prohibitions fall into three areas: (1) representing parties before public agencies; (2) profiting from public contracts in specified situations; and (3) releasing confidential information.

The Revolving Door Prohibition—R.C. 102.03(A)

The situation that you have described in your letter implicates R.C. 102.03(A), the "Revolving Door" prohibition of the Ohio Ethics Law, which imposes restrictions upon the ability of former public officials and employees to represent a client or act in a representative capacity for any person after leaving public service. R.C. 102.03(A)(1) provides:

No present or former public official or employee shall, during public employment or service or for twelve months thereafter, represent a client or act in a representative capacity for any person on any matter in which the public official or employee personally participated as a public official or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion.

The pertinent elements of this provision are: (1) a present or former public official or employee; (2) is prohibited from representing a client or acting in a representative capacity for any person; (3) before any public agency; (4) on any matter in which he personally participated

as a public official or employee; (5) during government service and for one year thereafter. See Adv. Ops. No. 86-001, 89-009, 91-009, and 92-005. The Franklin County Court of Appeals upheld the "Revolving Door" prohibition as constitutional in State v. Nipps, 66 Ohio App. 2d 17 (1979).

As a former employee of an administrative department of the state, you are a former "public official or employee" for purposes of R.C. 102.03(A), and are subject to its statutory prohibitions. See R.C. 102.01(B) and (C). Accordingly, R.C. 102.03(A) prohibits you, for a period of one year from the date you left your state employment, from representing any person, before any public agency, on any matter in which you personally participated while you were employed with ODJFS. Adv. Ops. No. 91-009 and 92-005.

The term "represent" is defined in R.C. 102.03(A)(5) to include "any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person." Examples of the types of activities that would fall within the definition of the term "represent," for purposes of this section, were described by the Ethics Commission in Advisory Opinion No. 86-001:

[T]his would include activities ranging from an appearance on behalf of a private client in a formal proceeding or meeting to informal "lobbying" of agency personnel by telephone or in person. It also includes written communications ranging from formal documents and filings to informal letters and notes. Even if the attorney or consultant does not sign the documents, letters, or notes, the prohibition would apply if she prepared the communication. If she merely consulted with the attorneys or other personnel who prepared the documents, letters, or notes, the prohibition would not apply.

R.C. 102.03(A) prohibits a former public official or employee from "representing" a client, new employer, or any other party, on a matter in which he personally participated, before any public agency, and not just before the agency with which he was previously employed. See Adv. Ops. No. 86-001, 87-001, and 92-005.

A "person," for purposes of R.C. 102.03(A)(1), has been interpreted by the Commission to include governmental agencies, individuals, corporations, business trusts, estates, trusts, partnerships, and associations. See R.C. 1.59(C) and Adv. Ops. No. 82-002 and 89-003. In your situation, this would include county human service agencies and any other "person." The prohibition in R.C. 102.03(A) applies to any "matter" in which the official or employee personally participated. The term "matter" is defined, for purposes of R.C. 102.03(A)(1) and (3), to include "any case, proceeding, application, determination, issue, or question, but does not include the proposal, consideration, or enactment of statutes, rules, ordinances, resolutions, or charter or constitutional amendments." R.C. 102.03(A)(5). The term "matter" is broadly defined under R.C. 102.03(A) and includes any issue or question, as well as particular cases, proceedings, applications, and determinations. See Adv. Ops. No. 91-009 and 92-005. In Advisory Opinion No. 99-001, the Ethics Commission further defined "matter" as follows:

"Matter" includes such concrete items as a specific occurrence or problem requiring discussion, decision, research, or investigation, a lawsuit or legal proceedings, an oral or written application, and a settlement of a dispute or question. "Matter" also includes such abstract items as a dispute of special or public importance and a controversy submitted for consideration. It is also apparent, however, that the term "matter" cannot be interpreted so broadly as to include a general subject matter.

In your situation, for example, the term matter would include specific ODJFS projects and issues, questions, and proceedings related to those projects.

R.C. 102.03(A) defines "personal participation" to include "decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion." In Advisory Opinion No. 91-009, the Ethics Commission held that "personal participation" in a matter also includes the exercise of "supervision or general oversight" over other personnel in their work on that matter, since supervision of a public official's or employee's activities involves decision-making, approval or disapproval, recommendation or advice, and other exercises of administrative discretion, by the supervisor, regarding that matter. See also Adv. Op. No. 92-005.

Therefore, R.C. 102.03(A) prohibits you from representing any person before any public agency on any matter in which you personally participated, whether you were primarily responsible for the matter, or supervised other officials or employees on the matter. See Adv. Op. No. 91-009. You would not be prohibited, however, from representing any party before any public agency on new matters or matters in which you did not personally participate as a public official or employee. See Adv. Op. No. 92-005.

In your letter to the Commission, you explain that, while you were publicly employed, you were assigned to work on public assistance statistics and data processing test design, and to provide direct staff support for consultants working on a date warehouse project. You also indicate that you sent a suggestion to the former Director of ODJFS asking that the agency establish a sheltered workshop for public assistance recipients that would help the state enforce R.C. 4141.044. You state, however, that you believe your suggestion did not receive serious consideration from the former Director. Based on the information that you have provided, the key question is whether you would, within one year of leaving ODJFS, be representing any person on any matter in which you personally participated as a public employee.

As stated above, "person" is defined to include governmental agencies, individuals, corporations, business trusts, estates, trusts, partnerships, and associations. Based on the definition of "person," you would, for example, be prohibited from representing yourself on any matter in which you personally participated as a public employee. You would be prohibited from representing your own interests before ODJFS, county human services agencies, or any other public agencies on any "matter" in which you personally participated as a public employee. You would also be prohibited from representing the interests of a corporation or other business

entity, or any other "person," before any public agencies, on any "matter" in which you personally participated as a public employee.

The next determination that must be made is whether your proposed private business activity, as described in your letter to the Commission, is, or involves, a "matter" in which you personally participated as a public employee. As stated above, "matter" includes such concrete items as a specific occurrence or problem requiring discussion, decision, research, or investigation, a lawsuit or legal proceedings, an oral or written application, and a settlement of a dispute or question. "Matter" also includes such abstract items as a dispute of special or public importance and a controversy submitted for consideration. Therefore, "matter" would include specific occurrences or problems concerning R.C. 4141.044 programs and ODJFS' efforts to address R.C. 4141.044. You would be prohibited from representing any person on any matter related to the R.C. 4141.044 program in which you personally participated as a public employee. The only remaining question is whether you would, in the course of doing business with ODJFS and county human service agencies, be representing a person on a matter in which you personally participated.

Personal participation is defined as "decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion." In your letter to the Ethics Commission, you explain that, while you were employed by ODJFS, your involvement with R.C. 4141.044 programs was limited to a "suggestion" you made to ODJFS to consider a different approach that would help the state enforce R.C. 4141.044. You explain that your suggested approach did not receive serious consideration. The question of whether what you describe as a "suggestion," and ODJFS's response, fall within the definition of personal participation is dependent upon the facts and cannot be resolved by an advisory opinion.

If your activities with respect to R.C. 4141.044 programs were limited to conduct that is not "personal participation," for purposes of R.C. 102.03(A)(1), and provided that you comply with the other restrictions of the Ethics Law and related statutes as described herein, R.C. 102.03(A)(1) does not prohibit you, within one year of the date you left your employment with ODJFS, from engaging in the private business activity that you describe in your letter to the Ethics Commission. If your activities were not so limited, those activities may constitute "personal participation," with respect to R.C. 4141.044 programs and you are barred from activities so related for one year under R.C. 102.03(A).

Profiting From a Public Contract—R.C. 2921.42(A)(3)

The situation that you have described in your letter may also implicate R.C. 2921.42(A)(3), 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, unless the contract was let by competitive bidding to the lowest and best bidder.

An employee of the state is a public official for purposes of R.C. 2921.42 and is subject to the prohibitions of R.C. 2921.42(A)(3). See R.C. 2921.01(A). Therefore, an employee of ODJFS is a public official subject to the prohibitions of R.C. 2921.42(A)(3). See R.C. 121.02(H) (ODJFS is an administrative department of the State). The term "public contract" is defined, for purposes of R.C. 2921.42 in Division (G)(1)(a) 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 the state, any of its political subdivisions, or any agency or instrumentality of either. You should note that the Ethics Commission has stated that a grant is a public contract where a public agency receives property or services in return for the issuance of the grant. See Adv. Ops. No. 87-003, 89-006, and 95-007.

For purposes of R.C. 2921.42(A)(3), a public contract will be deemed to have been "authorized" by a public official or board if the contract could not have been awarded without the approval of the official, or the office or position in which the public official serves, or the board on which he sits. See Adv. Ops. No. 88-008, 91-009, and 92-017.

Based on the information that you provided in your letter to the Ethics Commission, it appears that you did not participate in the authorization of contracts at ODJFS. If you were involved in the authorization of ODJFS contracts, you should be aware that R.C. 2921.42(A)(3) prohibits you from profiting, within one year of the date you resigned, from an ODJFS contract that you authorized in the course of your public employment. You would be prohibited from profiting from an ODJFS contract unless it is awarded pursuant to competitive bidding to the lowest and best bidder. If you have questions regarding this prohibition, please contact this Office for further information.

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

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

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.

Pursuant to this section, you are prohibited from disclosing or using, without appropriate authorization, any confidential information that you acquired in the course of your official duties. 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, based solely on the specific facts that you have provided in your letter to the Ethics Commission, and assuming that these facts are complete and accurate, and further provided that you adhere to the other restrictions of the Ethics Law and related statutes as described herein, R.C. 102.03(A)(1) does not prohibit you, within one year of the date you left your employment with ODJFS, from engaging in the private business activity that you describe in your letter to the Ethics Commission.

R.C. 2921.42(A)(3) prohibits you from profiting, within one year of leaving your position with ODJFS, from any contract that you authorized during the course of your public employment.

Also, R.C. 102.03(B) prohibits you from disclosing or using, without appropriate authorization, any information that you acquired in the course of your official duties at ODJFS that is confidential because of statutory provisions or that has properly been designated as confidential.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on September 7, 2001. 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. This opinion reaches no conclusions as to any past activity. If you have any questions or desire additional information, please contact this Office again.

Sincerely,



Timothy L. Gates
Staff Attorney