

OHIO ETHICS COMMISSION

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June 12, 2006

Informal Opinion 2006-INF-0612

Yvonne Lesicko
Cincinnati Bell Telephone

John W. Honabarger
Honabarger & Associates

Dear Ms. Lesicko and Mr. Honabarger:

In April 2006, the Ohio Ethics Commission received your letters requesting advisory opinions. In your letters, each of you asked whether you are a public official subject to the Ethics Law as a result of your service on the Ohio 9-1-1 Council. Your specific questions involve R.C. 102.04(A), which prohibits a person appointed to an office of a state instrumentality from receiving compensation for personal services rendered on any matter before a state agency.

Brief Answer

As explained more fully below, members of the Ohio 9-1-1 Council are both "public officials" and persons appointed to an office of an instrumentality of the state. As such, they are subject to the post-employment, confidentiality, and conflict of interest prohibitions contained in R.C. 102.03 and the representation and contract restrictions contained in R.C. 102.04. However, members of the Ohio 9-1-1 Council are not required to file financial disclosure statements with the Ohio Ethics Commission.

Facts

The Ohio 9-1-1 Council (Council) was created by the General Assembly in H.B. 361, which was effective in May 2005. According to R.C. 4931.68, the Council is composed of eleven members. Two members are state employees: the 9-1-1 coordinator (an employee of the Public Utilities Commission of Ohio) and a designee of the Department of Public Safety, appointed by the Department Director. R.C. 4931.68(A).

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The other nine members are appointed by the Governor. R.C. 4931.68(A). You are both among the members appointed by the Governor. *Id.* Members of the Council are uncompensated and do not receive any reimbursement for expenses.

R.C. 4931.68 sets forth the duties and authority of the Council. R.C. 4931.68(D) provides that the duties of the Council shall consist of the following:

- (1) Arbitrating or establishing relative to 9-1-1 systems in this state nondiscriminatory, competitively neutral, and uniform technical and operational standards consistent with recognized industry standards and federal law. This authority does not include authority to prescribe the technology that a telephone company or reseller uses to deliver 9-1-1 calls.
- (2) Including for the purpose of the Ohio 9-1-1 coordinator reporting to the general assembly, conducting research and making recommendations or reports regarding any wireline and wireless 9-1-1 issues, any improvements in the provision of service by 9-1-1 systems in this state, or any legislation or policies concerning such systems;
- (3) Regarding the position of Ohio 9-1-1 coordinator, submitting names of nominees and recommended duties as authorized under section 4931.60 of the Revised Code and, at least biennially, conducting and submitting with recommendations to the public utilities commission a performance evaluation of the coordinator.

Application of the Ethics Law to Members of the Council—R.C. 102.01(B) and (C)

The Ethics Commission is statutorily empowered to administer, interpret, and enforce Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code. *See* R.C. 102.02, 102.06, and 102.08. The statutes under the jurisdiction of the Ethics Commission include the financial disclosure law (R.C. 102.02), as well as prohibitions against public officials and employees misusing their public positions for their personal benefit or the benefit of their family members or business associates (R.C. 102.03, 102.04, 2921.42, and 2921.43).

R.C. 102.01(B) defines the term “public official” as a person who is elected or appointed to an office or is an employee of any “public agency.” R.C. 102.01(C) defines the term “public agency” as follows:

“Public agency” means . . . any . . . board, commission, authority, bureau or other instrumentality of the state . . . or any other governmental entity. “Public agency” does *not* include a department, division, institution, board, commission, authority,

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or other instrumentality of the state or . . . other governmental entity that functions exclusively for cultural, educational, historical, humanitarian, advisory, or research purposes; that does not expend more than ten thousand dollars per calendar year, excluding salaries and wage of employees; and whose members are uncompensated. (Emphasis added.)

“Public Agency” and Appointed to an “Office”

The first question is whether the Council is a “public agency” as defined in R.C. 102.01(C). The Council is an instrumentality of the state whose members are uncompensated and that does not expend more than ten thousand dollars per calendar year. Two aspects of the Council’s authority are advisory in nature. R.C. 4931.68(D)(2) and (3). However, the Council does not function exclusively for advisory purposes. The Council has the authority to arbitrate or establish technical and operational standards for the operation of 9-1-1 systems. R.C. 4931.68(D)(1). This authority is more than advisory. Therefore, the Council is a public agency.

The second question is whether a member of the Council is appointed to an “office.” Under Ohio law, a person who holds an “office” is an “officer.” Muskingum Co. Democratic Exec. Comm. v. Burrier, 31 Ohio Op. 570, 572 (C.P. Muskingum County 1945). See also Ohio Ethics Commission Advisory Opinion No. 85-005. The Ethics Commission has established five elements that, in combination, will determine whether a person is “appointed to an office.” It is not necessary that all five are present. The five elements are whether the person: (1) is appointed; (2) has a title; (3) exercises a function of government concerning the public; (4) is not subject to a contract of employment; and (5) exercises the “sovereign power” of government. See Adv. Ops. No. 74-007, 75-004, and 77-004. In Advisory Opinion No. 77-004, the Commission held that sovereign power “includes the exercise of a duty entrusted to one by virtue of statute or some other public authority, a duty that is not merely clerical, but that involves discretionary, decision-making qualities.” See Adv. Op. No. 75-004. See also State ex rel. Landis v. Butler, 95 Ohio St. 157 (1917).

A member of the Council is appointed to the position and is not subject to a contract of employment. As noted above, the Council has the authority to arbitrate or establish technical and operational standards for the operation of 9-1-1 systems. The duties of the Council are functions of government concerning the public. The duties are assigned by statute, and involve discretionary, decision-making authority.

Therefore, the members of the Council are appointed to an “office” of a “public agency,” and are “public official[s].” The members are subject to the revolving door, confidentiality, and conflict of interest provisions set forth in R.C. 102.03.

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Members of the Council are also “appointed to an office of . . . [an] instrumentality . . . of the state.” As such, they are subject to R.C. 102.04(A), which prohibits a person appointed to a state office from receiving compensation for personal services rendered on any matter before a state agency. Therefore, and in direct response to both of your questions, you are subject to R.C. 102.04(A).¹

Performing Services Before Public Agencies—R.C. 102.04(A)

R.C. 102.04(A) provides that, unless the exception in R.C. 102.04(D) applies, no person appointed to an office of any instrumentality of the state shall:

[R]eceive or agree to receive directly or indirectly compensation other than from the agency with which he serves for any service rendered or to be rendered by him personally in any case, proceeding, application, or other matter that is before the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts.

Members of state boards and commissions who are legislative agents paid to represent clients before the General Assembly, or are executive agency lobbyists paid to represent clients before executive agencies such as departments, boards, or commissions, are subject to the restrictions in R.C. 102.04(A). Adv. Op. No. 92-006. Therefore, R.C. 102.04(A) prohibits each of you from receiving compensation to represent clients on matters before the General Assembly or state executive branch agencies unless you can meet the exception in R.C. 102.04(D).

R.C. 102.04(D) applies to nonelective officials when both of these provisions are met:

- (1) The agency to which the official or employee wants to sell the goods or services, or before which the matter that involves the rendering of his services is pending, is an agency other than the one with which he serves;
- (2) Prior to rendering the personal services or selling or agreeing to sell the goods or services, he files a statement with the appropriate ethics commission, with the public agency with which he serves, and with the public agency before which the matter is pending.

¹ While it is not directly germane to your question, you should also be aware that, because members of the Council are appointed to an office of an instrumentality, or agency, of the State, they are “public officials,” subject to R.C. 2921.42 (public contract restrictions) and “public servants” subject to R.C. 2921.43 (supplemental compensation and coercion of campaign contributions restrictions).

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The statement described in R.C. 102.04(D)(2) must contain the official's name and home address, the name and mailing addresses of the public agencies with which he or she serves and before which the matter is pending, and a brief description of the personal services to be rendered. Further, the statement must contain the official's declaration that he or she will disqualify himself or herself from any participation as a public official in any matter involving any official or employee of the agency before which the matter is pending. The statement must be filed with the agency the official serves, the agency before which the matter is pending, and the Ethics Commission.

Both of you have filed the statement described in R.C. 102.04(D), disclosing that you are compensated to provide personal services on matters before the General Assembly. Therefore, because you are providing personal services on matters pending before an agency other than the one you serve, and you have filed the proper disclosure with the Ethics Commission, you can meet the exception in R.C. 102.04(D). You will be required to file the statement on an annual basis while you serve on the Council. Adv. Op. No. 93-010.

Of course, you are required to comply with the disqualification provision in R.C. 102.04(D)(2). See R.C. 102.04(E) (requiring that any person who has filed an R.C. 102.04(D) statement shall not fail to disqualify himself or herself from participating as described in the statement. If any matter before the Council would involve any official or employee of the General Assembly, you are prohibited from participating in that matter. R.C. 102.04(D) does not require that you remove yourself from all matters before the Council that involve the General Assembly. Adv. Op. No. 89-010. However, you would be required to remove yourselves from any matters that affect the interests of any specific officials or employees of the General Assembly. Id.

Financial Disclosure—R.C. 102.02(B)

R.C. 102.02(B) empowers the Ethics Commission to require:

[A]ny class of public officials or employees under its jurisdiction and not specifically excluded by this section whose positions involve a substantial and material exercise of administrative discretion in the formulation of public policy, expenditure of public funds, enforcement of laws and rules of the state or a county or city, or the execution of other public trusts, to file an annual statement on or before the fifteenth day of April under division (A) of this section.

R.C. 102.02(B) states that the Commission may adopt rules to require any class of public officials or employees under its jurisdiction and not specifically excluded under Section 102.02 of the Revised Code, who serve in positions that involve the type of administrative discretion described, to file annual financial disclosure statements. Ohio Administrative Rules No. 102-5-

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04 and 102-5-05 set forth the Commission's administrative responsibilities related to the authority set forth in R.C. 102.02(B). See OAC Rule No. 102-5-05 (board and commission members) and No. 102-5-04 (board and commission chief administrative officers).

While the Council does exercise significant and important authority of the State relative to the establishment of 9-1-1 systems, as described above, the nature of its authority is not the kind described in R.C. 102.02(B). Therefore, at this time, the Commission concludes that you and the other members of the Council who are appointed by the Governor are not required to file financial disclosure statements with the Ohio Ethics Commission.²

Conclusion

As explained above, members of the Ohio 9-1-1 Council are both "public officials" and persons appointed to an office of an instrumentality of the state. As such, they are subject to the post-employment, confidentiality, and conflict of interest prohibitions contained in R.C. 102.03 and the representation and contract restrictions contained in R.C. 102.04. However, members of the Ohio 9-1-1 Council are not required to file financial disclosure statements with the Ohio Ethics Commission.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on May 25, 2006. The Commission commends you for requesting guidance before taking any actions that could be prohibited by law.

The 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. If you have any questions or desire additional information, please feel free to contact this Office again.

Sincerely,



Jennifer A. Hardin
Chief Advisory Attorney

Enclosure: Advisory Opinion No. 93-010

² Regardless of this decision, the 9-1-1 Coordinator and Public Safety designee who serve on the Council may be required to file disclosure statements by virtue of their state employment.