

OHIO ETHICS COMMISSION

Sister Mary Andrew Matesich
Commission Chair

David E. Freel
Executive Director



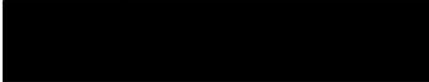
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January 12, 1999

Informal Opinion 1999-INF-0112-1

Sandra A. Drabik, Director
Ohio Department of Administrative Services



Dear Director Drabik:

In a letter that you sent to this office via fax on September 10, 1998, to which the Commission staff initially responded on the same date, you raise two questions regarding whether the Ohio Ethics Law and related statutes prohibit a company, The Slane Company, from either being a subcontractor to a contract with the Department of Administrative Services (DAS) or directly selling services to DAS. The contracts at issue are related to the Multi-Agency Radio Communications System (MARCS). The Slane Company is owned by Daniel Slane, who serves as a member of the Ohio Board of Building Appeals, the Capital Square Review and Advisory Board, and The Ohio State University Board of Trustees.

Because the questions you have asked are neither prospective nor hypothetical, as explained below, the Ethics Commission must decline to provide an advisory response to the questions that you have presented.

Facts—History of the Advisory Opinion Request

Your faxed letter of September 10, 1998 stated that DAS would be seeking Controlling Board approval for the MARCS contract on September 14, 1998, and you asked for an advisory response from the Ethics Commission to two questions that you presented. Our faxed response to DAS on September 10, 1998 explained that the earliest date at which the Ethics Commission could consider your request for an advisory opinion was at its next scheduled meeting after receipt of the request, which was set for September 25, 1998. On September 15, 1998, Commission staff learned that the Controlling Board had approved the MARCS contract between DAS and TRW Systems and Information and Technology Group (TRW). Subsequently, on September 23, 1998, staff notified DAS that the Controlling Board's action rendered your request of September 10, 1998 moot.

On September 24, 1998, you wrote this office stating that, while the Controlling Board approved the MARCS contract between DAS and TRW on September 14, 1998, the contract was amended prior to being approved to require subsequent Controlling Board approval for DAS to contract with any entity other than TRW on the MARCS Program. Because of this amendment, you viewed the questions you presented regarding Mr. Slane as not being moot. You restated the two questions that you asked on September 10, 1998, and asked for an advisory response.

At its meeting on September 25, 1998, the Ethics Commission reviewed your request and directed staff to obtain further information from DAS regarding the contract approved by the Controlling Board and its relationship to actions already taken by DAS, TRW, and Mr. Slane that involved the MARCS Project. The Commission sought this information in order to consider its response to your continued request for an advisory opinion. The Executive Director forwarded the Commission's request on October 5, 1998. That request asked four questions pertaining to DAS, TRW, Mr. Slane, and the MARCS Project, and requested that staff be provided with "a copy of all relevant contracts." You responded to these questions in a letter, dated November 20, 1998, in which you enclosed portions of the contract and other material.

Facts—DAS, TRW, Daniel Slane, and the MARCS Program

In your November 20, 1998 response to the questions asked by the Ethics Commission, you summarize the activity of DAS in the MARCS Project. Your summary and the documents that you provided describe complex and lengthy transactions involving TRW, The Slane Company, and other vendors and subcontractors in formulating the design and construction of the proposed MARCS Project.

The complexity of the MARCS Project, and length of time that DAS has taken to consider entering into a contract for its construction, are reflected in your November 20, 1998 letter. The October 5, 1998 request by the Ethics Commission had asked for all relevant contracts, and information about whether they were competitively bid. In your response you state:

The contract between DAS and TRW incorporated several documents including the terms and conditions, the request for proposal (RFP), TRW's response to the RFP, and other documents used during the process to evaluate the response and award the contract. The total contract is several hundred pages. For your purposes, we are enclosing the terms and conditions portion of the contract.

The contract was awarded pursuant to a request for proposal process, which is a competitive process. The state notified 140 companies of the state's intent to issue the MARCS RFP and requested a response if the company was interested in receiving a copy of the RFP. On July 25, 1995, DAS issued the RFP to the 29 companies who expressed an interest. The RFP established a three-stage evaluation process: Stage 1 – pre-qualification round; Stage 2 – technical and management analysis; Stage 3 – evaluation of cost proposals from those vendors successfully completing Stages 1 and 2. The MARCS evaluation team consisted of representatives from Public Safety, DRC, ONDR and DAS. Ericsson, Inc., MFS

Network Technology, Inc., and TRW responded to and successfully completed Stage 1. MFS withdrew its response prior to Stage 2; Ericsson and TRW continued to participate. Ericsson's proposal was disqualified at the end of Stage 2 for not meeting five of the eight critical requirements of the RFP. TRW successfully completed Stages 2 and 3 and was awarded the contract.

The specific documents that you provided in response to the Commission's question included the Terms and Conditions (Terms) portion of the Contract between TRW and DAS. The Terms were signed by a TRW representative on August 31, 1998, ten days prior to your initial request to the Commission, and by yourself on September 17, 1998. The Contract Terms you provided appear pertinent to the Commission's consideration of your request.

Section No. 66 of those Terms states that TRW's use of joint ventures and subcontractors is permissible only with the state's prior consent. Section 68 of the Terms states that after the award of the contract, TRW shall not hire or use subcontractors that were not identified within their proposal without the state's prior written approval. You state, in your letter of November 20, 1998, that TRW proposed using The Slane Company as a subcontractor for the construction of MARCS radio towers on state-owned property and that the Controlling Board approved The Slane Company as TRW's subcontractor on September 14, 1998. In essence, the State has already agreed to The Slane Company as a subcontractor for a portion of the contract performed by TRW.

Your correspondence of November 20, 1998 further states that TRW proposed The Slane Company as the entity responsible for identifying and selecting tower sites that are to be leased directly to the state. Section 20 of the Contract Terms enables the state to contract with third parties other than TRW for remote telecommunications tower sites and services

Section 2 of the Terms states that the contract between TRW and DAS consists of TRW's response to Addendum Three of the MARCS amended Request for Proposals (RFP). In the amended RFP, on page 7-6, TRW describes Mr. Slane's involvement in the lease of non-state owned tower sites. It reads in pertinent part:

Our General Contractor, Dan Slane, has committed to sign a lease option for all but eleven of the non-State-owned remote communication sites necessary to provide 97.5 percent coverage for voice and data. Mr. Slane will buy or lease all of the property, build the access road, provide utility power to the site, erect the MARCS-compliant tower, and prepare the site as required of a third-party-owned site, according to the Amended RFP.

The document later refers to these sites as "the Dan Slane third party sites."

Again, the letter that you sent to the Commission on November 20, 1998 states that the contract was amended prior to its approval by the Controlling Board to require the Controlling Board to approve any subsequent contract by DAS with any entity other than TRW on the MARCS Project. You state that because of this amendment, DAS may not enter into a contract with The Slane Company to identify and select tower sites that are to be leased directly by the State without prior Controlling Board approval.

Advisory Function of the Ethics Commission

It is helpful to our discussion of the questions you have presented to the Commission to set forth the purpose of an advisory opinion issued by the Ohio Ethics Commission. The General Assembly's grant of advisory authority to the Commission exists to guide a public official or employee prior to his acting in a matter that implicates the prohibitions imposed by Ohio's Ethics Law and related statutes. See State v. Nipps, 66 Ohio App. 2d 17, 22 (1979) (“[A] public official or employee is not required to guess whether his conduct may be prohibited, but, may request an advisory opinion from the Ohio Ethics Commission.”) The Commission generally renders advisory opinions in response to questions that are hypothetical or prospective. Ohio Ethics Commission Advisory Opinions No. 75-037 and 94-002.

In keeping with the Commission's duties, the rendering of an advisory opinion is not a fact-finding process. The Commission cannot, in an advisory opinion, examine the past actions of a public official or employee to determine whether the official or employee has taken any actions or used his authority in any way to contravene a criminal statute. Adv. Ops. No. 75-037, 92-003, and 94-002. If a question is raised with regard to activity in which a public official or employee has already engaged, then the Ethics Commission can only act through its investigative authority to determine whether the facts indicate that the Ethics Law and related statutes have been violated and to refer the matter for prosecution. R.C. 102.06; Adv. Ops. No. 92-003 and 94-002. The Ethics Commission's investigative authority is confidential by law. Id. Therefore, the Commission cannot issue an advisory opinion that would require an examination of a public official's or employee's past conduct. If the resolution of past facts is required, that is a function of a court of law.

In contrast, an advisory opinion explains the prohibitions imposed by the Ethics Law and related statutes, and sets forth the standards that a public official or employee must observe to avoid actions that may run afoul of these statutes in a given set of circumstances. Adv. Ops. No. 75-037, 90-013, 92-003, and 92-015. An advisory opinion responds to the facts presented to the Commission and offers immunity to the person to whom it is directed, and others similarly situated, from criminal prosecution, civil actions, and actions for removal from office for a violation of the Ohio Ethics Laws and related statutes, if they comply with the guidance provided in the opinion before they act, only as it relates to those facts. R.C. 102.08.

In some limited circumstances, the Commission has issued advisory opinions that have widespread application to many other public officials similarly situated based on facts that have already taken place. See, e.g., Adv. Ops. No. 85-015 (county sheriffs hiring family members), 89-014 (officials prohibited from accepting travel, meals, and lodging from vendors doing business with their agencies), 90-001 (vendors doing business with a public agency are prohibited from providing travel, meals, and lodging to the officials and employees of the agency), and 92-015 (public officials and employees accepting or using discounts offered by local retailers in recognition of their public service). The Commission has issued these opinions to provide general, uniform guidance to a broad spectrum of public officials and employees, faced with similar situations. In some cases, these opinions have addressed a widespread practice, that has existed for many years, and that public officials and employees had previously relied upon to guide their actions.

In the instant situation, you have asked the Ethics Commission to render an advisory opinion in response to questions that are neither hypothetical nor prospective.

As explained above, your response and the information that you have provided describe a process in which DAS and other State agencies, TRW, The Slane Company, and other vendors have been involved for at least three years. The result of this lengthy process has been a determination of the radio communication needs of public agencies and the design and siting of towers and equipment involving the massive outlay of public resources and revenue. The role of The Slane Company in the MARCS Project, as it has been designed, appears to have significantly and factually transpired.

As set forth above, TRW has already selected The Slane Company as a subcontractor for the construction of MARCS radio towers on state-owned property. Also, as set forth above, it appears that TRW, in planning its activity under the contract, anticipated that The Slane Company would lease non-state owned tower sites. It also appears, for resolution of the question DAS has posed to the Commission, that TRW based its response to the amended RFP on its agreement with The Slane Company.

Because the role of The Slane Company in the MARCS Project, as it has been designed, has significantly and factually occurred, the fact that the contract was amended to require prior Controlling Board approval for DAS to contract with any entity other than TRW on the MARCS Project does not now make your questions hypothetical or prospective. The Slane Company has been, and continues to be, an integral part of at least a portion of the MARCS Project that has already been approved by the parties. In fact, you provided the Commission with a copy of a letter that is dated October 7, 1995 to TRW from The Slane Company. In that letter, Mr. Slane tells TRW that his company "is willing to perform the work indicated" as a subcontractor on the MARCS Project. Thus, you have asked for an advisory opinion in response to questions that germinated from actions that appear to have begun over three years ago.

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The fact that the Ethics Commission cannot exercise its advisory authority on a specific matter where significant actions have already taken place is neither a judgment that a public official or employee has violated, nor that a public official or employee in question has complied with, the Ethics Laws and related statutes.

Conclusion

Because the questions you have asked are neither prospective nor hypothetical, as explained above, the Ethics Commission must decline to issue the advisory opinion that you have requested.

This response to your request was reviewed and was approved by the Commission at its meeting on January 12, 1999. It 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. If you have any further questions, please feel free to contact this Office again.

Sincerely,

A handwritten signature in cursive script, appearing to read "David E. Freel".

David E. Freel
Executive Director