

OHIO ETHICS COMMISSION

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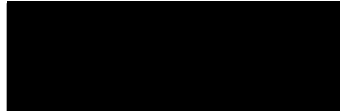


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August 2, 2002

Informal Opinion 2002-INF-0802-1

Frank E. Samuel, Jr., Chair
Biomedical Research and Technology Transfer Commission



Dear Mr. Samuel:

In a letter received by the Ohio Ethics Commission on July 13, 2002, you have asked for an advisory opinion concerning the grant review process conducted by the Washington Advisory Group (WAG) on behalf of the Biomedical Research and Technology Transfer Commission (BRTTC). Your question relates to a conflict of interest involving one of the principals of WAG that did not come to light until after the grant review was completed and shortly before it was presented to BRTTC by WAG for review and final action.

Specifically, you have asked whether the process conducted by WAG is so affected by the undisclosed conflict of interest that further review needs to be undertaken. If further review is required, you ask what form the review should take and whether any of the work product arising from the WAG review can be used in the re-evaluation.

Brief Answer

The Commission recommends that BRTTC conduct an independent review of the grant proposal with which the WAG principal was connected in order to determine whether it should be funded and, if so, at what level funding should be awarded. The Commission recommends that the review include, at a minimum, the two proposals in the second tier identified by WAG. BRTTC is not precluded, under the facts that you have presented, from moving forward to award grants to the three proposals recommended by WAG and in which the WAG principal had no conflicting interest.

Whether BRTTC includes additional grant proposals not recommended by WAG as a part of that review is a decision in the discretion of BRTTC. Although it appears from the facts that the conflict presented by BRTTC directly involved only one grant application, BRTTC may find that the appearances of conflict to all of those in the applicant pool require it to independently review all other non-funded proposals at this time. BRTTC has full discretion to decide to what extent an independent reviewer may further utilize any of the information produced by WAG that remains untainted by the interest of WAG's principal.

Because review of your question is dependent on the specific facts, it is necessary to begin with an unusually lengthy factual summary.

Facts

BRTTC is responsible for administering a grant program to enhance biomedical research and biotechnology in the state of Ohio that would be likely to produce jobs and business opportunities and produce beneficial long-term improvements in the health of Ohioans. In the summer of 2001, BRTTC issued a request for proposals (RFP) to administer the grant program. In its RFP, BRTTC set forth the expectations for and qualifications of the Grant Administrator. In Section 3.3, the RFP provides that BRTTC "expects that the review process will be a competitive peer review process involving expert reviewers, none of whom have any current connections with applicant organizations." In its description of the Qualifications of the Grant Administrator, the RFP provides that applicants for Grant Administrator will "[e]xplain procedures for adequately assuring that all peer reviewers and applicant staff and consultants participating in the BRTT Partnership Awards process have no continuing financial or fiduciary relationship with any Ohio entity that responds to the Awards RFP."

On July 31, 2001, WAG submitted a proposal in response to the BRTTC RFP. WAG's proposal provided that it would take the following steps to meet the conflict of interest requirements described in the BRTTC RFP:

- All reviewers will be required to reveal any conflicts of interest;
- All individuals working under a contract awarded to WAG, including WAG principals, staff, and subcontractors, will disclose any contract, fiscal, or fiduciary relationships with Ohio organizations involved in biomedical research or technology transfer;
- Any individuals identifying such relationships will, if appropriate, be recused from reviews of proposals and decisions affecting those Ohio organizations.

BRTTC engaged WAG to administer the grant review process. BRTTC and WAG entered into a contract for grant administration services in November 2001. Article VI of the contract provides:

1. No personnel of INDEPENDENT CONTRACTOR or member of BRTTC who exercises any significant functions or responsibilities in connection with the work to be performed hereunder, shall, prior to completion of said work, voluntarily acquire any fiduciary or pecuniary interest, direct or indirect, which is incompatible or in conflict with the discharge and fulfillment of his or her functions and responsibilities with respect to the carrying out of said work.
2. Any such person who acquires an incompatible or conflicting fiduciary or pecuniary interest, on or after the effective date of this AGREEMENT or who involuntarily acquires any such incompatible or conflicting fiduciary or pecuniary interest shall immediately disclose his or her interest to BRTTC in writing.

Thereafter, he or she shall not participate in any action affecting the work under this AGREEMENT, unless BRTTC shall determine that, in light of the fiduciary or pecuniary interest disclosed, his or her participation in any such action would not be contrary to the public interest.

Article XIII of the Contract refers to the Ohio Ethics Law, and provides:

INDEPENDENT CONTRACTOR has reviewed Ohio's ethics laws (Revised Code Chapter 102 and §§2921.42 and 2921.43) and certifies that the ethics laws do not prohibit INDEPENDENT CONTRACTOR from executing this AGREEMENT.

Exhibit 1 to the Consulting Agreement spells out the scope of work to be performed by WAG. In the exhibit, WAG agrees that, as described in its proposal, all reviewers will be required to reveal any conflicts of interest.

WAG is a consulting firm, providing management and strategic counseling services for clients in academia, information technology, bio-technology, healthcare, manufacturing, and natural resources. WAG had two teams of personnel managing the BRTTC project. The science and technology team was led by Dr. Daniel C. Tosteson and Dr. C. Thomas Caskey. The administrative team was led by Dr. Bruce Guile and Ms. Leslie Ricketts. Drs. Tosteson, Caskey, and Guile are all identified as principals of WAG. Ms. Ricketts is identified as staff to WAG. As is noted later, Dr. Caskey is the principal in WAG who also serves on the board of Athersys, Inc., and as the CEO and President of Cogene BioTech Ventures, which has invested in Athersys.

Pursuant to contract, WAG handled the entire grant review process. On October 31, 2001, Dr. Joseph Nadeau, Professor of Genetics in the Department of Genetics at Case Western Reserve University (CWRU) Medical School submitted a Letter of Intent (LOI) describing a proposal for research in the area of Genetics of Gastrointestinal Cancers. In that LOI, Gil Van Bokkelen, of Athersys, is listed as one of the Proposal Participants for the research proposal. On December 10, 2001, Mr. Van Bokkelen sent a letter to Marc G. Cloutier, Executive Director of BRTTC, in support of the CWRU proposal. In the letter, Mr. Van Bokkelen provided information about the work and mission of Athersys.

According to the documents provided by WAG, Dr. Caskey participated in the review of the CWRU proposal in the following ways:

- Dr. Caskey provided a list of potential reviewers for the proposals. Eight of those reviewers were selected for the review. Of the eight, four were business reviewers and four were science reviewers. None of these eight reviewers, however, participated in the review of the specific grant proposal submitted by CWRU. Two of the business reviewers participated in the panel review meeting on April 9 and 10, 2002. Again, neither was a reviewer of the CWRU proposal.

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- Dr. Caskey co-chaired the April panel review meeting. At the panel review meeting, all of the 15 eligible proposals were considered and ranked. The Proposal Information Sheet, which was used by all participants and reviewers in the meeting, lists Athersys as a Collaborating Organization on the CWRU proposal. Although Dr. Tosteson, the chairperson at this meeting, reminded all attendees that they were subject to conflict of interest disclosure, and written materials noted that an attendee should excuse himself if he had a conflict of interest, Dr. Caskey did not disclose his connection with Athersys, or excuse himself, at that time.
- Dr. Caskey, along with Dr. Tosteson and Dr. Choppin, reviewed the proposal rankings that resulted from the panel review meeting, and determined, based on those rankings, which proposals should be funded. There is no indication in the materials provided that Dr. Caskey disclosed his connection with Athersys.
- A memorandum from Drs. Tosteson, Caskey, and Choppin, summarizing award recommendations, and including proposal scores and budget recommendations, was sent to BRTTC by WAG on May 2, 2002. On page one of the memorandum, WAG specifically notes Athersys as a collaborator on the CWRU proposal. There is no indication in that memorandum that Dr. Caskey made his connection with Athersys known to BRTTC.

At its meeting on May 15, 2002, BRTTC was scheduled to act on the recommendations made by WAG and award grants to successful grant proposals. WAG recommended four proposals for funding. The top-ranked proposal recommended by WAG was the proposal from CWRU. On the evening of May 14, 2002, before the vote was to be taken, Dr. Caskey told you about his involvement in Athersys, a collaborator on the CWRU project. After you discovered and informed BRTTC of Dr. Caskey's interests, BRTTC halted the grant approval process. In a later disclosure filed with BRTTC on May 22, 2002, Dr. Caskey disclosed that he is on the Board of Athersys. Further, he is the Chief Executive Officer of Cogene BioTech Ventures, which has invested in Athersys.

Application of the Ohio Ethics Law and Related Statutes

The provision of the Ethics Law that is most applicable to the question you have raised is R.C. 2921.42(A)(1), a provision of the public contract law. R.C. 2921.42 (A)(1) provides that no public official shall knowingly:

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.

It is important to your question to note that R.C. 2921.01(A) defines the term "public official," as used in R.C. 2921.42(A)(1), to include "any elected or appointed officer, or employee, or agent of the state or any political subdivision, whether in a temporary or permanent capacity." (Emphasis added.)

The word "agent" is not statutorily defined for purposes of R.C. Chapter 2921.; however, an agency relationship has acquired a particular meaning through judicial decisions. An agency relationship is succinctly explained by the Court in Funk v. Hancock, 26 Ohio App.3d 107,110 (Fayette County 1985), which states:

An "agency relationship" is a consensual fiduciary relationship . . . where the agent has the power to bind the principal by his actions, and the principal has the right to control the actions of the agent.

A person is an agent of the state for purposes of R.C. 2921.42 when the state has delegated to the person or his business authority to act on the state's behalf, and bind the state. See Ohio Ethics Commission Advisory Opinion No. 85-005. See also Hanson v. Kynast, 24 Ohio St. 3d 171, 173 (1986) (in an agency relationship, one party exercises the right of control over the actions of another, and those actions are directed toward the attainment of an objective which the former seeks). A relationship of principal to agent may arise by express agreement, or by implication or estoppel. Levin V. Nielsen, 37 Ohio App.2d 29, 32 (1973).

The state (BRTTC) issued an RFP to which WAG responded. Pursuant to that RFP, WAG and BRTTC entered into a contract under which WAG performed a number of tasks on behalf of BRTTC in formulating, implementing, and completing the grant review process. WAG was responsible for designing and managing all aspects of the grant review process including: (1) reviewing all complete and complying proposals; (2) managing all aspects of receipt, tracking, distribution, compilation, and reporting of LOI's and proposals, including determining whether proposals complied with the technical requirements; (3) identifying, selecting, and compensating scientific and business expert reviewers; (4) managing the expert review process; (5) chairing in-person review sessions and provide summation of recommendations developed; (6) preparing final recommendations for BRTTC; and (7) making periodic reports of its progress to BRTTC. As agents, the principals and employees of WAG are subject to the public contract law, set forth in R.C. 2921.42.

A "public contract" is defined, in pertinent part, as:

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, including the employment of an individual by the state, any of its political subdivisions, or any agency or instrumentality of either.

Grants by governmental agencies are "public contracts," as defined in R.C. 2921.42(G)(1). See Adv. Ops. No. 82-004, 87-003, and 89-006. State v. Lordi, 140 Ohio App.3d 561, 568 (2000), discretionary appeal not allowed, 91 Ohio St.3d 1523, 91 Ohio St.3d 1526. Therefore, grants awarded by BRTTC for the purpose of enhancing biomedical research and biotechnology in the state of Ohio are "public contracts" for purposes of R.C. 2921.42.

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A public official, including an agent of the state, is prohibited from authorizing, or using his authority or influence to secure authorization of, a grant in which he or a business associate has an interest. The official will have an interest in a contract when a company of which he is an owner or officer has an interest in the contract. See Adv. Ops. No. 85-009, 86-005, and 88-008. See State v. Pinkney, 36 Ohio St.3d 190 (1988) (a public official who is a part-owner of an insurance company has an interest, for purposes of R.C. 2921.42(A)(1), in a public contract awarded to the company).

Grant Review Process

In this instance, the question you have asked is whether the review process conducted by WAG is so affected by the undisclosed conflict of interest that further review needs to be undertaken. If further review is required, you ask what form the review should take and whether any of the work products arising from the WAG review can be used for the re-evaluation.

As stated above, R.C. 2921.42 prohibits a public official from using his position to secure authorization of a public contract in which he has an interest. Therefore, the review of the individual grant proposal conducted by WAG raises issues under the Ethics Law because of the participation of a principal who has both an ownership and a fiduciary connection with one of the collaborators on that grant.

From your description, it appears that the principal at issue did not perform any duties that were exclusive to the proposal in which Athersys was a collaborator. However, as described above, he did participate in a number of critical duties with respect to all of the grants and the recommendation to fund the proposal in which he has an interest.

Conclusion

BRTTC is not precluded from awarding grant money to the three recommended proposals with which the WAG principal has no connection because there are no facts presented that show the conflict issue directly extended to those grants. BRTTC is free, within its discretion, to proceed to award those grants without further review.

R.C. 2921.42 and the contract between WAG and BRTTC required that the principal of WAG remove himself from participation with respect to the review process for the grant proposal in question as soon as the LOI listing Athersys was submitted to WAG, because he has significant fiduciary and financial connections to Athersys. These connections went far beyond limited levels of stockholding. See R.C. 2921.42(B) (providing an exception to the public contract law for a public official whose connection with a corporation that seeks a contract with his public agency is limited to holding less than five percent of the stock of the corporation). The Commission, therefore, recommends that BRTTC conduct an independent review of the grant proposal with which the WAG principal was connected in order to determine whether it should be funded and, if so, at what level funding should be awarded. The Commission further recommends that review include, at a minimum, the two proposals in the second group identified

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by WAG to determine whether either of those proposals should be funded, in combination with or in lieu of the proposal in question.

It is entirely within the discretion of BRTTC whether additional grant proposals not recommended by WAG should be included as a part of that review. Although it appears from the facts that the conflict presented by BRTTC directly involved only one grant application, BRTTC may find that the appearance of conflict extends to all of those in the applicant pool. For that reason, BRTTC may consider whether to independently review all other proposals not initially recommended for funding at this time. However, BRTTC is not required to conduct such an independent review. Because the facts presented do not clearly show that those selected to conduct reviews of the proposals not initially recommended for funding were directly and definitely affected by the conflict issue involving the WAG principal, BRTTC is also free to decide whether an independent reviewer may further utilize the factual review information produced by WAG.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on August 2, 2002. The purpose of this opinion is to provide recommendations to BRTTC with respect to the grant issuing process, and the opinion does not reach any conclusion regarding specific actions that have occurred. The Commission commends you and BRTTC for requesting guidance about the Ethics Law.

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

Sincerely,



David E. Freel
Executive Director