

OHIO ETHICS COMMISSION

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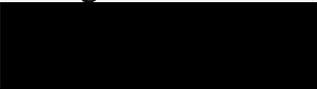
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David E. Freel, *Executive Director*

April 22, 2005

Informal Opinion 2005-INF-0422

Thomas W. Noe
Vintage Coins & Collectibles



Dear Mr. Noe:

In a letter received by the Ohio Ethics Commission on December 7, 2004, you ask whether the Ohio Ethics Law and related statutes prohibit you from being a partner in a research company, Hi-Genomics, that has a license agreement with, and leases space and equipment from, the University of Toledo (University) in light of the fact that you are a member of the Ohio Board of Regents (OBR).

Brief Answer

As explained below, you are prohibited from having a financial and fiduciary interest in Hi-Genomics, which leases space and equipment from the University to commercialize research developed at the University because it is interested in matters before and regulated by the OBR. Your desire to limit the opportunity for conflicts of interest to arise will aid you to comply with the Ethics Law in these circumstances. If you intend to retain your position on the OBR, you are required to divest yourself of any financial or fiduciary interest in the company.

Facts

At the time you submitted your letter, you were the Chair of the OBR. You are now a member of the OBR. You state that you are also the Vice-President of Hi-Genomics LLC, a limited liability company that is striving to commercialize technology related to the genetic transformation of plants. You state that you invested in Hi-Genomics through a general partnership, Nolap Partnership, in 2004. Nolap owns approximately 23% of Hi-Genomics. You are also a personal guarantor on a personal line of credit issued to Hi-Genomics. Even though you are a Vice-President, you state that you are not involved in Hi-Genomics's management or operation. You also state that your involvement in Hi-Genomics has been disclosed on all documents requested by any party that asks for a list of Hi-Genomics's members.

Hi-Genomics has negotiated license agreements with the University for the use of intellectual property owned by the University in the development of plant transgenics. Pursuant to the license agreements, Hi-Genomics pays the University royalties and reimbursement of intellectual property costs. Hi-Genomics rents space from the University's Office of Research and Technology. Hi-Genomics also leases the use of laboratory equipment, which is housed in the University's Plant Science Research Center, from the University. Hi-Genomics pays all leasing fees, reimbursements, and royalties directly to the University. You state that you have not participated in negotiations with the University for license or lease agreements.

Two partners of Hi-Genomics are University professors. The professors own 25% of Hi-Genomics and contribute in-kind services as their investment in Hi-Genomics. The professors have waived their right, under the University's inventor policy, to have the University pay them 50% of the proceeds from certain Hi-Genomics's licenses with the University. In addition to you and the two University professors, two other investors own approximately 47% and 5% of Hi-Genomics, respectively.

You state that you are willing to make alternative arrangements to limit the opportunity for conflicts of interest to arise. You state that these arrangements include declining to serve as Vice-President for Hi-Genomics, assigning your ownership interest to an entity not under your control, or resigning from the OBR.

Outside Business Restrictions—R.C. 102.03(D) and (E)

Your attention is directed to R.C. 102.03(D) and (E), which provide:

- (D) No public official or employee shall use or authorize the use of the authority or influence of office or business 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.

The term "public official or employee" is defined for purposes of R.C. 102.03 to include any person who is appointed to an office of any public agency. R.C. 102.01(B). The term "public agency" is defined to include any board of the state. R.C. 102.01(C). The OBR is a statutorily created board established within state government. R.C. 3333.01. Thus, as a member of the OBR, you are a "public official or employee" who is subject to the prohibitions of R.C. 102.03(D) and (E).

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. R.C. 1.03, 102.01(G). Compensation received from engaging in private business activity is a thing of value for purposes of R.C. 102.03(D) and (E). Ohio Ethics Commission Advisory Opinions No. 79-002, 89-010, and 92-005.

The Ohio Ethics Law does not prohibit a public official or employee from engaging in private business activity so long as no actual conflict of interest exists between the official's or employee's public and private positions. Adv. Op. No. 96-004. In some situations, however, a public official's or employee's private business interests could be of such a character as to manifest a substantial and improper influence, under the Ethics Law, upon the public official or employee with regard to his official decisions and responsibilities. In such situations, R.C. 102.03(D) and (E) prohibit the public official or employee from engaging in the private business activity. *Id.* See also Adv. Ops. No. 77-006, 84-009, and 86-008. The application of the prohibitions is dependent upon the facts and circumstances of each individual situation. Adv. Op. No. 87-008.

Prohibitions Imposed By R.C. 102.03(D)

Division (D) of Section 102.03 of the Revised Code prohibits a public official or employee from using the authority or influence of his position to secure anything of value for himself, family members, business associates, or others where there is a conflict of interest. Adv. Ops. No. 79-002, 80-004, and 89-006. As explained below, Division (D) prohibits any action or inaction by a public official or employee that could result in securing or accepting a substantial and improper thing of value.

In certain situations, compensation secured by a public official or employee while engaging in private business activity constitutes a thing 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 his duties. The Ethics Commission has reasoned that the public interest could be adversely affected when a public official or employee receives compensation for private business activity if the compensation is paid as a result of the public official's or employee's use of, or failure to exercise, his official authority, or if the receipt of compensation could impair the performance of his public duties and therefore burden public resources entrusted to him in favor of his own personal financial interests.

R.C. 102.03(D) would prohibit you from using your public position as it relates to other public officials and employees, including OBR officials and employees or officials and employees of the University, to secure a favorable decision or action by other officials or employees regarding your private business interests. Adv. Op. No. 96-004. R.C. 102.03(D) would also prohibit you from using your public position or authority in any other way to secure a benefit for your private outside business. *Id.*

Prohibitions Imposed By R.C. 102.03(E)

R.C. 102.03(E) prohibits a public official from soliciting or accepting anything of value that would have an improper influence upon him with respect to his duties. Unlike R.C. 102.03(D), which prohibits a public official from acting to secure a thing of value, R.C. 102.03(E) prohibits a public official from merely soliciting or accepting certain things of value even where the official takes no action to secure it.

A public official or employee is prohibited, by R.C. 102.03(E), from soliciting or accepting "anything of value" if the thing of value could have a substantial and improper influence upon him with respect to his duties. In order to determine whether something of value will also have an improper influence on a public official for purposes of R.C. 102.03(D) and (E), the Ethics Commission has stated that the question depends on the source of the thing of value. The acceptance of certain things of value is improper because of the relationship between the public official or employee and the source of the thing of value. Adv. Ops. No. 86-011 and 92-015. The Commission has explained that a public official's or employee's objectivity and independence of judgment with regard to his official actions could be impaired if he were to solicit or accept a thing of substantial value from a party that is interested in matters before, regulated by, or doing or seeking to do business with his own public agency. Adv. Ops. No. 87-006, 87-009, and 89-006. See also Ohio SupCt, Bd of Comm'rs on Grievances and Discipline, Op. 02-10 (2002) (a court probation officer is prohibited, by R.C. 102.03(D) and (E), from seeking or accepting employment from a company that provides a drivers' intervention program that individuals found guilty of operating a motor vehicle under the influence are sentenced to attend as a condition of probation).

Therefore, R.C. 102.03(E) prohibits a public official or employee from engaging in private business activity with a party that is interested in matters before, regulated by, or doing or seeking to do business with his own public agency, unless, as explained below, he is capable of withdrawing from participation in any matter that could affect the party. Adv. Op. No. 96-004. A public official's or employee's withdrawal from consideration of issues concerning parties who are interested in matters before, regulated by, or doing or seeking to do business with his own public agency may be accomplished only when such a withdrawal: (1) does not interfere with the official's or employee's performance of his assigned duties; and (2) is approved by his employing agency. See Adv. Ops. No. 89-006 (Ohio Department of Mental Health officials and employees accepting employment from colleges or universities that receive grants from ODMH) and 89-010 (a Department of Agriculture employee selling services to a state institution that is regulated by the Department). See also Adv. Ops. No. 90-002 and 90-010.

However, the Ethics Commission has explained that some high-level public officials and employees are charged with unique authority from which they cannot withdraw. Adv. Op. No. 92-009. Because they cannot withdraw from the performance of their official duties, it is impossible for those officials and employees to pursue certain kinds of private business activity.

Application of Conflict of Interest Restrictions

Universities are interested in matters before, and are, in certain instances, subject to the direct control and regulation of the OBR. See R.C. 3333.04 (OBR formulates a master plan for higher education in the state, approves or disapproves the establishment of institutions of higher education and their branches, recommends the nature of the programs, research, and services to be offered by state-assisted institutions of higher education, and approves or disapproves all new degree programs at state-assisted institutions); R.C. 3333.06 (OBR does all things necessary for participation in federal acts relative to the construction of higher educational facilities); and R.C. 3333.071 (OBR approves expenditures for land for higher education purposes by state-assisted institutions).

In this situation, while an OBR member may be able to withdraw from matters affecting a University with which his private business has a license agreement and also leases space and equipment, the University is only one of many institutions over which the OBR exercises its authority. The OBR must consider competitive issues involving institutions of higher education for federal grants, academic programs, or for outstanding faculty or students.

If you withdraw only from matters affecting the University, your withdrawal would not meet the conditions that the Ethics Commission has established regarding private business activity. Because OBR is involved in the operation of competing institutions of higher education within the state by recommending the nature of the programs, research, and services to be offered by state-assisted institutions of higher education, these decisions could also have an effect upon your private business even if you were to withdraw from specific matters involving the University. If you were to withdraw from matters involving the nature of the programs, research, and services to be offered by state-assisted institutions of higher education, then such a withdrawal would interfere with your performance of your unique statutorily assigned duties as a member of the OBR. Therefore, it is extremely difficult for you, as a member of the OBR to be a partner in a research company that has a license agreement to commercialize research with, and leases space and equipment from, a state university. See also Ohio Att'y Gen Op. No. 84-068 (R.C. 3333.01 prohibits a trustee of a public or private college or university from membership on the OBR because of the possibility of a conflicting sense of loyalty that would color his perception of his duties to the people of the State of Ohio).¹

¹ It should be noted that members of university boards of trustees are also prohibited from having the kind of interest you have described in your question. While there is a specific exception in the law that allows employees of a university who are engaged in research activities to have an interest in the commercialization of that research, the exception does not apply to members of university boards of trustees because of their authority over the operation of the university. See R.C. 3345.14(D)(2)(c). As a member of the Ohio Board of Regents, you exercise oversight over all state universities and colleges.

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Because it would be difficult, if not impossible, for you to withdraw from matters affecting a university with which you have a business relationship, in order to comply with the Ethics Law, R.C. 102.03(E) prohibits you from having a financial and fiduciary interest in Hi-Genomics, which leases space and equipment from the University to commercialize research developed at the University. If you were to continue to hold that interest, R.C. 102.03(D) would prohibit you from using your position, in any way, to secure any benefit for Hi-Genomics from the University.

Having an Interest in an University Contract—R.C. 2921.42(A)(4)

Hi-Genomics's commercialization of intellectual property owned by the University and its lease of space and equipment from the University would also implicate R.C. 2921.42(A)(4) which prohibits a public official from having an interest in a public contract entered into by or for the use of a "governmental agency or instrumentality with which he is connected." (Emphasis added.)

As explained above, the OBR decides issues affecting state-assisted institutions of higher education. Based on the many ties between the OBR and state-assisted institutions of higher education, a member of the OBR is "connected with" the University. Therefore, as a member of the OBR, you are prohibited from having a financial or fiduciary interest in a public contract entered into by or for the use of the University.

R.C. 2921.42(C) provides an exception to the prohibition imposed by R.C. 2921.42(A)(4). However, as set forth above, R.C. 102.03(D) and (E) prohibit you from having a financial and fiduciary interest in a company that has a license agreement with, and leases space and equipment from, the University. There is no exception to the prohibitions imposed by R.C. 102.03(D) and (E). Therefore, because R.C. 102.03(D) and (E) prohibit you from having the interest you have described, any provision of R.C. 2921.42 need not be addressed further.

Conclusion

As explained above, you are prohibited from having a financial and fiduciary interest in Hi-Genomics, which leases space and equipment from the University to commercialize research developed at the University because it is interested in matters before and regulated by the OBR.

The Commission commends you for seeking advice on this matter. As stated above, you have indicated that if your interest in this company is prohibited by the law, you would be willing to make alternative arrangements regarding the company. Your desire to limit the opportunity for conflicts of interest to arise will aid you to comply with the Ethics Law in these circumstances. If you intend to retain your position on the OBR, you are required to divest yourself of any financial or fiduciary interest in the company.

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The Ohio Ethics Commission approved this informal advisory opinion at its meeting on April 22, 2005. 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,

A handwritten signature in black ink, appearing to read "Jennifer A. Hardin". The signature is fluid and cursive, with the first name being the most prominent.

Jennifer A. Hardin
Chief Advisory Attorney