

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

August 25, 2006

Informal Opinion 2006-INF-0825-2

Melinda Taylor Swan

Dear Ms. Swan:

On July 14, 2006, the Ohio Ethics Commission received your letter requesting an advisory opinion. In your letter, you explained that you have been the Chief of Staff to Columbus City Council (City) since May 2000. Effective September 2, 2006, you plan to leave your position with the City to return to the business you operated prior to your employment. The business is a limited liability corporation (LLC) owned solely by you.

You have asked whether the Ethics Law prohibits you from continuing to work for the City on the 315 Research and Technology Corridor (315 Corridor), in an advisory/consultant capacity, rather than as an employee. You would assist the City with a variety of policy, public education, and marketing issues. The contract would be between the City and your LLC.

Brief Answer

As explained more fully below, as long as you have not used your public position to secure a contract with the City, a specific exception to the Revolving Door Law would allow you to be retained to assist with an ongoing project if City Council determines those services to best benefit the City.

Revolving Door Law—R.C. 102.03(A)(1)

The “Revolving Door Law,” 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.

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As an employee of the City, you are a "public employee" subject to the revolving door restrictions set forth in R.C. 102.03(A)(1). R.C. 102.01(B) and (C).

The term "represent" is defined as "any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person." R.C. 102.03(A)(5). A "person," for purposes of R.C. 102.03(A)(1), includes governmental agencies, individuals, corporations, business trusts, estates, trusts, partnerships, and associations. See R.C. 1.59(C) and Ohio Ethics Commission Advisory Opinions No. 82-002 and 89-003. Any new employer and any client or customer of your private consulting business would be a person for purposes of this restriction.

Representation of a person before a public agency can include appearances in formal proceedings, informal lobbying of agency personnel in person or by telephone, and the preparation of any written communications submitted to a public agency, such as filings, informal letters, notes, and e-mails, regardless of whether the former official or employee signs the communication. Adv. Ops. No. 86-001, 87-001, and 92-005. Any formal or informal written or oral communication you would have, on behalf of any person, with the City or any other state or local public agency, would be "representation."

The prohibition in R.C. 102.03(A) applies to any "matter" in which the official or employee "personally participated." The term "matter" includes such concrete items as a specific occurrence or problem requiring discussion, decision, research, investigation, a legal proceeding, an application, and a settlement of a dispute or question. Adv. Op. No. 99-001. "Matter" also includes such abstract items as a dispute of special or public importance and a controversy submitted for consideration. *Id.* In the instant situation, the 315 Corridor is a "matter" for purpose of R.C. 102.03(A)(1).

R.C. 102.03(A)(1) 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.

You have explained that you have been asked "continue the work [you] have undertaken" for the 315 Corridor. Because you are the Council Chief of Staff, it is likely that your work on the 315 Corridor as a city employee would fall within the definition of "personal participation" in that matter.

Therefore, R.C. 102.03(A)(1) prohibits you, for one year after you leave your employment with the City, from representing a new employer or client before the City or any other public agency, on any matter in which you personally participated as Chief of Staff, including the 315 Corridor. See Adv. Op. No. 91-009. However, the General Assembly has created an exception to this prohibition. The exception allows public agencies to make independent decisions on whether to retain the services of public officials or employees after they leave their public positions. The exception is applicable to the facts you have presented.

Exemption to the Revolving Door Prohibition—R.C. 102.03(A)(6)

R.C. 102.03(A)(6) provides:

Nothing contained in division (A) of this section shall prohibit, during such period, a former public official or employee from being retained or employed to represent, assist, or act in a representative capacity for the public agency by which the public official or employee was employed or on which the public official or employee served. (Emphasis added).

The Ethics Commission has explained that the exception of R.C. 102.03(A)(6) is available to a former public official or employee only where the official or employee is representing, assisting, or acting in a representative capacity for his former public agency. Adv. Ops. No. 91-005 and 91-009.

R.C. 102.03(A) is designed to protect the public interest by prohibiting situations from arising where a former public official or employee “will engage in a conflict of interest or realize personal gain at public expense from the use of ‘inside’ information.” State v. Nipps, 66 Ohio App.2d 17, 21 (1979). The exception of R.C. 102.03(A)(6) recognizes an absence of a conflict of interest or the realization of personal gain at public expense provided that the former official or employee is retained to represent or assist the public agency by which he had been employed. But see R.C. 102.03(D) and (E) (discussed below) and Adv. Op. No. 87-008 (A member of a governing board of a public agency is prohibited from accepting employment with the public agency, even after he leaves the board position, if he used his position while on the board to secure the employment opportunity.)

Under the facts presented, if the City Council, independent of any recommendation or involvement by you, were to decide that it was in the best interest of the City to secure your ongoing assistance as an independent contractor with the development of the 315 Corridor, the exception in R.C. 102.03(A)(6) would apply. Because of the exception, you would not be prohibited from entering into a contract with the City to provide the services you have described.

Use of Position to Secure and Soliciting Anything of Value—R.C. 102.03(D) and (E)

Also applicable to your question is R.C. 102.03(D) and (E), which provides:

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

As noted above, a City employee is a "public employee" subject to R.C. 102.03(D) and (E). "Anything of value" is defined to include money and the "promise of future employment," for purposes of R.C. 102.03(D). R.C. 102.01(G); 1.03.

In Advisory Opinion No. 96-004, the Ethics Commission explained that a public official who engages in private outside employment or business activity is prohibited from receiving fees for providing services rendered on projects that he or she has recommended in his or her official capacity. Adv. Ops. No. 84-012, 84-013, and 85-013. R.C. 102.03(E) would prohibit you from soliciting anything of value, including the promise of future employment, in any improper manner.

However, the Ethics Law does not prohibit a public agency from utilizing a former employee to work on a project he or she developed for the agency. You have explained that the Council President asked you to continue working on the project. You have also explained that your contract would have to be approved by City Council.¹ While you worked on the 315 Corridor project as a City employee, there is nothing in the facts that you have presented to suggest that your intention, at the time you worked on the project, was that you would continue to provide services on the project after you left your employment with the City.

For these reasons, and within the facts you described, R.C. 102.03(D) and (E) do not prohibit you from working, as an independent contractor of the City, on the project you have described.² The law does not prohibit the Council President from recommending, or City Council from deciding, to utilize your expertise in to work on the 315 Corridor. However, you would be

¹ Your letter does not indicate that you have any role in authorization or approval of a contract for your services. If you did play any role in that process, R.C. 2921.42(A)(3) would also apply to your question. R.C. 2921.42(A)(3) prohibits you, for one year after your public employment, from profiting from a public contract you authorized as a City employee. If you were involved in the authorization of this contract, please contact the Commission for further guidance.

² It should be noted that the restriction in R.C. 102.03(D) and (E) would have prohibited a governing board member, such as a member of city council, from entering into an independent contract of this nature. See Adv. Op. No. 87-008 (which also discusses the restriction in R.C. 2921.42(A)(3) regarding the board's award of a contract to a governing board member).

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prohibited from using your authority or influence over City staff to secure any future employment or contract opportunity for yourself.

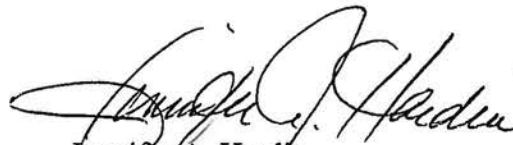
Conclusion

As explained more fully above, as long as you have not used your public position to secure a contract with the City, a specific exception to the Revolving Door Law would allow you to be retained to assist the City with an ongoing project if City Council determines those services to best benefit the City.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on August 22, 2006. The Commission commends you for requesting guidance on this matter.

This 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

cc: President of Council Matt Habash