

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

March 23, 2007

Informal Opinion 2007-INF-0323-2

Sam Speck


Dear Mr. Speck:

On March 7, 2007, the Ohio Ethics Commission received your letter requesting an advisory opinion. In your letter, you explained that you served as Director of the Ohio Department of Natural Resources (ODNR) from March 1, 1999, until January 7, 2007. You have asked whether the revolving door law, set forth in R.C. 102.03(A)(1), prohibits you from testifying before the General Assembly in support of the Great Lakes Compact (Compact). You explained that, as Director of ODNR, you served as Chair of the Council of Great Lakes Governors' Water Management Working Group, which was assigned the task of developing the Compact.

You have asked six specific questions about your activities, during the first year after you left the ODNR Director's position, regarding the Compact. You have asked whether the Ethics Law prohibits you, as a private citizen from: (1) testifying before Ohio House and Senate Legislative Committees; or (2) speaking to individual legislators. You have also asked whether the Ethics Law prohibits you, as an employee of and registered lobbyist for a natural resources interest group, from: (1) testifying before the House and Senate Committees; or (2) speaking to individual legislators. You have asked whether the application of the law, in either of these situations, is affected if you are testifying before legislative committees or meeting with legislators at the request of the current ODNR Director or any Committee Chairperson. Finally, you have asked whether you are prohibited, either as a private citizen or while employed by an interest group, from writing articles or letters to the editor, or making speeches, about the Compact.

Brief Answer

As explained more fully below, and in response to your specific questions, you are not prohibited, when acting as a private person, from: (1) testifying before legislative committees on the Compact; or (2) speaking to individual legislators about the Compact. If you were to testify or speak as a private citizen, you would not be “representing” any person on the matter under the “revolving door” prohibition of R.C. 102.03(A)(1). If you are engaged, as a representative or employee of, or registered lobbyist for, a natural resources interest group, or any other person, you are prohibited from: (1) testifying before legislative committees on the Compact; or (2) speaking to legislators about the Compact. In that case, testimony or participating in meetings would constitute prohibited representation. These conclusions apply regardless of whether you are compensated for the engagement and regardless of the source of the request for you to testify.

You are not prohibited from writing letters to the editor on the Compact, because newspapers are not public agencies. You are also not prohibited from speaking on the Compact, as a private citizen. However, you would be prohibited from speaking on the Compact as an employee of and lobbyist for the natural resources interest group, or any other person, if you are speaking before a public agency or an audience primarily composed of public officials and employees.

The Revolving Door Prohibition—R.C. 102.03(A)(1)

Division (A) of Section 102.03 of the Revised Code, the “Revolving Door” prohibition of the Ohio Ethics Law, imposes restrictions upon the ability of former public officials and employees to represent a client after leaving public service. 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.
(Emphasis added.)

R.C. 102.03(A)(1) 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 Court in State v. Nipps held that the revolving door prohibition was constitutional, and determined: “The state has a substantial and compelling interest to restrict unethical practices of its employees and public officials not only for the internal integrity of the administration of government, but also for the purpose of maintaining public confidence in state and local government.”

A former Department Director was a "public official" during his service to the state, and is subject to the revolving door prohibition for twelve months after he leaves his public position. R.C. 102.01(B) and (C). A "person" includes a governmental agency and a non-profit corporation, and would include a natural resources interest group. R.C. 1.59(C) and Ohio Ethics Commission Advisory Opinions No. 82-002 and 89-003.

The term "represent" includes "any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person." (Emphasis added.) Adv. Op. No. 86-001. The prohibition in R.C. 102.03(A)(1) applies to any "matter" in which you personally participated as ODNR Director. The term "matter" is defined in R.C. 102.03(A)(5) to include "any case, proceeding, application, determination, issue, or question," and would include the Compact. Adv. Op. No. 99-001.

R.C. 102.03(A)(1) prohibits a public official or employee, during the first year after his public service, from representing any person on a matter in which he personally participated, before any public agency, and not just before the agency with which he previously served. Adv. Ops. No. 86-001, 87-001, and 92-005. A "public agency" would include the General Assembly, all state departments and boards and commissions, the Governor's office, and any other public agency at the state or local level. "Personal participation" includes "decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion," and includes supervision of other public officials and employees, including employees of the ODNR. Adv. Op. No. 91-009.

Application to Facts Presented

R.C. 102.03(A)(1) prohibits you, during the first year after you left your position as Director, from representing a new employer or any other "person" before any public agency, on any matter in which you personally participated while you served as Director. Testimony at a public hearing, on behalf of anyone by whom you have been engaged, including a new employer, an organization for which you are a volunteer, or a private client, constitutes representation of that person, regardless of whether you are compensated for the engagement. Therefore, you are prohibited from testifying about the Compact before a legislative committee, on behalf of any person. You are also prohibited from meeting with individual legislators to discuss the Compact, on behalf of any person. This prohibition applies regardless of whether you are appearing at the request of the organization, a new ODNR Director, a legislator, or any other person.

However, the law does not prohibit an individual citizen from testifying in a public hearing, or meeting with legislators, in his or her private capacity. As long as you are not engaged by any person to represent the person's interests, or otherwise perform services related to the Compact, you are not prohibited from testifying or meeting with legislators, as a private citizen, on the Compact or other matters in which you personally participated as Director.

It is important to stress that, if you are engaged by any person or organization to perform services related to the Compact, you are prohibited from testifying before the General Assembly, meeting with legislators, or having any written or oral communication with any other public agency, on the Compact. In such a case, it would be impossible for you to separate your personal activities from your professional activities in order to testify or meet on the Compact in your private capacity without undertaking prohibited representation. The prohibition applies regardless of whether you are paid for the meetings or testimony.

Your final question is whether you are prohibited from writing letters to the editor or speaking on the Compact, either as a private citizen or as an employee of an organization. R.C. 102.03(A)(1) prohibits representation, which is defined as communication with "any public agency." A newspaper is not a public agency. Therefore, you are not prohibited from writing articles or letters to the editor, even though these communications are likely to be read by public officials or employees. As long as the audience that you are addressing as a speaker is not a public agency, or primarily composed of public officials and employees, the Ethics Law also does not prohibit you from making speeches about the Compact.

Disclosure of Confidential Information—R.C. 102.03(B)

Division (B) of Section 102.03 of the Revised Code reads as follows:

No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by the public official or employee in the course of the public official's or employee's official duties that is confidential because of statutory provisions, or that has been clearly designated to the public official or employee as confidential when that confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business.

Pursuant to this section, the former Director is prohibited from disclosing or using, without appropriate authorization, any confidential information that he acquired in the course of his public service. No time limitation exists for this prohibition. Adv. Op. No. 88-009.

Conclusion

As explained more fully above, and in response to your specific questions, you are not prohibited, when acting as a private person, from: (1) testifying before legislative committees on the Compact; or (2) speaking to individual legislators about the Compact. If you were to testify or speak as a private citizen, you would not be "representing" any person on the matter under the "revolving door" prohibition of R.C. 102.03(A)(1). If you are engaged, as a representative or employee of, or registered lobbyist for, a natural resources interest group, or any other person, you are prohibited from: (1) testifying before legislative committees on the Compact; or (2)

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speaking to legislators about the Compact. In that case, testimony or participating in meetings would constitute prohibited representation. These conclusions apply regardless of whether you are compensated for the engagement and regardless of the source of the request for you to testify.

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The Ohio Ethics Commission approved this informal advisory opinion at its meeting on March 23, 2007. 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