

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

October 31, 2007

Informal Opinion 2007-INF-1031-2

Loren E. Shaffer, MPH, PhD
Director of Public Health Surveillance Research
Health Monitoring Systems
[REDACTED]

Dear Mr. Shaffer:

On June 6, 2007, the Ohio Ethics Commission received your letter requesting an advisory opinion. In your letter, you explained that you were formerly employed by the Ohio Department of Health (ODH) as an early event surveillance supervisor. You have asked whether the Ethics Law and related statutes prohibit your new employer, Health Monitoring Systems, Inc. (HMS), from bidding on the Real-time Outbreak and Disease Surveillance (RODS) project that you participated in while you were employed by ODH.

By way of history, you explained that your position with ODH involved directing public health surveillance efforts for the early detection of infectious disease outbreaks. You stated that the crux of these efforts relied on RODS, which uses chief complaints from hospital patients as a data source. You indicated that it was your job to recruit hospitals and make the system available to local public health users. You explained that your superiors chose The Ohio State University School of Public Health (OSU) as the contracting agency for the RODS system. OSU awarded a sub-contract to the University of Pittsburgh (Pitt), the developers of the RODS system. In September 2006, Pitt decided it would no longer maintain RODS. OSU then contracted with HMS, which was formed by Pitt employees to take over the maintenance of the RODS system.

On April 16, 2007, you became the director of public health surveillance research for HMS. You indicated that the contract with OSU for continued operation of the RODS system will expire soon and the new contract will be competitively bid. HMS plans to submit a proposal for the project. You asked if HMS is permitted to make a bid provided that you do not represent them before ODH.

Brief Answer

As explained below, HMS is not prohibited from bidding on the RODS project. However, you are prohibited, for one year from the date you left your position with ODH, from representing HMS on the RODS project before any state or local public agency in Ohio.

Additionally, if you, or a board or committee of which you were a member, authorized any grants or other public contracts associated with the RODS project, you are prohibited from profiting from those public contracts, unless the contracts were let by competitive bidding to the lowest and best bidder. Finally, you are prohibited from using or disclosing confidential information that you acquired while in your public position for any purpose. There is no time limit on this prohibition. An information sheet with additional details about the law is attached and incorporated in this letter.

Post Employment Restrictions

R.C. 102.03(A)(1), the "Revolving Door" law, 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.

As a former employee of ODH, you are subject to the restriction in R.C. 102.03(A)(1) for one year from the date you left that employment. The RODS project is a "matter" in which you personally participated as an ODH employee, and you are prohibited from representing any person on the RODS project. Representation includes any formal or informal representation before, or written or oral communication with, any public agency in Ohio. R.C. 102.03(A)(5). Therefore, you are prohibited from making any formal or informal appearances before or otherwise communicating, orally or in writing, with any state or local public agency in Ohio, including ODH, OSU, any other public college, hospital, health department, or other public agency in Ohio, on behalf of HMS, on the RODS project. Ohio Ethics Commission Advisory Opinion No. 86-001.¹

¹ In addition to the statutes that specifically impose post-employment restrictions, R.C. 102.03(D) and (E) prohibit a public official or employee from soliciting or using his position to secure a future employment opportunity from an improper source. In your letter, you indicated that you immediately informed your supervisor that you were negotiating employment with HMS and withdrew from all decisions involving the company. Because you did not seek guidance before taking the position with HMS, this opinion will not address the job-seeking issue further.

However, R.C. 102.03(A) does not impose a restriction upon your employer, HMS. HMS is not barred from bidding on the new contract for the RODS project, even though you are barred from representing HMS or its clients on those matters in which you personally participated, including RODS. Adv. Op. No. 91-009.

For example, if HMS bids on the project, you would be prohibited from preparing, for application to OSU or any other public agency, any grant proposals, contract bid packages, responses to requests for proposals, or any other submission for financial support, on behalf of HMS, regarding the RODS project. You would also be prohibited from contacting officials or employees of ODH, or any other public agency in Ohio, on issues regarding the RODS project.

While R.C. 102.03(A)(1) prohibits you from representing HMS before any public agency on matters in which you personally participated, the law does not prohibit you from discussing the project with fellow HMS employees. You are not prohibited from sharing your opinions or impressions about the project, or providing advice and guidance about the best way to present a bid on RODS to ODH. Adv. Op. No. 89-003. You are prohibited from contacting ODH, OSU, or any other public agency in Ohio with respect to the matter.

You indicated that, after your employment with HMS, you spoke to Dr. Frank Holtzhauer in the Office of Public Health Workforce Development at OSU about a grant opportunity from the Robert Wood Johnson Foundation. You explained that the proposed project was to develop curricula for public health workers in the application and analytical results from RODS and similar systems in outbreak investigations. Dr. Holtzhauer considered including ODH in the project. General counsel at ODH determined that such a relationship would not be possible because you were a former employee of ODH. You indicated that since it was a new project for the parties, you thought it would be permitted by R.C. 102.03. You stated that, as a result of ODH's decision, OSU also declined to participate and the proposal was not submitted.

You have questioned whether ODH created a "restrictive covenant" by refusing to enter into a collaborative project based solely on your prior status as an employee. The Ethics Commission's advisory authority is limited to interpreting R.C. Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code. R.C. 102.08. The Ethics Commission has no authority to determine if ODH created a "restrictive covenant." However, any communication you would have with OSU or ODH concerning the RODS project is subject to the "revolving door" restrictions during the first year after you left your position at ODH.² Because the proposed grant opportunity involved RODS, the revolving door restrictions would apply to you regarding that grant. Further, even if the Revolving Door Law does not apply in a specific situation, the Ethics Law does not compel a public agency to enter into contracts with its former employees.

² As mentioned in footnote 1, this opinion does not review or reach any conclusions about actions you have already taken and the potential application of the Ethics Law to those actions.

Profiting From a Public Contract

R.C. 2921.42(A)(3) prohibits you, for a period of one year from the date you left ODH, from profiting from a public contract authorized by you, or by a board or committee of which you were a member, unless the contract was let by competitive bidding to the lowest and best bidder. The prohibition of R.C. 2921.42(A)(3) is pertinent whenever a former public official seeks employment with a party that has received funding from his former public agency.

ODH's purchase or acquisition of goods or services for the RODS system, through the provision of grants or other funding, is a public contract. See Adv. Op. No. 89-006. The sub-contract granted to HMS is also a public contract because it, like the primary contract, is for the purchase or acquisition of goods or services by or for the use of ODH. Adv. Ops. No. 85-002, 86-002, and 86-009.

A public official will be deemed to profit from a public contract if any of the following apply: (1) the establishment or operation of the company with which the official serves is dependent upon receipt of the contract; (2) the creation or continuation of the official's position with the company is dependent upon the award of the contract; (3) the contract moneys would be used by the company to compensate the official or as a basis for the official's compensation; or (4) the official would otherwise profit from the contract. Adv. Ops. No. 87-004 and 88-008.

A public official or board "authorizes" a contract where the contract could not have been awarded without the approval of the official, or the office or position in which the public official serves, or the board on which he sits. See Adv. Ops. No. 88-008, 91-009, and 92-017.

In your letter, you indicated that your superiors identified OSU as the contracting agency for the RODS system. It is unclear what, if any, role you played in the contract. If you participated in the authorization of the RODS contract, R.C. 2921.42(A)(3) prohibits you, for one year from the date you left ODH, from profiting from the primary contract to OSU or any sub-contract on the project to HMS that is not competitively bid.

Finally, R.C. 102.03(B) prohibits a current or former public official or employee from disclosing or using, without appropriate authorization, any confidential information that he acquired in the course of his official duties. No time limitation exists for this prohibition. Adv. Op. No. 88-009. For example, you are prohibited from using any confidential information you obtained about RODS during your employment with ODH for any purpose.

Conclusion

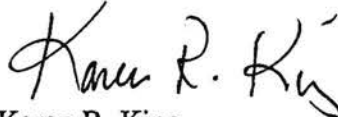
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The Ohio Ethics Commission approved this informal advisory opinion at its meeting on October 31, 2007. The opinion is based on the facts presented. It is limited to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised 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 that reads "Karen R. King". The signature is written in a cursive style with a prominent initial "K".

Karen R. King
Advisory Staff Attorney

Enclosure: Revolving Door Law Overview