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August 12, 2010

Informal Opinion 2010-INF-0812-2

Donald J. McTigue  
McTigue Law Group

Dear Mr. McTigue:

On July 15, 2010, the Ohio Ethics Commission received your letter requesting an advisory opinion on behalf of your client, Danny Williams, a candidate for Cuyahoga County (county) Council. In your letter, you explained that Mr. Williams is the Executive Director the Free Medical Clinic of Greater Cleveland (Clinic). The Clinic currently receives a \$50,000 grant from the county's general fund for operating costs, \$425,000 from the Cuyahoga County Alcohol, Drug, and Mental Health Services (ADAMHS) Board, and \$400,000 in federal Title I funds for HIV/AIDS services through the county. The total current budget of the Clinic is approximately \$3.7 million.

You have asked whether the Ethics Law and related statutes prohibit Mr. Williams from serving simultaneously as director of the Clinic and a member of the county council. Your firm provided a legal opinion to Mr. Williams in which you determined that Mr. Williams was not prohibited from serving as a member of county council. In the opinion, you stated that your firm's opinion is not binding authority under the Ethics Law and related statutes. You attached a copy of the opinion and an excerpt from the new county charter to your request.

### **Brief Answer**

The public contract provisions in the Ethics Law prevent those individuals who are responsible for making public purchases and expending public funds from profiting (R.C. 2921.42(A)(3)) or benefiting (R.C. 2921.42(A)(4)) from those purchases or expenditures, and from acting to secure such profits or benefits for themselves or closely related parties (R.C. 2921.42(A)(1)).

As explained below, within the facts you have presented, Mr. Williams would have an interest, but not occupy a position of profit, in contracts between the county and the Clinic. Therefore, R.C. 2921.42(A)(3) will not prohibit Mr. Williams from holding both positions. Other restrictions contained within R.C. 2921.42, however, will apply to these contracts.

If the Clinic continues to receive funding through the county, R.C. 2921.42(A)(4) would prohibit Mr. Williams from serving as a member of county council and Executive Director of the Clinic *unless* he can meet the exception in R.C. 2921.42(C). As discussed below, and as you concluded in your opinion, Mr. Williams may be able to meet this exception. Please note that even if Mr. Williams meets the exception, and can serve in both positions, R.C. 2921.42(A)(1) and 102.03(D) would prohibit you from actively using your position by voting, discussing, deliberating, formally or informally lobbying, or otherwise participating, as a member of the council, on matters that affect the Clinic. R.C. 102.04(C) would prohibit Mr. Williams, as part of his compensated employment at the Clinic, from representing, advocating, or performing any other services for the Clinic on any matter that is before any agency of the county.

**Profiting from a Public Contract—R.C. 2921.42(A)(3)**

If Mr. Williams were to be elected to county council, he would be a “public official” subject to the public contract restrictions in R.C. 2921.42. See R.C. 2921.01(A) (any elected officer of any political subdivision, including a county, is a “public official”). R.C. 2921.42(A)(3) states that no “public official” shall knowingly:

During the public official’s term of office or within one year thereafter, occupy any position of profit in the prosecution of a public contract authorized by the public official or by a legislative body, commission, or board of which the public official was a member at the time of authorization, unless the contract was let by competitive bidding to the lowest and best bidder.

A public contract includes any purchase or acquisition of goods or services by the county. R.C. 2921.42(I)(1)(a). The county’s acquisition of social and health care services from the Clinic for county residents is a public contract.

A grant, loan, or other similar funding program sponsored by a governmental agency is a public contract because a grant is the purchase or acquisition of services by or for the use of the governmental agency. See Adv. Ops. No. 85-002, 87-003, and 95-007. Therefore, a grant or other funding provided by or through the county regardless of whether the funding is provided through local, state, federal, or other moneys. See, e.g., Ohio Ethics Commission Advisory Opinions No. 2009-06, 2001-02, 92-014, and 87-004; ; *State v. Lordi* (2000), 140 Ohio App.3d 561, 569, discretionary appeal not allowed, 91 Ohio St.3d 1523, 91 Ohio St.3d 1526, 91 Ohio St.3d 1536, motion for reconsideration denied, 92 Ohio St.3d 1422 (2001). Therefore, the county grant, the funds from the ADAMHS Board, and the federal Title I funds that the Clinic receives are all public contracts.

The restriction in R.C. 2921.42(A)(3) applies to contracts that are authorized by a public official *or* a board of which he is a member, regardless of whether the official participated in the board's authorization. A public contract is considered to be authorized by an official or legislative body if the contract could not have been awarded without the approval of the official, the public position in which he serves, or the legislative board of which he is a member. Adv. Op. No. 87-004 and 87-008. Therefore, if Mr. Williams were to serve on county council, this restriction will apply to any contract authorized by the council while he is a member, regardless of whether he abstains from the council's consideration of the contract. Adv. Op. No. 87-008.

The prohibition of R.C. 2921.42(A)(3) will apply whenever a public official realizes a financial advantage, gain, or benefit that is a definite and direct result of a public contract authorized by him *or* by a legislative body of which he is a member, if the contract was not competitively bid and awarded to the lowest and best bidder. Adv. Op. No. 89-006. In the absence of competitive bidding, there is no exception to R.C. 2921.42(A)(3). Adv. Op. No. 92-014.

Mr. Williams is the Executive Director of the Clinic. You have described three sources of funding from the county to the Clinic totaling \$875,000. Collectively, the funding the Clinic receives through the county is approximately twenty-four percent of the Clinic's \$3.7 million annual budget.

### ***ADAMHS Funding***

The first source of funding is \$425,000 provided by to the county ADAMHS board. In the opinion you provided Mr. Williams, you stated that the council will not authorize the funding decisions of the ADAMHS board. As you mentioned in your letter, R.C. 2921.42(A)(3) applies to a "public contract *authorized by the public official or by a legislative body, commission, or board of which the public official was a member* at the time of authorization." Therefore, provided that the county council will not authorize the funding, the prohibition in R.C. 2921.42(A)(3) will not apply to the funds the Clinic receives from ADAMHS. But see R.C. 2921.42(A)(4) (discussed below).

### ***Title I funds***

The second source you identified is \$400,000 in federal Title I funds which comprise between ten and eleven percent of the Clinic's total annual budget. In your opinion to Mr. Williams, you stated that the Title I funding will be distributed based on recommendations made by an HIV Services Planning Council and that the Planning Council's recommendations will be approved by either the county council *or* the county executive. You stated that this award also appears to be made pursuant to a competitive bid process.

Provided that the Title I funds are not authorized by the county council or are awarded by competitive bidding to the lowest and best bidder, then the prohibition of R.C. 2921.42(A)(3) would not apply. However, if the Title I funding is in fact authorized by the county council and is not competitively bid, the prohibition in R.C. 2921.42(A)(3) will apply.

A public official will be deemed to profit from a contract awarded to his employer where: (1) the establishment or operations of his employer are dependent upon receipt of the contract; (2) the creation or continuation of the official's position with his employer is dependent upon the award of the contract; (3) monies received from the contract would be used by his employer to compensate the employee or as a basis for the official's compensation; or (4) the employee would otherwise profit from the award of the contract. Adv. Ops. No. 87-004 and 88-008.

One test of the first of these parameters, whether the establishment or operations of a company or organization are "dependent" on a particular contract or funding source, is the amount of funding the company or organization receives from the source. If any one source provides twenty-five or more percent of a company's or organization's funding, the Commission concludes, absent a showing to the contrary, that the establishment or operation of the company or organization is dependent on that source of funding. If this source of funding is a public agency, and an official of the agency is also an executive employee of the company or organization, the public official occupies a "position of profit" in the prosecution of the contracts between the agency and the company or organization. This is true even if the company or organization uses funds other than those provided by the agency to compensate the employee.

Other factors may suggest that an organization is "dependent" on a source of funding even if the source provides less than twenty-five percent of the agency's funding. A public official employed by an organization that receives funding from the public agency he serves should consult with the Ethics Commission to determine whether the organization is dependent on the agency's funding.

Even if a company or organization is not dependent on a public agency for its funding, an official of the agency who is also employed in an executive position with the company or organization could occupy a position of profit in the prosecuting of contracts between the employer and the agency in one of the other ways described above. If the creation or continuation of the person's position with the company or organization is dependent on the contract with the public agency he serves, the official occupies a position of profit in the contract. Also, an employee of an organization occupies a definite and direct position of profit in a contract of the organization when, for example, he receives a fee or commission from the contract, or some portion of the funds is earmarked to support his salary.

If a public official is employed with an organization that has a contract with his public agency, and organization is *not* dependent on the agency's funding, the official will not necessarily occupy a position of profit in the contracts between the agency and the organization. This is true even if the funds are part of the organization's general operating budget from which the salaries of all employees are drawn.

You stated that approximately ten percent of the Clinic's budget comes from Title I funds that may be authorized by the county council, and are not competitively bid. Further, you have stated that the Clinic's HIV/AIDS operations are not 'completely' dependent on the Title I funds and no portion of the funding will be used to compensate Mr. Williams. You have presented no other facts that suggest that the Clinic is dependent on the Title I funds. Based on the facts you have presented, the Commission concludes that the operations of the Clinic are not dependent upon the receipt of these funds.

Therefore, even if the funds are authorized by the county council and the award is not competitive, the prohibition in R.C. 2921.42(A)(3) does not apply to Mr. Williams regarding the Title I funds. However, if the amount of the Title I funds the Clinic receives increases, R.C. 2921.42(A)(3) may apply to Mr. Williams.

### ***County Grant***

The last source of funding that you identified is a \$50,000 grant from the county for the Clinic's operating costs. You stated that these funds will likely be authorized by the County Executive, not council and that this grant makes up a very small percentage of the Clinic's total budget.

Because the grant constitutes only about 1.5% of the Clinic's budget, the Commission concludes that the operations of the organization are not dependent upon the county grant. Therefore, provided that Mr. Williams does not receive a fee or commission from the grant, and the funds are not directed toward or specifically used by the Clinic to support his salary, as discussed on the previous page, Mr. Williams would not occupy a definite and direct position of profit in the Clinic's grant from the county.

However, if the amount of this grant increases, or the terms of the grant between the county and the Clinic would change in any way such that Mr. Williams would occupy a definite and direct position of profit in the county grant, R.C. 2921.42(A)(3) would prohibit him from serving in both positions at the same time.

### **Interest in a Public Contract—R.C. 2921.42(A)(4)**

If he is elected to county council, Mr. Williams would also be subject to R.C. 2921.42(A)(4), which states that no public official shall knowingly:

Have an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which the public official is connected.

R.C. 2921.42(A)(4) prohibits a public official from having any definite and direct, pecuniary or fiduciary, interest in the contracts of his agency. Adv. Ops. No. 78-005 and 81-003. An officer, executive director, chief administrative official, or member of the board of an

organization has a fiduciary interest in the contracts of the organization. Adv. Ops. No. 92-004 and 96-005. A person who serves as a chief administrative official of an organization, and is compensated for his service, also has a financial interest in the contracts of the organization.

R.C. 2921.42(A)(4) prohibits you from having an interest in the contracts entered into by or for the use of any of the governmental agencies with which you are “connected.” As a county council member, you will be connected with the county, and any of its divisions, departments, or offices. As explained above, the grant from the county, the Title I funds, and the funds from the ADAMHS Board, are contracts entered into by and/or for the use of county.

Therefore, if Mr. Williams were to simultaneously serve on the county council and as the Executive Director of the Clinic, he would have a **prohibited interest** in the funding provided through the county to the Clinic. R.C. 2921.42(A)(4) would prohibit Mr. Williams from serving in both positions at the same time **unless he could meet an exception to the law contained in R.C. 2921.42(C).**

**Exception—R.C. 2921.42(C)**

R.C. 2921.42(C) provides that R.C. 2921.42(A)(4) does not apply to a public contract in which a public official has an interest when all four requirements in the exception can be met. The criteria are strictly construed against the public official who must show compliance with them. Adv. Ops. No. 83-004 and 84-011. The Ethics Commission has explained that the application of the (C) exception must be consistent with the underlying principle in R.C. 2921.42: “[A] public official should not have an interest in a public contract with the governmental entity with which he serves unless the contract is the best or only alternative available to the governmental entity.” (Emphasis added). *Id.* All four requirements in R.C. 2921.42(C) must be met, and they are:

- (1) The subject of the public contract is necessary supplies or services for the political subdivision or governmental agency or instrumentality involved;
- (2) The supplies or services are unobtainable elsewhere for the same or lower cost, or are being furnished to the political subdivision or governmental agency or instrumentality as part of a continuing course of dealing established prior to the public official’s becoming associated with the political subdivision or governmental agency or instrumentality involved;
- (3) The treatment accorded the political subdivision or governmental agency or instrumentality is either preferential to or the same as that accorded other customers or clients in similar transactions;

- (4) The entire transaction is conducted at arm's length, with full knowledge by the political subdivision or governmental agency or instrumentality involved, of the interest of the public official, member of the public official's family, or business associate, and the public official takes no part in the deliberations or decision of the political subdivision or governmental agency or instrumentality with respect to the public contract.

**Necessary Services—R.C. 2921.42(C)(1)**

Provided that the contracts and grants to the Clinic are awarded and administered by the county to carry out its mandate and purpose, as established by statutes, charter, ordinances, or resolutions of the county, the services the county would acquire through the contracts would be considered necessary. R.C. 3379.04. Adv. Ops. No. 85-002, 88-006, and 2001-02. In that case, Mr. Williams would be able to meet the requirement in R.C. 2921.42(C)(1).

**Continuing Course of Dealing or Unobtainable Elsewhere—R.C. 2921.42(C)(2)**

R.C. 2921.42(C)(2) requires that the service provided to the county by the Clinic are either "unobtainable elsewhere for the same or lower cost," or are furnished as part of a "continuing course of dealing" established before Mr. Williams became associated with the county.

**Continuing Course of Dealing**

For purposes of R.C. 2921.42(C)(2), a continuing course of dealing is a contractual agreement between the parties that existed prior to the time that the official assumed public office. Adv. Ops. No. 82-007, 84-006, and 88-008. Mr. Williams is not yet a county official and the contract/grant relationships between the county and the Clinic has already been established. Therefore, if Mr. Williams were to be elected to county council, he will meet the "continuing course of dealing" requirement in Division (C)(2) regarding any contracts or grants that are in place at the time he is sworn in to office.

If the original contract or grant terms between the county and the Clinic provide for automatic renewal, without any action by the county or any changes to the terms or conditions of the contract or grant after the current terms expire, the automatic renewal would be considered part of a continuing course of dealing. Adv. Op. No. 88-008. If, however, a renewal requires the county to act, or there is any revision or change in the contract or grant terms, the resulting agreements are considered new contracts, and accordingly they are not considered part of a "continuing course of dealing" for purposes of R.C. 2921.42(C)(2). *Id.*

If a renewal of the contracts or grants cannot be deemed part of a "continuing course of dealing," then Mr. Williams would be required to demonstrate that the county cannot acquire the

services provided by the Clinic, under its contract with the county or in return for the grant, from other sources for the same or lower cost.

**Unobtainable Elsewhere for the Same or Lower Cost**

The requirement that the goods or services be “unobtainable elsewhere for the same or lower cost” must be demonstrated by an objective standard. As stated in Advisory Opinion No. 84-011:

The criterion that the goods or services be “unobtainable for the same or lower cost” requires that a public official or employee be at a disadvantage when attempting to do business with his governmental entity, and that an equally qualified applicant who is not a [public official] must receive preference.

In order to meet the requirement in R.C. 2921.42(C)(2), Mr. Williams would have to demonstrate, objectively, that the services provided by the Clinic are unique, and that no other source could perform the same services for the same or lower cost. The Ethics Commission has held that, in some rare instances, an organization in which a public official has an interest may be uniquely qualified to provide services to the official’s own public agency. Adv. Op. No. 88-001.

With respect to service contracts, one way to demonstrate that the Clinic is the only or lowest cost provider for the services would be for the county to issue a request for proposals (RFP) for the services. An RFP process is not a competitive bidding process, and cannot absolutely establish whether a particular provider is the lowest cost provider. See *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Management District* (1994), 73 Ohio St. 3d 590, 600 (“The RFP method of procurement is not competitive bidding.”) See also Adv. Op. No. 88-006. Rather, an RFP process is a negotiated procurement method, where both parties have greater flexibility. Each party has the freedom to propose or chose alternatives in service delivery, price, and payment methods. The purchasing party can use subjective scoring criteria to assess responding proposals, with greater weight given to consideration such as past experience with the vendor or quality, rather than cost.

Even though an RFP is not a strict competitive bid, it can still help to establish whether there are multiple parties that would be interested in providing a particular service to the agency and determine whether a particular provider is the lowest cost provider. In order for an RFP to be truly assistive, it must be open and fair, with all potentially interested providers given the opportunity to respond to it. Further, the interested public official (in this case, Mr. Williams) would be prohibited from participating, in any way, in the county’s decision to issue an RFP, or establishment of the terms and conditions of the contract. See also R.C. 2921.42(A)(1) and 102.03(D), discussed below.) If the RFP is openly and fairly created and advertised, Mr. Williams did not participate in any way to in agency’s activities related to the RFP, and the Clinic’s response to the RFP is the only or lowest cost for the necessary services, the RFP process will help Mr. Williams to meet the requirement in R.C. 2921.42(C)(2). This requirement

could also be met through a competitive bid process where the Clinic submits the lowest and best bid.

With respect to grants, Mr. Williams could meet this requirement where either: (1) all qualified and interested applicants for the grants have received grants and funds remain to provide grants to the Clinic; *or* (2) the county accepts applications for grants on an ongoing first-come, first-served basis, in a fair and open application process in which all interested and qualified applicants receive funding, and where there has historically been enough money to fund all qualified grant applications. See Adv. Op. No. 93-008 and 2001-02. The purpose of this requirement is to require a demonstration that grant funds are distributed fairly, without the official's public position influencing decision makers.

**Same or Better Treatment—R.C. 2921.42(C)(3)**

The third requirement, R.C. 2921.42(C)(3), is that the Clinic treats the county either better than or the same as it would treat other customers or clients in similar transaction. In situations where the contract involves grant programs, the Commission has explained that grant recipients have no "customers or clients in similar transactions." Adv. Ops. No. 84-011 and 2001-02. Therefore, Mr. Williams could meet this part of the exception for the grant the Clinic receives through the county. For any service contracts the Clinic has entered into with the county, Mr. Williams would have to show that the services the Clinic provides to the county are the same as or better than the services the Clinic provides to any other person or entity it serves.

**Arm's Length Transaction—R.C. 2921.42(C)(4)**

Finally, R.C. 2921.42(C)(4) requires that the entire transaction is conducted at arm's length, that the county has full knowledge that Mr. Williams has an interest in any contracts or grants awarded to the Clinic, and that Mr. Williams takes no part in the county's decisions regarding the contract or grant. For example, R.C. 2921.42(C)(4) would prohibit you from discussing any Clinic contracts or other funding with the County Executive.

In an arm's length transaction: (1) both the Clinic and the public agency act voluntarily, without compulsion or duress; (2) the transaction occurs in an open market; and (3) both the Clinic and the public agency act in their own self-interest. *Walters v. Knox Cty. Bd. of Rev.* (1989), 47 Ohio St.3d 23, 25. With respect to the criteria set forth in Division (C)(4), the Commission has concluded that, if the public agency's procedure for determining whether to provide financing for a particular project, notice to prospective funding recipients, and selection of qualified projects are fair and objective with no preference given to organizations connected with public officials or employees, it will significantly help a public official to demonstrate compliance. Adv. Op. No. 84-011.

### **Summary of R.C. 2921.42(C) Exception**

If Mr. Williams is unable to meet any of the four requirements in R.C. 2921.42(C), he would be prohibited from simultaneously serving as a member of the council and as the Executive Director of the Clinic. As you concluded in your opinion, it appears, based on the services provided by the Clinic, that Mr. Williams can meet these requirements regarding the three sources of county funding he has identified. If Mr. Williams *is* able to meet all four parts of the exception in R.C. 2921.42(C), he would not have an unlawful interest in the county contracts and grants you have described. However, Mr. Williams must comply with other provisions of the Ethics Law that will limit his conduct.

### **Other Requirements**

R.C. 2921.42(A)(1), a felony provision, states that a public official shall not knowingly authorize or employ the authority or influence of his office to secure authorization of any public contract in which he has an interest. This provision would prohibit Mr. Williams, as a county council member, from voting upon, discussing, or otherwise using your authority or influence to secure, any allocation of county funds to the Clinic. Mr. Williams would be prohibited, for example, from recommending the Clinic to any county agency or any other public agency with which he is connected, or from using his position to set forth competitive bidding or RFP requirements if the Clinic is likely to respond to the invitation or RFP. You would be prohibited from discussing contract matters related to the Clinic with any county officials or employees, including the County Executive.

R.C. 102.03(D) would prohibit Mr. Williams from using or authorizing the use of the authority or influence of his office to secure anything of value if the thing of value is of such a character as to manifest a substantial and improper influence upon him with respect to his duties. R.C. 102.03(E) would prohibit Mr. Williams from soliciting anything of value if the thing of value is of such a character as to manifest a substantial and improper influence upon him with respect to his duties. The Ethics Commission has determined that R.C. 102.03(D) and (E) prohibit a public official from participating in any matter that would provide a benefit to an organization that he serves in a fiduciary capacity and from soliciting any benefit to an organization he serves in a fiduciary capacity. See Adv. Ops. No. 89-005, 90-012, and 92-004.

In the situation you have described, the funding that the Clinic receives through the county is a thing of value. Because Mr. Williams serves as the Executive Director of the Clinic, the funding that the Clinic receives from the county could manifest a substantial and improper influence upon Mr. Williams in matters before the county council involving the Clinic. Adv. Op. No. 87-006.

Therefore, R.C. 102.03(D) and (E) would prohibit Mr. Williams from participating in matters before county council that affect the interests of the Clinic. Mr. Williams would be prohibited from participating in council votes or discussion, and any other formal action by council, involving these matters. In addition, Mr. Williams would be prohibited from

participating in such matters informally by discussing them with other council members and engaging in formal or informal lobbying on behalf of the Clinic. For example, he would be prohibited from participating in the county council's discussion of terms or requirements for an RFP or competitive bid for health care services for county residents. You would be prohibited from discussing matters related to the Clinic with any county officials or employees, including the County Executive.

Further, the Commission delineated the specific application of R.C. 102.03(D) to outside employment issues. Some of the restrictions will apply to Mr. Williams if he is elected to county council and continues to serve as the Executive Director of the Clinic. Specifically, Mr. Williams will be prohibited from lending the stature inherent in his public position to the promotion or advocacy of a matter for the Clinic. Adv. Op. No. 2008-02. If the Clinic has expressed a position on a matter that is before council, even the Council is not a party to the matter, Mr. Williams will be prohibited from participating in council's discussion, consideration, or actions on the matter. Id. You would also be prohibited from discussing matters on which the Clinic has expressed a position with any county officials or employees, including the County Executive. The Clinic has expressed a position on a matter where its board votes or makes a determination on a matter, directs staff to lobby or speak on its behalf on the matter, or otherwise makes its position on the matter known through communications by the board or the staff of the organization.

Other specific restrictions are enumerated in Advisory Opinion No. 96-004 and 2008-02. For example, Mr. Williams will be prohibited from using public time, facilities, personnel, or other resources in conducting the Clinic's business. See also R.C. 2921.41 (theft in office). Copies of these opinions are enclosed for you and your client.

**Mr. Williams should also be aware that R.C. 102.04(C) would prohibit him, as a member of county council, from receiving compensation from the Clinic for performing services on matters pending before any instrumentality of the county.<sup>1</sup>** Mr. Williams is compensated for his service as the Executive Director of the Clinic. Therefore, in the course of his job duties with the Clinic, Mr. Williams would be prohibited from discussing the Clinic's contracts with any county official or employee, and from interacting with county offices regarding any of the services that the Clinic provides to the county.

Mr. Williams would be prohibited from acting as the Clinic's representative on any matter involving the contracts or grants or any projects between the Clinic and the county. Adv. Op. No. 89-008. For example, Mr. Williams would be prohibited from making telephone calls, sending e-mails or letters, or performing any other services for the Clinic regarding the work the Clinic does for ADAMHS or the funds the Clinic receives for that work. Adv. Op. No. 91-006.

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<sup>1</sup> There is an exception to this prohibition, but it would not apply to Mr. Williams as an elected official.

If it is necessary for an employee of the Clinic to perform services on any matters that will be before a county agency, it must be someone other than Mr. Williams. If Mr. Williams's job duties as the Clinic's Executive Director require that he work on matters affecting the Clinic that will be before any county agencies, it would be impossible for him to engage in those job duties and comply with R.C. 102.04(C) while he serves on county council.

Additionally, R.C. 102.03(A)(1) would prohibit Mr. Williams from representing the Clinic, before any public agency including but not limited to the county, on any matter in which he personally participated as a public official. Unlike R.C. 102.04(C), which prohibits him from receiving compensation to perform services, R.C. 102.03(A)(1) prohibits Mr. Williams from representing any person on certain matters regardless of whether he receives compensation for his services. This prohibition would apply during Mr. Williams's public service and for one year after his public service.

Therefore, if Mr. Williams participated in a matter as a member of county council, and was later asked to represent the Clinic or any other person except the county on the matter before any public agency, such as a state department, municipality, or regional authority, R.C. 102.03(A)(1) would prohibit Mr. Williams from engaging in those activities.

Finally, if Mr. Williams were to be elected to county council, R.C. 102.03(B) would prohibit him from disclosing or using, without appropriate authorization, any confidential information he acquired during that service. He will be prohibited from disclosing or using the information even if he does not personally benefit from the disclosure or use. There is no time limit for this prohibition, and it will apply to Mr. Williams during and after his public service, as long as the information is confidential.

### **Conclusion**

The Commission advises that, if Mr. Williams were to continue to serve as the Executive Director of the Clinic after being elected to county council, he should exercise extreme caution to make sure he is complying with all of the requirements in the law discussed in this opinion. Failure to comply with these restrictions can result in consequences for the county as well as criminal penalty for Mr. Williams. For example, if Mr. Williams were to be unable to show that he meet the exception in R.C. 2921.42(C) regarding a contract between the county and the Clinic, the contract would be void and unenforceable. R.C. 2921.42(H). Mr. Williams should seek assistance from the Ethics Commission if he has any questions about his ability to comply with the law after election to county council.

As explained above, within the facts you have presented, Mr. Williams would have an interest, but not occupy a position of profit, in contracts between the county and the Clinic. Therefore, R.C. 2921.42(A)(3) will not prohibit Mr. Williams from holding both positions. Other restrictions contained within R.C. 2921.42, however, will apply to these contracts.

Donald J. McTigue  
August 12, 2010  
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If the Clinic continues to receive funding through the county, R.C. 2921.42(A)(4) would prohibit Mr. Williams from serving as a member of county council and Executive Director of the Clinic *unless* he can meet the exception in R.C. 2921.42(C). As discussed below, and as you concluded in your opinion, Mr. Williams may be able to meet this exception. Please note that even if Mr. Williams meets the exception, and can serve in both positions, R.C. 2921.42(A)(1) and 102.03(D) would prohibit you from actively using your position by voting, discussing, deliberating, formally or informally lobbying, or otherwise participating, as a member of the council, on matters that affect the Clinic. R.C. 102.04(C) would prohibit Mr. Williams, as part of his compensated employment at the Clinic, from representing, advocating, or performing any other services for the Clinic on any matter that is before any agency of the county.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on August 10, 2010. 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

Enclosures: Advisory Opinion No. 96-004 and 2008-02