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November 3, 2011

Informal Opinion 2011-INF-1103-1

Diane R. Brey
Deputy Chief Counsel
Office of Governor John Kasich



Dear Ms. Brey:

On October 21, 2011, the Ohio Ethics Commission received your letter requesting an advisory opinion. In your letter, you asked:

If the current Director of the Department of Agriculture (ODA) were to be appointed as Director of the Department of Natural Resources (ODNR), what restrictions would apply to him under the Ethics Law and related statutes?

Brief Answer

As explained more fully below, if the Director of ODA were to become the Director of ODNR, he would be prohibited, for one year after leaving ODA, from representing ODNR before any public agency on any “matter” in which he “personally participated” as the ODA Director. However, because of the Director’s limited participation at ODA in matters over which ODNR has jurisdiction, the Ethics Law, in its current form, will not significantly limit the Director’s activities if he becomes the Director of ODNR.

The ODA Director did not personally participate in a matter if his involvement in that matter was limited to attending meetings to gather information from or share information with the public about Department programs, activities, and policies. Further, the proposal, consideration, or enactment of any statutes, rules, ordinances, resolutions, or charter or constitutional amendments is not a “matter.”

The ODA Director would also be prohibited from disclosing or using any confidential information he acquired while he was ODA Director. There is no time limit on this restriction.

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

A former Director of a state department is a “public official”¹ subject to the “Revolving Door” prohibition in R.C. 102.03(A)(1), which 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.

R.C. 102.03(A)(1) is designed to protect the public interest by prohibiting situations from arising in which 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.”² 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.”³

A public official who has moved from one public employer to another is prohibited for one year from “representing” his new public employer or any other person on any matter in which he personally participated in his former public employment. The terms “represent,” “person,” and “matter” are defined and more fully explained in R.C. 102.03(A) and Ethics Commissions Advisory Opinions. Briefly:

- “Represent” includes any formal or informal appearance before or written or oral communication with any “public agency.”⁴
 - “Public agency” includes the General Assembly, any state department, board, or commission, any political subdivision, or any other governmental entity in the state of Ohio.⁵
- “Person” includes an individual, corporation, association, and public agency.⁶ ODNR would be a “person.”
- “Matter” includes “any case, proceeding, application, determination, issue, or question.”⁷ Water quality improvement projects in the Grand Lake St. Mary’s area, preserving or improving water quality in other parts of the state, shale exploration and development, permits allowing farmers to raise white-tailed deer for hunting preserves, and the eradication of the Asian Longhorned Beetle (ALB) are all matters under this definition.
 - “Matter” excludes the “proposal, consideration, or enactment” of statutes, rules, ordinances, resolutions, or charter or constitutional amendments on any topic.⁸ However, the implementation of government programs established under existing laws, rules, or regulations, and other activities to carry out laws, rules, and regulations, are matters.

R.C. 102.03(A)(1) does not prohibit a public employee who moves from one public agency to another from representing his new public employer, before the agency that formerly employed him or any other public agency, on matters in which he did not “personally participate” in his former public employment. The question of “personal participation” is central to this opinion.⁹

Grand Lake St. Mary’s, Water Quality Improvement, and Shale Exploration and Development

As noted above, water quality improvement projects in the Grand Lake St. Mary’s area, preserving or improving water quality in other parts of the state, and shale exploration and development are all matters under this definition. R.C. 102.03(A)(1) would prohibit the Director of ODA if he becomes Director of ODNR from representing ODNR before ODA, the Governor’s Office, any county or municipal corporation, the General Assembly, or any other public agency, on these matters if he personally participated in those matters as Director of ODA.

The term “personal participation” is defined in R.C. 102.03(A)(1) as “decision, approval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion.” You have described the ODA Director’s activities on the matters listed above as meeting with farmers-agricultural landowners to identify their concerns or obtain feedback about these matters. You have stated that ODA does not have direct regulatory oversight of these areas.

These activities of the ODA Director, therefore, are not personal participation. Participating in discussions and gathering information do not rise to the level of the “substantial exercise of administrative discretion.” For example, the Commission has concluded that when a public official is merely communicating or providing information about an agency’s policies and decisions, without any exercise of administrative discretion, the official is not personally participating in matters before the agency.

Provided that the ODA Director’s activities in the matters discussed in this section were limited to those you described, and he did not “personally participate” in the matters, R.C. 102.03(A)(1) does not prohibit him, if the Governor appoints him to be ODNR Director, from representing ODNR before ODA or any other public agencies on these matters. As you noted in your letter, the ODA Director’s limited involvement in matters touching on areas under the direct regulation of ODNR will not create a conflict of interest.

Raising White-Tailed Deer

You have also described the Director’s activities regarding proposals to permit farmers to raise white-tailed deer for hunting preserves. You stated that the Director’s role was limited to attending meetings to obtain feedback about potential regulations. Oversight of these activities is a “matter” for both ODA (which regulates farming activities) and ODNR (which regulates

hunting preserves). Implementation of any programs related to farming practices and hunting preserves established under existing laws, rules, or regulations are matters. However, the proposal, consideration, or enactment of any statutes and rules that govern these activities are not matters.¹⁰ As a result, the revolving door law does not apply to the Director's activities related to these regulations.

Eradication of the Asian Longhorned Beetle and Regulation of Farming Practices

You have also described a matter involving the Asian Longhorned Beetle (ALB). You have stated that ODNR employees assisted ODA by identifying trees affected by the ALB in connection with ODA's efforts to eradicate the ALB. The eradication of the ALB is a matter under the purview of both ODA and ODNR.

Finally, you have stated that the ODA Director "expressed support" for regulations regarding farming practices that are designed to improve water quality. The regulation of farming practices is a matter under ODA's purview. Implementation of any programs related to farming practices established under existing laws, rules, or regulations are matters. However, the proposal, consideration, or enactment of any statutes and rules that govern the activities are not.¹¹

If the ODA Director personally participated in either of these matters, by recommending or approving ODA's regulatory approach or otherwise exercising administrative discretion on the matter, R.C. 102.03(A)(1) will prohibit him, if appointed as ODNR Director, from representing ODNR before ODA or any other public agency on the matter. This restriction would apply to the former ODA Director for one year after he leaves his position at ODA. If R.C. 102.03(A)(1) prohibits the ODNR Director from representing ODNR on a particular matter, the Commission notes that, because of R.C. 121.05, the Assistant Director of the Department can represent the Department on that matter.¹²

However, your letter suggests that ODNR's involvement in the ALB eradication matter is somewhat limited. You stated: "[E]mployees of the Department of Natural Resources assisted the Department of Agriculture by identifying trees affected by the Asian Longhorn Beetle in connection with the Agriculture Department's efforts to eradicate the pest." Neither R.C. 102.03(A)(1) nor any other provision of the Ethics Law prohibits employees of ODNR from continuing these activities. Further, even if the Director did personally participate, during his employment at ODA, in these matters, he would not be prohibited, as Director of ODNR, from guiding ODNR officials and employees in these matters because that activity is not representation of ODNR before another public agency. For that reason, should the current ODA Director become the ODNR Director, R.C. 102.03(A)(1) does not prohibit him, in that role, from asking ODNR employees to continue these activities.

Further, the Ethics Law does not prohibit the officials or employees of two departments from cooperating in the manner described in R.C. 121.17:

Under the director of the governor, the directors of departments shall devise a practical and working basis for co-operation and co-ordination of work and for the elimination of duplication and overlapping functions. They shall co-operate with each other in the employment of services and the use of quarters and equipment. The director of any department may empower or require an employee of another department, subject to the consent of the superior officer of the employee, to perform any duty which he might require of his own subordinates.

Where the Directors of two departments are cooperating on a particular matter as described in R.C. 121.17, the Ethics Law would not prohibit the Director of one agency from participating in that matter if he becomes the director in the other agency.

With respect to the issue of farming regulations that may improve water quality, the “matter” on which the ODA Director personally participated would be the implementation of the regulations rather than the adoption of the regulations. If the ODA Director merely “expressed support” for proposed regulations in this area, those regulations are not matters for purposes of R.C. 102.03(A)(1).

However, even if the ODA Director participated in the implementation of programs related to farming practices established under existing laws, rules, or regulations, the Ethics Law may not prohibit him from representing ODNR, if he becomes the ODNR Director, on related matters.¹³ Although water quality improvement may have been a consideration in the implementation of the farming regulations, and the ultimate result of the regulations may be that water quality is improved, the ODA Director did not personally participate in the regulation of water quality. Therefore, he is not prohibited from participating, should he become the ODNR Director, in matters involving water quality improvement unless they also involve the implementation of farming regulations on which he personally participated.

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 ODA Director is prohibited 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.¹⁴

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on November 3, 2011. 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

The Ohio Ethics Commission Advisory Opinions referenced in this opinion are available on the Commission's Web site: www.ethics.ohio.gov.

¹ R.C. 102.01(B) and (C).

² *State v. Nipps* (1979), 66 Ohio App.2d 17, 21.

³ See also *Brinkman v. Budish* (S.D. Ohio Feb. 17, 2010), Case No. 1:09-cv-326. R.C. 102.03(A)(4) prohibits a former employee or member of the general assembly, for one year after the conclusion of his or her service with the general assembly, from representing any person on any matter before the general assembly, a committee of the general assembly, or the controlling board. The *Brinkman* court, considering the *Nipps* precedent, recognized that the stated purpose of the version of the statute considered in *Nipps* was closely tied to its narrow restriction against advocacy on matters on which the official had personally participated. The court decided that the current version of R.C. 102.03(A)(4), which prohibits former general assembly members from representing clients on any matter before the general assembly, regardless of whether it is a matter in which they personally participated while in office and on which they had the opportunity to gain inside information, was not narrowly tailored. R.C. 102.03(A)(1), the statute considered here and over which the Ethics Commission has jurisdiction, is similar to the statute considered in the *Nipps* case in that it limits a former public official or employee from representing anyone in a matter in which he has personally participated.

⁴ Ohio Ethics Commission Advisory Opinion No. 86-001.

⁵ R.C. 102.01(C).

⁶ R.C. 1.59(C). See Adv. Op. No. 82-002, 89-003, and 93-011.

⁷ R.C. 102.03(A)(5); Adv. Ops. No. 99-001 and 2004-04.

⁸ R.C. 102.03(A)(5); Adv. Op. No. 2004-04.

⁹ Adv. Op. No. 86-001.

¹⁰ Adv. Op. No. 2004-04.

¹¹ *Id.*

¹² Adv. Op. No. 2011-02.

¹³ Adv. Op. No. 99-001.

¹⁴ Adv. Op. No. 88-009.