



OHIO ETHICS COMMISSION
THE ATLAS BUILDING
8 EAST LONG STREET, SUITE 1200
COLUMBUS, OHIO 43215-2940
(614) 466-7090

Advisory Opinion Number No. 89-003
February 23, 1989

Syllabus by the Commission:

- (1) Division (A) of Section 102.03 of the Revised Code prohibits a former public official or employee who participated as a public official or employee through the exercise of administrative discretion under R.C. Chapters 343. or 3734. from representing or acting in a representative capacity for an owner or operator of a facility as defined in R.C. 3734.01(N) or an applicant for a permit or license for a facility under that chapter, before any public agency for twenty-four months after the conclusion of his service on any matter, regardless of whether he personally participated in the matter as a public official or employee, and regardless of whether the matter was handled by a governmental agency other than his former employer, or is unrelated to the regulation of solid, hazardous, or infectious wastes;
- (2) As used in Division (A) of Section 102.03 of the Revised Code, the term "represent" is defined to include any formal or informal appearance before, or written or oral communication with, any public agency including all courts.
- (3) A former public official or employee who is subject to the post-employment restrictions added by Am. Sub. H.B. 592 to R.C. 102.03(A) is prohibited from formally or informally appearing before, or communicating orally or in writing with, any public agency on behalf of a facility owner or operator or applicant for a permit or license for a facility, and from preparing any letters, reports, or other documents that are presented to a public agency on behalf of such a party, regardless of whether the former official or employee personally participates in the presentation of the materials to the public agency;
- (4) A former public official or employee who is subject to the postemployment restrictions added by Am. Sub. H.B. 592 to R.C. 102.03(A) is prohibited from representing a facility owner or operator, or applicant for a permit or license for a facility before a public agency on any legislation or administrative rules in which he participated while in public service;
- (5) The twenty-four month period imposed by the amendment to R.C. 102.03(A) under Am. Sub. H.B. 592 commences when the public official or employee leaves public service, and not when he ceases to have responsibility for matters under Chapter 343. or Chapter 3734. of the Revised Code.
- (6) Division (A) of Section 102.03 of the Revised Code does not apply to an independent contractor with a governmental agency so long as the independent contractor does not

exercise sovereign powers of government through his authority and administrative discretion;

(7) A public official or employee who is subject to the post-employment restrictions added by Am. Sub. H.B. 592 to R.C. 102.03(A) is prohibited from representing a political subdivision or governmental agency which is a facility owner or operator, or an applicant for a permit or license for a facility;

(8) The post-employment restrictions added by Am. Sub. H.B. 592 to R.C. 102.03(A) do not apply to a former public official or employee who exercised administrative discretion under R.C. Chapter 343. or R.C. Chapter 3734. prior to the effective date of H.B. 592;

(9) The restrictions added by Am. Sub. H.B. 592 to R.C. 102.03(A) do not apply to present, as opposed to former public officials and employees. However, the general provision of Division (A) of Section 102.03 of the Revised Code prohibits a present public official or employee who exercises administrative discretion under R.C. Chapters 343. or 3734. from representing or acting in a representative capacity for a facility owner or operator or applicant for a permit or license for a facility before any public agency on any matter in which the official personally participated as a public official or employee. Other provisions of the Ohio Ethics Law also restrict the conduct of a present public official or employee in representing a facility owner, operator, or applicant;

* * * * *

You have asked several questions concerning the amendment to R.C. 102.03(A) which was enacted as part of Am. Sub. H.B. 592, 117th Gen. A. (1988) (eff. June 24, 1988). This amendment imposed an additional restriction to Ohio's "Revolving Door" law for any former public official or employee who participated through the exercise of administrative discretion under R.C. Chapter 343. or R.C. Chapter 3734. Chapter 343. of the Revised Code deals generally with the establishment of county, joint-county, and regional solid waste management districts, and R.C. Chapter 3734. regulates the handling, storage, transportation, and disposal of solid, hazardous and infectious wastes. In order to address your questions, it is helpful to first review the general provisions of R.C. 102.03(A) which remain unaffected by the H.B. 592 amendment.

All public officials and employees within the state of Ohio are subject to the postemployment restrictions of the "Revolving Door" prohibition of the Ohio Ethics Law, Section 102.03(A) of the Revised Code. The general provision of Section 102.03(A) prohibits a present or former public official or employee during government service and for one year thereafter from representing a client or acting in a representative capacity for any person (defined by Section 1.59 of the Revised Code to include an individual, corporation, partnership, association, or other similar entity) before any public agency on any matter in which he personally participated as a public official or employee. A former public official or employee who is subject to this general provision is not prohibited by R.C. 102.03(A) from representing persons on new matters, legislative matters, or matters in which he did not participate as a public official or employee. Special provision exists for former commissioners and attorney examiners of the Public Utilities Commission of Ohio, who are also prohibited for two years after leaving

public service from representing a public utility before a state board, commission, or agency. R.C. 102.03(A) does not prohibit a former official or employee from being retained or employed by the agency with which he served or from performing ministerial functions such as preparing tax returns and filing applications for permits or licenses. Violation of R.C. 102.03(A) carries criminal penalties of up to six months imprisonment and/or a \$1,000 fine.

The special provision added to R.C. 102.03(A) by Am. Sub. H.B. 592 reads:

For twenty-four months after the conclusion of his service, no former public official or employee who participated as a public official or employee through decision, approval, disapproval, recommendation, the rendering of advice, the development or adoption of solid waste management plans, investigation, inspection, or other substantial exercise of administrative discretion under Chapter 343. or 3734. of the Revised Code shall represent a person who is the owner or operator of a facility, as defined in section 3734.01 of the Revised Code, or who is an applicant for a permit or license for a facility under that chapter, or shall act in a representative capacity on behalf of any such person before any board, commission, or agency of the state or a political subdivision.

R.C. 3734.01(N) defines facility as:

[A]ny site, location, tract of land, installation, or building used for the incineration, composting, sanitary landfilling, or other methods of disposal of solid wastes; for the transfer of solid wastes; for the treatment of infectious wastes; or for the storage, treatment, or disposal of hazardous waste.

The pertinent elements of the H.B. 592 amendment to R.C. 102.03(A) are: (1) a former public official or employee who participated while in public service through decision, approval, disapproval, recommendation, the rendering of advice, the development or adoption of solid waste management plans, investigation, inspection, or other substantial exercise of administrative discretion under Chapters 343. or 3734. of the Revised Code; (2) is prohibited for twenty-four months after leaving public service; (3) from representing or acting in a representative capacity for a person who is the owner or operator of a facility as defined in Section 3734.01 of the Revised Code, or who is the applicant for a permit or license for such a facility; (4) before any board, commission, or agency of the state or a political subdivision.

Your first question asks whether R.C. 102.03(A), as amended, prohibits a former public official or employee who had participated in actions arising under Chapters 343. or 3734. of the Revised Code (hereinafter affected former official) from representing a new client or employer in waste management matters in which the affected former official had not personally participated while employed by the state or local government. You have also asked whether the H.B. 592 amendment prohibits an affected former official from representing a new client or employer in matters handled by governmental units other than his previous employer, or in matters unrelated to the regulation of solid, hazardous, or infectious wastes.

As stated above, the H.B. 592 amendment prohibits an affected former official from representing or acting in a representative capacity for a person who is the owner or operator of a

facility as defined in Section 3734.01 of the Revised Code, or who is the applicant for a permit or license for such a facility (hereinafter facility owner). The Ohio Ethics Commission addressed the issue of statutory construction of the Ethics Law in its first formal advisory opinion, and held in Ohio Ethics Commission Advisory Opinion No. 74-001:

In rendering advisory opinions pursuant to Section 102.08 of the Revised Code, the Ohio Ethics Commission, like the courts, in the construction of a statute, must be guided by the statute as it exists, in other words, as the Legislature enacted it. The primary and paramount rule in the interpretation or construction of statutes is to ascertain, declare, and give effect to the intention of the Legislature.... [I]t is to be assumed that the Legislature used the language contained in a statute advisedly and intelligently and expressed its intent by the use of the words found in the statute ... (Emphasis added.)

Although the general Revolving Door provision does, as described above, prohibit a former public official from representing a client or other person in a matter in which he had personally participated while a public official, the criterion of personal participation in a matter is not an element of the post-employment restrictions imposed upon affected former officials with regard to representing facility owners. Also, the H.B. 592 amendment to R.C. 102.03(A) contains no language limiting the prohibition against an affected former officials representation to matters involving the regulation of solid, hazardous, or infectious wastes. The Ethics Commission has adhered to the well established rule of statutory construction that words not used in a statute may not be inserted in construing that statute. See Dougherty v. Torrence, 2 Ohio St. 3d. 69 (1982). See also Advisory Opinion No. 89-001. Therefore, since the H.B. 592 amendment to R.C. 102.03(A) does not impose the prohibition against an affected former official representing facility owners only as to certain matters, an affected former official is prohibited from representing or acting in a representative capacity for a facility owner on any matter, regardless of whether he personally participated in the matter as a public official or employee, and regardless of whether the matter was handled by a governmental unit other than his former employer, or is unrelated to the regulation of solid, hazardous, or infectious wastes.

You have asked whether an affected former official who had served as a government lawyer would be prohibited by the H.B. 592 amendment from representing a client in a court of law and whether an affected former government attorney may assist another lawyer in a court proceeding. You have also asked what acts by an affected former official constitute "representation" or "action in a representative capacity." R.C. 102.03(A) defines the term "represent," for purposes of that division, to include "any formal or informal appearance before, or written or oral communication with, any public agency on behalf of any person." (Emphasis added.) Division (C) of Section 102.01 of the Revised Code defines "public agency" for purposes of Chapter 102., to include "the general assembly, all courts, any department, division, institution, board, commission, authority, bureau or other instrumentality of the state, a county, city, village, township, and the five state retirement systems, or any other governmental entity." (Emphasis added.) See Advisory Opinion No. 87-001. The H.B. 592 amendment provides that no affected former official "shall represent a person who is the owner or operator of a facility . . . or shall act in a representative capacity on behalf of any such person before any board, commission, or agency of the state or a political subdivision." As set forth above, the term, "represent" is defined in R.C. 102.03(A) to include "any formal or informal appearance before, or any written

or oral communication with, any public agency on behalf of any person. In Advisory Opinion No. 86-001, the Commission applied R.C. 102.03(A) to a practicing attorney who had previously served with a department of the state, and set forth the actions which are prohibited under R.C. 102.03(A) as follows:

Clearly, this would include activities ranging from an appearance on behalf of a private client in a formal proceeding or meeting to informal "lobbying" of agency personnel by telephone or in person. It also includes written communications ranging from formal documents and filings to informal letters and notes. Even if the attorney or consultant does not sign the documents, letters, or notes, the prohibition would apply if she prepared the communication. If she merely consulted with the attorneys or other personnel who prepared the documents, letters, or notes, the prohibition would not apply. However, an attorney who engages in such consulting should be certain that such conduct is not prohibited by the Code of Professional Responsibility. Such questions are within the jurisdiction of the Office of the Disciplinary Counsel, Supreme Court of Ohio.

See also Advisory Opinions No. 77-001 (preparation of reports, letters, or other Documentary evidence); 81-002 (lobbying or negotiating contracts or other matters). Therefore, the H.B. 592 amendment to R.C. 102.03(A) prohibits an affected former government attorney from formally or informally appearing before or communicating with, either in writing or orally, a court of law or any other public agency on behalf of a facility owner. An affected former official is also prohibited from preparing letters, documents, or reports that are presented to a public agency, even if the former affected official himself does not personally participate in the presentation of the materials to the public agency. While this prohibition would not generally apply to private behind-the-scenes consulting with attorneys or individuals who would then make an appearance before or communicate with, the public agency, the prohibition would apply if the affected former official had personally prepared the communication even if he did not sign the letters, documents, or reports. See Advisory Opinion No. 86-001.

You have asked if an affected former official who was involved with legislation or rule-making during his tenure in government is precluded from representing a client or employer with respect to those matters. As noted above, the general provision of Section 102.03(A) prohibits a former public official from representing a person "on any matter" in which he personally participated as a public official. R.C. 102.03(A) defines "matter" as follows: "As used in this division, matter' includes any case, proceeding, application, determination, issue or question, but does not include the proposal, consideration, or enactment of statutes, rules, ordinances, resolutions, or charter or constitutional amendments." (Emphasis added.) However, the H.B. 592 amendment to R.C. 102.03(A) does not use the term "matter" to describe or explain the special post-employment restrictions which apply to former public officials or employees who have taken action under R.C. Chapters 343. or 3734. H.B. 592 simply prohibits an affected former official from representing a facility owner or acting in a representative capacity on behalf of a facility owner. As used and defined in R.C. 102.03(A), the term "matter," applies only in the context of the general provision of the "Revolving Door" law, which prohibits representation on "any matter" in which there was personal participation. Therefore, an affected former official who was involved in legislation or rule-making while in public service is prohibited from

representing a facility owner on such legislation or rules for twenty-four months after leaving public service.

You have asked for clarification of when the twenty-four month prohibition period commences. You have specifically asked whether a public official who is employed by a public agency and has responsibility under R.C. Chapters 343. or 3734. becomes a "former" public official for purposes of H.B. 592 once he ceases to have any responsibility under Chapters 343. or 3734., even though he remains employed by the same agency in a different capacity. Again, the legislature has used plain language. The H.B. 592 amendment to R.C. 102.03(A) prohibits an affected former official from representing a facility owner for twenty-four months "after the conclusion of his service," rather than after the conclusion of his participation under Chapters 343. or 3734. In this regard, the H.B. 592 amendment does not differ from the general provision of the "Revolving Door" prohibition. The Ethics Commission has consistently held that the commencement of the time period for the post-employment restriction occurs when the public official or employee leaves public service regardless of when he, while in public service, participated in actions regarding-a certain matter. See Advisory Opinions No. 81-002, 86-006, 87-001, and 87-004.

You have asked whether an independent contractor who provides services to a government unit that is charged with the administration and enforcement of Chapter 343. or 3734. is subject to the post-employment restrictions of R.C. 102.03(A). The Ohio Ethics Commission has previously determined that independent contractors of public agencies are not generally within the class of persons who are subject to the Ohio Ethics Law. The rationale is that the employees of a public entity share in the responsibilities of the public trust exercised principally by their elected and appointed superiors, but independent contractors, who do not exercise the public trust, are not within the purview of the Ohio Ethics Law. See Advisory Opinion No. 75-012. However, the Commission has held that an individual who provides services to a public agency pursuant to contract, but who exercises sovereign powers of government through his authority and administrative discretion is vested with the public trust and ceases to be an independent contractor. Such an individual is subject to the Ohio Ethics Law regardless of the contractual arrangement under which he serves. See Advisory Opinion No. 77-004. The H.B. 592 amendment to R.C. 102.03(A) has no effect on these past holdings.

You have asked whether the H.B. 592 amendment to R.C. 102.03(A) prohibits an affected former official from representing a political subdivision or governmental agency which is a facility owner. R.C. 102.03(A), as amended, provides that no affected former official "shall represent a person" who is a facility owner, or "shall act in a representative capacity on behalf of any such person." The term "person" is not defined in the Ohio Ethics Law.

However, the Ohio Ethics Commission has consistently held that the general prohibition of R.C. 102.03(A) which provides that no former public official shall "act in a representative capacity for any person on any matter in which he personally participated" prohibits a former public official from representing a new public employer before his former employing agency or any other public agency on a matter in which he had personally participated. See Advisory Opinion No. 82-002. It has been held that a reenactment or amendment of a statute without modification after administrative or judicial interpretation is an indication of implied legislative

approval of such interpretation. See Laufman v. Oakley Building and Loan Company 408 F. Supp. 489 (S. D. Ohio 1976). See also Seeley v. Expert, Inc. 26 Ohio St. 2d 61 (1971). The legislature has not acted to modify the Commission's interpretation of the word "person" as including governmental agencies, and more, specifically, there is nothing in Am. Sub. H.B. 592 to indicate that such interpretation was not intended.

Also, a political subdivision or governmental agency which is a facility owner stands in the same relationship to state and local regulatory bodies as private facility owners, and the policies supporting the prohibition of Am. Sub. H.B. 592 exist regardless of whether the former official's new employer or client is a public or private facility owner. The H.B. 592 amendment to the Revolving Door prohibition creates a longer post-employment restriction period for public officials and employees who have participated in actions under R.C. Chapter 343. or Chapter 3734. and imposes an absolute prohibition against the representation of facility owners. These restrictions are, as explained above, more stringent than those which apply to other public officials and employees, except for Commissioners and attorney examiners of the P.U.C.O. It would be inconsistent with the more restrictive provision of the H.B. 592 amendment to conclude that the word "person" as used in the H.B. 592 amendment would have a less restrictive construction than the Ethics Commission's previous interpretation of the word "person" for purposes of the general prohibition of R.C. 102.03(A). It should also be noted that R.C. 3734.01(G) defines the word "person" to include governmental entities. H.B. 592 amended R.C. Chapter 3734., R.C. Chapter 343., and R.C. 102.03(A), thereby creating a comprehensive statutory scheme designed for the common purpose of protecting the public interest through the strict regulation of handling, treatment, storage, and disposal of various wastes. It is consistent with this scheme to interpret the word "person" as used in the new amendment to R.C. 102.03(A), as also including governmental agencies. Therefore, R.C. 102.03(A), as amended, prohibits an affected former official from representing a political subdivision or governmental agency which is a facility owner before his former employing agency or any other public agency.

You have asked whether the H.B. 592 amendment to R.C. 102.03(A) applies to a former official or employee who had participated under Chapters 343. or 3734. while a public official or employee, but who concluded his public service prior to June 24, 1988, the effective date of H.B. 592. Section 1.48 of the Revised Code provides that "[a] statute is presumed to be prospective in operation unless expressly made retrospective." Also, Section 1.58 provides in pertinent part:

(A) The reenactment, amendment, or repeal of a statute does not, except as provided in division (B) of this section:

(1) Affect the prior operation of the statute or any prior action taken thereunder.
(Emphasis added.)

Article 1, Section 10 of the United States Constitution prohibits the states from enacting ex post facto laws, and Article 11, Section 28 of the Ohio Constitution prohibit the General Assembly from enacting retroactive laws. An ex post facto law is a law which would make criminal an action done before the passage of the law which was innocent when done, and punishes such action. See Blackburn v. State, 50 Ohio St. 428 (1893). A retroactive law is a statute which attaches a new disability with respect to past transactions. See State ex rel.

Michaels v. Morse, 165 Ohio St. 599, 604 (1956). An ex post facto law is one type of retroactive law since retroactive laws impose disabilities as well as punishments with respect to past transactions. ' See State ex rel. Corrigan v. Barnes 3 Ohio App. 3d 40, 44 (Franklin County 1981). It is presumed that the General Assembly, in enacting a statute, intended compliance with the constitutions of the state and United States. R.C. 1.47(A).

R.C. 102.03(A) is a criminal statute which prohibits certain conduct by an affected former official and provides a criminal penalty for its violation. See R.C. 102.99(B). The H.B. 592 amendment to R.C. 102.03(A) cannot be applied to a situation where a former public official or employee who had taken action under Chapter 343. or Chapter 3734. then represented a facility owner after he had left public service and prior to the effective date of H.B. 592. Such application would be an ex post facto law and a retroactive law. Of course, the general prohibition of R.C. 102.03(A) would apply to such representation. Also, to apply the H.B. 592 amendment to a situation where an affected former official had acted under Chapter 343. or Chapter 3734. prior to the effective date of H.B. 592 but who represented a facility owner after the effective date would be an imposition of a disability upon the past transactions of the public official, and thus would be a retrospective application of the law. A public official who exercised administrative discretion under Chapters 343. or 3734. prior to the enactment of Am. Sub. H.B. 592 was not subject to a stricter post-employment restriction with regard to the representation of facility owners. Therefore, the H.B. 592 amendment to R.C. 102.03(A) must be applied prospectively and affects only public officials or employees who acted under Chapters 343. or 3734. after the effective date of Am. Sub. H.B. 592. However, the general provision of R.C. 102.03(A), as discussed above, would apply to former affected officials regardless of when they acted under Chapters 343. or 3734.

You have asked whether the H.B. 592 amendment to R.C. 102.03(A) prohibits a present public official or employee currently involved in actions involving substantial administrative discretion under R.C. Chapters 343. or 3734. (hereinafter affected present official) from representing or acting in a representative capacity on behalf of a facility owner. R.C. 102.03(A), as amended, does not extend the new prohibition to present officials or employees; however, such representation is otherwise restricted by the Ohio Ethics Law.

First, the general prohibition of R.C. 102.03(A) prohibits a present public official or employee from representing a facility owner or other person on a matter in which he personally participated as a public official or employee. Actions of a present affected official would also be conditioned by R.C. 102.03(D), (E), and (F), which provide:

(D) No public official or employee shall use or authorize the use of the authority or influence of his 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 him with respect to his 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 him with respect to his duties.

(F) No person shall promise or give to a public official or employee anything of value that is of such a character as to manifest a substantial and improper influence upon him with respect to his duties.

Divisions (D) and (E) of Section 102.03 prohibit a public official or employee from accepting, soliciting, or using his official authority or influence to secure anything of value for himself, or anyone else, if the thing of value is of such a character as to manifest a substantial and improper influence upon him with respect to his official duties. See Advisory Opinions No. 80-003, 87-004, and 88-004. It is assumed that the payments received from a facility owner for representation before a public agency would not be minimal or incidental in amount, and thus, would be of a substantial nature. As to whether the payments would be of an improper character, the Ethics Commission has held that public officials and employees are prohibited by the Ohio Ethics Law from holding outside, private employment where an actual conflict of interest exists between the officials' or employees' public and private positions. See Advisory Opinions No. 87-006 and 88-002. Furthermore, the Ethics Commission has consistently held that Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a public official or employee from soliciting, accepting, or using his authority or influence to secure fees, honoraria, expenses, promises of future employment, and other things of value from parties that are interested in matters before, regulated by, or doing or seeking to do business with, the agency with which he serves. See Advisory Opinions No. 79-002, 79-006, 80-004, 84-010, 85-014, and 86-008.

A public official or employee who exercises administrative discretion under Chapters 343. or 3734. of the Revised Code has the duty and responsibility to provide his services to the public in an objective and impartial manner. This public duty must not be hindered by any improper influence. When a public officials or employee's private employment could impair his independence of judgment with regard to his official decisions and responsibilities, and thus, be of such a character as to manifest a substantial and improper influence upon him, the public official or employee is prohibited from holding such private employment. See Advisory Opinions No. 84-009 and 85-006. See also Advisory Opinions No. 77-006, 86-007, and 86-008. The Ethics Commission has held that the application of R.C. 102.03(D) and (E) is dependent on the facts and circumstances of each individual situation. See Advisory Opinion No. 87-008. Therefore, an affected present public official may be prohibited in certain circumstances by Divisions (D) and (E) of Section 102.03 of the Ohio Ethics Law from soliciting, accepting or using his authority or influence to secure fees, promises of future employment, or any other thing of value from a facility owner while employed by or serving the state or any political subdivision in a capacity involving actions under Chapters 343. or 3734. Furthermore, R.C. 102.03(F) would in those circumstances prohibit the facility owner from promising or giving anything of value to the official. See Advisory Opinions No. 87-005 and 87-007.

A present public official or employee who exercises administrative discretion under R.C. Chapters 343. or 3734. is also subject to either Division (A) or (C) of Section 102.04, depending upon the governmental entity which he serves. Divisions (A) and (C) of Section 102.04 of the Revised Code provide:

(A) Except as provided in division (D) of this section, no person elected or appointed to an office of or employed by the general assembly or any department, division, institution,

instrumentality, board, commission, or bureau of the state, excluding the courts, shall receive or agree to receive directly or indirectly compensation other than from the agency with which he serves for any service rendered or to be rendered by him personally in any case, proceeding, application, or other matter that is before the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts.

...

(C) Except as provided in division (D) of this section, no person who is elected or appointed to an office of or employed by a county, township, municipal corporation, or any other governmental entity, excluding the courts, shall receive or agree to receive directly or indirectly compensation other than from the agency with which he serves for any service rendered or to be rendered by him personally in any case, proceeding, application, or other matter which is before any agency, department, board, bureau, commission, or other instrumentality, excluding the courts, of the entity of which he is an officer or employee.

Therefore, a present public official or employee is prohibited from receiving or agreeing to receive directly or indirectly compensation for personally representing, or providing other personal services for a facility owner on any matter pending before the governmental entity which he serves. Division (D) of Section 102.04 provides an exception to the prohibitions of Division (A) and (C) but is unavailable to elected officers, as well as to an official who wishes to receive compensation for rendering services on a matter which is pending before the agency with which he serves. See Advisory Opinion No. 87-009. Also, prior to rendering such services, the public official or employee must file the statement required in Division (D) with the agency which he serves, the agency before which the matter is pending, and the Ohio Ethics Commission identifying the agencies involved, describing the matter involved and the service to be rendered, and stating that the public official or employee disqualifies himself for two years from participating in matters concerning personnel of the agency before which the matter is pending. See Advisory Opinions No. 78-007 and 82-006.

Finally, Division (B) of Section 102.03 of the Revised Code provides:

No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by him in the course of his official duties which is confidential because of statutory provisions, or which has been clearly designated to him as confidential when such 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.

Therefore, any present or former public official or employee is prohibited by R.C. 102.03(B) from using or disclosing to a facility owner, or any other person, confidential information acquired by him in his official capacity. It is important to note that no time limit


exists for this prohibition and it is effective while the official or employee serves and after he leaves office. See Advisory Opinions No. 88-003 and 88-009.

This advisory opinion is based on the facts presented and 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.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that:

- (1) Division (A) of Section 102.03 of the Revised Code prohibits a former public official or employee who participated as a public official or employee through the exercise of administrative discretion under R.C. Chapters 343. or 3734. from representing or acting in a representative capacity for an owner or operator of a facility as defined in R.C. 3734.01(N) or an applicant for a permit or license for a facility under that chapter, before any public agency for twenty-four months after the conclusion of his service on any matter, regardless of whether he personally participated in the matter as a public official or employee, and regardless of whether the matter was handled by a governmental agency other than his former employer, or is unrelated to the regulation of solid, hazardous, or infectious wastes;
- (2) As used in Division (A) of Section 102.03 of the Revised Code, the term "represent" is defined to include any formal or informal appearance before, or written or oral communication with, any public agency including all courts;
- (3) A former public official or employee who is subject to the post-employment restrictions added by Am. Sub. H.B. 592 to R.C. 102.03(A) is prohibited from formally or informally appearing before, or communicating orally or in writing with, any public agency on behalf of a facility owner or operator or applicant for a permit or license for a facility, and from preparing any letters, reports, or other documents that are presented to, a public agency on behalf of such a party, regardless of whether the former official or employee personally participates in the presentation of the materials to the public agency;
- (4) A former public official or employee who is subject to the post-employment restrictions added by Am. Sub. H.B. 592 to R.C. 102.03(A) is prohibited from representing a facility owner or operator, or applicant for a permit or license for a facility before a public agency on any legislation or administrative rules in which he participated while in public service;
- (5) The twenty-four month period imposed by the amendment to R.C. 102.03(A) under Am. Sub. H.B. 592 commences when the public official or employee leaves public service, and not when he ceases to have responsibility for matters under Chapter 343. or Chapter 3734. of the Revised Code;
- (6) Division (A) of Section 102.03 of the Revised Code does not apply to an independent contractor with a governmental agency so long as the independent contractor does not exercise sovereign powers of government through his authority and administrative discretion;
- (7) A public official or employee who is subject to the post-employment restrictions added by Am. Sub. H.B. 592 to R.C. 102.03(A) is prohibited from representing a political subdivision or governmental agency which is a facility owner or operator, or an applicant for a permit or license for a facility;
- (8) The post-employment restrictions added by Am. Sub. H.B. 592 to R.C. 102.03(A) do not apply to a former public official or employee who exercised administrative discretion under R.C. Chapter 343. or R.C. Chapter 3734. prior to the effective date of H.B. 592;
- (9) The restrictions added by Am. Sub. H.B. 592 to R.C. 102.03(A) do not apply to present, as opposed to former public officials and employees. However, the general provision of Division (A) of Section 102.03 of the Revised Code prohibits a present public official or employee who exercises administrative discretion under R.C. Chapters 343. or 3734. from representing or acting in a representative capacity for a facility

owner or operator or applicant for a permit or license for a facility before any public agency on any matter in which the official personally participated as a public official or employee. Other provisions of the Ohio Ethics Law also restrict the conduct of a present public official or employee in representing a facility owner, operator, or applicant.



Richard D. Jackson, Chairman
Ohio Ethics Commission