

OHIO ETHICS COMMISSION

Merom Brachman, *Chair*
Sarah M. Brown, *Vice Chair*



8 East Long Street, 10th Floor
Columbus, Ohio 43215
Telephone: (614) 466-7090
Fax: (614) 466-8368
Web site: www.ethics.ohio.gov

David E. Freel, *Executive Director*

INFORMATION SHEET: ADVISORY OPINION NO. 2004-03 **PRIVATE BUSINESS ACTIVITIES OF CODE ENFORCEMENT OFFICIALS**

What is the question addressed in the opinion?

Can a code enforcement official engage in private business activities?

What is the answer in the draft?

There are significant restrictions on outside employment for code enforcement officials under the Ethics Law. A code enforcement official is prohibited from receiving anything of value, including compensation for goods or services, from parties that are interested in matters before, regulated by, or doing or seeking to do business with the public agency she serves, unless the public agency, not the official, determines that the official is able to fully withdraw from consideration of matters that affect the interests of the party. Where these conditions are met, as specifically described in the opinion, the Ethics Law does not absolutely prohibit certain private business activity.

Even if the code enforcement official is able to fully withdraw from matters affecting her clients or outside employers, she will be required to adhere to a number of additional restrictions related to her outside employment activity.

To whom does this opinion apply?

This opinion applies to any person who serves with a public agency, including the state, or any county, city, village, township, health district, or other public entity, and whose assigned duties include the enforcement of any building, plumbing, electrical safety, mechanical, or other code provisions.

How and when did the opinion become effective?

The opinion became effective upon acceptance by the Commission.

For More Information, Please Contact:

David E. Freel, Executive Director, or
Jennifer A. Hardin, Chief Advisory Attorney

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IT IS NOT AN ETHICS COMMISSION ADVISORY OPINION.
ADVISORY OPINION NO. 2004-03 IS ATTACHED.**

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Advisory Opinion
Number 2004-03
July 1, 2004

Syllabus by the Commission:

- (1) Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a code enforcement official from engaging in private business activity if she will be paid by any party that is interested in matters before, regulated by, or doing or seeking to do business with the public agency she serves, unless the public agency determines that she is able to fully withdraw from consideration of matters that affect the interests of the party;
- (2) Division (D) of Section 102.03 of the Revised Code prohibits a code enforcement official who engages in private business activity from:
(a) using public time, facilities, personnel, or resources in conducting a private business or while engaging in private employment; (b) using her official title or identification on private business cards or other written materials or appearing in uniform while soliciting or conducting her private business; (c) using her relationship with other public officials and employees to secure a favorable decision or action by the other officials or employees regarding her private interests; (d) discussing, deliberating, or voting on any matter involving her private business, including recommending services to her own public agency; (e) receiving fees for providing services rendered on projects that she has recommended in her official capacity; (f) participating in decisions or recommendations regarding her competitors; and (g) using her public position or authority in any other way to secure a benefit for her private business;
- (3) In addition to the prohibitions in the Ohio Ethics Law and related statutes, the Ohio Building Code, Ohio Administrative Rules, and local ordinances, rules, and policies may contain provisions that limit the outside employment activity of code enforcement officials.

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The Ohio Ethics Commission has been asked a number of questions about whether the Ethics Laws and related statutes prohibit a code enforcement official from engaging in private outside business activity or employment in related fields. For example, one code enforcement official has asked whether the law would prohibit her from offering home inspection services for homebuyers, or from accepting employment with a company that performs home inspections. Another official has asked whether she would be prohibited from performing inspection services for developers in surrounding communities. A third has asked whether she is prohibited from performing services as a subcontractor to developers on projects in the community where she is employed and in surrounding communities.

Code Enforcement Official

As used in this Advisory Opinion, the phrase “code enforcement official” includes any person who serves with a public agency, including the state, or any county, city, village, township, health district, or other public entity, and whose assigned duties include the enforcement of any building, plumbing, electrical safety, mechanical, or other code provisions. Examples of code enforcement officials can include, but are not limited to, any person who is employed by any public agency as a building, plumbing, electrical safety, or mechanical inspector, any person who contracts with a public agency to serve as a code inspector, and any person who supervises the work of code inspectors.

Conflict of Interest Prohibitions—R.C. 102.03(D) and (E)

Your attention is directed to R.C. 102.03(D) and (E), which provide:

- (D) No public official or employee shall use or authorize the use of the authority or influence of 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 the public official or employee with respect to that person’s 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 the public official or employee with respect to that person’s duties.

The term “public official or employee” is defined in R.C. 102.01(B), and includes any person who is elected or appointed to an office or is an employee of any public agency. A “public agency” includes 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. Any person employed as a code enforcement official by the state, or any county, city, village, township, or other governmental entity is a “public official” subject to the provisions of R.C. Chapter 102. Also, any person who performs the

duties of a code enforcement official under a personal services contract may be a public official and subject to the law. See Ohio Ethics Commission Advisory Opinion No. 98-005.

The term “anything of value” is defined for purposes of R.C. 102.03 in R.C. 1.03 to include money and every other thing of value. R.C. 1.03, 102.01(G). The compensation a public official or employees receives from engaging in private outside employment or business activity is a thing of value for purposes of R.C. 102.03 (D) and (E). Adv. Op. No. 79-002, 89-010, and 92-005.

Prohibition Imposed by R.C. 102.03(E)

R.C. 102.03(E) prohibits a public official or employee from soliciting or accepting “anything of value” if the thing of value could have a substantial and improper influence upon the official or employee. The Ethics Commission has determined that compensation earned in connection with outside employment is “substantial” for purposes of this restriction. Adv. Op. No. 92-015.

The Ethics Commission has explained that soliciting or accepting certain things of substantial value by a public official or employee will have an improper influence because of the relationship between the public agency she serves and the person or entity that is the source of the thing of value. Adv. Ops. No. 86-011 and 92-015. The Commission has stated that a thing of value will have an “improper” influence on a public official or employee if it is received from a prohibited source. A prohibited source is a person, corporation, non-profit organization, or other entity that is: (1) interested in matters before; (2) regulated by; or (3) doing or seeking to do business with the public agency the official or employee serves. Adv. Ops. No. 87-006, 87-009, and 89-006. Therefore, R.C. 102.03(E) prohibits a public official or employee from receiving compensation from private business activity with these prohibited sources. See, e.g., Adv. Ops. No. 83-007 (a Board of Cosmetology inspector is prohibited from selling products to regulated salons). The application of R.C. 102.03(E) is dependent upon the facts and circumstances of each individual situation. Adv. Ops. No. 90-004 and 91-002.

A public official or employee who engages in private business activity that is related to the type of work she is assigned to perform for her public agency may face a greater potential for the creation of a conflict of interest than if she were to sell unrelated goods or services. However, the prohibition applies even if the goods or services that the public official or employee desires to provide through her private business are unrelated to the type of work that she performs for the public agency, if she is engaged in private business activities with parties that are interested in matters before, regulated by, or doing or seeking to do business with the public agency she serves. See Adv. Op. No. 89-010 (a Department of Agriculture meat inspector is prohibited from selling tool sharpening services to a state institution that is regulated by the Department).

Code enforcement officials have asked the Commission whether the Ethics Law would prohibit a code enforcement official from performing inspection services for developers or performing services as a subcontractor to developers. If the developers are doing or seeking to do

business with, interested in matters before, or regulated by, the public agency she serves, the code enforcement official is prohibited from accepting either of these outside employment opportunities. She would be prohibited from pursuing these opportunities even where: (1) the project on which she has been asked to provide services is not subject to regulation by the public agency she serves; (2) the project is located outside of the jurisdiction of the public agency she serves; or (3) the services she would provide on the project are unrelated to the code enforcement inspection services she provides to her public employer.

For example, a city plumbing inspector would be prohibited from accepting compensation as a subcontracted plumber on a project if the project's developer had other projects subject to regulation by the city. This prohibition would apply regardless of whether the project on which the plumbing inspector is a subcontractor is located outside the city. She would also be prohibited from accepting compensation for performing services that are unrelated to plumbing on the project.

Another code enforcement official has asked whether the law would prohibit her from offering home inspection services for homebuyers in the community where she is employed, or from accepting employment with a company that performs home inspections. The services could include inspections of remodeling work, commercial buildings, and homes under construction.

A building department may have regulatory authority over a broad class of individuals and entities and many individuals and entities in the community may be parties that would be regulated by or interested in matters before the governmental entity she serves. The source of the compensation determines whether she is prohibited from engaging in the activity. If the source is interested in matters before, regulated by, or doing or seeking to do business with the public agency she serves, R.C. 102.03(E) would prohibit the official from accepting the fee. Even if she would inspect a structure located outside the jurisdiction of her public agency, the person who owns, is buying, or is selling the structure may also be subject to the jurisdiction of the code enforcement official serves.

Withdrawal

The Ethics Commission has explained that, in certain situations, a public official or employee may withdraw from consideration of a matter where the Ethics Law would otherwise prohibit her participation. Adv. Ops. No. 89-006, 90-002, and 93-015. A public official's or employee's withdrawal from consideration of issues concerning the related parties described above may be accomplished only when such a withdrawal: (1) does not interfere with the official's or employee's performance of her assigned duties; and (2) is approved by her employing agency. Adv. Op. No. 96-004.

Therefore, R.C. 102.03(E) prohibits a code enforcement official from engaging in private outside business activity with parties that are interested in matters before, regulated by, or doing or seeking to do business with the public agency she serves unless she is able to fully withdraw from consideration of matters that affect these parties. The official or employee must consult with her supervisor and chief legal counsel for the public agency, who must determine whether the code

enforcement official is capable of withdrawing from consideration of matters that could pose a conflict of interest and whether her withdrawal would impair the public agency's ability to provide a code enforcement program. Even where the code enforcement official does not have assigned duties that bring her into direct contact with a party who is regulated by the agency she serves, she should consult with her supervisor and legal counsel for the agency to protect against any potential hardships for the public agency. Adv. Ops. No. 90-002 and 96-004.

In Advisory Opinion No. 89-010, the Commission stated regarding withdrawal:

An [public] employee . . . owes his responsibility to the exercise of the public trust by performing the tasks assigned to him by his employing agency. This duty must not be impaired by a public employee's concern for his own personal interests. . . . There may be instances where a[n] . . . agency is willing to accommodate the personal interests of its employees . . . [however] [t]he . . . agency's determination whether such action is possible or desirable is a matter within the discretion of the affected agency.

The Ohio Ethics Law and related statutes do not require that a public agency change the way it operates in order to allow a public official or employee to pursue private business opportunities where there may be conflicts of interest. Adv. Op. No. 90-002.

If a code enforcement official were to engage in private outside business activity under circumstances that would not be prohibited by R.C. 102.03(E), she would also have to abide by the prohibitions imposed by R.C. 102.03(D).

Prohibitions Imposed By R.C. 102.03(D)

Division (D) of Section 102.03 of the Revised Code prohibits a public official or employee from using the authority or influence of her position to secure anything of value for herself or others with whom she has a close familial, economic, business, or other relationship. Adv. Ops. No. 79-002, 80-004, and 89-006. Unlike R.C. 102.03(E), which prohibits a public official from merely soliciting or accepting certain things of value, R.C. 102.03(D) prohibits a public official or employee from acting to secure a thing of value either for herself or another person or entity because of the relationship she has with the person or entity that is the source of the thing of value.

The Ethics Commission has reasoned that the public interest could be adversely affected when a public servant receives compensation from engaging in private outside business activity if the compensation is paid as a result of the public servant's use of, or failure to exercise, her official authority, or if the receipt of compensation could impair the performance of public duties and therefore burden public resources entrusted to the public servant in favor of her own personal financial interests. Adv. Ops. No. No. 84-012, 84-013, and 85-013. The Commission has therefore determined that a public official or employee who is engaged in a private business is prohibited from: (a) using public time, facilities, personnel, or resources in conducting the business, including using public equipment; (b) using her official title or identification on private business cards and

advertising materials; (c) using her relationship with other public officials and employees to secure a favorable decision or action by the other officials or employees regarding her private interests; (d) discussing, deliberating, or voting on any matter involving her private business interests; (e) receiving fees for providing services rendered on projects that she has recommended in her official capacity; (f) participating in decisions or recommendations regarding her competitors; and (g) using her public position or authority in any other way to secure a benefit for her outside employer or private business. Adv. Op. No.96-004. See also Adv. Ops. No. 85-014, 90-003, and 90-009.

For example, a county building inspector would be prohibited from lobbying her fellow county employees, or other county officials, to secure a favorable decision on a regulatory matter involving her client or private employer. Adv. Op. No. 90-002.

Receiving Compensation for Performing Personal Services—R.C. 102.04(C)

In addition to the prohibitions imposed by R.C. 102.03 (D) and (E), as set forth above, other statutes under the jurisdiction of the Ethics Commission may be relevant if the code enforcement official desires to conduct outside business activities. For example, R.C. 102.04(C) prohibits a person who is appointed to an office of, or employed by, a governmental agency from receiving compensation, directly or indirectly, from a private client for services rendered by her personally on any case, proceeding, application, or other matter before any agency, department, board, bureau, commission, or other instrumentality, excluding the courts, of the municipality with which she serves. See Adv. Op. No. 92-020 (the use of the word “agency” in R.C. 102.04(C) denotes a legislative intent that the word “agency” means something different than the political subdivision as a whole).

“Compensation,” as used in R.C. 102.04(C) is “money, things of value, or financial benefit.” R.C. 102.01(A). A matter is “before” a public agency “when it is being considered by, decided by, or in the presence of or under the official purview of” a governmental agency. Adv. Op. No. 76-009. See also Adv. Op. No. 75-025. Therefore, R.C. 102.04(C) would prohibit a code enforcement official from receiving compensation to represent clients, by appearing before or submitting documents, reports, or plans that she personally prepared to, any instrumentality of the governmental entity she serves, even if the governmental entity with which she is employed is not required to act on the matter. There is a comparable provision for state officials and employees, set forth in R.C. 102.04(A). Adv. Op. No. 93-004.

There are two exceptions to R.C. 102.04(C), set forth in R.C. 102.04(D) and (F). R.C. 102.04(D) provides an exception whenever the matter is pending before an agency other than the one the official serves. R.C. 102.04(F) provides an exception for receiving compensation for the performance of ministerial functions. A code enforcement official should contact the Commission for guidance about these exceptions if she is asked to represent a party on a matter before any instrumentality of the public agency she serves.

Representation on Matters—R.C. 102.03(A)

R.C. 102.03(A) prohibits a present or former public official or employee from representing a client or acting in a representative capacity for any person, before any public agency, on any matter in which she personally participated as a public official or employee. Adv. Ops. No. 86-001, 91-009, and 92-005. The restriction applies during government service and for one year thereafter.

A public official or employee is engaging in representation if she makes any formal or informal appearance before, or written or oral communication with, any public agency, on behalf of any person. R.C. 102.03(A)(5). R.C. 102.03(A) prohibits a public official or employee from representing any person, on a matter in which she personally participated, before any public agency, and not just before the agency with which she is employed. Adv. Ops. No. 87-001 and 92-005. A “public agency” is defined in R.C. 102.01(C) 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.”

R.C. 102.03(A) defines the term “matter” to include “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.) The Ethics Commission has explained that “matter” includes such concrete items as a specific occurrence or problem requiring discussion, decision, research, or investigation, a lawsuit or legal proceedings, an oral or written application, and a settlement of a dispute or question. See Adv. Ops. No. 91-009 and 92-005. The Commission has also determined that “matter” includes such abstract items as a dispute of special or public importance and a controversy submitted for consideration. Adv. Op. 99-001. However, the Commission has explained that the term “matter” cannot be interpreted so broadly as to include a general subject matter. Id.

“Personal participation” includes “decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion,” and includes supervision or general oversight of other public officials or employees. R.C. 102.03(A)(1); Adv. Op. No. 91-009. Therefore, R.C. 102.03(A)(1) prohibits a code enforcement official, while she serves in that position, and for one year after leaving the position, from representing any person before any public agency on any matter in which she personally participated as a code enforcement official. If a code enforcement official is approached to represent any person, including an outside employer, a client, or any other person, before any public agency, *she should contact the Commission for further guidance.*

R.C. 102.03(B) prohibits a public official or employee from disclosing or using confidential information acquired in the performance of her public duties. A code enforcement official would be prohibited from disclosing or using any confidential information she acquired through her public employment. There is no time limit for this restriction.

Other Applicable Laws, Rules, Ordinances, Policies, and Guidelines

The Ohio Ethics Commission has the authority to provide advisory opinions regarding the Ohio Ethics Law and related statutes. However, there may be provisions outside the Ethics Law that apply to outside employment questions raised by code enforcement officials. See, e.g., R.C. 3781.10(E)(5)(a) and OAC 4101:1-1-03.2(5), OAC 4101:2-93-08(B), and 4101:3-1-01.3.

Before pursuing any kind of outside employment activity, a code enforcement official should consult with her supervisor and the legal advisor for the public agency she serves to determine whether there are any applicable state or local laws, rules, ordinances, policies, or guidelines that apply to outside employment questions, including the requirement to disclose outside employment activity. A code enforcement official may be barred from pursuing an outside employment opportunity even if the Ohio Ethics Law does not prohibit the action.

This advisory 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.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that: (1) Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a code enforcement official from engaging in private business activity if she will be paid by any party that is interested in matters before, regulated by, or doing or seeking to do business with the public agency she serves, unless the public agency determines that she is able to fully withdraw from consideration of matters that affect the interests of the party; (2) Division (D) of Section 102.03 of the Revised Code prohibits a code enforcement official who engages in private business activity from: (a) using public time, facilities, personnel, or resources in conducting a private business or while engaging in private employment; (b) using her official title or identification on private business cards or other written materials or appearing in uniform while soliciting or conducting her private business; (c) using her relationship with other public officials and employees to secure a favorable decision or action by the other officials or employees regarding her private interests; (d) discussing, deliberating, or voting on any matter involving her private business, including recommending services to her own public agency; (e) receiving fees for providing services rendered on projects that she has recommended in her official capacity; (f) participating in decisions or recommendations regarding her competitors; and (g) using her public position or authority in any other way to secure a benefit for her private business; and (3) In addition to the prohibitions in the Ohio Ethics Law and related statutes, the Ohio Building Code, Ohio Administrative Rules, and local ordinances, rules, and policies may contain provisions that limit the outside employment activity of code enforcement officials.

Merom Brachman

Merom Brachman, Chair
Ohio Ethics Commission