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ADVISORY OPINION NO. 2001-10

Thomas H. Garrett
Employee, Air Division
Alabama Department of Environmental Management
159 Bozeman Trail
Wetumpka, Alabama 36093

Confidential Information/Employee Of The
Air Division Of The Alabama Department Of
Environmental Management (ADEM)
Developing And Licensing Technology
Using Confidential Information Obtained In
The Course Of His Employment.

An employee of the Alabama Department of
Environmental Management may not use
confidential information obtained by virtue of
his employment with ADEM to develop and
market technology for use in the industry.

Dear Mr. Garrett:

The Alabama Ethics Commission is in receipt of your request for an Advisory Opinion of this Commission, and this opinion is issued pursuant to that request.

QUESTION PRESENTED

May an employee of the Alabama Department of Environmental Management develop and market technology using confidential information obtained in the course of his employment with ADEM?

FACTS AND ANALYSIS

The facts as have been provided to this Commission are as follows:

Thomas H. Garrett is an employee of the Air Division of the Alabama Department of Environmental Management. His duties involve reviewing applications for Air Permits and Title V Operating Permits, writing those permits, and performing inspections and handling any necessary enforcement action recommendations. In the course of this work, he has access to certain "business confidential" information as it relates to air emissions. Furthermore, in the course of performing inspections, he has the opportunity to ask questions regarding practices of handling waste materials at the plants.

Mr. Garrett states that he often asks questions regarding ultimate disposal of waste streams. One reason is to gather information for inclusion in the Department's annual report to EPA on pollution prevention (P2) activities in the State. The other reason is that he has a personal interest in waste utilization, waste reduction, and pollution prevention.

As a result of this personal interest, Mr. Garrett has conceived an idea that he believes could be added to a process that one of the companies he regulates uses to make its product. This idea, if technically feasible, should enable that company to clean up one particular waste stream to the point of being able to sell it as a raw material for use in another industry. He states that if the idea works, the company should also be able to eliminate the waste stream and possibly reclaim waste that is currently disposed of in a landfill, thereby eliminating that landfill. Mr. Garrett also states that there are other companies in the nation and internationally that utilize the same process as the plant to which he is referring.

Mr. Garrett states that ADEM would have no regulatory authority to require implementation of this idea. The facility is currently in compliance with environmental regulations. Implementation of the idea would not result in any reduction of air emissions, water discharges or production of hazardous waste. It would result in a significant reduction in the amount of a nonhazardous solid waste generated. The process to clean up the waste stream could result in a slight increase in air emissions and water discharge.

In his request, Mr. Garrett refers to Advisory Opinion No. 99-26. In that opinion, the Commission held that,

"A Public Health employee, whose main duties include surveying nursing homes for compliance with state and federal regulations, may market a product to the nursing home industry and other health care related industries. However, he may not market the product to nursing homes or health care related industries over which he has regulatory authority."

"In addition, the Public Health employee may not use public equipment, facilities, time, materials, human labor or other public property under his discretion or control to either assist him in obtaining the opportunities or in providing the services."

The questions presented by Mr. Garrett are based on his interpretation of this opinion. His specific questions are as follows:

"What restrictions would I have regarding marketing/licensing the technology if I

- (a) no longer regulate this plant,
- (b) were no longer employed by ADEM,
- (c) employed by another agency of the State, or
- (d) no longer employed by the State?"

Mr. Garrett again states:

"I have access to some information that is considered 'business confidential.' At this point I have not explored how much, if any, of this confidential information impacted the conception of my idea. For sake of discussion, let us assume that some confidential information was crucial to conceiving this idea. In the purview of the Ethics Commission:

(a) Is there a potential conflict of interest if confidential information was used in the conception of this idea?

(b) Would it be possible for me (outside of official State duties) to 'legitimize' this information? In other words, if I determine that some information that was submitted as confidential information played a role in my conceiving this idea, could I contact the plant (or other plant with the same process) and request the information (as an outside contractor) and thereby relieve any potential conflict of interest?"

All of the above questions can be answered together.

The Alabama Ethics Law, Code of Alabama, 1975, Section 36-25-8 states:

"No public official, public employee, former public official or former public employee, for a period consistent with the statute of limitations as contained in this chapter, shall use or disclose confidential information gained in the course of or by reason of his or her position or employment in any way that could result in

financial gain other than his or her regular salary as such public official or public employee for himself or herself, a family member of the public employee or family member of the public official, or for any other person or business."

Section 36-25-1(23) defines a public employee as:

"(23) PUBLIC EMPLOYEE. Any person employed at the state, county, or municipal level of government or their instrumentalities, including governmental corporations and authorities, but excluding employees of hospitals or other health care corporations including contract employees of those hospitals or other health care corporations, who is paid in whole or in part from state, county or municipal funds. For purposes of this chapter, a public employee does not include a person employed on a part-time basis whose employment is limited to providing professional services other than lobbying, the compensation for which constitutes less than 50 percent of the part-time employee's income."

Section 36-25-5(a) states:

"(a) No public official or public employee shall use or cause to be used his or her official position or office to obtain personal gain for himself or herself, or family member of the public employee or family member of the public official, or any business with which the person is associated unless the use and gain are otherwise specifically authorized by law. Personal gain is achieved when the public official, public employee, or a family member thereof receives, obtains, exerts control over, or otherwise converts to personal use the object constituting such personal gain."

Section 36-25-5(c) states:

"(c) No public official or public employee shall use or cause to be used equipment, facilities, time, materials, human labor, or other public property under his or her discretion or control for the private benefit or business benefit of the public official, public employee, any other person, or principal campaign committee as defined in Section 17-22A-2, which would materially affect his or her financial interest, except as otherwise provided by law or as provided pursuant to a lawful employment agreement regulated by agency policy."

Section 36-25-2(b), in pertinent part states:

"(b) An essential principle underlying the staffing of our governmental structure is that its public officials and public employees should not be denied the

opportunity, available to all other citizens, to acquire and retain private economic and other interests, except where conflicts with the responsibility of public officials and public employees to the public cannot be avoided."

Section 36-25-1(8) defines a conflict of interest as:

"(8) CONFLICT OF INTEREST. A conflict on the part of a public official or public employee between his or her private interests and the official responsibilities inherent in an office of public trust. A conflict of interest involves any action, inaction, or decision by a public official or public employee in the discharge of his or her official duties which would materially affect his or her financial interest or those of his or her family members or any business with which the person is associated in a manner different from the manner it affects the other members of the class to which he or she belongs."

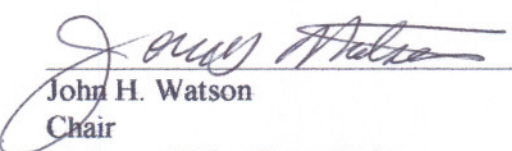
Based on the information provided, it would violate the Alabama Ethics Law for an employee of the Alabama Department of Environmental Management to use confidential information obtained in the course of his employment to develop and market technology relating to the industry.

CONCLUSION

An employee of the Alabama Department of Environmental Management may not use confidential information obtained by virtue of his employment with ADEM to develop and market technology for use in the industry.

AUTHORITY

By 5-0 vote of the Alabama Ethics Commission on March 7, 2001.


John H. Watson
Chair

Alabama Ethics Commission