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ADVISORY OPINION NO. 2002-23

Mr. Ronald W. Penn
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Opp, Alabama 36467

Use Of Office For Personal Gain/Supervisor Of City-Owned Cable Company, Who Is Part Owner Of Private Cable Company, Bidding On Air Time Minutes On Behalf Of Privately Owned Company With City Owned Cable Company.

Andalusia Cable 12, a private cable company, which is owned in part by a supervisor with the City of Opp's TV6, may only do business with the City of Opp's cable company through a competitive bid process.

Should Andalusia Cable 12, a privately owned cable company, desire to bid on business with the City of Opp's TV6, the supervisor for the City of Opp's television station, who is a part owner of the private cable company, may not participate in any aspect of the negotiations or business dealings between the private cable company and his employer, the City of Opp, Alabama.

A supervisor with the City of Opp's TV6, who is a part owner of Andalusia Cable 12, may not disclose confidential information

obtained in the course of his employment with the City of Opp including, but not limited to, client lists, to Andalusia Cable 12 that in any way may provide a benefit to Andalusia Cable 12.

A copy of each contract entered into between Opp TV6 and Andalusia Cable 12, must be filed with the Alabama Ethics Commission within ten (10) days after the contract has been entered into.

Dear Mr. Penn:

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.

QUESTIONS PRESENTED

- 1) May a privately owned cable company enter into a business relationship with the City of Opp's cable company, when a supervisor with the City of Opp's cable company is part owner of the private cable company?
- 2) May the privately owned cable company provide services to customers of the City of Opp's cable company, when those services are not provided by the City of Opp's cable company?

FACTS AND ANALYSIS

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

Ronald W. Penn is an attorney representing the City of Opp, Alabama. The mayor and city council have requested an opinion on a situation that has come to their attention.

The City of Opp owns and runs its own cable company called TV6. There are currently four companies, ESPN, CNN, Lifetime, and CBS, that grant to the City of Opp, a certain amount of free air time in which to run ads. This allows the city to sell ads which will run during regular

programming of these networks. This air time is given to the City of Opp gratuitously for subscribing to that network. Currently, TV6 does not employ a sales staff and wishes to contract with other companies to sell ads which will air during these gratuitous minutes.

One of the prospective companies that wishes to contract for these air time minutes is a neighboring cable company called Andalusia Cable 12. It has come to the City of Opp's attention that the primary supervisor in charge of TV6, Mike Russell, is a partner in Andalusia Cable 12. The City of Opp feels that because an employee in a supervisory position with a city-owned cable company would be bidding on those air time minutes through a privately owned cable company in which he is a part owner, and whose private business would potentially receive an economic benefit from the transaction, could have the appearance of a conflict of interest. The city reiterates that whoever wins the contract would pay the Opp City Utilities Board a certain fee, and they would, in turn, resell that time to their customers for whatever price they deemed reasonable.

The second part of this request concerns other services that might be required by Opp cable customers, such as wiring of buildings or other services, in which the same individual, Mike Russell, would learn about through his association with TV6. These services that would be provided by that company would be services not generally performed by Opp's TV6 crew. The potential conflict appears to be that Mr. Russell's company may be making a profit from customers it is acquiring through his position with Opp's TV6.

The City of Opp is asking for guidance from the Commission concerning these potential conflicts that would exist by Mr. Russell's personal financial gain from his ownership of Andalusia Cable 12, wherein he would bid on the air time provided to Opp's Cable 6 and, subsequently, sell that air time to its customers for a profit; and, whether or not Mr. Russell's company, Cable 12, could provide additional services to Opp's TV6 customers, such as installation of wiring or other services not normally provided by Opp TV6, by gaining its customer base through his employment with Opp TV6.

Mr. Russell, while employed as the supervising manager of Opp TV6, is strictly an employee and is not an elected official of the City of Opp. The mayor and city council feel that competitive bidding by any and all companies that wish to purchase the air time and resell it with full disclosure from anyone bidding on that air time as to their affiliation to Opp TV6, might mitigate any perception of impropriety on the part of the bidder. They also feel that Mr. Russell would only be able to provide services to Opp TV6 customers that are not provided by Opp TV6 and would have to be purchased from outside companies.

The Alabama Ethics Law, Code of Alabama, 1975, 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 36-25-1(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."

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 36-25-1(2) defines a business with which the person is associated as:

"(2) BUSINESS WITH WHICH THE PERSON IS ASSOCIATED. Any business of which the person or a member of his or her family is an officer, owner, partner, board of director member, employee, or holder of more than five percent of the fair market value of the business."

Section 36-25-11 states:

"Unless exempt pursuant to Alabama competitive bid laws or otherwise permitted by law, no public official or public employee, or a member of the household of the public employee or the public official, and no business with which the person is associated shall enter into any contract to provide goods or services which is to be paid in whole or in part out of state, county, or municipal funds unless the contract has been awarded through a process of competitive bidding and a copy of the contract is filed with the commission. All such contract awards shall be made as a result of original bid takings, and no awards from negotiations after bidding shall be allowed. A copy of each contract, regardless of the amount, entered into by a public official, public employee, a member of the household of the public employee or the public official, and any business with which the person is associated shall be filed with the commission within 10 days after the contract has been entered into."

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."

On July 12, 2000, the Commission rendered Advisory Opinion No. 2000-20, which dealt with a member of the Legislature, who owned an interest in an investment advisory firm doing business with public entities. The Commission held that:

"An investment advisory firm owned in part by a member of the Alabama House of Representatives may do business with public entities; provided, that the member of the Alabama House of Representatives not be personally and directly

involved in any aspect of a transaction with public entities within his sphere of influence including, but not limited to, the solicitation or negotiation of contracts, as well as personally making contact with public entities, regardless of the means of contact, as his direct contact with those public entities would be a use of office for personal gain.”

The opinion also pointed out that, while it was addressed specifically to a member of the Alabama Legislature, it was also applicable to all public officials and public employees in the State of Alabama, who wish to do business with a public entity.

The Commission has repeatedly held that when a public official or a public employee, who has private business interests, would like to do business with the public entity by which he is employed or for which he serves, it must be done through a competitive bid process.

On November 1, 2000, the Commission rendered Advisory Opinion No. 2000-59, which held that:

“A member of the Northwest Alabama Regional Airport Authority, who has purchased an insurance agency that provides insurance coverage to the Airport Authority, may not renew policies that were issued to the Authority prior to his purchasing the insurance agency, except through the competitive bid process.”

“An insurance agency owned by a member of the Northwest Alabama Regional Airport Authority may conduct new business with the Airport Authority; provided, that the member of the Authority not be personally and directly involved in any aspect of a transaction with the Authority including, but not limited to, the solicitation or negotiation of new insurance contracts, as well as personally making contact with the other members of the Authority, regardless of the means of contact, as his direct contact with those members would be use of office for personal gain. Further, the member of the Authority may not communicate with adjusters or otherwise involve himself in any settlement or other matters that relate to a claim on behalf of or against the City on a policy written through his agency, nor may he use confidential information obtained in the course of his service on the Airport Authority to assist his agency in being the successful bidder.”

Likewise, on October 4, 2000, the Commission rendered Advisory Opinion No. 2000-54, which held that:

“A business owned by a candidate for the Bibb County Board of Education may do business with the County Board of Education if the candidate is elected; provided, that all competitive bid laws are strictly adhered to; that no confidential information obtained in the course of his service as a member of the School Board be used to influence the bid process; and, that the School Board Member not otherwise use or attempt to use his position on the School Board to obtain business for his company.”

“In addition, any contracts entered into by the member of the Bibb County Board of Education, which are paid in whole or in part by state, county or municipal funds, must be filed with the Ethics Commission within ten days after the contract has been entered into.”

The Commission has addressed the issue differently when the individual, seeking to do business with the entity which employs him or on which he serves, is a sole proprietorship.

On January 10, 2001, the Commission rendered Advisory Opinion No. 2001-03, which held that:

“A Deputy Sheriff with the Tuscaloosa County Sheriff’s Office, who owns a web-based law enforcement supply company, may not do business with Tuscaloosa County or the Tuscaloosa County Sheriff’s Office, as his primary employment is with the Tuscaloosa County Sheriff’s Office. However, he may conduct business in other counties outside of his jurisdiction as Deputy Sheriff and that of the Tuscaloosa County Sheriff’s Office . . .”

Likewise, Advisory Opinion No. 2000-36, rendered on August 2, 2000, held that:

“A member of the Jackson Police Department may set up a part-time business filling and inspecting portable fire extinguishers; however, all work conducted in conjunction with his off-duty employment must be done on his own time, whether it is after-hours, on weekends, etc.; that there is no use of any public equipment, facilities, time, materials, human labor, or other public property under his discretion or control to assist him in conducting his outside employment or in obtaining opportunities; and further, that the member of the Jackson Police Department not do business with the City with which he is employed or with the various departments or agencies of the City.”

As Andalusia Cable 12 is not a sole proprietorship, there is not a strict prohibition in the company doing business with Opp TV6. However, any business dealings between Andalusia

Cable 12 and Opp TV6 must be done through a competitive bid process. In addition, Mr. Russell cannot be involved in any aspect of a transaction between TV6 and Andalusia Cable 12, either as an employee of TV6 or as a partner in Andalusia Cable 12.

Further, Mr. Russell may not use any confidential information obtained in the course of his employment with the City of Opp and TV6 that might in any way benefit Andalusia Cable 12. This would include, but not be limited to, client lists or individuals needing other services that might be required by Opp cable customers that are not provided by Opp TV6, such as the wiring of buildings, etc.

Based on the facts as presented and the above law, Andalusia Cable 12, a private cable company, which is owned in part by a supervisor with the City of Opp's TV6, may only do business with the City of Opp's cable company through a competitive bid process.

Additionally, should Andalusia Cable 12, a privately owned cable company, desire to bid on business with the City of Opp's TV6, the supervisor for the City of Opp's television station, who is a part owner of the private cable company, may not participate in any aspect of the negotiations or business dealings between the private cable company and his employer, the City of Opp, Alabama.

Further, a supervisor with the City of Opp's TV6, who is a part owner of Andalusia Cable 12, may not disclose confidential information obtained in the course of his employment with the City of Opp including, but not limited to, client lists, to Andalusia Cable 12 that in any way may provide a benefit to Andalusia Cable 12.

Finally, a copy of each contract entered into between Opp TV6 and Andalusia Cable 12, must be filed with the Alabama Ethics Commission within ten (10) days after the contract has been entered into.

CONCLUSION

Andalusia Cable 12, a private cable company, which is owned in part by a supervisor with the City of Opp's TV6, may only do business with the City of Opp's cable company through a competitive bid process.

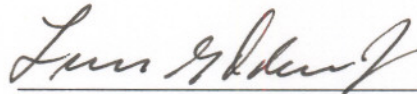
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A supervisor with the City of Opp's TV6, who is a part owner of Andalusia Cable 12, may not disclose confidential information obtained in the course of his employment with the City of Opp including, but not limited to, client lists, to Andalusia Cable 12 that in any way may provide a benefit to Andalusia Cable 12.

A copy of each contract entered into between Opp TV6 and Andalusia Cable 12, must be filed with the Alabama Ethics Commission within ten (10) days after the contract has been entered into.

AUTHORITY

By 5-0 vote of the Alabama Ethics Commission on May 1, 2002.



Lewis G. Odom, Jr., Esq.
Chair
Alabama Ethics Commission