



STATE OF ALABAMA ETHICS COMMISSION



COMMISSIONERS

Cameron McDonald Vowell, Ph.D., Chair
Michael K. K. Choy, Esq., Vice-Chair
Linda L. Green
Braxton L. Kittrell, Jr., Esq.
Josephine M. Venable

MAILING ADDRESS
P.O. BOX 4840
MONTGOMERY, AL
36103-4840

STREET ADDRESS
RSA UNION
100 NORTH UNION STREET
SUITE 104
MONTGOMERY, AL 36104

James L. Sumner, Jr.
Director

TELEPHONE (334) 242-2997
FAX (334) 242-0248
WEB SITE: www.ethics.alabama.gov

February 4, 2009

ADVISORY OPINION NO. 2009-03

The Honorable Thomas S. Wilson
Post Office Box 27
Coaling, Alabama 35449

Confidential Information/Retired Circuit
Judge Using Information That Was
Formerly Confidential To Write Book
About Case He Presided Over

A retired Circuit Court Judge may use documents that were at one time confidential that have become public records to assist him in writing a book about a case he presided over without violating the confidentiality provisions of the Alabama Ethics Law, once the information loses its confidential status.

Confidential Information/Complaints

An individual against whom a complaint is filed with the Ethics Commission is not prohibited from using that information in any way he or she so desires; provided that the information and its use is not subject to the Grand Jury Secrecy Act, codified at Sections 12-16-214 through 12-16-216.

Confidential Information/Judicial Inquiry Commission (JIC) Complaints

The requestor of this opinion is advised to contact the Judicial Inquiry Commission (JIC) regarding any confidentiality provisions relating to complaints before that body.

Confidential Information/Statute Of
Limitations

The statute of limitations for the disclosure of confidential information begins to run at the time the confidential information is used or disclosed in a manner that could result in financial gain.

Confidential Information/Permission To
Disclose

Receiving permission to disclose what is considered confidential information under the Ethics Law, does not negate the confidentiality provision.

Dear Judge Wilson:

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). How do the confidentiality provisions of the Alabama Ethics Law apply to a former Circuit Court Judge, who is writing a book about a case he presided over, when the information has become public record or otherwise is no longer confidential?
- 2). May an individual, who has had a complaint filed against him or her with the Alabama Ethics Commission, use that information personally without violating the confidentiality provisions of the Ethics Law?
- 3). When does the statute of limitations begin to run in relation to Section 36-25-8?

FACTS AND ANALYSIS

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

The Honorable Thomas S. Wilson is a retired Circuit Judge in the State of Alabama. He is in the process of writing a book about a case that he tried in 2005. He has several questions in light of Section 36-25-8, dealing with confidential information. It is his desire that he not run afoul of the Ethics Law in the course of writing his book.

During the course of the case, there were a number of documents that were at one time confidential. This category of documents was made a part of the record at various times. They are now part of the court file and any person can walk off the street and see them. It is Judge Wilson's contention that they have become public records.

The second category of documents is that which is partially disclosed during the case, i.e., for example, depositions of which parts were read at the trial. By disclosing part of the document, Judge Wilson asks whether or not the document loses its confidential status, and whether or not obtaining the permission from the affected individual to use the document in the book alleviates the confidentiality issues.

Another category of documents is that which was discussed *in camera*, but sealed by the court. Judge Wilson, again, asks whether or not obtaining permission from the affected parties to use the document in his book alleviates the confidentiality issues.

The contents of one of these sealed documents were revealed during oral arguments for the Alabama Supreme Court. These contents were reported in at least one newspaper of general circulation.

Finally, one of the plaintiff's attorneys filed a complaint against Judge Wilson with the Judicial Inquiry Commission (JIC). Proceedings before the JIC are confidential. Judge Wilson wants to discuss the complaint, the documents he filed which were provided to him, and his response to the complaint. He asks whether the Ethics Law would prohibit him from doing this, even though all the documents concerned him personally.

Judge Wilson is also concerned about the statute of limitations for prosecution of an Ethics violation, and whether or not, for purposes of the confidentiality provisions, the statute runs from the date the information is disclosed to the public official, or from the date the public official uses the information for financial gain.

The Alabama Ethics Law, Code of Alabama, 1975, Section 36-25-1(24) defines a public official as:

“(24) PUBLIC OFFICIAL. Any person elected to public office, whether or not that person has taken office, by the vote of the people at state, county, or municipal level of government or their instrumentalities, including governmental corporations, and any person appointed to a position at the state, county, or municipal level of government or their instrumentalities, including governmental corporations. For purposes of this chapter, a public official includes the chairs and vice-chairs or the equivalent offices of each state political party as defined in Section 17-16-2.”

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 36-25-8 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 36-25-27(g) states:

“(g) Any felony prosecution brought pursuant to this chapter shall be commenced within four years after the commission of the offense.”

Section 12-16-214 states:

“The Legislature hereby finds, declares and determines that it is essential to the fair and impartial administration of justice that all grand jury proceedings be secret and that the secrecy of such proceedings remains inviolate. The provisions of this division are to be construed for the accomplishment of this purpose and to promote the following:

- (1) That grand juries have the utmost freedom in their discussions, deliberations, considerations, debates, opinions and votes without fear or apprehension that the same may be subsequently disclosed, or that they may be subject to outside pressure or influence or injury in their person or property as a result thereof.
- (2) That those persons who have information or knowledge with respect to the commission of crimes or criminal acts be encouraged to testify freely and truthfully before an appropriate grand jury without fear or apprehension that their testimony may be subsequently disclosed, or that they may be subject to injury in their person or property as a result thereof.
- (3) That those persons who have committed criminal acts or whose indictment may be contemplated not escape or flee from the due administration of justice.
- (4) That those persons falsely accused of criminal acts are not subject to public scrutiny or display and their otherwise good names and reputations are left intact.”

Section 12-16-215 states:

“No past or present grand juror, past or present grand jury witness or grand jury reporter or stenographer shall willfully at any time directly or indirectly, conditionally or unconditionally, by any means whatever, reveal, disclose or divulge or attempt or endeavor to reveal, disclose or divulge or cause to be revealed, disclosed or divulged, any knowledge or information pertaining to any grand juror’s questions, considerations, debates, deliberations, opinions or votes on any case, evidence, or other matter taken within or occurring before any grand jury of this state. Nor shall any person at any time, directly or indirectly, conditionally or unconditionally by any means whatever, corruptly or with intent to influence a grand juror or other person authorized by law to attend a grand jury, or by threat of harm to person or property, or by threatening letter or

communication, or by offer of reward, remuneration, gift, benefit or thing of value of whatever nature or kind, obtain or endeavor to obtain, any information pertaining to, or any knowledge of any grand juror's questions, considerations, debates, deliberations, opinions or votes on any case, evidence or other matter taken or transpiring within or before any grand jury of this state."

Section 12-16-216 states:

"No past or present grand juror, past or present grand jury witness or grand jury reporter or stenographer shall willfully at any time, directly or indirectly, conditionally or unconditionally, by any means whatever, reveal, disclose or divulge or endeavor to reveal, disclose or divulge or cause to be revealed, physical evidence presented to any grand jury of this state or any knowledge within or before any grand jury or any comment made by any person in response thereto or any other evidence, testimony or conversation occurring or taken therein. Nor shall any person at any time directly or indirectly, conditionally or unconditionally, by any means whatever, corruptly or with intent to influence a grand juror or other person authorized by law to attend a grand jury, or by threats of harm to person or property, or by force applied to person or property or by threatening letter or communication, or by offer of reward, remuneration, gift, benefit or thing of value or whatever nature and kind, obtain or endeavor to obtain any knowledge of the form, nature or content of any physical evidence presented to any grand jury of this state, or any knowledge of the form, nature or content of any question propounded to any person within or before any grand jury, or any knowledge of the form, nature or content of any answer or comment made by any person in response thereto, or any other evidence, testimony, or conversation occurring or taken therein.

Provided however, the State of Alabama shall not be precluded from using the testimony of a grand jury witness to impeach that witness's testimony in the trial of a criminal case, nor shall the State of Alabama be precluded from using grand jury testimony to prosecute a perjury warrant or indictment, nor shall the State of Alabama be precluded from using grand jury testimony in any manner otherwise permitted by law. Further, provided however, that grand jury evidence and testimony may be presented to grand juries of other circuits and jurisdictions upon the issuance of a proper grand jury subpoena."

The confidentiality provision of the Alabama Ethics Law does not require that financial gain be realized. It states that if financial gain could result, the law is violated by the disclosure of the confidential information. Further, the provision also relates only to information which the public official or public employee received in his or her official capacity, and which otherwise would not have been available to him or her.

It is the use of that information while it remains confidential that invokes the penalties of the Ethics Law. Therefore, once the documents have become public record, the confidentiality provisions no longer apply.

This applies not only to exhibits; it applies to parts of depositions, etc., i.e. – any and all information that comes to the public official's/public employee's attention via his or her official position.

Items that had been reviewed by the Judge *in camera* retain the confidential status until such time as that record is unsealed, or otherwise become public.

As relates to complaints filed against an individual, if a complaint had been filed with the Ethics Commission against Judge Wilson, he would have been free to disclose the specifics of that complaint in any manner he saw fit; provided, they were not covered by the Grand Jury Secrecy provisions, in that he would not be allowed to discuss his testimony before the Commission, or Exhibits presented to the Commission during the hearing.

As relates to a complaint with the JIC, the Ethics Commission does not have jurisdiction to discuss or interpret any confidentiality provisions that apply to complaints with the JIC.

There are no provisions in the Ethics Law which allow permission to be granted to use information that is otherwise confidential under the Ethics Law. The fact that an individual does not mind the information being disclosed publicly, does not remove the prohibitions contained in Section 36-25-8.

The statute of limitations for a felony Ethics violation is four years from the date of occurrence. In applying the statute of limitations to Section 36-25-8, it would appear that the statute begins to run at the time the confidential information is disclosed in a way that it may provide a financial gain to the individual or another person.

CONCLUSION

A retired Circuit Court Judge may use documents that were at one time confidential that have become public records to assist him in writing a book about a case he presided over without violating the confidentiality provisions of the Alabama Ethics Law, once the information loses its confidential status.

An individual against whom a complaint is filed with the Ethics Commission is not prohibited from using that information in any way he or she so desires; provided that the

The Honorable Thomas S. Wilson
Advisory Opinion No. 2009-03
Page eight

information and its use are not subject to the Grand Jury Secrecy Act, codified at Sections 12-16-214 through 12-16-216.

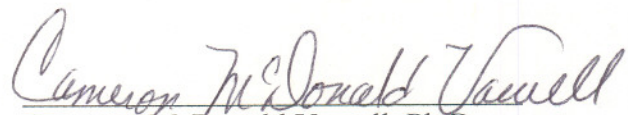
The requestor of this opinion is advised to contact the Judicial Inquiry Commission (JIC) regarding any confidentiality provisions relating to complaints before that body.

The statute of limitations for the disclosure of confidential information begins to run at the time the confidential information is used or disclosed in a manner that could result in financial gain.

Receiving permission to disclose what is considered confidential information under the Ethics Law, does not negate the confidentiality provision.

AUTHORITY

By 4-0-1 vote of the Alabama Ethics Commission on February 4, 2009.


Cameron McDonald Vowell, Ph.D.
Chair
Alabama Ethics Commission