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RECONSIDERATION OF ADVISORY OPINION NO. 2016-29

Mr. Matthew W. Bowden
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Alabama Power Company
600 North 18th Street
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Alabama Power Company Receiving And Responding To Fundraising Requests From Charities And Nonprofit Organizations That Are Supported By Public Officials

Alabama Power, when donating to charities, nonprofits, and public entities, is not required to investigate whether a person seeking a donation is a public official or employee (or family member), and if they are, whether such individuals are compensated or receiving any personal gain from the recipient.

At the same time, however, Alabama Power cannot ignore actual knowledge of personal gain.

Moreover and as it recognizes, Alabama Power cannot give any donation to any charity, nonprofit or public entity for the purpose of corruptly influencing official action without violating Ala. Code § 36-25-7.

Dear Mr. Bowden:

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

QUESTIONS PRESENTED

- 1) Is Alabama Power permitted to make a donation to a charity or nonprofit organization (or purchase tickets to the group's fundraising events) if the request to donate is made by a public official or employee who serves on the organization's board?
- 2) Is Alabama Power permitted to make a donation to a charity or nonprofit organization (or purchase tickets to the group's fundraising events) if the request to donate is made by a public official or employee who is involved with the group – but does not serve on its board?
- 3) Is Alabama Power permitted to make a donation to a charity or nonprofit organization (or purchase tickets to the group's fundraising events) if the request to donate is made by a "family member" of a public official or employee (as that term is defined in the Act)?
- 4) Is Alabama Power permitted to make a donation to a charity or nonprofit organization (or purchase tickets to the group's fundraising events) if the letterhead used to request the donation (or related fundraising materials such as brochures or online information about the event) includes the names or titles of any public officials or employees who are board members or only supporters of the organization?
- 5) Is Alabama Power permitted to make a donation to a charity or nonprofit organization (or purchase tickets to the group's fundraising events) when the written or verbal request to donate is made by a private citizen, but a public official or employee then follows-up on the solicitation with an Alabama Power employee and urges or encourages the Company to respond affirmatively to the request?
- 6) If the Commission believes that it would be impermissible for Alabama Power to respond to any of the above fundraising requests, would the Company be permitted to make a donation to such a charity or nonprofit organization if, following the problematic initial solicitation, Alabama Power subsequently receives an appropriate fundraising request that did not involve a public official or employee in a manner that the Commission believes is improper?

- 7) Is the answer to any of the questions above different if the request is made to the Alabama Power Foundation? The Foundation itself is a 501(c)(3) charitable organization under the IRS' private foundation regulations and is a separate legal entity from Alabama Power. The Foundation is not a "principal" under the Ethics Act and is only permitted to donate to 501(c)(3) charities. Is it relevant whether the request is made via the Alabama Power Foundation's online grant request page or made directly to an Alabama Power employee who then forwards that request to the Foundation?

- 8) Alabama Power often receives requests from public officials and employees to support the governmental entity with which the public official or employee is associated or employed (as opposed to benefitting a charity or nonprofit organization). Examples of the types of requests that Alabama Power and other businesses frequently receive include the following:
 - (a) A mayor asking for a donation to support the construction of new educational facilities.
 - (b) A public university employee asking for a donation to benefit a scholarship fund, building campaign, public-private partnership, academic initiative, or general operations.
 - (c) A municipal employee seeking a sponsorship for a 4th of July parade or similar local event.
 - (d) Requests from public university, State Department of Education, or local school system employees to sponsor a student event or to purchase materials to be used by students as part of various educational and training programs.
 - (e) A public high school sports coach asking for a donation to purchase new uniforms for a team.
 - (f) A city councilman asking for a donation to assist in renovating facilities at a municipal park.
 - (g) The director of a local transit authority requesting a sponsorship for a conference that will include training programs and related activities for public employees who participate.
 - (h) An employee of a state agency asking for in-kind support (*e.g.*, meeting space, resources, employee time) to assist with a project being undertaken by the agency.

- (i) A public employee involved in economic development asking for in-kind support (e.g., research, event hosting, and/or transportation) to assist with the state's economic development efforts.

FACTS AND ANALYSIS

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

This Opinion is requested in light of previous Commission Opinions holding that public officials cannot solicit contributions for 501(c)(3) organizations if in doing so they realize personal gain. Moreover, they cannot use their public position to benefit a business with which they are associated, which the 501(c)(3) could be. Alabama Power, which makes charitable contributions many times at the request of public officials or employees, is concerned that by making donations when the solicitation may be made in violation of the Act, even if it is unaware that the solicitation was improper, then they may be exposed under the Act for being complicit in that violation. Much of this concern arises from the volume of requests they receive as well as the manner in which they receive them. Alabama Power claims that requests for charitable donations are presented to at least 200 Alabama Power employees annually and that the company receives, conservatively, 2, 250 requests per year. In many cases, Alabama Power does not even know whether the individual seeking a donation is covered by the Ethics Act as a public official or employee or their family member.

For that reason Alabama Power has requested an Advisory Opinion outlining their obligations with respect to the charitable donations they make. It is worth pointing out that Advisory Opinions only apply to the requester and those who in good faith reasonably rely on them "in a materially like circumstance." Ala. Code § 36-25-4. This Opinion is given to Alabama Power only, in the context of charitable, nonprofit, and public entity donations only, and is given in part based on the number of requests they receive annually for donations and the number of employees to whom the requests are directed. Moreover, the Commission recognizes that the Ethics Act should not unnecessarily impede philanthropic support and the good work done by charitable organizations, but at the same time we point out the Code's instruction that the Act is to be construed liberally so as to protect the public interest. Ala. Code § 36-25-2.

Regarding donations made to charities and nonprofits, compliance with the Ethics Act is generally best managed by those who have the information necessary to ensure compliance. Therefore, Alabama Power, when making donations is not required to investigate whether a person seeking a donation is a public official or employee (or family member), and if they are, whether such individuals are compensated or receiving any personal gain from the charity. As a general matter, therefore, when a public official or employee (or family member) solicits a donation for a charity or nonprofit that, for example, compensates them, or provides them with

any other personal gain , then that is an issue for the public official or employee (or family member) as well as the charity or nonprofit to monitor, not Alabama Power.

At the same time, however, Alabama Power cannot ignore actual knowledge of personal gain. Keeping in mind Alabama Power's size and the obvious difficulty in establishing what those employed by them may know or not know, given the large number of people solicited, a statement by the requestor that no public official or employee is compensated or otherwise receiving personal gain, is sufficient to relieve Alabama Power of any further obligation to investigate. It is incumbent upon Alabama Power, however, to notify the charity or nonprofit that pursuant to this Opinion it is their obligation to verify compliance, not Alabama Power's. Moreover and as it recognizes, Alabama Power cannot give any donation for the purpose of corruptly influencing official action without violating Ala. Code § 36-25-7.

The above guidelines apply equally to most of the questions Alabama Power raises. Specifically, Questions 1 - 5 are answered affirmatively within the guidelines referenced above.

Regarding Question 6, the Commission has stated, "If a public official or employee solicits in violation of the Act and money is received pursuant to that solicitation, then the donation must be returned." The obligation to return the improperly solicited donation, likewise, falls on the public official or public employee who inappropriately solicited the donation to return it.

Regarding Question 7, Alabama Power states in its request for an Opinion that the Foundation is not a principal. We have confirmed that it is not registered as one with the Commission. An online solicitation is a "solicitation" under Section 5.1, but answering this question ultimately depends on whether the request is made to an employee of Alabama Power who is a principal; but since there has not yet been a final resolution of the definition of "principal" we will refrain from answering this question until such issues are resolved. If the employee is a lobbyist, then Ala. Code § 36-25-23(c) prohibits the solicitation. If the requestor is a public official or public employee who realizes personal gain from the solicitation, then the solicitation is improper; and if the contribution is for the purpose of corruptly influencing official action, etc., then the Foundation cannot contribute.

Question 8 sets out nine (9) separate scenarios and they are asked in the context of donations to support "governmental bodies" which can include a number of institutions beyond a municipality or the State of Alabama itself. In fact, "governmental body" is defined in Ala. Code § 36-25A-2(4) as:

"Governmental body. All boards, bodies, and commissions of the executive and legislative departments of the state or its political subdivisions or municipalities which expend or appropriate public funds; all multimember governing bodies of departments,

agencies, institutions, and instrumentalities of the executive and legislative departments of the state or its political subdivisions or municipalities, including, without limitation, all corporations and other instrumentalities whose governing boards are comprised of a majority of members who are appointed or elected by the state or its political subdivisions, counties, or municipalities; all quasi-judicial bodies of the executive and legislative departments of the state; and all standing, special, or advisory committees or subcommittees of, or appointed by, the body. The term “governmental body” does not include any of the following:

- a. Legislative party caucuses or coalitions.
- b. Alabama appellate or trial courts, except as required by the constitution of this state or any body governed by rules of the Alabama Supreme Court.
- c. Voluntary membership associations comprised of public employees, retirees, counties, municipalities, or their instrumentalities which have not been
- d. delegated any legislative or executive functions by the Legislature or Governor.”

Given the broad definition of “governmental bodies,” the Commission limits this Opinion to the specific fact scenarios Alabama Power presented and within the context of public entities. It should be noted that generally donations made to a municipality, for example, are considered a donation to the public. If there is personal gain to the public employee or official soliciting a donation, then that would change the analysis, but we do not believe, absent additional facts, that the mere fact that a public official or employee is employed by the public entity he or she is fundraising for means that the public official or employee is realizing personal gain from a donation. We have recognized that public employees can make decisions benefitting the public even if the public is their employer under the Act’s definitions. See, e.g., AO 2015-15.

The beneficiary of those solicitations, however, must be the public entity and the donation itself must benefit the public. Similar to the analysis for charitable donations, it is the responsibility of the public employee or official seeking the donation to the public entity to ensure that the donation is used to benefit the public and is not used to provide personal gain for themselves or their family members. In this way, the responsibility for compliance is placed with the public entity and public employees and officials who have the ability to ensure it. Alabama Power, within the parameters of the question asked, is not required to investigate whether a public employee or official who is seeking a donation will receive any type of impermissible personal gain as a result of that donation. It is also not required to determine whether the public is sufficiently benefitting from the public entity’s use of the donation. At the

same time, however, Alabama Power cannot ignore actual knowledge of personal gain in this context either.

Scenarios (a) through (i) are, therefore, answered by the above standards.

Given the large numbers of requests presented to Alabama Power annually and considering the limited purpose of Advisory Opinions, the Commission will not address the issue, through this Opinion, from the perspective of the requestor. They should request their own Opinion directed to this issue if they have questions about its application.

CONCLUSION

Alabama Power, when donating to charities, nonprofits, and public entities, is not required to investigate whether a person seeking a donation is a public official or employee (or family member), and if they are, whether such individuals are compensated or receiving any personal gain from the recipient.

At the same time, however, Alabama Power cannot ignore actual knowledge of personal gain.

Moreover and as it recognizes, Alabama Power cannot give any donation to any charity, nonprofit or public entity for the purpose of corruptly influencing official action without violating Ala. Code § 36-25-7.

AUTHORITY

By 5-0 vote of the Alabama Ethics Commission on December 7, 2016.



Jerry L. Fielding, Ret. Sr. Circuit Judge
Chair
Alabama Ethics Commission