

ADVISORY OPINION
CASE NO. 00011.A
Outside Employment

To: [John]

Date: September 13, 2000

In a letter dated May 31, 2000, you asked if the Ethics Ordinance would prohibit you from approaching [the Commissioner] of the Department of Public Health to solicit the Department's interest in your [Alpha data elements set]. After careful consideration of the facts and the relevant law, the Board finds that the Ordinance does not prohibit you from approaching [the Commissioner], although it does place certain restrictions on your future conduct while a City employee. This advisory opinion reviews the facts you presented and sets forth the Board's analysis and conclusions.

FACTS: You have been the [regional administrator] of the [...] Neighborhood Health Center within the Chicago Department of Public Health for approximately the past 18 months. As an administrator you oversee the core staff at the [neighborhood] clinic, as well as the various operations of the clinic, such as its ambulatory care facility.

Before being employed by the City, you were on [a state] Governor's Task Force on Medical Communications Technology and were also a fellow at the American College of Health Care Executives. Both of these experiences were instrumental in the development of [Alpha], a set of data elements that you hope will one day constitute the essential structure in a healthcare management information system. You said that in April 1998, you received a patent for [Alpha] and also received a copyright for the research on which it is based [...].

The current healthcare management information system used by the City is called Global System. Although you are uncertain about the details, you believe that the City acquired it under a contract that is about to expire. As with most health care management information systems, Global System provides some information about healthcare providers (e.g. hospitals, nursing homes), payers (e.g. Blue Cross), suppliers (e.g. pharmaceutical companies) and consumers. With this system, the relevant employees of the City can find out how many patients are seen by a particular hospital, which doctors saw them, and so forth. You stated that you use the system for basic information searches and receive reports that are generated by the system at the central

office. You said that you did not have a hand in training individuals to use Global, and that you did not have any input in the City's decision to use it.

In your opinion, Global System is inadequate on at least two levels. First, its software does not carry out many of the tasks for which it is designed. You attribute this first failure to poor linkage of databases and unsuitable algorithms, which direct the system in obtaining and organizing data. The second inadequacy of Global System, in your opinion, is that it does not include enough data or categorize that data effectively.

You believe that [Alpha], with what you characterize as its well-considered and near-exhaustive set of data elements (5,750 of them), could either complement or replace Global System. More specifically, you said that the set of data elements will address the second inadequacy in Global System — that it does not include enough data and does not categorize the data effectively. You stated that the repository capabilities of [Alpha], which enable it to collect and store data, and its ability to organize this data could be very valuable to the City's Department of Public Health, as well as to suppliers, consumers, payers, and so forth. You claimed that it would enable one to track, benchmark and compare, among other things, demographic information about patients, the number of employees per square footage at hospitals, the kind of tests ordered by doctors, practice patterns of different doctors and institutions, the reasons for and numbers of complaints and grievances at a particular hospital, which tests providers have ordered, and so forth.

Before [Alpha] could be put into practice, however, you estimate that [Alpha] would require approximately six months of development work, devoted to designing a database platform. You do not anticipate the City would be involved with this development. You stated that you believe that this development work would need to be performed by a company such as Oracle Corporation. You estimated these development costs at around 8 to 9 million dollars, and you expect that you would need to enlist the support of venture capital in order to fund the development. You said that you would expect to be paid for your ideas and labor by these venture capitalists. You stated that, at this point in time, you have not yet approached any companies such as Oracle or any venture capitalists.

You said that you would like to approach the Commissioner of the Department of Public Health [...] to "see if [s/he] might be interested" in using [Alpha] once it is developed. You indicated that any endorsement or expression of interest by [the Commissioner] could then be parleyed by you to venture capitalists, as positive evidence of the potential of [Alpha]. Once [Alpha] is developed, you envision offering a 5 or 10 year license to the City for the use of [Alpha], free of charge.

LAW & ANALYSIS

1. Section 2-156-090(a)

The first section of the Ordinance that applies to your situation is 2-156-090(a), "Representation of Other Persons," which provides, in relevant part:

No... employee may represent... any person other than the City in any formal or informal proceeding or transaction before any City agency in which the agency's action or non-action is of a nonministerial nature; provided that nothing in this subsection shall preclude any employee from performing the duties of his employment....

This provision prohibits City employees from representing persons other than the City in certain situations. In the past, the Board has interpreted such representation as applying to a broad range of activities in which one person acts as a spokesperson for someone other than the City, and seeks to communicate or promote the interests of that party.

In prior Board cases decided under §2-156-090 of the Ordinance, there has always been an explicitly identified third party — such as a corporation — in addition to the City and the individual employee. *See* Case No. 89126.A The instant case marks the first time the Board has addressed the question of whether a person, speaking on his or her own behalf (as you would be if you approached [the Commissioner]), should be understood to be "representing a person other than the City," within the meaning of §2-156-090.

Nevertheless, in past post-employment cases, decided under §2-156-100 of the Ordinance¹, the Board has addressed a similar question regarding representation. In both Case Nos. 93018.A and 99010.A, the Board determined that the Ordinance does not prohibit consulting agreements between the City and its former employees provided, among other conditions, the former employee does not represent the interests of any other entity in connection with his or her responsibilities to the City.

In its reasoning in Case No. 99010.A, the Board made the following observation:

If you were to consult with the City in your capacity as an employee of your own professional services corporation, however, you would be assisting or representing a third party — the corporation — and, as such, would be confronted with a situation in which you would owe loyalties to both the City and to your corporation — a situation the Board viewed in Case No. 93018.A as the major harm contemplated by the post-employment provisions. The fact that you would be the sole owner, shareholder, officer, and employee of the corporation does not change the Board's conclusion. A corporation is a separate entity. If your corporation were to enter into a consulting agreement under which you would personally provide services to your former Department, you would owe a fiduciary duty to the corporation. *Id.* at 4.

¹In relevant part, the provision states: No former official or employee shall, for a period of one year after the termination of the official's or employee's term of office or employment, assist or represent any person in any business transaction involving the City or any of its agencies, if the official or employee participated personally and substantially in the subject matter of the transaction during his term of office or employment.

In the instant case, the Board concludes that a similar distinction is appropriate; that is, as long as you are acting merely as an individual when you approach [the Commissioner], and not as part of a larger business enterprise, whether a corporation, a partnership or some other kind of organization, you are not "representing a person other than the City," in the sense that is prohibited by Section 2-156-090.

It is important to emphasize, however, that if your situation should change — if, for example, you incorporate or enter into some kind of agreement with a database platform developer, a venture capitalist, and so forth — you should re-contact the Board with the relevant details, so that we may advise you on how the Ordinance applies to your new situation.

2. Section 2-156-080(a)

A second Ordinance provision relevant to your situation is Section 2-156-080(a), "Conflicts of Interest; Appearance of Impropriety." It states, in pertinent part:

No ... employee shall make or participate in the making of any governmental decision with respect to any matter in which he has any economic interest distinguishable from that of the general public.

The Ordinance defines an "economic interest" in §2-156-010(i) as "any interest valued or capable of valuation in monetary terms..." At this point, [Alpha] is an idea in need of development, not a finished product that someone could purchase and then put into immediate use. Nonetheless, since you expect to profit from [Alpha] when you enter into an agreement with a database platform developer and a venture capitalist, it is reasonable to conclude that [Alpha] is capable of valuation in monetary terms, even in its present underdeveloped state, and that you have an economic interest in [Alpha] that is distinct from the interests of the general public.

The conflict of interest provision prohibits City employees from participating in or making governmental decisions or actions in which they have an "economic interest" (as defined) that is distinguishable from that of the public. When fully developed, [Alpha], you suggest, could replace Global Systems, the healthcare management information system that the City presently uses. Since you have an economic interest in [Alpha], it follows that governmental decisions involving [Alpha] as an alternative or supplemental healthcare management information system may affect your economic interest. Therefore, in your City employment you are prohibited from participating in governmental decisions about [Alpha]. Furthermore, given that your participation in any decision about keeping, replacing or supplementing the Department's healthcare management information system, whether or not these decisions make explicit reference to [Alpha], may present the appearance of impropriety, we strongly recommend that you recuse yourself from these decisions as well.

3. Section 2-156-110

A third Ordinance provision that might apply to your situation is §2-156-110, "Interest in City Business," which states, in relevant part:

No ... employee shall have a financial interest in his own name or in the name of any other person in any contract, work or business of the City, or in the sale of any article, whenever the expense, price or consideration of the contract, work, business or sale is paid with funds belonging to or administered by the City, or is authorized by ordinance...

At present, a contract or other agreement with the City involving the use or sale of [Alpha] appears rather remote. Should such a possibility materialize in the future, however, we advise you to contact the Board for specific advice on how the Ordinance would apply. Conceivably, if your interest in such an agreement were to give you a "financial interest" in City business, you might be obligated to resign your position with the City in order to proceed with the agreement.

DETERMINATION: The Board determines that the Ethics Ordinance does not prohibit you from approaching [the Commissioner] of the Department of Public Health to solicit the Department's interest in your [Alpha data elements set]. However, once you have approached [the Commissioner], you are prohibited from participating in governmental decisions about [Alpha], and furthermore, we recommend that you recuse yourself from all discussions about keeping, replacing, or supplementing the Department's healthcare management information systems, whether or not these decisions make explicit reference to [Alpha], in order to prevent the appearance of impropriety. Finally, if a contract or other agreement with the City involving the use or sale of [Alpha] should materialize in the future, we advise you to contact the Board for specific advice on how the Ordinance applies.

The Board's opinion is not necessarily dispositive of all issues relevant to this situation, but is based solely on the application of the City's Governmental Ethics Ordinance to the facts stated in this opinion. If the facts stated are incorrect or incomplete, please notify us immediately, as any change may alter our opinion. Other laws or rules also may apply to this situation. Be advised that City departments have the authority to adopt and enforce rules of conduct that may be more restrictive than the limitations imposed by the Ethics Ordinance.

We appreciate your inquiry and your concern to abide by the standards embodied in the Ethics Ordinance. We enclose a copy of the Ordinance for your reference. If you have any further questions, please do not hesitate to contact us.

RELIANCE: This opinion may be relied upon by (1) any person involved in the specific transaction or activity with respect to which this opinion is rendered and (2) any person involved in any specific transaction or activity indistinguishable in all its material aspects from the transaction or activity with respect to which the opinion is rendered.

[Signature]

Darryl L. DePriest
Chair