

CONFLICT OF INTEREST

STATE REPRESENTATIVE OFFERED POSITION AS PUBLIC INFORMATION OFFICER FOR OFFICE OF CRIMINAL CONFLICT AND CIVIL REGIONAL COUNSEL

To: Philip J. Massa, (Regional Counsel, Fourth District)

SUMMARY:

Section 112.313(7)(a), Florida Statutes, would not prohibit a member of the Legislature from being employed as Public Information Officer for the Fourth District Office of Criminal Conflict and Civil Regional Counsel. There is no indication that the entity is doing business with the Legislature, and to the extent it is regulated by that body through the enactment of laws, the exemption of Section 112.313(7)(a)2, Florida Statutes applies. However, Article II, Section 8(e), Florida Constitution and Section 112.313(9)(a)3, Florida Statutes, would prohibit the Representative from representing the OCCCRC before any state agency during his term of office.

QUESTION:

Does the Code of Ethics for Public Officers and Employees prohibit a member of the Florida House of Representatives from being employed as Public Information Officer for the Fourth District Office of Criminal Conflict and Civil Regional Counsel?

Your question is answered in the negative, under the circumstances presented.

You write that you are the Director of the Fourth District Office of Criminal Conflict and Civil Regional Counsel, and you are considering employing a member of the Florida House of Representatives in the position of Public Information Officer I.¹

In May 2007, the Florida Legislature enacted Chapter 2007-62, Laws of Florida (the "Act"), to create a revamped system of court-appointed counsel to represent indigent defendants primarily in those cases where the public defender has a conflict. The Act established five Offices of Criminal Conflict and Civil Regional Counsel ("OCCCRC"), which coincide with the geographic boundaries of the five District Courts of Appeal. Each OCCCRC is headed by a Regional Counsel, who is appointed to a four-year term by the Governor from a list of three candidates vetted by the Supreme Court Judicial Nominating Commission. Each Regional Counsel is responsible for hiring Assistant Regional Counsel and other support staff for their

¹ Pursuant to Section 112.322(3)(a), Florida Statutes, any public officer or employee who has the power to hire or terminate employees may seek an advisory opinion from the commission as to the application of the provisions of of the Code of Ethics to any such employee or applicant for employment.

respective offices. In telephone conversations with our staff, you advise that as the OCCCRC is such a newly-created entity, you believe you need someone to help "get the word out" to persons and agencies about what your office is, what it does, and what services it can provide. You advise that the position of Public Information Officer I will report directly to you, and is currently an OPS position, although you hope to make it permanent.

You have provided a position description which indicates that the person filing the position will have responsibilities including, but not limited to, the following:

- Dissemination of information on office policies to the general public and media representatives;
- Coordinating with state and local criminal justice agencies in planning and presenting major programs or events;
- Writing and editing speeches, statements and news releases and maintaining liaison with local, state and national media;
- Producing news releases to the public regarding the criminal justice system, its operation, the disposition of certain cases, and other matters, including appearing in broadcast news interviews and on radio and television public affairs programs; and,
- Handling inquiries from the media regarding the activities of the office.

In addition, you have advised that the person filling this position will assist you in administrative matters, such as public records and Sunshine Law issues, staffing and human resources, and developing reports. The position will not have any responsibilities related to seeking funds or other resources, either at the state or local level, and will have no duties related to lobbying the Legislature or any activities related to such lobbying. You further advise that the member you would like to hire is not currently assigned to any committee likely to deal with legislation affecting your office. He has a background in military, security, and management issues, and a communications degree.

Section 112.313(7), Florida Statutes, provides:

CONFLICTING EMPLOYMENT OR CONTRACTUAL RELATIONSHIP.—No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he or she is an officer or employee . . . ; nor shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties.

The member's agency is the Florida Legislature (CEO 95-21) and as an employee of the OCCCRC, he would have an employment relationship with the OCCCRC. Because service in the House of Representatives is an office, rather than an employment or contractual relationship,

(CEO 06-26) the question is whether his employment relationship with the OCCCRC would cause a conflict of interest with any of his legislative duties.

Absent the applicability of an exception, the first part of Section 112.313(7) prohibits the Representative from having an employment relationship with the OCCCRC if it is regulated by or doing business with the Legislature. Nothing in the materials you have provided suggests that the office is "doing business" with the Legislature, and to the extent that it may be regulated by the Legislature, Section 112.313(7)(a)2, Florida Statutes, would apply. It provides:

When the agency referred to is a legislative body and the regulatory power over the business entity resides in another agency, or when the regulatory power which the legislative body exercises over the business entity or agency is strictly through the enactment of laws or ordinances, then employment or a contractual relationship with such business entity by a public officer or employee of a legislative body shall not be prohibited by this subsection or be deemed a conflict.

We have often found this provision applicable to exempt from the prohibition of Section 112.313(7)(a) situations in which the potentially conflicting relationship was based on the possible "regulation" of an entity by the Legislature (a situation applicable to many "citizen-legislators"). See, CEO 03-3, footnote 5. Thus, insofar as the OCCCRC can be said to be "regulated" by the Legislature through its enacting laws, the application of Section 112.313(7)(a)2 negates any prohibition.

Although we have not applied this exemption to lobbying activities, we have concluded that Section 112.313(7)(a) does not prohibit a legislator from having any employment whatsoever with an organization if the organization engages in lobbying the Legislature. CEO 91-1. However, our previous opinions have indicated that "a legislator's employment should be completely separated from the lobbying activities of his employer." *Id.* In CEO 90-8, we found that a State Representative was not prohibited from serving as president and CEO of a nonprofit corporation formed to promote private higher education, but that he would be prohibited "from engaging in lobbying activities personally and also in any activities related to lobbying." Such activities:

would include not only actual contact with legislators through physical attendance at legislative meetings, submission of written materials, and personal contact with legislators in an effort to encourage the passage, defeat, or modification of any measure before the Legislature, as part of your employment responsibilities, but also directing the activities of those who will contact the Legislature, participating in setting the strategies of whom to contact and what to say, and assisting in preparing amendments to documents in support of the corporation's position. In other words, it is our view that your employment with the corporation should be completely separated from the lobbying activities of your employer.

As you have already recognized, the member in question here would be similarly prohibited from engaging in lobbying activities. Under such circumstances, his proposed employment would not be prohibited by the first part of Section 112.313(7), Florida Statutes.

The second part of Section 112.313(7) prohibits a public officer from having any contractual relationship which would create a continuing or frequently recurring conflict between his private interests and the performance of his public duties, or which would impede the full and faithful discharge of his public duties. In Zerweck v. State Commission on Ethics, 409 So. 2d 57, 61 (Fla. 4th DCA 1982), the District Court of Appeals said that this provision establishes an objective standard which requires an examination of the nature and extent of the public officer's duties together with a review of his private interests to determine whether the two are compatible, separate and distinct, or whether they coincide to create a situation which "tempts dishonor."

In CEO 06-12, we advised the incoming President of the Florida Association of Realtors (FAR) that a conflict under Section 112.313(7)(a) would be created were she to serve as a member of the Florida House of Representatives while holding this position. In so finding, we noted that as President of FAR, she would have significant duties pertaining to the FAR's legislative agenda which she could not completely eliminate and still serve effectively as President. In addition, we said:

it would be virtually impossible to draw a line distinguishing when you were acting "as a State Representative" as opposed to acting "as president of the FAR." Your questions themselves illustrate how, as a member of the Legislature, you would be faced on almost a daily basis with situations where your dual responsibilities would interface. Furthermore, when a member of the Legislature is the public "face" of the organization, indeed, its highest-ranking member, the potential exists for doubt to arise in the minds of the public as to whether the member's position is espoused because of his or her true belief in its benefit, or because the member has a responsibility to promote and advocate for the organization's philosophy. Accordingly, we find here, as we did in CEO 88-68, that such line-drawing is, as a practical matter, unachievable.

In CEO 06-19, we advised a member of the Florida House of Representatives that a prohibited conflict of interest would be created under Section 112.313(7)(a) were he to consult with a waste management company as its Manager of Community and Municipal Relations. We referenced CEO 06-12, and said:

Similarly, here, there would be no way to distinguish between when you are wearing your "legislator" hat and when you are wearing your "waste management company" hat when you undertake the activities listed in the position description. Moreover, the local governments you would interact with on behalf of the company could feel unduly pressured to yield to your influence so that they do not alienate you when they approach you

with their local issues of legislative concern, and the voters who elected you would be confused about whether you were advocating for an issue because you genuinely believed it was good legislative policy, or because you were receiving compensation from a company whose interests could be impacted by the issue. For these reasons, the rationale of CEO 06-12 applies equally to your proposed consulting arrangement.

Your situation differs from these in a number of ways. First, while not dispositive, the fact that the OCCCRC is a public, rather than private organization, is meaningful in that your organization's responsibility is to the citizens, rather than to private members or stockholders. Further, the range of legislative issues concerning the OCCCRC is likely to be narrower than either that of the FAR or the private waste company. In addition, although a Public Information Officer may fairly be considered an "advocate" for the organization he serves, such a position does not appear to us to be emblematic of the organization in the way that a President would, and while the occupant of such a position may be expected to have some "institutional loyalty" to the organization, such loyalty would not appear to us to exist to any greater degree than would be experienced by other highly placed persons in the organization and would not in itself give rise to a conflict under Section 112.313(7)(a).² Finally, you have advised that the responsibilities of the Public Information Officer, as you have advised the position is contemplated, will not include advocating for issues, funds, or contracts, but rather is designed to encourage others to understand and utilize the resources of your office. In such circumstances, there does not appear to be much opportunity for local governments to feel pressured.

We have recognized that "members of the Legislature are expected to serve as citizen-legislators on a part-time basis and must be employed elsewhere to support themselves and their families," (CEO 09-8) and have thus found that no conflict would exist in a number of "outside" employments which arguably have a greater potential for conflict than is presented under these facts. For example, in CEO 03-11 we advised that no prohibited conflict of interest would exist under the second part of Section 112.313(7), where a State Senator/attorney represented a client (a hospital) before county commissions and in various other matters not involving the Legislature, and also participated in legislation affecting the hospital. In CEO 90-10 we found that Section 112.313(7) would not preclude a State Representative who was Chair of the Committee on Finance and Taxation from employment as a sales consultant with a health care management firm, even though some of the health care providers she would contact in this position would be special districts established by special acts of the Legislature, and she might be presented, in her capacity as Committee Chair, with proposals benefitting a particular hospital or district which could be a client of her firm.

The employment here does not encompass lobbying or activities related to lobbying; nor does it arise from the member's public position or relate directly to issues that may be expected to come before him in his official capacity. Accordingly, we find that no conflict under Section 112.313(7)(a) would exist were the member to serve as OCCCRC Public Information Officer under the circumstances you have described. While it is conceivable that a particular set of circumstances could cause the Representative to be tempted to dishonor his public

² If the notion of institutional loyalty were enough to create a conflict of interest under Section 112.313(7), virtually *any* outside employment would create a conflict of interest for members of the Legislature.

responsibilities, that possibility exists in any number of employment and professional opportunities, and given that Florida's constitution and laws presently preserve the notion of a "citizen" legislature, it is insufficient by itself to violate Section 112.313(7).

We next must consider whether the Article II, Section 8(e), Florida Constitution, or Section 112.313(9)(a)3, Florida Statutes, prohibits the employment. These provisions state:

Article II, Section 8(e), Florida Constitution, provides, in pertinent part:

No member of the legislature shall personally represent another person or entity for compensation during term of office before any state agency other than judicial tribunals. Similar restrictions on other public officers and employees may be established by law.

Section 112.313(9)(a)3, Florida Statutes, enacted in 1991, reiterates this standard, stating:

No member of the Legislature shall personally represent another person or entity for compensation during his or her term of office before any state agency other than judicial tribunals or in settlement negotiations after the filing of a lawsuit.

Your letter of inquiry states that the Public Information Officer position "Assists and coordinates with local and state criminal justice agencies in the planning and presentation of major programs or events within the state or judicial circuit." In telephone conversations with our staff, you relate that this would include such things as Gideon Day³ events and other meetings or events at which the role and resources of the OCCRC could be showcased. You emphasize that the position would have no responsibilities to advocate for resources.

Pursuant to Section 112.312(22), Florida Statutes, "Represent" or "representation"

means actual physical attendance on behalf of a client in an agency proceeding, the writing of letters or filing of documents on behalf of a client, and personal communications made with the officers or employees of any agency on behalf of a client.⁴

This is a broad definition, and we have interpreted it to include attendance at meetings (CEO 92-3 and CEO 06-22), asking questions (CEO 00-6), making requests for information (CEO 01-3), and filing applications (CEO 05-4). Accordingly, we do not find that the fact that

³ Marking the anniversary of the ruling in Gideon v. Wainwright, 372 U.S. 335 (1963), in which the Supreme Court held that the right of an indigent defendant in a criminal trial to have the assistance of counsel is a fundamental right essential to a fair trial.

⁴ In previous opinions we have recognized that the constitutional prohibition is not phrased in terms of representation of a "client," but rather in terms of representation of persons or entities. We understand this choice of language to indicate that the people of this State intended to prohibit a broader range of representation than that only of "clients" before State agencies.

the Public Information Officer will not be "advocating" for any particular issue or position removes his actions from the definition of "representation."

Further, while not every occasion at which the Public Information Officer may represent the OCCCRC may be an "agency proceeding,"⁵ we do not find that this resolves the question, as the language of the constitutional and statutory prohibitions is broader than the language of the definition—prohibiting representation before *any* state agency other than judicial tribunals. The language of the statute and Constitution is straightforward on this issue. In CEO 81-57, we concluded that post-officeholding restrictions would prohibit a former State Senator from accepting employment as Director of the Division of Hotels and Restaurants in the Department of Business Regulation within two years after leaving office, where that employment would require him to engage in lobbying activities before the Legislature in behalf of the Division, but that the provision would not prohibit him from accepting such employment if the duty of lobbying were transferred to another person. Similarly, we find here that while the member is not prohibited from holding the position, he would be precluded from performing any duties requiring him to represent the OCCCRC before any state agency.

Your question is answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on July 24, 2009 and **RENDERED** this 29th day of July, 2009.

Cheryl Forchilli, *Chair*

⁵ In CEO 07-6, we said that a former county commissioner was not prohibited by Section 112.313(14), Florida Statutes, (which restricts certain former local officers in the "representations" they may make after leaving office) from merely attending, in behalf of a client, gatherings which are not regular meetings of the county commission and which are not advertised or noticed under the Sunshine Law. However, we also found that the former commissioner was prohibited from making comments in behalf of his client at such a gathering if a county commissioner or one or more enumerated county employees were present.