

1983 WL 181742 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

February 9, 1983

*1 Mr. Gregg Steinle
Staff Reporter
Greenville Piedmont
P. O. Box 1688
Greenville, SC 29602

Dear Mr. Steinle:

In a letter to this Office, you described a situation involving the development of certain innovative computer software by a State agency with modifications of such being among the products marketed by a private company. You further indicated that an executive with the particular State agency is a director of the private company and that activities of the private company and the State agency sometimes overlap in the marketing of software. You have questioned whether certain activities as described in your letter are contrary to any State law.

In your letter, you specifically questioned what State laws are applicable to the situation where a State agency executive produces software while a public employee and then becomes a director in a company that offers modified versions of the software for a fee. You also questioned what would be the applicable State laws pertaining to the actions of former agency employees who participated in development of the software and then left the government to set up a company to market versions of the software. Also questioned were the applicable laws in regard to an agency executive demonstrating agency software during his work hours, and then profiting through a private company in the sale of modified versions of the software.

While a formal opinion cannot be provided by this Office, in providing a response to your question, a review of provisions of this State's Ethics Act, [Section 8-13-10, et seq., Code of Laws of South Carolina \(1976\)](#), as amended, and published opinions of the State Ethics Commission has been made. Certain provisions of such Act are relevant to your inquiry. Section 8-13-410(1) provides,

'No public official or public employee shall use his official position or office to obtain financial gain for himself.'

Section 8-13-460 provides in part,

'Any public official or public employee who, in the discharge of his official duties, would be required to take action or make a decision which would substantially affect directly his personal financial interest or those of a member of his household, or a business with which he is associated, shall instead take the following actions:

(a) prepare a written statement describing the matter requiring actions or decisions, and the nature of his potential conflict of interest with respect to such action or decision.

(c) If he is a public employee, he shall furnish a copy to his superior, if any, who shall assign the matter to another employee who does not have a potential conflict of interest. If he has no immediate superior, he shall take such action as prescribed by the State Ethics Commission. . . .'

Section 8-13-20(b) defines business with which he is associated as

‘ . . . any business of which the person or a member of his household is a director, officer, owner, employee, or holder of stock worth \$10,000 or more at fair market value, and any business which is a client of the person.’

*2 Section 8-13-430 may also be of relevance. Such section provides that:

‘no person shall offer or pay to a public official or public employee and no public official or employee shall solicit or receive any money in addition to that received by the public official or public employee in his official capacity for advice or assistance given in the course of his employment as a public official or public employee.’

Therefore, the receipt of any additional compensation for carrying out the duties and responsibilities of a particular public position is prohibited, Section 8-13-1010 provides a penalty of a fine of not more than one thousand dollars or imprisonment for not more than ninety days or both for willful violations of such provisions.

In prior advisory opinions, the State Ethics Commission has advised generally that public employees may engage in outside business activities within certain guidelines. Such guidelines are that: (1) no public materials or equipment are utilized, (2) such business interest does not interfere with the needs of the agency, (3) the employee's public position is not utilized as leverage to obtain or continue such employment, and (4) such outside employment is engaged in on other than normal working hours. See: State Ethics Commission Opinion 81-046. State Ethics Commission Opinion 82-010, referencing previous opinions of the Commission, advised that outside employment which closely parallels activities of a public employee creates inherent conflicts and care should be taken to see that such work not violate the principles of Section 8-13-410. The opinion further stated:

‘a violation of this section would occur if the employee channelled prospective clients to the outside business interest or took action to delay or kill public actions or decisions while offering such service by the outside business. Further, the public employees could not utilize their official positions to obtain favorable treatment by the agency or in regard to any service or materials or equipment which may be available from the public agency.’

Please be further advised that additional sections of the State Ethics Act pertain to contracts between a public employee's firm and public agencies. Section 8-13-410(2)(a) and (b) provides in part that:

‘(2) No public official or public employee shall participate directly or indirectly in a procurement when he has knowledge or notice that:

(a) he or any business with which he is associated has a financial interest pertaining to the procurement.

(b) any other person, business, or organization with whom he or a member of his household is negotiating or has an arrangement concerning prospective employment is involved in the procurement.’

Pursuant to such provision, a public employee is prohibited from participating in a procurement in which the business with which he is associated has a financial interest.

Section 8-13-500(3) states:

‘It shall be a breach of ethical standards for a business, in which a public employee or public official has a financial interest, knowingly to act as a principal or as an agent for anyone other than the State or other governmental entity with which he is associated, in connection with any contract, claim or controversy, or any judicial proceeding in which the public employee or public official either participates personally and substantially through decision, approval, disapproval, recommendation, the

rendering of advice, investigation, or otherwise, or which is the subject of the official's or employee's official responsibility, where the State or governmental entity is a party or has a direct and substantial interest.'

*3 Such section precludes a business with which a public employee is associated from entering into a contract with the State in a situation where there was action or a decision made concerning the contract by a public employee.

Referencing the above, it is obvious that outside employment and business interests, while not strictly prohibited in all respects by the referenced statutory provisions, can create conflicts of interest if such off-duty employment is closely related to an individual's public position. While an argument may be that the factual circumstances as outlined in your letter are not totally in keeping with the referenced provisions of this State's Ethics Act, the absence of knowledge by this Office of all the facts which may be relevant to a thorough understanding of the situation prevents a more specific response to your inquiry.

A further matter which would have to be considered is the nature of any contractual arrangement between the agency and its employee, or any agency policy which may permit the employee to own, or share royalties from, copyrights or patents.

We hope these comments are helpful to you; but, as you see, there is no all-encompassing short answer to a broad general series of questions.

With best regards, I am
Sincerely,

T. Travis Medlock
Attorney General

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