

LETTER OPINION
93-L-204

June 25, 1993

Ms. Deborah Fohr Levchak
President, Board of Directors
Technology Transfer, Inc.
1833 East Bismarck Expressway
Bismarck. ND 58504

Dear Ms. Levchak:

Thank you for your May 21, 1993, letter concerning Technology Transfer, Inc. (TTI), and its receipt of an application for continued project funding from Andre Kulisz, Inc. Specifically, you ask whether, based on the information provided in your letter, Mr. Mick Bohn's involvement in the Kulisz project is permissible under North Dakota law. Mr. Bohn held the position of director of the Department of Economic Development & Finance (ED&F) from January of 1992 through December of 1992.

The general rule is that public "officials may not abuse their office by using [inside] information gained in their official capacities for their own personal benefit." Evans v. Hall, 396 A.2d 334, 336 (N.H. 1978). N.D.C.C. ch. 12.1-13 implements that rule in North Dakota. Specifically, N.D.C.C. ? 12.1-13-02(1) provides:

1. A person is guilty of a class A misdemeanor if during employment as a public servant, or within one year thereafter, in contemplation of official action by himself as a public servant or by a government agency with which he is or has been associated as a public servant, or in reliance on information to which he has or had access only in his capacity as a public servant, he:

a. Acquires a pecuniary interest in any property, transaction, or enterprise which may be affected by

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such information or official action;

b. Speculates or wagers on the basis of such information or official action; or

c. Aids another to do any of the foregoing.

An essential element set forth in N.D.C.C. ? 12.1-13-02 is the existence of information to which the person has peculiar access by virtue of his or her capacity as a public servant. See Commonwealth of Pennsylvania v. Lynch, 411 A.2d 1224, 1235 (Pa. Commw. Ct. 1979); Kirby v. Cruce, 688 S.W.2d 161, 171 (Tex. App. 1985) ("The fiscal integrity of the state may be undermined if public servants are permitted to profit from confidential information acquired by virtue of their position.") (Carver, J., dissenting, quoting the Practice Commentary to Tex. [Penal] Code Ann. 39.03 (West 1993)). See also Working Papers of the National Commission on Reform of Federal Criminal Laws, Proposed Section 1372: Speculation or Wagering on Official Action or Information, p. 725 (July 1970) ("The conduct may be generally proscribed since it constitutes taking undue and partisan advantage of a public position and is, therefore a serious breach of the integrity of government operations."); Act of October 26, 1978, Pub. L. 95-521, 1978 U.S.C.C.A.N. (92 Stat.) [Ethics in Government Act] 4247 ("Former officers . . . should not be permitted to utilize information on specific cases gained during government service for their own benefit and that of private clients.").

The confidentiality of commercial and financial information of a TTI applicant is provided for by N.D.C.C. ? 10-30.4-06. That section provides:

10-30.4-06. Confidentiality of records. To assure parties dealing with the corporation that their confidential information will not be made public and to protect the patent position of emerging technologies, the following records of the corporation are confidential:

1. Patents, trade secrets, and scientific

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information that is identified as proprietary and which has been submitted to the corporation on a confidential basis for consideration or investment.

2. Commercial or financial information, whether obtained by the corporation directly or indirectly, of any entity to or from which a license is granted, an equity interest is acquired, or considered for acquisition under this chapter.

3. Internal or interagency memorandums, working papers, letters, or statements of evaluation which would not be available by law to a party other than in litigation with the corporation.

N.D.C.C. ? 12.1-13-02(1) also prohibits a public servant from engaging in certain activities if he does so "in contemplation of official action by himself . . . or by a government agency with which he is or has been associated as a public servant."

Whether Mr. Bohn's involvement with the Kulisz project is impermissible pursuant to N.D.C.C. ? 12.1-13-02 is a question of fact which I cannot resolve. In addition, it is a long-standing policy of this office not to determine whether a violation has occurred and should be charged or whether a board should grant or deny an application based upon a specific set of facts. It is the Board which serves as the fact finder and decision maker in the exercise of its statutory authority.

As the fact finder, the Board may review the following questions to determine if the actions of an individual are subject to the sanctions of state law:

1. Whether the individual is or was a public servant;
2. Whether the action at issue was taken:
 - a. during the individual's employment as a public servant; or
 - b. within one year of the individual's employment as a public servant.
3. Whether the action at issue was taken:
 - a. in contemplation of his own official action

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or the official action of the government agency with which he was associated; or

b. in reliance upon information to which the individual has or had access only as a public servant;

4. Whether the action at issue was:

a. Acquiring a pecuniary interest in any property, transaction, or enterprise which may be affected by information or official action;

b. Speculating or betting on the basis of information or official action; or

c. Assisting another to do any of the foregoing.

If the Board determines that Mr. Bohn's actions fall within the terms of the statute, it has several options including:

1. Denying the application based on an apparent conflict of interest.

2. Granting the application with conditions. For example, Mr. Bohn could be required to sign an affidavit that he has not acquired a pecuniary interest in the Andre Kulisz project in contemplation of official action on behalf of TTI or in reliance upon any information to which he had access only in his capacity as director of the Department of Economic Development and Finance.

3. Granting the application without conditions.

4. Pursuing the matter with the appropriate state's attorney.

Finally, the TTI Board has broad discretion to grant or deny applications for funding projects within North Dakota. Regardless of its review of the facts in this case, TTI has the legal authority to deny an application based on all relevant factors including the appearance of a conflict of interest.

I trust this addresses your inquiry. If I can be of any further assistance in this matter, please let me know.

Sincerely,

Deborah Fohr Levchak
June 25, 1993

Heidi Heitkamp
ATTORNEY GENERAL

dec/pg