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**EXECUTIVE BRANCH ETHICS COMMISSION**  
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Executive Branch Ethics Commission

**ADVISORY OPINION 17-07**

July 17, 2017

**RE:**

- (1) Does the Commission still view Advisory Opinions 03-05 and 06-16 as valid?
- (2) May the Attorney General that has not ruled out a run for the office of Governor undertake an investigation, either by himself or through employees of the Attorney General's Office of a potential political opponent?
- (3) If the answer to (2) is yes, then will a recusal by the Attorney General from the investigation cure any conflict of the staff of office of Attorney General conduct the investigation if sufficient "firewalls" are in place to shield the Attorney General from the investigation of his potential political opponent?
- (4) If the answer to (3) is no, then may the Attorney General contract with a third party to perform the investigation if that contractor ultimately answers to an official with the Attorney General's Office?
- (5) Is it a conflict of interest for a Constitutional Officer to—directly, or through a department, cabinet, or agency run by his appointees and ultimately answerable to him – investigate a likely or potential political opponent? In other words, is it also the case that a conflict of interest exists if a sitting Governor considering seeking re-election initiates an investigation – involving himself personally or any employee, agency, or contractor at his direction – that could further his private interest (possible candidacy) to the detriment of a known or likely political adversary?

**DECISION:**

- (1) Yes
- (2) Maybe, depending on the Attorney General's intended course of action.
- (3) No
- (4) Qualified Yes, as long as the report of the third-party investigator is given to an individual with no conflict of interests in the matter.

(5) The Commission does not have sufficient information to answer this question. The Requester may restate the question outlining the exact scenario in which he needs guidance pursuant to KRS 11A.110. Otherwise, the question is too vague to provide a response.

This opinion is issued in response to your May 16, 2017, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the July 17, 2017 meeting of the Commission and the following opinion is issued pursuant to KRS 11A.110(1).

You state the relevant facts as follows: The Kentucky Attorney General is the Commonwealth's chief law officer pursuant to KRS 15.020. In this capacity, the Attorney General's duties include investigating and prosecuting public corruption. *See* KRS 15.7158(6)-(7). Within the Attorney General's Office, such functions are performed by the Public Integrity/Special Investigations Branch. That Branch is part of the larger Department of Criminal Investigations, which is overseen by a Commissioner. The Commissioner reports to an Assistant Deputy Attorney General, who then reports to the Deputy Attorney General, who then reports to the Attorney General.

Due to recent reports in the media, questions have arisen surrounding a recent financial transaction of the current Governor. You are seeking an opinion from the Commission to determine whether conflicts of interest exist that would prohibit or hinder the Attorney General or his office from investigating the circumstances of the recent conduct of the current Governor. You ask the following questions:

*(1) Does the Commission still view Advisory Opinions 03-05 and 06-16 as valid, such that an Attorney General that has not ruled out a run for the office of governor should not undertake an investigation – by himself personally or by any employee, branch, or division of his Office, with or without the Attorney General's personal recusal and appropriate "firewalls" – to the detriment of a known, likely, or potential political opponent?*

*(2) If the answer to the first question, above, is yes, is the Attorney General prohibited from contracting with a third party to perform the investigation if that contractor ultimately answers to an official within the Attorney General's Office?*

*(3) As you are aware, KRS 11A.020(1)(a) applies not only to the Attorney General, but to all "public servants." Thus, a rule that applies to one Constitutional Officer should apply to all others. If the Commission still views Advisory Opinions 03-05 and 06-16 as valid, is it also a conflict of interest in violation of the Ethics Code for another Constitutional Officer to—directly, or through a department, cabinet, or agency run by his appointees and ultimately answerable to him – investigate a likely or potential political opponent? In other words, is it also the case that a conflict of interest exists if a sitting Governor considering seeking re-election initiates an investigation – involving himself personally or any employee, agency, or contractor at his direction – that could further his private interest (possible candidacy) to the detriment of a known or likely political adversary?*

KRS 11A.005(1)(a), (c) and (d) provide:

- (1) It is the public policy of this Commonwealth that a public servant shall work for the benefit of the people of the Commonwealth. The principles of ethical behavior contained in this chapter recognize that public office is a public trust and that the proper operation of democratic government requires that:
  - (a) A public servant be independent and impartial;
  - ...
  - (c) A public servant not use public office to obtain private benefits; and
  - (d) The public has confidence in the integrity of its government and public servants.

Further KRS 11A.020 provides in pertinent part:

- (1) No public servant, by himself or through others, shall knowingly:
  - (a) Use or attempt to use his influence in any matter which involves a substantial conflict between his personal or private interest and his duties in the public interest;
  - (b) Use or attempt to use any means to influence a public agency in derogation of the state at large;
  - (c) Use his official position or office to obtain financial gain for himself or any members of the public servant's family; or
  - (d) Use or attempt to use his official position to secure or create privileges, exemptions, advantages, or treatment for himself or others in derogation of the public interest at large.

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- (3) When a public servant abstains from action on an official decision in which he has or may have a personal or private interest, he shall disclose that fact in writing to his superior, who shall cause the decision on these matters to be made by an impartial third party.

KRS 11A.030 provides considerations for public servants in determining whether to abstain from action on official decision:

In determining whether to abstain from action on an official decision because of a possible conflict of interest, a public servant should consider the following guidelines:

- (1) Whether a substantial threat to his independence of judgment has been created by his personal or private interest;
- (2) The effect of his participation on public confidence in the integrity of the executive branch;
- (3) Whether his participation is likely to have any significant effect on the disposition of the matter;
- (4) The need for his particular contribution, such as special knowledge of the subject matter, to the effective functioning of the executive branch; or
- (5) Whether the official decision will affect him in a manner differently from the public or will affect him as a member of a business, profession, occupation, or group to no

greater extent generally than other members of such business, profession, occupation, or group. A public servant may request an advisory opinion from the Executive Branch Ethics Commission in accordance with the commission's rules of procedure.

9 KAR 1:025 provides guidance on prohibited conduct and conflicts of interest:

Section 1. Definitions. (1) "Appointing authority" is defined by KRS 11A.010(16).

(2) "Commission" means the Executive Branch Ethics Commission.

(3) "Family" is defined by KRS 11A.010(4).

(4) "Matter" means any measurable case, litigation, decision, grant, proceeding, application, determination, contract, claim, investigation, charge, or legislative bill.

(5) "Public servant" is defined by KRS 11A.010(9).

Section 2. If a public servant engages in any of the following conduct, the commission may conduct an investigation in accordance with KRS 11A.080 of the conduct as a possible violation of KRS 11A.020 or KRS 11A.030:

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(4) A public servant uses state time, equipment, personnel, facilities, or other state resources for political campaign purposes;

The Commission has issued a series of advisory opinions concerning the Attorney General's ability to investigate a sitting governor against whom the Attorney General had intentions of becoming a political opponent in a future election and his ability to investigate other political adversaries. The Commission's review of the first scenario resulted in the issuance of Advisory Opinion 03-05. In this matter, the Attorney General had filed as a candidate for governor. Two of the other candidates for governor were either under investigation by the Attorney General's office or were somehow related to the investigation. The Commission stated as follows:

It does appear that a potential conflict of interest exists in this matter, and the Attorney General must take steps to ensure that he has no part in the ongoing investigation, and that he receives no communications from employees conducting the investigation. The Commission believes if the Office of the Attorney General continues to investigate this matter, unspoken or implied pressure may exist or appear to exist for the employees conducting the investigation. In order for the Attorney General to remove himself from being in a position that would allow him to misuse his influence, or give an appearance that he might be misusing his influence, or that his influence may be creating implied pressure, the Commission believes that the Office of the Attorney General should remove itself from the investigation until after the primary election, or refer the case to another law enforcement agency, not under the authority of the Office of the Attorney General, that could appropriately investigate and prosecute the case. If no agency has

jurisdiction to prosecute the case, the Commission believes that the case could be returned to the Office of the Attorney General once the election is over.

Thus, the Commission determined that the Attorney General could not investigate his declared political opponent, meaning a person against whom he was actively running for elected office. Further, the Commission determined that the Attorney General's Office also could not conduct such an investigation and advised that another law enforcement agency conduct such an investigation.

In the next scenario reviewed by the Commission that resulted in the issuance of Advisory Opinion 06-16, the Office of the Attorney General was involved in the high profile merit hiring investigation involving the conduct of former Gov. Ernie Fletcher and his administration that led to criminal prosecutions. The current Attorney General had not yet filed as a candidate, but had "made a public statement that he was 'considering' a run for governor" and had "further stated publicly that he will not be a candidate against the sitting Governor as long as the Office of the Attorney General is prosecuting the Governor's case." The Commission stated as follows:

[D]ue to the Office of the Attorney General's involvement to date in the investigation and prosecution of merit hiring violations involving the current Governor, a potential conflict of interest will present itself should the Attorney General at any time file as a candidate in the 2007 gubernatorial election, regardless of whether the investigation and prosecution have been completed, or whether the current Governor remains a candidate in that election. One cannot erase a possible conflict of interest by merely completing the action that would have made the matter a conflict in the first place. Nor would the possible conflict disappear if the action, once completed, was then used for the purpose of furthering one's own personal or private interest over one's duties in the public interest. Should the Governor withdraw as a candidate in the 2007 gubernatorial election as the result of his investigation and prosecution by the Office of the Attorney General, the Attorney General should continue to take care not to take any action that will make it appear that he used his public office to obtain private benefits. Becoming a candidate for governor after the sitting Governor withdrew as a candidate due to actions taken by the Office of the Attorney General could lead, at the very least, to the perception that a conflict of interest existed all along.

Unlike the situation addressed in Advisory Opinion 03-5, in this matter prosecutorial action was taken by the Office of the Attorney General against the Governor after the Governor had already announced his candidacy for 2007. For this reason, the Commission believes that the Office of the Attorney General's referral, at this point and time, of the merit hiring investigation and prosecution relating to the Governor to another law enforcement agency would not remove the perceived or actual conflict of interest for the current Attorney General as contemplated in Advisory Opinion 03-5, if he were then to become a candidate for governor in the 2007 election. Nor, would the completion of the investigation and

prosecution by the Office of the Attorney General remove such a potential conflict of interest.

If the Attorney General contemplated an eventual candidacy for the office of governor in 2007, he should have removed himself and his office from the merit system investigation of the Governor upon the Governor's announcement for candidacy.

Thus, the Commission determined that because the Attorney General had already taken action to prosecute the sitting Governor who was also a candidate for office, referring the investigation to another office does not cure the conflict of interest in light of the fact that the then current Attorney General had made open comments that he planned to run for governor in the same election. The time for then current Attorney General to abstain and refer to another agency was at the time the sitting Governor filed his candidacy and before making statements that he, the then current Attorney General, planned to run.

In reviewing your questions, the Commission will address each issue raised by your questions separately. Firstly, the Commission continues to view Advisory Opinions 03-05 and 06-16 as valid as they applied to the individual scenarios listed in those opinions. However, each factual scenario adds nuance to any given application of the Ethics Code. Your individual circumstances may be different than that of your predecessors. Thus, we must review your scenario to properly provide advice. Ultimately, the Commission appreciates your continued perseverance in seeking to follow the provisions of the Ethics Code.

You have stated in your request that you have "not ruled out a run for the office of Governor." The Commission will have difficulty in giving you clear advice in such a scenario. If you intend to run for the office of governor in the 2019 election cycle, in line with its advice given in Advisory Opinion 03-05 and 06-16, then the Commission will advise you to refer any potential investigations of the current Governor to other law enforcement agencies over which you do not exercise control as the Attorney General.

If, however, you are willing to declare affirmatively that you will not run for the office of Governor during the 2019 election cycle, nor will you assist others in their run against the current Governor during the 2019 election cycle, then you and your office will not have a conflict of interest or be perceived as you using the office of the Attorney General to further yours or others political interest pursuant to KRS 11A.020 and 9 KAR 1:025. As such, your office may undertake an investigation, either by yourself or through employees of the Attorney General's Office of the current Governor.

Alternatively, if you do not wish to declare at this time whether or not you will run for the office of governor during the 2019 election cycle, but you intend to have your office conduct the investigation, you will risk violating the ethics code the day you seek to run for that office for the

2019 election cycle. Therefore, we recommend you refer the investigation to another law enforcement entity over which you do not have jurisdiction.

You ask whether, if the Commission states that your office may investigate the current Governor, will a recusal by the Attorney General from the investigation cure any conflict of the staff of office of Attorney General to conduct the investigation if sufficient “firewalls” are in place to shield the Attorney General from the investigation of his potential political opponent. This question contemplates that the Attorney General may have his office investigate the current Governor and still seek to run for office as governor in the next election cycle as long as he personally abstains from participating in the investigation. Unfortunately, a recusal would not absolve the Office of the Attorney General from the perception that it is being used for political purposes, in line with the Commission’s previous decisions.

As such, as stated above, the Attorney General must declare that he does not intend to run for Governor during the 2019 election cycle before his office may conduct the investigation of the current Governor. Or, if he does not declare at this time, but has his office conduct the investigation, he risks creating a future issue under the Ethics Code when he does decide to run. Otherwise, the Attorney General must refer the matter to another law enforcement agency with authority to investigate such matters that is not under the authority of the Attorney General.

Finally, as it relates to the scenario that is applicable to the Attorney General, you ask whether the Attorney General may contract with a third party to perform the investigation if that contractor ultimately answers to an official within the Attorney General’s Office. The Commission believes that if the Attorney General is unwilling to declare whether he intends to run for governor during the 2019 election cycle, then he may fulfill the provisions of KRS 11A.020(3) without violating the provisions of KRS 11A.020(1), by referring the matter to be investigated by a third party under contract. Nevertheless, the final report and investigation of the third-party contractor should be given to an individual with authority to prosecute such actions that does not have a conflict of interest and is not under the authority of the Attorney General.

As for your last question, which does not relate to your actions, but to the authority of other Constitutional Officers, namely the Governor, to investigate matters over which his cabinets may have jurisdiction. Your question is merely hypothetical as stated, thus, it is difficult to provide a clear answer without knowing more about an individual scenario. The Commission has issued a series of advisory opinions about the conduct of the Governor relating to conflicts of interest. Although the Commission believes that the Governor has ultimate authority over all executive branch agencies (other than the offices of the elected officials listed in KRS 11A.010(9)(b)-(h)), the Commission has stated that unless an entity is doing business with or regulated by the Office of the Governor, or is seeking to influence the actions of the Governor, no apparent conflict will exist for the Governor or members of his staff concerning that entity. Advisory Opinion 00-55. However, the Commission also stated that the Governor should not solicit any entities doing

business with or regulated by any agency over which he has ultimate authority, and he should not solicit entities seeking to influence his actions. Advisory Opinion 98-13.

The Commission has also determined that although the Governor has ultimate authority over every executive branch agency, he should not be considered to be employed by or supervising every executive branch agency when applying the gifts provisions. Advisory Opinion 04-07. Only when the Governor is directly involved or has direct participation in interests before a particular agency should the Governor be considered to be employed by or supervising that agency for the purposes of the gifts provisions.

Finally, the Commission determined that when applying the provisions of KRS 11A.040, “because the Governor has ‘ultimate authority’ over every executive branch agency, and thus ultimately supervises every executive branch agency, neither he nor any business in which he hold at least five percent (5%) interest should hold or enjoy part of a contract awarded by any executive branch agency.” The Commission further stated that this “would prohibit the potential candidate, if elected Governor, and any business in which he owns or controls an interest of more than five percent (5%), from knowingly holding a contract with, subcontracting with a prime contractor to provide services that will fulfill part of a contract with, or selling materials to a prime contractor or subcontractor to fulfill part of a contract with an executive branch agency.”

Although these advisory opinions do not directly address your question, it may resolve the question concerning the Governor’s “ultimate authority” and whether the agencies in his Cabinet may be independent in conducting investigations of potential conduct that may violate statutes over which the individual cabinets have authority. If you would like to submit an additional request for an opinion related to your last question that provides further clarification as to your question, please do so.

Sincerely,

**EXECUTIVE BRANCH ETHICS COMMISSION**



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By Chair: William G. Francis

Attachment: Advisory Opinion 05-03  
Advisory Opinion 06-16