



COMMONWEALTH OF KENTUCKY  
**EXECUTIVE BRANCH ETHICS COMMISSION**

CAPITAL COMPLEX EAST  
1025 CAPITAL CENTER DRIVE, SUITE #104  
FRANKFORT, KY 40601  
(502) 564-7954  
FAX: (502)-695-5939  
[HTTPS://ETHICS.KY.GOV/](https://ethics.ky.gov/)

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MICHAEL W. BOARD  
GENERAL COUNSEL

SUCHETA MEENA MOHANTY  
DEPUTY GENERAL COUNSEL

Executive Branch Ethics Commission  
**ADVISORY OPINION 20-02**  
July 14, 2020

**RE:**

- (1) Under the application of the post-employment rules in the Executive Branch Code of Ethics, is a contract for a 2020 construction project (Contract) in Henderson, Kentucky, to complete a section of the I-69 Ohio River Crossing considered to be a separate “matter” or the same “matter” as a 2016 agreement between Kentucky and Indiana (Agreement) to complete the environmental studies and preliminary development of the I-69 Ohio River Crossing?
- (2) May a former officer be listed as a point of contact on the Contract with his former agency within one year post employment even though he served as the agency contact on the Agreement during his final three years of state service without violating the post-employment provisions of the Ethics Code?
- (3) May a former officer work on the Contract with his former agency within one year post employment even though he served as the agency contact on the Agreement during his final three years of state service without violating the post-employment provisions of the Ethics Code?

**DECISION:**

- (1) As defined in 9 KAR 1:025, Section 1(4), the Contract and the Agreement are two separate matters for the application of the post-employment rules in KRS 11A.040(6) through (9).
- (2) Yes, the former officer may be listed as a point of contact on the Contract during his first year post-employment without violating KRS 11A.040(6) through (9) as long as he abides by KRS 11A.040(9) in limiting any contacts he has with KYTC concerning the Agreement.
- (3) Yes, the former officer may work on the Contract during his first year post-employment without violating KRS 11A.040(6) through (9) as long as he abides by KRS 11A.040(7) and abstains from working on the Agreement and abides by KRS 11A.040(9) and avoids contacts with KYTC concerning the Agreement.

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This opinion is issued in response to your June 25, 2020 request for an advisory opinion pursuant to KRS 11A.110(1) from the Executive Branch Ethics Commission (Commission). The Commission reviewed your request at the July 14, 2020 meeting and issued the following advisory opinion.

On behalf of the Kentucky Transportation Cabinet (KYTC) you have requested that the Commission revisit the post-employment advice that was provided to a former public servant (Former Officer) and officer of KYTC as this advice directly affects issues involving a current contract about to be entered into by KYTC. Based on the information you and the Former Officer have provided, the relevant facts are as follows:

In 2016, the KYTC and the Indiana Department of Transportation (INDOT) entered into the “Agreement for the I-69 Crossing Over the Ohio River Between Evansville, Indiana, and Henderson, Kentucky (Environmental and Preliminary Development Phase)” (Agreement). The Agreement was for a term that was to end on December 31, 2019, but was extended for another three-year term before the end of 2019. The Agreement’s purpose was to have INDOT and KYTC “cooperate in the National Environmental Policy Act (NEPA) environmental studies and preliminary development of the I-69 crossing over the Ohio River . . . .” The scope of the project was to “jointly evaluate the feasibility and examine the environmental impacts of the I-69 Evansville to Henderson proposal . . . pursuant to the requirements of NEPA . . . .” Each state agreed to pay an equal amount of the initial \$17,000,000 cost of the Agreement. INDOT was to be the lead agency in the Agreement and all contracts with consultants were to enter into agreements directly with INDOT. However, this Agreement was not to cover the plans for construction, which was to be covered under future agreements:

Additional phases of work, and both the costs and cost-sharing provisions thereof, required during or after the NEPA and preliminary development phase, including but not limited to additional environmental and preliminary design, detailed/final/phase II design, waterway permit applications and mitigation, Section 106 mitigation, right-of-way acquisition, utility relocation, and/or construction, shall be covered under future supplements to this agreement executed by all parties.

(Agreement page 2). The Former Officer served as the Deputy State Highway Engineer and was listed as the KYTC agency contact in the Agreement. The Former Officer left state service on December 1, 2019, at which time he was in the position of Deputy Secretary of the Cabinet.

During the 2020 Legislative Session, the Legislature, at the request of KYTC, agreed to break up the original project into sections so that the first phase of the construction project could begin earlier than was originally planned by KYTC. On March 10, 2020, KYTC advertised a

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Request for Proposal for Professional Services Contract (Contract). The Request for Proposal describes the project as for construction: "I-69 Ohio River Crossing between KY425 and Veterans Boulevard in Indiana. The project has been broken into two construction phases. This is for section 1 of the project which begins at KY 425 and extends to US 60 in KY."

Based on verbal conversations between the Commission's Executive Director, the Former Officer, and the current KYTC Executive Advisor assigned by the KYTC Cabinet Secretary as a point of contact for the purposes of this Advisory Opinion request, the Former Officer was not a part of the planning for the March 20, 2020 Request for Proposal as it was not contemplated prior to his leaving state service on December 1, 2019.

The Former Officer's new employer EA Partners is listed as a subcontractor on the bid to the Request for Proposal on the Contract that was submitted by Parsons Transportation Group, Inc. (Parsons) on April 1, 2020, and the Former Officer is listed as the deputy project manager assisting the Parsons project manager if Parsons were to receive the award of the Contract. Parsons is currently a consultant for the NEPA studies on the Agreement. KYTC has put a hold on the selection process on the Contract pending the outcome of this advisory opinion.

On January 27, 2020, the Former Officer sought the guidance and advice of the Executive Director of the Commission prior to pursuing his post-employment work, which included in-person meetings and emailed conversations that eventually lead to the Executive Director issuing a letter on March 9, 2020. The Commission reviewed this letter at its May 18, 2020 Commission meeting<sup>1</sup>, but did not issue any further advice. The Executive Director's letter is included in Parsons bid submission indicating that the Commission had cleared the Former Officer to be listed as a contact for the Contract and could work on the Contract.

As a summary of the advice provided by the Executive Director, the Former Officer's intended employer was EA Partners. EA Partners has a master agreement with KYTC and has multiple project-specific agreements under the original master agreement unrelated to the I-69 Ohio River Crossing project. The Former Officer indicated that in his former position with KYTC, he was not involved with the EA Partners original master agreement; however, he stated that he had varying levels of involvement related to the project-specific agreements that were issued under the original master agreement. According to KYTC, EA Partners was not a part of the Agreement entered in 2016 for which the Former Officer served as the agency contact, nor has it provided any consulting services under the Agreement.

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<sup>1</sup> On May 27, 2020, the Governor issued Executive Order 2020-423 abolishing the Executive Branch Ethics Commission and reinstating the Commission with new membership. However, the Executive Order indicates that "all other provisions of law and statute that apply to the Executive Branch Ethics Commission shall remain in full force and effect."

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In the role of Deputy State Highway Engineer and Deputy Secretary, the Former Officer was considered to be an “officer” as defined in KRS 11A.010(7). This Former Officer has an engineering degree and a certificate issued by the KY Board of Engineers and Land Surveyors in the spring of 1996, and, as such, is considered to be a professional engineer. He began employment with the KYTC full-time in June of 1997 and thus maintained the professional degree and license prior to his state service. Therefore, all of the post-employment provisions contained in KRS 11A.040(6) through (9) will apply to this Former Officer during his first year post-employment. However, because the Former Officer was returning to his former profession in engineering, the Executive Director indicated that the Former Officer fit within the exception to KRS 11A.040(7) and could work for EA Partners immediately after leaving state service as long as he abstained from any involvement with ongoing matters with the KYTC and avoided making contacts with KYTC about those matters. The Former Officer further requested whether he could be listed as a point of contact in a new matter that had arisen since his departure from employment with KYTC, the Contract referenced above. The Executive Director determined that since the Contract was a new matter, that the Former Officer could be listed as a point of contact and work on the new matter on behalf of his employer.

The Executive Director’s staff opinion is under review by the Commission at the request of the KYTC Cabinet Secretary. The Cabinet Secretary contends that the Executive Director’s advice to the Former Officer is “simply not accurate” in the characterization of the Contract being a “brand new” matter. The Cabinet Secretary states:

This project has been underway for several years. Moreover, as an employee of the Transportation Cabinet, [the Former Officer] was intimately involved with the Ohio River Crossing project and was agency contact in [the Agreement] . . . Accordingly, the characterization of this project as “new” is simply not accurate and the [Agreement] clearly indicates that [the Former Officer] has worked on this project since as far back in time as 2006.

The Cabinet Secretary requests the Commission issue an advisory opinion amending the Executive Director’s post-employment guidance letter

to indicate that since the Former Officer was previously personally involved in the project in question that he be prohibited from being listed as an employee of EA Partners in the engineering proposal and that he be prohibited from being involved in the project through meetings, correspondence, or communications during his first 12 months post-employment in the event EA Partners is selected by the Cabinet.

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As such, the Commission will undertake a full review of this matter. The applicable post-employment provision that only apply to officers, apply during the first year post-employment. KRS 11A.040(6) provides:

A former officer or public servant listed in KRS 11A.010(9)(a) to (g) shall not, within one (1) year of termination of his employment, knowingly by himself or through any business in which he owns or controls an interest of at least five percent (5%), or by any other person for his use or benefit or on his account, undertake, execute, hold, bid on, negotiate, or enjoy, in whole or in part, any contract, agreement, lease, sale, or purchase made, entered into, awarded, or granted by the agency by which he was employed. This provision shall not apply to a contract, purchase, or good faith negotiation made under KRS Chapter 416 relating to eminent domain or to agreements that may directly or indirectly involve public funds disbursed through entitlement programs. This provision shall not apply to purchases from a state agency that are available on the same terms to the general public or that are made at public auction. This provision shall not apply to former officers of the Department of Public Advocacy whose continued representation of clients is necessary in order to prevent an adverse effect on the client.

KRS 11A.040(7) provides:

A present or former officer or public servant listed in KRS 11A.010(9)(a) to (g) shall not, within one (1) year following termination of his office or employment, accept employment, compensation, or other economic benefit from any person or business that contracts or does business with, or is regulated by, the state in matters in which he was directly involved during the last thirty-six (36) months of his tenure. This provision shall not prohibit an individual from returning to the same business, firm, occupation, or profession in which he was involved prior to taking office or beginning his term of employment, or for which he received, prior to his state employment, a professional degree or license, provided that, for a period of one (1) year, he personally refrains from working on any matter in which he was directly involved during the last thirty-six (36) months of his tenure in state government. This subsection shall not prohibit the performance of ministerial functions including, but not limited to, filing tax returns, filing applications for permits or licenses, or filing incorporation papers, nor shall it prohibit the former officer or public servant from receiving public funds disbursed through entitlement programs.

“Directly involved” is defined in KRS 11A.010(18) to mean “to work on personally or to supervise someone who works on personally.” The term “doing business with” is defined by

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KRS 11A.010(14) to mean "contracting, entering into an agreement, leasing, or otherwise exchanging services or goods with a state agency in return for payment by the state, including accepting a grant, but not including accepting a state entitlement fund disbursement." The term "regulated by" is not defined in the Executive Branch Code of Ethics.

As for the remaining post-employment provisions, the provisions that apply to every employee post-employment apply for one year post-employment and are contained in KRS 11A.040(8) and (9). They are as follows:

- (8) A former public servant shall not act as a lobbyist or lobbyist's principal in matters in which he was directly involved during the last thirty-six (36) months of his tenure for a period of one (1) year after the latter of:
  - (a) The date of leaving office or termination of employment; or
  - (b) The date the term of office expires to which the public servant was elected.
  
- (9) A former public servant shall not represent a person or business before a state agency in a matter in which the former public servant was directly involved during the last thirty-six (36) months of his tenure, for a period of one (1) year after the latter of:
  - (a) The date of leaving office or termination of employment; or
  - (b) The date the term of office expires to which the public servant was elected.

KRS 11A.010 (17) defines "represent" to mean "attend an agency proceeding, write a letter, or communicate with an employee of an agency on behalf of someone else." The Ethics Commission has defined the term "matter" to mean "any measurable case, litigation, decision, grant, proceeding, application, determination, contract, claim, investigation, charge, or legislative bill." 9 KAR 1:025, Section 1(4).

Generally, a former officer may not accept or enter into a contract, either directly or indirectly, with his former agency for one year post-employment. Furthermore, he may not accept employment with an entity that contracts or does business with or is regulated by his former agency in matters in which he was directly involved during his last thirty-six (36) months with the state for a period of one (1) year after leaving employment with the state, unless he was returning to his former business or profession, which applies to this Former Officer.

As such, this Former Officer was at liberty to immediately go to work for any entity, regardless of whether it was regulated by or doing business with his former agency. However, for a period of one year, he must abstain from working on any matters that he worked on directly

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or supervised someone who worked directly on during the last three years of his state service. After that one-year period expires, he may work on those matters.

Furthermore, for one year after he left state service, the Former Officer must follow the provisions of KRS 11A.040(8) and (9). These provisions determine that he must wait one year before he can 1) act as a lobbyist in regard to any matter in which he was directly involved during his last three years in state service, and 2) represent a person or business before a state agency in any matter in which he was directly involved during his last three years in state government. Therefore, until the one-year post-employment period passes, he may not lobby on behalf of or represent EA Partners on any matters that he, or anyone under his supervision, worked on during his last three years of state service. This restriction does not prevent him from dealing with or working on new “matters” for EA Partners.

For the purposes of the application of these provisions, it is important to review the definition of a matter and how that applies to the Agreement and the Contract.

As for the application of KRS 11A.040(6), the Former Officer’s scenario does not indicate that he personally or through a business that is owned by him or his family intends to enter into such an agreement with KYTC. Any contracts that EA Partners may enter into with KYTC would be between the two entities and not the Former Officer personally.

KRS 11A.040(7), provides that the Former Officer may immediately go to work for EA Partners despite its contractual status with KYTC without waiting until the end of the first year post-employment because the Former Officer will be returning to his former profession or using a professional degree or license that he earned prior to his state employment. However, during his first year post-employment, he must abstain from working on any matter in which he was directly involved during his last three years of service with KYTC. This would clearly apply to prohibit the Former Officer from working on the Agreement, but would not necessarily apply to prohibit him from working on the Contract.

The Executive Advisor for KYTC, assigned by the Cabinet Secretary to advise the Commission on this request, indicated to the Executive Director that the Former Officer would not need to have any contacts with KYTC about the Agreement to perform his duties as deputy project manager on the Contract for EA Partners. Furthermore, the Former Officer would not be required to work on the Agreement in order to provide the services required by the Contract.

As for the application of KRS 11A.040(8), the Former Officer’s intended conduct does not involve lobbying. Finally, as for the application of KRS 11A.040(9), for one year, the Former Officer cannot represent EA Partners by direct communications with the KYTC, attend KYTC proceedings, or send correspondence to KYTC related to any ongoing matters in which the Former Officer, or any of his former subordinate staff, were directly involved during the last

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three years of his state service. The Former Officer was not involved in matters involving EA Partners when he worked for KYTC. EA Partners is not a consultant to the Agreement and the Former Officer would not need to have contacts with KYTC involving the Agreement. As such, all that remains is for the Commission to determine is whether the Agreement and the Contract are the same matter.

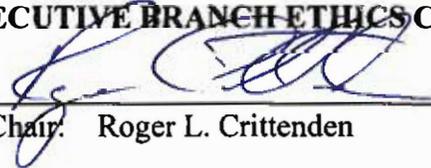
To reiterate, through administrative regulation in 2016, the Commission defined the term “matter” to mean “any measurable case, litigation, decision, grant, proceeding, application, determination, contract, claim, investigation, charge, or legislative bill.” 9 KAR 1:025, Section 1(4). Measurable means that the matter must have a beginning and end. Notice that the term “project” is not included in the definition list. That is because “project” is a nebulous term that could be applied to a grouping of contracts, decisions, proceedings, applications, etc. A project alone is not a matter without the specific terms needed under the definition of a matter.

As such, when the KYTC refers to the I-69 Ohio River Crossing project, that project in and of itself does not fit within the definition of a matter. Indeed, at this going rate that project has no end considering that it began back in 2006 and does not have a determinable end date. However, the Agreement, which began in 2016, has a three-year renewable term, has a designated scope, INDOT is the lead, and all consultants are to contract directly with INDOT; thus, the Agreement alone fits within the definition of a matter. The Former Officer was involved in that matter when he worked for KYTC and must abstain from making contacts or working on the Agreement in his post-employment until December 1, 2020.

However, the Contract began with the Request for Proposal on March 10, 2020, is to be entered between KYTC and the consultant companies directly, and was not contemplated or discussed when the Former Officer was an employee of KYTC. Indeed, it took an act of the Legislature in 2020 to spur the Contract into existence. The Contract appears to be its own matter with its own term and parties. The Contract is not a matter that the Former Officer worked on when he was with KYTC. Even though the Contract will be influenced by the outcome of the Agreement, and will involve the overarching I-69 Ohio River Crossing project, that does not prohibit the Former Officer from working on the Contract, as the Contract is its own matter.

However, those wishing to follow this advice for their individual scenarios should seek further guidance from the Commission before proceeding as the nuances in the post-employment provisions of the Code of Ethics may apply differently given a varying set of facts.

**EXECUTIVE BRANCH ETHICS COMMISSION**

  
By Chair: Roger L. Crittenden