

January 8, 2019

Mr. Thomas B. Albritton
Executive Director
Alabama Ethics Commission
100 North Union Street, Suite 104
Montgomery, AL 36104

Re: Request for Formal Advisory Opinion Regarding Status of Members of the Birmingham Airport Authority Board of Directors Under the Alabama Ethics Act

Dear Mr. Albritton:

On behalf of the Birmingham Airport Authority's Board of Directors ("Board"), I am submitting this request to the Alabama Ethics Commission ("Commission") for a formal advisory opinion regarding several questions related to the status of Board members under the Alabama Ethics Act, Ala. Code § 36-25-1 et seq. ("Act" or "Ethics Act").

The Birmingham Airport Authority ("Authority") was incorporated on June 6, 1986 as a public nonprofit corporation under the provisions of the Code of Alabama, Title 4, Chapter 3, Article 2. The Authority is responsible for managing and operating the Birmingham-Shuttlesworth International Airport ("Airport"), which is owned by the City of Birmingham. The Airport is operated by the Authority pursuant to a 50-year lease, which became effective on September 16, 1986 and expires on September 15, 2045.¹ The Authority is governed by a seven (7) member Board, whose members are nominated by the Mayor of Birmingham and elected by Birmingham City Council. *See* Ala. Code § 4-3-45.

The Authority's operating expenses consist of personnel costs, contractual services, utilities, maintenance, materials and supplies, professional services, depreciation and amortization, and equipment rental and repairs. The operations and improvements at the Airport are funded by airport user charges, Passenger Facility Charges (PFCs), Customer Facility Charges (CFCs), bond funds, and funds received from the Federal Aviation Administration (FAA) and the Transportation Security Administration (TSA). Of particular note for purposes of the Board's questions herein is that no general tax fund revenues are used to fund the Authority's operating expenses.

The Board is submitting this request for a formal advisory opinion to obtain answers to several questions regarding what obligations, if any, Board members have under the Act. Specifically, the Board presents six questions:

¹ *See Comprehensive Annual Financial Report for the Fiscal Year Ending June 30, 2017*, available at <https://www.flybirmingham.com/wp-content/uploads/2018/07/BAA-CAFR-2017-ebook.pdf>.



1. Are Board members subject to the Ethics Act?
2. Given that employees of the Authority are compensated from funds generated from non-public sources, are they nonetheless considered Public Employees subject to the Act?
3. Assuming Board members are subject to the Act, are they required to file Statements of Economic Interest?
4. Assuming Board members are subject to the Act, if the Authority hires a lobbyist through authorization provided via at least a majority vote of the Board, is each individual Board member considered a principal under the Act? Is the analysis different for an individual Board member who voted against providing authorization to hire the lobbyist but whose vote was ultimately defeated by a majority vote in favor of providing the authorization? If so, please explain.
5. Does the act of signing the Principal's Statement for Lobbyist Registration or the Principal's Quarterly Statement of Lobbying Activities on behalf of the Authority, standing alone, make the individual signing those forms a principal under the Act? Is the analysis different if the individual who signs the principal-related filings has no authority or supervision over the hiring, firing, or activities of the lobbyist, but merely signs as a function of his or her job duties? If so, please explain.
6. The Authority has the responsibility to increase and improve air service from airlines and to promote the Airport. What limitations does the Act place on this marketing responsibility?

Each of these questions is addressed below.

1. Are Board members subject to the Ethics Act?

The Board is aware of a 1996 advisory opinion from the Ethics Commission issued to the Mobile Airport Authority that addressed whether members of the Mobile Airport Authority Board ("Mobile Board") are considered public officials subject to the Ethics Act. *See* AO96-54. In that advisory opinion, the Commission determined that the members of the Mobile Board were subject to the Act. As discussed below, the Board believes this question is ripe for consideration here because it is unclear whether the Mobile Airport Authority operated on general tax fund revenues at the time the Commission issued AO96-54, and if it did, AO96-54 is silent as to whether the Commission considered the nature of the funding in reaching its conclusion.

In reaching its conclusion, AO96-54 relies only on the Act's definitions for "Governmental Corporations and Authorities," "Public Official," and "Public Employee." The definitions for each of those terms appear to have the same substantive application to the Authority and Board now as they did to the Mobile Airport Authority and Mobile Board when the Commission issued AO96-

54. The Commission noted that “[i]n 1995, the Alabama Legislature broadened the definition of a ‘public official’ in the Alabama Ethics Law to include the newly-defined ‘governmental corporations and authorities,’ pursuant to Act No. 95-194.” AO2015-06. Prior to the addition of the “governmental corporations and authorities” language to the Act in 1995, members of the Mobile Board were not considered public officials subject to the Act.² According to AO96-54, the addition of the “governmental corporations and authorities” language to the Act in 1995 rendered Mobile Board members subject to the Act.

What remains unclear to the Board is whether the fact that the Authority uses no general tax fund revenues to operate or maintain the Airport affects the Commission’s analysis of the Board members’ status as public officials subject to the Act. The Board respectfully requests the Commission’s guidance as to whether its members are subject to the Act.

2. Given that employees of the Authority are compensated from funds generated from non-public sources, are they nonetheless considered Public Employees subject to the Act?

In AO96-54, the Commission concluded that “employees of the Mobile Airport Authority are public employees; and therefore, are subject to the Alabama Ethics Law.” AO96-54 at p. 4. As referenced above, no general tax fund revenues are used to fund the Authority’s operating expenses, which include the compensation and benefits of the Authority’s employees. For similar reasons set forth above in Question 1, the Board respectfully requests the Commission’s guidance as to whether the employees of the Authority are Public Employees subject to the Act in light of the fact that they compensated from funds generated from non-public sources.

3. Assuming Board members are subject to the Act, are they required to file Statements of Economic Interest?

In AO96-54, the Commission concluded that because “the Mobile Airport Authority does not have statewide jurisdiction, board members [of the Mobile Airport Authority] are not required to file Statements of Economic Interest (“SOEI”) unless their base pay with the board is \$50,000 or more per year.” AO96-54 at p. 4.

Like the Mobile Airport Authority, the Authority does not have statewide jurisdiction. Further, Board members are not compensated for their service, therefore they do not meet the \$75,000 base pay threshold for filing SOEI set forth in the current version of the Act at Ala. Code § 36-25-14(a)(2).³

² See AO96-54 at p. 3 (referencing that “the members of the [Mobile] Board and employees of the [Mobile] Airport [had] not been considered subject to the Ethics Act” prior to the 1995 amendment).

³ Since the Commission issued AO96-54, the \$50,000 threshold for filing SOEI has been increased to \$75,000. See Ala. Code § 36-25-14(a)(2) (requiring the filing of a yearly SOEI by “any person

Based on the Commission's conclusions in AO96-54, the Board does not believe its members are required to file yearly SOEI. The Board respectfully requests that the Commission confirm the Commission's conclusions in AO96-54 specifically as to the question concerning the obligation of each individual Board member to file SOEI with the Commission.

4. Assuming Board members are subject to the Act, if the Authority hires a lobbyist through authorization provided via at least a majority vote of the Board, is each individual Board member considered a principal under the Act? Is the analysis different for an individual Board member who voted against the hiring of the lobbyist but whose vote was ultimately defeated by a majority vote for approval in favor of providing the authorization? If so, please explain.

Assuming the Board's members are subject to the Act, the Board is unclear whether its individual members are considered principals under the Ethics Act. The Act defines "principal" as "A person or business which employs, hires, or otherwise retains a lobbyist." Ala. Code § 36-25-1(24). The Authority retains a lobbyist through authorization provided by a vote of the Board. The Board understands, based on the plain language of the Act, that such retention makes the Authority itself a principal.

The Board also understands, however, there has been significant debate in recent years regarding the scope and applicability of the Act's definition of principal. Given the potentially criminal consequences and reporting obligations attendant with being considered a principal under the Act, the Board seeks clarification as to whether, if the Authority retains a lobbyist through authorization provided by a vote of the Board, individual Board members are also considered principals.

To provide context, the Board notes several facts. First, no individual Board member is specifically responsible for providing authorization to the Authority to retain a lobbyist. The decision of whether to authorize the retention of a lobbyist for the Authority is made on a yearly basis by a majority vote of the Board members. Second, no individual Board member is specifically responsible for supervising the Authority's lobbyist's actions taken on behalf of the Authority. The Board collectively retains the power to supervise the lobbyist's actions. Third, no individual Board member is responsible for deciding whether to terminate a contract with a retained lobbyist. Again, that decision is collectively made by the Board as a whole. Finally, no individual Board member is responsible for setting the rate of compensation for a lobbyist retained by the Authority. Compensation for any lobbyist retained by the Authority is collectively set by the Board.

appointed as a public official . . . at the state, county, or municipal level of government or their instrumentalities who occupies a position whose base pay is seventy-five thousand dollars (\$75,000) or more annually . . .").

The Board does not necessarily concede the facts included above are relevant to the Commission's analysis. To the contrary, the Board believes the plain language of the Act is clear that only the Authority as an entity (i.e., the "business" as referenced in the principal definition in the Act), and not the individual Board members, should be considered principals. The Board is providing these facts for context based on the Board's understanding that similar factors have been discussed in the Commission's prior analyses on this issue.

It has not been uncommon for Board members to disagree regarding the Authority's retention of a lobbyist. If the Commission believes the Board's collective vote authorizing the Authority to retain a lobbyist makes all individual Board members principals under the Act, the Board then requests the Commission's guidance as to whether a Board member who voted against providing the authorization would be excepted from that classification. In the Board's view, it is one thing for an individual Board member to vote to authorize the Authority's retention of a lobbyist knowing such authorization carries with it significant legal ramifications under the Act; it is quite another thing for an individual Board member who voted *against* authorizing the Authority to retain a lobbyist to also be classified as a principal.

Members of the Board consider it an honor and a privilege to serve the Authority. They do not take their Board service lightly, and likewise they do not take lightly the potential criminal consequences and reporting obligations associated with being classified as a principal under the Act. The Board is concerned that individuals most qualified to serve on the Board in the future will be deterred from agreeing to become Board members should the Commission take an expansive view of the Act's definition of principal. Consequently,, the Board respectfully asks the Commission to answer the questions of whether all individual Board members are considered principals under the Act by virtue of voting to authorize the Authority to retain a lobbyist, and if so, whether an individual Board member who voted against authorizing the retention of the lobbyist by the Authority would still be classified as a principal.

5. Does the act of signing the Principal's Statement for Lobbyist Registration or the Principal's Quarterly Statement of Lobbying Activities on behalf of the Authority, standing alone, make the individual signing those forms a principal under the Act? Is the analysis different if the individual who signs the principal-related filings has no authority or supervision over the hiring, firing, or activities of the lobbyist, but merely signs as a function of his or her job duties? If so, please explain.

The Board also seeks guidance on whether the individual who signs an entity's Principal's Statement for Lobbyist Registration or Principal's Quarterly Statement of Lobbying Activities is also considered a principal simply by virtue of his or her signature. The Board believes construing the Act's definition of principal to include the individual person who signs an entity's principal-related filings goes well beyond the plain language of the Act. The Act defines a "principal" as the "person or business which employs, hires, or otherwise retains a lobbyist," and the Board is not aware of any formal guidance that expands that statutory definition. The Board therefore requests the Commission's guidance as to whether an individual who signs the Authority's principal-related

filings on the Authority's behalf is also considered a principal under the Act. Relatedly, if the individual who signs the principal-related filings has no individual authority or supervision over the hiring, firing, or activities of the Authority's lobbyist, but signs merely as a function of his or her job title, would that individual also be considered a principal under the Act?

6. The Authority has the responsibility to increase and improve air service from airlines and to promote the Airport. What limitations does the Act place on this marketing responsibility?

The Authority has several different marketing responsibilities aimed at increasing and improving air service at the Airport and promoting the Airport for the overall benefit of the seven-county Birmingham-Hoover Metropolitan Statistical Area ("MSA"). The Authority's marketing responsibilities are ongoing and are crucial to the future development of the Airport itself and the economic development of the Birmingham-Hoover MSA as a whole.

Considering the importance of this marketing responsibility, the Board respectfully requests the Commission's guidance as to what limitations, if any, the Act places on this responsibility.

Thank you for your attention to these important questions. Please let me know if you have any questions or if I need to provide you with any additional information.

Sincerely,



Sylvester Lavender
Interim President and CEO
Birmingham Airport Authority

cc: Hon. Jerry L. Fielding
Mr. Frank C. "Butch" Ellis, Jr., Esq.
Hon. Charles Price
Mrs. Beverlye N. Brady, Esq.
Mr. John M. Plunk, Esq.