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August 7, 2019

## ADVISORY OPINION NO. 2019-07

Sylvester Lavender  
Interim President and CEO  
Birmingham Airport Authority  
5900 Messer Airport Highway  
Birmingham, AL 35212

Public Officials/Public Employees  
Definition /Marketing/Birmingham Airport  
Authority

Birmingham Airport Authority Board Members are "public officials" subject to the Ethics Act and as such are required to file Statements of Economic Interests if they fall within the categories of Ala. Code § 36-25-14. The Authority states that none of its Board members fall within any enumerated category of this section. Assuming that to be accurate, the Board members would not be required to file. Employees of the Birmingham Airport Authority are "public employees" as that term is defined in Ala. Code § 36-25-1(26). With respect to marketing, under the facts presented and the marketing strategies contemplated, Ala. Code §§ 36-25-5, 7 and 8 limit the Board's conduct.

Dear Mr. Lavender:

The Alabama Ethics Commission is in receipt of your request for a formal Advisory Opinion of this Commission and this opinion is issued pursuant to that request.

## FACTS

The Birmingham Airport Authority (hereinafter “Authority”) is an incorporated public nonprofit corporation. The Authority is responsible for managing and operating the Birmingham-Shuttlesworth International Airport (hereinafter “Airport”), which the City of Birmingham owns. The Authority is governed by a seven-member Board of Directors whose members are appointed to their terms by the City of Birmingham. Ala. Code § 4-3-45. Board members are not compensated for their service. Additionally, the Authority periodically retains a lobbyist. Funding for operations at the Airport, including the salaries of all employees, come from user and landing fees paid by the airlines, and from rental, concession and other fees paid by lessees, concessionaires and other users of airport property and facilities. The Airport’s ability to charge user, rental and concession fees comes from the legislative grant of authority to charge and collect these fees. See Ala. Code § 4-3-11.

Capital improvements at the Airport are funded through various grants from the Federal Aviation Administration, from passenger facility charges and from the proceeds of industrial revenue bonds. The grants are always for specific capital projects which must be separately accounted for. (FAA holds the funds for approved projects and periodically reimburses the Airport Authority for approved expenditures.). Money used for salaries and operating expenses is not comingled with grant money.

## QUESTIONS PRESENTED<sup>1</sup>

1. Are Authority Board members subject to the Ethics Act?
2. If Board members are subject to the Ethics Act are they required to file Statements of Economic Interests?
3. Are employees of the Authority “public employees” subject to the Act?
4. 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?

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<sup>1</sup>The Authority has asked, in addition, whether their Board members are required to file principal-related ethics filings separate and apart from those filings made on behalf of principals as entities. We do not address that issue in this Advisory Opinion. At the time of the consideration of this Opinion, the application of the definition of “principal” is currently under consideration by the Alabama Supreme Court in the case of *Hubbard v. State of Alabama*. Until such time as the Alabama Supreme Court resolves the issues currently on appeal in that case, however, the individual Board members of the Birmingham Airport Authority are not required to file principal-related ethics filings separate and apart from those filings made on behalf of principals as entities.

### ANALYSIS

Authority Board members are subject to the Ethics Act. Case law and the Commission's formal opinions conclude that its Board members are public officials subject to the Ethics Act, and they are required to file Statements of Economic Interests if they fall within any of the enumerated categories of Ala. Code § 36-25-14. See Advisory Opinions AO 96-54; 2000-58. If Board members fall outside the enumerated categories of Ala. Code § 36-25-14, and the Authority asserts that they do, then they are not required to file Statements of Economic Interest.

As to whether employees of the Authority are "public employees," it is worth noting that the Ethics Act defines "public employee" as an employee of a governmental corporation or an instrumentality of state, county or local government who is paid in whole or in part from "state, county or municipal funds." Ala. Code § 36-25-1(26). The definitions imply legislative intent to include employees of public corporations such as the Authority within the definition of "public employee." The central inquiry, however, is whether funds collected from user and landing fees paid by the airlines, and from rental, concession and other fees paid by lessees, concessionaires and other users of airport property and facilities are considered "state, county or municipal funds."

The Commission determined in Advisory Opinion 1996-54 (Dorman) that employees of the Mobile Airport Authority who were paid out of funds the Authority generated were "public employees." Likewise, in Advisory Opinion 1999-25 (Denson) the Commission's opinion assumes that the Deputy Director of the Birmingham Airport Authority was a public employee subject to the Act. In these opinions, the Commission never specifically addressed whether self-generated funds from a public corporation were "state, county or municipal funds" but simply concluded without analysis that the employees at issue were "public employees." Subsequent to those opinions, however, circuit court rulings in ethics enforcement actions called into question whether self-generated funds were "state, county or municipal funds." Those Circuit Court decisions affected the informal advice the Commission has given related to employees of public corporations which self-generate their operating funds, such as the Birmingham Airport Authority. The Commission never formally revoked those Advisory Opinions, however. Therefore, the Authority has asked the Commission to formally clarify this issue.

The terms "state, county or municipal funds" and "public funds" are not defined in the Ethics Act.<sup>2</sup> The commonly understood meanings of the words, however, would lead one to conclude that money a public corporation generates for the public's benefit should be considered "state, county or municipal funds."<sup>3</sup> "Public Funds" is defined in the Open Meetings Act to

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<sup>2</sup> For purposes of the questions asked, the distinction between "public funds" and "state, county or municipal funds" is irrelevant.

<sup>3</sup> Black's Law Dictionary defines public funds as "[t]he money that is used by the government to provide goods and services to the public in general." Black's Law Dictionary, 2nd Ed. It defines government to include "the whole class or body of office-holders or functionaries considered in the aggregate, upon whom devolves the executive, judicial, legislative, and administrative business of the state..." Id. Other online legal definition websites include "the revenue or money of a government, state, or municipal corporation" in the definition of public funds. See, e.g.,

include “fees” collected by a “governmental body,” which includes governmental corporations such as the Authority. Ala. Code § 36-25A-2. Generally, public corporations are created by the people or the government, state or federal, for political or governmental purposes only. 18 C.J.S. Corporations § 12 (June 2019). The operation of municipal airports, specifically, is by statute a public governmental function. Ala. Code § 4-4-4.

The Authority’s function and what it can do with its money is relevant to determining whether its employees are “public employees.” The City of the Birmingham, the Authority, and its functions are inextricably linked. The Authority exists to further a governmental purpose related to economic development and transportation. The Authority is a public corporation organized under Ala. Code § 4-3-40 et seq to manage and operate the airport which is owned by the City of Birmingham. Its membership is determined by the Birmingham City Council, any of whom may serve on the Board. Its offices are in City Hall. It receives its mail “c/o City of Birmingham.” The Board is required to give the Mayor of the City of Birmingham notice of all meetings. When the Authority is dissolved, all of its assets revert to the City of Birmingham. Ala. Code § 4-3-61. For purposes of retirement, employees of the Authority are by statute considered employees of the City of Birmingham. Ala. Code § 45-37A-51.307.

The money the Authority collects can only be used for public purposes. The Articles of Incorporation supplied to the Commission state, “[N]o part of the net earning thereof shall inure to the benefit of any individual or private corporation.” Its money can be used to pay for property the Authority acquires by eminent domain. It can be used to hire employees to serve the Authority and make improvements to the Airport, as well as the other public functions specifically granted to it by the authority of the legislature or the City of Birmingham. See Ala. Code § 4-3-47.

The Attorney General has not defined “state, county or municipal funds.” That office has held, however, that money raised by a municipally-sanctioned Volunteer Fire Department are municipal funds, notwithstanding the fact that the Department is a separate entity from the City. See AG AO 94-00063. The Attorney General reaffirmed this conclusion in AO 2012-016. The AG has also said that “funds arising from private sources in the hands of public officials, for public use” should be considered “public funds.” AG AO 94-242. The money the Authority generates is held by public officials for public use.

For purposes of carrying out audits and examinations, the Department of Examiners of Public Accounts considers any funds, licenses, or fees collected under the authority of or on behalf of a state or county office, bureau, board, commission, corporation, institution, department, or agency, to be considered “public funds.” See Ala. Code §41-5A-5 and 41-5A-12(a)(1)(1975).

Alabama case holdings regarding public corporations are inconsistent, but recent authority, and older authority in line with the same reasoning, conclude that in specific contexts

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uslegal.com, definition of “public funds”. Black’s includes in the definition of municipal “a public corporation, created by government for political purposes...” Black’s Law Dictionary, 2nd Ed.

other than the Ethics laws, employees of a public corporation, like the Authority, are public employees. Moreover, this authority gives some guidance about how to view the money public corporations generate. The Alabama Supreme Court held as far back as 1941, “The funds of such enterprise belong to the city, raised by the operation of a business belonging to the city, and for the use and benefit of the citizens thereof and all members of the public who qualify for its use, and operated for a public use, all within the definition of ‘public funds.’” “[H]ence employees engaged in operation of the electric distribution system were paid in whole or in part from the ‘public funds’ of the city...notwithstanding that operation of the distribution system could not result in profit to the city of Bessemer, and that the city acted through a public utility board.” City of Bessemer v. Personnel Board for Jefferson County, 199 So. 815 (Ala. 1941). The same reasoning applies to the money the Authority receives for its operations and employee salaries.

The Alabama Court of Civil Appeals later determined that public corporations are instrumentalities of the municipality that created them, making them subject to the Ethics laws. The court found the following factors to be relevant: they can only be incorporated with the approval of the municipality; they bear the name of the municipality; their board members are appointed by the municipality; and upon dissolution, their assets revert to the municipality. Harris v. Ethics Comm’n of State, 585 So. 2d 93 (Ala. Civ. App. 1991)(holding that an Industrial Development Board is an instrumentality of the City and its members are, therefore, public officials subject to the Ethics Act). All of these factors apply equally to the Birmingham Airport Authority.

The Alabama Supreme Court later recognized that employees of a public corporation can function as “agents” of the municipality which created them. Water Works and Sewer Board of the City of Talladega v. Consolidated Publishing, Inc., 892 So. 2d 859 (Ala. 2004). This Court held, as well, that these employees’ actions are subject to the Open Meetings Act, because for purposes of that Act they are to be considered “public servants.”<sup>4</sup> See also City of Montgomery v. Water Works and Sanitary Sewer Bd. of City of Montgomery, 660 So. 2d 588 (Ala. 1995)(“It has been held that a water and sewer board is an administrative agency and performs city functions... Although the Water and Sewer Board is a corporation, it is so organized to perform its functions as an agency of the City. Accordingly, such a board is treated in the same light as the City itself....”).

Last, the intent of the legislature appears to have been to make public corporations and their employees subject to the Ethics Act. Considering the legislative intent expressed in the definitions of public employee and public official, and the Alabama courts’ determinations that

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<sup>4</sup> But see, Water Works and Sewer Board of City of Selma v. Randolph, 833 So. 2d 604 (Ala. 2002) which concluded that employees of the Water Works and Sewer Board were not public employees subject to the “Sunshine Law.” Consolidated Publishing, decided two years later, appears to be the last time the Court spoke to this particular issue and has been cited numerous times for this conclusion. This holding with respect to the public nature of the employees for purposes of the Open Records Act was reaffirmed in Tennessee Valley Printing Co., Inc. v. Health Care Authority of Lauderdale County, 61 So.3d 1027 (Ala. 2010). See also, Foster Poultry Farms, Inc. v. Water Works & Sewer Board of the City of Demopolis, 370 F.Supp.3d 1341 (S D Ala. 2019) (with respect to a public corporation, “Alabama law is clear that a water works board is an agency of the municipality it serves.”).

public corporations are subject to the Act and that their board members are public officials, it seems unlikely that the legislature would intend to treat employees serving that Authority differently.

Given the definitions of the commonly used terms within the definition of “public employee,” the Commission’s previous Advisory Opinions which concluded that employees of Airport Authorities are public employees subject to the Ethics Act, the practice of the Department of the Examiners of Public Accounts with respect to money public corporations generate pursuant to the legislative grant of authority, the relevant cases from the Alabama courts analyzing public corporations’ self-generated funds as well as those individuals who work for public corporations, all available authority that is relevant to the issue of how to determine whether money should be considered “public,” the apparent legislative intent expressed through the definitions in the Ethics Act, as well as the Code’s directive to the Commission to resolve any ambiguities within the Act in such a way so as to protect the public interest,<sup>5</sup> we conclude that the employees of the Birmingham Airport Authority are “public employees” as that term is defined in Ala. Code § 36-25-1(26) and are subject to the Ethics Act.

Question 4 asks whether the Ethics Act places any limits on the Board’s ability to market the Airport.<sup>6</sup> The Airport plans the following activity with respect to marketing: creation of marketing materials which includes business cards, website design, print brochures, rack cards; content marketing which includes press releases, social media posts, photos, videos, images, newsletters, advertising through targeted advertising outlets to the benefit of airlines and airport tenants, paid online advertising through LinkedIn, Facebook, Twitter, Instagram, Foursquare, Google, Pinterest, YouTube, Yelp; and business retention strategies to include passenger and parking loyalty programs. These marketing efforts would be paid for from the Airport’s operating funds. The Board members are public officials. Within the context of the above activities, they cannot use their official positions in order to benefit themselves, their families, or businesses they are associated with, and this restriction would apply to their marketing efforts (for example, contracts entered into with family members or their businesses). Ala. Code § 36-25-5. Moreover, they cannot accept anything from anyone for the purpose of corruptly influencing their official actions as Board members in the course of their marketing efforts. Ala. Code § 36-25-7. They cannot use or disclose confidential information in any way that could result in financial gain in violation of Ala. Code § 36-25-8.

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<sup>5</sup> “This chapter shall be liberally construed to promote complete disclosure of all relevant information and to insure that the public interest is fully protected.” Ala. Code § 36-25-2.


<sup>6</sup> The Authority is a principal. The restrictions on transfers of “thing[s] of value” from principals, as well as the exceptions to the definition of “thing of value” could apply to marketing, as well. The marketing strategies identified by the Airport, however, do not contemplate the transfer of any “thing of value” to a public official or employee, so this discussion is unnecessary for this answer given the facts supplied.

### CONCLUSION

Birmingham Airport Authority Board Members are “public officials” subject to the Ethics Act and as such are required to file Statements of Economic Interests if they fall within the categories of Ala. Code § 36-25-14. The Authority states that none of its Board members fall within any enumerated category of this section. Assuming that to be accurate, the Board members would not be required to file. Employees of the Birmingham Airport Authority are “public employees” as that term is defined in Ala. Code § 36-25-1(26). With respect to marketing, under the facts presented and the marketing strategies contemplated, Ala. Code §§ 36-25-5, 7 and 8 limit the Board’s conduct.

### AUTHORITY

By 4-1 vote of the Alabama Ethics Commission on August 7, 2019.

  
Jerry L. Fielding, Ret. Sr. Circuit Judge  
Chair  
Alabama Ethics Commission