

ADVISORY OPINION NO. 89-6

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON OCTOBER 5, 1989

GOVERNMENTAL BODY SEEKING OPINION

A Deputy Attorney General

Opinion Sought

1. "If the Court in the Texas libel suit rules that the testimony and documents sought by the plaintiff are not privileged and are relevant under Rule 26(b)(1) of the Federal Rules of Civil Procedure, and if the Court thereafter orders the official to fully or partially comply with the subpoena, would such full or partial compliance by the official constitute a violation of W.Va. Code Section 6B-2-5(e) in the form of a 'knowing and improper' disclosure of confidential information acquired by the official in the course of his official duty, or in the form of the use of such information to further the official's personal interests or the interests of another person?"

2. "If the Court in the Texas libel suit rules that the official must comply with the subpoena, and if the official then complies with the subpoena, but subsequently a federal appeals court or other authority, either in the Texas libel suit or in other future legal proceedings, rules that the earlier ruling and order by the Court that the official must comply with the subpoena constituted in whole or in part an error of law, would the official's compliance with the earlier ruling and order constitute a violation of W.Va. Code Section 6B-2-5(e) in the form of a 'knowing and improper' disclosure of confidential information acquired by the official in the course of his official duty, or in the form of the use of such information to further the official's personal interests of another person?"

3. "Does information acquired by the Attorney General of West Virginia under W.Va. Code Sections 47-18-6 and 47-18-7(a), whether acquired under oath, subpoena or otherwise, constitute 'confidential information' as that term is used in W.Va. Code Section 6B-2-5(e)?"

4. "If it is the studied judgment of the Attorney General of West Virginia that W.Va Code Section 47-18-14 allows him to provide the other six states, who are cooperating as part of the multistate investigation, with information obtained through a subpoena issued pursuant to W.Va Code section 47-18-7(a) and that such provision of information does not violate the 'make public' prohibition of W.Va. Code Section 47-18-7(d), would the provision of such information by the Attorney General or his employees to the six states constitute a violation of W.Va. Code Section 6B-2-5(e) in the form of a 'knowing and improper' disclosure of confidential information acquired by the Attorney General of West Virginia or his employees in the course of his or their official duty, or in the form of the use of such information to further the Attorney General's or the employees' personal interests or the interests of another person?"

5. "If the Attorney General of West Virginia, in his studied judgment, provides or his employees provide, the other six states with information obtained through a subpoena issued pursuant to W.Va. Code Section 47-18-7(a), but subsequently a federal or state court or other authority rules that the studied judgment of the Attorney General, which allowed the provision of the information to the other six states, constituted in whole or in part an error of law, would the Attorney General's or the employees' provision of such information constitute a violation of W.Va. Code Section 6B-2-5(e) in the form of a "knowing and improper" disclosure of confidential information acquired by the Attorney General or his employees in the course of his or their official duty, or in the form of the use of such information to further the Attorney General's or the employees' personal interest or the interests of another?"

6. "If the Attorney General of West Virginia, in his studied judgment, provides or his employees provide the other six states with information obtained through a subpoena pursuant to W.Va. Code Section 47-18-7(a), and if the Attorney General, in his studied judgment, provides or his employees provide the other six states with such information with the understanding that once provided such information will be treated by each such state in accordance with the various confidentiality provisions of each such state's own respective state statutes, even though such statutes may differ from those which apply in West Virginia, but subsequently a federal or state court or other authority rules that the studied judgment of the Attorney General, which allowed the provision of such information to each such state subject only to their respective state's confidentiality statutes, constituted in whole or in part an error of law, would the Attorney General's or the employees' provision of such information constitute a violation of W.Va. Code Section 6B-2-5(e) in the form of a 'knowing and improper' disclosure of confidential information acquired by the Attorney General or his employees in the course of his or their official duty, or in the form of the use of such information to further the Attorney General's or the employees' personal interest or the interests of another?"

Other Facts Relied Upon By The Commission

The plaintiff in a civil action for libel under Texas state law which action is in the United States District court in West Virginia under federal diversity jurisdiction believes that he and others are the subject of an investigation by the Attorney General of West Virginia under the Antitrust Act.

The plaintiff believes that such investigation if it exists was instituted on the basis of libelous accusations communicated by defendant in the Texas libel suit to an attorney who serves as an antitrust enforcement official in the Attorney General's Division.

The plaintiff issued a federal deposition subpoena to the official requiring him to appear for questioning and to produce all records concerning such alleged investigation.

The official filed a motion to quash the subpoena claiming compliance with the subpoena was not required under Rule 26(b)(1) of the Federal Rules of Civil Procedure because such documents and testimony are privileged under the Antitrust Act and are irrelevant to the Texas libel suit.

On another matter unrelated to the Texas libel suit the Attorney General of West Virginia has been conducting an antitrust investigation in cooperation with six other states of a certain industry. Prior to this time the Attorney General has not exchanged information he has obtained with the six other states pursuant to W.Va. Code 47-18-7(a).

The Attorney General now proposes to provide information obtained through a subpoena issued pursuant to W.Va. Code 47-18-7(a) to the other six states under the "cooperation" provisions of W.Va. Code 47-18-14.

It is expected by the Attorney General that such information would be treated by those states in accordance with the various confidentiality provisions of their own respective state's statutes, even though such states may contain different confidentiality restrictions or provisions of their own.

Pertinent Statutory Provisions Relied Upon By The Commission

W.Va. Code 6B-2-5(e) states that no present or former public official or employee may knowingly and improperly disclose any confidential information acquired by him or her in the course of his or her official duties nor use such information to further his or her personal interests or the interests of another person.

W.Va. Code 47-18-7(d) states that the Attorney general shall not make public the name or identity of a person whose acts or conduct he investigates pursuant to this section or the facts disclosed in the investigation, but this subsection does not apply to disclosures in actions or enforcement proceedings pursuant to this article.

W.Va. Code 47-18-14 states that the attorney general may cooperate with officials of the federal government and the several states in the enforcement of this article.

Advisory Opinion

1. The legislative intent of W.Va. Code 6B-2-5(e) was to prohibit improper disclosure by a current or former employee or official. Such disclosure would be proper if made pursuant to a lawful court order or subpoena. If made merely by subpoena, a protective order should be sought.

2. Good faith reliance upon an order issued by a lower court, regardless of its reversal by a higher court, would still not make the disclosure improper.

3. This question is too broad to supply an answer to at this time, but will be considered on a case-by-case basis; and limited to specific facts presented for advisory opinions.

4. W.Va. Code 47-18-7(d) prohibits the attorney general from making public the name or identity of a person whose acts or conduct he investigates. However, W.Va. Code 47-18-14 specifically allows the Attorney General to cooperate with...the several states in the enforcement of the Antitrust act.

Cooperation in this sense necessarily means the sharing of information that could be of assistance to the other states in enforcing the Act. Therefore, such disclosure would not be "improper" within the meaning of W.Va. Code 6B-2-5(e).

5. It would not be an improper disclosure within the meaning of West Virginia Code Section 6B-2-5(e) if the Attorney general or his employee(s) acted in good faith in interpreting Code section 48-18-14 to allow disclosure to cooperating states of confidential information, even if a federal or state court or other proper subsequent authority determined that the providing of the information constitutes an error of law.

6. It would not be an "improper" disclosure within the meaning of W.Va. Code 6B-2-5(e) if the Attorney general or his employee(s) provided other cooperating states with confidential information obtained through a subpoena with the understanding that once provided such information would be treated by each such state in accordance with that state's confidentiality provision even if subsequent federal or state court or other proper authority determined that to be error in law.



Chairman