Confidential Information – Client's Failure to Obtain Building Permits

Case No. 07-11

Facts:

Engineer A is retained by Client X to prepare drawings and plans for a structure on Client X's property. During the course of Engineer A performing services for Client X, Client X mentions to Engineer A that there is an existing structure on the property that required permits and approvals to be constructed but that Client X had the property built without obtaining the necessary plumbing, electrical, structural, and mechanical permits and code approvals. The structure is used for the storage of materials and equipment but is usually not intended for human habitation or use, other than for delivery and servicing.

Question:

What is Engineer A's ethical obligation under the circumstances?

References:

Section II.1.	-	*NSPE Code of Ethics:*	*Engineers shall hold paramount the safety, health, and welfare of the public.*
Section II.1.c.	-	*NSPE Code of Ethics:*	*Engineers shall not reveal facts, data, or information without the prior consent of the client or employer except as authorized or required by law or this Code.*
Section II.1.e.	-	*NSPE Code of Ethics:*	*Engineers shall not aid or abet the unlawful practice of engineering by a person or firm.*
Section II.1.f.	-	*NSPE Code of Ethics:*	*Engineers having knowledge of any alleged violation of this Code shall report thereon to appropriate professional bodies and, when relevant, also to public authorities, and cooperate with the proper authorities in furnishing such information or assistance as may be required.*

Discussion:

During the course of providing professional services, an engineer sometimes becomes privy to information that raises ethical questions and places the engineer in a difficult predicament whereby the engineer must exercise critical judgment and discretion as happened under the facts present in this case. The NSPE Board of Ethical Review has addressed this issue on several occasions.

One example of this predicament was BER Case No. 97-5. In that case, Engineer A was retained to investigate the structural integrity of a 60-year-old occupied apartment building, which his client was planning to sell. Under the terms of the agreement with the client, the structural report written by Engineer A was to remain confidential. In addition, the client made clear to Engineer A that the building was being sold "as is" and that the client was not planning to take any remedial action to repair or renovate any system within the building prior to its sale. Engineer A performed several structural tests

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on the building and determined that the building was structurally sound. However, during the course of providing services, the client confided in Engineer A and informed him that the building contained deficiencies in the electrical and mechanical systems, which violated applicable codes and standards. While Engineer A is not an electrical or mechanical engineer, he realized that those deficiencies could cause injury to the occupants of the building and so informed the client. Specifically in his report, Engineer A made a brief mention of his conversation with the client concerning the deficiencies; however, in view of the terms of the agreement, Engineer A did not report the safety violations to any third party. In deciding it was unethical for Engineer A not to report the safety violations to the appropriate public authorities, the Board noted that the facts presented in the case raised a conflict between two basic ethical obligations of an engineer: (1) the obligation of the engineer to be faithful to the client and not to disclose confidential information concerning the business affairs of a client without that client's consent and (2) the obligation of the engineer to hold paramount the public's health and safety.

Later in BER Case No. 97-13, a public agency retained the services of VWX Architects and Engineers to perform a major scheduled overhaul of a bridge. VWX Architects and Engineers retained the services of Engineer A, a civil engineer, as its subconsultant to perform bridge inspection services on the bridge. Engineer A's scope of work was solely to identify any pavement damage on the bridge and report the damage to VWX for further review and repair. Three months prior to the beginning of the scheduled overhaul of the bridge, while traveling across the bridge, Police Officer B lost control of his patrol car. The vehicle crashed into the bridge wall. The wall failed to restrain the vehicle, which fell into the river below, killing Police Officer B. While conducting the bridge inspection, and although not part of the scope of services for which he was retained, Engineer A noticed an apparent preexisting defective condition in the wall close to where the accident involving Police Officer B occurred. Engineer A surmised that the defective condition may have been a contributing factor in the wall failure and noted this in his engineering notes. Engineer A verbally reported this information to his client, who then verbally reported the information to the public agency. The public agency contacted VWX Architects and Engineers who then contacted Engineer A and asked Engineer A not to include this additional information in his final report since it was not part of his scope of work. Engineer A stated that he will retain the information from his engineering notes but not include it in the final report, as requested. Engineer A did not report this information to any other public agency or authority. The Board decided that Engineer A acted reasonably under the circumstances by properly balancing the obligation of the engineer to be faithful to the client and not to disclose what might be considered by the client to be confidential information concerning the business affairs of a client without that client's consent and the obligation of the engineer to hold paramount the public health and safety. The Board concluded that Engineer A's actions were consistent with the NSPE Code of Ethics because there was nothing under the facts to indicate anything more than Engineer A's general surmise and speculation

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about the cause of the structural failure of the wall. Engineer A's observation appeared to be based upon a visual inspection without anything more. There was also nothing noted in the facts to indicate that Engineer A had expertise in structural engineering. While it may have been appropriate for Engineer A to note such information in his field notes, to place this information in a final report would not be responsible and could unnecessarily inflame the situation. However, under no circumstance would it have been appropriate for Engineer A to alter his field notes. The Board also noted that while it might have been appropriate for Engineer A to verbally report this information to Engineer A's client and for the client to report this information to the public agency, it was clear that Engineer A was retained to perform a specific task for which he was presumably competent. Clearly the prime consultant, who had overall responsibility for the project, was in a far better position than Engineer A to understand the interrelationships between various elements of the projects, including the history of previous work performed on the bridge, prior consultants, contractors, etc., in order to make an informed evaluation. Therefore, the Board concluded that Engineer A did the appropriate thing in coming forward to his client with the information and also by documenting the information for possible future reference as appropriate. Under the circumstances, it would have been improper for Engineer A to include reference to the information in his final report, particularly since it would have been based upon mere speculation and not careful testing or evaluation by a competent individual or firm. At the same time, the Board was of the opinion that Engineer A had an obligation to follow through to see that correct follow-up action is taken by the public agency. Only if the public agency does not take corrective action should Engineer A consider alternatives. Finally, said the Board, for Engineer A to have reported this information to a public authority under the circumstances as outlined in the facts, before determining whether corrective action is taken, would have been an overreaction and could easily have risked jeopardizing the professional reputations of his client and the public agency.

Turning to the facts of the instant case, it is the Board's view that the facts in the present case, while somewhat similar to the earlier discussed cases, are significantly different in many respects. In the present case, the issues involved are not of the same scale and magnitude as the two earlier cases. While scale and magnitude are not necessarily controlling issues, they can have a bearing on the engineer's ethical obligations. In addition, the facts in the present case do not appear to directly impact upon the public health and safety since the building in questions is used for storage and does not appear to involve either public or private occupancy, other than for delivery and for servicing. Furthermore, the building in question was built without obtaining the necessary plumbing, electrical, structural, mechanical permits and code approvals, but it is unclear whether the actual "as built" construction was in violation of the applicable codes.

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Because of the circumstances involved, the Board is of the opinion that Engineer A would have an obligation to discuss with Client X the fact that code exists to protect public health and safety as well as the overall integrity of the building and its contents and that Client X has an obligation to comply. Engineer A should encourage Client X to bring the storage facility into code compliance.

Conclusion:

Engineer A would have an obligation to discuss with Client X the fact that code exists to protect the public health and safety as well as the overall integrity of the building and its contents and that Client X has an obligation to comply. Engineer A should encourage Client X to bring the storage facility into code compliance.

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