Confidentiality of Competitor Information Submitted to Government Agency

Case No. 15-8

Facts:
Engineer A works for a government agency involved in the design and construction of facilities. During Engineer A's tenure with the government agency, Engineer A receives access to confidential and proprietary design information provided by companies seeking approval from the government agency for their facility designs. Company X is among the companies submitting confidential and proprietary design information. Engineer A ends her employment with the government agency and accepts an engineering position with Company Y, a competitor of Company X.

Question:
What are Engineer A's ethical obligations under these circumstances?

NSPE Code of Ethics References:

Section II.4. - *Engineers shall act for each employer or client as faithful agents or trustees.*

Section II.4.a. - *Engineers shall disclose all known or potential conflicts of interest that could influence or appear to influence their judgment or the quality of their services.*

Section III.4. - *Engineers shall not disclose, without consent, confidential information concerning the business affairs or technical processes of any present or former client or employer, or public body on which they serve.*

Section III.4.a. - *Engineers shall not, without the consent of all interested parties, promote or arrange for new employment or practice in connection with a specific project for which the engineer has gained particular and specialized knowledge.*

BER Case References: 74-2; 85-4

Discussion:
Confidentiality issues relating to client or employer information has always been an important ethical consideration within the practice of engineering. Several provisions within the NSPE Code of Ethics' Fundamental Canons, Rules of Practice, and Professional Obligations address, or at least touch upon, these considerations. The ethical concerns in this area relate to the need to preserve the privacy and confidentiality of client or employer information, as well as the proprietary nature of much of what is often contained in the client or employer records. The engineer's duty in this area is rooted in the obligation to serve as a faithful agent and trustee to the client or employer, and also the obligation to avoid circumstances that could appear to influence the engineer's professional judgment.

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Over the years, the Board has considered a number of cases relating to the engineer's ethical obligation to maintain confidentiality and the impact that obligation may have on current or future clients. In BER Case No. 74-2, the Board held that a part-time consultant arrangement to municipalities by engineers in private practice did not preclude those same engineers from providing normal engineering services to the same municipalities. The Board noted, under the facts, that the engineer's loyalties were not divided. In BER Case No. 82-6, the Board ruled that where an engineer is retained by the US government to study the causes of a dam failure, it would not be ethical for the engineer to agree to be retained by the contractor involved in the construction of the dam. The contractor had filed a claim against the US government for additional compensation. Citing NSPE Code Section III.4.b., the Board found that nothing in the record indicated that the engineer was given the consent of his former client, the US government, to represent the interests of the contractor in its claim against the government for additional compensation.

In another BER case, Case No. 85-4, Engineer A, a forensic engineer, was hired as a consultant by Attorney Z to provide an engineering and safety analysis report and courtroom testimony in support of a plaintiff in a personal injury case. Following Engineer A's review and analysis, Engineer A determined that he could not provide an engineering and safety analysis report favorable to the plaintiff. The Board concluded he could not do this because the results of the report would have to suggest that the plaintiff, and not the defendant, was at fault in the case. Engineer A's services were terminated and his fee was paid in full. Thereafter, Attorney X, representing the defendant in the case, learned of the circumstances relating to Engineer A's unwillingness to provide a report in support of Attorney Z's case and sought to retain Engineer A to provide an independent and separate engineering and safety analysis report. Engineer A agreed to provide the report. In deciding that Engineer A's actions were not ethical, the Board noted that the mere fact that Engineer A ceased performing services for Attorney Z would not be an adequate solution to the ethical dilemma at hand. Nor was the fact that Engineer A had agreed to provide a "separate and independent engineering and safety analysis report." On the former point, the fact that Engineer A ceased performing services for Attorney Z did not mitigate the fact that Engineer A, throughout his first analysis, had access to information, documents, etc., that were made available to him by the plaintiff and plaintiff's attorney in a cooperative and mutually beneficial manner. The Board could not accept the proposition that, following the termination of the relationship with the attorney for the plaintiff, Engineer A would "blot all" of that information from his mind and start from "square one" in performing his engineering and safety analysis report. Nor did the Board believe the latter point that Engineer A would be capable of providing a "separate and independent" report for the defendant in this case. (See also NSPE Code Section II.4.b.). The Board noted, "it is clear from the facts that the real reason for the defendant's attorney's hiring Engineering A was that the attorney believed Engineer A would provide a report that would be favorable to the attorney's client." The BER concluded that Engineer A had to have been aware of the reasons why his services were being retained by virtue of the sequence of events. "Even if Engineer A was so naive as to believe that Attorney X was

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unaware of the circumstances of his termination," the Board noted, "this would not excuse his actions." The Board further noted that Engineer A should instead have fully discussed the issue with Attorney Z. It may be argued that Engineer A's loyalties under the facts in BER Case No. 85-4 were not divided because he had terminated his relationship with the plaintiff's attorney. It must be recognized that, while an engineer may not currently have a professional relationship with a former client, the engineer still has an ethical obligation to that client to protect certain confidential information and facts, as well as a certain duty of trust and loyalty. How long that duty of trust and loyalty must be maintained, the Board is not prepared to state at this time.

The aforementioned cases represent the longstanding BER positions relating to the question of conflicts of interest and the duty of engineers who gain, or are perceived to have gained, access to knowledge that may be advantageous to one client and disadvantageous to another. Obviously, the appropriate ethical course of action is dictated by the particular facts and circumstances of a case.

Shifting to the facts in the current case, it is the Board's view that while many of the considerations discussed in the previous cases are relevant to this case, the Board must conclude that Engineer A is free to pursue employment with Company Y, provided Engineer A does not disclose any confidential and proprietary design information Engineer A learned about Company X during Engineer A's employment with the government agency. Engineer A should not be unduly limited or penalized for accepting a position with Company Y, a competitor of Company X. At the same time, engineers have an obligation not to disclose (without consent) confidential information concerning the business affairs or the technical processes of any present or former client or employer, or public body on which they serve. Under the facts, consent does not appear to be a relevant factor, since Company Y is a direct competitor of Company X. In sum, Engineer A's obligation is linked to her employment with a government agency that was entrusted with Company X's confidential and proprietary design information.

Conclusion:
Engineer A is free to pursue employment with Company Y provided Engineer A does not disclose any confidential and proprietary design information Engineer A learned about Company X during Engineer A's employment with the government agency and makes this obligation clear to Company Y before accepting employment.

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Each opinion is intended as guidance to individual practicing engineers, students, and the public. In regard to the question of application of the NSPE Code to engineering organizations (e.g., corporations, partnerships, sole proprietorships, government agencies, and university engineering departments), the specific business form or type should not negate nor detract from the conformance of individuals to the NSPE Code. The NSPE Code deals with professional services, which must be performed by real persons. Real persons in turn establish and implement policies within business structures.

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