CITY OF PHILADELPHIA

BOARD OF ETHICS
PACKARD BUILDING
1441 Sansom Street
2nd Floor
Philadelphia, PA 19102-3026
(215) 686 – 9450
FAX 686 – 9453

Evan Meyer
General Counsel

Philadelphia Board of Ethics
Advice of Counsel GC-2010-503 (Amended)

March 11, 2010
(Amended May 6, 2011)

Donald F. Schwarz, MD, MPH
Deputy Mayor, Health & Opportunity
Health Commissioner
Department of Public Health
1401 JFK Boulevard, Room 600
Philadelphia, Pennsylvania 19102

Re: Proposed Animal Advisory Committee / Ethics Requirements for Members

Dear Dr. Schwarz:

You have requested a public advisory as to the legal requirements that the Public Integrity Laws would impose on members of a proposed Animal Advisory Committee. You advise that the Health Department is currently in the process of establishing the Animal Advisory Committee, as provided in Section 10-102(3) of The Philadelphia Code. You have asked for an opinion "to establish the legal requirements to which the candidates [for committee membership] must comply, particularly with regard to political participation, financial disclosure, and the need for on-going ethics

training, if they choose to accept [appointment]." You advise that the purpose for this request is to allow candidates for Committee membership to make an informed decision prior to accepting appointment.

In keeping with the concept that an ethics advisory opinion is necessarily limited to the facts presented, this Advice is predicated on the facts that you have provided. We do not conduct an independent inquiry into the facts. Although previous opinions of this office that interpret statutes are guidance to how this office will likely interpret the same provision in the future, previous opinions do not govern the application of the law to different facts. Ethics opinions are particularly fact-specific, and any official or employee wishing to be assured that his or her conduct falls within the permissible scope of the ethics laws is well-advised to seek and rely only on an opinion issued as to his or her specific situation, prior to acting. In that regard, to the extent that this opinion states general principles, and there are particular fact situations that you or Committee members may be concerned about, you are encouraged to contact us for specific advice on the application of the ethics laws to those particular facts.

Ethics Code Analysis

First, any such body of indefinite existence that included appointed citizens (that is, was not simply a working group made up solely of City officials) would be a "board or commission of the City" for purposes of the Ethics Code, Chapter 20-600 of The Philadelphia Code. The Board of Ethics has previously ruled a body that is assigned a title that does not contain the word 'board' or 'commission' – but is instead called a 'task force,' 'committee,' 'panel,' 'council,' or the like – is still formally a "board or commission of the City." *See* Opinion No. 2007-006 at page 3. As a member of a City board or commission, each member would be an 'officer' of the City. *See* Code Section 20-601(2).

Generally, under the Ethics Code, members of City boards and commissions may not do any of the following:

(a) act on matters in which they (or certain close relatives) have a personal financial interest (Code Section 20-607(a));

(b) act on matters in which their for-profit employer has a financial interest (Code Section 20-607(b));

(c) act on matters in which a member of their for-profit entity is appearing before their Board as agent or attorney (Code Section 20-602(5)(a));

(d) personally represent, as agent or attorney, any person before their own board (Code Section 20-602(2))[1]; and

(e) solicit or receive a gift of substantial economic value from a person or entity that might have an interest in official action by the Committee.

In addition, members of City boards and commissions must do the following:

(i) file the City of Philadelphia financial interest statement, disclosing their finances for the prior calendar year, every year by May 1 (May 3 in 2010, since May 1 falls on a weekend) (Code Section 20-610);

(ii) attend annual ethics training conducted by or authorized by the Ethics Board (Code Section 20-606(1)(b)(iii) and Board of Ethics Regulation No. 7) ; and

(iii) if the member has a conflict of interest—that is, their board/commission is about to act on a matter identified in one of the first three prohibitions above: (a), (b), or (c)—the member must publicly disclose the conflict and disqualify himself, under Code Section 20-608.

This is not intended to be an exhaustive list of all requirements and restrictions stated in the Public Integrity Laws. For example, other restrictions that generally apply to City officers, including board and commission members, may be found in the Code at Sections 20-606(1)(i)(Ethics Board confidentiality), 20-606(1)(j)(retaliation against employees who file complaints), 20-606(2)(mandatory cooperation with the Ethics Board), and 20-609(confidentiality of City matters).

[1] Subsection (2) of Code Section 20-602 provides an exception for members of boards and commissions from the general rule that City officers may not represent any person in any transaction involving the City. Subsection (2) states that, for part-time officers (such as members of boards/commissions) the restriction applies only to matters before that member's particular board.

Charter Section 10-107 Analysis

You have also asked about political activities. Charter Section 10-107 restricts the political activities of appointed City officers in several ways. In Formal Opinion No. 2007-006 (incorporating Opinion No. 2007-004) the Board of Ethics stated in the first paragraph that the intent of the Opinion was to address the application of Section 10-107 to members of "all boards and commissions of the City." The Opinion then analyzed the 81 boards and commissions as to which the Board had information were in existence and active. Opinion No. 2007-006 considered the powers and duties of the individual bodies, in conjunction with the compensation provided, under the Code, for members. *See also* Advice of Counsel No. 2009-508 (Charter §10-107 does not apply to Commission on Parks & Recreation, because its authority "is an essentially advisory function and does not rise to the level of the exercise of significant powers of government.") Section 20-304 of the Code provides for compensation for City boards and commissions. As of this writing, there is no subsection providing for compensation for members of an Animal Advisory Committee, so the current compensation is zero. In addition, effective March 28, 2011, Board of Ethics Regulation No. 8 ("Political Activity") supersedes prior advisory opinions, to the extent that they are inconsistent.

As to powers and duties, these are spelled out in Code Section 10-102(3)(b): to advise the Health Commissioner (10-102(3)(b)(i)), to propose regulations (10-102(3)(b)(ii)), and to make suggestions regarding contracts. These three functions—advising, proposing, and suggesting—all constitute nothing more than recommendations, rather than the Committee itself exercising the power of City government. Accordingly, the proposed Animal Advisory Committee, as authorized under Code Section 10-102, clearly does not fit with those bodies listed in Paragraph 8.21 of Regulation No. 8 ("Boards and commissions that exercise significant powers of government") and thus is an "advisory board or commission" subject only to the restrictions in Paragraph 8.22. In short, members of the committee may not engage in political activity while on duty as committee members or while using City resources; and may not use their City position as a member of the committee while participating in political activity. Committee members are otherwise generally permitted to engage in political activity. See Regulation No. 8 for a more detailed description of the rules.

Therefore, you are advised that, based on the current language of the Code, members of the proposed Animal Advisory Committee would not be subject to Subparts D, E, and H of Regulation No. 8, interpreting Charter Section 10-107, except for those members who are otherwise full-time officers or employees of the City of

Philadelphia, and except to the degree that subsections 10-107(1) and (2) apply to any person. Of course, should City Council amend Code Section 10-102 or provide significant powers for the Committee, or amend Charter Section 10-107,[2] this conclusion might require re-visiting.

Other Provisions

1. Mayor's Executive Orders. The Board of Ethics does not have jurisdiction to interpret or enforce Executive Orders. Nevertheless, it is our understanding that Executive Order No. 3-11 (Gifts) applies only in a limited way to members of advisory boards/commissions. See Section 3(g) of the Executive Order. Also, Executive Order No. 11-84, which requires that members of certain boards/commissions file the Mayor's Form financial disclosure form, applies only to members who receive certain compensation. Since it appears that the members of the Animal Advisory Committee will not be compensated, they would not be required to file the Mayor's Form. You may wish to consult with Chief Integrity Officer Joan Markman for confirmation.

2. The State Ethics Act. The Act, 65 Pa.C.S. §1101 *et seq.*, applies to "public officials." However, the Act defines "public official" to exclude members of purely advisory bodies. The Act's definition of "public official" provides that the term "shall not include members of advisory boards that have no authority to expend public funds other than reimbursement for personal expense or to otherwise exercise the power of the State or any political subdivision thereof." Although final authority to interpret the Act rests with the State Ethics Commission, you are advised that it is likely that the Commission would conclude that the Animal Advisory Committee, based on the powers and duties set out in Code Section 10-102, will not have authority to exercise the power of the City, and thus its members will not be "public officials" subject to the Act. Therefore, members of the Committee will not be required to file the State financial disclosure form, or be subject to other substantive provisions of the State Ethics Act.

Conclusion

Your request is unusual in its scope, compared to the typical request we receive, which is generally from a particular City official/employee contemplating a

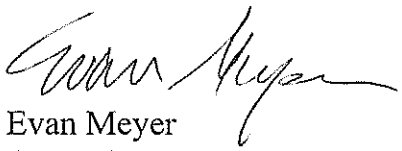
[2] *See* Bill Nos. 100121 and 100128, and Resolution No. 100139, all introduced on March 4, 2010.

specific official or personal action, and inquiring how the ethics laws might restrict that action. In such a case, there are generally only a few provisions of the Public Integrity Laws that apply, and we can apply those laws to the particular facts provided. In contrast, the question you have presented is more in the nature of asking "What are all the laws that may apply to this group of people in anything they might do?" It is understandable that you ask this question, as it is understandable that citizens whom you may ask to serve may well want to know what restrictions would apply to them if they became City officers. Nevertheless, it is difficult to provide a summary that covers every possible restriction, because to be complete, such a summary would have to provide the text of the entire City Ethics Code, as well as other provisions. This Advice of Counsel has attempted to summarize the major restrictions that commonly are of concern to citizens undertaking service with the City of Philadelphia.

If you have questions about any other particular factual situations, you would be well-advised to present the specific facts and request advice on the particular question. Also, especially, once appointed, if any members of the Committee have questions about the application of the ethics laws to their conduct, they should request individual advice.

If you have any additional facts to provide, we will be happy to consider if they change any of the conclusions in this opinion. Since you have requested public advice from the Board of Ethics, we will make this letter public as required by Code Section 20-606(1)(d)(iii).

Sincerely yours,



Evan Meyer
General Counsel

cc: Richard Glazer, Esq., Chair
J. Shane Creamer, Jr., Esq., Executive Director