

CITY OF PHILADELPHIA

BOARD OF ETHICS
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Evan Meyer
General Counsel

**Philadelphia Board of Ethics
Advice of Counsel GC-2011-501**

February 16, 2011

Michael Hayes, Esq.
Montgomery, McCracken, Walker & Rhoades, LLP
123 South Broad Street
Philadelphia, PA 19109

Re: Potential Conflict / Police Advisory Commission / Siblings

Dear Mr. Hayes:

You advise that you represent the Police Advisory Commission of the City, which was created by and operates pursuant to Executive Order No. 8-93.¹ You have requested public advice on whether there is an impermissible conflict of interest arising out of the fact that the Executive Director of the Police Advisory Commission is the brother of the official in the Police Department who is head of the Department's Internal Affairs Division and is responsible for the investigation of alleged police misconduct.

You advise that the Executive Director of the Police Advisory Commission (PAC), since approximately June 2004, is William Johnson. His brother, Stephen

¹ The provisions of the Executive Order are mirrored in Chapter 21-1200 of The Philadelphia Code.

Johnson, is a Deputy Commissioner in the Police Department, and since April 2010, has served as the head of the Internal Affairs Division.

You provided the following information in response to a request for details concerning the official interactions between the two brothers:

William Johnson and his brother Stephen discuss, approximately once or twice a week (usually by telephone, rather than in-person) two distinct types of police-related matters.

First, because the PAC's responsibilities include working to improve community-police relations and the quality of policing in the City of Philadelphia, Bill Johnson and Stephen Johnson will sometimes discuss police service issues that members of the public bring to the attention of the PAC at community meetings that the PAC hosts or that members and staff of the PAC attend. By way of example, citizens sometimes express to the PAC community meetings that there isn't enough of a police presence at or around a local playground, school, or other area, or that the police response to 911 calls take too long. The Executive Director of the PAC often communicates those sorts of issues to his brother Stephen and to other officials within the Police Department (including local District Captains, etc.), with the hope that the concerns raised will be considered and addressed by the appropriate police personnel.

In addition, the PAC is tasked with the responsibility to investigate individual complaints of police misconduct and, when appropriate, to make advisory recommendations to the Mayor, the Police Commissioner and the Managing Director concerning them. Bill Johnson's communications with his brother Stephen concerning individual allegations or complaints of police misconduct are limited to procedural matters only; they do not discuss the allegations, substance, merits, or appropriate outcome of any complaint under investigation by the PAC and/or the Police Department's Internal Affairs Division ("IA").

Regarding file / information access, the PAC has the authority to request and obtain any and all Internal Affairs files or information necessary to the PAC's investigation and determination of individual complaints of police misconduct. That authority is laid out in Executive Order (8-93) pursuant to which the PAC operates. Internal Affairs has

no discretion to turn down a PAC request for Division files or information related to a complaint of police misconduct before the PAC. On the other side of the coin, the PAC's requests for IA files and information are generated by the PAC's investigators, Bill Johnson reviews and signs the PAC's request letters for IA files/information related to individual complaints of police misconduct, and if there are additional files or information that the PAC determines it requires, then the PAC investigator(s) responsible for the matter make follow-up requests to the assigned IA investigator(s). On one or two occasions since April 2010, Bill Johnson has called Stephen Johnson to ask that a PAC request for files / information be expedited, but Bill Johnson could not recall even a single instance in the past five years when IA refused to provide the PAC with files / information relating to a PAC investigation.

In response to a request to provide more information as to William Johnson's duties as executive director, you provided his job description, and the following information was provided in a meeting:

Bill Johnson explained that his duties include: (1) interviewing and hiring staff and supervising their work; (2) overseeing the day-to-day operations of the PAC; (3) answering/responding to requests for statements to the public (at the direction of the Commission); and (4) completing administrative duties, including time sheets, payroll, and personnel reviews.

In addition, Bill Johnson explained that PAC investigator Will Michael is currently being trained to take over the position of Chief Investigator for the PAC. In the interim, Bill Johnson and/or Deputy Executive Director Kelvyn Anderson may review complaints filed with the PAC, but the investigation of complaints is the responsibility of the PAC investigators.

Mr. Johnson does not make recommendations to the PAC regarding the disposition of any complaint. Rather, PAC investigators prepare memoranda summarizing their investigations into complainants' allegations, and those memoranda are provided to an internal committee of the PAC, the Investigatory Review Committee. The IRC exercises oversight over the investigations conducted by Commission staffers and makes recommendations to the entire PAC concerning the disposition of

individual complaints - including whether complaints should be scheduled for hearing. The IRC is made up of several Commissioners.

In keeping with the concept that an ethics advisory opinion is necessarily limited to the facts presented, my advice is predicated on the facts that I have been provided. We do not conduct an independent inquiry into the facts. Further, we can only issue advice as to future conduct. Accordingly, this Advice does not address anything that may have occurred in the past. You are advised that, 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 may be concerned about, you are encouraged to contact us for specific advice on the application of the ethics laws to those particular facts.

William Johnson is a City employee. The Philadelphia Code and the Commonwealth's Ethics Act contain "conflict of interest" provisions which prohibit certain official action by City employees that may affect the financial interests of specified close relatives. We may address your request on behalf of the Police Advisory Commission as to the conduct of William Johnson, since the Commission is the appointing authority of William Johnson. *See* Board of Ethics Regulation No. 4, Paragraph 4.1(c). However, nothing herein will constitute advice as to the permissibility of any conduct of Stephen Johnson, as a request would have to come from Stephen Johnson or a superior in the Police Department.

Philadelphia Code

The Philadelphia Ethics Code prohibits City officers and employees from having conflicts of interest that arise from taking official action that affects either a personal financial interest or an interest held by their business or by certain relatives. As to the interest through another person or entity, Code Section 20-607(b) provides:

- (b) In the event that a financial interest in any legislation (including ordinances and resolutions) award, contract, lease, case, claim, decision, decree or judgment, resides in a parent, spouse, child, brother, sister, or like relative-in-law of the member of City Council, other City officer or employee; or in a member of a partnership, firm, corporation or other

business organization or professional association organized for profit of which said member of City Council, City officer or employee is a member and where said member of City Council, City officer or employee has knowledge of the existence of such financial interest he or she shall comply with the provisions of Section 20-608(a) (b) (c) of this ordinance and shall thereafter disqualify himself or herself from any further official action regarding such legislation (including ordinances and resolutions) award, contract, lease, case, claim, decision, decree or judgment.

We have interpreted the phrase “award, contract, lease, case, claim, decision, decree or judgment” broadly to include any official action. See Nonpublic Formal Opinion No. 2009-003 at 7 n.4. Accordingly, since a brother is an included applicable relation, William Johnson may not take official action for the Police Advisory Commission that affects the financial interests of his brother, Stephen.

For example, should the Commission investigate a complaint concerning the conduct of Stephen Johnson, in light of the fact that the Commission may recommend personnel actions including demotion or dismissal,² the Commission’s action may impact on Stephen Johnson’s financial interests, and William Johnson must therefore publicly disclose the financial interest of his brother and disqualify himself from participating in that matter, according to the requirements of Code Section 20-608. See the discussion under “Disclosure and Disqualification” below. Such disqualification should include any official action by William Johnson relating to that matter, including requesting files, scheduling meetings, assigning investigators, or preparing draft findings or letters.

As to matters other than a complaint involving Stephen Johnson’s personal conduct, an argument could be made that an Executive Director of the Police Advisory Commission who wanted to help his brother in Internal Affairs could, for example, suppress details critical of Internal Affairs or emphasize matters that are complimentary to Internal Affairs. For example, if the PAC is investigating some other police officers—say an important deputy, or a highly visible case involving several officers—it could be argued that the PAC’s finding could impact on the prestige of the department and the Commissioner’s (or the Mayor’s) satisfaction with his Chief of Internal Affairs, both with eventual possible impact for his future professional success.

² See Executive Order No. 8-93, at 6

However, there are a number of factors that weigh against this argument. First, it is important to keep in mind that the Police Advisory Commission is advisory only. The Executive Order makes it clear that the Commission has the power to make recommendations, but it does not have the power to impose discipline. *See* Executive Order No. 8-93, at Sections 4(a), 4(e), 4(f)(2), and 4(f)(3). Second, based on the facts that you have provided, it appears that the details of any findings are determined by the Board of the PAC, based on facts provided to them by the PAC's investigators; the Executive Director's role is procedural. Third, any link between the effect on Stephen Johnson's reputation that accrues from a particular matter, and any potential financial benefit to Stephen Johnson would be tenuous, at best.

This Board discussed the meaning of "financial interest" at length in Nonpublic Formal Opinion No. 2009-003. Although the Board did not adopt a standard for defining the term (which is not defined in the City Code), it did note authorities to the effect that, although a pecuniary interest need not require a direct cause-and-effect impact on the subject's personal finances, such an interest must be "direct, immediate, and particular, as distinct from the interests that might be shared by a larger group" in order to find a conflict of interest. *Id.* at 4-5. The two particular examples discussed by the Board in that Opinion (only one of which was suggested as representing a conflict) both involved a direct link to future work by, and fees paid to, a law firm. *Id.* at 7. In contrast, the possibility that William Johnson's actions could make relations between Internal Affairs and the Police Advisory Commission go more or less smoothly and any resulting connection with possible future compensation to Stephen Johnson is much less direct, immediate, and particular. Accordingly, I conclude, and you are advised, that, based on the facts that you have provided and except for matters involving a complaint as to Stephen Johnson's personal conduct, the fact that the Executive Director of the Police Advisory Commission (William Johnson) is the brother of the official in the Police Department (Stephen Johnson) who is head of the Department's Internal Affairs Division and is responsible for the investigation of alleged police misconduct does not constitute a conflict of interest for William Johnson under Code Section 20-607.

Note, also, that Section 20-609 of the Code provides that no City officer or employee "shall directly or indirectly disclose or make available confidential information concerning the property, government or affairs of the City without proper legal authorization, for the purpose of advancing the financial interest of himself or others." Obviously, if William Johnson were to make available to his brother any confidential internal Police Advisory Commission information that would not normally be provided to the Police Department, that may raise an issue under this provision.

Disclosure and Disqualification

Should William Johnson be faced with official action involving his brother that would require him to publicly disclose the financial interest of his brother and disqualify himself from participating in that matter, as noted above, the procedure in Code Section 20-608 must be followed. Section 20-608(1)(c) of the Philadelphia Code spells out the precise procedure for the disclosure required: The requestor should write a letter, which should contain the following elements:

1. That the purpose of the letter is to publicly disclose a potential conflict of interest;
2. The requestor's public position (executive director of the Commission) and description of duties relevant to the conflict, if not obvious;
3. The requestor's private position or financial interest (interest of his brother, an employee of the Police Department) that presents the conflict;
4. A statement of how the requestor's public duties may intersect with his/her private interest; and
5. The requestor's intention to disqualify himself from any official action in matters affecting the private interest (should indicate, if possible, that such disqualification precedes any official action being taken in any such matter).

The letter should be sent by certified mail to the following: (1) the Chair of the Police Advisory Commission; (2) the Ethics Board, c/o Evan Meyer, General Counsel, Packard Building, 1441 Sansom Street, 2nd Floor, Philadelphia, PA 19102; and (3) the Department of Records, Room 156, City Hall, Philadelphia, PA 19107. The letter should indicate on its face that copies are being sent to all three of the above addressees.

The above paragraph is the standard advice that we always give on disclosure and disqualification. However, there is a possible unique factor in this matter. Section 5(b) of Executive Order No. 8-93 provides that the findings of the Commission "shall remain confidential until the Commission officially releases such findings." It is presumed that prior to the release of such findings, all matters related to that Commission investigation would be confidential during the course of the investigation, of necessity. Code Section 20-608 provides no guidance on providing public disclosure where the official action related to a financial interest is confidential, and no prior authority addresses this question. In such a case, you are advised that William Johnson should consult with the Board of Ethics for advice on providing the required disclosure.

State Ethics Act

The State Ethics Act, 65 Pa.C.S. §1101 *et seq.*, has a “conflict of interest” provision that is similar to that in the Philadelphia Code. The Act applies to William Johnson only if he is a “public employee,” which is defined in the Act to include: “Any individual employed by . . . a political subdivision who is responsible for taking or recommending official action of a nonministerial nature with respect to (1) contracting or procurement; (2) administering or monitoring grants or subsidies; (3) planning or zoning; (4) inspecting, licensing, regulating or auditing any person; or (5) any other activity where the official action has an economic impact of greater than a de minimis nature on the interests of any person.” 65 Pa.C.S. §1102. Executive directors of boards and commissions have long been considered to be “public employees” subject to the Act. *See* the Regulations of the State Ethics Commission, 51 Pa. Code § 11.1(iv)(A), (G). Accordingly, you are advised that it is likely that the Commission would determine that William Johnson is a “public employee” and is subject to the Act, including the “conflict of interest” provision at 65 Pa.C.S. §1103(a).

This Board has said many times that, although the wording of the statutes is different, the “conflict of interest” rule of the State Ethics Act is substantially similar to that of Code Section 20-607. *See, e.g.*, Nonpublic Advice of Counsel GC-2010-515 at 8. Section 1103(a) of the Act provides:

- (a) Conflict of interest. No public official or public employee shall engage in conduct that constitutes a conflict of interest.

What is a “conflict of interest” may be determined by reference to the definitions section of the Act for a definition of that term and terms included within that definition, as follows:

Section 1102. Definitions.

The following words and phrases when used in this chapter shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

...

“Authority of office or employment.” The actual power provided by law, the exercise of which is necessary to the performance of duties and responsibilities unique to a particular public office or position of

public employment.

“Business.” Any corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, organization, self-employed individual, holding company, joint stock company, receivership, trust or any legal entity organized for profit.

“Business with which he is associated.” Any business in which the person or a member of the person’s immediate family is a director, officer, owner, employee or has a financial interest.

...

“Conflict” or “conflict of interest.” Use by a public official or public employee of the authority of his office or employment or any confidential information received through his holding public office or employment for the private pecuniary benefit of himself, a member of his immediate family or a business with which he or a member of his immediate family is associated. "Conflict" or "conflict of interest" does not include an action having a de minimis economic impact or which affects to the same degree a class consisting of the general public or a subclass consisting of an industry, occupation or other group which includes the public official or public employee, a member of his immediate family or a business with which he or a member of his immediate family is associated.

65 Pa.C.S. §1102.

In Confidential Opinion No. 2007-001, this Board considered the application of the phrases “use of authority of ... office” and “for the private pecuniary benefit of himself [or a family member]” from the definition of “conflict of interest.” The Board concluded that

We conclude that these are essentially the same questions as those we address [] under the City Ethics Code. That is, acting for the “private pecuniary benefit of himself” under the Act is essentially the same as “being financially interested” under the Code. Similarly, “use by a public official or public employee of the authority of his office . . .” under the Act is essentially the same as making an “award, contract, lease, case, claim, decision, decree or judgment” under the Code.

Accordingly, our advice as to public disclosure and disqualification under the State Ethics Act remains the same as under the City Code.

Confidential Opinion No. 2007-001 at 12. However, the facts of Confidential Opinion No. 2007-001 did not require the Board to consider that part of the definition that states that “‘conflict’ or ‘conflict of interest’ does not include an action having a de minimis economic impact.” Nevertheless, a recommendation of the Police Advisory Commission that may result in employment action such as demotion, suspension, or dismissal clearly has a greater than de minimis economic impact.

Thus, I believe there is a significant probability that, if asked, the State Ethics Commission would determine that the State Ethics Act would also require that William Johnson may not take official action for the Police Advisory Commission that affects the financial interests of his brother, Stephen.

You are advised, however, that the State Ethics Commission is the ultimate arbiter of interpretations of the Act, including on the question of whether the Act applies to William Johnson. Our advice as to the Act is guidance only and does not provide protection from possible enforcement action by the State Ethics Commission. To those who rely in good faith on advice from the Commission itself, the State Act provides a complete defense in any enforcement action by the Commission and evidence of good faith conduct in other criminal or civil proceedings. 65 Pa.C.S. § 1107 (10), (11). Upon request, advice from the State Ethics Commission can be redacted to protect the identities of those involved. The State Act also provides certain protection from penalties for those who rely on a non-confidential Solicitor’s opinion. 65 Pa.C.S. §1109(g) (“A public official of a political subdivision who acts in good faith reliance on a written, nonconfidential opinion of the solicitor of the political subdivision . . . shall not be subject to the penalties provided for in [certain provisions of the Act].”). Since the Board of Ethics is not “the solicitor” of the City, requestors have the option to obtain an opinion from the Law Department as to the application of the State Ethics Act. *See* Charter §4-1100 (giving Law Department concurrent jurisdiction with the Board regarding ethics matters under State law.) Any such request, to receive the protection, could not be confidential. For these reasons, you may choose to seek advice about the State Ethics Act directly from the State Ethics Commission or from the Law Department.

Appearance of Impropriety

In a recent opinion, the Board of Ethics explained appearances of impropriety as follows:

Situations in which there is no conflict of interest or prohibited gift under the letter of the law can nevertheless create appearances of impropriety. Although the ethics laws do not prohibit appearances of impropriety, and an enforcement action could not be brought based on an appearance of impropriety, such appearances can be damaging to public confidence in government. There is no formal definition of "appearance of impropriety" in the laws under which this Board has jurisdiction, but generally there is an appearance issue any time there is a possible public perception that improper influence was being exerted upon or by a public official or that a public official's personal interest in a matter is so substantial that it would be difficult to resist the temptation to act in favor of that interest.

Formal Opinion 2009-001 at 4. *See also* Nonpublic Advice of Counsel GC-2009-503 at 9; Nonpublic Advice of Counsel GC-2009-509 at 6-7; Nonpublic Advice of Counsel GC-2009-512 at 8-9. All of the cited Advices of Counsel advised measures to reduce the appearance issue, in matters where there was a possible public perception of improper influence.³ In this regard, the Police Advisory Commission may wish to be sensitive to any possible public perception that a recommendation relating to the overall management of the Bureau of Internal Affairs could be influenced by William Johnson's family relationship with the head of that Bureau.

However, based on the facts that you have provided, it appears that, in most cases, William Johnson would have little, if any, influence in any such recommendation. As noted above, you have advised that the duties of the Executive Director relating to investigations are procedural, and the investigations are carried out by investigators on the Commission's staff. It was further noted that that PAC investigator Will Michael is currently being trained to take over the position of Chief Investigator for the Commission, and that in the interim, William Johnson and/or Deputy Executive Director Kelvyn Anderson may review complaints filed with the Commission, but the investigation of complaints is the responsibility of the Commission's investigators. Nevertheless, I would advise that, in order to reduce any appearance of impropriety, William Johnson should, as soon as possible, turn over to other staffers the responsibility for reviewing complaints filed with the Commission.

³ The Board of Ethics also advised on appearance issues in Formal Opinion 2009-006 at 9-10, Nonpublic Formal Opinion 2009-005 at 3-4, Nonpublic Formal Opinion 2009-004 at 11, and Nonpublic Formal Opinion 2009-003 at 8 n.5.

With the above recommendation, I do not conclude that there is an appearance of impropriety that is inherent in the fact that the Executive Director of the Police Advisory Commission and the Deputy Police Commissioner who is the head of the Internal Affairs Division of the Police Department are brothers. Should an unusual matter arise where William Johnson is faced with taking official action on a Police Advisory Commission matter that would significantly affect the reputation, budget, or functioning of the Internal Affairs Division, specific analysis of that particular situation may be required. In such a case, William Johnson or the Police Advisory Commission may wish to seek specific advice on that matter from the Board of Ethics.

Conclusion

You have asked for public advice as to whether there is an impermissible conflict of interest arising out of the fact that the Executive Director of the Police Advisory Commission (William Johnson) is the brother of the official in the Police Department (Stephen Johnson) who is head of the Department's Internal Affairs Division and is responsible for the investigation of alleged police misconduct.

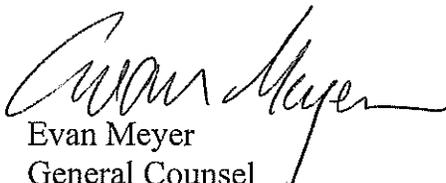
Based on the facts that you have provided, you are advised as to the following:

1. This Advice is issued to you as representative for the Police Advisory Commission, which is requesting advice concerning the conduct of its employee, William Johnson.
2. This Advice concerns the conduct of William Johnson only; you have not asked to receive, and are not entitled to, advice as to the conduct of Stephen Johnson.
3. This Advice concerns future conduct only, and does not address past behavior.
4. A brother is an applicable relation under Code Section 20-607(b). Accordingly, should the Commission investigate a complaint concerning the conduct of Stephen Johnson, William Johnson must publicly disclose the financial interest of his brother and disqualify himself from participating in that matter as Executive Director of the Commission.
5. Disclosure and disqualification must occur as required under Code Section 20-608. For confidential matters, the advice of this Board should be sought as to how to provide public disclosure.

6. The conflict of interest provision of the State Ethics Act applies in the same way. However, this advisory is not binding on the State Ethics Commission, and you may wish to seek a ruling from the Law Department or the State Ethics Commission.
7. An investigation or other matter not involving Stephen Johnson's personal conduct would not require disclosure and disqualification under either the Code or the State Ethics Act.
8. The Board of Ethics occasionally advises on "the appearance of impropriety." The ethics laws do not prohibit appearances of impropriety, and an enforcement action could not be brought based on an appearance of impropriety, but such appearances can be damaging to public confidence in government. There is not an appearance of impropriety that is inherent in the fact that the Executive Director of the Police Advisory Commission and the Deputy Police Commissioner who is the head of the Internal Affairs Division of the Police Department are brothers.
9. If a particular Police Advisory Commission matter should arise where a possible public perception could be that a Commission decision may be influenced by this family relationship, the advice of this Board may be sought, upon providing the particular details of the matter.

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