



# CITY OF PHILADELPHIA

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## **Philadelphia Board of Ethics Nonpublic Advice of Counsel GC-2010-509**

June 21, 2010

### **Re: Potential Conflict / Ownership of Day Care Center**

A City employee requested nonpublic advice as to whether a prohibited conflict of interest would exist in certain circumstances, if he were to become the owner of a for-profit day care center that would be the recipient of State-subsidized payments on behalf of eligible parents.

The requestor advised that he has no connection with and does not know anyone who is responsible for making decisions about the parental subsidies and how they are administered nor does he have a connection with anyone who regulates or licenses day care centers. The requestor advised that the center will be for profit and will have another staff member responsible for dealing with the City as it relates to the subsidy and all other issues.

The requestor advised that the subsidy at issue is available in Philadelphia for working families through Child Care Information Services ("CCIS"). It is our understanding that CCIS agencies are nonprofit agencies funded by the Pennsylvania Department of Public Welfare. It is unclear whether CCIS has any interaction with the City. You advise that to qualify for the subsidy, a parent must work at least 20 hours per week or work at least 10 hours per week and go to school/ training at least 10 hours per week, receive an income within certain guidelines and live in Philadelphia. There are no

services the day-care center would provide to the City in exchange for these services except to make potential clients aware of the subsidy if necessary.

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 have been provided to the Board of Ethics. We do not conduct an independent inquiry into the facts. Further, we can only issue advice as to future conduct. 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 the requestor may be concerned about, he was encouraged to contact the Board for specific advice on the application of the ethics laws to those particular facts.

There is no general requirement that City officers or employees avoid all other financial interests while serving the City, provided that outside work is not performed on the City's time or using City materials or equipment, and conflicts of interest are avoided. In that regard, the Philadelphia Home Rule Charter, the Philadelphia Code, and the Commonwealth's Ethics Act specify certain conduct which is prohibited for a City officer or employee. This advisory will discuss the restrictions of each of those three bodies of law in the following paragraphs, in addition to disclosure and disqualification requirements.

### **Home Rule Charter**

Section 10-102 of the Charter prohibits certain compensated City officers and employees from benefiting from, or having a direct or indirect interest in, certain City contracts, even if they had no official connection with the contract. However, the requestor advised that there is no City contract involved in this matter, so there is no issue under this Charter provision. The fact that local day care centers are licensed by the City does not implicate Section 10-102.

### **Philadelphia Code Representation Provision**

The Philadelphia Ethics Code imposes certain restrictions on City officers or employees representing others. Code Section 20-602(1) would prohibit a City officer or employee from engaging in outside employment (even if unpaid) that involved

representing another person, directly or indirectly, as that person's agent or attorney in any transaction involving the City. The term "represent," in the context of Code Section 20-602, is narrow, since the provision is qualified by the phrase, "as agent or attorney." (In contrast, "represent" in the post-employment provision of the State Ethics Act, not applicable here, is interpreted much more broadly.) Accordingly, the requestor was advised that, so long as he is employed by the City, any representation of his day care center in any City matter, including that involving City offices other than the office by which he is employed, such as applying to the City for a license to operate as a day care center, must occur without the requestor's active involvement.<sup>1</sup>

In addition, Section 20-602(5) applies a restriction, similar to that in Section 20-602(1), to the entire outside entity of which the City officer is a member, so that anyone in that entity would be prohibited from the same representation ("as agent or attorney") but only in a matter in which the requestor, as a City officer, has "the responsibility for decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise determining such matters." Unlike §20-602(1), §20-602(5) allows for the City official to avoid the prohibition by making the public disclosure and disqualification provided in §20-608.<sup>2</sup> Accordingly, in any City matter potentially involving the

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<sup>1</sup> However, if the license is issued to the requestor personally as the owner, the Code provision has an exception that would permit him to represent himself. Code § 20-602(4).

<sup>2</sup> Section 20-608(1)(c) of the Philadelphia Code spells out the precise procedure for disclosure, which involves writing a letter that contains the following elements:

1. That the purpose of the letter is to publicly disclose a potential conflict of interest;
2. Your public position and description of duties relevant to the conflict, if not obvious;
3. Your private position or financial interest (owner of the day care center) that presents the conflict;
4. A statement of how your public duties may intersect with your private interest or that of the day center (if not obvious from 2 & 3 above); and
5. Your intention to disqualify yourself from any official action in matters affecting the private interest (should indicate 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 head of your City department; (2) the Ethics Board, c/o Evan Meyer, General Counsel, Packard Building, 1441 Sansom Street, 2<sup>nd</sup> 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.

requestor's office and the financial interests<sup>3</sup> of his day care center, he should follow the mandated procedure.

### **Conflict of Interest Provision—Philadelphia Code**

The Philadelphia Ethics Code prohibits City officers and employees from having conflicts of interest that arise from either having a personal financial interest or from being a member of a business or other entity that has a financial interest in their official decisions. As to the personal interest, Code Section 20-607(a) provides:

- (a) Unless there is public disclosure and disqualification as provided for in Section 20-608 hereof, no member of Council, or other City officer or employee shall be financially interested in any legislation including ordinances and resolutions, award, contract, lease, case, claim, decision, decree or judgment made by him in his official capacity . . .

This provision does not prohibit an employee from having an outside source of income; it only prohibits one from taking official action in his City job that affects that income. Accordingly, the requestor would be required to publicly disclose his interest and disqualify himself from such official action, as provided in Code §20-608. See note 2. Participation that he should avoid would include not only final decisions, but also any preliminary discussion, review, or action.

As to the interest through another 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

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<sup>3</sup> See Nonpublic Formal Opinion No. 2009-003 on the definition of "financial interest." In cases where the financial interest is not substantial or direct, the requestor may wish to seek further advice from the Board of Ethics.

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.

Code Section 20-607(b)(emphasis added). Thus, an action by the requestor that affected any member of the day care center, or the center itself, would be restricted by this provision, if he is a “member” of the center. As an owner, the requestor was advised that he would be a “member” of the center. Thus, even if he were realizing no income from the center, if a City matter affected the center, he would still have a conflict, and disclosure and disqualification, as noted in footnote 2, would be required.

### **State Ethics Act**

The State Ethics Act, 65 Pa.C.S. §1101 et seq., applies to the requestor. Section 1103(a) 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.

...

“Financial interest.” Any financial interest in a legal entity engaged in business for profit which comprises more than 5% of the equity of the business or more than 5% of the economic interest in indebtedness.

65 Pa.C.S. §1102.

Thus, the requestor may not take official action, as an employee of the City, that has an economic impact on himself or on the day care as a “business with which you are associated.” This is essentially the same requirement as under the City Code conflict provision, as discussed above.

Accordingly, the requestor was advised that it is likely that the State Ethics Commission would interpret the State Ethics Act to require the requestor to abstain fully from any participation<sup>4</sup> in any City official action that would have a financial impact on a day care center owned by him. Moreover, he would be required to publicly disclose any

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<sup>4</sup> “Official action” is not limited to final votes or determinations. The State Ethics Commission has said many times that the “use of authority of office” that constitutes a conflict of interest “includes more than mere voting; for example, it includes discussing, conferring with others, and lobbying for a particular result.” *See, e.g., Confidential Opinion No. 07-018, at page 6.*

such conflict of interest. An adequate process for such disclosure would be to follow the procedure outlined in footnote 2, above.

Nevertheless, the State Ethics Commission is the ultimate arbiter of interpretations of the Act. Please note that the Act provides that: "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]." 65 Pa.C.S. §1109(g). *See* Charter §4-1100 (giving Law Department concurrent jurisdiction with the Board regarding ethics matters under State law). 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. Any such request, to receive the protection, could not be confidential, and will only protect the subject from the criminal penalties in subsections 1109(a) and (b) and from treble damages under subsection 1109(c) of the Act. (A violation of the Ethics Act can still be found, and restitution can still be ordered.)

### **Conclusion**

The requestor asked for advice concerning the application of the Public Integrity Laws as to his position as a City employee, in the event that he should become an owner of a local for-profit day care center that may receive subsidized payments. Based on the facts that we were provided, the requestor was advised as to the following:

1. As the requestor has not identified any applicable City contract, there is no issue under Charter Section 10-102.
2. Under Code Section 20-602(1), the requestor may not represent, as agent or attorney, the day care center or any of its clients in a transaction involving the City.
3. Under Code Section 20-602(5), another member of the requestor's day care center may represent, as agent or attorney, the day care center or any of its clients in a transaction involving the City, provided that the requestor disclose the conflict and disqualify himself as provided in Code Section 20-608.
4. If the City should consider any official action that could impact on either the requestor's personal financial interest in the day care center or the financial interests of the center itself, and if that official action might involve his work for the City, both the City Code and the State Ethics Act would require that the requestor publicly disclose the financial interest and disqualify himself from taking action for the City in the matter.

5. Remember that for any issues under the State Ethics Act, the guidance in this Advice does not bind the State Ethics Commission, and the requestor may wish to seek the advice of the Commission or a nonconfidential opinion from the Law Department.

If the requestor has any additional facts to provide, we will be happy to consider if they change any of the conclusions in this opinion. Since the requestor requested nonpublic advice from the Board of Ethics, we will not make this letter public, but we will be required to make public a revised version, edited to conceal the requestor's identity, as required by Code Section 20-606(1)(d)(iii).

Evan Meyer  
General Counsel

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