



# CITY OF PHILADELPHIA

BOARD OF ETHICS  
ONE PARKWAY BUILDING  
1515 Arch Street  
18<sup>TH</sup> Floor  
Philadelphia, PA 19102-1504  
(215) 686 – 9450  
FAX 686 – 9453  
Evan Meyer  
General Counsel

## Philadelphia Board of Ethics Nonpublic General Counsel Opinion GC-2012-516

December 31, 2012

### Re: Clarification of Prior Post-employment Advisory

The former City employee who had been issued a post-employment advisory, Nonpublic Advice of Counsel GC-2012-503 of March 30, 2012, requested clarification as to the application of the Public Integrity Laws to more specific job-seeking activities.

As noted in the prior advisory, the requestor advised that he had a varied employment history over the past 12-13 years, including periods as a City employee and positions not as a City employee but in a position in a City department that was “funded by [the department] through [a nonprofit].” Based on the facts provided, it was our understanding that the requestor was, in those latter positions, considered to be an employee of the nonprofit, providing services to the City, pursuant to a contract between the nonprofit and the City, and not a City employee.

In the most recent request, the former employee advised that, in response to an employment application, a certain nonprofit organization<sup>1</sup> (“the nonprofit”) had offered to meet with him to discuss “contract/project opportunities.” The requestor advised that the nonprofit has a contract with his former City department.

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<sup>1</sup> This is a different nonprofit from the one that had previously employed the requestor.

The requestor asked the following specific questions:

1. What, if any limitations do I have in pursuing contract opportunities with the nonprofit in light of my employment history?
2. What if any limitations do I have in pursuing contracting opportunities with other providers that have contracts with [my former City department]?
3. Are there any limitations to the issues or scope of work that I may be involved in? For example, am I prohibited from doing work in the same practice areas as those I worked in for the City?

The issue is how the post-employment rules would apply to the requestor for various periods after his separation from the City, if he were to accept employment with the nonprofit or possibly other City contractors. As noted in our prior advice, there are three different ethics laws that relate to post-employment restrictions, two in the City Code and one in the State Ethics Act.

#### **A. One-Year Limitation On Representing Others—State Ethics Act**

Section 1103(g) of the State Ethics Act, 65 Pa.C.S. §1103(g), restricts “post-employment” activities as follows:

No former public official or public employee shall represent a person, with promised or actual compensation, on any matter before the governmental body with which he has been associated for one year after he leaves that body.

The key words in that provision are defined in Section 1102 of the Act, 65 Pa.C.S. §1102. “Represent” is defined as follows:

To act on behalf of any other person in any activity which includes, but is not limited to, the following: personal appearances, negotiations, lobbying and submitting bid or contract proposals which are signed by or contain the name of a former public official or public employee.

“Governmental body with which a public official or employee is or has been associated” is defined as follows:

The governmental body within State government or a political subdivision by which the public official or employee is or has been

employed or to which the public official or employee is or has been appointed or elected and subdivisions and offices within that governmental body.

Based on opinions of the State Ethics Commission, the requestor was advised that it is unclear whether his “governmental body” would be his former City department or the entire City government, and whether it might also include his former nonprofit. Accordingly, the requestor was advised that he may not for one year after the date he separated from City employment (last day on the payroll) represent anyone—himself, any entity that employs him, or any of its clients—before his “former governmental body.” Please note the broad definition of “represent,” which includes having one’s name appear on a bid or contract proposal submitted to the former governmental body or otherwise making known to that body one’s work for the contractor.

In short, it is not “practice areas” that the State Ethics Act restricts, but “representation.” Thus, in addition to the questions of whether the Act applies to the requestor, what dates apply, and what his “former governmental body” is, the main question for any employment with the nonprofit would appear to be whether the requestor’s employment at the nonprofit would require him to contact the City or to have his name appear on certain documents provided to the City. Only the State Ethics Commission can provide comprehensive and controlling advice on these points.<sup>2</sup>

For specific guidance on the State Ethics Act, the requestor was advised to seek either a confidential or a non-confidential advisory opinion issued by the State Ethics Commission, which would provide him with a complete defense in any enforcement proceeding initiated by the Commission and is evidence of good faith conduct in any other civil or criminal proceeding, provided that he disclose truthfully all the material facts and act in reliance on the Advice. *See*, 65 Pa.C.S. §1107 (10), (11). The State Act would also provide a requestor protection from certain penalties if he should seek and rely on non-confidential advice from the City Solicitor. *See* 65 Pa.C.S. §1109(g).

A request for advice from the State Ethics Commission should be directed to:

State Ethics Commission  
Attention: Legal Division

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<sup>2</sup> Attached is a post-employment Advice of Counsel (No. 12-558) of the State Ethics Commission as a representative advisory, but this is not a substitute for obtaining personal advice from the Commission on one’s particular facts.

Room 309 Finance Building  
P.O. Box 11470  
Harrisburg, Pa 17108-1470

**B. Permanent Limitation On Assistance With Particular Matters—City Code**

Section 20-603(1) of the City Ethics Code states:

No person who has served for compensation as a member of Council, City officer or employee shall assist, at any time subsequent to his City service or employment, another person, with or without compensation, in any transaction involving the City in which he at any time participated during his City service or employment.

The “transactions” to which this provision applies are defined broadly in Section 20-601(4) to include matters (i) which are or will be the subject of City action; (ii) to which the City is or will be a party; or (iii) in which the City has a direct proprietary interest. This provision is not a one-year prohibition, like the State Ethics Act provision, but applies “at any time” after a person leaves City employ. However, it is much narrower in scope than the State Ethics Act provision, since it only applies to matters in which the employee “participated” during City employ. This has been interpreted to mean matters in which the employee exercised discretion (and not merely, for example, responded to a routine request for information). Thus, if during the requestor’s service with his former City department, he took official action on any particular transaction concerning which a future employer should contact the City at any time henceforth, he may not assist that future employer in the matter relating to that transaction. On the other hand, we interpret “matter” to mean only the particular issue or issues on which decisions were made by the City with the requestor’s involvement, not every issue related to that project that may arise after he separated from City service.

By referring to matters in which the requestor “participated,” the provision means official City actions that he was involved in as part of his duties, in a way that is more than merely ministerial (such as by handing a blank form to someone). In other words, he made a recommendation, did some research, participated in a meeting, analyzed some data, drafted a document, or the like. “Transaction” generally means any “proceeding, application, submission, request for a ruling or other determination, contract, lease, claim, case, award, decision, decree, judgment or legislation” and would include the creation of any policy, regulation, or grant of a permit or license, creation of any right or responsibility, or assessment of any fee. If it can be said that the City (or an official of the City) officially acted, that is likely a ‘transaction.’

However, even if the requestor participated in a transaction while he was a City employee, the rule of Code Section 20-603 only permanently prohibits him (assuming that the one-year rule and two-year rule don't apply) from assisting someone in that same transaction, which means that the transaction must still be "live" in some way. For example, if—as a City employee—he worked on an administrative matter involving a particular citizen, that citizen later challenged the ruling, and the same matter is still in the courts, the requestor could not now assist the citizen in that particular matter, if that citizen, or an agency helping her, asked for the requestor's help.

However, the fact that the requestor generally worked on such matters for the City would not prohibit him (under Code Sect. 20-603) from ever again working on any such matters, so long as they were different specific matters from the ones he worked on for the City.

### **C. Two Year Limitation On Financial Interests—City Code**

Section 20-607(c) of the Code states:

No member of Council or other City officer or employee shall become financially interested, subsequent to final action, in any legislation including ordinances and resolutions, award, contract, lease, case, claim, decision, decree or judgment made by him in his official capacity, during his term of office or employment and until two (2) years have elapsed since the expiration of service or employment in the term of office of said member of Council or other City officer or employee.

This prohibition shall apply so as to prevent a parent, spouse, child, brother, sister or like relative-in-law or any person, firm, partnership, corporation, business association, trustee or straw party from becoming financially interested for or on behalf of a member of City Council, City officer or employee within said two (2) year period.

In short, this provision prohibits a City employee for two years after leaving City employ from acquiring a financial interest in official decisions he made while in City employ. Thus, if the requestor had, for example, been officially involved in awarding, renewing, amending, or administering a City contract with an outside entity, he would be prohibited for two years from being employed by and receiving any compensation from that entity, if such compensation was derived from revenue received under that

City action affecting the contract.

With regard to the requestor's particular questions as to the nonprofit, he advised that, although the contract between his former department and the nonprofit was under his office, he "did not directly manage their contract, but met with them approximately four times to discuss concerns the department had . . . and how to improve service delivery." Based on that representation, we concluded that the requestor's employment by the nonprofit would not constitute a financial interest in an "award, contract, lease, case, claim, decision, decree or judgment made by him in his official capacity." Thus, such employment before two years after separation would not violate Code Section 20-607(c).

As to other potential employers that may have contracts with the requestor's former department, it again is a question of the applicable facts as to whether, as an employee of that department, he was officially involved in awarding, renewing, amending, or administering the City contract with that employer. If he were so involved, Code Section 20-607(c) would prohibit his employment with that contractor until after two years from separation from City employment.

#### **D. Summary**

In summary, based on the facts that the requestor provided, he was advised as to the following conclusions:

(1) The State Ethics Act likely applies to the requestor. Under the Act, he would be prohibited for one year after he left applicable employment (as interpreted by the State Ethics Commission) from representing anyone, including himself and any future employer (or any client of himself or any future employer), before his former governmental employer. Please note the broad definition of "represent," which includes having your name appear on a bid, contract proposal, engineering report, invoice, or other official document submitted to your former governmental body.

(2) Please note that this Advice is not binding on the State Ethics Commission, which has authority to interpret the State Ethics Act. Anyone with questions regarding the advice herein as to the State Ethics Act is advised to contact the State Ethics Commission.

(3) Under the City Code, the requestor may never in the future assist anyone, such as a future employer or one of its clients, in a transaction involving the City on a particular issue or issues on which decisions were made by the requestor's former City department with his involvement. See the explanation and example on

page 5 above.

(6) Under the City Code, the requestor may not for two years after he left the employ of the City acquire a financial interest in any official decision he made while in City employ. As to working for a City contractor, "official decision" involves matters affecting the award, significant terms, or financial details of the contract.

The requestor was advised to feel free to request further advice from the Board of Ethics, or the State Ethics Commission, if he has additional facts to provide. Please also note the option of requesting advice of the City Solicitor (as to the State Act only), as discussed on page 3 above.

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 may be concerned about, you are encouraged to contact us for specific advice on the application of the ethics laws to those particular facts.

Since the requestor requested nonpublic advice from the Board of Ethics, we will not make the original letter public, but we will be required to make public this revised version, edited to conceal facts that are reasonably likely to identify the requestor, as required by Code Section 20-606(1)(d)(iii) and Board Regulation No. 4.

Evan Meyer  
General Counsel

Attachment: State Ethics Commission Advice of Counsel 12-558  
cc: J. Shane Creamer, Jr., Esq., Executive Director

# ADVICE OF COUNSEL

August 21, 2012

Brian Abernathy  
1522 S. 12<sup>th</sup> Street  
Philadelphia, PA 19147

12-558

Dear Mr. Abernathy:

This responds to your letters of July 3, 2012, and July 16, 2012, by which you requested an advisory from the Pennsylvania State Ethics Commission.

**Issue:** Whether the Public Official and Employee Ethics Act ("Ethics Act"), 65 Pa.C.S. § 1101 *et seq.*, would impose any restrictions upon employment of the Chief of Staff and Deputy Managing Director to the Managing Director of the City of Philadelphia ("City") following termination of employment with the City.

**Facts:** You request an advisory from the Pennsylvania State Ethics Commission regarding the post-employment restrictions of the Ethics Act. You have submitted facts that may be fairly summarized as follows.

You are currently employed as the Chief of Staff and Deputy Managing Director to the Managing Director of the City. You have submitted copies of a position description for the position of Chief of Staff, Managing Director's Office, and an organizational chart for the City, both of which documents are incorporated herein by reference.

You state that pursuant to the Philadelphia Home Rule Charter ("Charter"), the Managing Director is the City's Chief Operating Officer. It is administratively noted that the following provisions of the Charter relating to the Managing Director are pertinent to the instant matter:

**§ 3.3-206. Other Department Heads, with the Approval of the Mayor.**

(a) The Managing Director shall appoint the Police Commissioner, the Health Commissioner, The Fire Commissioner, the Street Commissioner, the Recreation Commissioner, the Welfare Commissioner, the Water Commissioner, the Commissioner of Public Property, the Commissioner of Licenses and Inspections, and the Commissioner of Records;....

**§ 5.5-100. Supervisory Powers.**

The Managing Director shall exercise supervision over all activities of those departments whose heads he appoints and the boards and commissions connected with such departments and shall be the contact officer between the Mayor and such departments, boards and commissions.

Philadelphia Home Rule Charter, §§ 3.3-206, 5.5-100.

You state that in 2008, Mayor Michael A. Nutter ("Mayor Nutter") restructured the City government, maintaining the Managing Director title but assigning many of the powers of the Office of the Managing Director to Deputy Mayors. You state that traditionally, operational Departments like the Department of Streets, the Department of Licenses and Inspections, and the Water Department would report to the Managing Director, but the Office of the Managing Director now has no direct authority over such Departments due to the reduction of the Managing Director's role by Mayor Nutter. You additionally state that the Departments of Public Property, Records, Fleet, Human Resources, Information and Technology, and Procurement report directly to the Office of the Managing Director.

You state that as the Managing Director's Chief of Staff, your responsibilities include: (1) managing the administrative staff and budget; (2) scheduling and planning for the Managing Director; (3) providing personal support for the Managing Director; (4) serving as gatekeeper for the Managing Director; (5) supervising the office's project portfolio; and (6) managing relationships with other City Departments and City Council. You support the Departments of Public Property, Records, Fleet, Human Resources, Information and Technology, and Procurement and have influence on their operations, but state that you do not have direct control or authority over them.

You serve as the Managing Director's appointee, with voting power, to the Philadelphia City Planning Commission ("City Planning Commission") and the Philadelphia Housing Development Corporation ("PHDC"). You attend meetings of the Board of the Philadelphia Industrial Development Corporation ("PIDC") on behalf of the Managing Director, but you do not participate in decisions or have voting power. You also represent the Office of the Managing Director on a number of issues before City Council.

You seek guidance as to whether the Ethics Act would impose any restrictions upon you if you would terminate your employment with the City and accept employment with a real estate developer (the "Developer"). In particular, you pose the following questions:

- (1) Whether you would be permitted to represent the Developer before the City Planning Commission;
- (2) Whether you would be permitted to represent the Developer before the City Commerce Director/Deputy Mayor for Planning and Economic Development, who serves as a Member of the City Planning Commission;
- (3) Whether you would be permitted to represent the Developer before PIDC;
- (4) Whether you would be permitted to represent the Developer before operational Departments that presently do not directly report to the Office of the Managing Director;
- (5) Whether you would be permitted to represent the Developer before Departments that report directly to the Office of the Managing Director; and

- (6) Whether you would be permitted to advocate for the Developer before City Council.

**Discussion:** It is initially noted that pursuant to Sections 1107(10) and 1107(11) of the Ethics Act, 65 Pa.C.S. §§ 1107(10), (11), advisories are issued to the requester based upon the facts that the requester has submitted. In issuing the advisory based upon the facts that the requester has submitted, the Commission does not engage in an independent investigation of the facts, nor does it speculate as to facts that have not been submitted. It is the burden of the requester to truthfully disclose all of the material facts relevant to the inquiry. 65 Pa.C.S. §§ 1107(10), (11). An advisory only affords a defense to the extent the requester has truthfully disclosed all of the material facts.

As the Chief of Staff and Deputy Managing Director to the Managing Director of the City, you would be considered a "public employee" subject to the Ethics Act and the Regulations of the State Ethics Commission. See, 65 Pa.C.S. § 1102; 51 Pa. Code § 11.1. This conclusion is based upon the submitted facts, which when reviewed on an objective basis, indicate clearly that the power exists to take or recommend official action of a non-ministerial nature with respect to one or more of the following: contracting; procurement; administering or monitoring grants or subsidies; planning or zoning; inspecting; licensing; regulating; auditing; or other activity(ies) where the economic impact is greater than de minimis on the interests of another person.

Consequently, upon termination of employment with the City, you would become a "former public employee" subject to Section 1103(g) of the Ethics Act.

While Section 1103(g) does not prohibit a former public official/public employee from accepting a position of employment, it does restrict the former public official/public employee with regard to "representing" a "person" before "the governmental body with which he has been associated":

#### **§ 1103. Restricted activities**

**(g) Former official or employee.--**No former public official or public employee shall represent a person, with promised or actual compensation, on any matter before the governmental body with which he has been associated for one year after he leaves that body.

65 Pa.C.S. § 1103(g) (Emphasis added).

The terms "represent," "person," and "governmental body with which a public official or public employee is or has been associated" are specifically defined in the Ethics Act as follows:

#### **§ 1102. Definitions**

**"Represent."** To act on behalf of any other person in any activity which includes, but is not limited to, the following: personal appearances, negotiations, lobbying and submitting bid or contract proposals which are signed by or contain the name of a former public official or public employee.

**"Person."** A business, governmental body, individual, corporation, union, association, firm, partnership, committee, club or other organization or group of persons.

**"Governmental body with which a public official or public employee is or has been associated."** The governmental body within State government or a political subdivision by which the public official or employee is or has been employed or to which the public official or employee is or has been appointed or elected and subdivisions and offices within that governmental body.

65 Pa.C.S. § 1102.

The term "person" is very broadly defined. It includes, inter alia, corporations and other businesses. It also includes the former public official/public employee himself, Confidential Opinion, 93-005, as well as a new governmental employer. Ledebur, Opinion 95-007.

The term "represent" is also broadly defined to prohibit acting on behalf of any person in any activity. Examples of prohibited representation include: (1) personal appearances before the former governmental body or bodies; (2) attempts to influence; (3) submission of bid or contract proposals which are signed by or contain the name of the former public official/public employee; (4) participating in any matters before the former governmental body as to acting on behalf of a person; and (5) lobbying. Popovich, Opinion 89-005.

Listing one's name as the person who will provide technical assistance on a proposal, document, or bid, if submitted to or reviewed by the former governmental body, constitutes an attempt to influence the former governmental body. Section 1103(g) also generally prohibits the inclusion of the name of a former public official/public employee on invoices submitted by his new employer to the former governmental body, even if the invoices pertain to a contract that existed prior to termination of service with such governmental body. Shay, Opinion 91-012. However, if such a pre-existing contract does not involve the unit where a former public employee worked, the name of the former public employee may appear on routine invoices if required by the regulations of the agency to which the billing is being submitted. Abrams/Webster, Opinion 95-011.

A former public official/public employee may assist in the preparation of any documents presented to his former governmental body. However, the former public official/public employee may not be identified on documents submitted to the former governmental body. The former public official/public employee may also counsel any person regarding that person's appearance before his former governmental body. Once again, however, the activity in this respect should not be revealed to the former governmental body. The Ethics Act would not prohibit or preclude making general informational inquiries to the former governmental body to secure information which is available to the general public, but this must not be done in an effort to indirectly influence the former governmental body or to otherwise make known to that body the representation of, or work for, the new employer.

Section 1103(g) only restricts the former public official/public employee with regard to representation before his former governmental body. The former public official/public employee is not restricted as to representation before other agencies or entities. However, the "governmental body with which a public official/public employee is or has been associated" is not limited to the particular subdivision of the agency or other governmental body where the public official/public employee had influence or control but extends to the entire body. See, Legislative Journal of House, 1989 Session, No. 15 at 290, 291; Sirolli, Opinion 90-006; Sharp, Opinion 90-009-R.

Based upon the submitted and administratively noted facts, you are advised that the governmental body with which you would be deemed to have been associated upon

termination of employment with the City, hereinafter collectively referred to as your "former governmental body," would consist of: (1) the Office of the Managing Director; (2) all City Departments over which the Managing Director has authority pursuant to the Charter or otherwise; (3) the City Planning Commission; and (4) PHDC.

To the extent there are factual or legal issues as to which City Departments fall within the authority of the Managing Director, this advisory is not a vehicle to resolve such issues. However, the submitted fact that the City Commerce Director also serves on the City Planning Commission would not be sufficient, in and of itself, to include the City Commerce Director within your former governmental body.

For the first year following termination of your employment with the City, Section 1103(g) of the Ethics Act would apply and restrict "representation" of a "person" before your "former governmental body" as set forth above.

In response to your specific questions, you are advised that during the first year following termination of your employment with the City, Section 1103(g) of the Ethics Act would prohibit you from representing the Developer before the City Planning Commission, City Department(s) that fall under the authority of the Office of the Managing Director, or any other entity(ies) that would be included within your "former governmental body" as delineated above. Section 1103(g) of the Ethics Act would not prohibit you from representing the Developer before entity(ies) that would not be included within your former governmental body as long as in performing such activity(ies), you would not engage in prohibited representation before your "former governmental body" as set forth above.

Based upon the facts that have been submitted, this Advice has addressed the applicability of Section 1103(g) only. It is expressly assumed that there has been no use of authority of office or employment, or confidential information received by being in the public position, for a private pecuniary benefit as prohibited by Section 1103(a) of the Ethics Act. Further, you are advised that Sections 1103(b) and 1103(c) of the Ethics Act provide in part that no person shall offer or give to a public official/public employee and no public official/public employee shall solicit or accept anything of monetary value based upon the understanding that the vote, official action, or judgment of the public official/public employee would be influenced thereby. Reference is made to these provisions of the law not to imply that there has been or will be any transgression thereof but merely to provide a complete response to the question presented.

Lastly, the propriety of the proposed conduct has only been addressed under the Ethics Act; the applicability of any other statute, code, ordinance, regulation, or other code of conduct other than the Ethics Act has not been considered in that they do not involve an interpretation of the Ethics Act.

**Conclusion:** As the Chief of Staff and Deputy Managing Director to the Managing Director of the City of Philadelphia ("City"), you would be considered a "public employee" subject to the Public Official and Employee Ethics Act ("Ethics Act"), 65 Pa.C.S. § 1101 *et seq.*, and the Regulations of the State Ethics Commission, 51 Pa. Code § 11.1 *et seq.* Upon termination of your employment with the City, you would become a "former public employee" subject to Section 1103(g) of the Ethics Act. Based upon the submitted and administratively noted facts, the governmental body with which you would be deemed to have been associated upon termination of employment with the City, hereinafter collectively referred to as your "former governmental body," would consist of: (1) the Office of the Managing Director; (2) all City Departments over which the Managing Director has authority pursuant to the Philadelphia Home Rule Charter or otherwise; (3) the Philadelphia City Planning Commission; and (4) the Philadelphia Housing Development Corporation. For the first year following termination of your employment with the City, Section 1103(g) of the Ethics Act would apply and restrict "representation" of a "person" before your "former governmental body" as delineated

above. The restrictions as to representation outlined above must be followed. Lastly, the propriety of the proposed conduct has only been addressed under the Ethics Act.

Pursuant to Section 1107(11) of the Ethics Act, an Advice is a complete defense in any enforcement proceeding initiated by the Commission, and evidence of good faith conduct in any other civil or criminal proceeding, provided the requester has disclosed truthfully all the material facts and committed the acts complained of in reliance on the Advice given.

This letter is a public record and will be made available as such.

***Finally, if you disagree with this Advice or if you have any reason to challenge same, you may appeal the Advice to the full Commission. A personal appearance before the Commission will be scheduled and a formal Opinion will be issued by the Commission.***

***Any such appeal must be in writing and must be actually received at the Commission within thirty (30) days of the date of this Advice pursuant to 51 Pa. Code § 13.2(h). The appeal may be received at the Commission by hand delivery, United States mail, delivery service, or by FAX transmission (717-787-0806). Failure to file such an appeal at the Commission within thirty (30) days may result in the dismissal of the appeal.***

Sincerely,

Robin M. Hittie  
Chief Counsel