



City of Philadelphia Law Department

CLIENT NEWS

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ETHICS

INTRODUCTION

“What evil lurks in the hearts of men? The Shadow knows!” So goes the tag line of a popular 50’s radio program. But while the Shadow may know, the rest of us do not. So how do we prevent people who do business with the City from seeking to gain an unfair advantage by improperly influencing City officials? We have the governmental ethics laws, which forbid certain situations that could present a risk of improper influence being exerted.

Everyone understands corruption that occurs in the form of bribery or embezzlement. Bribery involves a specific understanding that a gift to a public official is given in return for a promised action by that official. Embezzlement involves a public official stealing public money. Both are crimes,

and persons committing them may be prosecuted under the Crimes Code. However, more subtle forms of impropriety may undermine public confidence in government, and are thus addressed by the ethics laws.

As the State Ethics Act says: “Public office is a public trust and ... any effort to realize personal financial gain through public office other than compensation provided by law is a violation of that trust The people have a right to be assured that the financial interests of holders of . . . public office do not conflict with the public trust.” Thus, the ethics laws forbid any situation where a public official can take official action that results in a financial benefit to that official, even if the official were somehow able to demonstrate that he or she would not be influenced in any way by that financial benefit. Addressing the

objective situation, rather than the official's subjective intent, avoids the problem of our inability to see into the hearts of men and women. There are a wide variety of ethics provisions, and in some cases, multiple provisions on different levels (federal, state, local, and employer policy). These will be discussed in this newsletter.

This newsletter will not discuss the residency requirement (Charter §3-306), the prohibition against dual office-holding (Charter §8-301), and restrictions on political activity (Charter §10-107). Also, this newsletter will not discuss in detail the "post-employment" ethics laws, those that apply after a person leaves government employment, because those laws were covered in Client News No. 2-98 (February 1, 1998).

An Important Caution

This newsletter is not intended to make you an expert on the ethics laws. The purpose is merely to acquaint you enough with the general principles that you will recognize situations, as they arise, on which there may be an ethics issue and seek further guidance. This newsletter is not legal advice, and it is not intended to be a comprehensive description of the applicable laws. It is a summary. The ethics laws are complicated, and very fact-specific, so that the way the laws apply to one person's situation may be very different from the way they apply to a nearly identical situation of another person. If in doubt, seek advice as described in Paragraph K ("Getting Advice / Reporting Violations") below.

The First Question: Does the rule apply to you?

One reason why the ethics laws are fact-specific is that not all the ethics laws apply to all City officials and employees. Thus, Mayor's Executive Orders apply only to members of the Administrative and Executive Branch of City government, that is, employees under the control of the Mayor. Executive Orders generally do not apply to City Council, other elected officials, or officials not appointed by the Mayor, such as the Personnel Director (who is appointed by the Civil Service Commission). On the other hand, even members of City advisory boards are considered to be officers of the City and therefore subject to the City Ethics Code.

The State Ethics Act applies only to "public employees" and "public officials" as defined in the Act, and that definition excludes members of advisory boards and employees who exercise no discretion or take no official action that has a financial impact on any person. Thus, certain "ministerial" employees (like secretaries) who simply follow the direction of their superiors are not subject to the State Ethics Act.

A. Conflict of Interest

Perhaps the most familiar type of ethics provision is that concerning conflicts of interest. What is a conflict of interest? Generally, it is a situation where a public official/employee has a conflict between two interests: (1) her interest in properly carrying out her

official duties as a public servant; and (2) a personal and private financial interest. A typical example is where a City employee is moonlighting, or holding down a second job outside City working hours. Moonlighting is not itself prohibited. Note, however, that in no case may City employees use City facilities, equipment, materials, or time in performing outside employment. Also, Civil Service employees are governed by a Civil Service Regulation on Outside Employment, Regulation 33.02, and individual Departments may adopt policies on outside employment.

For an example of permissible outside employment, a City social worker may work Saturdays and Sundays as a sales clerk in a department store. The social worker has an interest in doing his social work job well, and a private interest in his commissions at the store, but these interests should not conflict, because City social workers usually do not take official action affecting department stores (although one could imagine a situation where, say, the social worker would be called upon by the City to investigate a claim that the department store was employing and abusing children).

Let's take an example of a situation that may raise conflicts issues. Suppose you are a City employee responsible for ordering certain services within your department through a Miscellaneous Purchase Order (used when the amount of the order is too small to require competitive bidding). Considering a vendor with a certain relationship to you may violate Section 1103(a) of the State Ethics Act or Section

20-607 of the City Code. Here are seven examples of different vendors that might have some relationship to you, and how each one would implicate the ethics laws, if considered:

1. Yourself. You cannot award contracts to yourself or your own company. Considering yourself for the contract award would violate both the City Code and the State Ethics Act--although under both laws, you could publicly disclose the conflict and disqualify yourself from taking the official action, and then another official could award the contract. Note that this would be required even if the contract were not eventually awarded to you--just being considered for the contract is enough to raise a conflict. Moreover, the Charter prohibits you from having an interest in a City contract (see "Contract Requirements" below), so even with disqualification, you could not be awarded this contract.

2. A Private Firm, where you have a financial interest. For you award a contract to a firm that employs several people, including you, who would work on this project, would violate all three laws--the Code, the State Ethics Act, and the Charter. You have a financial interest in the contract because you would be paid out of its proceeds. Again, under the Code and State Law, you could publicly disclose the conflict and disqualify yourself from taking the official action, and then another official could award the contract. But the Charter would still prohibit your interest in the contract.

3. Private Firm where you do no work relating to the City contract. You work for the firm on your spare time, but you would not work on, or be paid out of the proceeds of, this project. The Charter would not prohibit the contract from being awarded to this firm with your official involvement, but the conflict would be prohibited by the Code and Ethics Act. Under both laws, you could publicly disclose the conflict and disqualify yourself from taking the official action, and then another official could award the contract.

4. A Firm where a family member has a financial interest. The ethics laws prohibit financial interests in close relatives. The State Act would prohibit the conflict just because the firm employs your sister even if she did not work on that contract. However, the Code would prohibit it only if the sister would be compensated under the contract. (Same principles on disqualification apply, as with above examples.)

5. In-laws. While the City Code would prohibit the action, the State Ethics Act would not (the Act does not consider in-laws to be "immediate family"). (Same principles on disqualification apply, as with above examples.)

6. Your favorite niece who is an orphan and has lived with you for years. No ethics law would prohibit awarding the contract to her (a niece is not a close enough relative under any provision). However, considerations of avoiding an "appearance of

impropriety," of "fairness in contracting," and of due process (see discussions below) may argue for disqualifying yourself from the matter.

7. A firm where you have a close association. Perhaps this firm follows a particular philosophy (opposed by other prospective vendors) that is strongly supported by a national association of which you are an officer, and employs several members of the association who are friends of yours and with whom you have worked closely on association committees. No ethics law would prohibit considering the firm under these circumstances or awarding the contract to them. Conflicts of interest are financial conflicts. A philosophical interest does not give rise to a conflict. Nor does the fact that a vendor may have contacts or friends in City government. However, as in 6 above, a very close relationship may argue for avoiding the appearance of bias.

Again, the point of this exercise is not to exhaust the possibilities, but to illustrate how a slight difference in the facts can result in a different application of the ethics laws. In general, except for applying to different classes of employees/officials and their relatives, the definition of what is a "conflict of interest" is essentially the same for the City Code and the State Ethics Act: taking official action as a City employee or using confidential government information in a way that has a private financial impact on the employee, his close relatives, or his business (or, in some cases, the business of his close relatives). Note that "taking official action" does not mean only making final

decisions, but can include preliminary discussions, designing proposals, and making recommendations.

B. Interest in Contracts

Section 10-102 of the Home Rule Charter prohibits City officers and employees from benefiting from, or having a direct or indirect interest in, a City service contract or other contracts paid out of the City Treasury. (Section 10-100 is a similar provision that applies only to members of Council.) This is not strictly a “conflict of interest” provision, and there are some important ways that it differs from conflict of interest provisions.

First, unlike conflict provisions, this one applies regardless of whether your official duties have anything to do with the contract in question. For example, if a sanitation worker is president of a computer software company, the company may not have a contract with MOIS to provide software to the City, even though as a sanitation worker, he has nothing to do with the software contract or MOIS in general. Therefore, unlike conflict situations, disclosing the conflict and disqualifying yourself does not avoid the Charter issue.

Second, unlike most conflict provisions, this one applies only to the official herself. A City official/employee’s close relatives, even spouse, may have an interest in a City contract without violating this provision, so long as the City official/employee does not have a

financial interest in the relative’s business.

A contract to purchase goods or services from the City would not violate the Charter.

This provision only covers contracts “for the purchase of property . . . or for the erection of any structure or the supplying of any services to be paid for out of the City Treasury.”

C. Representation

The City Code, in Section 20-602(1), prohibits “assist[ing] another person by representing him directly or indirectly as his agent or attorney, whether or not for compensation, in a transaction involving the City.” There are four notable things about this provision: (1) it applies even if the City employee is not being paid for the representation; (2) it cannot be avoided by disqualification; (3) there is no comparable provision in the State Ethics Act; and (4) there are a number of exceptions.

Here are the exceptions: (1) the provision does not apply to representing yourself or certain close relatives; (2) it does not apply to part-time or unpaid City employees, unless they have taken official action in the matter or the matter is pending in the employee’s City unit; and (3) it does not apply to assisting someone where providing that assistance is part of your official duties.

As an example, suppose a City employee is employed by an outside entity and has been talking to her own unit about awarding a City contract to that outside entity. When the conflict is pointed out, the employee offers to disclose the conflict and disqualify herself from being involved in the contract award. However, this does not solve the problem, because the employee has already violated Code Section 20-602(1) by representing the entity in attempting to obtain the contract. As a policy matter, the City generally does not award or enforce contracts that cannot be performed without a violation of law occurring. Another common example is that of a member of a City board or commission who wishes to represent a client before another City agency (not the member's own board). Most boards and commissions are considered "part-time," so the representation might not be prohibited.

The above provision applies only to the employee himself, but a second provision in this section, Section 20-602(5), prohibits any member of the City employee's firm from representing a person in a matter in which the City employee has authority to act. However, this provision does not prohibit the representation if the City employee discloses the conflict and disqualifies himself from acting in the matter.

D. "The Revolving Door"—Moving between Public and Private Employment

As noted above, the rules relating to the activities of former City officials/employees after they leave City government are discussed in Client News No. 2-98. The general concept is that government employees should not be able to leave the government and then come right back in the door (like in a "revolving door") as a private person, now using their influence with their former colleagues to obtain an unfair advantage over their competitors. However, the "revolving door" does not work in reverse. That is, there is no similar blanket restriction against new government employees having official dealings with their former private employer, so long as no issue arises under the other ethics laws cited in this newsletter. Of course, if a new government employee had retained financial ties to his former private employer, he would have a conflict of interest if he took official City action affecting that former employer. But if the new government employee had cut all financial ties, there is no ethics issue that arises merely out of the fact that he has a personal relationship with his former associates.

E. Disclosure and Disqualification

In many cases, as noted elsewhere in this newsletter, a conflict may be avoided by public disclosure of the conflict and disqualification from taking official action in the matter. The same procedure satisfies the disqualification and disclosure requirements of both the City Code and the State Ethics Act. Section 20-608(1) of the Philadelphia Code spells out the

precise procedure for the disclosure required, in three separate subsections. Subsection (a) governs Councilmembers with interests in legislation; subsection (b) governs other City officials with interests in legislation; and (c) governs Councilmembers and other City officials with interests in official actions other than legislation. The differences concern when and to whom the notice should be sent. Consult the Code or seek the advice of the Law Department for further details. Essentially, a disclosure letter should state the official's name and position and summarize the official's duties that might lead to official action in the matter. Then the letter should clearly identify the official's private financial interest (or that of the official's relative or business) and how that interest could be affected by City action. Finally, the letter should announce the official's intent to disqualify himself in any future City action in the matter. For this purpose, "City action" includes discussions, analysis, and recommendations prior to final action. We occasionally encounter the notion that an employee/official with a conflict need only disqualify herself from the final vote or ultimate decision in the matter; this is incorrect. The letter should be sent to the persons identified in Code Section 20-608 (This includes the Records Department, which will keep the letter on file for access by the public, if requested.) Note that for "Board of Ethics" the address to which to send notices is the following:

Evan Meyer, Senior Attorney
Counsel, Board of Ethics
Law Department, 17th Floor

One Parkway Building
1515 Arch Street
Philadelphia, PA 19102-1595

F. Exception for City Employees "Acting in their Official Capacity"

In certain cases, a City employee may serve as an officer or employee of an outside entity in a situation that might otherwise present a conflict of interest if such service is solely an extension of their official duties. That is, if the appropriate supervisory official of such employee makes a policy decision that it furthers a City public interest for that employee to serve the outside entity, no issue would arise as to a conflict of interest. However, any such situation should be reviewed by the Law Department.

G. Gifts, Gratuities, and Honoraria

In general, City officers and employees should do their public duty only for the compensation provided by law, and accept no other payments or gifts of anything of value. There are a number of different provisions that express this concept, with certain exceptions:

1. Code Provision on Gifts. Code Section 20-604(1) prohibits receipt of a gift of "substantial economic value" that "reasonably may be expected to influence" the official in carrying out official duties. This requires a case-by-case evaluation of the circumstances of the gift, its value, and the ability of the recipient to take official action affecting the donor.

2. Mayor's Executive Order No. 002-04. This Executive Order was intended to cut through the complications of other laws, particularly the Code provision cited immediately above. The very broad definition of prohibited sources of gifts includes almost any person or entity that is or could do business with the City or be subject to City action. There are these principal exceptions:

- a. Gifts from close family members and friends, when it is clear that the motivation for the gift is that relationship.
- b. Gifts of food of nominal value during a meeting (but not at a restaurant or other non-business environment).
- c. Gifts of food and beverage at a public event sponsored by a nonprofit entity and attended by the public official in his/her official capacity.
- d. Gifts from one City employee to another, if of nominal value, and given on an occasion normally associated with gift-giving.

What is the value of a gift? It is the "fair market value" or the price that a member of the general public would have to pay to obtain the same item or service. For example, if someone offers to buy you a ticket to a \$500-a-plate political fundraising dinner, the value of that gift is \$500. Moreover, that gift would not fit within the "food and drink" exception, because it is presumed that the dinner is not worth \$500 and the ticket is paying for something else in addition to the food.

In certain circumstances, a gift may be accepted as a "gift to the City," provided that the gift defrays the cost of an expense that would serve a legitimate governmental purpose and is received subject to certain controls to ensure that it is not a gift to a particular City employee or official. Consult the Law Department (see Section "K" below on "Getting Advice.")

3. State Ethics Act, Section 1103(b) and (c). These provisions prohibit a gift offered or accepted based on an understanding that the governmental official would be influenced by the gift. This is essentially a bribe, and requires a meeting of the minds of the giver and the recipient that the official will be influenced. The State Act has no "gift" provision based merely on the circumstances, except the honorarium provision, discussed below.

4. Charter Section 10-105 ("Gratuities"). This section provides that no officer or employee of the City shall "solicit or accept any compensation or gratuity in the form of money or otherwise for any act or omission in the course of his public work." There is an exception for a reward publicly offered, but generally the reward must be offered before the task is performed that earns the reward. (Also, Charter §8-107 prohibits the City from paying extra compensation if not in the pay plan.)

5. Honoraria. State Ethics Act, Section 1103(d). Honoraria are flatly prohibited. However, what is an "honorarium" is more complicated than one might think. Most people generally think of an

honorarium as a fee that one receives for giving a speech or a presentation, but that is not what is meant. As noted above, it is permissible to “moonlight” in certain circumstances. A similar principle applies here. If you are an accountant for the Tax Review Board and you have an outside job as a dog breeder, you may give a presentation to a breeders’ association on dog breeding and be paid the usual and customary fee for such a presentation. However, you may not give a presentation to a citizen’s group on how the City determines tax liabilities and be paid a fee, because that is part of your job, and would be an “honorarium.” The fee must also be the customary amount and based on the value of the service. Thus, if a City Councilmember who happens to own a dog is invited to give a speech on dog breeding and is offered three times the fee normally offered to an official dog breeder, there is a presumption that the excess fee is simply an attempt to buy influence with the Councilmember, and it would be a prohibited honorarium.

There is an exception for tokens of insignificant value.

6. Disclosure. Note that, even if their receipt is permissible, all gifts and fees received are subject to being reported on financial disclosure forms (if above the threshold amount), as noted below.

H. Financial Disclosure

How is the public to know if a public official or employee has a financial interest in City action and thus has a conflict of interest? Providing a

measure of confidence that such financial interests can be identified is the function of “financial disclosure,” the process by which certain officials are required annually to publicly disclose their finances and outside income. Three separate laws--the State Ethics Act, the City Code, and a Mayor’s Executive Order--mandate that certain officials file the disclosure form required by each law. These forms are then kept on file in the Department of Records, where they are open to the public.

The process of determining which employees should file which forms and of distributing forms and instructions is a function of the individual City offices and departments, usually handled through the Departmental personnel officers. The forms are all required to be filed on May 1 of each year, disclosing finances for the preceding calendar year (that is, the forms to be filed on May 1, 2006 will disclose finances for the year January 1-December 31, 2005). Therefore, the forms are distributed to each Department around the end of March of each year. New employees appointed any time before May 1 need only wait until May 1 to file. New employees appointed after May 1 have 30 days after appointment to file (except for the State Form and Mayor’s Form, which only require filing by the following May 1).

Under Executive Order 1-90, all officials and employees must provide copies of completed forms to their immediate supervisor, who will inspect the forms for completeness and timeliness, and to see whether any real

or potential conflicts have been disclosed, and whether any gifts or honoraria violate applicable law.

I. Open and Public Process

Under the State Ethics Act, a contract valued at \$500 or more with a public official or employee, spouse or child, or a business with which they are associated must be awarded through an "open and public process." The required process is not competitive bidding, but includes prior public notice of the contracting opportunity and subsequent public disclosure of contract proposals received and contracts awarded. This provision applies only if the contract is otherwise permitted. As noted earlier in this newsletter, under the Charter, City officials and employees are absolutely prohibited from having an interest in most City contracts. Moreover, since Chapter 17-1400 of the City Code took effect in February 2006, most City contracts are required to be awarded through an open and public process.

J. Other Applicable Principles

Certain other provisions or principles may also govern the conduct of City employees. These include the following:

1. Federal Regulations and Contract Provisions. If a City activity receives federal funding, the regulations of the funding federal agency may have conflict of interest provisions. The most commonly-cited of these is the HUD regulation governing the use of federal Community Development Block Grant

funds. In addition, where there is a contract between the City and a funding agency, that contract may include conflict of interest provisions.

2. Due Process Considerations. In certain situations, a City official may be biased to act in a way that would not violate the ethics laws, but might violate the due process rights of an individual. For example, if an official who serves on an administrative agency that makes adjudications has a close relationship with a party to a certain claim before that agency, the official may be required to recuse herself from participating in that matter, out of fairness to the other party.

3. Fairness in contracting. Contracts must be awarded through a process that is "fair." Even if no violation of the ethics laws occurs, a process might not be fair, if an official involved in awarding the contract has too close a relation to the entity receiving the contract award.

4. Appearance of impropriety. The ethics laws do not prohibit actions of a City official that "have the appearance of impropriety." Nevertheless, the "Guide to Ethical Conduct for City Officers and Employees," published in 1982 City Solicitor's Opinions at page 306, states: "[I]mproper appearances may be as or more detrimental than actual conflicts to the public's confidence in City government. Situations of apparent impropriety should be avoided wherever possible." We have advised others that in a particular situation, a City employee may want to consider whether a possible public perception would be that improper

influence would be exerted or confidential information be at risk of improper use under any scenario where he works for an outside entity with contacts with the City, even though no issue arises under any of the above-cited ethics laws. This is also known as “the Sitwell Test” (it just wouldn’t sit well with a reasonable person).

K. Getting Advice/ Reporting Violations

For advice as to your personal situation, you should, if at all possible, seek advice before acting (that is, before accepting the gift, or taking the official action that affects the private financial interest, or contacting the City on behalf of an outside party, etc.). You may request informal advice of the author of this newsletter, or formal advice of the City Solicitor. In either case, you may request that the advice be confidential, although a confidential opinion may not be relied on in certain circumstances, especially if it involves the State Ethics Act. Also, questions relating to the State Ethics Act may be referred to the State Ethics Commission, and the Law Department can assist with such a request, if desired. If you are the supervisor of an employee, you may also request advice as to restrictions on that employee’s conduct.

To report violations within the Administrative and Executive branch of City government, you may wish to contact your Departmental Integrity Officer or the Inspector General’s office. See Mayor’s Executive Order Nos. 2-94 and 4-94 on the responsibilities of these programs.

L. Penalties

The penalties for violations of the various ethics provisions vary. It should be sufficient to note that penalties can be severe. For example, under the State Ethics Act, violation of the conflict of interest provision is a felony and the maximum penalty is a fine of \$10,000 and imprisonment for up to five years.

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This Client News was prepared by Evan Meyer, Senior Attorney. Evan may be reached at 683-5008.