

ETHICS

A Plain Language Summary

INTRODUCTION

“Yo! No busting da line!” That’s the essence of ethics: fairness. The taxpayers should get the best, fairest deal for their money. Public employees should be hired because they are competent, not because of having a political patron. Every citizen should get the same service from their government, without regard to who knows somebody, or is a relative of somebody, or gave a campaign donation or a gift to somebody, or is just “connected.” And the taxpayers deserve careful stewardship of their tax dollars. If a contract is awarded to the second-lowest bidder, or to a bidder who is less efficient, merely because that bidder knows somebody, then that adds a hidden cost, call it a “corruption tax,” to City government. 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 no one needs an opinion

from the Ethics Board to know how to avoid committing such crimes.

However, more subtle forms of impropriety may undermine public confidence in government, and are thus addressed by the ethics laws.

A 1974 ordinance amending the City’s Ethics Code contains this recital:

Declaration of Policy. Public officials and employees shall be independent, impartial, and responsible public servants. Government decisions and policy shall be made in the interests of the people, the community, and the government. Public office shall not be used for personal gain.

To carry out this policy, 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. In other words, public officials and employees must not be in a position where there is a temptation for them to act to benefit a private interest, even if they would not actually yield to that temptation. Addressing the objective situation, rather than the official’s subjective intent, avoids the problem of trying to read someone’s mind. In short, if you join a line anywhere

but at the end you are “busting da line”—we don’t care why you are doing it. 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 article.

An Important Caution

This article is not intended to make you an expert on the ethics laws. The purpose is merely to acquaint you enough with the general principles so that you will recognize situations, as they arise, on which there may be an ethics issue and seek further guidance. This article 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 L (“Getting Advice / Reporting Violations”) on page 10.

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. 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. Board and commission members appointed by the

Mayor may be subject to Mayoral Executive Orders. ***The Board of Ethics has no jurisdiction over Executive Orders.***

The State Ethics Act applies only to “public employees” and “public officials” as defined in the Act, so the Act does not apply to all City officials and employees. On the other hand, the State Act does apply to some State officials who are not otherwise subject to the City’s ethics laws, like members of municipal authorities. Moreover, the State Ethics Commission is the ultimate authority on the application of the 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, either for herself, or through a relative or a business. 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. See also Executive Order No. 2-11 on outside employment.

For example, let’s say a City sanitation worker works Saturdays and Sundays as a house painter for a house painting business. This person has an interest in doing his City trash collection job

well, and a private interest in his pay from the house painting business, but there would be no ethics issue from these two interests, because City trash collectors usually do not take official action affecting a particular business (although one could imagine a situation where, say, the house painting business had an office on a street that was on the trash collector's route; or where the trash collector was soliciting painting jobs from homes on his route).

There are any number of possible examples of conflict situations. Just to illustrate the variety, here are a few sample situations that could raise issues:

1. You work in L & I handling Code enforcement complaints. Let's say that L & I routinely dismisses complaints about a neighbor's grass being too long unless it's a foot long. A letter comes in with a complaint from one of your neighbors about your own grass, which is only a couple of inches long. Can you send the standard denial letter? No. Since an enforcement complaint could result in a fine to you, this is a matter in which you have a financial interest, and even though the answer is pretty clear, you still have discretion, and you should not be the person to take official action in this matter.

2. You work in a City department that has a Miscellaneous Purchase Order with Staplers, an office supply company, to provide office supplies. The Order has been in place for years. You just started working at Staplers in your spare time. Can you still order supplies from them? No. Staplers is now your employer and you may not take official action that benefits them financially.

3. You are a Human Resources representative for the Water Department. The department, with no involvement from

you, has hired your father-in-law to work as an engineer in the department. No problem, right? Wrong. There will still be matters where you might be called upon to take official action that might affect your father-in-law's time-keeping, benefits, or personnel record. You may not be involved in such official action affecting a close in-law. See also Executive Order No. 1-11 on nepotism.

4. Same situation as above but it's your nephew, not your father-in-law. A nephew is not a close enough relation for the interest to be prohibited by the ethics laws. However, considerations of avoiding an "appearance of impropriety" (see discussion on page 10) may argue for disqualifying yourself from the matter. See also Executive Order No. 1-11 on nepotism.

5. You work in a department that awards service contracts, and you make recommendations as to which firm should get the contract. An applicant is a firm where you have no financial interest, but 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 4 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. So if it would be your job to do any of these things, and it would affect a financial interest of yours, of a close relative, or of a business in which you have an interest, you must publicly disclose that fact and remove yourself from taking that City action. (See B. Disclosure and Disqualification, below.)

B. Disclosure and Disqualification

In many cases, as noted elsewhere in this article, 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 Ethics Board 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 be disqualified from 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, Esq.
General Counsel
Board of Ethics
Packard Building
1441 Sansom Street, 2nd Floor
Philadelphia, PA 19102-3026

C. 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 City firefighter is president of a computer software company, the company may not have a contract with the Department of Technology (DOT) to provide software to the City, even though as a firefighter, he has nothing to do with the software contract or DOT 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 that are “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.”

D. Representation

Another way for a citizen to “bust da line” or get an unfair advantage over others is to have a City employee run interference for them, by acting on their behalf. 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.” This provision is different from the “conflict of interest” rule in two main ways: it applies even if the City employee is not being paid for the representation; and it cannot be avoided by disqualification (except in one instance, discussed below).

Also there are some exceptions: (a) the provision does not apply to representing yourself or certain close relatives; (b) 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 (such as a board/commission); (c) it does not apply to assisting someone where providing that assistance is part of your official duties; and (d) it applies only to action “as agent or attorney”—so not to less formal help.

As an example, suppose a City employee has a weekend job with 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. The City would not violate anything by awarding the contract, but 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). Remember there is an exception for part-time officials. 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. This often comes up with boards and commissions. If your firm represents someone before your City board, and you are not personally involved in the representation, your firm may do it, provided that you disclose and disqualify and do not participate in any way in the Board’s action.

E. “The Revolving Door”—Moving between Public and Private Employment

The ethics laws have a variety of post-employment rules that continue to govern your conduct after you leave service with the City. 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.

Section 1103(g) of the State Act restricts City officials and employees for one year after they leave City employment, as follows:

No former 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.

This provision contains a number of significant phrases. Whether you are an "official or public employee" to which this applies depends on the Act's definitions (see “Does the rule apply to you?” on page 2). "Governmental body with which he has been associated" is usually the entire City government, but could just be your department. "Matter before the governmental body" means any transaction on which some official in that body will take official action. Note the phrase, "with promised or actual compensation," which means that nothing prevents a former employee from representing a person before the City for free.

The meaning of "represent" has been the subject of lengthy analysis in several opinions of the State Ethics Commission. It means that the former employee may not: (1) make personal appearances before the City; (2) attempt to influence the City; (3) submit bid or contract proposals, or invoices, that are signed by, or even contain the name of, the former employee; (4) participate, by acting on behalf of a person, in a matter before the City; (5) lobby the City; or (6) be identified on any document submitted to the City.

“Represent” does not include, and the former employee may permissibly do, the following: (1) assist in the preparation of any document submitted to the City if the employee’s name does not appear in the document; (2) counsel any person regarding that person’s appearance before the City, so long as that activity is not revealed to the City; or (3) make general informational inquiries to the City to obtain information that is available to the general public, so long as it is not done in a way to influence

the City or make known to the City that the former employee represents his new employer. That last phrase is key. In other words, Section 1103(g) would not prohibit you from working for a company that had a City contract, so long as your work for them was entirely internal at the company and your involvement in the project was in no way revealed to the City.

Another frequent question often comes up when a valuable employee retires, and his or her department, rather than lose that employee's expertise, wants to arrange immediately with the employee to continue to provide similar services during retirement, under contract with the City. This is prohibited by Section 1103(g). The phrase, "a person," includes the former public official himself and thereby includes representing himself in negotiating a consultant contract with his former body. Thus, such "revolving door" consulting contracts are prohibited in the first year after the employee separates (since it is presumably impossible to obtain one without representing yourself, at the least in signing the contract).

There are also two less commonly-cited provisions in the City Code. You should know that if you are planning to leave City service, it might be a good idea to seek advice from the Board of Ethics before you separate. Or see Advice of Counsel No. GC-2009-513, for a general summary.

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 article. Of course, if a new government employee had retained financial ties to her former private employer,

she would have a conflict of interest if she 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 she has a personal relationship with her former associates.

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 Ethics Board.

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.

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.

2. Mayor’s Executive Order No. 3-11. *Note that Executive Orders are interpreted by the Mayor.* See the paragraph on “Does this rule apply to you?” on page 2. The Board of Ethics does not have jurisdiction over Executive Orders, so any interpretation issues should be addressed to the Chief Integrity Officer in the Mayor’s Office. (We may refer to the Executive Order in an advisory that generally addressed gift issues, however.)

3. Is it a gift to you? In certain circumstances, a gift has been considered to be a “gift to the City,” and thus not a gift to a particular City employee or official. Generally, such gifts defray 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 benefiting a particular City employee or official. Before accepting any gift on this basis, you should check with the Chief Integrity Officer or the Ethics Board.

4. 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.

5. 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.

5. Honoraria. State Ethics Act, Section 1103(d). **Important: The Act is interpreted by the State Ethics Commission.** The Ethics Board may attempt to predict what the Commission might say in a particular factual situation but our interpretation is not binding on the Commission. Also see the paragraph on “Does this rule apply to you?” on page 2. 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 the fee 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 by May 1 of each year, disclosing finances for the preceding calendar year. For example, the forms to be filed by May 1, 2012 will disclose finances for the year January 1-December 31, 2011. 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 officials/employees appointed after May 1 have 30 days after appointment to file to file the City Form, if applicable. The State Form and Mayor’s Form only require filing by the following May 1, for those who must file those forms.

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. See the note on Executive Orders on page 2.

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 article, 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. Issues under Ch. 17-1400 may involve either the Ethics Board or the Law Department.

J. Political Activities

Section 10-107 of the Home Rule Charter restricts political activity of City employees. The Annotation to this provision states the policy:

Merit principles of governmental employment require the divorcement of politics from such employment. They presuppose employment upon merit and

not because of political connections, powers and pressures. They also presuppose that governmental employment will not serve as a means for political tribute to maintain political parties and regimes.

As a result, among other things, appointed City employees may not take part in the management of a political campaign, may not be involved in soliciting campaign contributions, and must resign their City position before running for elective office. See Board of Ethics Regulation No. 8.

K. Appearance of Impropriety

In Formal Opinion No. 2009-006, at page 9, the Ethics Board stated:

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 undermine 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.

This may be known as “the smell test” or “the six o’clock news test.” Even though technically legal, a situation may be close

enough that the official may wish to voluntarily avoid the issue.

L. Training

Code Section 20-606 requires that all City employees receive ethics training. See Board of Ethics Regulation No. 7.

M. 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.). Board of Ethics Regulation No. 4 outlines the process of requesting advice. You may also request advice by clicking on the feature “Ask for Advice” on the board’s website. You may request informal general guidance in email form if your question does not depend on your unique facts. In order to have an advisory that you may rely on, you must make a request in writing and receive a written advisory. Also, questions relating to the State Ethics Act may be referred to the State Ethics Commission or the Law Department. If you are the supervisor of an employee, you may also request advice as to restrictions on that employee’s conduct, but we generally do not advise on a third person’s conduct.

To report violations within the Administrative and Executive branch of City government Board of Ethics Regulation No. 2 outlines the process of filing a complaint. Also, you may click on the feature “Report a Concern” on the Board’s website.

N. 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. Violations of the City Code may be subject to fines of up to \$2,000, and in some circumstances subject the violator to possible employment discipline, up to and including dismissal.

O. For More Information

This article is intended to be a general summary, not a formal policy, to provide a guide for City officials and employees as to ethical conduct. Not every provision of the Public Integrity Laws is addressed herein. For example, subjects not addressed include campaign finance, lobbying, and Code Sections 20-605, 20-609, and 20-611.

The Board of Ethics website, at www.phila.gov/ethicsboard, is an excellent source of information. Board advisory opinions, regulations, and text of applicable laws, among other things, are available there.

Revised 7/22/2011