CITY OF PHILADELPHIA

BOARD OF ETHICS
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Evan Meyer
General Counsel

Philadelphia Board of Ethics
Advice of Counsel

July 7, 2008

Terry M. Phillis
Chief Information Officer
Mayor's Office of Information Services
1234 Market Street, Suite 1850
Philadelphia, PA 19107

Re: Pursuing Future Employment and Post-Employment Restrictions

Dear Mr. Phillis:

You have requested a public advisory opinion as to the effect of the ethics laws on you as you seek to obtain, and eventually work at, employment outside the City government, after your planned separation from the City effective July 31, 2008.

You advise that you are the Chief Information Officer of the City, and the head of the Mayor's Office of Information Services. You advise that you will be separating from the City on July 31, 2008. As to seeking future employment, you advise: "I will be looking at the types of opportunities that I have experience and expertise in and they might be with companies that the city has done business with." You note that you have had no contacts with any City vendors regarding a job opportunity to date.

In keeping with the concept that an ethics advisory opinion is necessarily limited to the facts presented, my advice is predicated on the facts that I have been provided. I wish to point out that, although previous opinions of this Board, the City Solicitor's Office, and the State Ethics Commission 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. 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 the Board of Ethics for specific advice on the application of the ethics laws to those particular facts.

Since you advise that you are a current City employee, there are two broad areas of ethics laws that apply to your request: (1) whether any action you may take to pursue employment with certain local businesses while you are still a City employee would constitute a conflict of interest; and (2) how the post-employment rules would apply to you after you separate from the City, if you were to accept such employment.

I. Conflict of Interest in Pursuing Future Employment

The Board of Ethics discussed this issue in detail in Confidential Opinion No. 2007-001, which I attach for your reference. Note especially the discussion on pages 8-9. Essentially, in order to avoid a prohibited conflict of interest under Section 20-607 of The Philadelphia Code, you must publicly disclose[1] any financial interest in a potential employer and disqualify yourself from taking any official action that would affect the financial interests of that potential employer once you have yourself acquired a "financial interest" in a certain potential employer. As the attached Opinion No. 2007-001 notes, you would have a financial interest in a potential employer upon either:

a) an action by you that a reasonable person would consider to be an application for employment; or

b) an action by the potential employer that a reasonable person would consider to be a job offer to you.

What would constitute "official action" by you that would trigger the need for disclosure and disqualification is also discussed on page 8 of the attached Opinion. You would have a conflict in any matter in which a prospective employer has a financial interest if you participate personally and substantially in an action involving

[1] Opinion No. 2007-001 discusses on page 9 the method for disclosure and disqualification that is required under Code §20-608. For purposes of sending any disclosure letter, note that the recipients, in addition to the Board of Ethics and the Records Department, would include your appointing authority, which in your case would be the Mayor.

your personal judgment without which a matter cannot proceed that fixes the personal or property rights, privileges, immunities, duties or obligations of that employer, again assuming that discussions with that employer have reached the stage described in either (a) or (b) above. Feel free to contact us for advice on a particular factual situation.

II. Post-Employment Restrictions

There are three different ethics laws that relate to post-employment restrictions, two in the City Code and one in the State Ethics Act. The provision in the State Act may present some difficulty for you in doing consulting work for the City of Philadelphia or for any current vendor to the City..

A. A Threshold Question on What Law Applies

The State Ethics Act applies only if, during your City employment, you are a "public employee." "Public employee" is defined in the Act to include: "Any individual employed by the Commonwealth or a political subdivision who is responsible for taking or recommending official action of a nonministerial nature with respect to (1) contracting or procurement; (2) administering or monitoring grants or subsidies; (3) planning or zoning; (4) inspecting, licensing, regulating or auditing any person; or (5) any other activity where the official action has an economic impact of greater than a de minimis nature on the interests of any person." 65 Pa.C.S. §1102. I conclude that there is no question that the Chief Information Officer for the City is a "public employee" under the Act.

B. 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, I believe that your "governmental body" would be the entire City of Philadelphia. Accordingly, you may not for one year after the date you separate from City employment (last day on the payroll) represent anyone—yourself, any firm that employs you, or any of its clients—before the City of Philadelphia. 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 (the City) one's work for the contractor. This means that, until the anniversary date of your separation, any interaction between you or any future employer or one of your or its clients and the City regarding any City transactions (such as a contract) may not have any involvement by you, unless such involvement is purely internal at your employer (if another entity, other than a sole proprietorship) and not in any way revealed to the City.

More particularly, Section 1103(g) would prohibit you for one year from separation from representing any person before the City. 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. This would include telephone calls, e-mails, and attendance at meetings.

"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, "make known to the City," is important. In other words, Section 1103(g) would not prohibit a former City employee from working for a company that had a City contract, so long as his work for them was entirely internal at the company and his involvement in the project was in no way revealed to the City.

In addition, I note that the same principles apply to any other employment that you may obtain in the first year after leaving the City, including the possibility that you might contract with the City itself to provide consultant services. Section 1103(g) of the Act prohibits a former public employee or official from representing "a person" before his "former governmental body" for one year after he leaves governmental employment. The State Ethics Commission, in Opinion No. 93-005, has held that "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 (since it is presumably impossible to obtain one without representing one's self, at least in signing the contract). Therefore, I advise you that the State Ethics Act would prohibit you for one year after your separation from City service from executing a personal consultant contract to work for the City, in any capacity at all.

Nevertheless, the State Ethics Commission is the ultimate arbiter of interpretations of the Act. Please note that the Act provides that: "A public official of a political subdivision who acts in good faith reliance on a written, nonconfidential opinion of the solicitor of the political subdivision . . . shall not be subject to the penalties provided for in [certain provisions of the Act]." 65 Pa.C.S. §1109(g). *See* Charter §4-1100 (giving Law Department concurrent jurisdiction with the Board regarding ethics matters under State law). Since the Board of Ethics is not "the solicitor" of the City, requestors have the option to obtain an opinion from the Law Department as to the application of the State Ethics Act. Any such request, to receive the protection, could not be confidential, and will only protect the subject from the criminal penalties in subsections 1109(a) and (b) and from treble damages under subsection 1109(c) of the Act. (A violation of the Ethics Act can still be found, and restitution can still be ordered.)

C. 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 your service with MOIS, you took official action on any particular transaction concerning which a future employer should contact the City at any time henceforth, you may not assist that future employer in the matter relating to that transaction. On the other hand, I interpret "matter" to mean only the <u>particular</u> issue or issues on which decisions were made by MOIS with your involvement, not every issue related to that project that may arise after you separate from City service. .

D. 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 she made while in City employ. Thus, if you had, for example, been officially involved in awarding, renewing, amending, or administering the City's contract with an IT vendor, you could not for two years be employed by and receive any compensation from that IT firm, if such compensation was derived from revenue received under that MOIS action affecting the contract.

III. Summary

In summary, I reach the following conclusions:

(1) While you are still a City employee, you may be required to disclose a conflict of interest and disqualify yourself from taking certain official action for the City, if your pursuit of employment with a certain potential employer reaches the level that you have a "financial interest" in the company, as defined in the attached Opinion No. 2007-001.

(2) The State Ethics Act applies to you. Under the Act, you would be prohibited for one year after you leave the employ of the City from representing anyone, including yourself and any future employer (or any client of yourself or any future employer), before the City. 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, the City of Philadelphia. This is not limited to any particular department or office of the City.

(3) Under the City Code, you 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 MOIS with your involvement.

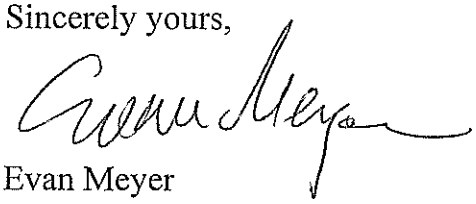
(4) Under the City Code, you may not for two years after you leave the employ of the City acquire a financial interest in any official decision you made while in City employ.

Please feel free to request further advice from the Board of Ethics, or the State Ethics Commission, if you have 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 5 above.

Since you have not requested nonpublic advice from the Board of Ethics, we will make this letter public.

Sincerely yours,



Evan Meyer
General Counsel

Attachment (Board of Ethics Opinion No. 2007-001)
cc: Richard Glazer, Esq., Chair
J. Shane Creamer, Jr., Esq., Executive Director

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November 5, 2007

Philadelphia Board of Ethics
Confidential Opinion No. 2007-001

Re: Responding to inquiries about availability for post-employment work

The Board of Ethics was asked by a City official for confidential guidance on how the ethics laws would apply to any activity that the official may participate in while still employed by the City, where such activity involves the process of exploring and pursuing potential future employment opportunities, to follow the official's service with the City.

The Board took into account the official's position and the types of organizations that might be affected by official actions of that official.

The Board understood the request to involve some or all of the following types of contacts with potential future employers:

- seeking general career advice;
- having informational meetings where you seek information about what a person or organization does;
- being recruited for a position where your level of interest in a particular position is being sought;
- applying for a position where you make yourself a candidate for a particular position;
- receiving an offer of employment; and
- accepting or negotiating terms of employment.

As is standard in ethics advisory opinions, the Board' Opinion noted the following:

> In keeping with the concept that an ethics advisory opinion is necessarily limited to the facts presented, the Board's advice is

> predicated on the facts that have been provided to it. 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. In that regard, to the extent that this opinion states general principles, and there are particular fact situations that you may be concerned about (such as a particular contact with a particular company), you are encouraged to contact the Board for specific advice on the application of the ethics laws to those particular facts.

The central issue is whether the official must take any actions to avoid a conflict of interest. The Charter, the City Ethics Code, and the State Ethics Act all contain provisions that address conflicts of interest.

Home Rule Charter

Section 10-102 of the Charter prohibits certain compensated City officers and employees from benefiting from, or having a direct or indirect interest in, certain City contracts, even if they had no official connection with the contract. The full text of the provision is as follows:

> City Officers and Employees Not to Engage in Certain Activities. As provided by statute, the Mayor, the Managing Director, the Director of Finance, the Personnel Director, any department head, any City employee, and any other governmental officer or employee whose salary is paid out of the City Treasury shall not benefit from and shall not be interested directly or indirectly in any contract for the purchase of property of any kind nor shall they be interested directly or indirectly in any contract for the erection of any structure or the supplying of any services to be paid for out of the City Treasury; nor shall they solicit any contract in which they may have any such direct or indirect interest.

The Board understood that the official did not contemplate actually being compensated under any City contract while still on the City payroll. The Board advised as follows: "The only issue is whether any level of interest or commitment by an entity with a City contract as to future employment by that entity, perhaps for you to be paid under that contract, would constitute "benefiting from" or having a "direct or indirect interest in" the City contract with that entity in the present, while

you are a City officer. With one exception, explained below, we conclude that Charter Section 10-102 applies to present entitlement to compensation or financial gain under a City contract, and not to any potential future employment. Only if an offer of future employment is memorialized in a contract that obligates the entity to pay you out of a City contract in the future would there be an issue under this provision. As will be discussed below, we recommend that you execute no employment agreement that contractually obligates another entity to employ you before you separate from the City, if the entity does any business with the City. If you accept that recommendation, no issue under Charter Section 10-102 should present itself."

Philadelphia Code

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

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

As to the interest through another entity, Code Section 20-607(b) provides:

> (b) In the event that a financial interest in any legislation (including ordinances and resolutions) award, contract, lease, case, claim, decision, decree or judgment, resides in a parent, spouse, child, brother, sister, or like relative-in-law of the member of City Council, other City officer or employee; or in a member of a partnership, firm, corporation or other business organization or professional association organized for profit of which said member of City Council, City officer or employee is a member and where said member of City Council, City officer or employee has knowledge of the existence of such financial interest he or she shall comply with the provisions of Section 20-608(a) (b) (c) of this ordinance and shall thereafter disqualify himself or herself from any further official action regarding

> such legislation (including ordinances and resolutions) award, contract, lease, case, claim, decision, decree or judgment.

As to the second provision, interest through another entity, this would only apply if the official's pursuit of an employment opportunity had progressed to the point that the other entity was obligated to the official contractually, so that it could be said that the official had become "a member of" the entity prior to his/her separation from the City. In order to avoid this issue, we recommended that the official avoid any such contractual obligation prior to separation, if possible. Otherwise, Code subsection 20-607(b) would require the official's disclosure and disqualification from any City decision that would have a financial impact on any such entity.

As to the first provision above, a personal financial interest under Code Section 20-607(a), that issue is more complicated. The question resolves into two basic issues:

1) What degree of progress along the job search path—from general inquiry about interest to negotiating terms of an offer—gives a City official sufficient interest in possible future employment with a company that it constitutes "being financially interested" in City decisions that affect the company; and

2) What actions by an official relative to such a company, its officers, or affiliates would constitute an "award, contract, lease, case, claim, decision, decree or judgment made by him" in the language of Section 20-607(a)?

Accordingly, the question becomes what official involvement may an official have with respect to potential future employers, under Code §20-607(b), which prohibits "official action" regarding any "award, contract, lease, case, claim, decision, decree or judgment." Several of these terms have distinct definitions; however, nearly any action can be a "decision" or "judgment." Clearly, any City official with significant authority makes many decisions and judgments with respect to a particular matter. Moreover, "official action regarding a contract" clearly involves a whole panoply of actions beyond simply awarding the contract. We conclude that the best way to analyze such situations is to consider the potential effect of a decision that is the result of improper influence, not because we considered the requestor personally to be susceptible to improper influence, but because it is the belief of the Board that the ethics laws are written to require avoidance of any objective situation that presents the potential for influence impacting a decision. For example, it is our understanding that the Law Department has advised at least one City official that:

> [A]ny significant decision regarding the design and drafting of a Request for Proposals, especially if that decision concerns the qualifications of respondents, the standards by which proposals will be judged, or the assignment of personnel to review responses, could have an impact on which responses will be more likely to win the award, and thus will have a financial impact on individual possible responding entities. Accordingly, it is my advice that you should disclose the conflict and disqualify yourself from both the process of preparing and reviewing the RFP in the [subject] matter and the process of awarding, negotiating, and executing the contract to the winning respondent. I note that you asked whether you may participate in meetings. Although merely being present at a meeting (or participating in a conference call, or included in an e-mail conversation, or copied on documents) may not actually involve making a "decision," "judgment" or other action explicitly prohibited in Code §20-607(b), I believe that officials with a conflict should remove themselves as far as possible from decision-making, lest there be a possible public perception that they are directing matters by their presence or influencing the decisions of subordinates or colleagues. I recommend that you avoid such contacts with the [subject] matter insofar as possible, in order to avoid an appearance of impropriety, if not an actual violation of Code Chapter 20-600.

Opinion by Senior Attorney Evan Meyer, April 11, 2006. This was not, however, an opinion addressed to potential pursuit of future employment opportunities, but a clear conflict of interest through a relative connected with a firm doing business with the City. Moreover, it involved a single firm and a single RFP. The requesting official in this matter stated a more broad range of potential factual circumstances.

The general rule in matters of a conflict of interest is that an official with a conflict must publicly disclose the private financial interest and disqualify himself from taking official action that would affect that interest. The disqualification implies that the relevant authority will assign another official to handle the matters from which the official has been disqualified. This must be done in such a way that it is clear that the disqualified official cannot still be directing the result.

The Board's research has uncovered no precedential opinion or ruling on pre-separation job search questions under the City Code. Nor is there a specific statutory provision on such questions applicable in Philadelphia. As an analogous situation, we may look to a jurisdiction that has such a statutory provision, the

executive branch of the federal government. We have considered two separate federal provisions:

1) A statute: Section 208 of the Federal Crimes Code ("Acts affecting a personal financial interest") in the Chapter on "Bribery, Graft and Conflicts of Interest," 18 U.S.C. sec. 208; and

2) A set of regulations: Part 2635 ("Standards of Ethical Conduct for Employees of the Executive Branch") in Title 5 of the Code of Federal Regulations, 5 C.F.R. sec. 2635.101 and secs. 2635.601 through 2635.606.

These provisions govern the conduct of federal employees and do not apply directly to City officers/employees. However, we find that they may be instructive in guiding us how to interpret the language of the City Ethics Code. Section 208 prohibits a federal official from participating in any official matter in which a financial interest is held by the official him or herself, a close relative, a business and "any person or organization with whom he is negotiating or has any arrangement concerning prospective employment." This last phrase has no equivalent in Philadelphia local or Pennsylvania state law.

The federal regulations in 5 C.F.R. sec. 2635.601-606 make clear that they interpret section 208, except that section 2635.602 refers also to sec. 2635.101(b), which states "general principles" and may possibly be a separate requirement concerning "issues of impartiality requiring disqualification." Section 2635.604(a) provides that, unless a waiver has been issued, a federal employee "shall not participate personally and substantially in a particular matter that, to his knowledge, has a direct and predictable effect on the financial interests of a prospective employer with whom he is seeking employment [as defined]." The definitions section of the regulations, Section 2635.603, defines the critical terms:

> (b) An employee is seeking employment once he has begun seeking employment within the meaning of paragraph (b)(1) of this section and until he is no longer seeking employment within the meaning of paragraph (b)(2) of this section.
>
> (1) An employee has begun seeking employment if he has directly or indirectly:
>
> (i) Engaged in negotiations for employment with any person. For these purposes, as for 18 U.S.C. 208(a), the term negotiations means discussion or communication with another person, or such

person's agent or intermediary, mutually conducted with a view toward reaching an agreement regarding possible employment with that person. The term is not limited to discussions of specific terms and conditions of employment in a specific position;

(ii) Made an unsolicited communication to any person, or such person's agent or intermediary, regarding possible employment with that person. However, the employee has not begun seeking employment if that communication was:

(A) For the sole purpose of requesting a job application; or

(B) For the purpose of submitting a resume or other employment proposal to a person affected by the performance or nonperformance of the employee's duties only as part of an industry or other discrete class. The employee will be considered to have begun seeking employment upon receipt of any response indicating an interest in employment discussions; or

(iii) Made a response other than rejection to an unsolicited communication from any person, or such person's agent or intermediary, regarding possible employment with that person.

(2) An employee is no longer seeking employment when:

(i) The employee or the prospective employer rejects the possibility of employment and all discussions of possible employment have terminated; or

(ii) Two months have transpired after the employee's dispatch of an unsolicited resume or employment proposal, provided the employee has received no indication of interest in employment discussions from the prospective employer.

(3) For purposes of this definition, a response that defers discussions until the foreseeable future does not constitute rejection of an unsolicited employment overture, proposal, or resume nor rejection of a prospective employment possibility.

It is instructive to know that the federal government has defined restrictions on its employees to this extent. Nevertheless, it is important to keep several things in

mind. First, the regulations quoted above are in service of a statute (18 U.S.C. §208(a)) that, unlike the City Ethics Code, explicitly governs a government employee's contact with an entity with whom he or she "is negotiating or has any arrangement concerning prospective employment." Second, the regulations were formally adopted via a public process. Third, a further section of the regulations, 5 C.F.R. sec. 2635.605, provides for the possibility of such an employee obtaining a waiver in certain circumstances. Section 2635.604(a) explicitly states that the disqualification applies only if no waiver has been granted. It would be a harsh interpretation of the City Ethics Code to read into it all the requirements of 5 C.F.R. sec. 2635.604, as defined in 5 C.F.R. sec. 2635.603, without providing for the integral waiver, as provided in 5 C.F.R. sec. 2635.605. However, since the City Code has no provisions for waiver, to add such a provision would be to exceed the power of this Board.

Thus, the Board of Ethics concludes that, for purposes of Philadelphia Code §20-607, a City official is "financially interested" in an entity that has either contacted the official regarding any interest in employment or an entity that the official has contacted to inquire about any interest in the official only upon either:

a) an action by the official that a reasonable person would consider to be an application for employment; or

b) an action by the entity that a reasonable person would consider to be a job offer.

Additionally, the Board concludes that, for purposes of Code §20-607, a City official makes an "award, contract, lease, case, claim, decision, decree or judgment made by him" when the official participates personally and substantially in an action involving his personal judgment without which a matter cannot proceed that fixes the personal or property rights, privileges, immunities, duties or obligations of any person.

Accordingly, the Board advised the requestor that,

> where you have become "financially interested" in a prospective future employer as defined above, before you are presented with a situation where you are called upon to take official action that would constitute making an "award, contract, lease, case, claim, decision, decree or judgment," as defined above, you must publicly disclose the financial interest and disqualify yourself from any such official action, as described below, under "Method of Disclosure." Initially, however,

> because any such disqualification must provide for the official to make such decisions in your stead, you should confer with [your appointing authority] as to which official in the government will take action that would normally be referred to you.

We note for the sake of completeness that Section 20-609 of the Code provides that no City employee "shall directly or indirectly disclose or make available confidential information concerning the property, government or affairs of the City without proper legal authorization, for the purpose of advancing the financial interest of himself or others."

Method of Disclosure

Section 20-608(1)(c) of the Philadelphia Code spells out the precise procedure for the disclosure required: the official should write a letter, which should contain the following elements:

> 1. That the purpose of the letter is to publicly disclose a potential conflict of interest;
> 2. Your public position (and description of duties relevant to the conflict, if not obvious);
> 3. The private financial interest (i.e., potential future employment by the entity) that presents the conflict;
> 4. A statement of how your public duties may intersect with the private interest (if not obvious from 2 and 3 above);
> 5. Your intention to disqualify yourself from any official action in matters affecting the private interest (should indicate that such disqualification precedes any official action being taken in any such matter); and
> 6. A statement that you or your appointing authority will notify appropriate officials in the government as to the official that your appointing authority has approved to act in your stead and directing such officials that all matters from which you are disqualified must be referred to that official.

The letter should be sent by certified mail to the following: (1) the relevant appointing authority as stated in Code §20-608(1)(c); (2) the Ethics Board, c/o Evan Meyer, General Counsel, Packard Building, 2nd Floor, 1441 Sansom Street, Philadelphia, PA 19102; and (3) the Department of Records, Room 162-A, City

Hall, Philadelphia, PA 19107. The letter should indicate on its face that copies are being sent to all three of the above addresses.

State Ethics Act

The State Ethics Act, 65 Pa.C.S. §1101 et seq., applied to this official. Section 1103(a) provides:

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

For the remainder of the discussion of the State Act, we will quote directly from the confidential opinion.

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

> Section 1102. Definitions.
>
> The following words and phrases when used in this chapter shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:
>
> . . .
>
> "Authority of office or employment." The actual power provided by law, the exercise of which is necessary to the performance of duties and responsibilities unique to a particular public office or position of public employment.
>
> "Business." Any corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, organization, self-employed individual, holding company, joint stock company, receivership, trust or any legal entity organized for profit.
>
> "Business with which he is associated." Any business in which the person or a member of the person's immediate family is a director, officer, owner, employee or has a financial interest.
>
> . . .

> "Conflict" or "conflict of interest." Use by a public official or public employee of the authority of his office or employment or any confidential information received through his holding public office or employment for the private pecuniary benefit of himself, a member of his immediate family or a business with which he or a member of his immediate family is associated. "Conflict" or "conflict of interest" does not include an action having a de minimis economic impact or which affects to the same degree a class consisting of the general public or a subclass consisting of an industry, occupation or other group which includes the public official or public employee, a member of his immediate family or a business with which he or a member of his immediate family is associated.
>
> . . .
>
> "Financial interest." Any financial interest in a legal entity engaged in business for profit which comprises more than 5% of the equity of the business or more than 5% of the economic interest in indebtedness.
>
> . . .
>
> "Immediate family." A parent, spouse, child, brother or sister.

65 Pa.C.S. §1102.

As with the City Ethics Code, the Act raises two issues: whether you have a personal interest in your official actions and whether you have an interest through an other entity. The statutes use different language, but the concepts are similar. Thus, whereas under the City Code, you must be a "member" of the outside entity to have an interest, under the Act, the outside entity must be a "business with which [you are] associated." The analysis is similar, although more clear under the Act, since the Code does not define "member," but the Act does define "business with which he is associated," as noted above. As you can see, the definition is limited to businesses in which the official has a "financial interest," and "financial interest" is defined to include a particular equity interest, which one would not have merely upon an offer of employment, unless your pursuit of an employment opportunity had progressed to the point that the other entity was obligated to you contractually, so that it could be said that you had become "an employee of" the entity prior to your separation from the City. Thus, we are not concerned with this part of the "conflict of interest" principle.

Whether you have a personal interest under the Act is similar to the analysis under the City Code. The question resolves again into two basic issues:

1) What degree of progress along the job search path—from general inquiry about interest to negotiating terms of an offer—gives a City official sufficient interest in possible future employment with a company that an action affecting that company can be said to so influence the company in its consideration of the hiring question that it constitutes acting for the "private pecuniary benefit of himself"; and

2) What actions by you relative to such a company, its officers, or affiliates would constitute "use by a public official or public employee of the authority of his office or employment or any confidential information received through his holding public office or employment," in the language of Section 1102 (definition of "conflict of interest")?

We conclude that these are essentially the same questions as those we address above under the City Ethics Code[1]. That is, acting for the "private pecuniary benefit of himself" under the Act is essentially the same as "being financially interested" under the Code. Similarly, "use by a public official or public employee of the authority of his office . . ." under the Act is essentially the same as making an "award, contract, lease, case, claim, decision, decree or judgment" under the Code.

Accordingly, our advice as to public disclosure and disqualification under the State Ethics Act remains the same as under the City Code. Thus, you would be required to publicly disclose the potential conflict and disqualify yourself from taking any official City action, as discussed under "Method of Disclosure" above, prior to any applicable City action being taken. See also 65 Pa.C.S.A. §1103(j). This disqualification provision of the Act is parallel to that of the Code. Section 1103(j) of the Act specifically addresses "voting conflicts." However, the State Ethics Commission has applied this provision to any kind of official action.

In addition, you should note that the State Ethics Commission has opined as to delegation of matters to a subordinate:

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[1] Our research has not discovered any ruling by the State Ethics Commission on the question of restrictions on current government employees pursuing potential future employment.

> Where a conflict of interest would exist, [the official] could not, in an effort to remove himself from the conflict, take action to delegate his job responsibilities to a subordinate. Because the subordinate would be in a subservient position, the act of substituting a subordinate in and of itself would constitute a use of authority of office by [the official] in derogation of Section 1103(a) of the Ethics Act. However, where there would be a pre-existing mechanism in place for the delegation of [the official]'s authority in the event of a conflict, he would not run afoul of Section 1103(a) in that there would be no use of authority of office.

Advice of Counsel No. 04-565 (citing Confidential Opinion No. 02-004). In general, we conclude that the appointment in advance of a particular [subordinate] to handle all conflict matters, as discussed above under "Method of Disclosure," would accomplish this purpose.

Finally, we note that the State Ethics Commission has final administrative jurisdiction over interpretation of the State Ethics Act. Thus, you may wish to request the advice of the Commission to obtain a definitive ruling on any particular fact situation.

Appearance of Impropriety

The above-stated conclusions reflect the Board's understanding of the requirements of the applicable law, as well as a need to balance the public's right to public disclosure with an understanding of the impracticality of a rule that would require City officials and employees to publicly disclose every and all interactions of any kind that might be part of that individual's efforts to "feel out" the job market and investigate various possible areas for future employment in advance of actually applying for a position. Such a rule might well require City officials and employees to disclose to their colleagues and superiors their intention to pursue other opportunities well before the individual is ready to have such intentions known, and could create difficulties for any individual making such a disclosure. Moreover, such a strict rule might have the effect of encouraging contempt for and disregard of the ethics laws, in general. Accordingly, the Board concludes that public disclosure is required only in the late stages of the "job hunt" as noted above.

Nevertheless, considerations of public confidence in government argue for some disqualification from official action as to entities with whom you may have contacts that are less directly related to an offer of employment. As the Law

Department noted in an ethics newsletter in 2000, on the subject of "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.

We reaffirm this principle. Accordingly, we conclude that there would be an appearance of impropriety if you were to take official action regarding an entity with which you were involved in exploratory discussions about possible future employment, even if it did not reach to the level we defined above as one where the conflict of interest laws require public disclosure and disqualification. The Board concluded that the official in this case had taken appropriate actions to avoid an appearance of impropriety.

Examples

In order to give clear guidance, the Board deems it appropriate to elucidate the conclusions of this opinion, both as to interpretation of the law and advice as to avoiding any appearance of impropriety, by providing a number of hypothetical examples of situations that a similarly situated official might face, and how this opinion would apply.

Example 1: You have a supervisory position in the Procurement Department. The Department is preparing a Request for Proposals (RFP) for services to be provided to the City under contract, and your duties would normally include assisting with drafting the RFP You are aware of a position available at Company X, which is a logical candidate for such a contract and can be expected to respond to this RFP. You are planning to send your resume to Company X, along with a letter of application for the position. In this circumstance, you would have a conflict of

interest, and, before sending your resume to Company X, you must publicly disclose your financial interest in Company X and disqualify yourself from working on the draft RFP or any other official action regarding this contract, unless and until it is clear that Company X is not an applicant for the contract.

Example 2: You have a supervisory position in the Streets Department. The Department is considering promulgating new regulations significantly changing its trash collection practices with respect to certain businesses, which is likely to result in litigation. Normally, such a matter is one that you would assist with. One of the businesses likely to be affected is Company Y. A recruiter for Company Y, knowing that the Administration will change upon the election of a new Mayor soon, has approached you and offered you a position in his company. In this circumstance, you would also have a conflict of interest, and—unless you immediately tell the recruiter that you are not interested in his offer—you must publicly disclose your financial interest in Company Y and disqualify yourself from working on the draft Streets Department regulations or any other official action regarding this matter, unless and until you have conclusively expressed your withdrawal from any consideration for the position at Company Y.

Example 3: You have a supervisory position in the Office of Emergency Shelter & Services (OESS). The office is considering closing one shelter in the City. Community Group Z and Company A have both written letters to the Managing Director urging him not to close the shelter that is within their community. Community Group Z is a nonprofit corporation that has expressed interest in your serving as an unpaid member of their board of directors after your City service. A vice president of Company A, whom you encountered at a meeting, has asked whether you would be at all interested in some kind of managerial position with their company. You have filed a disclosure and disqualification letter disqualifying yourself from any action affecting Community Group Z or Company A. In this circumstance, you would not have a financial interest in Community Group Z and thus no conflict of interest in discussing with them a future role on their board, and so you may respond to their letter. As to Company A, the inquiry is too preliminary to give you a financial interest in any future position, so you would not have a conflict of interest that would require public disclosure and disqualification. As a policy matter, however, you should not personally respond to Company A's letter, and therefore, your disqualification as per your letter is appropriate.

Example 4: National Entertainment Company B causes a City-wide disaster/terrorism alert when it hides several electronic devices around the City in a publicity stunt. A coordinated response by the Managing Director's Office, Police, Fire, and other offices disrupts the City for hours before it is determined that the

devices are harmless. You are heavily involved in the matter as a captain in the Police Department. During the course of discussions with officials from Entertainment Company B, you come to respect and work well with one of its officers. After the whole matter is concluded, you seek out this officer for general advice on job opportunities in the entertainment industry, both in Philadelphia and nationally. The company does have one subsidiary that has an office in the City (and is thus subject to the usual City services and regulation—police and fire protection, trash collection, licenses and inspections, etc.), but this subsidiary has no contracts with the City and does not contemplate applying for any business relations with the City. In this circumstance, you would not only not have a financial interest in Company B or its subsidiary and so no conflict of interest, but also there would be no appearance issue that would argue for disqualifying yourself from any particular matter as a policy matter, in your normal course of police work.

The Board emphasizes that it offers these examples as general guidance only. Any public official or employee is encouraged to request additional advice if a particular factual situation arises where it is not clear what our conclusion would be.

Conclusion

We concluded that the ethics laws do not disable the requesting official from inquiring from others as to potential interest in employing him/her, and responding to others who inquire as to his/her interest, and even keeping such matters confidential, so long as there is an arrangement for appropriate assignment to another official of matters in which the requesting official may have a conflict, and that the requesting official publicly disclose the conflict and disqualify upon any discussion of an employment opportunity that reaches the stage of a "financial interest," as discussed in this Opinion. As to exploratory discussions that do not rise to the level of a "conflict of interest," we conclude that the official may avoid the appearance of impropriety by continuing with the current arrangements for others to handle some matters that would otherwise come to the official.

The Board also advised as follows:

> If any particular matter arises that raises a question of what, if any, official action you may take, feel free to provide the particular facts and request specific advice. Please note that the State Ethics Act provides that: "A public official of a political subdivision who acts in good faith reliance on a written, nonconfidential opinion of the solicitor of the political subdivision . . . shall not be subject to the

penalties provided for in [the Act]." 65 Pa.C.S. §1109(g). Therefore, in order for this protection to apply, the opinion must be nonconfidential—in other words, a public document. Additionally, the opinion must be issued by the City Solicitor. This is presumably the reason why, in creating this Board, the voters approved an amendment to the Home Rule Charter that gives the Board concurrent jurisdiction with the Law Department in issuing advisory opinions involving the State law. (Charter §4-1100) However, the protection will not apply to this opinion, since you have requested that this be a confidential opinion.

By the Board:

Richard Glazer, Esq., Chair
Pauline Abernathy, Member
Stella M. Tsai, Esq., Member
Rev. Dr. Alyn E. Waller, Member

Richard Negrin, Esq., Vice-Chair, did not participate in consideration of this opinion. Rev. Waller has since left the Board and been replaced by Phoebe A. Haddon, Esq., and Pauline Abernathy has since left the Board and that vacancy has not yet been filled.

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