CITY OF PHILADELPHIA

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Evan Meyer
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Philadelphia Board of Ethics
Advice of Counsel

March 20, 2008

Chris Creelman
Legislative Aide for Councilwoman Krajewski
Room 506 City Hall
Philadelphia, PA 19107

Re: Request for Advice Regarding Potential Conflict

Dear Mr. Creelman:

You have asked to be advised on procedures that you must take to ensure compliance with the ethics laws, because you are an employee of City Council and serve on the board of a nonprofit that has received a grant of funds directed from the Commerce Department through PIDC. You advise the following as to the facts:

> I currently serve a Legislative Aide to Councilwoman Krajewski. I have also served on the board of the Major Artery Revitalization Committee (MARC) for the past five years. The mission of MARC is to improve the quality of life in residential neighborhoods and commercial corridors. MARC has, in recent years, received both federal and state funding for major improvements to a local commercial corridor, Torresdale Avenue. MARC recently received @ one million dollars from Commerce, through the Restore Commercial Corridors Program, for lighting improvements scheduled to begin in the spring.
>
> I want to make sure that this doesn't present a potential conflict of interest on my part since the nonprofit has received city funding. Our

> office had nothing to do with the application, nor were we involved with the decision making process.

You also advise that you serve as uncompensated treasurer of the MARC board. On a follow-up, you advised that you receive a quarterly stipend for expenses, but that the amount does not exceed $2400 annually. You further advised the following:

> The grant from Commerce is actually being administered and bid by PIDC. MARC doesn't physically receive funds from Commerce. Nor does MARC provide any service under that contract. Grant is part of the Restore Commercial Corridors program and is being used for lighting improvements.

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 office or the Law Department 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 us for specific advice on the application of the ethics laws to those particular facts.

The issue is whether you 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. Based on the facts you have provided, I conclude that there is not an inherent unavoidable conflict in the situation you describe, provided that you observe the restrictions stated in this opinion.

Home Rule Charter

Section 10-102 of the Home Rule Charter prohibits City employees from benefiting from, or having a direct or indirect interest in, a City service 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 City Solicitor has said in the past that where a City employee, as an individual, enters into a personal services contract with the City, that clearly violates this provision. See, e.g., Opinion No. 95-16 and Opinion No. 95-17, 1994-1996 City Solicitor's Opinions at 130-137.

Where the City employee does not have a contract directly with the City, but instead receives compensation from an entity that in turn contracts with the City and has other sources of funding, there is clearly no "direct interest" in a City contract, since the employee's compensation may well derive from funds other than those from the City. Moreover, to implicate Section 10-102, the contract must be "for the purchase of property of any kind" or "for the erection of any structure or the supplying of any services." You advise that to the extent that the grant to MARC is memorialized in a document, the grant is administered, not by the City's Commerce Department, but by PIDC, a nonprofit corporation not part of the City government. Nor does MARC provide any service, you advise, to PIDC in exchange for the grant. Accordingly, based on the facts that you provided, it appears that you have no interest in a City contract that is prohibited by Charter Section 10-102.

Philadelphia Code

The Philadelphia Ethics Code imposes certain restrictions on City officers or employees representing others. Code Section 20-602(1) would prohibit a City employee from representing another person, directly or indirectly, as that person's agent in any transaction involving the City. Accordingly, you should not personally represent MARC in any application for any grant from the City or in any other City transaction.

I note that, on its face, Section 20-607(a), read together with Section 20-608, appears to require an employee to disclose the financial interest and disqualify

himself in the event of any pending City action that affects his financial interests, even if that employee normally would have no responsibility in such a matter. Thus, I conclude that even if you have taken no official action in this matter and will take no official action in this matter, if you wish to avoid even an appearance of a conflict, you may wish to comply with the disqualification and disclosure requirements of Code §20-608[1] by publicly disclosing your board membership in MARC and the interest of MARC in the PIDC grant, and by disqualifying yourself from any official City action that may affect MARC.

We are occasionally asked whether merely refraining from taking official action, or "abstaining" in some way short of the procedure spelled out in Code §20-608, is adequate. It is not. There is a sound public policy reason for the Code requirement. It is a well-established principle of governmental ethics laws that public disclosure is an essential part of maintaining public confidence in government. The public is on notice, through a publicly enacted Ethics Code, that the place to go to learn of disclosures of conflicts of interest in City officials is the Records Office in City Hall. Accordingly, it is only by complying with the requirements for public filing of disclosure letters, in advance of official action, as provided in Code §20-608 that City employees and officials may assure the public that personal financial interests do not conflict with the public trust.

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[1] We have advised others that Section 20-608(1)(c) of the Philadelphia Code spells out the precise procedure for the disclosure required: for non-legislative matters the affected City employee 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. The employee's public position (and description of duties relevant to the conflict, if not obvious);
3. The private position or financial interest (or that of a relative or business of the discloser or relative) that presents the conflict;
4. A statement of how the employee's public duties may intersect with his private interest or that of his relative or business (if not obvious from 2 & 3 above); and
5. The employee's intention to disqualify himself from any official action in matters affecting the private interest (should indicate that such disqualification precedes any official action being taken in any such matter).

The letter should be sent by certified mail to the following: (1) "the Commissioner, Secretary and/or Executive Director of the pertinent agency" (in your case, the Council President); (2) the Ethics Board, c/o Evan Meyer, General Counsel, Packard Building, 1441 Sansom Street, 2nd Floor, Philadelphia, PA 19102; and (3) the Department of Records, Room 156, City Hall, Philadelphia, PA 19107. The letter should indicate on its face that copies are being sent to all three of the above addressees. If the matter involves Council legislation, see Code Section 20-608(1)(b) for the procedure.

However, this does not address a separate restriction on any other employee of MARC, as imposed by a separate provision, Code Section 20-602(5). Section 20-602(5) applies a restriction, similar to that in Section 20-602(1), to any outside firm of which the City officer is a member, so that anyone in that firm would be prohibited from the same representation. Unlike §20-602(1), however, §20-602(5) allows for the City official to avoid the prohibition by making the public disclosure and disqualification provided in §20-608. Thus, an officer or employee of MARC could represent MARC in a transaction involving the City, provided that you made the requisite disclosure and disqualification. See footnote 1.

Additionally, 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.

Thus, for either a personal financial interest (such as in the quarterly stipend you receive from MARC) or an interest that MARC itself may have in City action, the rule is the same: You must disclose the conflict and disqualify yourself. In such matters, you must publicly disclose the financial interest and announce your intention to disqualify yourself from all official consideration of the matter. Participation that you should avoid would include not only final decisions, but also any preliminary discussion, review, or action. See footnote 1. The Code does not define the term "financial interest." Nor has the reach of what it means to "be financially interested in any . . . decision, decree or judgment" been the subject of extensive analysis. However, some interests clearly are too remote to require the disclosure and disqualification of Code §20-607(a). You have advised that you have had no official role in the decision-making process regarding this PIDC grant to MARC.

Note, also, that Section 20-609 of the Code provides that no City officer or 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." Obviously, if you were to make available to MARC any confidential City information you learn in your service for City Council, that would violate this provision.

State Ethics Act

The State Ethics Act, 65 Pa.C.S. §1101 et seq., applies to you.[2] Section 1103(a) provides:

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

What is a "conflict of interest" may be determined by reference to the definitions

[2] The Act applies only if you are a "public employee," 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. Based on prior rulings of the State Ethics Commission, I believe that a legislative aide for a City Councilmember is a "public employee." However, note again that the Board of Ethics does not have jurisdiction to issue a ruling on this point on which you may rely, and if there is any question about this, you may seek the advice of the Commission or the Law Department.

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

> engaged in business for profit which comprises more than 5% of the equity of the business or more than 5% of the economic interest in indebtedness.

65 Pa.C.S. §1102.

I conclude that for you to take official action that has an economic impact on MARC would be a conflict under the State Act in the same way it would be under the City Code. In such a case, Section 1103(a) would restrict your activities as a public official relative to the use of authority of office to obtain a private pecuniary benefit for MARC, and would require disclosure and disqualification, as set out in City Code Section 20-608(1)(b) or (c), prior to any City action being taken, as described in footnote 1 above. See also 65 Pa.C.S.A. §1103(j).

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 [the Act]." 65 Pa.C.S. §1109(g). Presumably, it is this provision that is the reason for the concurrent jurisdiction of the Law Department provided for in Charter §4-1100 as to matters involving State law. Since the Board of Ethics is not "the solicitor" of the City, you may, if you wish, also 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.

Financial Disclosure

As a City employee (assuming you meet the definition of "public employee" under the State Ethics Act), you would also be required to disclose your stipend as an board member of MARC as income in the State Ethics Commission Financial Interest Form you must file each May 1 (if the amount exceeds the required threshold).

Conclusion

I conclude that you do not have an impermissible conflict of interest because you are an employee of City Council and serve on the board of a nonprofit, the Major Artery Revitalization Committee (MARC), including as its treasurer, and receive a modest stipend for expenses. No issues are presented because MARC has

received a grant of funds directed from the Commerce Department through PIDC. You are advised to comply with the restrictions stated in this letter, including that you should publicly disclose the financial interest of yourself and MARC in any City Council action affecting MARC, and, as provided in Code §20-608(1)(b) and (c), disqualify yourself from any such official City action. You have not requested confidentiality, so this Advice of Counsel is public and will be posted on the web site of the Ethics Board, and otherwise made public, as required by Code Section 20-606(1)(d)(iii).

Sincerely yours,

Evan Meyer

Evan Meyer
General Counsel

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