



CITY OF PHILADELPHIA

BOARD OF ETHICS  
ONE PARKWAY BUILDING  
1515 Arch Street  
18th Floor  
Philadelphia, PA 19102-1504  
(215) 686 – 9450  
FAX 686 – 9453

**Philadelphia Board of Ethics  
Nonpublic Formal Opinion No. 2012-003<sup>1</sup>**

July 18, 2012

Daniel W. Cantú-Hertzler  
Chair, Corporate and Tax Group  
Law Department  
City of Philadelphia  
One Parkway Building, 17<sup>th</sup> Floor  
1515 Arch Street  
Philadelphia, PA 19102-1595

**Via email and hand delivery**

**Re: Lobbying / City Entities as Principals**

Dear Mr. Cantú-Hertzler:

You advise that you represent the City Administration<sup>2</sup> and the Philadelphia Gas Works (PGW). You advise as follows:

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<sup>1</sup> On September 13, 2012, the requestor approved the Board releasing, as public, this Opinion.

<sup>2</sup> Formally, this is presumed to be the Executive and Administrative Branch of City government, as described in Article III of the Home Rule Charter. Although the Law Department represents the entire City government, including the Board of Ethics in some matters, this Opinion will address the reach of the phrase “the City” for purposes of this advisory.

In late March of this year, the City of Philadelphia issued miscellaneous purchase orders for up to \$30,000 each to Kleinbard, Bell & Brecker LLP and Ceisler & Jubilirer[sic] LLC, the purpose being to assist the City Administration and PGW in persuading City Council, the Gas Commission, and the public to consider a potential sale of PGW on its merits.

You have requested a nonpublic<sup>3</sup> advisory on behalf of your two clients (“the City and PGW”) seeking answers to several questions, which you frame as follows (numbers added for convenience):

1. Whether attempts to influence City agencies as described herein constitute “lobbying” when undertaken on behalf of PGW and the City;
2. Whether such representation requires the City and PGW to register with and report to the Ethics Board as principals under the Lobbying Code, Chapter 20-1200 of The Philadelphia Code; and
3. If so, when the reporting obligation accrues.

### **Summary of Conclusions**

1. The Board finds that the principals here are the Administrative and Executive Branch of City government, and PGW.
2. The Board finds that the agencies to be lobbied are City Council and the Gas Commission.
3. The Board finds that the exemption in Code Section 20-1204(7) does not apply, nor any other exemption, and thus the principals here are not exempt from registering with the Lobbying System.
4. As both principals are registered for calendar year 2012, expense reports are due for each quarter of the year, even if only to note that the threshold amount was not exceeded.

### **Summary of your request**

You advise as to these additional facts:

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<sup>3</sup> See note 1.

Both PGW and the City have registered as principals in an abundance of caution, and the above firms have registered as lobbyists for the City and PGW. The firms' work under these MPOs will cease on June 30, 2012. However, a recently closed Request for Proposals, as to which no award has yet been posted, seeks similar services for the City and PGW under a larger contract or contracts beginning July 1, 2012. If and to the extent the Lobbying Code does not apply to the City and/or PGW under these circumstances, the City and PGW request your informal opinion that they need not register as principals with respect to the coming contract(s) and that expense reports need not be filed as to any of the contractors.

By way of further background, PGW is City property and is not a legal entity for most purposes (its pension plan excepted), though it does have its own personnel. The City Solicitor represents PGW pursuant to the City's management agreement with Philadelphia Facilities Management Corporation, which retains PGW's top management and operates PGW for the City. PFMC is a nonprofit whose directors are appointed by the Mayor.

Essentially, your position is that the Lobbying Code does not require your clients to register as principals in this matter because the matter involves solely the same entity (the City) lobbying itself. On this point, your request states:

The City Administration, the Gas Commission and its members, and City Council and its members are all "City," and PGW is also "City" for many purposes. The Gas Works Revenue Fund, which comprises PGW's funds, is an enterprise fund of the City and supports the City's Gas Works Revenue Bonds issued for PGW; and this office represents PGW as well as the Commission and the Administration as well as Council. While it is clear that the City can be a principal as defined in the Lobbying Code for purposes of lobbying the Commonwealth or other governments, it would be anomalous to find that the City as a "principal" was lobbying itself. Such a ruling would risk a determination that the City and PGW must file detailed reports on the activities of those serving in such positions as press secretary or director of legislative affairs if they choose to utilize contractors rather than employees in such positions. It appears that the Lobbying Code should be read not to encompass self-lobbying. One way of reaching that result would be to construe the "principal's or client's interests, rights, or privileges" clause of both Section 20-1201(18) and Section 20-1204(13)

broadly when the principal is the City and the “lobbied” City agency is also the City.

The Lobbying Code is based on part on the State Lobbying Act, 65 Pa.C.S. §§ 13A01 *et seq.* While it is true that the State Act presumes that governments may be principals when they retain third parties to advocate on their behalf, *see* 51 Pa. Code § 57.2(a)(7) and Opinion No. 07-1002 of the State Ethics Commission, nothing in the Act suggests that this applies to intragovernmental communications as in this case. And 51 Pa. Code § 51.1 lacks the “principal’s or client’s interests” language cited above.

### **Who is the principal (or principals)?**

The first question raised by your request is the identity of the principal or principals represented by the two lobbying firms, Kleinbard, Bell & Brecker LLP (“Kleinbard”) and Ceisler & Jubiliner LLC[sic]<sup>4</sup> (“Ceisler”). Although you begin your request by referring to assisting “the City Administration and PGW,” you later posit that the principal is “the City,” citing various units of the City government, including the City Administration, the Gas Commission, City Council, and—for some purposes—PGW. Although it is true that the Law Department represents all of these entities, there may well be cases where some of these entities may have conflicting interests, and Law would be compelled to seek outside counsel to represent some of them, as it has in the past in some cases.

Moreover, as your request makes clear in its first sentence, the purpose of the City’s contractual arrangement with Kleinbard and Ceisler is “to assist the City Administration and PGW” in persuading others (we will discuss who is to be lobbied below) to consider the merits of a potential sale of PGW. It is clear that Kleinbard and Ceisler are not contemplated to assist City Council, the Controller, the Board of Ethics, or many other units of City government in this effort. Thus, it is not necessary to characterize the principal as being the entire City government.

Rather, we view the principals here to be: the “City Administration” (more formally, the Executive and Administrative Branch of City government, as described in Article III of the Home Rule Charter) and PGW.

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<sup>4</sup> The firm name registered with us as a lobbying firm is Ceisler Media & Issue Advocacy.

### **What is the agency to be lobbied?**

In your request, you identify three different groups to be persuaded by Kleinbard and Ceisler: City Council, the Gas Commission, and the public. We will examine these in turn.

1. City Council. City Council is clearly an “agency” as defined in the Lobbying Code, Section 20-1201(3), and thus is an entity that can engage in administrative action or legislative action, as defined in Section 20-1201(1) and (17), and therefore can be the agency to be lobbied, as defined in Section 20-1201(18).<sup>5</sup>

2. The Gas Commission is also an “agency” as a commission of the City, see Code Section 20-1201(3)(a).

3. However, “the public” does not engage in administrative action or legislative action, as defined in Section 20-1201(1) and (17), and thus cannot be the entity to be lobbied as defined in Section 20-1201(18). “The public” can be the immediate target of “indirect communication,” as defined in Section 20-1201(15). However, an essential component of this definition of “indirect communication” is that it is an effort “the purpose or foreseeable effect of which is to directly influence legislative action or administrative action.” Thus, as the term implies, it is indirect, and the ultimate target of such lobbying must be an agency or City official or employee with the ability to recommend or take City official action (“legislative action or administrative action”). Therefore, although “the public” can be a “recipient group” for purposes of disclosure on expense reports, it is not the entity being lobbied.

### **Are the identified principals subject to the Lobbying Code?**

Based on the above conclusions, the Board does not agree that the lobbying sought to be undertaken by Kleinbard and Ceisler constitutes “the City lobbying the City,” because neither the identified principals nor the agencies to be lobbied are so broad in scope.

Rather, we must look to the statute and the regulation to determine if any stated exceptions apply.

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<sup>5</sup> See also Regulation 9, Paragraphs 9.1(B), (D), (W), and (X).

1. Lobbying. You urge the Board to apply the exception stated in Code Sections 20-1201(18) and 20-1204(13)<sup>6</sup> and to read broadly the phrase “principal’s or client’s interests, rights, or privileges.” The entire provision must be read, however. The exception refers only to matters where either the principal itself, or the relevant professional or consultant contacts a City agency on a particular substantive matter, such as an accountant contacting the Revenue Department to clear up a tax bill. The exception plainly does not refer to lobbyists contacting City Council or the Gas Commission on a matter of major City policy or engaging in indirect communications with the public. No broad reading of the phrase you quote can insert representation by a lobbyist into the list of agents that may represent a principal’s interests under this exception.

2. Thresholds. It is assumed, for purposes of this request, that there will be sufficient contacts with City Council or the Gas Commission by Kleinbard and Ceisler in a quarter that constitute lobbying such that there is no question that the applicable thresholds apply (i.e., principal incurs expenses exceeding \$2500 in the quarter). Moreover, for purposes of registration, you advise that “the City” and PGW have already registered as principals for calendar year 2012, so no further registration would be required.

3. Testimony. It is also assumed that, although some of the representation by Kleinbard and Ceisler will be exempt under Section 20-1204(1) (preparing testimony and testifying before City Council),<sup>7</sup> there will be sufficient other representation that will not be exempt under that provision, and thus the representation will otherwise qualify as lobbying.

4. Official Capacity. With the above assumptions, the only issue that you are presenting appears to be whether the exemption applies that is stated in Code Section 20-1204(7): A City official or employee, acting in official capacity.<sup>8</sup> The question is whether this exemption applies only to individual governmental officers/employees, and not to government entities, particularly when the entity is acting as principal and employing outside lobbyists or lobbying firms. The Board concludes that, where the City government entity hires an outside lobbyist or lobbying firm, the exemption in Code Section 20-1207(7) does not apply.

Although the Board has not to date officially opined on this question, we conclude that persuasive authority can be found in rulings of the State Ethics Commission, in interpreting the very similar State Lobbying Act, 65 Pa.C.S.A. Sect. 13A01, *et seq.*

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<sup>6</sup> See also Regulation 9, Paragraphs 9.1(X) and 9.24(O).

<sup>7</sup> See also Regulation 9, Paragraph 9.24(A).

<sup>8</sup> See also Regulation 9, Paragraph 9.24(G)

City Code Section 20-1204(7) is closely modeled on Section 13A06(10) of the State Act. The State's regulations interpreting Section 13A06(7)-(10), at 51 Pa. Code Sect. 57.2(a)(7), after discussing lobbying by government officials/employees, include this sentence: "The governmental entity would be required to register or report as a principal if other lobbyists or lobbying firms would engage in lobbying on behalf of the governmental entity [and the total expenditures would exceed the expenditures threshold]." (emphasis added).

This interpretation codified two prior Opinions of the State Ethics Commission, Opinions 07-1001 and 07-1002. In Confidential Opinion 07-1001, the Commission applied the Act's definition of "principal" to a certain "Commission A" (identities were concealed in this Confidential Opinion). The Opinion noted that the 2006 State Lobbying Disclosure Act had changed the definition of "principal" from the prior Act (struck down in 2000), so that the definition changed from:

Any individual, firm, association, corporation, partnership, business trust, or business entity

to

An individual, association, corporation, partnership, business trust, or other entity.

The Opinion then held that the phrase "other entity" includes governmental entities, like Commission A. The Opinion held that Commission A is a principal, but that under the exemption for certain entities or officials acting themselves in their official capacities, Commission A would only be required to register and report as a principal to the extent that other lobbying firms or lobbyists engaged in lobbying on behalf of Commission A. Similarly, in Opinion 07-1002, the State Ethics Commission ruled that SEPTA is a principal "to the extent lobbying firms or lobbyists engage in lobbying on behalf of SEPTA," relying on Opinion 07-1001. The Commission's conclusion were not affected by the fact that both Commission A and SEPTA are agencies of the Commonwealth and would be engaging in lobbying of other Commonwealth entities.

Thus, where the City Administration and PGW are represented by a lobbying firm or lobbyist before City Council, the exemption of Code Section 20-1204(7) does not apply, and would not exempt these governmental entities from being required to register as principals, under the Philadelphia Lobbying Code.

### **When must filing occur?**

Your question on this point involves two different requirements, the requirement to register with the Board of Ethics (Subpart B of Regulation 9) and the requirement to

file quarterly expense reports (Subpart C of Regulation 9). It is important to keep these separate.

1. The requirement to register as a principal. You advise that “the City” and PGW have both registered with the lobbying system. Thus, these principals<sup>9</sup> have complied with the registration requirement for calendar year 2012 and are registered for the entire year. No further registration is required in 2012. You refer to registration “as to the two current contracts” and contrast this with registration “with respect to the coming contracts” beginning July 1, 2012. However, there exists no such concept as registration “with respect to a contract.”<sup>10</sup> Rather, as noted above, registration is for a calendar year, and the two identified principals are already registered for calendar year 2012, so the question of when these principals must register is moot.<sup>11</sup>

2. The requirement to file quarterly expense reports. Once registered, a registered principal must file expense reports for each quarter.<sup>12</sup> Even if no lobbying occurred in a quarter, a registered principal is still required to file an expense report form and check the applicable box on the form if lobbying expenses did not exceed the \$2500 threshold for the quarter. *See* Code Section 20-1203(7); Regulation 9, Paragraph 9.14(B). The deadlines for filing for each quarter are stated in Paragraph 9.2 (Filing Deadlines).

### **When are expenses reportable?**

Related to the above question is the question of when an expense becomes reportable. As you note, there are a number of different possible accounting methods for recording expenses. Paragraph 9.16(G) of Regulation 9 provides: “For the purpose of calculating total lobbying costs reportable in an expense report, a registrant may use a reasonable method of estimation and allocation.” However, the unique facts of any situation may include different fee arrangements, billing schedules, and payment plans.

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<sup>9</sup> See page 4 for the Board’s conclusion as to the principal described by the phrases “the City Administration” or “the City.”

<sup>10</sup> *See* Code Section 20-1202 and Regulation 9, Subpart B.

<sup>11</sup> Although the Code refers to filing “within ten days of engaging in lobbying,” that is a deadline, not a narrow window of time earlier than which registration may not occur. The principals here registered in May 2012. Given that the principals here had a lobbying contract in place and assuming that they anticipated lobbying to occur in the second quarter which would likely exceed the threshold amount of \$2500, it was reasonable to register during that quarter. *See* Regulation 9, Example at Paragraph 9.3 and Paragraph 9.16(G).

<sup>12</sup> *See* Code Section 20-1203(1) and Regulation 9, Paragraph 9.13.



Specific questions should be referred to staff of the Board of Ethics. Given that you advise that each of the two principals has a \$30,000 contract that expired on June 30, 2012, it appears likely that the \$2500 threshold was exceeded in the second quarter, and the principals should file expense reports by July 30, 2012 for that quarter.

In keeping with the concept that an ethics advisory opinion is necessarily limited to the facts presented, this Opinion has been predicated on the facts that were provided to the Board of Ethics. We do not conduct an independent inquiry into the facts. Further, we can only issue advice as to future conduct. Although previous opinions of this office that interpret statutes are guidance as to how this office will likely interpret the same provision in the future, previous opinions do not govern the application of the law to different facts. Ethics opinions are particularly fact-specific, and any official or employee wishing to be assured that his or her conduct falls within the permissible scope of the ethics laws is well-advised to seek and rely only on an opinion issued as to his or her specific situation, prior to acting. In that regard, to the extent that this opinion states general principles, and there are particular fact situations that you may be concerned about, you are encouraged to contact the Board for specific advice on the application of the ethics laws to those particular facts.

Although you initially requested nonpublic advice from the Board of Ethics, you later waived the request that it be nonpublic,<sup>13</sup> so we are making this letter public, as mandated by Code Section 20-606(1)(d)(iii).

By the Board:

Richard Glazer, Esq., Chair  
Michael H. Reed, Esq., Vice-Chair  
Judge Phyllis W. Beck (Ret.), Member  
William H. Brown III, Esq., Member  
Sanjuanita González, Esq., Member

[William H. Brown III, Esq. resigned from the Board effective July 30, 2012. Mr. Brown participated in the approval of the original Nonpublic Formal Opinion sent to the requestor.]

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<sup>13</sup> See note 1.