

CITY OF BALTIMORE

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**BOARD OF ETHICS
OF BALTIMORE CITY**

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**BALTIMORE CITY BOARD OF ETHICS
Ethics Opinion 16-001
(February 12, 2016)**

In the course of addressing a complaint involving the Ethics Code's gift provisions, the Ethics Board has become aware that some well-settled and long-established elements of those provisions may not be as well understood by City officials as they should be. The Board believes that the issuance of a formal Opinion reiterating some important elements of the City's law on the solicitation and acceptance of gifts by public servants could be beneficial in both helping officials avoid inadvertent violations of these provisions in the future, and educating the general public and potential donors about the limits on acceptable gifts.

In the matter giving rise to this Opinion, a public servant was said to have solicited and accepted a gift of free services from an individual with interests that could have been significantly affected by decisions that the public servant would be expected to be involved in making. The services were said to be accepted for the purposes of advancing the interests of the general public, rather than the private interests of the public servant. The public servant also publically promised to refrain from future participation on matters involving the gift giver.

This scenario presented four main questions for the Board to consider:

1. Can services be considered gifts, or must a gift be a tangible object?
2. If a person does not directly "do business" with a public servant's agency, are there other factors that might make it impermissible to accept or solicit a gift from them?
3. Is it permissible for a public servant to independently solicit or accept an otherwise impermissible gift for public, charitable, or governmental purposes if the gift provides no private benefit to the public servant?
4. Can an otherwise illegal and impermissible gift be made permissible by a public servant's promise to recuse him- or herself from future decisions relating to the gift giver?

Long-standing and well-settled, but perhaps not widely understood, elements of the City's Ethics rules provide definitive answers to each of these questions.

Three main sections of the Ethics Code are most relevant to this discussion. Ethics Code § 6-26, laid out in its entirety below, addresses when it is and is not permissible to solicit gifts. § 6-27 lays out nearly identical general criteria for when even unsolicited gifts cannot be accepted. The general non-acceptance rule in § 6-27 is subject to a few limited exceptions, but none of those exceptions were relevant in the underlying matter and, therefore, will not be discussed in this Opinion.

§ 6-26 states:

§ 6-26. Solicitation prohibited.

(a) In general.

Except as permitted under subsection (b) of this section, a public servant may not solicit or facilitate the solicitation of a gift, whether on the public servant's own behalf or on behalf of another person, from any person that the public servant knows or has reason to know:

- (1) does or seeks to do business of any kind, regardless of amount:
 - (i) with the public servant's agency; or
 - (ii) with another person in connection with or in furtherance of a contract that is being negotiated or has been entered into by the other person with the public servant's agency;
- (2) engages or seeks to engage in an activity that is regulated or controlled by the public servant's agency;
- (3) is or, within the preceding 12 months, has been a lobbyist with respect to matters within the jurisdiction of the public servant;
- (4) has a financial interest that might be substantially and materially affected, in a manner distinguishable from the public generally, by the performance or nonperformance of the public servant's official duties; or
- (5) is an owner, partner, officer, director, trustee, employee, or agent of any person described in items (1) through (4) of this subsection.

(b) Exception.

The prohibition in subsection (a) of this section does not apply to a solicitation if:

- (1) it is for the benefit of an official governmental program or activity or a City-endorsed charitable function or activity; and
- (2) it either:
 - (i) is expressly allowed by a rule or regulation of the Ethics Board; or
 - (ii) otherwise has been approved in advance by the Ethics Board, on the written request of the public servant and his or her agency.

(In § 6-27, the list of donors from whom even unsolicited gifts may not be accepted is identical to that in § 6-26(a)(1)-(5).)

The word “gift” is generally defined in Ethics Code § 2-17 to mean “the transfer of any thing or any service of economic value, regardless of the form, without adequate, identifiable, and lawful consideration”.¹

Services as Gifts

The definition of a gift in § 2-17 explicitly refers to “any thing *or any service*” as potentially being a gift, removing any suggestion that a gift must be a tangible item to come within the Ethics Code’s purview. This explicit reference to services as gifts was added to the Ethics Code in September of 2011, ending any possible basis for arguing that a service should not be considered a gift.

Even before this clarification, however, it had been well understood that the previous language, dating back at least to the early 80’s and defining a gift as “anything of economic value, regardless of form”, was intended to include services.

Gifts from People Not “Doing Business” with a Public Servant’s Agency

§§ 6-26 and 6-27 list five categories of persons from whom a public servant may not ordinarily solicit or accept a gift. The first of these categories, someone who “does or seeks to do business” with a public servant’s agency, is the most commonly thought of and encountered type of controlled donor;² but the prohibitions apply equally to people in the other 4 categories.

Three of the additional categories – a person “regulated or controlled by” a public servant’s agency, a lobbyist on matters within the public servant’s jurisdiction, and an “owner, partner,

¹ § 2-17 excludes from this definition, for Ethics Code purposes, campaign donations regulated by State law.

² This “doing business” category also encompasses a subcontractor on an existing or potential contract with a public servant’s agency.

officer, director, trustee, employee, or agent” of someone in any of the other categories – are fairly self explanatory.

The remaining category, listed in §§ 6-26(a)(4) and 6-27(4), may benefit from additional explanation. These provisions prohibit the solicitation or acceptance of gifts from any person that a public servant knows or has reason to know “has a financial interest that might be substantially and materially affected, in a manner distinguishable from the public generally, by the performance or nonperformance of the public servant’s official duties”.

This language has been part of the City’s Ethics Code for more than 30 years, and it was substantially mirrored in the official Codes of Conduct for the Mayor’s Office, City Council, and Comptroller’s Office that were in place prior to the adoption of the most recent version of the Ethics Code.

This language is not designed to prevent gifts from any member of the public who could be touched in some remote manner by a public servant’s duties. For example, a Councilperson is not prohibited from accepting gifts from all Baltimore property owners merely because the City Council votes on the property tax applicable to everyone, nor from any resident merely because the resident could theoretically be fined for violating an ordinance that the Council has the power to repeal.

Instead, it focuses on individuals who could be impacted in a particularly identifiable way by the public servant’s official decisions or actions. For instance, a property owner across the street from a proposed project seeking a City subsidy would fall into this category vis-a-vis any public servant involved in the process of approving or disapproving the subsidy, since the property owner would see her property value rise or fall based on whether the project proceeds or not. This would be true even if, on its own, the public servant’s decision would not be determinative of whether the subsidy would be awarded or, in any event, be decisive to the project’s success. If, at the time of the gift, the public servant’s involvement *could* impact whether the subsidy will be awarded, and if the subsidy *could* affect whether the project proceeds or not, this provision would apply.

Similarly, a building inspector could not solicit a gift (or accept an unsolicited gift) from a prospective tenant of a building she was inspecting to verify its readiness for occupancy, even though the prospective tenant itself is not regulated by the inspector, does not have a contract with the inspector’s agency, and may not yet have a formal relationship with anyone regulated by or doing business with the inspector’s agency. The prospective tenant’s established interest in possibly using the space in the future is a sufficiently significant and identifiable interest of the tenant that could be affected by the inspector’s duties.

Importantly, as the above examples illustrate, many people covered by this prong of the City’s gift law will not have a direct relationship with the public servant’s agency or officially be a “party” to a matter within the public servant’s jurisdiction. However, if a public servant knows

that a person could be specifically impacted – for good or for ill – by the disposition of a matter that the public servant is involved in (or if the potential impact on that person is sufficiently well known that the public servant *should* be aware of it) then gifts may not ordinarily be solicited or accepted from that person.

The use of the term “might” in this statutory clause makes it clear that the ultimate influence that the public servant exerts on the disposition of the matter in question, and whether that disposition actually does impact the donor, is not relevant to determining whether a gift can be solicited or accepted. It is enough that, at the time the gift is solicited or accepted, the public servant knows (or should know) that the donor, under some set of foreseeable circumstances, could be specifically aided or harmed by the public servant’s official actions.

Gifts Intended to Benefit the Public

Many people think of something as a gift only if it is given directly to them for their own benefit. This understanding of the idea of a gift is, however, extremely limited and not appropriate for application to conflict of interest concerns. The Ethics Code has always had a broader conception of gifts.

The Ethics Code’s definition of gift is conspicuously lacking in any language limiting who the recipient of a “transfer” has to be in order for it to constitute a gift. § 2-17 requires merely that some transfer, to *any* recipient, take place.

The gift solicitation and acceptance provisions are even more explicitly broad, generally prohibiting the solicitation of a gift from certain people, “whether on the public servant’s own behalf or on behalf of another person”, and the acceptance of a gift “directly or indirectly” from the same people. No provision states or implies that a gift must be directly for the public servant’s personal benefit in order to be subject to the Ethics Code’s prohibitions.

Indeed, even before the explicit phrase “whether on the public servant’s own behalf or on behalf of another person” was added to the Code, it had long been interpreted to apply equally to all gifts, whether received directly by a public servant, sent to a third party or donated to a charity at a public servant’s request, or given directly to the City for official purposes. The Ethics Code is not concerned with how a gift is ultimately used, just from whom it is solicited or accepted.

This understanding of the gift provisions was also publically adopted by the Codes of Conduct for the Mayor’s Office, City Council, and Comptroller’s Office adopted in 1995, all of which specified that their prohibitions applied “even if the ‘gift’ is solicited to support a governmental function”.

The Ethics Code, in § 6-26(b), does allow for the solicitation of some gifts for government programs or City endorsed charities, but only if the solicitations are handled in a public way through a specific process, established by regulation, that includes approval in advance by both

the Board of Estimates and the Ethics Board. Gifts for ostensibly public purposes solicited outside of this process are treated the same as gifts given directly to a public servant for personal use.

Putting an illegally solicited or accepted gift to good use once it's received simply does not impact the illegality of the original solicitation or acceptance.

Curing a Gift Violation Through Recusal

The Ethics Code recognizes that *some* potential conflicts of interest can be avoided by a public servant's decision to recuse him- or herself from any involvement in a matter that could impact the public servant or a relative. By not participating in a matter covered by Ethics Code § 6-6 {"Prohibited participation"}, a potential conflict is avoided and never actually comes into existence. No action that could violate the Ethics Code ever occurs.

The logic of § 6-6 – that a conflict can sometimes be avoided, and a violation prevented, by recusal – does not apply to a gift scenario. §§ 6-26 and 6-27 create violations of the Ethics Code at the moment that certain gifts are solicited or accepted. Subsequent actions, or inactions, do not change the existence of the initial violation. Although § 6-6 *requires* recusal in certain situations where the recusal would *avoid* a potential conflict entirely, neither that section, nor any other provision of the Ethics Code, *permits* recusal as a "cure" for other situations and actions that the Code deems to be inherent conflicts and, as such, expressly prohibits.

The language used in describing the donors from whom gifts shouldn't be solicited or accepted, referring to broad categories of potential or perceived conflicts rather than narrow actual ones, also makes clear that even the potential for a future conflict triggers the gift prohibitions. Regardless of a public servant's promise to recuse in the future, a donor would still be doing business with or regulated by the public servant's agency, lobbying on an issue "within the jurisdiction" of the public servant, or have an interest that "might" be affected by the public servant's duties. The gift prohibitions are designed and intended to be much broader in nature than the provisions requiring recusal.

Further, agreeing not to take action on a matter in exchange for a gift could often be, in fact, a result that is sought by, and beneficial to, a donor. If a donor did not want a board to approve a certain contract for instance, they could give gifts to two of the three board members and have them recuse themselves from voting on the contract in question, thereby making it impossible for a majority of the board to approve it. Allowing such a result would certainly not advance the Ethics Code's purpose of guarding against "improper influence or even the appearance of improper influence".

Summary

The scenario discussed at the start of this Opinion would be a clear violation of the Ethics Code. Application of the well-settled law explained in this Opinion establishes that accepting a gift of services, even for ostensibly public purposes, from a person who might specifically benefit from a public servant's official actions or inactions is a violation that cannot be rendered permissible by any subsequent actions, even recusal from matters involving the donor. Arguments against this finding are not supported by law or practice.

It is important that all public servants have a clear understanding of the entire Ethics Code, including the four main points raised by the complaint giving rise to this Opinion. Those essential points are:

1. A gift can be anything of value, including services, discounts, or material objects.
2. The prohibition on soliciting or accepting gifts extends beyond people "doing business" with a public servant's agency. Rather, the prohibition includes:
 - (i) persons doing or seeking to do business with the public servant's agency (including subcontractors);
 - (ii) persons engaged in or seeking to engage in an activity regulated or controlled by the agency;
 - (iii) certain lobbyists;
 - (iii) persons who could be specifically and materially affected by a public servant's official actions – even if they are not directly a party to the matter involving the public servant and even if the public servant's actions alone might not decide the matter; and
 - (iv) certain affiliates of people in the other four categories.
3. A gift need not personally benefit a public servant to be prohibited. Impermissible gifts are not rendered permissible merely because a gift is intended for charitable purposes or to otherwise benefit the public.
4. Gift violations are incurred at the moment of the impermissible solicitation or acceptance. Promises to recuse oneself from matters related to the gift giver, whether kept or not, do not in any way ameliorate the violation.