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Subject: Ethics Commission issues Formal Advisory Opinion on Fundraising by Municipalities

The Ethics Commission has issued a formal advisory opinion, EC-COI-12-1*, that explains how the conflict of interest law, G.L. c. 268A, applies to municipal employees who solicit donations or engage in fundraising on behalf of the municipality where the persons and entities approached for a donation may have business dealings with the municipality or its agencies or employees.

In general, public employees are prohibited by §§ 3 and 23(b)(2) from soliciting anything of substantial value from anyone with whom the public employee has official business dealings. However, as discussed in EC-COI-12, a municipal employee may solicit donations to a municipal entity from persons and entities with whom he, or other municipal employees, has or expects to have official dealings, consistent with c. 268A, provided that all of the following are true:

- (1) the solicitation is carried out in accordance with G.L. c. 44, § 53A, which authorizes acceptance of gifts by municipal employees on behalf of the municipality, and, by implication, authorizes the solicitation of gifts;
- (2) the solicitation is not made in circumstances that are inherently coercive because the person or entity solicited may be directly and significantly affected by a pending or anticipated decision of the same municipality;
- (3) no overt pressure is exerted in connection with any such solicitation;
- (4) the municipality and its employees apply objective standards in all dealings with persons and entities who are solicited, and do not favor those who give or disfavor those who do not; and
- (5) the municipal employee principally responsible for making such solicitations discloses publicly and in writing the names of those solicited, pursuant to G.L. c. 268A, § 23(b)(3).

A copy of the opinion is attached. Please contact the Commission at 617-371-9500 with any questions. If you need specific advice about how the advisory opinion applies to your prospective situation, ask to speak to the Legal Division.

** Formal advisory opinions are issued by the Commission and address issues for which there is no clear Commission precedent. They are confidential, except that the Commission publishes public versions of such opinions with any identifying information deleted. Formal advisory opinions can be found on the Commission's website, www.mass.gov/ethics.*

Commonwealth of Massachusetts

State Ethics Commission

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EC-COI-12-1

FACTS:

A municipality seeks guidance with respect to whether municipal employees may fundraise for a tax-exempt municipal trust fund. In general, persons and entities solicited to make donations to the fund do not have business dealings with the department of the particular municipal employee principally responsible for soliciting such donations, but in some instances they may have such dealings. In addition, the solicited persons and entities are likely to have business dealings with some other municipal department or agency.

QUESTION:

May a municipal employee, consistent with G.L. c. 268A, the conflict of interest law, solicit donations to a municipal trust fund from persons and entities with whom he, or other municipal employees, has or expects to have official dealings?

ANSWER:

Yes, provided that (1) the solicitation is carried out in accordance with G.L. c. 44, § 53A, which authorizes acceptance of gifts by municipal employees on behalf of the municipality and, by implication, solicitation of gifts; (2) the solicitation is not made in circumstances that are inherently coercive because the person or entity solicited may be directly and significantly affected by a pending or anticipated decision of the same municipality; (3) no overt pressure is exerted in connection with any such solicitation; (4) the municipality and its employees apply objective standards in all dealings with persons and entities who are solicited, and do not favor those who give or disfavor those who do not; and (5) the municipal employee principally responsible for making such solicitations discloses the names of all those solicited in any manner (oral, written, electronic, or other), by himself or other municipal employees; these disclosures must be made publicly and in writing pursuant to G.L. c. 268A, § 23(b)(3).

1. Statutory Authorization for Solicitation

Sections 3 and 23(b)(2) of the conflict of interest law generally prohibit public employees from soliciting anything of substantial value. Section 3(b), in pertinent part, prohibits a public employee from asking for or soliciting anything of substantial value for himself, for or because of any official act, or to influence or attempt to influence him in an official act, "otherwise than as provided by law for the proper discharge of official

duty.” Sections 23(b)(2)(i) and (ii), respectively, prohibit public employees from “solicit[ing] or receiv[ing] anything of substantial value for [themselves], which is not otherwise authorized by statute or regulation, for or because of [their] official position;” and from using their official positions to “secure for [themselves] or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals.” “Substantial value” is \$50 or more.

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Most of our opinions applying these statutes to public employee solicitations have involved solicitations for non-governmental purposes.² In that context, we have consistently stated that public employees may not use their titles, public work time, or public resources to solicit for non-governmental purposes.³ We have explained that such solicitations are problematic for numerous reasons, including because they raise questions about the soliciting public employee’s objectivity and impartiality and may cause persons solicited by the public employee to feel compelled to comply.⁴

In two prior opinions we have concluded that proposed solicitations by public employees for specific governmental purposes did not violate the conflict of interest law.⁵ In both cases, the state agencies seeking to carry out the solicitations had provisions in their enabling acts that authorized them to accept gifts, and therefore, by implication, to solicit gifts. The proposed solicitations were for specific purposes that bore some relation to the interests of the entities to be solicited, or might even benefit them.⁶ The solicitations were made to entire industries or groups of businesses, and were not targeted to individuals or specific entities. While employees of the soliciting public agencies anticipated having future dealings with the entities to be solicited, the solicited entities did not have specific, significant matters pending before the soliciting agencies at the time of the solicitations.⁷ In those circumstances, we permitted the proposed solicitations because the agencies’ enabling acts implicitly authorized them to solicit gifts, but advised the agencies to use objective standards in their future dealings with the entities solicited, and not reward or penalize them based on whether or not they contributed. In the later decision we also concluded that the requirement of § 23(b)(3), that public employees not engage in conduct which gives a reasonable basis for the impression that they can be improperly influenced, was satisfied by public disclosures identifying all the contributing companies.

The present opinion request by a municipality that wishes to solicit donations to a municipal trust fund is less specific than the opinion requests we have previously considered, with respect to both the purposes of the proposed solicitations and the intended targets. The municipality does not state that the purpose of its solicitations will be to raise funds for specified municipal actions that may benefit the targets of those solicitations; instead, the municipality apparently wishes to be able to solicit donations for any of the broadly defined purposes for which the municipal trust fund may be used.⁸ In addition, the proposed targets of solicitation are not limited to those who may at some point have official dealings with the municipality, but include persons and entities with

matters pending before municipal employees, including matters of significance to those persons and entities.

Our two prior opinions in the area of public employee solicitation for governmental purposes did not explicitly address whether such a solicitation may occur only when there is statutory or regulatory authority for the solicitation. The requesting municipality argues that statutory authorization should not be required for fundraising that serves a governmental purpose. While there is statutory authority for a municipality to accept gifts in some circumstances,⁹ the requesting municipality does not rely upon those statutes, but instead argues that no statutory authorization should be required because of the public purposes for which its trust fund will be used.

We disagree. The conflict of interest law requires that there be express statutory or regulatory authority for public employee solicitations for governmental purposes. Section 3 prohibits public employee solicitation of gifts “otherwise than as provided by law for the proper discharge of official duty.” Sections 23(b)(2)(i) prohibits solicitations “not otherwise authorized by statute or regulation,” and Section 23(b)(2)(ii) prohibits the use of one’s official position to obtain “unwarranted” privileges. In determining whether a privilege is “unwarranted,” we have stated that conduct explicitly authorized by statute or regulation is not “unwarranted,”¹⁰ while conduct prohibited by statute is “unwarranted.”¹¹ In sum, §§ 3 and 23 prohibit solicitations by public employees for governmental purposes absent statutory or regulatory authorization. This conclusion is consistent with our two prior opinions in this area.

G.L. c. 44, § 53A authorizes acceptance of gifts by municipal employees on behalf of their municipality, and, by implication, solicitation of gifts to be used for municipal purposes. The municipal employee who is the subject of the present request may solicit donations from persons and entities that have business before him and other municipal employees in accordance with G.L. c. 44, § 53A, subject to the further limitations on such solicitations set forth below.

2. Inherently Coercive Solicitations

The Commission has consistently interpreted § 23(b)(2) to prohibit public employees from soliciting private business relationships from individuals over whom the public employee has authority or a regulatory relationship. We have repeatedly expressed concern that a solicitation made by a public employee to someone under his authority or regulatory control is inherently coercive, stating, for example, “In these circumstances, one may never know whether the private party is objectively responding to the solicitation or whether his decision is influenced by a pressure to maintain good relationships with the public employee, or whether any official dealings are affected by the private dealing.”¹² Similarly, we have stated, “Regardless of the purpose of a solicitation, the dangers of compromising a public employee’s impartiality and objectivity and of creating an atmosphere where potential vendors feel compelled to

contribute to foster the agency's or the public employee's good will remain."¹³ We have repeatedly applied that principle in our enforcement actions, and have found violations of § 23(b)(2) when a public employee asked for something from someone at a time when a matter of significance to the person receiving the request was pending before the public employee.¹⁴

Solicitations for governmental purposes by public employees from those under their authority or regulation raise the same concern: a solicitation made at the time when the person solicited may be directly and significantly affected by the authority of the soliciting public employee, or by his public employer, is inherently coercive. Indeed, the purpose of a solicitation -- whether it is for governmental or non-governmental purposes - - is irrelevant to whether the person who receives it will feel pressured to comply because of the possibility of adverse governmental action if he declines.

We therefore take this occasion to state explicitly that we will find a violation of § 23(b)(2) when a municipal employee uses his official position to make a solicitation for municipal purposes under inherently coercive circumstances, i.e., when the solicitation is made by the municipal employee, knowingly or with reason to know, to a person or entity who may be directly and significantly affected by a pending or anticipated decision of the same municipality. A municipal employee soliciting for a municipal purpose has a duty to make reasonable inquiry into whether the person or entity whom he intends to solicit has a matter pending or anticipated before his employing municipality such that a solicitation would be inherently coercive.¹⁵ If a solicitation would be inherently coercive in the circumstances, it may not be made. Any doubt as to whether a pending or anticipated matter will have a direct and significant effect on a potential target of a solicitation should be resolved against making the solicitation.

3. Solicitations Accompanied by Overt Pressure

Of course, § 23(b)(2) prohibits not just inherently coercive solicitations, as discussed above, but also solicitations accompanied by overt pressure.¹⁶ Just as a municipal employee's solicitation for municipal purposes may not be made in inherently coercive circumstances, such a solicitation may not be accompanied by overt pressure.

4. Objective Standards in Dealing with Those Solicited

Our prior opinions in the area of public employee solicitations for government purposes have emphasized that persons or entities who receive such solicitations cannot be rewarded for donating to a governmental purpose or penalized for declining to do so.¹⁷ This principle applies to all municipal employees who have official dealings with persons or entities solicited to contribute to the municipal trust fund. That is, municipal employees who have dealings with persons or entities who have been solicited to contribute to the municipal fund must apply objective standards in those dealings, and

may not give preferential treatment for donating, or adverse treatment for declining to donate.

5. Written Disclosures

Section 23(b)(3) of the conflict of interest law prohibits a public employee from engaging in conduct which gives a reasonable basis for the impression that any person or entity can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, or the position of any person. In one of our earlier opinions concerning solicitations by public employees for governmental purposes, we approved the agency's proposal to comply with this requirement by publicly disclosing the names of all donors to the Secretary of the Executive Office that included the soliciting agency, and to the Commission.¹⁸ The purpose of the disclosure was to dispel any appearance of favoritism towards the donors.

The requesting municipality should follow the disclosure procedure set forth in our earlier opinion, and require the municipal employee principally responsible for soliciting donations to the municipal trust fund to disclose the names of all those solicited in any manner, whether the solicitation was oral, written, electronic, or by some other means, by himself or other municipal employees. The disclosures should be made publicly and in writing pursuant to § 23(b)(3). These written disclosures should be updated at appropriate intervals and filed with the municipal clerk, who will maintain them as public records. This will dispel any appearance that donors, or those who do not donate, will influence the discretion or decisions of municipal employees in any way.

CONCLUSION:

A municipal employee may, consistent with the conflict of interest law, solicit donations to a municipal trust fund from persons and entities with whom he, or other municipal employees, has or expects to have official dealings, provided that (1) the solicitation is carried out in accordance with G.L. c. 44, § 53A; (2) the solicitation is not made in circumstances that are inherently coercive because the person or entity solicited may be directly and significantly affected by a pending or anticipated decision of the same municipality; (3) no overt pressure is exerted in connection with any such solicitation; (4) the municipality and its employees apply objective standards in all dealings with persons and entities solicited, and do not favor those who give or disfavor those who do not; and (5) the municipal employee principally responsible for making such solicitations discloses the names of all those solicited in any manner (oral, written, electronic, or other), by himself or other municipal employees; these disclosures must be made publicly and in writing pursuant to G.L. c. 268A, § 23(b)(3).

DATE AUTHORIZED: July 20, 2012

¹ 930 CMR 5.05.

² *EC-COI-95-9; 93-23; 93-11; 93-6; 92-28; 92-12; 92-7*. These citations reference Commission conflict of interest opinions available on our website, www.mass.gov/ethics.

³ *Id.*

⁴ *EC-COI-92-28*.

⁵ *EC-COI-92-38; 84-128*.

⁶ In *EC-COI-84-128*, the Secretary of the Executive Office of Public Safety wished to solicit donations for a public education campaign concerning the use and sale of drugs and alcohol in high schools from drug and liquor companies, distributors, and private drug and alcohol treatment centers, all entities with an interest in responsible drug and alcohol use. In *EC-COI-92-38*, employees of the Mass. Office of Business Development wished to solicit donations from representatives of the biotechnology and telecommunications industries to fund two agency positions that would assist those industries.

⁷ In *EC-COI-84-128*, the solicited entities were under the Secretary's enforcement authority. In *EC-COI-92-38*, the agency employees who would carry out the solicitation anticipated future dealings with the biotechnology and telecommunications industries.

⁸ The purposes recognized as tax-exempt under Internal Revenue Code § 501(c)(3) are charitable, educational, scientific, literary, testing for public safety, fostering national or international amateur sports competition, and preventing cruelty to children or animals. The IRS uses the term "charitable" "in its generally accepted legal sense and includes relief of the poor, the distressed, or the underprivileged; advancement of religion; advancement of education or science; erecting or maintaining public buildings, monuments, or works; lessening the burdens of government; lessening neighborhood tensions; eliminating prejudice and discrimination; defending human and civil rights secured by law; and combating community deterioration and juvenile delinquency."

⁹ G.L. c. 44 § 53A authorizes municipalities to accept gifts, but requires that the city council authorize their expenditure, and also that such funds be deposited with the city treasurer. G.L. c. 44 § 53A½ authorizes city councils to accept and use gifts of tangible personal property without specific appropriation.

¹⁰ *EC-COI-02-3; 98-2; 95-5; 92-38 n. 2; 92-37; 92-28; 92-23*.

¹¹ *Advisory 11-1; EC-COI-98-2*.

¹² *EC-COI-93-23* and opinions cited therein.

¹³ *EC-COI-92-28*.

¹⁴ See, for example, *Craven v. State Ethics Commission*, 390 Mass. 191, 202 (1983), affirming *In Re Craven*, 1980 SEC 17 (state representative asked agency to award grant at a time when agency's budget request was pending before representative's committee); *In Re Piatelli*, 2010 SEC 2296, 2301-2 (college president asked subordinate to consider hiring her brother when subordinate's employment contract was about to be up for renewal); *In Re Smith*, 2008 SEC 2152 (City Council employee requested special consideration by parking company in dealing with damage to car when parking-related matters were before City Council); *In Re Hamilton*, 2006 SEC 2043 (public employee sought to sell product to person who had building permit pending before his board); *In Re Travis*, 2001 SEC 1014 (state representative sought contribution from bank that had or would have issues before his committee); *In Re Mazzilli*, 1996 SEC 814

(public employee asked landfill operator to continue accepting old tires while company's contract pending before landfill committee); *In Re Galewski, 1991 SEC 504* (building inspector, while conducting permit inspection, asked developer to build him a house he could afford).

¹⁵ Public employees have a duty of reasonable inquiry to determine whether their actions will violate the conflict of interest law. *EC-COI-02-2*.

¹⁶ *In Re Singleton, 1990 SEC 476* (fire chief violated § 23(b)(2) by telling a developer that "it could take forever" to obtain a Fire Department inspection in the context of seeking private work from the developer).

¹⁷ *EC-COI-92-38; 84-128*.

¹⁸ *EC-COI-92-38*.