

City of Detroit
Board of Ethics

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Advisory Opinion #2017-08
Issued: February 2, 2018

Advisory Opinion #2017-08: At its meeting on December 21, 2017, the Board of Ethics voted to issue this Advisory Opinion pursuant to Section 2-6-104(B)(3) of the Ordinance. It concludes upon review and investigation, the Requestor must disclose its spousal relationship to NED, if NED applies for a CDBG grant. The Requestor must also refrain from participating in the negotiating or approval of funding to NED. In addition, the Requestor must refrain from sharing confidential information, as defined in the Charter and Ordinance.

I. Procedural Background

Request for Advisory Opinion #2017-08 (the "Request"), is dated October 9, 2017, and was sent to the Board of Ethics (the "Board") by electronic communication and received October 11, 2017. The Request was submitted by a current public servant as defined by Section 2-6-3 of the Detroit Ethics Ordinance (the "Ordinance"), who did not waive confidentiality with respect to identity.

At its meeting on October 19, 2017, the Board determined that the Request met the basic requirements for a Request for Advisory Opinion under Section 2-6-101 of the Ordinance. At this meeting, the Board reviewed a Preliminary Analysis of the Request and an extension was allowed for additional investigation. At its meeting on December 21, 2017, after consideration and

discussion of the issues presented, the Board voted to issue this Advisory Opinion pursuant to Section 2-6-104(B)(3) of the Ordinance.

II. Facts Alleged In The Request

In the Request, the Requestor states in summary as follows:

My [spouse] is an employee of [nonprofit entity in Detroit] (NED)¹ and plans to submit an application on behalf of their employer for this year's NOF CDBG funding. Please provide an opinion on my requirements for:

1. Disclosure
2. Voting for applications this year
3. What communications can I have with my spouse regarding the deliberation process for CDBG funding?

I want to ensure that my actions comply with the law and do not provide an opportunity to questions the fairness of the CDBG deliberation process.

By this request, the Public Servant seeks an advisory opinion as to the applicability of the 2012 Detroit City Charter.

III. Applicable Charter Sections

Section 2-6-3

The requestor is a public servant as defined by the Ordinance. Section 2-6-3, 1984 Detroit City Code. A spouse is an immediate family members as defined by the Ordinance. *Id.*

Section 2-6-31(a)(1)

(a) Except as otherwise provided for by applicable law, a public servant who exercises significant authority over a pending matter shall disclose:

- (1) Any financial interest, direct or indirect, that he or she **or an immediate family member** has in any contract or matter pending before city council.

Section 2-6-67

Except as otherwise provided for by applicable law, a public servant shall not knowingly vote, or knowingly participate in the negotiation or making of any

¹ NED means nonprofit entity in Detroit; this acronym is used to assist with the anonymity required by the Charter to keep the employer unnamed.

City contract, or any other type of transaction with any business entity² in **which he or she or an immediate family member has a financial interest.** (Emphasis added.)

Section 2-106.1(2)(f)

A public servant may not “vote or otherwise participate in the making of any city contract, or any other type of transaction, **with any business entity in which he or she or an immediate family member has an interest.**”

Section 4-108

A City Council member must promptly disclose any pecuniary interest in a contract which the City Council has the power to approve and no City Council member may vote on any matter related to the approval of the contract in which the City Council member has a pecuniary interest.”

Section 2-6-3

Confidential information means information that has been obtained by a public servant in the course of acting as a public servant, that is not available to members of the public pursuant to the Michigan Freedom of Information Act, being MCL 15.231 et seq., or pursuant to other law, regulation, policy or procedure recognized by law, and that the public servant is unauthorized to disclose, including:

- (1) Any written information, whether in document or in electronic form, which could be exempted from disclosure pursuant to state law or to other pertinent law, regulation, policy or procedure recognized by law, unless the public servant disclosing the information is permitted by such authority to make disclosure; and
- (2) Any non-written information which, if written, could be exempted from disclosure pursuant to state law or to other pertinent law, regulation, policy or procedure recognized by law, unless the public servant disclosing the information is permitted by such authority to make disclosure; and
- (3) Information which was obtained in the course of or by means of a written or electronic record or oral report of a lawful executive or closed session, whether or not the disclosure of the information would violate state law, unless the public servant disclosing the information is

² The NED is listed as a “business entity” by the Michigan Department of Licensing and Regulation Affairs (LARA).

authorized by state law to make disclosure, or unless the public servant disclosing the information has been properly authorized to make disclosure pursuant to an applicable law, regulation, policy or procedure, except that when such information is available through channels which are open to the public, this provision does not prohibit public servants from disclosing the availability of those channels.

Section 2-6-62

Except as otherwise provided by applicable law, a **public servant shall not knowingly use or disclose confidential information to third parties concerning the property, government or affairs of the City or any office, department or agency thereof, which is not available to members of the public and gained by reason of his or her official duties.**

IV. Application of the Charter to the Facts Presented

The Requestor's disclosure obligations are governed by Section 2-6-31(a)(1). Primary in this writing is "Exercising significant authority," which is defined as "having the ability to influence the outcome of a decision on behalf of the City government in the course of the performance of a public servant's duties and responsibilities." Since the CDBG allocations are approved by the Detroit City Council and the public servant is [REDACTED] to vote on these allocations, the public servant clearly exercises significant authority and is required to disclose this matter on the appropriate form. Section 2-6-31(b), 1984 Detroit City Code.

The Requestor also asks about the vote on the CDBG allocation. Presuming the NED's application makes it to a [REDACTED] vote, it would appear the Requestor would not be eligible to vote on the matter. Section 2-6-67, 1984 Detroit City Code, states as follows:

Except as otherwise provided for by applicable law, a public servant shall not knowingly vote, or knowingly participate in the negotiation or making of any City contract, or any other type of transaction with any business entity in **which he or she or an immediate family member has a financial interest.** (Emphasis added.)

Assuming that the spouse's employment and salary constitute a "financial interest," the public servant may not vote on NED's grant proposal and must also refrain from participating in any negotiations regarding any award to NED.

These restrictions are clearly rooted in the provisions of the 2012 City Charter. The Charter provides that a public servant may not “vote or otherwise participate in the making of any city contract, or any other type of transaction, **with any business entity in which he or she or an immediate family member has an interest.**” Section 2-106.1(2)(f), 2012 Detroit City Charter.

The current charter also provides that “a [REDACTED] member must promptly disclose any pecuniary interest in a contract which the [REDACTED] has the power to approve and no [REDACTED] member may vote on any matter related to the approval of the contract in which the [REDACTED] member has a pecuniary interest.” Section 4-108, 2012 Detroit City Charter.

Similarly, [REDACTED] own rules require disclosure and abstention. Those rules provide as follows:

10.10 [REDACTED] member Must Vote Unless Prohibited: Every member present when a question is put shall vote for or against it unless prohibited from voting by provision of state law, charter or because of a conflict of interest, which interest shall be disclosed.

10.11 Financial Interest of [REDACTED]: No [REDACTED] shall vote on any question in which the member has a financial interest, as defined by law, charter or ordinance.

Section 2-106.1(2)(f), 2012 Detroit City Charter bars voting here, thereby triggering the application of City Council Rule 10.10, which also bars voting. Similarly both the Charter and Ordinance attribute a family member’s financial interest to the Member, thereby triggering the application of City Council Rule 10.11. **In summary, the Charter, Ordinance and City Council Rules bar voting on and participation in the award of any grant to NED.**

The Requestor next seeks guidance as to any communications that may occur with its spouse regarding CDBG grants. The Requestor should exercise caution regarding the use of confidential information. Section 2-6-3, 1984 Detroit City Code, defines confidential information as follows:

Confidential information means information that has been obtained by a public servant in the course of acting as a public servant, that is not available to members of the public pursuant to the Michigan

Freedom of Information Act, being MCL 15.231 et seq., or pursuant to other law, regulation, policy or procedure recognized by law, and that the public servant is unauthorized to disclose, including:

(1) Any written information, whether in document or in electronic form, which could be exempted from disclosure pursuant to state law or to other pertinent law, regulation, policy or procedure recognized by law, unless the public servant disclosing the information is permitted by such authority to make disclosure; and

(2) Any non-written information which, if written, could be exempted from disclosure pursuant to state law or to other pertinent law, regulation, policy or procedure recognized by law, unless the public servant disclosing the information is permitted by such authority to make disclosure; and

(3) Information which was obtained in the course of or by means of a written or electronic record or oral report of a lawful executive or closed session, whether or not the disclosure of the information would violate state law, unless the public servant disclosing the information is authorized by state law to make disclosure, or unless the public servant disclosing the information has been properly authorized to make disclosure pursuant to an applicable law, regulation, policy or procedure, except that when such information is available through channels which are open to the public, this provision does not prohibit public servants from disclosing the availability of those channels.

The Ethics Ordinance addresses the improper use of confidential information at Section 2-6-62, 1984 Detroit City Code, which states as follows:

Except as otherwise provided by applicable law, a **public servant shall not knowingly use or disclose confidential information to third parties concerning** the property, government or affairs of the City or any office, department or agency thereof, **which is not available to members of the public and gained by reason of his or her official duties.** (Emphasis added.)

The definition of confidential information found at Section 2-6-3 is anchored to the Michigan Freedom of Information Act (FOIA) and other applicable laws. Thus, if information is available under the FOIA, the public servant is free to disclose it. The Board has historically refrained from construing the FOIA, deeming it beyond its expertise. (See Request for Advisory Opinion 2009-06.) Several exemptions from the FOIA disclosure that might be relevant here are those found at MCL 15.243(f), (g), and (i). These provisions bar the disclosure of trade secrets or commercial or financial information provided to a governmental agency (MCL 15.243(f)); information protected by the attorney-client privilege (MCL 15.243(g); and bids or proposals to enter into a contract or agreement before the bids are opened or prior to the deadline for submission (MCL 15.243(i).

V. Conclusion

The Board of Ethics concludes based on a review and investigation, the Requestor, who is a [REDACTED], must disclose its spouse's relationship to NED, if NED applies for a CDBG grant. The Requestor must also refrain from participating in the negotiating or approval of a grant to NED. In addition, the Requestor must refrain from sharing confidential information, as defined in the Charter and Ordinance.

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Dated: February 2, 2018