



OFFICE OF THE COUNTY ATTORNEY

Douglas M. Duncan
County Executive

Charles W. Thompson, Jr.
County Attorney

August 23, 2002

TO: Hon. Elizabeth K. Kellar, Chair
Montgomery County Ethics Commission

THROUGH: Charles W. Thompson, Jr.
County Attorney

Marc P. Hansen *Marc Hansen*
Chief General Counsel

FROM: Judson P. Garrett, Jr. *Judson P. Garrett, Jr.*
Principal Counsel for Opinions and Advice

RE: Legal Sufficiency of A Complaint

This is an opinion of the County Attorney in response to the Ethics Commission's request for legal advice.

QUESTIONS ADDRESSED

1. Does the June 18, 2002, letter to the Commission concerning the application of a former County Council member to fill, by Council appointment, a vacancy in the office of Vice-Chair of the Maryland-National Capital Park and Planning Commission (which currently also serves as the Chair of the Montgomery County Planning Board) constitute a formal complaint for the purposes of the Montgomery County Public Ethics Law?

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2. If the letter constitutes a complaint, does it, as a matter of law, allege facts sufficient to state an ethics violation?¹

ADVICE

1. The June 18th letter is a request for the Commission to meet to determine if an investigation is necessary. Although the letter's author subsequently referred to it as a complaint and verified it by oath, the letter is not a formal complaint for purposes of the Ethics Law.

2. Even if the June 18th letter is a formal complaint, the Commission may dismiss it because it "does not allege facts sufficient to state a violation of [the Ethics law],"² *i.e.*, "facts ... that would support a reasonable person in concluding that a violation of [the County's ethics provisions] occurred."³

3. Nevertheless, the Commission may investigate the matter on its own initiative, if the Commission: (a) believes that an ethical violation may have occurred, and (b) finds in writing that an investigation is necessary to resolve the matter.⁴

Our advice is founded on the following understanding of the facts and applicable law.

THE LETTER

In a letter to the Chair of the Ethics Commission, dated June 19, 2002, a citizen requested that the Commission:

convene an emergency meeting to decide if there is sufficient reason to conduct an investigation into whether the County Council entered into a private agreement that amounts to aiding and abetting [a]

¹ As you know, the Ethics Commission asked only the second question. We have concluded, however, that a full response to that question requires that we also address the threshold question presented above.

² MONT. CO. CODE § 19A-10 (a) (4).

³ MONT. CO. CODE § 19A-10 (a) (1).

⁴ MONT. CO. CODE § 19A-9 (a).

newly resigned Councilman ... to violate the County Code of Ethics Sections 19A-14(a) and 19A-15(a), as well as Section 410(b) of the County Code.

In support of that request, the letter stated, in substance:

- the former member resigned from the Council only two days before the deadline for candidates seeking the dual positions of a member and chairman of a bi-county commission;
- on the date of the deadline a local newspaper reported that at least five council members—enough for approval—were prepared to vote for their former colleague;
- an editorial in the same issue, while referring to the former council member as “a lackluster councilman (who) frequently was absent while practicing law,” stated that five members of the Council “seem[ed] united by the theme that [the former council member was] the best they can do;”
- the same news story noted that some critics complain that the former council member has an unfair advantage over other candidates and pointed out that no sitting council member has ever resigned to apply for the commission office; however, the news story added that the former council member would be judged on his merits, like any other candidate.

The writer then said:

[T]he timing and the process of the matter are ethically suspect, to say the least. While [the former council member] announced last December that he would not seek reelection, there was no mention of his future plans. The Council position pays [substantially less than [the Commission position]]. So one could conclude that [the then council member] resigned a ... county position only to be immediately appointed to one at more tha[n] twice that amount. I respectfully suggest that the December announcement, with later

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rumors that his appointment was assured, chilled the prospects of other potential candidates. And I respectfully submit there could be a question of conflict of interest when the interviews take place. Just what impartial questions would [the former council member] be asked? Or, would he even bother with that interview, as well as others usually conducted by several civic organizations?

According to the writer:

The basic ethical question is this: Was [the former member's] eventual resignation well before his term would have expired conditioned on a guarantee of appointment?

The letter concluded by: (1) asserting that "the Commission has the power to invoke Section 19A-27(b)(2)(B) that would 'void an official action (by the Council) if the outcome ... was substantially affected by the conflict of interest;'"⁵ and (2) requesting that, if the Commission decides to question the members of the Council and the former member, it do so under oath.⁶

We note that subsequent to June 18, 2002, the former council member was appointed Vice-Chair of the Maryland-National Capital Park and Planning Commission [and, therefore, Chair of the Montgomery County Planning Board] on a unanimous vote the County Council.⁷

⁵Actually, § 19A-27 (a) authorizes the Commission, or the County Attorney to seek injunctive or other appropriate relief to require compliance with the Ethics provisions, and subsection (b) permits the court to take certain actions, including voiding an official action if: (a) the action arises from or involves the subject matter of a conflict of interest for which no waiver was granted; (b) the outcome of the official action was substantially affected by the conflict of interest; and (c) legal action is filed within 90 days after the official action.

⁶In a follow-up letter dated June 19, 2002, the individual noted that he had "inadvertently omitted the necessary notarized oath" in his June 18th "complaint," and corrected that omission.

⁷ The Maryland-National Capital Park and Planning Commission is a bi-county creature of state law that is authorized to acquire, develop, maintain and administer a regional system of parks in Montgomery and Prince George's Counties. The Commission also is empowered to prepare and administer a General Plan for the physical development of most of the bi-county area and, in Prince George's County, conducts the public recreation program. MD. ANN. CODE, art. 28. The Commission is comprised of ten commissioners -- five appointed by each County as the Montgomery County Planning Board and the Prince George's County Planning Board. The Commission chair and vice-chair is split between the two counties, with each serving as their respective county planning board chair.

APPLICABLE LAW

In pertinent part, the Montgomery County Code provides:

Sec. 19A-14. Misuse of prestige of office; harassment; improper influence.

(a) A public employee must not intentionally use the prestige of office for private gain or the gain of another. Performing usual and customary constituent services, without additional compensation, is not prohibited by this subsection.

* * *

(f) A person must not influence or attempt to influence a public employee to violate this Chapter.

Sec. 19A-15. Disclosure of confidential information; ex parte communications.

* * *

(a) Except when authorized by law, a public employee or former public employee must not disclose confidential information relating to or maintained by a County agency that is not available to the public. A public employee or former public employee must not use confidential information for personal gain or the gain of another. Unless expressly prohibited by law, a public employee may disclose validly obtained confidential information to another public employee if the other public employee reasonably needs the information to carry out the employee's official duties.

Sec. 19A-10. Complaint; Adjudicatory Hearing.

(a) (1) Any individual may file a confidential written complaint with the Commission. The complaint must allege facts under oath that would support a reasonable person in concluding that a violation of this Chapter or Sections 2-109, 11B-51 or 11B-52(a) occurred.

* * *

(4) If the complaint does not allege facts sufficient to state a violation of this Chapter, the Commission may dismiss the complaint. The Commission must inform the complainant of its decision to dismiss the complaint. The Commission may inform the subject of the complaint that the complaint was filed and dismissed, but must not disclose the identity of the complainant.⁸

Sec. 19A-9. Investigations.

(a) The Commission may on its own initiative investigate any matter that the Commission believes may constitute a violation of this Chapter or Sections 2-109, 11B-51 or 11B-52(a) if the Commission finds in writing that an investigation is necessary to resolve the matter.

ANALYSIS

Section 19A-10(a) requires that a complaint allege facts that would support a reasonable person in concluding that a violation has occurred. If a complaint is facially lacking in merit under this standard, the Ethics Commission may summarily dismiss it. The Commission must inform the complainant of its decision to dismiss the complaint. It also may inform the subject of the complaint that the complaint was filed and dismissed, but must not disclose the identity of the complainant.

⁸ "A final decision of the Commission on a complaint ... may be appealed to the Circuit Court under the applicable Maryland Rules of Procedure governing administrative appeals." MD. CO. CODE § 19A-6(c).

1. *The June 18th Letter Does Not Constitute A Complaint.*

It appears that the writer of the June 18th letter intended that his letter constitute a formal complaint of an ethics violation. Indeed, he supplemented the June 18th with a notarized June 19th letter in which he affirmed, subject to the penalties of perjury, “that the *complaint* of June 18, 2002 was true to the best of [his] knowledge.” (Emphasis added.) However, a careful reading of the June 18th letter readily reveals that it does not allege a violation; rather, asserting “ethically suspect” timing and process, the letter is merely a request that the Commission meet for the purpose of determining if (based on a newspaper story and editorial, and the author’s suspicions) the application of a recently resigned member of the County Council for appointment to a position to be filled by the Council should be investigated for aiding and abetting violations of several provisions of the Ethics law. It raised, but did not purport to answer, a “basic ethical question: Was [the former member’s] eventual resignation well before his term would have expired [was] conditioned on a guarantee of appointment?” Clearly, the letter does not allege facts that would support a reasonable person in *concluding* that such a guarantee or any of those Ethics violations had occurred.

In a popular, generic sense, any letter to the Ethics Commission that requests an investigation is a “complaint.” However, for the purposes of, a mere request for an investigation is not a formal complaint, and does not trigger the requirements of § 19A-10.

Section 19A-10 (a) requires that a complaint allege facts under oath that would support a reasonable person in concluding that [an Ethics violation has] occurred. A document that does not even purport to allege such facts is, therefore, not a formal complaint for Ethics law purposes; its author is not a complainant for those purposes; and when the Commission receives such a non-complaint it is under no obligation to treat the request as a formal complaint.

2. If The Letter Is A Complaint, The Commission May Dismiss It.

If the Commission decides to treat the letter as a formal complaint, it may conclude that the letter does not, as a matter of law, allege facts sufficient to state a violation of the Ethics law (*i.e.*, facts that would support a reasonable person in concluding that an ethical violation has occurred), and may dismiss the complaint.

The letter refers to potential violations of three ethics provisions:

(1) § 19A-14(a), which prohibits a public employee from intentionally using the prestige of his or her office for his or her private gain or the gain of another;

(2) § 19A-15(a), which prohibits a public employee or former public employee from: (a) disclosing, except when authorized by law, confidential information relating to or maintained by a County agency that is not available to the public; or (b) using confidential information for his or her personal gain or the gain of another; and

(3) violating "Section 410 (b) of the County Code."

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At the outset, there is no § 410 of the County Code. Probably the writer meant to refer to § 410 (b) of the County Charter, which requires that the County Council adopt a code of ethics that, among other things:

prohibit[s] a public employee from obtaining an economic benefit as a result of public employment if the economic benefit is received on terms more favorable than those available to persons who are not public employees.

Section 410 (b), obviously, prohibits nothing. Rather, this charter provision mandates the County Council to enact, as part of the Ethics law, a particular type of prohibition. This mandate has been satisfied by the enactment of § 19A-16 concerning the solicitation and accepting of gifts, and is not even remotely implicated in the matter under consideration. The letter contains no allegation that the former council member received anything on *terms* more favorable than those available to persons who are not public employees. The letter implies that the former council member received favorable *consideration* from his former colleagues because of their former relationship, and the familiarity that resulted from that relationship. Such treatment, however, would not cause his appointment to be “on *terms* more favorable than those available to persons who are not public employees.” Indeed, because the terms of the appointment are fixed by law, the Council could not appoint on terms more favorable than those available to the public.

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§ 19A-15(a), is equally inapplicable. The letter refers to § 19A-15(a), but alleges absolutely no facts concerning the disclosure or use of any confidential information.

Finally, at no point does the letter allege any facts that would support a reasonable person in *concluding* that the former council member *misused the prestige of his office*. To state a “prestige-of-office” violation, a complaint must allege facts demonstrating that a public employee has sought or received special treatment because of his or her county position. The mischief at which the prestige-of-office prohibition is aimed is a public employee’s use or ability to use his or her position to pressure or intimidate another for some personal favor or benefit. It is predicated on the public employee’s ability, in the exercise of his or her authority, to reward or punish another for his or her own personal gain.

Relying upon innuendo, the “complainant” in this case asks the Ethics Commission to infer, or at least suspect, that the council member asked for or received special treatment because he was a member of the County Council. To be sure, as the writer has put it, “resign[ing] a \$66,000 a year county position only to be almost immediately appointed to one at more than twice that amount” amounts to personal gain. But it does not follow that that personal gain was the result of the *use or misuse of the prestige of his office*. On the contrary, given the Council’s unique relationship with and reliance on the Chair of the County Planning Board, the Council’s unanimous vote to

appoint their former colleague would seem more likely to be a tribute to his past performance and a testament to the Council's trust in his ability to perform well the demanding duties of the new position and their new relationship. Familiarity, it is said, often breeds contempt. That it did not in this case is not, on its face, evidence of a misuse of the prestige of a former council member's office. In any event, the letter does not allege facts sufficient to lead a reasonable person to conclude that the then council member used the prestige of his council office for real or perceived intimidation, pressure or a *quid pro quo*. Rather, the author, perhaps carefully, chose merely to ask the Commission to investigate the "basic ethical question...: Was [the former member's] eventual resignation well before his term would have expired conditioned as a guarantee of appointment?"

For these reasons, the Commission may dismiss the complaint. Of course, if the Commission decides that the letter alleges facts sufficient to support a reasonable person in concluding that an ethics violation has occurred, it may proceed under § 19A-10 with an investigation. Furthermore, if the Commission, based on a complaint and an investigator's report, if any, finds reasonable cause to believe that an ethics violation has occurred, it must hold an adjudicatory hearing, unless the matter is disposed of by consent order.⁹

⁹Mont. Co. Code § 19A-10 (c).

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3. *Under Certain Circumstances the Commission May Investigate the Matter On Its Own Initiative.*

If the Commission concludes that the letter is a formal complaint but does not allege sufficient facts, the Commission, nevertheless, may institute an investigation on its own initiative under § 19A-9, and ultimately, “on its own motion” under § 19A-10 (b), may file a complaint based on a report received from an investigator under § 19A-9. But, under such circumstances, the request is not a complaint and the requester is not a complainant for the purposes of the Ethics law.

We trust this opinion is fully responsive to the Commission’s request, and of assistance.