

[Waiver 1992-10]
W-92-38

MEMORANDUM

November 6, 1992

TO: Betty Ann Krahne
Councilmember

FROM: Jay L. Cohen, Chair
Montgomery County Ethics Commission

RE: Request for Waiver

The Ethics Commission has reviewed your request dated September 25, 1992, for a waiver to participate as a Councilmember in impending discussions and decisions regarding the disposal of solid waste.

Based on your memorandum, the Ethics Commission understands that you and your husband own 800 shares of Waste Management, Inc. (Waste Management). There are about 495,535,000 outstanding shares of Waste Management; each share is currently worth approximately \$35. The net income of Waste Management in 1991 was approximately \$609,509,000. Waste Management is in the business of transporting and disposing of solid waste.

In order to understand the role of the Council in the impending debate and action on how the County should dispose of its solid waste, the Ethics Commission interviewed Council Legislative Analyst Stewart McKenzie who is responsible for analyzing solid waste issues for the Council. Based on this interview and information obtained by Commission staff, the Ethics Commission understands the Council's role in the impending solid waste decisions to be as follows:

The County is undergoing a review of its solid waste disposal plan. This review is centered on the fundamental decision of whether to: (1) burn or bury non-recyclable solid waste inside Montgomery County; or (2) burn or bury non-recyclable waste outside Montgomery County. The current County plan, which is now under review, is to burn non-recyclable solid waste inside Montgomery County at Dickerson and bury the ash at a nearby landfill. In order to evaluate the costs and benefits of in-County versus out-of-County solid waste disposal, the Transportation and Environmental Committee of the Council has requested the Executive to seek offers from private solid waste disposal firms to transport and dispose of the County's solid waste outside of the County.

The estimated term of a contract to dispose of the full solid waste stream outside of the County is 30 years. The estimated value of such a contract is between 5 and 7 billion dollars.

The County expects to receive 7 to 8 responses to its solicitation for out-of-County solid waste transportation and disposal. Waste Management is expected to meet the County's minimum qualifications and may submit a response to this solicitation. The Council intends to review the responses. After this review, the Council will decide whether to amend the Ten Year Solid Waste Management Plan by designating the mix of disposal technology and possibly the out-of-County disposal site.¹ The decision of the technology mix and where the disposal will take place may well determine the specific vendor for out-of-County disposal if that option is selected.

The Council hopes to complete this review and decision-making process before the end of 1992.

Section 19A-11 prohibits a public employee from participating in any matter that affects, in a manner distinct from its effect on the public generally, a business in which the public employee has an economic interest.² The Ethics Commission finds that your economic interest in Waste Management's stock exceeds the minimum \$1,000 threshold applicable to Section 19A-11. Accordingly, the question is whether or not your participation in this decision-making process may affect Waste Management in a manner distinct from its effect on the other potential vendors.

In this regard, the Ethics Commission has considered two alternative levels of your participation in the decision-making process.

On the one hand, if your sole participation in the process were to be that of generally amending the Comprehensive Solid Waste Plan or Chapter 48 of the Code, the Commission believes that your actions would not affect any specific business in a manner distinct from its effect on the public generally. Therefore, in such a case, your participation would not require a waiver.

On the other hand, however, the Ethics Commission understands from your staff that your participation in this process may well include making some very specific decisions regarding such matters as the acceptable technology mix and the acceptable geographic disposal site(s). Since such decisions could themselves actually pre-determine the specific vendor(s) who could receive this contract award, your actions would affect a specific business in a manner distinct from its effect on the public generally. Therefore, in this later case, your participation would require a waiver.

Section 19A-8 authorizes the Ethics Commission to grant a waiver from the prohibition of Section 19A-11 if the Commission finds that:

¹ Council will also have to amend Chapter 48 of the County Code to establish a method for financing the solid waste disposal and recycling plan. The need to establish a financing plan exists whether the County's solid waste is disposed of in-County or out-of-County.

² Unless otherwise indicated, section references are to the Montgomery County Code (1984).

- “(1) The best interest of the County would be served by granting the waiver;
- (2) The importance to the County of a public employee performing his or her official duties outweighs the actual or potential harm of any conflict of interest; and
- (3) Granting the waiver will not give a public employee an unfair advantage over other members of the public.”

A. Best Interest Test. The Ethics Commission believes that it is in the public interest for all members of the County Council to participate in reaching a decision on the extraordinarily important decision of how the County will dispose of its solid waste. Accordingly, the Commission concludes that granting you a waiver would be in the best interest of the County.

B. Balance Test: Public Benefit vs. Public Harm. The Ethics Commission believes that due to its extraordinary term and value, a contract to dispose of the County’s solid waste may well have a positive impact on the value of the contract awardee’s stock. In this case, a thirty year contract valued at 5 to 7 billion dollars may well have a positive impact on the value of the stock of a corporation the size of Waste Management. Therefore, your participation in this matter would involve an actual conflict of interest.

The potential harm which could be caused by this conflict is mitigated by the fact that you are participating in a decision-making process that involves other members of the Council. It is also mitigated by the fact that the proceedings of the Council, as a public body, are subject to the State Open Meetings Act. Finally, by imposing a condition that you publicly disclose your holdings in Waste Management, the Ethics Commission believes that the potential of actual public harm in this case would be minimized even further.

Against this potential harm must be measured and balanced the importance to Montgomery County of its elected officials participating in a decision as significant as solid waste disposal.

On balance, the Ethics Commission concludes that your participation in the discussions and decisions on solid waste disposal outweigh the actual harm of any conflict of interest.

C. Unfair Advantage Test. Finally, the Ethics Commission does not believe that granting you a waiver to participate in this matter will give you an unfair advantage over other members of the public.

Accordingly, the Ethics Commission grants you a waiver from Section 19A-11 to participate in the discussions and decisions regarding whether the County will provide for out-of-County transportation and disposal of solid waste and establishing a financing plan for solid waste disposal and recycling.

This waiver is conditioned on you publicly including in the minutes of the next Council meeting regarding this matter your interest in Waste Management and the fact that the Ethics Commission has granted you a waiver to participate in this matter.

If you have any questions regarding this waiver, please contact the Ethics Commission.