

MEMORANDUM

January 29, 2016

TO: County Council

FROM: Robert H. Drummer, Senior Legislative Attorney 

SUBJECT: **Action:** Expedited Bill 49-15, Ethics - Update

Government Operations and Fiscal Policy Committee recommendation (3-0): approve the Bill with amendments.

Expedited Bill 49-15, Ethics - Update, sponsored by Lead Sponsor Councilmember Leventhal, was introduced on December 1, 2015. There were no speakers at the public hearing held on January 12. A Government Operations and Fiscal Policy Committee worksession was held on January 28.

Bill 49-15 would revise several provisions of the County Ethics Law governing conflicts of interest and financial disclosure to meet the requirements of State law.

Background

The State Ethics law requires that the County Ethics law be “**similar**” to the State law for all public employees except elected officials, and must be “**equivalent to or exceed the requirements of**” State law for elected officials (County Executive and Councilmembers).

In both cases, the State law allows the County to modify its law “to the extent necessary to make the provisions **relevant to the prevention of conflicts of interest in that jurisdiction**”. The State Ethics Commission apparently interprets the latter phrase to only allow those modifications of County law that would make the County law more stringent than the State law; however, that is not what this proviso says. In Council staff’s view, the primary goal of the County Ethics Law generally should be to improve the County law and make it clearer, more effective, and easier to apply and enforce, rather than simply conform it to the State law in every detail.

Bill 39-14, Ethics – Amendments, enacted by the Council on July 21, 2015, signed into law by the Executive on July 31, 2015, and effective October 30, 2015, made some significant amendments to the County Ethics Law to conform to the State Ethics Law. On September 10, 2015, the State Ethics Commission reviewed the County Ethics Law, as amended by Bill 39-14, and concluded that it conformed to the State Ethics Law with several minor exceptions. See the letter from Assistant General Counsel, Katherine Thompson dated September 21, 2015 attached at

©9-10. Bill 49-15 would amend the County Ethics Law to satisfy the State Commission's concerns.

GO Worksession – January 28, 2016

Edward Lattner, Chief, Division of Government Operations, County Attorney's Office, represented the Executive Branch. Robert Cobb, Chief Counsel for the County Ethics Commission represented the Ethics Commission. Robert Drummer, Senior Legislative Attorney, represented the Council staff. The Committee discussed the Bill and the staff amendment. The staff amendment would eliminate the requirement that members of 3 County Boards file either a confidential or a limited public financial statement since Bill 39-14 required all disclosure statements to be public. The Committee also discussed the limits of the general restriction in Code §19A-13(a). The Committee recommended (3-0) approval of the Bill with Staff Amendment 1.

The Amendments

1. Eliminate authority to waive Section 19A-13(a).

Section 19A-13(a) states that:

- (a) A former public employee must not work on or otherwise assist any party, other than a County agency, in a case, contract, or other specific matter for 10 years after the last date the employee significantly participated in the matter as a public employee.

Section 19A-8 would permit the County Ethics Commission to waive this requirement under certain circumstances. The State points out that this waiver provision does not exist in State law. Bill 49-15 would eliminate this waiver provision. This waiver provision has rarely been used, and staff could not find an Ethics Commission opinion granting a waiver in the last 10 years.

The Committee discussed how §19A-13(a) is interpreted by the Ethics Commission. The restriction on future employment is limited to a specific matter that the employee significantly participated in as an employee. Section 19A-13(c) defines "significant participation" as:

...making a decision, approval, disapproval, recommendation, rendering of advice, investigation, or similar action taken as an officer or employee. Significant participation ordinarily does not include program or legislative oversight, or budget preparation, review, or adoption.

A 2011 Advisory Opinion of the County Ethics Commission is attached at ©14-17 as an example of how this provision has been interpreted.

Committee recommendation (3-0): approve this amendment.

2. Remove the 10-year time limit on the prohibition in §19A-13(a) stated above.

The State law prohibition on this type of post-employment does not contain a 10-year time

limit. Although it is unlikely that a specific matter that an employee worked on as a County employee would still be ongoing after 10 years, Bill 49-15 would change the 10-year time limit to forever.

Committee recommendation (3-0): approve this amendment.

3. Extend the prohibition against soliciting or receiving a gift from a restricted donor to a person seeking to do business with the County.

The Bill does not include this amendment in the gift provision because §19A-4(e) already defines “doing business with” as:

- (e) Doing business with means:
 - (1) being a party with a County agency to a transaction that involves at least \$1,000 during a year;
 - (2) negotiating a transaction with a County agency that involves at least \$1,000 during a year; or
 - (3) submitting a bid or proposal to a County agency for a transaction that involves at least \$1,000 during a year.

Further amendment is unnecessary to conform to the State Law.

Committee recommendation (3-0): no amendment necessary.

4. Clarify that a financial disclosure statement must include both the filer’s outside employment and the employment of the filer’s immediate family members.

Council staff believes Bill 39-14 already requires this, but Bill 49-15 would clarify the issue.

Committee recommendation (3-0): approve this amendment.

5. Remove the exception to disclose a source of earned income if the filer and the source have a confidential relationship.

The State Law does not include this exception. Council staff does not believe it is necessary since Bill 39-14 was amended to remove the requirement that the filer list each individual client. Bill 49-15 would remove this exception.

Committee recommendation (3-0): approve this amendment.

6. Should the Bill delete reference to confidential financial disclosure statements being filed by members of Boards and Commissions?

Bill 39-14 eliminated the use of a confidential financial disclosure statement and a limited public financial disclosure statement at the request of the State Ethics Commission. All statements are now public. Section 19A-17 lists who must file a financial disclosure statement. Members of

the Board of Appeals, the Ethics Commission, the Fire and Emergency Services Commission, the Board of License Commissioners, the Revenue Authority, the Housing Opportunities Commission, and the Merit System Protection Board are expressly listed as mandatory filers in §19A-17. Section 19A-17(c)(2) also requires “any paid member of any board, commission, or committee of County government, and any other member of a board, commission, or committee of County government who the Chief Administrative Officer designates” to file a public financial disclosure statement.

However, Bill 39-14 did not remove the existing provisions requiring members of the Cable and Communications Advisory Committee, the Cable Compliance Commission, and the Advisory Board for the Montgomery Cares Program to file either a confidential statement or a limited public statement. Staff Amendment 1 would delete the requirement that members of these 3 boards file either a confidential or limited public statement. The result of this amendment would be to permit the Chief Administrative Officer to decide if members of these boards should file a public statement in the same manner that the CAO must decide whether to designate members of other unpaid boards that are not expressly required to file in §19A-17.

In the alternative, the Committee may decide to list one or more of these boards as mandatory filers in §19A-17. **Committee recommendation (3-0):** amend the Bill with Staff Amendment 1 and authorize the CAO to decide if these board members should file.

This packet contains:	<u>Circle #</u>
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Ethics Advisory Opinion 11-04-002	14

Expedited Bill No. 49-15
Concerning: Ethics – Update
Revised: January 28, 2016 Draft No. 4
Introduced: December 31, 2015
Expires: June 1, 2017
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

Lead Sponsor: Councilmember Leventhal

AN EXPEDITED ACT to:

- (1) revise certain provisions of the County Ethics Law governing conflicts of interest and financial disclosure to meet certain requirements of State law; and
- (2) generally update and amend the County Ethics Law.

By amending

Chapter 8A, Cable Communications
Sections 8A-30 and 8A-31

Chapter 19A, Ethics
Sections 19A-8, 19A-13, and 19A-19

Chapter 24, Health and Sanitation
Section 24-50

Boldface	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

The County Council for Montgomery County, Maryland approves the following Act:

1 **Sec. 1. Sections 8A-30, 8A-31, 19A-8, 19A-13, [[and]] 19A-19, and 24-50**
 2 **are amended as follows:**

3 **8A-30. Cable and Communications Advisory Committee.**

4 (a) Established. The Cable and Communications Advisory Committee
 5 may provide advice and recommendations to the County Executive,
 6 County Council, and the Department of Technology Services on all
 7 telecommunications issues, including the administration of this Chapter
 8 and any franchise agreement or application.

9 (b) The Advisory Committee should meet quarterly or more frequently if
 10 requested by the County Executive or County Council or if the Chair or
 11 Committee finds it necessary.

12 (c) The Advisory Committee must have 15 voting members appointed by
 13 the Executive and confirmed by the Council for 3-year terms. The
 14 members should broadly represent technology areas.

15 (d) The membership must include one representative selected by the
 16 Montgomery County Chapter of the Maryland Municipal League; one
 17 representative selected by the City of Rockville; and one representative
 18 selected by the City of Takoma Park. The members annually must elect
 19 the chairperson and vice chairperson of the Committee. A person must
 20 not serve more than 2 consecutive terms as chairperson.

21 (e) Members are subject to Chapter 19A [[, except that financial disclosure
 22 statements are confidential and limited to communications-related
 23 activities and interests]].

24 **8A-31. Cable Compliance Commission.**

25 (a) *Established.* The Cable Compliance Commission is established to
 26 adjudicate subscriber complaints involving customer cable service and

27 other consumer protection claims that arise under this Chapter, any
 28 regulation adopted or franchise agreement approved under this Chapter,
 29 or Section 11-4A.

30 (b) *Membership.* The Commission is comprised of 5 voting members
 31 appointed by the County Executive and confirmed by the County
 32 Council. Each appointee must be appointed to a 3-year term. The
 33 Commission should include:

- 34 (1) a cable television service subscriber;
- 35 (2) a broadband Internet service subscriber;
- 36 (3) an individual with general business experience; and
- 37 (4) an individual with technical experience in communications.

38 (c) *Officers.* The Commissioners annually must elect a chair and vice chair
 39 of the Commission. An individual must not serve more than 2
 40 consecutive terms as chair.

41 (d) *Reserved.*

42 (e) *Ethics.* Each member of the Commission is subject to Chapter 19A [],
 43 except that the member must file a limited public financial disclosure
 44 statement regarding any communication-related activities and interests
 45 and a full confidential financial disclosure statement[]].

46 **19A-8. Waivers.**

47 * * *

48 (c) After receiving a written request, the Commission may waive the
 49 prohibitions of Section [19A-13] 19A-13(b) if it finds that:

- 50 (1) failing to grant the waiver may reduce the ability of the County to
- 51 hire or retain highly qualified public employees; or

52 (2) the proposed employment is not likely to create an actual conflict
53 of interest.

54 * * *

55 **19A-13. Employment of former public employees.**

56 (a) A former public employee must not work on or otherwise assist any party,
57 other than a County agency, in a case, contract, or other specific matter
58 [for 10 years after the last date] if the employee significantly participated
59 in the matter as a public employee.

60 * * *

61 **19A-19. Content of financial disclosure statement.**

62 (a) Each financial disclosure statement filed under Section 19A-17(a) must
63 disclose the following:

64 * * *

65 (8) *Sources of earned income.*

66 (A) The statement must list the name and address of:

67 (i) each employer of the filer, other than the County
68 Government[,];

69 (ii) [or a] each employer of a member of the filer's
70 immediate family[,]; and

71 (iii) each business entity of which the filer or a member
72 of the filer's immediate family was a sole or partial
73 owner and from which the filer or member of the
74 filer's immediate family received earned income at
75 any time during the reporting period.

76 * * *

77 [(C) If a source of earned income and the filer have a confidential
78 relationship which creates a privilege against testifying

79 under state law, the filer need not report the identity of the
80 source unless the source:

- 81 (i) is registered or must register as a lobbyist on a matter
82 that is or could be considered by the County agency
83 with which the filer is affiliated;
- 84 (ii) does business with the County agency with which the
85 filer is affiliated;
- 86 (iii) owns or operates a business that is regulated by the
87 County agency with which the filer is affiliated; or
- 88 (iv) has an economic interest that is different from the
89 public interest, which the filer may substantially
90 affect in performing the filer's official duties,

91 in which case the identity of the source must be disclosed
92 confidentially to the Commission in a manner prescribed by
93 the Commission.]

94 * * *

95 **24-50. Members; appointments; terms.**

96 (a) *Total members.* The Board has 17 members.

97 (b) *Ex officio members.* Subject to confirmation by the County Council, the
98 County Executive should appoint the following individuals to serve as ex
99 officio members of the Board:

100 (1) The County Health Officer or Officer's designee; and

101 (2) The Chief of the Department's Behavioral Health and Crisis
102 Service or the Chief's designee.

103 (c) *Other members.* Subject to confirmation by the County Council, the
104 County Executive should appoint the following individuals to serve on
105 the Board:

- 106 (1) 2 representatives of community health care providers that
 107 participate in the Program;
- 108 (2) 1 representative of hospitals that participate in the Program;
- 109 (3) The chair of the Board of Directors of the entity that contracts with
 110 the Department to administer the distribution of funds for the
 111 delivery of Program services or the chair's designee;
- 112 (4) 3 members of the public;
- 113 (5) 3 individuals who have knowledge of and experience with issues
 114 relating to health care for uninsured individuals such as primary
 115 care, specialty care, dental care, behavioral health care, or fiscal
 116 matters relating to any of these types of care;
- 117 (6) 1 representative of the Commission on Health;
- 118 (7) 1 representative of the County Medical Society;
- 119 (8) 2 current or former recipients of services under the Program; and
- 120 (9) 1 representative from a Managed Care Organization who is
 121 familiar with Medicaid and insurance issues affecting low-income
 122 populations.

123 * * *

124 (f) *Conflicts of Interest.*

- 125 (1) Section 19A-11(a) does not apply to a member appointed under
 126 subsection (c).
- 127 (2) A member appointed under subsection (c) must []:
- 128 (A) file a limited public financial disclosure statement that
 129 complies with Section 19A-17(a)(6); and
- 130 (B)] publicly disclose to the Board the nature and circumstances
 131 of any conflict before voting on any Board
 132 recommendation.

133 **Sec. 2. Expedited Effective Date.**

134 The Council declares that this legislation is necessary for the immediate
135 protection of the public interest. This Act takes effect on the date on which it becomes
136 law.

137

138 *Approved:*

139

Nancy Floreen, President, County Council Date

140 *Approved:*

141

Isiah Leggett, County Executive Date

142 *This is a correct copy of Council action.*

143

Linda M. Lauer, Clerk of the Council Date

LEGISLATIVE REQUEST REPORT

Expedited Bill 49-15
Ethics - Update

DESCRIPTION: Expedited Bill 49-15 would make several amendments to the County Ethics Law to conform to the State Ethics Law.

PROBLEM: The State Ethics Commission found that several amendments were necessary to conform to the State Ethics Law.

GOALS AND OBJECTIVES: Approval of the County Ethics Law by the State Ethics Commission.

COORDINATION: County Ethics Commission, County Attorney

FISCAL IMPACT: To be requested.

ECONOMIC IMPACT: To be requested.

EVALUATION: To be requested.

EXPERIENCE ELSEWHERE: To be researched.

SOURCE OF INFORMATION: Robert H. Drummer, Senior Legislative Attorney

APPLICATION WITHIN MUNICIPALITIES: Not applicable.

PENALTIES: Class A Violation



COMMISSION MEMBERS:
PAUL M. VETTORI, *Chairman*
KIM COBLE
JANET E. MCHUGH
JACOB YOSEF MILIMAN

STATE ETHICS COMMISSION

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KATHERINE P. THOMPSON
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September 21, 2015

Bob Drummer
Senior Legislative Attorney
Montgomery County Council
100 Maryland Avenue, 5th Floor
Rockville, Maryland 20850

Re: Montgomery County Ethics Law

Dear Mr. Drummer:

At its September 10, 2015 meeting, the State Ethics Commission ("Commission") reviewed the recently submitted Montgomery County Ethics Law. The Commission reviewed the law in compliance with Subtitle 8 of the Maryland Public Ethics Law (Md. Code Ann., Gen. Prov. Title 5 (2014)). After careful review of the ethics law, the Commission did not approve the law as compliant with Subtitle 8 of the Public Ethics law and COMAR 19A.04 for the following reasons:

1. Section 19A-8 creates a waiver provision that allows the County Ethics Commission to waive the prohibition of the post-employment restrictions. There is no such waiver provision in the State Public Ethics Law;
2. The post-employment provisions of Section 19A-13 contain a 10 year limit. The Public Ethics Law has no time limit, as the restriction should be in effect for the duration of the "case, contract or specific matter";
3. The gift provisions includes a provision that prohibits the acceptance of a gift from any restricted donor which includes business entities that are doing business with the city. The Public Ethics Law requires that provision be extended to business entities that are also seeking to do business with the County to capture, for example, business entities bidding on a County project;
4. The enacted financial disclosure provisions for disclosure of sources of earned income provide that the statement must list the name and address of each employer of the filer, or a member of the filer's immediate family. The Public Ethics Law requires both, the filer and the filer's immediate family to disclose their employer. Based on our conversations, it is our understanding that was the intent of the law and the "or" was a typo;

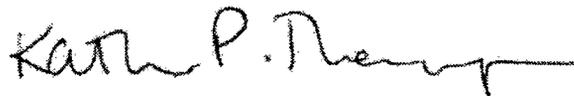
5. The enacted financial disclosure provisions for disclosure of sources of earned income provides exceptions for disclosing earned income sources if the employer and the filer have a confidential relationship which creates a privilege. The Public Ethics Law does not have this exception because it would not require, for example, a solo practice attorney to list his individual income sources by client name, but instead would simply require the disclosure of the practice's name.

The Commission's review of Montgomery County's proposed ethics law was in accordance with Subtitle 8 and COMAR 19A.04.02. In order to be approved, these provision should be amended to reflect the changes indicated above. The provisions in their current form are not at least equivalent for local elected officials or similar for employees and appointed officials as required by Subtitle 8 and COMAR 19A.04. If requested, we are happy to provide in electronic form, the model law language suggested by the Commission.

The remaining financial disclosure requirements and conflict of interest provisions for local elected officials, local appointed officials and local employees meet the requirements of Subtitle 8 of the Public Ethics Law and COMAR 19A.04 and are approved by the Commission. The Commission's next meetings are scheduled for October 22, 2015 and December 17, 2015. Please provide a letter to the Commission in advance of one of the meetings detailing the actions that Montgomery County has taken, or plans to take, in this matter. If other revisions to the ethics law are drafted or enacted, please forward that to the Commission for review and approval. The Commission will review that information in order to evaluate whether Montgomery County is making progress or good faith efforts toward compliance with the requirements established by the Maryland General Assembly in the Public Ethics Law.

Please contact me if you have any questions. I look forward to receiving an update from you regarding Montgomery County's progress in this matter.

Sincerely,



Katherine P. Thompson
Assistant General Counsel

Staff Amendment 1 – Financial Disclosure for Boards and Commissions

Add the following after line 1:

8A-30. Cable and Communications Advisory Committee.

- (a) Established. The Cable and Communications Advisory Committee may provide advice and recommendations to the County Executive, County Council, and the Department of Technology Services on all telecommunications issues, including the administration of this Chapter and any franchise agreement or application.
- (b) The Advisory Committee should meet quarterly or more frequently if requested by the County Executive or County Council or if the Chair or Committee finds it necessary.
- (c) The Advisory Committee must have 15 voting members appointed by the Executive and confirmed by the Council for 3-year terms. The members should broadly represent technology areas.
- (d) The membership must include one representative selected by the Montgomery County Chapter of the Maryland Municipal League; one representative selected by the City of Rockville; and one representative selected by the City of Takoma Park. The members annually must elect the chairperson and vice chairperson of the Committee. A person must not serve more than 2 consecutive terms as chairperson.
- (e) Members are subject to Chapter 19A [], except that financial disclosure statements are confidential and limited to communications-related activities and interests[]].

8A-31. Cable Compliance Commission.

- (a) *Established.* The Cable Compliance Commission is established to adjudicate subscriber complaints involving customer cable service and other consumer protection claims that arise under this Chapter, any regulation adopted or franchise agreement approved under this Chapter, or Section 11-4A.

- (b) *Membership.* The Commission is comprised of 5 voting members appointed by the County Executive and confirmed by the County Council. Each appointee must be appointed to a 3-year term. The Commission should include:
 - (1) a cable television service subscriber;
 - (2) a broadband Internet service subscriber;
 - (3) an individual with general business experience; and
 - (4) an individual with technical experience in communications.
- (c) *Officers.* The Commissioners annually must elect a chair and vice chair of the Commission. An individual must not serve more than 2 consecutive terms as chair.
- (d) *Reserved.*
- (e) *Ethics.* Each member of the Commission is subject to Chapter 19A [[, except that the member must file a limited public financial disclosure statement regarding any communication-related activities and interests and a full confidential financial disclosure statement]].

Add the following at the end of Section 1:

24-50. Members; appointments; terms.

- (a) *Total members.* The Board has 17 members.
- (b) *Ex officio members.* Subject to confirmation by the County Council, the County Executive should appoint the following individuals to serve as ex officio members of the Board:
 - (1) The County Health Officer or Officer's designee; and
 - (2) The Chief of the Department's Behavioral Health and Crisis Service or the Chief's designee.
- (c) *Other members.* Subject to confirmation by the County Council, the County Executive should appoint the following individuals to serve on the Board:
 - (1) 2 representatives of community health care providers that participate in the Program;
 - (2) 1 representative of hospitals that participate in the Program;

- (3) The chair of the Board of Directors of the entity that contracts with the Department to administer the distribution of funds for the delivery of Program services or the chair's designee;
- (4) 3 members of the public;
- (5) 3 individuals who have knowledge of and experience with issues relating to health care for uninsured individuals such as primary care, specialty care, dental care, behavioral health care, or fiscal matters relating to any of these types of care;
- (6) 1 representative of the Commission on Health;
- (7) 1 representative of the County Medical Society;
- (8) 2 current or former recipients of services under the Program; and
- (9) 1 representative from a Managed Care Organization who is familiar with Medicaid and insurance issues affecting low-income populations.

* * *

(f) *Conflicts of Interest.*

- (1) Section 19A-11(a) does not apply to a member appointed under subsection (c).
- (2) A member appointed under subsection (c) must []:
 - (A) file a limited public financial disclosure statement that complies with Section 19A-17(a)(6); and
 - (B)]] publicly disclose to the Board the nature and circumstances of any conflict before voting on any Board recommendation.

MONTGOMERY COUNTY ETHICS COMMISSION

Advisory Opinion 11-04-002

Section 19A-13(a) of the ethics law provides that a former employee “must not work on or otherwise assist any party, other than a County agency, in a case, contract, or other specific matter for 10 years after the last date the employee significantly participated in the matter as a public employee.” A former employee who significantly participated in a series of lease agreements with a developer that were signed in 2002, but impose continuing obligations, asks whether he can work for that developer so long as he does not work on those agreements. The Commission concludes that the former employee must not work on or assist the developer with the implementation of any obligation flowing from the scope of work of those agreements without first obtaining a waiver from the Commission.

The former public employee left County employment in December of 2006.[1] During his employment he significantly participated in a series of lease agreements between the County and a developer. The Commission understands that although those agreements were signed in 2002, they impose obligations that continue to this day.

Section 19A-13, entitled “Employment of former public employees,” states as follows:

(a) A former public employee must not work on or otherwise assist any party, other than a County agency, in a case, contract, or other specific matter for 10 years after the last date the employee significantly participated in the matter as a public employee.

* * *

(c) Significant participation means making a decision, approval, disapproval, recommendation, rendering of advice, investigation, or similar action taken as an officer or employee. Significant participation ordinarily does not include program or legislative oversight, or budget preparation, review, or adoption.

The Commission “has narrowly interpreted § 19A-13(a), given its proscription against working on the same ‘specific matter’ and its relatively harsh 10-year prohibition.” *AO 07-11-020* (Johnson, Feb. 8, 2008). Thus, the Commission has permitted former public employees who significantly participated in matters to work for someone else on related matters, so long as they were not the same specific matter. *See AO 03-015* (Kellar, Apr. 8, 2003) (former County employee could work for company conducting inventory of bus stops (specifically including recommendations for capital improvements to bus stops having safety concerns) although duties as a public employee included planning bus service, recommending route changes, and community outreach); *AO 03-016* (Kellar, May 15, 2003) (former County employee could work for County contractor on DHHS’ budget applications although duties as a public employee included work for DIST on budget applications); *AO 07-11-020* (Johnson, Feb. 8, 2008) (former County employee could service County bank account as president and CEO of the bank although

duties as public employee included responsibility for management of the account when it was at a different bank).

The State Ethics Commission has similarly interpreted a similar prohibition in the State ethics law. Md. Code Ann., State Gov't § 15-504(d), prohibits a former employee from assisting or representing a party other than the State in any matter involving the State if the matter is one in which he or she participated significantly while an employee. The State Ethics Commission interpreted that provision most recently in *Opinion No. 07-01* (Mar. 8, 2007). In that case, the requestor was the Executive Director of the Pen Mar Development Corporation (PMDC). PMDC was created in response to the Base Closure and Realignment Commission laws. Those laws called for the creation of local redevelopment authorities to facilitate the sale and private economic development of military installations designated for closure. Ft. Ritchie in Washington County, Maryland was one such installation. A developer bought Ft. Ritchie from PMDC in October 2006 for \$9 million pursuant to a (1) July 26, 2004, purchase and sale agreement and (2) November 12, 2004, development agreement with PMDC. The requestor sought an opinion from the State Ethics Commission regarding his ability to work for the developer as its on-site representative.

The State Ethics Commission found that the requestor significantly participated in the 2004 agreements, which transferred Ft. Ritchie to the developer, although he did not have final approval authority on those agreements. The next issue was determining the scope of "the matter" in which the requestor significantly participated. The State Ethics Commission wrote that this determination turned on whether the two matters involved "the same basic facts, related issues, the same or related parties, time elapsed, the same confidential information, and the continuing existence of an important government interest." The State Commission wrote:

We have addressed the concept of "matter" taking in to account substantial federal case law relating to similar federal requirements. In Opinion 97-11, we discussed factors to be considered in determining whether the matter is the same matter:

. . . The resulting basic criteria that we have considered in applying this provision are whether a matter involves the same matter as a previous activity, whether it involves "**the same basic facts, related issues, the same or related parties, time elapsed, the same confidential information, and the continuing existence of an important [government] interest.**" As a particular example, in a 1987 enforcement matter (which was sustained by the Court) the Commission concluded that a property tax assessment for one year in which a former supervisor of assessments did not participate was nevertheless the same matter as a prior year assessment, since the key issue being contested by the former employee was one where he had been instrumental in the initial policy development. . . . (Emphasis added.)

We recognize that the Requestor's situation is somewhat atypical in State government. PMDC was created and exists to accomplish a long-term objective involving the full economic development of the Ft. Ritchie property. The project could easily extend over 25 years. The Requestor suggested that the current PMDC "matter" was the planning process that resulted in the transfer and sale of the property to the Developer. He also suggested that the actual

redevelopment of the property would be “new” matters that should not disqualify him from considering employment with the Developer.

We have very carefully reviewed and considered the facts of this matter. . . . The 2004 Agreements create financial and development obligations that have survived the actual transfer of Ft. Ritchie to the Developer and may continue for many years. The Development Agreement requires the Developer to spend \$7.5 million on development and construction within 5 years or the property will transfer back to PMDC. There is a job creation requirement that could reduce the purchase price up to \$4 million in nine years. The Developer is required by the PMDC approved development plan to complete work for an historical area, a general and restrictive business area, and a residential area. The Developer must also provide periodic reports to PMDC on the progress of the development and jobs created on site. PMDC also has responsibilities related to monitoring of the Developer’s activities pursuant to the BRAC requirements that will continue for at least seven more years. It must also spend the funds it has accumulated (from the sale and the prior leasing of the property) for the benefit of the project. In this regard, PMDC and the Developer have discussed a joint effort to develop a community center on the property.

Having determined that “the matter” was the 2004 agreements, the State Ethics Commission concluded that the State ethics law prohibited the requestor from being employed by the Developer to assist in any activities “that flow from the 2004 Agreements.”

Therefore, the Requestor may not oversee the proposed development activities that were promised in the Development Agreement, including the demolition projects and the new construction infrastructure projects. Nor could he market the property to potential tenants related to the development plan or manage environmental issues that may be part of the Developer’s new obligation to comply with the Corporation’s agreements with the United State Army and the State Historic Preservation Officer. Neither could he represent the Developer on the board of directors for the community center that was part of the Fort Ritchie Development Plan proposed by the Developer and approved by PMDC.

Therefore, we advise that the Requestor’s proposed employment as the Fort Ritchie on-site asset manager or owner’s representative for the Developer would be prohibited by the post-employment provisions of §15-504(d) of the Ethics Law. We note that, as discussed above, the Ethics Law does not generally prohibit all affiliations with entities involved with one’s former agency. Other assistance or employment by the Requestor with the Developer that does not deal with the activities proposed or anticipated by the 2004 agreements at Ft. Ritchie would not be barred.

The State EC also wrote that the Developer “could hire the Requestor to market its development capabilities to other BRAC sites nationally. He could also serve on the Museum Board of Directors that was not part of any agreement prior to the transfer.”

In this case, the former public employee significantly participated in a series of lease agreements with a developer that were signed in 2002. Those lease agreements are the “case, contract, or other specific matter” under § 19A-13(a). Because the Commission understands that those agreements impose continuing obligations, the former employee cannot work on or assist the

developer with the implementation of any obligation flowing from the scope of work of those agreements.[2] The former employee's request seeks to work for the developer on "ongoing operational issues" including "security, safety, maintenance, tenants, regional development, special events, and county facilities." The former employee cannot work on those ongoing issues to the extent they flow from the scope of work of the agreements. This prohibition ends 10 years after the former employee last significantly participated in the matter as a public employee.

In reaching this decision, the Commission has relied upon the facts as presented by the requestor.

FOR THE COMMISSION:



Date: June 22, 2011 Nina Weisbroth, Chair

[1] The former employee is not categorically precluded from working for the developer under § 19A-13(b) because it has been well over one year since he left County employment.

[2] In his request, the former employee stated that he would not "be working on the legal agreement between the County and [the developer] or any case or specific matter involving the County and [the developer] that I worked on as [a County employee]."