



MONTGOMERY COUNTY ETHICS COMMISSION

August 16, 2022
Advisory Opinion 22-08-14

The Chief of the Energy, Climate & Compliance Division at the Department of Environmental Protection (DEP) has sought an advisory opinion from the Ethics Commission pertaining to the administration of a set of County programs known as the EV Purchasing Co-op (EVPC, or EV Group Buy) and the Electrified Dealers Program. (The request was styled as a request for advisory opinion or a waiver, but as the request did not meet the requirements for submission of a waiver request in accordance with County Code 19A-8(f), Commission staff clarified with DEP staff that the request was for an advisory opinion only.)

The submission explains that these programs are part of the County's strategy to reduce greenhouse gas emissions by incentivizing residents and businesses to transition from fossil-fueled internal combustion engine (ICE) vehicles to plug-in electric vehicles (EVs). DEP requests a review of certain elements of this program to determine whether Section 19A-14 of the County's Public Ethics Law and applicable regulations apply to this program. Specifically, these programs involve promotion of certain incentives and products offered by private automobile dealerships that are intended to reduce costs for County residents and businesses that want to lease or purchase an electric vehicle. The submission states that the programs advance a clear public interest and are supported by the Acting Director of DEP; however, they are not directly authorized by any County statute beyond the Council's Emergency Climate Mobilization established via Resolution 18-974.

For the reason stated below, the Commission advises that the prohibitions of 19A-14 are implicated by certain aspects of the County's EV purchasing programs. The Commission concludes that statutory authority will be needed to conduct activities that are otherwise prohibited by 19A-14. Alternatively, if a request for a waiver of the 19A-14 prohibitions is sought and granted by the Ethics Commission, the programs could proceed without offense to the prohibitions of 19A-14.

The question asked is whether those elements of the County EV program that involve promotion of and direction to specific dealers and their incentive offers for purchase of EVs implicates the prohibitions in 19A-14.

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In pertinent part, 19A-14 provides:

- (a) Unless expressly authorized by regulation or as may be permitted under Section 19A-16, 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.
- (b) Unless expressly authorized by the Chief Administrative Officer, a person must not use an official County or agency title or insignia in connection with any private enterprise.
- (c) A public employee must not use any County agency facility, property, or work time for personal use or for the use of another person, unless the use is:
 - (1) generally available to the public; or
 - (2) authorized by a County law, regulation, or administrative procedure.

....

The Commission's regulations at COMCOR 19A.14.01 provide:

An employee must not use or permit the use of his or her Government position or title or any authority associated with his or her public office to endorse any product, service or enterprise except:

- a. In furtherance of statutory authority to promote products, services or enterprises; or
- b. As a result of documentation of compliance with agency requirements or standards or as the result of recognition for achievement given under an agency program of recognition for accomplishment in support of the agency's mission.

The Commission recognizes that many of the risks that are sought to be addressed by the County's ethics laws are not present. In particular, County Code 19A-2 sets forth some of the general principles upon which the ethics law is based:

- (a) Our system of representative government depends in part on the people maintaining the highest trust in their officials and employees. The people have a right to public officials and employees who are impartial and use independent judgment.
- (b) The confidence and trust of the people erodes when the conduct of County business is subject to improper influence or even the appearance of improper influence.

....

There is nothing to suggest in the submission that any employee's impartiality or independence of judgment is at issue through the implementation of the EV program. One could argue that the prohibition against an employee intentionally using prestige of office for private gain or gain of another does not apply to a County-sanctioned program where that program serves a valid public purpose. It is true that the focus of the ethics laws is on the intersection of employees' personal interests and those employees' public responsibilities.

However, the fact a program is sanctioned by a County agency and in that agency's view serves a valid public purpose does not, by itself, overcome the requirements of the ethics law provisions designed to prevent County employees, working individually or collectively, from abusing government power to the advantage of individual parties. This is why, for example, in 19A-14(b), approval of the Chief Administrative Officer is required to allow a private party to use the County seal, even where there is no question about the objectivity and impartiality of an employee involved in making an arrangement for a private party to use County insignia. County government routinely confers rights and benefits on private parties through exercise of government functions. Conferral occurs pursuant to exercise of a variety of statutory authorities to provide services to County residents. The vast majority of these services fall into the category of "usual and customary constituent services", typically underpinned by the government agency or agencies providing the services having been authorized to do so pursuant to County law, including laws establishing appropriate systems to conduct business, such as procurement law, permit issuance, and direct provision of services.

The ethics law requires, in effect, a check on exercise of government power to the benefit of private parties where the benefit conferred is not a usual and customary constituent service. This check comes in the form of a requirement to have specific authority to engage in the activity. To use County insignia, the approval of the CAO is required. To engage in activity that involves an endorsement or advancement of the interests of a specific business, statutory authority or a waiver of the ethics provision is required. The Commission notes that the effect of a waiver addresses only the applicability of the ethics law to the endeavor, not whether a County agency has general or inherent authority to engage in an activity.

Preparation of a Waiver Request

19A-8 details the requirements for a waiver:

- (f) Each waiver request must:
 - (1) be in writing;
 - (2) be signed under oath by the public employee who applies for the waiver;
 - (3) disclose all material facts;
 - (4) show how the employee meets the applicable waiver standard, and

(5) include a statement from the public employee's agency head (or the Chief Administrative Officer if the employee is not supervised by an agency head) indicating whether the agency head concurs with the waiver request.

What conduct requires statutory authority or a waiver?

Educating the public about what County businesses sell products that are considered by County government to likely to improve the health and welfare of County residents, would not normally require an ethics waiver. This type of activity is routinely and appropriately carried out in identifying where citizens can obtain needed services and products, for example. As long as these educational activities are carried out in a way that provides the same opportunity for all similarly situated entities with services and products deemed to advance the public interest and without using private businesses' marketing materials (such as logos), the Commission believes that County agencies can identify these entities to the public without a waiver. On the other hand, individualized partnering with an organization to promote or facilitate its business does require specific authority or a waiver from ethics requirements.

More specifically, the Ethics Commission believes that the following activities of the County require specific statutory authority or a waiver:

- inclusion of promotional material of individual businesses, including publication of Company logos;
- provision of sales leads to dealers;
- activities designed to help a specific business sell a product.

The Commission notes that activities resulting in government entanglement in individual dealer promotional programs risks disruptive association with private business sales tactics and products. It is one thing for the government to provide incentives, as the Federal government does, for consumer purchases of certain classes of motor vehicles. It is quite another for a government to sponsor and endorse an individual dealer's incentives to purchase a particular vehicle. Should the vehicle not perform to the purchaser's satisfaction or the sales practices of the dealer come into question, what culpability, legally or otherwise, does the government have relating to the transaction? Even if it is none pursuant to disclaimers, what confidence would a consumer have in making a complaint to the County's Office of Consumer Protection about one or more of the many things that can go wrong in a car purchase transaction where the purchase was pursuant to promotion by the County?¹

¹ Another risk in administration of the program are complaints from dealers about program administration resulting in their dealership being disadvantaged in the administration of the program. For example, the program intends to divide sales leads when multiple dealerships offered the same brand by dividing the list of contacts for that brand evenly between the dealerships based on proximity to the dealership location. While this sounds even-handed, what if the vast majority of identified buyers live closer to one dealer? Will the contacts be divided equally with some buyers being channeled to the geographically less convenient dealer?

The Ethics Commission raises these rhetorical questions because it believes these considerations should be taken into account by the County in its program design; while these considerations are not determinative of whether a waiver will be issued by the Commission, the question of the proper role of government vis-a-vis private enterprise cannot be ignored when considering the rationale behind 19A-14.

Should a waiver be sought, the Ethics Commission recommends that the waiver be submitted by the agency head with a statement of concurrence from the Chief Administrative Officer. When the Chief Administrative Officer commends a request, it signals that the Executive Branch in its entirety embraces the activity that is sought to be waived and that countervailing concerns of County agencies have been considered.

For the Commission:



Susan Beard, Chair