



MONTGOMERY COUNTY ETHICS COMMISSION

Steven Rosen
Chair

Kenita V. Barrow
Vice Chair

Montgomery County Ethics Commission
Annual Report for Calendar Year 2016

March 1, 2017

I. Introduction

Section 19A-6(f) of the Montgomery County Public Ethics Law requires the Ethics Commission (the Commission) to publish an annual report. The report is to summarize the actions the Commission has taken during the preceding calendar year and describe each waiver it approved and advisory opinion it issued during the year.

The mission of the Commission is to promote the public's trust of County government through the independent administration, including enforcement, of laws designed to ensure the impartiality of County employees, including elected officials, in the execution of their responsibilities. It does this through the administration of three programs: financial disclosure, lobbying disclosure, and outside employment approval -- and through a myriad of other activities.

The Commission currently has five members which is a full complement under the Public Ethics Law. They, along with the respective dates of their terms' expiration, are:

Steven Rosen, Chair	10/2019
Kenita V. Barrow, Vice Chair	10/2019
Barbara Fredericks	10/2017
Claudia Herbert	10/2017
Rahul Goel	10/2020

Rahul Goel was appointed in August of 2016 to complete the term of Mark Greenblatt who resigned in September of 2015 and whose term was to expire in October of 2016. Mr. Goel was then reappointed to a first full term. Steven Rosen was reappointed to a first full term, and Kenita Barrow was reappointed to a second full term.

MONTGOMERY COUNTY ETHICS COMMISSION

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In 2016, the Commission made substantial progress towards its primary objectives for the year. Going into the year 2016, the Ethics Commission reported the following objectives over and above the expectation to continue to successfully conduct its required programs and operations during the year:

- 1) Continue the Development of Systemic Ethics Education for County Employees
- 2) Development of a New Online Financial Disclosure System
- 3) Work to Institute Ethics Regulations that Implement a Suitable Framework for Implementation of the Ethics Program

The steps taken to implement these objectives are described in the substantive program sections further below.

The Commission met in regular Public Meetings 11 times during 2016. The Commission also conducted eleven Administrative Meetings following regular Public Meetings. (The Commission holds administrative meetings following its regular monthly meetings to consider matters that are non-public.)

Major Objectives for 2017

The Commission will continue to focus on the management of its core programs, the financial disclosure system, the lobbying program and the outside employment approval process. The Commission has three continuing priorities for 2017:

- 1) Establish mandatory training for public financial disclosure filers on a three year cycle;
- 2) Establish and implement a new financial disclosure platform prior to January 1, 2018;
- 3) Obtain approval from the County Council for ethics regulations.

The education objective is to ensure that the County's most senior managers and employees receive in-person ethics training at least once every three years.

The Financial Disclosure System (FDS) is in critical need of updating, and the Commission staff is working with DTS in developing a new system. In the context of the system development and implementation, Commission staff anticipates that system usability will be improved for filers.

The Commission submitted ethics regulations to the County Council in December 2016, and hopes the regulations will be approved in 2017. There are pending issues that are likely to require resolution, particularly as regards the processes and standards for approving outside employment of police. The Commission is hopeful that these issues can be resolved in ways that satisfy policy objectives for police and requirements of the ethics law.

II. Status of Programs and Operations

Ethics program statistics:

Performance Measures	Actual 2012	Actual 2013	Actual 2014	Actual 2015	Actual 2016
Number of Issuances of Formal Opinions, Waivers, or Guidance for Calendar Year	13	11	6	17	28
Number of Lobbyists Registered for Calendar Year	161	177	199	230	262
Number of Lobbyist Activity Reports for Calendar Year	140	216	251	350	372
Number of Financial Disclosure Statements for Calendar Year	1741	2034	2037	1651	1702
Number of Outside Employment Requests for Calendar Year	926	1157	975	1089	1568

This annual report summarizes the work of the Commission in each of the following areas:

- 1. Financial Disclosure**
- 2. Outside Employment**
- 3. Lobbying**
- 4. Complaints, Investigations and Hearings**
- 5. Advisory Opinions, Interpretation and Advice, and Waivers**
- 6. Education**
- 7. Legislative and Regulatory**
- 8. Outreach**
- 9. Administration**

1. Financial Disclosure:

The Public Ethics Law promotes the public's confidence in the integrity of County employees by requiring certain employees, including elected officials, to file financial disclosure reports that are required to be made publicly available. The reports detail financial holdings and relationships so that conflicts of interest between an employee's County duties and the employee's personal activities and interests can be identified and addressed. The Public Ethics Law requires filings of financial disclosure reports when individuals are first appointed to a filing position, annually thereafter, and when terminating from a filing position. The Commission prepares the form for financial disclosure and makes it available electronically, and the Commission maintains filed reports. The Commission coordinates with the Office of Human Resources and all County agencies regarding the status of filers. It also resolves all anomalous circumstances and questions associated with the filing of financial disclosure reports.

In 2015, major changes to the financial disclosure provisions in the Public Ethics Law were enacted. As a consequence, Ethics Commission staff, working closely with the Department of Technology Services (DTS), made significant changes to the online filing system to address the statutory changes, with these changes being implemented for all filings made in calendar year 2016. For the most part, the changes made filing easier. Due to changes in required content of the online form, the so-called "copy data" feature could not be used by filers in 2016 for the 2015 annual reports to copy data from a previously filed report. This feature was reinstated for the 2016 annual reports to be filed in 2017 as the form's content requirements are the same for 2016 annual reports as they were for 2015 annual reports.

Aside from the absence of the "copy data" feature, the roll-out of annual financial disclosure and submission of forms was smooth in 2016, notwithstanding changes to the form resulting from changes to the ethics law. Compliance with the requirement to file a disclosure report was universal, with all stragglers being encouraged to and eventually filing reports without the necessity of any Ethics Commission enforcement actions being undertaken.

There were 1702 financial disclosure forms completed by County employees in 2016. Successful program administration is dependent on the accuracy of the database of employees and their status as filers. It is also dependent on the employees who file the forms; on County senior management who are the designated reviewers of forms; and the Ethics Commission staff that processes and reviews the forms. Lastly, it is dependent on a collaborative working relationship between Commission staff and agency and department management and human resources liaisons to follow-up with employees who have not filed and to obtain final reports from employees who are terminating from filing positions. Members of certain County boards, commissions, and committees, who are considered "public employees" for purposes of the Public Ethics Law, are also required to file reports. As these persons are not normally tracked in the County's personnel system, a separate tracking system has been established for these persons.

As in the prior three years, there was one hundred percent compliance with requirements to file initial and annual financial disclosure statements. With respect to full-time County employees,

there was one hundred percent compliance with the requirement to file a final financial disclosure, as the County withholds the final paycheck of employees until a final disclosure statement has been filed. There are instances where the Commission is not notified of a filing employee's departure from service, and the employee is paid without having filed a final disclosure. Due to notification and enforcement challenges associated with obtaining these reports, on occasion Commission staff treats the last filed report by the filer as a final report. This also occurs with some terminating board, commission, and committee volunteers who terminate service and do not file a disclosure report after leaving County service.

Finally, as a consequence of the Financial Disclosure System being currently hosted on Windows 2003 web servers, which are no longer supported by Microsoft, the existing system will be upgraded in 2017 to a new ASP.NET application and deployed to a web server that is supported. In the context of this major system work being implemented, Commission staff anticipates that there will be opportunities to improve the usability of the system for filers. Work began on this project in 2016, with Commission staff directing the specifications for form content, and DTS leading on system development.

2. Outside Employment: The Public Ethics Law requires that County employees obtain approval from the Commission prior to engaging in any employment other than County employment.

Outside employment of employees other than sworn police.

The Commission has an effective online system built by DTS for employees to make requests for outside employment. The system processes the requests for review by the employing department's management and the Ethics Commission. The Commission's staff prepares all requests for consideration by the Commission, to include obtaining additional information from requestors and County agencies and conducting preliminary legal analysis of requests. The Commission approves requests, as appropriate, setting conditions on approval as necessary to ensure compliance with ethics requirements, and staff notifies requestors of the disposition of requests by the Commission. The Commission publishes approved Outside Employment information required to be made publicly available by the Public Ethics Law.

The Commission approved 568 requests for outside employment in calendar year 2016 for employees other than sworn police. This compares to 262 approvals in 2015, 139 in CY14, 168 in CY 13 and 137 in CY 2012. The approximately four fold increase in approvals from years prior to 2015 resulted from changes made in the management of the outside employment program. The increase resulted in greater workload and time commitment of the Ethics Commission and its staff in processing and reviewing requests, but the program fulfilled the requirements and objectives of the Public Ethics Law.

While the online system was launched in June of 2015, part of the implementation plan for the new system took effect in June 2016. Prior to the institution of the new system, outside employment approvals either had a specified termination date or they did not, with the majority having no termination date. Outside employment approvals were effective back to the implementation of the ethics law in the early 1980's, with effective record-keeping of approvals

going back about 20 years. As many persons will terminate or move on from outside employment positions over time, the list of approved outside employment did not provide continuous insight or currency to which County employees are actually engaged in outside employment. This diminished the accuracy and utility of the list for management and compliance purposes.

To bring some contemporaneity and integrity to the approved outside employment list, the Ethics Commission determined that outside employment approvals would last for a maximum of three years. To further bring integrity to the outside employment system, the Commission determined that one year after the launch of the new system, all prior paper approved outside employment requests would expire; any person who had obtained outside employment under the old paper system would, in order to continue in approved outside employment, have to submit a new request for outside employment using the new online system by June 24, 2016. That this procedural change would occur was announced to all County employees by the Chief Administrative Officer through an MCG-All email. As a result of this approach, the Ethics Commission now has a current list that it publishes which is also incorporated into dataMontgomery's publicly available information of all currently approved outside employment of County employees.

In addition, there were several consequences of the changes in program operation. In anticipation of and upon the expiration of previously approved paper forms, the Ethics Commission received a sharp increase in applications for outside employment, many of which involved seeking approval for outside employment that had been approved prior to June of 2015. In many instances, conflict of interest issues with outside employment were identified that had not previously been identified, resulting in an increase in the number of requests for waivers.

The new system allows for substantial benefits in program management as Commission staff has insight to all pending applications for outside employment. Previously, an employee filling out a paper application would submit the paper through the employee's chain of command and the Commission would have no notice or opportunity to ensure the process was operating effectively. Now the Ethics Commission can assure that reviews by agency officials of submitted outside employment requests are taking place in a timely fashion.

Outside employment of sworn police.

Sworn police do not use the online system for employees and instead use the form created by the Department of Police in connection with policies and practices developed by the Department in consideration of collective bargaining processes and departmental objectives. These police forms are then submitted to the Ethics Commission for processing and approval. In 2016, the Ethics Commission approved 653 applications for sworn police outside employment and processed 346 renewals of outside employment for sworn police.

For several years, the Ethics Commission has been challenged by the process and standards used in connection with the approval of outside employment of sworn police. In response to comments made by the Department of Police in connection with the publication of proposed ethics regulations that purposefully proposed to omit sworn police from Ethics Commission

review, the Staff Director/Chief Counsel wrote a letter dated October 24, 2016, that reflected the perspective of the Commission:

The review given by the Ethics Commission to the outside employment requests of police bears no resemblance to the review given other County employees. The form and process is different and the standards for review applied to all other County employees are not applied to police officers. This is because the rules applicable to police outside employment contained in Article 27 of the County's Collective Bargaining Agreement ("CBA") with the Fraternal Order of Police Lodge 35 includes about 100 provisions and sub-provisions specific to allowing police officers conduct outside employment activities that often relate to their County duties.

How and whether police officers comply with the police officer specific requirements is solely a function of police administration of its own rules and not a function of the administration of the Public Ethics Law. If the County's ethics standards applied, there would be no use of County vehicles, uniform, firearms or other equipment in outside employment activity and there would be no allowance for the provision of any security related outside employment in Montgomery County by County police officers. [Footnote: This view is based on the interrelationship of duties of security officers and County police. In applying ethics standards to other County employees, the Commission has sought to prevent outside employment where there is a likelihood the outside employment will result in the employee engaging in outside employment activities that bring the employee into contact with the employee's County agency. I note that Commission regulations for many years prohibited officers holding outside employment involving security duties in the district to which an officer was assigned. This provision was not included in the Executive Regulation on police outside employment issued in the year 2000, which tracked the terms of the CBA in place at the time. This provision addressed the additional ethics threat of giving preferential treatment to an outside employer while on official duty.] Instead, the Commission's review is a pro forma process, where no substantial inquiry is conducted by the Commission because the applicable rules are police-specific rules. (So, for example, when police officers are permitted to conduct uniformed traffic activity on a County road for a private employer, the Commission does not check to see whether any required permits have been obtained by the outside employer pursuant to the requirement in Article 27, Section F, para. 13 of the CBA.)

Through published approvals, the public may believe a substantive Commission review has occurred under the County's ethics law when, in fact, no such thing has occurred. While the process is pro forma, substantial Commission resources are involved in inefficient data entry associated with the several hundreds of applications each year. (This is in contrast to the electronic form submitted by all other County employees with data captured and manipulated by Commission staff for purposes of Commission review under the County ethics law.)

The Commission recognizes that there may be financial benefits to taxpayers from having police officers working in County and paid for with private rather than public dollars. However, this benefit is not consistent with the administration of the Public Ethics Law. Moreover, the Commission believes this same objective could be obtained through a system administered by the Department whereby private parties could contract with the Department for police resources so officers would remain on duty subject to direction and control of the Department in activities conducted in the County, rather than serving two masters as occurs under the current system.

The proposed regulation on outside employment is intended to address the processes and standards that apply to all public employees other than the police and a few other very discreet groups of public employees. The MDLEOBR states secondary employment of police can be subject to reasonable regulation by a law enforcement agency. It seems the appropriate course under the MDLEOBR would be for a Department regulation issue to replace the expired Executive Regulation addressing police secondary employment. The Commission would recommend that the regulation specifically provide that when there are conflicts of interest issues that arise in the review of outside employment requests, that Department officials be directed to consult with the Ethics Commission.

After meeting with Department of Police officials who stated that they believed there was value in continued review of sworn police outside employment requests by the Ethics Commission, the Commission, in forwarding its regulation for approval to the County Council, expressed the intent of the Commission to work with interested stakeholders so that new regulations specifically addressing the outside employment of sworn police can be proposed. In so doing, it will be the intent of the Ethics Commission to ensure that: the applicable standards for review are clear; the Ethics Commission's roles and responsibilities are defined; and that each of these have the approval of the County Council.

3. Lobbying: The Public Ethics Law requires persons meeting certain criteria and thresholds who communicate with County employees to register as lobbyists and to file semi-annual activity reports with the Commission. Annual registration fees are required and are paid to the Commission and processed and deposited into the General Fund.

Since CY 2013, lobbying registration and activity reporting has been effected through an online application developed by the Commission and DTS. The system has made registration easier for registrants, allowing data to be captured electronically rather than through manual processes and promoted transparency and public access to online data.

These systems have resulted in almost instantaneous availability of lobbying information on the Ethics Commission's website.

<https://www2.montgomerycountymd.gov/Lobbyist/ActivityReport.aspx>

As a result of having implemented a lobbying filing system with reliable data sets, Commission staff has focused additional time on proactive steps to educate those who might meet registration thresholds in the Public Ethics Law to register as lobbyists.

As the system is easy to use, registering lobbyists' compliance with requirements is very high. For example, 100 percent of required semi-annual activity reports for 2015 and 2016 have been filed. This compliance rate is in stark contrast to the system in place prior to 2013 where compliance was irregular and there were no systems in place to measure compliance.

The Ethics Commission has charged a lobbying registration fee since FY 2011. Since FY13, registration numbers have increased substantially and receipts of registration fees has more than doubled, from \$13,500 in FY 2013, to almost \$31,000 in FY 2015. The total receipts for calendar year 2016 are just over \$31,000 at \$31,375. The increase in fee income is the result of charging a registration fee for each lobbyist on a registration and of more registrations being received overall. The increase in registrations is a consequence of the ease of compliance using the online system and proactive management of the lobbying registration program to include identification of possible lobbyists who may be required to register and notification of those persons by the Commission of lobbying registration requirements.

4. Complaints, Investigations and Hearings: Pursuant to the Public Ethics Laws, the Commission receives complaints and, as appropriate: conducts investigations, conducts hearings, makes findings, and imposes sanctions and penalties.

During 2016, no new formal complaints of ethics violations that fell within the jurisdiction of the Commission were received. There were no pending formal complaints at the close of 2016. Aside from formal complaints, many issues were brought to the attention of the Ethics Commission during 2016 including several "complaints" that did not meet the criteria for filing a formal complaint under the Public Ethics Law. Some of these did not raise issues that were within the jurisdiction of the Commission and were closed or referred to a more appropriate office for disposition. Others were brought to the attention of the Commission and considered and addressed by the Commission. In some of these, the Commission determined that no further action was warranted. In others, the Commission determined that there was insufficient cause to dedicate resources to an Ethics Commission investigation, but nonetheless merited staff follow-up to address possible violations of law, including the Public Ethics Law. Several of these matters were coordinated with the County Attorney and the Inspector General for further action or disposition or referred to Department or Agency management for consideration. One matter that was under confidential Ethics Commission investigation at the beginning of the year was closed by the Ethics Commission after the report of investigation showed no probability of a violation of the ethics law.

5. Advisory Opinions, Interpretation and Advice, and Waivers: The Ethics Commission is expressly authorized to interpret the Public Ethics Law and advise persons as to its application. It does this proactively or in response to or as a result of informal inquiries. In addition, the Commission is authorized to grant waivers of ethics law requirements, as appropriate. The Commission is required to publish its waivers and advisory opinions, or, in the event an opinion is not published, state the reasons for not publishing the opinion.

The Commission published eight advisory opinions during calendar year 2016, all of which can be found at:

<http://www.montgomerycountymd.gov/Ethics/Decisions/opinions/2016.html>

The Ethics Commission issued 20 waivers, which are published at:

<http://www.montgomerycountymd.gov/Ethics/Decisions/waivers/2016.html>

Summaries of the opinions, waivers and guidance appear below. The decisions made were limited to the facts presented and no assumption should be made as to the application of any opinion to any other circumstances.

Advisory Opinions

Advisory Opinion 16-01-001.

This opinion involved the denial of a request for a waiver and the rationale for the Commission's decision. The Ethics Commission received a request for a waiver in connection with an application for outside employment with an entity that contracts with the employee's agency, the Department of Health and Human Services (DHHS). Section 19A-12(b)(1) of the County's Public Ethics Law prohibits an employee from engaging in outside employment with an entity that contracts with the employee's agency unless the employee obtains a waiver from the Ethics Commission pursuant to 19A-8(b). The employee requested a waiver from the Ethics Commission on the basis that there was no actual conflict. The Ethics Commission denied the request for a waiver and denied the request for outside employment because it concluded the work the employee would be doing at the outside employer was related to the contract between DHHS and the outside employer. In particular, the outside employment would present the negative appearance to the public of the employee profiting privately from agency action. The Commission found that where there is a direct relationship between DHHS's contract with an outside employer and the outside employment activity of a DHHS employee, the Commission should not waive the prohibition. The Commission noted that in the employee's official capacity, the employee had some professional interaction with the contractor/proposed outside employer. This interaction reinforced the Commission's decision as it reflected the proximity of the employee's official job responsibilities to the outside employment activity.

Advisory Opinion 16-01-002

The request involved an employee who requested outside employment approval from the Commission pursuant to the County's ethics law (19A-12(a)), as the employee was new to County employment and at the same time employed as mayor of a local town.

In the outside employment application, the employee indicated that the prospective employer was subject to the authority of, did business with, or was regulated by, or negotiated or contracted with the employee's County department/agency. Section 19A-12(b) of the ethics law provides that unless the Commission grants a waiver under subsection 19A-8(b), a public employee must not be employed by any such "business."

As 19A-12(b)(1) focuses on employment with “a business”, the question was whether a local town is considered a business under that provision of the County ethics law.

The Commission noted that “business” is a term defined in the ethics law at 19A-4(b) as “any for-profit or non-profit enterprise, including a corporation, general or limited partnership, sole proprietorship, joint venture, association, firm, institute, trust, or foundation.” The law specifically “excludes a County agency, but includes an independent fire department or rescue squad.”

The Commission concluded that a local town is a “business” for purposes of the application of the prohibition in 19A-12(b)(1) as the specificity of exclusions in 19A-4(b) suggest that the definition of business is intended to be broad and inclusive. In addition, the specific inclusion in 19A-4(b) of “an independent fire department or rescue squad” reflects the definition’s intent to be inclusive of entities providing services typically provided by government or community entities.

The Commission noted that the County’s ethics law is to be “liberally construed to accomplish the policy goals” set forth under the law, which includes avoidance of “improper influence or even the appearance of improper influence.” The Commission believes that there is potential for improper influence or appearance of improper influence where a County employee works at a local town and the employee’s County agency regulates, negotiates or contracts with the local town.

The Commission noted that the Commission’s decision was consistent with State Ethics Law and that the waiver process pursuant to 19A-8(b) was available for those instances where the outside employment provision of 19A-12(b) should not apply due to the absence of an actual conflict. [In fact, a waiver was sought by the requestor and was granted by the Commission, see Waiver 16-02-001.]

Advisory Opinion 16-03-004

The inquiry concerned whether a financial disclosure filer is required to disclose on a financial disclosure report in Section 4, “Offices or Directorships in Entities Doing Business with the County”, those offices or directorships to which an employee has been assigned by the Chief Administrative Officer to represent the County as part of official duties.

The Public Ethics Law specifically requires the disclosure of “each office [or] directorship . . . held at any time during the reporting period with any entity doing business with the County.”

The Commission found, with respect to the appointment by the CAO of the employee to a number of Washington area governmental boards, that the positions were not required to be disclosed on the employee’s financial disclosure report.

The Commission found that the financial disclosure report is a tool for eliciting personal financial interest and relationship information in order for the public and for agency officials and the Ethics Commission to consider whether the personal interests conflict with the obligations the employee has as to the execution of the employee’s official position. In this instance, the

employee's involvement with the organizations is not a personal affair but fulfillment of County business. Assignment by County officials to a position as an officer or director of an organization that is comprised of representatives of governments to allow the County to collaborate with other government bodies with respect to issues in which the County has an interest, does not involve interests that require disclosure pursuant to 19A-19(a).

Further, the Commission noted the scope of coverage of the conflict of interest prohibitions and exceptions recited in 19A-11 of the Public Ethics Law. While 19A-11(a)(2)(A) prohibits an employee from working on a matter if a party to the matter is a business in which the public employee is an officer or director, the exception in 19A-11(b)(4) exempts from the coverage of this prohibition a public employee if the County Executive (or County Council) appoints the public employee to serve as an officer or director of an organization to serve the public interest.

Advisory Opinion 16-05-009

A financial disclosure filer asked the Ethics Commission whether the filer was required to report real estate property owned by a Limited Liability Corporation (LLC) in section one of the financial disclosure report. The filer stated to the Commission that the filer owns five percent of the LLC while the filer's spouse owns ninety-five percent.

The Public Ethics Law at 19A-19(b)(1) and the financial disclosure report's online instructions provide that an employee must disclose each ownership interest in real property held by a member of the filer's immediate family (defined in 19A-4(i) to include the employee's spouse). The law and the instructions also require a filer to disclose the holdings of a business entity in which the filer held a 30% or greater interest at any time during the reporting period. The issue presented was whether the provision for reporting interests of the filer's immediate family requires disclosure of interests of a business entity more than 30% owned by an immediate family member.

The Commission concluded that 19A-19 requires that the holdings of a business where more than 30% of the business is held by the family member are required to be disclosed in the same manner an employee's holdings would be required to be disclosed. The Commission believes the law was designed to require the disclosure of immediate family members' property and assets as though they were the filer's property and assets. The Commission concluded that otherwise, property and assets could be titled in a spouse's or dependent child's business entity with the effect of legally avoiding financial disclosure of the property and assets.

Advisory Opinion 16-05-010

An Office of Human Resources (OHR) employee inquired about how to record information about two public financial disclosure filers who are not included in the personnel database managed by OHR. These persons, who had been filing financial disclosure reports at least since the electronic database was established in 2003, were contract hearing examiners for a particular County agency. Most of the requirements of the County's ethics law, including financial disclosure, are tied to whether a person is a "public employee." Fundamentally, the question addressed was whether these persons who provide services to a County agency through contracts are "public employees" subject to the provisions of County's ethics law applicable to County employees.

A “public employee”, subject to the County’s ethics laws, is defined in 19A-4(m) as including “any person employed by a County agency . . .” The Commission concluded that the term “public employee” does not include persons who are contractors of the County. The County’s ethics law has previously been construed by the Ethics Commission with respect to its application to County contractors. Advisory Opinion No. 04-014, issued January 26, 2005, affirmatively states that “an independent contractor does not fall within the definition of public employee in section 19A-4(m) of the ethics law.” The Commission stated that the contract between the County and a contractor should define the relationship with contractors, not the law regulating County employee conduct. With respect to hearing examiners who are independent contractors, financial disclosure could be required pursuant to contract. This would not be financial disclosure under the Public Ethics Law and must be handled separately from the Ethics Commission’s financial disclosure system.

Advisory Opinion 16-05-011

A private attorney inquired whether a lobbyist for a town or municipality is required to register as a lobbyist. Section 19A-21(c)(3) of the Public Ethics Law indicates the lobbying disclosure article does not apply to "communicating with a County agency as an official act of an official or employee of the state, a political subdivision of the state, or the United States, and not on behalf of any other person or business." The Commission concluded that a private attorney who lobbies the County on behalf of a town or municipality and otherwise meets the thresholds for registration in lobbying for the governmental client is not exempt from lobbying registration pursuant to 19A-21(c)(3) of the ethics law.

For purposes of the lobbying registration requirements, the Commission found that the language of the exemption extended to an “official act” executed by “an official or employee” of the specified governmental units. Actions of private attorneys who have been engaged by a governmental entity are neither “official acts” nor are they acts by “an official or employee” of the governmental entity.

Advisory Opinion 16-08-022

The Ethics Commission received a request for an advisory opinion and a request for a waiver in connection with a County employee who retired from service and sought to work for a contractor of the employee’s agency that the employee had contact with as a County employee.

The employee inquired whether the proposed employment arrangement with the contractor was consistent with the postemployment requirements of County law, found in 19A-13. The Ethics Commission concluded that 19A-13(b) barred the employee from working for the contractor for one year from the end of the employee’s County service, and that 19A-13(a) constitutes a permanent bar to the former employee providing services to the contractor in connection with the existing contract it has with employee’s former division at her County agency.

The Commission examined the facts applying the standards of 19A-13. Both of the substantive prohibitions of 19A-13 are triggered by an employee’s “significant participation” in “a case, contract, other specific matter” (19A-13(a)) or “in regulating the person or business; . . . or in

any procurement or other contractual activity concerning a contract with the person or business . . .” (19A-13(b)).

The Commission concluded that the employee’s participation was significant. While the employee was not the contract administrator or a case manager involved in day to day the handling by the contractor of its responsibilities, the employee was the supervisor of those who were directly responsible for matters under the contract. In the role as supervisor, the employee received monthly reports and ensured the matters under the contract were being addressed; the employee met monthly with the contractor’s Program Coordinator (which was the job the employee sought to occupy at the contractor) to ensure a range of issues were properly addressed; and the employee reported monthly on the contractor’s performance under the contract to the contract administrator. The Commission found that any one of these activities could constitute significant participation in the contractual activity; collectively, they clearly reflected the employee’s significant participation in the contract activity and the contract’s proper execution.

As a consequence of the finding of significant participation, the Commission concluded that the one year bar of 19A-13(b) prohibited the former employee from working for the contractor for one year after leaving County service and that 19A-13(a) permanently prohibits the employee from assisting the contractor on the existing contract between the contractor and the County.

The Commission found that the waiver request did not meet the requirements for submission as it was not accompanied by the required statement from the Department head. But the Commission indicated that as a consequence of recent changes to the County’s ethics law, the Commission does not have authority to issue a waiver pursuant to the waiver provision under 19A-8(c) for the permanent bar of 19A-13(a).

If the employment with the contractor were designed to keep the employee away from any work relating to the existing contract with the County, the bar of 19A-13(a) would not be at issue. If this were true, the employee could seek a waiver of the one year bar of 19A-13(b) pursuant to 19A-8(c) of the ethics law. The Commission noted that contractors engaged in a procurement matter are by County law prohibited from employing or offering to employ employees whose duties involve significant participation in the procurement matter. (Code 11B-52.) Furthermore, pursuant to section 19A-11(a)(2)(C) of the County code, County employees are prohibited from working on matters affecting any businesses with which they are applying, negotiating, or have an agreement for employment.

Advisory Opinion 16-11-026

A national association representing a particular industry inquired whether it or its representatives would be required to register and report as lobbyists pursuant to the Montgomery County's Public Ethics Law. The association and its representatives would be engaged in grassroots activities educating industry retailers in Montgomery County about pending legislation in the County that may impact their business. If, as a consequence of the provision of information by the association, a retailer wished to communicate with the County Council about the legislation, the communication would be conducted by the retailer itself. The association and its

representatives would not directly communicate with County Council members or other County staff to influence legislation.

The Commission cited to § 19A-21(a)(1) in finding that the law requires a communication from the association or its representatives to a County employee. If there is no such communication the requirement to register under the law is not triggered. A caveat identified by the Commission might exist where parties act as “agents” of and engage in activity that would require registration.

Waivers

The Ethics Commission processed a substantial number of waiver requests in 2016. The spike in waiver applications primarily resulted from the implementation of a more robust outside employment system that increased compliance with and attention to statutory requirements concerning outside employment.

The vast majority of the waivers issued involved outside employment requests. In particular, a public employee must not, pursuant to § 19A-12(b)(1)(B) of the Public Ethics Law, be employed by a business that negotiates or contracts with the County agency with which the public employee is affiliated, unless the Ethics Commission grants a waiver. In review of requests by the employing agency or the Ethics Commission staff, outside employment is identified that would violate this provision unless waived. Accordingly, employees are notified of the prohibition and waiver requests are submitted, reviewed by senior management with the employing agency or department, and acted upon by the Ethics Commission. Many of these waiver applications involve employees of the Department of Health and Human Services (DHHS), and are granted as there is no relationship between the conduct of the employee’s County duties, the duties performed in the outside position, and the contract between the County and the outside employer. In short, there is no actual conflict of interest. The following waivers were issued applying this model: **16-04-003, 16-04-006, 16-05-007, 16-05-008, 16-06-012, 16-06-013, 16-07-015, 16-08-016, 16-08-017, 16-08-18, 16-08-019, 16-08-020, 16-08-021, 16-08-023, 16-10-25 and 16-10-27.** The Ethics Commission has been reluctant to issue waivers in circumstances where an employee’s position with an outside organization is directly funded by DHHS, where there is direct interaction between the employee in conducting the outside work with the Department, or where the employee’s official County duties involve the outside employer. The waivers routinely are conditioned on the employees not making, in their official capacities, any referrals to the outside entity or working on matters that are the subject of the contract between the outside employer and the County.

There have been occasional circumstances where there is a minor relationship between the employee’s duties at the outside employer and the contract or grant with the County. In one instance, for example, a DHHS employee requested outside employment to work at a shelter funded in part through a DHHS grant. There was no direct tie in the funding between the County and the employee’s position. The Commission found that there was no actual conflict of interest in the employee providing intake services to the shelter.

Waiver 16-09-024 involved an outside employment request of a Montgomery County Fire and Rescue Service employee. The waiver used the same analysis as the DHHS waivers mentioned above.

Waiver 16-02-001 also involved outside employment. In this instance, an employee began working with the Office of the County Executive, as the White Oak Science Gateway Coordinator, while continuing his compensated outside employment as the Mayor of the Town of Kensington. Because the Town of Kensington negotiates or contracts with the Office of the County Executive, the employee required a waiver of the prohibition in § 19A-12(b) of the Public Ethics Law on outside employment with a business that is regulated by or negotiates or contracts with his agency. [See Advisory Opinion 16-01-002].

The Commission issued a waiver of the outside employment prohibition based on the representations that the employee, in his capacity as Mayor, had taken steps to avoid making communications on behalf of the Town to Montgomery County and that he would recuse himself from Town matters in which the County was a party or had a substantial interest. The employee also represented that in his capacity as a Montgomery County employee, he would not participate in any matter affecting the Town (in a way that is distinct from the effect of the matter on the general public).

Waiver 16-04-005 involved the post-employment restriction of 19A-13(b) of the Public Ethics Law. For one year after the effective date of termination from County employment, a former public employee must not enter into any employment understanding or arrangement with any person or business if the public employee significantly participated during the previous three years in regulating the person or business or in any procurement or other contractual activity concerning a contract with the person or business, unless the Ethics Commission grants a waiver of the restriction.

The employee was employed by the Montgomery County Department of Transportation (MCDOT) as the Chief, Division of Highway Services, DOT, until his retirement on October 1, 2015. The employee was found to have significantly participated in a contract matter by listening to a proposal relating to the contract and, by silence, having assented to the proposed course of action. The employee requested a waiver from the prohibition stating that his proposed work included only work on projects outside of Maryland, in Prince Georges County, MD, Howard County, MD, and for the Maryland State Highway Administration, Maryland Port Administration, and the Maryland Transportation Authority. The Ethics Commission found that there would be no actual conflict of interest where the proposed outside employment activity excluded conducting business with the employee's former County agency.

Waiver 16-06-014. Pursuant to 19A.06.02.04.4.3 of the County's ethics regulations, a public employee may not work for an entity where an economic interest is held by a person the employee supervises or who supervises the County employee. The regulatory provision prohibiting employees from working in outside employment circumstances where the employee's superior or subordinate is working is based on a likelihood that there could be some compromising of one or both of their official responsibilities because of the outside business relationship. The submission from the superior establishes that while he is the Captain of the

station where the firefighter is employed, he has no control or influence over the employee's salary, overtime, benefits, leave, assignments, evaluations or transfer.

Upon a review of the request and the Department's concurrence in and support for the waiver request, the Commission found that there was no actual conflict of interest. Pursuant to the standard of § 19A-8(b)(3), the Commission granted the waiver of the prohibition of 19A.06.02.04.4.3.

6. Education: The Commission conducts public education and other information programs regarding the Ethics Law. Commission staff routinely provides individual instruction on filling out and review of financial disclosure forms, outside employment requests and lobbying reports, and other matters falling within its jurisdiction.

Ethics Commission staff participated in biweekly orientation sessions for all new County employees. This activity, conducted since April of 2014, results in hundreds of new County employees each year receiving basic information about their responsibilities under the County's ethics law.

Commission staff provided additional ethics education at the annual meeting of Boards, Commissions, and Committees with the County Executive in April 2016.

The Ethics Commission made incremental progress towards its goal of developing systemic ethics education for County employees in 2016. In particular, the Commission is working with County management on plans to require public financial disclosure filers to receive mandatory ethics training once every three years.

During 2016, the Commission investigated various methods of delivering online ethics training including webinars and podcasts. These efforts have not culminated in the implementation of any new systems in part due to the complexities of integrating training with County education and tracking systems.

Commission staff also delayed developing new ethics training content pending approval of new regulations addressing issues such as gifts between employees and misuse of position.

7. Legislative and Regulatory: The Commission recommends and prepares new ethics legislation and regulations.

In 2015, the County enacted significant changes to the County's Public Ethics Law through Bill 39-14. The changes were primarily a result of requirements imposed by State law. After the law was passed, the State Ethics Commission recommended some additional changes so the County's ethics law would be consistent with State ethics law requirements. In February 2016, the County Council passed expedited Bill 49-15, which conformed the Montgomery County Public Ethics Law to recommendations of the State Ethics Commission.

The changes made through bill 49-15 included:

- Making the post-employment bar of 19A-13(a) permanent and unwaivable;
- Clarifying that a financial disclosure statement must include the employment of the filer's immediate family members;
- Removing (as unnecessary) an exception to disclose a source of earned income if the filer and the source have a confidential relationship;
- Deleting provisions in the County's enabling legislation for several County boards and commissions for the filing of confidential and other financial disclosure statements that are inconsistent with the Public Ethics Law as amended in 2015.

Regulations Submitted to Council for Approval

After the revisions to the Public Ethics Law in 2015 and early 2016, the Ethics Commission focused on preparing regulations to replace existing regulations and provide new guidance to County employees on several topics. This effort culminated in a submission on December 16, 2016, by the Ethics Commission to the County Council of a package of proposed regulations. The proposed regulations had been published in the County register in September 2016, and County employees were notified of the opportunity to comment on the proposed regulations.

New Ethics Commission Regulations.

The proposed regulations are completely new. There have been in place regulations concerning outside employment and financial disclosure, but these regulations became obsolete due to changes in the Public Ethics Law and changes in processes and policies implemented by the Ethics Commission. There have been two regulations that have governed the Ethics Commission's review and approval of outside employment requests. One regulation governed all employees and the other regulation focused on sworn management (non-collective bargaining unit) police officers. The regulation governing all employees' outside employment is an Ethics Commission regulation and is to be repealed. The regulation governing sworn management police officers, sponsored by the Department of Police and issued by the County Executive in the year 2000, stated as policy that the pertinent secondary employment provisions of Article 27 of the collective bargaining agreement between the County and the Fraternal Order of Police were "adopted and incorporated by reference" by the Ethics Commission.

The regulation concerning sworn management police officers sunsetted in 2001, but is still republished in the Code of Montgomery County Regulations. A corresponding police directive, Function Code 355, still governs management officers. By virtue of the collective bargaining agreement with the Fraternal Order of Police, sworn police may engage in outside employment pursuant to rules and processes unlike those applicable to all other County employees. In a number of respects, the existing regulations are confusing and contradictory as applied to sworn police. (See discussion in Section 2, Outside Employment, at pages 5-8.)

Aside from outside employment regulations, the other ethics related regulations in COMCOR addressed the County Executive's designation of financial disclosure filers and the Content of

Limited Public Financial Disclosure Statements. The designation process was eliminated, along with the need for an annual regulation designating filing positions, as a result of changes to the Public Ethics Law by Bill 39-14, effective in October of 2015. That law also eliminated Limited Public Financial Disclosure Statements. Regulation 33-01 concerning Content of Limited Public Financial Disclosure Statements is an Ethics Commission regulation and is to be repealed by the new regulation. The Executive Regulation concerning designation of financial disclosure filers is to be repealed pursuant to a separate regulatory package submitted by the County Executive (Executive Regulation 21-16).

The new regulation is comprised of five sections.

19A.9.01 COMMISSION PROCEEDINGS CONCERNING POSSIBLE VIOLATIONS OF THE PUBLIC ETHICS LAW

This section addresses Commission processes concerning violations and is completely new. The Public Ethics Law leaves some flexibility in how the authorities in the statute regarding enforcement are to be deployed, and this section is intended to provide some clarity and transparency into the manner and authority associated with the Commission's fulfillment of its statutory duties.

19A.12.01 ADMINISTRATIVE POLICIES AND PROCEDURES FOR OUTSIDE EMPLOYMENT

The Ethics Commission has replaced the paper system for submission of outside employment requests with an electronic system that facilitates compliance with requirements of the Public Ethics Law and promotes transparency. The new regulation includes provisions applicable to all County employees (as that term has been redefined) necessary for the appropriate operation of the outside employment approval process. Paid and unpaid members of boards, committees, and commissions are excluded from the definition, whereas the current regulation excludes only unpaid board members. As the regulation was submitted, sworn police are excluded from coverage of the regulation and particular provisions applicable only to sworn police were removed. But, the approach taken in the submitted regulation as to sworn police is likely to be revised in 2017 prior to Council approval.

19A.14.01 ADDITIONAL GUIDANCE CONCERNING MISUSE OF PRESTIGE OF OFFICE; IMPROPER INFLUENCE.

This new regulatory guidance is intended to develop what is meant by the term "misuse of the prestige of office" to give employees notice and guidance as to what is considered appropriate conduct under certain circumstances.

19A.16.01 GIFT ACCEPTANCE BY MONTGOMERY COUNTY EMPLOYEES

The regulation creates an exemption from coverage of the prohibitions on solicitation and acceptance of gifts for certain activities that are not offensive to ethics principles. Actions taken

within the scope of the regulation will not be subject to ethics enforcement by the Commission as they are viewed as being appropriate and consistent with the intent of the ethics law.

19A.17.01 FINANCIAL DISCLOSURE: RANGES OF VALUES FOR DISCLOSURE BY ELECTED OFFICIALS

This section implements a practice established in 2016 by the Ethics Commission for the financial disclosures of elected officials and candidates for elective office. The ranges of value were established by the Commission based on similar practices adopted by the Maryland State Ethics Commission for filers required by law to provide values in connection with certain disclosures.

The Commission will seek the approval of the regulations by the County Council in 2017.

8. Outreach and Other Activities: The Staff also serves as the principal public resource on the County's ethics laws, to include managing a website that reflects Commission programs, activities, and publications such as annual reports, approvals of outside employment requests, lobbying data, and waivers and opinions.

Commission staff also engaged in activities during 2016 to support the ethics program, not otherwise addressed in this report. For example, Robert Cobb testified before Senate and House Committees in Annapolis in opposition to a bill designed to change current State ethics law so as to expressly limit local jurisdictions' current authority to modify local ethics laws "to the extent necessary to make the provisions relevant to the prevention of conflicts of interest in that jurisdiction." The testimony sought to limit the exporting of weaknesses in State ethics law to local jurisdictions. Staff testified that operation by clear law is preferable to operation by opinion, which is preferred by State law as implemented by the State Ethics Commission. The Montgomery County ethics law, like the State's, carries criminal penalties for its violation. Providing clear notice as to the conduct that is sanctionable is fundamental to fair governance. Other Maryland localities and the Maryland Association of Counties also testified in opposition to the legislation. Despite the opposition, the legislation passed. Commission staff also provided comments to the County's liaisons to the State legislature concerning changes to State ethics legislation concerning Bi-County Commissions.

Internal to County Government, the Commission, through staff, is a resource to agencies and departments on matters that relate to the ethics law and more broadly to ethics-related matters, such as political activity.

9. Administration: The Staff of the Commission is responsible for assuring that Commission meetings are run in accordance with the Open Meetings Act and other applicable law. The Staff informs and advises the Commission as to all material matters under its jurisdiction; Commission staff are also responsible for budget, procurement, human resources, and resource management for the operation of the office in accordance with Montgomery County policies, and attends required training in these and other office management areas.

For the Commission:

Respectfully Submitted,



March 1, 2017

Steven Rosen, Chair

Date