



## MONTGOMERY COUNTY ETHICS COMMISSION

**October 4, 2022**  
**Waiver 22-10-016**

The Department of Environmental Protection (DEP) has applied for a waiver of the prohibitions in 19A-14 of the ethics law and applicable regulations for the class of County employees involved in the design or implementation of the EV Purchasing Co-op Program (EVPC or EV Group Buy).

The EVPC is part of the County's strategy to reduce greenhouse gas (GHG) emissions by incentivizing residents and businesses to transition from fossil-fueled internal combustion engine (ICE) vehicles to plug-in electric vehicles (EVs). The EVPC involves the promotion of certain incentives and products offered by private automobile dealerships that would reduce costs for County residents and businesses that want to lease or purchase an electric vehicle. Following the completion of a short pilot phase of the EVPC, DEP requested an advisory opinion from the Commission to determine if Section 19A-14 of the County Ethics Law applied to the administration of the EVPC. On August 16, 2022, the Commission advised in AO22-08-014 that the prohibitions of 19A-14 and implementing regulations are implicated by certain aspects of the proposed EVPC and concluded that DEP would require statutory authority or a waiver of prohibitions to proceed.

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:

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- (1) generally available to the public; or
- (2) authorized by a County law, regulation, or administrative procedure.

COMCOR 19A.14.01 provides:

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.

### **Relevant Facts**

In December 2017, the Montgomery County Council adopted Resolution 18-974, Emergency Climate Mobilization. This resolution calls upon the national Administration, Congress, the State, and other local governments to join Montgomery County to use all available powers and resources to reduce greenhouse gas (GHG) emissions by 80 percent by 2027 and 100 percent by 2035.

In 2021, the County adopted a Climate Action Plan (CAP) that identified on-road transportation as a major source of greenhouse gas emissions, accounting for 36 percent of the county's emissions. The CAP identified a key action to encourage and accelerate the adoption of private electric vehicles among residents and businesses through purchase incentives. The CAP estimated that vehicle electrification would produce 75-85 percent of necessary transportation emissions reductions.

To further these goals, the County included the launch of an "EV Group Buy" program as a "Front burner Climate Action" in its FY 2022 Climate Work Plan. An EV Group Buy, also known as a "Cooperative Purchasing" or "Purchasing Co-op" program, aims to use the purchasing power of a large group of people to decrease the price of the products offered. For example, the County is currently a promotional partner of the Capital Area Solar Co-op, allowing hundreds of County residents to install solar panels at a reduced price via collective purchasing power.

The County's EVPC was inspired by similar bulk purchasing programs successfully implemented in other states and regions. Various program models have been implemented across the country, including traditional requests for proposals (RFPs), direct dealership negotiation, and "rolling" promotions of dealer incentives.

The common elements of EV Group Buy or Purchasing Co-op programs are 1) discounted prices on EVs, 2) limited-time offers, and 3) community-based outreach and marketing. Some programs also include dealership engagement and education to encourage dealerships to be more knowledgeable and enthusiastic about selling EVs, increasing the dealership's commitment to the product and by extension the overall sales of the product. The submitted waiver request referenced programs in other jurisdictions.

In December 2021, the Montgomery County Department of Transportation (MCDOT) and DEP coordinated with the Metropolitan Washington Council of Governments (MWCOC) to competitively select and execute a contract with the Electrification Coalition to support an EV Purchasing Co-op pilot program from January 1, 2022 – May 31, 2022.

The County Executive announced the initiative in January 2022, setting a goal to challenge 1,000 residents and businesses to pledge that their next vehicle will be a new or pre-owned electric vehicle. The County Executive stated that these pledges will form the foundation of a full-scale EV Purchasing Co-op where “the County will work with auto manufacturers and dealers to negotiate favorable pricing for EV purchases and leases on behalf of our community members who have taken the pledge.”

The EVPC contemplates the following elements and benefits:

#### Benefits for County Residents and Businesses

1. Discounted prices and other promotional offers from area dealerships and other automotive businesses, including timely information about where and how to access such promotions.
2. Educational content and experiences related to EVs offered by the County and its community partners that will help residents be better informed when making a purchasing decision.
3. Improved experiences when shopping for electric vehicles because of training and educational content offered to dealership partners.

#### Benefits to Participating Dealers

1. Identifying participating dealer names and Montgomery County-based locations.
2. Placing participating dealer logos on County web pages such that residents can better identify these dealers.
3. Promoting dealer-provided incentives on County web pages, and in newsletters and social media.

4. Providing training to participating dealers on electric vehicle technology, local policies and incentives, and best practices through in-person meetings, live virtual training, and/or on-demand videos and materials.
5. Providing printed educational materials on electric vehicle technology, local policies and incentives, and best practices for use by dealership staff to better communicate with customers. These materials may bear the County seal and logos for sponsoring agencies, including DEP and MCDOT, to indicate they are an impartial, trusted source for information.
6. Coordinating with dealers to host, participate in, or sponsor educational events for residents and businesses. DEP would either organize events directly or facilitate introductions with third parties, such as community organizations, that organize events for the public to learn about and experience electric vehicles.

The EVPC incorporates a number of detailed structures and elements that are explained in the waiver request and the attachments thereto, a copy of which may be obtained from the Ethics Commission upon request.

### **Analysis and Decision**

As stated in the Commission's advisory opinion regarding the EVPC, the ethics law requires 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 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 noted 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.

The Commission further noted that activities resulting in government entanglement in individual dealer promotional programs risks disruptive association with private business sales tactics and products. Accordingly, the Ethics Commission recommended that if a waiver request were to be submitted, that it be submitted by the agency head with a statement of concurrence from the Chief Administrative Officer. Here a waiver request has been submitted with the concurrence of the Chief Administrative Officer, signaling 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.

There are three requirements to be met in order for the Ethics Commission to issue a waiver pursuant to 19A-8 of the ethics law:

- (1) the best interests of the County would be served by granting the waiver;

- (2) the importance to the County of a public employee or class of employees performing official duties outweighs the actual or potential harm of any conflict of interest; and
- (3) granting the waiver will not give a public employee or class of employees an unfair economic advantage over other public employees or members of the public.

The Ethics Commission grants the requested waiver to the class of persons working on the EVPC, subject to certain conditions, detailed further below.

The Commission believes the request from the Acting Director of the Department of Environmental Protection, as supported by the Chief Administrative Officer, demonstrates that the administration of Montgomery County believes that the EVPC is in the best interest of the County. The information provided in the request supports that determination, and the Commission concludes based on the request and the concurrence of the Chief Administrative Officer that the best interest of the County would be served by granting the waiver.

The request for a waiver outlines perceived ethics risks associated with the EVPC and then details the mitigating approach to each risk. In this regard, the EVPC administrators will ensure that all of the dealers will be offered the same opportunities. To ensure that the public will not perceive that the County favors particular dealers or their incentives, the EVPC administrators will make clear that the County does not endorse or guarantee any dealer representations or offers. As for the risk of personal benefit to County employees administering the EVPC, the waiver request stipulates that staff may not accept discounts not available to members of the public or, when personally purchasing a vehicle, identify themselves to dealers as being associated with the EVPC. The EVPC administrators must attest, if transacting business with dealerships doing business in the County, that no benefit unavailable to the public or due to EVPC administration was advanced to the employee.

As the EVPC design is not for the benefit of County employees but for County citizens and the environment, there is minimal risk of potential conflicts of interest. With the stipulations, conditions, and attestations with respect to purchases by EVPC administrators described in the waiver, the Commission is satisfied that steps have been taken to assure that no public employee or class of employee will receive an unfair economic advantage over other public employees or members of the public. Of course, it would be a misuse of the prestige of office if an employee were to leverage their County position to seek for themselves or others a price or benefit in purchasing a vehicle not generally available to program participants.

The Commission concludes that all three of the requirements for issuance of a waiver of 19A-8(a) are satisfied.

The request states: “as the program proceeds it may be necessary to adjust some of [the] elements in response to feedback from participating dealers and the public.” Noting this, the Commission imposes the following conditions on the issuance of the waiver:

1. Any material change to the EVPC design must be approved by the Chief Administrative Officer.
2. The waiver expires one year from the date of its issuance.

To the extent the waiver request itself states that the EVPC will adjust, the Commission wants to be assured that material EVPC changes are approved by the Chief Administrative Officer. In this fashion, the Commission can be assured that the EVPC will continue to meet the requirement that it be in the “best interests of the County.” Additionally, due to potential for adjustments in the EVPC and in light of the likelihood of change in the rapidly altering landscape of the development and sale of electronic vehicles, the waiver will expire one year from the date of its issuance. The Commission would expect that a new waiver request would be submitted prior to the expiration of the current waiver. In this way, any risk that the waiver is overtaken by events and utilized in a manner not contemplated by the original grant of the waiver will be minimized.

The issuance of the waiver is based on the facts and representations made in the waiver request presented to the Commission on September 13, 2022.

For the Commission:



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Susan Beard, Chair