

**COMMONWEALTH OF PENNSYLVANIA
OFFICE OF GENERAL COUNSEL**

SUBJECT: ETHICS ACT GUIDANCE—UPDATED

TO: All Public Officials and Public Employees under the Governor's
Jurisdiction

FROM: Barbara Adams
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DATE: December 29, 2009

I. PURPOSE

On November 30, 2009, the Supreme Court of Pennsylvania issued an important opinion that alters the analysis that each public official and public employee must undertake to identify potential conflicts of interest under the Public Official and Public Employee Ethics Act ("Ethics Act"). In the new opinion, *Rendell v. State Ethics Commission*, the Supreme Court held that a **non-profit** entity is a "business" as defined by the Ethics Act. In doing so, the Supreme Court reversed the Commonwealth Court, which had held to the contrary in October 2008.

This memorandum updates the ethics guidance that this office provided on May 22, 2007, to all public officials and public employees under the Governor's jurisdiction to incorporate the new ruling of the Supreme Court.

Please note that this guidance does **not** require an official or employee to make any reports or filings other than those he is already required to make annually under the Ethics Act and the Governor's Code of Conduct. Rather, this memorandum is intended to serve as guidance to each public official and public employee in assessing and determining the actions that she must take to **avoid conflicts of interest** under the Ethics Act as interpreted by the State Ethics Commission. However, please take note that all public officials and public employees must list on their annual Statements of Financial Interests any non-profit entity with which they were "associated" (as that term is defined by the Ethics Act) at any time during the preceding calendar year.

It is important for all public officials and public employees to avoid conflicts of interest in the performance of their public powers and duties. Even an unintentional conflict of interest under the Ethics Act can result in a public official or public employee having to pay substantial financial penalties, and intentional violations of the Ethics Act also can result in criminal prosecution.

II. GUIDANCE SUMMARY¹

A. IDENTIFYING AND AVOIDING “CONFLICTS OF INTEREST”²

1. **Establish** and Maintain a **Personal Inventory** of Potential Sources of Conflicts of Interest.
 - Identify all “businesses” (including non-profit entities) with which you are “associated.”
 - Identify all “members of your immediate family” and all “businesses” (including non-profit entities) with which each “member of your immediate family” is “associated.”
 - Identify all of your private business clients and customers, the business clients and customers of a “member of your immediate family”, and the clients and customers of all “businesses” with which you or a “member of your immediate family” is “associated”.
 - Identify all persons or entities with which you, a “member of your immediate family”, or a “business” with which you or your family member is “associated”, have a reasonable and legitimate expectation of forming a business relationship.
2. **Identify**—on a continuing basis—all **official or public powers, duties and responsibilities** that you have or in which you engage.
3. **Compare** your official powers and public duties and responsibilities with:
 - your personal private interests,
 - the interests of the “members of your immediate family”, and
 - the “businesses” with which you or “members of your immediate family” are “associated”.
 - i. This includes clients and customers and potential future clients and customers that can be reasonably anticipated.
4. **Identify** those powers, duties and public activities you may have which may enable you to be in a position to use the “authority of your public office or public employment” in a manner that could result in private pecuniary benefit to you, a “member of your immediate

¹ This summary provides a brief overview of this Guidance. An official or employee should carefully review the **entire** detailed Guidance that immediately follows.

² An alphabetical list of Key Definitions under the Ethics Act appears on pages 9 and 10 of this memorandum. For ease of identification, the terms that are defined by the Ethics Act appear in this Guidance Summary section bearing quotation marks.

family”, or a “business” with which you or a “member of your immediate family” is “associated”.

- This includes your clients and customers, the clients and customers of a “member of your immediate family”; the clients and customers of any “business” with which you or a “member of your immediate family” is “associated”; and any person or entity with which you, a “member of your immediate family”, or a “business” with which you or your family member is “associated”, have a reasonable and legitimate expectation of forming a business relationship.
5. **Avoid** possible “conflicts of interest”, *i.e.*, avoid becoming involved in any matter that may confer a private pecuniary benefit on any person or entity in your personal inventory.
- Please note that when a public official or public employee has a “conflict of interest” as to one person or entity that is seeking a pecuniary benefit from a Commonwealth agency in competition with others who seek the same limited benefit (such as a grant or license that is to be awarded to a limited number of applicants competing as part of a pool of applicants), the public official or public employee has a “conflict of interest” as to **every applicant in the competitive pool and must fully abstain from the entire matter.**

B. WHAT TO DO WHEN AN ACTUAL OR POTENTIAL “CONFLICT OF INTEREST” IS IDENTIFIED.

1. **Immediately notify your superior.** In the case of an agency head, **immediately** notify the Governor’s General Counsel
2. The public official or public employee and/or the immediate supervisor also should **immediately notify** the agency’s **legal office.**

C. HOW TO RESOLVE A “CONFLICT OF INTEREST”

1. Full **abstention/recusal** from participation in a matter in which an actual or potential “conflict of interest” exists.
2. **Re-assignments and delegations** are required.
 - *Agency Heads—Establish and Maintain a Written Conflict of Interest Policy and Procedure for your agency.*

III. IDENTIFYING AND AVOIDING CONFLICTS OF INTEREST

A. Establish and Maintain a Personal Inventory of Potential Sources of Conflicts of Interest.

The creation of a personal inventory will require you to *identify, on an ongoing basis*, the following:

1. *Identify all businesses (including non-profit entities) with which you are associated.*

Include all businesses, including non-profit entities, of which you are a director, officer, owner or employee, or in which you have a “financial interest”. (See Key Definitions.) Please note that the State Ethics Commission has ruled that a governmental entity is **not** a business under the Ethics Act, but a governmental entity may be a client or customer of a business and, therefore, affect the conflict of interest analysis required under the Ethics Act as described below.

The State Ethics Commission has ruled that a public official or public employee must avoid taking action that would benefit the private pecuniary interests of the clients and customers of a public official or public employee’s business activities, including the clients and customers of all businesses with which a public official or public employee is associated. Consequently, you must identify any clients and customers that you might have in your private business activities, including the clients and customers of any business with which you are associated as those terms are defined in the Ethics Act.

In addition, the Ethics Commission has ruled that a public official or public employee must avoid taking action that would benefit the private pecuniary interests of any person or entity with which he, or a business with which he is associated, has a reasonable and legitimate expectation of forming a business relationship. Thus, those potential customers or clients also should be included in your personal inventory.

2. *Identify all members of your immediate family and all businesses (including non-profit entities) with which each member of your immediate family is associated.*

You must identify all of your immediate family members—*i.e.*, your spouse, and each parent, child, brother and sister—**and** all businesses, including non-profit entities, with which each member of your immediate family is associated. The same tests regarding businesses with which you are associated (as those terms are defined in the Ethics Act) must be applied to each member of your immediate family, and this inventory must be added to yours.

Consequently, you must include in your inventory all businesses of which a member of your immediate family is a director, officer, owner or employee, or in which he/she has a financial interest as defined by the Ethics Act. As noted above, a

governmental entity is not a business as defined by the Ethics Act. However, a governmental entity can be a client or customer of a business with which a family member is associated and, therefore, affect the conflict of interest analysis required under the Ethics Act as described below.

Because the State Ethics Commission has ruled that a public official or public employee must avoid taking action that would benefit the private pecuniary interests of the clients and customers of his immediate family members and the clients and customers of all businesses with those family members are associated, you must identify any such clients and customers (**including** governmental entities) of your immediate family members and any business with which they are associated. Also, you must identify any person or entity with which a member of your immediate family, or a business with which he or she is associated, has a reasonable and legitimate expectation of forming a business relationship.

Certain individuals and businesses (such as health care providers and lawyers) may have professional responsibilities or other legal duties that would limit their ability to disclose the names of their clients. The State Ethics Commission's opinions do not describe how professional codes requiring confidentiality relate to the obligation of public officials and public employees to refrain from participating in decisions involving their clients and customers with respect to any non-official or non public-employment activity and clients and customers of members of their immediate family or businesses where they or members of their immediate family are associated. Please contact your agency's office of chief counsel if you believe that those situations might affect your ability to prepare a complete personal inventory.

B. Identify—on a continuing basis—all official or public powers, duties and responsibilities that you have or in which you engage.

You may not use the authority of your office or employment for your private pecuniary benefit or the benefit of your immediate family, a business with which you or a member of your immediate family is associated, or the clients and customers of you, a member of your immediate family or a business with which you or a member of your immediate family is associated. If you or a member of your immediate family is associated with any business that does business with, or is regulated by, your agency (including boards and commissions), your participation in any decision affecting such a business and its clients or customers is viewed by the State Ethics Commission as the improper use of the authority of your office or employment for a private pecuniary benefit.

Also, in those programs (such as grant programs) or other matters in which multiple persons or entities are in competition for grants, contracts or other benefits from the Commonwealth, and a member of your immediate family or a business with which you or a member of your immediate family is associated (including their clients and customers) is or is reasonably anticipated to be among the competitors, your participation in that program or matter would be a conflict of interest ***and you may not participate in***

any decision whatsoever regarding the program or matter. In other words, if you reasonably anticipate that a member of your immediate family, a business with which you or a member of your immediate family is associated, or a client or customer of an immediate family member or associated business is or is reasonably anticipated to be among the competitors for a grant, contract or other benefit from the Commonwealth, the Ethics Act as interpreted by the Commission bars you from participating in any way respecting **any** of the competitors.

Based on these rules, to avoid conflicts of interest, you should identify your official powers, public duties and responsibilities to determine the scope of:

- The possible uses of public authority that you might exercise that potentially could result in a private pecuniary benefit to you, a member of your immediate family, or a business with which you or a member of your immediate family is associated (including your clients and customers and the clients and customers of the members of your immediate family and the clients and customers of any business with which you or a member of your immediate family is associated).
 - The possible types of “confidential information” (*see* Key Definitions) that you could receive through holding public office or public employment that potentially could result in private pecuniary benefit to yourself, a member of your immediate family, or a business with which you or a member of your immediate family is associated (including clients and customers as described above).
- C. Compare your official powers and public duties and responsibilities with your personal private interests, the interests of the members of your immediate family members, and the businesses with which you or members of your immediate family are associated (including clients and customers and potential future clients and customers that can be reasonably anticipated), to identify those powers, duties and public activities you may have which may enable you to be in a position to use the authority of your public office or public employment in a manner that could result in private pecuniary benefit to you, a member of your immediate family, or a business with which you or a member of your immediate family is associated (including your clients and customers, the clients and customers of a member of your immediate family, and the clients and customers of businesses with which you or a member of your immediate family is associated).**

Please consider that a possible conflict of interest might arise in a variety of contexts, including for example—

- in any agency procurement or other contracting matter;
- in any grants programs;

- in the administration of subsidy programs;
- in licensing matters;
- in any type of regulatory matter; and
- in auditing matters.

These are examples only and not an exhaustive list of all activities in which a conflict of interest might arise.

Also, in a program or activity in which persons or entities compete for grants, contracts or other government benefits as a pool of candidates, a conflict of interest as to one competitor constitutes a conflict of interest as to **the entire program or activity**. For example, when multiple applicants seek grants from a limited amount of money and must compete against one another, a public official or public employee who has a conflict of interest as to just one of the applicants has a conflict of interest as to the entire grant program, for so long as the conflict exists as to even one applicant. Thus, in such a circumstance, you may not participate in that activity or program as to **any** of the competitors.

D. Avoid possible conflicts of interest.

In the daily performance of your public duties and responsibilities, you should be constantly vigilant to avoid the exercise of authority or use of confidential information that might constitute a conflict of interest under the Ethics Act determined in accordance with the scope of potential conflicting interests described above in this memorandum.

IV. WHAT TO DO WHEN AN ACTUAL OR POTENTIAL CONFLICT OF INTEREST IS IDENTIFIED?

- A. ***Immediately* notify your superior. In the case of an agency head, *immediately* notify the Governor's General Counsel.**
- B. **The public official or public employee and/or the immediate supervisor also should immediately notify the agency's legal office to assure that all necessary and appropriate measures are taken to assess the validity of the conflict of interest concerns and, if validated, to take the action that is necessary and appropriate to remedy or avoid the conflict of interest or potential conflict of interest.**

V. HOW TO RESOLVE A CONFLICT OF INTEREST

- A. **Full abstention/recusal is required from participation in a matter in which an actual or potential conflict of interest exists using the tests set forth above.**

Full abstention means that a public official or public employee must be removed and insulated from any involvement in the matter in question, as well as insulated from access to confidential information involving the matter in which the conflict exists. This removal/insulation must extend to supervision, implementation and administration of the activity or program (including grant programs and contracting activities).

B. Re-assignments and delegations are required.

1. *Agency Heads—Establish and Maintain a Written Conflict of Interest Policy and Procedure.*

Each agency has, or should have, a written conflict of interest policy outlining who would assume the duties and responsibilities of the agency head and deputy agency heads in the event that an actual or potential conflict of interest requires recusal.

2. *Agency re-assignments/delegations.*

The agency's conflict of interest policy should be consulted to determine the manner in which the usual responsibilities of the conflicted public employee will be re-assigned or delegated. However, if the conflict of an employee cannot be resolved directly or completely under the agency's written conflicts of interest policy, the immediate superior of the conflicted official or employee or other properly assigned agency official or employee should re-assign or delegate the affected powers, duties and responsibilities to an agency official or employee other than the conflicted person.

VI. QUESTIONS, COMMENTS AND CONCERNS

If you have questions about this guidance or the opinions of the State Ethics Commission, please address them to the chief counsel of your agency and to Deputy General Counsel Gregory E. Dunlap at gdunlap@state.pa.us.

KEY DEFINITIONS UNDER THE ETHICS ACT
[65 Pa.C.S. § 1102]

“Associated with any business.” Any business, including any non-profit entity, of which the public official, public employee or immediate family member is a director, officer, owner, employee or has a financial interest. **The State Ethics Commission has determined that a person is associated with a business that is a client or customer of the person or a client or customer of a business with which the person is associated, or under circumstances in which it is reasonably anticipated that a person or business will become a client or customer of any of such businesses.**

The *“authority of office or employment”* is “[t]he actual power provided by law, the exercise of which is necessary to the performance of duties and responsibilities unique to a particular public office or position of public employment.”

A *“business”* includes “[a]ny corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, organization, self-employed individual, holding company, joint stock company, receivership, trust or any legal entity organized for profit.” **The State Ethics Commission has ruled that a non-profit corporation, association or other entity is a business under the Act. The Commission also has ruled that a governmental entity is not a business under the Ethics Act, but a governmental entity can be a client or customer and, as such, falls within the relationships that result in a conflict of interest under the Ethics Act as interpreted by the Commission.**

“Confidential information” is “[i]nformation not obtainable from reviewing a public document or from making inquiry to a publicly available source of information.”

A *“conflict of interest”* is “[u]se by a public official or public employee of the authority of his office or employment or any confidential information received through his holding public office or employment for the private pecuniary benefit of himself, a member of his immediate family, or a business with which the public official/employee or a member of his immediate family is associated.” The State Ethics Commission has ruled that it may be a conflict of interest also to use the authority of public office or public employment or confidential information for the private pecuniary benefit of a client or customer of the public official/employee, a member of his immediate family, or a business with which the public official/employee or a member of his immediate family is associated. It is not a conflict of interest, however, if the official’s or employee’s action has “only a *de minimis* economic impact” or “affects to the same degree a class consisting of an industry, occupation or other group which includes the public official or public employee, a member of his immediate family or a business with which he or a member of his immediate family is associated.”

A person has a *“financial interest”* in a business if the business is “a legal entity engaged in business for profit” **and** the person has a financial interest in the business that “comprises more than 5% of the equity of the business or more than 5% of the assets of or the economic interest in indebtedness.”

An “*immediate family member*” is a parent, spouse, child, brother or sister of a public official or public employee.

A “*public employee*” is an individual employed by the Commonwealth or a political subdivision who is responsible for taking or recommending official action—in a manner that is “nonministerial”, *i.e.*, involves the exercise of judgment—with regard to:

- (1) contracting or procurement;
- (2) administering or monitoring grants or subsidies;
- (3) planning or zoning;
- (4) inspecting, licensing, regulating or auditing any business, governmental body, individual, corporation, union, association, firm, partnership, committee, club, or the interests of any business, governmental body, individual, corporation, union, association, firm, partnership, committee, club or other organization or group of persons; or
- (5) any other activity where the official action has an economic impact of greater than a *de minimis* nature on the interests of any person.

A “*public official*” is a person elected by the public or elected or appointed by a governmental body or an appointed official of the government of the Commonwealth or one of its political subdivisions, **except** members of advisory boards that have no authority to expend public funds other than reimbursement for personal expenses or to otherwise exercise the power of the State.