

February 15, 2017

**CONFIDENTIAL**

**Advisory Opinion, Case No. 17004.A, Gifts**

[addressee]

Dear

On [date], you spoke with Steve Berlin, our Executive Director, and requested a formal advisory opinion addressing the following situation: [E] died [the previous day, [a covered relative of one of your department's employees, E] died]. [The covered relative] is survived by [E and a minor child]. You asked how the City's Governmental Ethics Ordinance (the "Ordinance") would apply to the following two scenarios: (i) an association] wishes to take up a collection for E – donations would include in-kind services like child care, or cash or checks; and (ii) his friends wish to host a GoFundMe page for E, which would also yield cash or its equivalent.<sup>1</sup>

The question we address is whether, under the Ordinance's gift restrictions,<sup>2</sup> either method is permissible. After carefully considering your question, the facts presented, and applicable Board precedent, the Board has determined that, in this tragic circumstance, both fund-raising methods are acceptable under the Ordinance: that is, people *may* donate cash, checks, or gift cards that will make their way to E to aid in this difficult time, provided that:

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<sup>1</sup> Our staff also noticed that [another fund] was established by [a religious organization] in order to support E. The same analysis and determinations we make with respect to the [association] and GoFundMe page, explained below, apply to this fund and its donors.

<sup>2</sup> The Ordinance's gift restrictions provide, in pertinent part:

**§2-156-142. Offering, receiving and soliciting of gifts or favors.**

- (a)(1) Except as otherwise provided in this chapter, no city ... employee, and, subject to subsection (h) no covered relative, shall
- (i) solicit any gift for himself or any covered relative;
  - (ii) accept any anonymous gift; or
  - (iii) accept any gift of cash, gift card or cash equivalent.

(2) Except as otherwise provided in this chapter, no city ... employee, and, subject to subsection (h) no covered relative, shall knowingly accept any gift, unless the total value of all gifts given to the official, candidate for city office, employee or covered relative by a single source amounts to no more than \$50.00 in a calendar year ...

(d) The restriction in subsection (a) shall not apply to the following ...

(4) Any gift from a relative.

(5) Any gift from an official superior as the term "official superior" is defined in section 2-156-143 of this chapter.

(6) Any gift from a personal friend, unless the official, candidate for city office, or employee has reason to believe that, under the circumstances, the gift was given because of the official position, candidacy or employment of the official, candidate for city office, or employee ...

**§2-156-143. Employee-to-employee gifts.**

(a) For purposes of this section, the following definitions shall apply: "Official superior" means any employee, including but not limited to an immediate supervisor, whose official responsibilities include directing or evaluating the performance of other employees' official duties or those of any other supervisor of the employee. For purposes of this section, the term "official superior" shall also include the mayor. Additionally, for purposes of this section, an employee is considered to be the subordinate of any of his official superiors ...

(d) The restriction[s on gifting between employees] in subsections (b) and (c) shall not apply to the following ...

(2) A gift appropriate to the occasion may be given to an official superior or accepted from a subordinate or other employee receiving less pay:

(i) In recognition of infrequently occurring occasions of personal significance such as marriage, illness, or the birth or adoption of a child ..."

(i) Donations do not exceed \$50 from any person (except those made by relatives and personal friends of E or of E's late [covered relative] , or by you or E's co-workers, which are not limited);

(ii) A careful listing of all donors and their donations is kept (the GoFundMe campaign will do this automatically, but the list should be kept with respect to donations made by neighbors through the Association), so as to minimize the possibility of anonymous gifts, though anonymous gifts that do not exceed \$50 made through these funding sources would not be prohibited<sup>3</sup>;

(iii) No donation is made or accepted based on an explicit or implicit mutual understanding that any votes, decisions or actions concerning City business made by you, E , or any other employee of your office, would be affected thereby; and

(iv) E discloses the name of any donor from whom E receives any combination of gifts that total in excess of \$250 in calendar year 2017 (except from relatives) on E's 2018 Statement of Financial Interests.

Our analysis follows.

**Analysis.** Your question revolves around the permissibility of utilizing these fundraising techniques to raise money, gift cards, or in-kind gifts, to be given to E as gifts during this life crisis.

On its face, the Ordinance does not allow persons to give cash, checks, or gift cards to E in any amount, or in-kind gifts worth in excess of \$50 per calendar year, unless a specific exception in the law applies. *See* §§ 2-156-142(a); -142(d), cited in footnote 2. The only exceptions written into the law are that E could receive unlimited cash gifts from you, or fellow employees, or E's or E's late [family member's] personal friends or family. Hence, these campaigns — which exemplify a community- and humanitarian-oriented spirit of charity and kindness — appear to be prohibited under a literal reading of the Ordinance.

However, the Board notes that:

(i) Under the November 1, 2012 revisions, the Board was granted limited authority to waive the application of various provisions of the Ordinance in limited and appropriate circumstances. Although this situation would appear to present a paradigmatic instance where we would apply our waiver authority, our waiver authority with respect to the Ordinance's gift restrictions are limited to travel situations and does not apply here;<sup>4</sup> and

(ii) More importantly, the Board strives to achieve fundamental fairness on the matters addressed to it. The death of a loved one brings with it circumstances and challenges that are unique. That "fairness" result is sometimes uncertain, but it is often, as here, clear; the Board believes it has the authority to do what is fair and right, and has done so in the past.<sup>5</sup>

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<sup>3</sup>We advise that anonymous gifts in excess of \$50 should be donated to charity, and E should report them as donated gifts on the 2018 Statement of Financial Interests. A [member of the association] contacted Mr. Berlin on and he advised her to keep a detailed spreadsheet of those [members] who donate, and what they donate. We encourage this in order to minimize anonymous gifts, and for the sake of transparency.

<sup>4</sup> *See* §-156-402. **Waivers.** This section, provides, in relevant part:

(a) When requested by a city official or employee, the board may grant a waiver from compliance with any of the following: (1) The gift restrictions in Section 2-156-142(a) to the extent they apply to material or travel expenses for meetings ...” Moreover, we note that, under the Ordinance's gift restrictions prior to the November 1, 2012 revisions made to it, these cash gifts *would* have been allowable in *any* amount, provided they came from persons who did not have City business that E could substantially affect at the time the gifts were made .

<sup>5</sup> The Board is acting, in its own way, and under its own authority, as would a court of "equity." "Equity" means:

"Justice administered according to fairness as contrasted with the strictly formulated rules of common law. ... The term 'equity' denotes the spirit and habit of fairness, justness and right dealing which would regulate the intercourse of men [and women] with men [and women]." Black's Law Dictionary, 5<sup>th</sup> Ed., 1979. (bracketed materials added)

In the early 1990's, we issued what we refer to as the five (5) "Homestead Cases," where the Board reserved for itself the ability to fashion an equitable remedy when the facts require it. *See, e.g.*, Case No. 90040.A. In that case, a City employee requested an opinion from the Board as to whether the employee could continue to receive the benefits of purchasing and rebuilding City-owned real estate under the City's Urban Homestead Program. The Board noted first "that, as a general matter, the Government Ethics Ordinance prohibits City employees from participating" because the employee would have had a prohibited financial interest in City business. However, after investigating and reviewing the facts adduced from that investigation, in detail, the Board determined that it would allow these employees to participate, despite the wording of the Ordinance. Our determination was based on these factors: (i) the program involved a lottery; (ii) the City employee acted in good faith; and (iii) the City employee expended substantial time and money pursuing and executing under this City program. We wrote that:

"[B]ased on the totality of the circumstances in this particular case, it [is] the Board's opinion that equity and justice require [us] to conclude that [this employees] should have been allowed to continue to participate in the Program. ... [we] cannot in this case make the recommendation that [the City employee] be prohibited from further participation in the Program. We have concluded that to do so would be highly inequitable and unjust... Therefore, in coming to our decision on this matter, we considered not just the letter of the Ordinance but the principles of equity, good conscience and justice."

We applied the same reasoning and made the same determinations in four other Homestead program cases based on similar facts.<sup>6</sup> Twenty years later, the Board cited these Homestead cases in a lobbying case. In Case No. 10041.36.LOB, a lobbyist, who the Board determined violated the lobbyist filing requirements and properly had his lobbying registration cancelled, later petitioned the Board to allow him to continue his registration. In his petition, he set forth facts, including religious observation requirements, among others, from which the Board could discern that he (like the City employees in the Homestead cases) had not only made a good faith effort to comply with all the lobbying laws, but was prevented from properly filing due to external circumstances. The opinion noted that, while the Board may not grant "exceptions" in the case of Ordinance violations, it did have the authority to fashion equitable remedies, which it did.

In the present situation, based on the totality of circumstances, we conclude that, in the same spirit of these earlier Board cases, it is appropriate for the Board to fashion an equitable remedy consistent with the spirit of the Ordinance and within the conditions we enumerate below.

**Determination.** Based on principles of justice and equity, the Board determines that the fundraising campaigns described in this advisory opinion may operate to raise cash, checks, gifts cards, or in-kind donations for the purpose of aiding E and E's minor child, and that E may accept these, subject to the following conditions:

- (i) Cash, checks or gifts cards raised through these fundraising campaigns may not exceed \$50 for the total amount given by any single donor/household<sup>7</sup>;
- (ii) E's and E's late covered relative's (as defined in §2-156-010(w)) or personal friends<sup>8</sup> may gift cash or gift cards to E in any amount;

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<sup>6</sup> *See also* Case Nos. 90029.A; 90033.A; 90040.A; and 90062.A.

<sup>7</sup> A single donor includes a "household." Thus, gifts given separately by a husband and wife may not total in excess of \$50.

<sup>8</sup> What is a "personal friend?" The Ordinance does not define the term. This personal friendship exemption was added to the Ordinance as part of the revision that took effect on November 1, 2012. Since that time, Board staff has advised City employees and officials regarding who is a personal friend. Because this exemption is derived from an Illinois statute, the "State Officials and Employees Ethics Act," we employ the guidance in that statute, and will accordingly consider "the circumstances under which the gift was offered," such as (i) the history of the relationship between the individual giving the gift and the recipient of the gift, including any previous exchange of gifts between those individuals; (ii) whether to the actual knowledge of City official or employee the individual who gave the gift personally paid for the gift or sought a tax deduction or business reimbursement of the gift; and (iii) whether to the actual knowledge of the City official or employee, the individual who gave the gift also at the same time gave the same or similar gifts to other City officials or employees. *Cf.* 5 ILCS 430/10-15(7).

(iii) You and E's co-workers may also give him cash or gifts cards in any amount for this purpose;

(iv) A careful listing of all donors and their donations is kept (the GoFundMe campaign will do this automatically, but the list should be kept with respect to all donations made by neighbors through the [association]), though anonymous gifts that do not exceed \$50 made through these funding sources would not be prohibited;

(v) No donation may be made or accepted based on an explicit or implicit mutual understanding that any votes, decisions or actions concerning City business made by E, or any other employee of your office or any other City employee or official, would be affected thereby; and

(vi) On E's 2018 Statement of Financial Interests, E discloses the name of any donor from whom E receives any combination of gifts that total in excess of \$250 in calendar year 2017 (except from relatives), pursuant to §2-156-160(a)(8).

Our determination is based on the facts presented in this opinion, and covers only the application of the City's Governmental Ethics Ordinance to these facts. If the facts change, please advise us, as that could change the Board's determination. As required by our Rules and Regulations, we are also sending a copy of this advisory opinion to E. We also remind you that other laws and concerns may apply here.<sup>9</sup>

**Reliance.** Either of you may rely on the advice given in this advisory opinion. Should you desire a reconsideration of the Board's determination, please notify us in writing within 14 days, that is, by [date], explaining any material facts or circumstances that were not before the Board when it deliberated on this opinion.

We also remind you, and anyone who reads this opinion in its redacted form, that an advisory opinion we issue for one case is not a sufficient basis for inferring legal permissibility or impermissibility of conduct in other cases, even though the cases may be similar in some respects. This opinion is based on and limited to the specific set of facts and circumstances described above. *Cf., e.g.,* Case No. 90040.A.

On behalf of the Board and staff, I extend condolences to E and E's child, and E's and E's late covered relative's entire family.

Sincerely,

William F. Conlon, Chair

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<sup>9</sup> In particular, Illinois has a new law, informally known as the Illinois Intrastate Crowdfunding Bill, which affects raising capital for businesses through "crowdfunding," that is, raising money through small sums on the internet. *See* <https://crowdfundinglegalnews.files.wordpress.com/2015/05/hb-3429-final1.pdf>. Moreover, we urge that you advise concerned and charitable citizens to familiarize themselves with GoFundMe's company policies to ensure that no one is defrauded. It is a new technique, and not without its risks. *See* <http://www.nonprofitlawblog.com/nonprofit-crowdfunding-risks/>; <https://oag.ca.gov/sites/all/files/agweb/pdfs/charities/publications/crowdfunding.pdf>; <https://www.gofundme.com/terms>; <https://www.gofundme.com/legal>.