

Advisory Opinion No. 93-25

A public servant has requested an opinion from the Conflicts of Interest Board (the "Board"), concerning the permissibility of publishing a book based on her experience as a public servant. Specifically, the public servant has requested an opinion as to whether, consistent with Chapter 68 of the City Charter, she may enter into an agreement with a firm to publish a book she has authored, and whether she may accept royalties derived from the sale of the book.

Background

The public servant has advised the Board that she is an employee of a City agency charged with enforcing certain laws, and has been employed by that agency since 1972. She has participated in the prosecution of several well-known cases involving laws under the jurisdiction of her agency, and has developed a professional expertise in this area.

The public servant has further advised the Board that in 1986, with the permission of the head of her agency, she began to write a manuscript on such laws, and her experience in such cases. The manuscript was

initially submitted to a publisher in 1987, but was subsequently rewritten. A revised manuscript was recently delivered to a publishing firm, which plans to publish it in 1993.

The public servant has represented that the manuscript was written on her own time (after hours, over weekends, and during vacations), and that she has not used City office facilities or equipment in its preparation.

The public servant has also represented that the manuscript, while drawing upon her experience as a City employee, is not an autobiography but is instead a review and analysis of certain laws and the manner in which New York State has demonstrated national leadership in strengthening such laws and prosecuting offenders. The manuscript describes several trials and appeals that the public servant was involved with and which have been closed, and the public servant states that all information concerning these matters was drawn from public records.

For the following reasons, it is the opinion of the Board that it would not be a violation of Chapter 68 for the public servant to enter into an agreement to publish the manuscript, or to receive royalties from its sale as a book.

### Publication of Books and Articles

In many cases, the publication of books and articles helps transmit information acquired by City employees and, in addition, helps develop recognition of the talents and skills of City employees, and of the accomplishments of City government generally. However, there are also cases in which this form of outside activity could interfere with the proper discharge of a public servant's official duties, or create an appearance of misusing public office for personal gain.

As an example, if a City employee utilized confidential information in preparing a manuscript for publication, or used the authority of his or her agency to pressure individuals or firms into buying the finished product, the employee would be exploiting the power of public office for personal gain and undermining public confidence in the integrity and impartiality of government officials.

For these reasons, our predecessor agency, the New York City Board of Ethics, and our sister-agency, the New York State Ethics Commission, have both placed certain limitations on the ability of public servants to publish books or articles.

### Board of Ethics

In Opinion No. 34 (1961), the Board of Ethics held

that an employee of the Department of Buildings, who taught at a City vocational high school, could publish a book on laws relating to building construction. The book was drawn from notes that the employee used in teaching at the high school, but did not disclose any information received in confidence or information which, as a matter of policy, the Department of Buildings had elected to keep confidential.

In Opinion No. 55 (1962), the Board of Ethics held that two employees of the Board of Education could not form a corporation to sell books to that agency, including books authored by City employees. The Board of Ethics reached this conclusion because the business relationship between the corporation and the Board of Education would violate the latter's by-laws, although the authorship of the books in question was unexceptionable.

Finally, in Opinion No. 323 (1974), the Board of Ethics permitted a public servant to publish a book based on his experience with the City, as well as in the private sector. The Board of Ethics concluded that there was no violation of the Code of Ethics or a Mayoral Memorandum permitting teaching, writing and occasional lecture engagements because the work would be done on the public servant's own time and would not

interfere with his official duties.

State Ethics Commission

In 1989, the New York State Ethics Commission <sup>1</sup> also considered the issue of whether a public servant could properly write a book or article for publication.

In its Advisory Opinion No. 89-10, the Commission considered whether or not a State employee, subject to Section 74 of the State Public Officers Law,<sup>2</sup> could publish a treatise or textbook on land use control problems, including zoning and planning. The employee participated in various programs offered by his agency to train local officials on the basic principles of zoning. While the agency offered these programs as a service to local governments, the latter were not required to participate, and were not subject to the jurisdiction of the agency in connection with their

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<sup>1</sup> The State Ethics Commission was established pursuant to Section 94 of the Executive Law. Among other things, it is authorized and empowered to issue advisory opinions interpreting the State Ethics in Government Act. See Executive Law, Section 94(15).

<sup>2</sup> Section 74 of the Public Officers Law provides, in appropriate part, that

No officer or employee of a state agency ... should have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the proper discharge of his duties in the public interest.

exercise of zoning powers.

The book in question was being published by a not-for-profit organization, for sale to local government officials, developers and interested members of the public. Profits from the sale of the book were to be shared by the not-for-profit and the State employee. The book was written on the employee's own time, and without the use of State supplies or equipment.

The Commission concluded that while the State employee had a financial interest in the sale of the book, his interest was not relevant to or part of his official duties, and was not in substantial conflict with the proper discharge of such duties.

The Commission determined that under the facts and circumstances presented, "it is a benefit to the State to have an employee who is expert on [the] particular subject matter [at issue]. That he acted upon his own initiative to write a book from which he will receive royalties does not conflict with the proper discharge of his duties for the [State]."

#### Chapter 68 of the City Charter

Chapter 68 of the City Charter, as presently written, took effect on January 1, 1990. Chapter 68 by its terms applies to all "public servants" in agencies the expenses of which are paid in whole or in part by

the City.<sup>3</sup>

Although Chapter 68 does not expressly deal with the publication of books and articles, it does contain a series of provisions which place conditions and limitations on the outside activities of public servants generally. These include Charter Section 2604(b)(2), which prohibits a public servant from engaging in any transaction which is in conflict with the proper discharge of his or her official duties; Charter Section 2604(b)(3), which prohibits a public

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<sup>3</sup> A "public servant" is defined as "all officials, officers and employees of the city, ... except unpaid members of advisory committees shall not be public servants." Charter Section 2601(19).

In determining whether or not an individual is a public servant, for purposes of Chapter 68, the Board considers whether the office, bureau, department or other entity in which the individual works is an "agency" of the City. The Charter defines "agency" as

[any] city, county, borough or other office, position, administration, department, division, bureau, board, commission, authority, corporation, advisory committee or other agency of government, the expenses of which are paid in whole or in part from the city treasury, ... .

Charter Section 2601(2).

Since the expenses of the public servant's agency are paid, in part, from the City treasury, such agency is an "agency" of the City, and employees of such agency are "public servants" subject to the provisions of Chapter 68.

servant from using his or her official position to secure a private advantage for the public servant, or for any person or firm associated with the public servant; and Charter Section 2604(b)(4), which prohibits a public servant from disclosing information which is confidential to the City, or using such information to advance the private interests of the public servant or any person or firm associated with the public servant. In addition, Chapter 68 places a restriction on the compensation which a public servant may derive from an outside activity, by prohibiting the acceptance of any compensation except from the City for activities which are part of the public servant's official duties. See Charter Section 2604(b)(13).

These provisions are, among other things, intended to insure that City employees devote their time and energy, during normal working hours, to the service of the public at large and the efficient performance of their assigned tasks; that the integrity of City government is not called into question by any appearance of divided loyalty; that official decision-making is not compromised through preferential treatment, confidential information, or special access to those in power; and that private parties are not able to exert influence through payments to public

servants for work which they are already paid by the City to perform.

The task before us is to interpret the Charter provisions in a manner which, while allowing public servants to exercise their freedom of expression, and share their expertise through the publication of books and articles, remains fully consistent with the foregoing principles and with the need for City employees to avoid even the appearance of a conflict of interest.

We are of the opinion that a current public servant may, consistent with Chapter 68, write and publish a book or an article, and accept compensation for the publication of the completed work, provided that

(1) the book or article is written on the public servant's own time and not when he or she is required to perform services for the City;<sup>4</sup>

(2) the public servant does not utilize City facilities, supplies or equipment in writing the book

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<sup>4</sup> This proviso is based on Charter Section 2604(b)(2). The Board has held, in a number of cases, that this Section requires that public servants schedule outside activities so that they do not interfere with the proper discharge of official duties, during normal working hours. See, e.g., Advisory Opinion No. 92-34.

or article;<sup>5</sup>

(3) the book or article does not disclose any information which is confidential to the City and is not otherwise a matter of public record;<sup>6</sup>

(4) the book contains a disclaimer that the views expressed therein are those of the public servant alone, and are not necessarily the views of his or her agency, or of the City;<sup>7</sup> and

(5) no other facts or circumstances are presented which suggest that the publication of the book or article would result in a conflict of interest proscribed by Chapter 68.<sup>8</sup>

This opinion supersedes and replaces Board of Ethics Opinion Nos. 34, 55 and 323.

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<sup>5</sup> See Charter Section 2604(b)(3). In Advisory Opinion No. 91-7, the Board held that a public servant could, consistent with Chapter 68, maintain a private legal practice, provided that certain conditions were observed. One condition, based on Charter Section 2604(b)(3), was that the public servant not use City facilities, supplies or equipment in conducting such a practice.

<sup>6</sup> See Charter Section 2604(b)(4).

<sup>7</sup> See Charter Sections 2604(b)(2) and (b)(3).

<sup>8</sup> As an example, if the facts and circumstances indicate that the public servant is using the power of his or her official position to pressure or coerce individuals or firms into buying the published work, such conduct would constitute a violation of Charter Section 2604(b)(3).

Based on her representations to the Board and on the foregoing analysis, we have also determined that the public servant in this case may, consistent with Chapter 68 of the City Charter, publish the book she has written, and receive royalties from the publisher based on sales of the completed work. The public servant has represented that, although the book is based upon her experience in the enforcement of certain laws, it was written with the approval of the head of her agency, on her own time, without the use of City facilities, supplies or equipment, and on the basis of information which is available to the public. She has also represented that she is willing to include the required disclaimer as part of the final text which is published. Finally, no information has been presented to the Board which suggests that the publication of her book would otherwise result in a conflict of interest prohibited by Chapter 68.

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Dated: August 20, 1993