

Post-employment Restrictions  
Testimony

Charter Sections 2601(4), (15)  
2604(d)(4), (5)

Advisory Opinion No. 94-5

A former public servant has requested an opinion from the Conflicts of Interest Board (the "Board") as to whether he may, consistent with the conflicts of interest provisions of the City Charter, testify at an administrative proceeding before his former City agency concerning particular matters with respect to which he had participated personally and substantially as a public servant. For the reasons discussed below, it is the opinion of the Board that the former public servant may testify, subject to the conditions set forth in this opinion.

Background

The former public servant retired from his City employment approximately three years ago. While employed by the City, his duties included reviewing, for other government agencies, private contractors' claims for payment in a specialized technical program

area, and, based on his reviews, making payment recommendations. One claim which the former public servant had recommended for payment was denied by the government agency to which he had made the recommendation. The contractor has commenced an administrative proceeding before the public servant's former agency in order to re-examine the basis on which the other government agency rejected the claim. The former public servant has been subpoenaed to testify at that proceeding. He will testify only as to non-confidential factual matters and will not be compensated for his testimony.

#### Discussion

Chapter 68 contains several provisions which limit the activities of former City employees. Among these provisions is Charter Section 2604(d)(4), which provides:

No person who has served as a public servant shall appear, whether paid or unpaid, before the city, or receive compensation for any services rendered, in relation to any particular matter involving

the same party or companies with respect to which particular matter such person had participated personally and substantially as a public servant through decision, approval, recommendation, investigation or other similar activities.<sup>1</sup>

Under Charter Section 2601(4), "appear" means to make any communication, for compensation, other than those involving "ministerial matters," which involve actions carried out in a prescribed manner and which do not involve substantial personal discretion. See Charter Section 2601(15).

The other post-employment provision of Chapter 68 which is relevant to the Board's consideration of this request is Charter Section 2604(d)(5), which provides:

No public servant shall, after leaving city service, disclose or use for private advantage any

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<sup>1</sup> Charter Section 2601(17) defines "particular matter" as "any case proceeding, application, request for a ruling or benefit ... or other similar action which involves a specific party or parties, including actions leading up to the particular matter ...."

confidential information gained from public service which is not otherwise made available to the public; provided, however, that this shall not prohibit any public servant from disclosing any information concerning conduct which the public servant knows or reasonably believes to involve waste, inefficiency, corruption, criminal activity or conflict of interest.

These provisions, while limiting the activities of former public servants, do not prohibit the former public servant who made this request and other similarly situated former public servants from giving factual testimony concerning non-confidential matters or confidential matters which involve waste, inefficiency, corruption, criminal activity or conflict of interest.

The subject of the former public servant's testimony -- a contractor's claim for payment -- is clearly a particular matter with respect to which he had participated personally and substantially as a

public servant. Thus, the former public servant is prohibited from appearing before the City, with or without compensation, or from receiving compensation for any services rendered in relation to the contractor's claim for payment. While Charter Section 2601(4) defines an "appearance" as any communication for compensation, Charter Section 2604(d)(4) prohibits compensated and uncompensated appearances; however, Chapter 68 specifically excepts communications which are ministerial, i.e., which are carried out in a prescribed manner and which do not involve substantial personal discretion. The act of taking or offering sworn testimony regarding only factual matters is a ministerial act which does not involve substantial personal discretion. Accordingly, inasmuch as the former public servant's proposed testimony is ministerial in nature, it is not a prohibited appearance. Furthermore, the former public servant is not being compensated for the services he expects to render as a witness. In light of these two factors, the former public servant's testimony would not violate Chapter 68, provided that he observes the confidentiality requirements of Charter Section 2604(d)(5).

Conclusion

It is the opinion of the Board, for the reasons stated above, that the former public servant's uncompensated testimony before his former City agency concerning factual matters, including the particular contractor's payment claim with respect to which he participated personally and substantially, would not violate Chapter 68, but that he would be prohibited from disclosing any confidential information gained from his City service which is not otherwise available to the public, except for any information concerning waste, inefficiency, corruption, criminal activity or conflict of interest.

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Dated: March 4, 1994