

ADVISORY OPINION 11-01

May 10, 2011

A member of the City of College Cable Television Commission (“CTC”) has asked the Ethics Commission for an advisory opinion regarding potential conflicts of interest relating to Cable Television Commissioner X’s participation in CTC matters relating to public access television. Specifically, the Requestor asked for an advisory opinion “about the degree to which a Commissioner can participate, if at all, in discussions about public access television, whether that discussion is requested by him or another Commission member, in the circumstances stated in this letter.”

I. Facts.

Commissioner X stated on his January 6, 2011, Annual Financial Disclosure Statement (“Disclosure Statement”) that he founded a nonprofit corporation, Corporation Y, which he formed for the purpose of managing a possible future public access cable channel for the City of College Park. According to the records of the Maryland State Department of Assessment and Taxation, Commissioner X is the sole Director of Corporation Y. He indicated on his Disclosure Statement that he intended to recuse himself from voting on whether to transfer management of a public access channel from the City to a third party.

Under the College Park Code, the CTC has broad authority over the City’s cable television system. However, according to the Requestor, the CTC’s only activities have related to oversight of the City’s two cable television franchisees, Comcast and Verizon, and the renewal of their franchises. The oversight primarily involves raising subscriber complaints with the franchisees. According to the Requestor, the franchise agreements must be renewed every ten years, the franchise agreements for both franchisees must be substantially similar, and the Comcast agreement will expire this year. The Requestor further stated that the City has three Public, Education, and Government (“PEG”) channels, but that it uses only one of the channels and does not have any plans to develop public access programming. The Requestor stated that matters such as the fee the franchisees pay to the City (which may be used solely for telecommunication purposes) and the number of PEG channels that must be set aside for the City may come up during franchise renewal negotiations.

Commissioner X, on January 14, 2011, sent an email to the CTC’s staff liaison requesting the addition of a discussion of the initiation of a public access channel to the agenda of the CTC’s upcoming meeting. Commissioner X attached a PowerPoint presentation to be used to guide the discussion of the matter. Commissioner X’s email indicated that he intended to participate in the CTC’s discussion.

II. Applicable Law.

Chapter 38 of the College Park Code establishes ethical standards for City employees. The goal of the Ethics Chapter is to ensure that City officials perform their duties with only the best interests of the City in mind. Section 38-11 prohibits City officials from participating in certain matters and holding certain employment relationships or business interests that may create conflicts between their private interests and the interests of the City.

Based on the information provided by the Requestor and the information readily available to the Commission, the Commission believes that four provisions of the Ethics Chapter are pertinent to the Requestor's inquiry. First, under section 38-4, one who serves as an officer or director of a business entity is deemed to have an interest in that business entity. Second, section 38-11(A)(1) provides, in pertinent part, that

[n]o City official or employee shall participate on behalf of the City in any matter which would, to their knowledge, have a direct financial impact, as distinguished from the public generally, on themselves, their employers, a member of their family or any business entity in which they have an interest.

Third, section 38-11(B)(1) provides that

[n]o City official or employee shall hold . . . an interest in a business entity . . . when the interest may be substantially and materially affected, in a manner distinguishable from the public generally, by the performance or nonperformance of the covered person's official duty.

Finally, section 38-13 prohibits City officials and employees from "us[ing] the prestige of his or her office to advance his or her own private interest or the private interest of any other person."

III. Discussion.

A. Section 38-11(A)(1), Disqualification from Participation.

As the director of Corporation Y, Commissioner X has an interest in Corporation Y for purposes of the Ethics Chapter. Therefore, section 38-11(A)(1), prohibits him from participating in CTC matters that would have a direct financial impact on Corporation Y. Based upon Commissioner X's Disclosure Statement, he appears to have determined that a decision by the Commission to transfer public access management services to a third party such as Corporation Y would have a direct financial impact upon Corporation Y. Moreover, according to the proposed presentation that Commissioner X prepared for the CTC, a public access channel would be funded with City funds, specifically, money collected on behalf of the City by the City's cable franchisees. Accordingly, for purposes of this Advisory Opinion, it appears that the initiation of a public access channel would have a direct financial impact upon the entity selected to operate

the channel.

The next issue is whether a decision by the CTC to initiate a public access channel, as opposed to the selection of an entity to operate the channel, would have a direct financial impact upon Corporation Y. The Commission believes that it would. To the Commission's knowledge, and to the knowledge of the Requestor, Commissioner X is the only person interested in operating a public access channel for the City, and Corporation Y is the only business entity formed for that purpose. A decision by the CTC to initiate a public access channel and the specific procedures adopted by the CTC in considering potential operators would lay the groundwork for Corporation Y to operate the channel. Accordingly, the Commission concludes that a decision by CTC to initiate a public access channel would have a direct financial impact upon Corporation Y.

Finally, we must determine what actions by Commissioner X constitute "participation" in the CTC's decision whether to initiate a public access channel. The Commission has previously interpreted "participation" broadly for conflict of interest purposes. For example, in Advisory Opinion 95-1, the Commission advised that a Councilmember would violate section 38-11 by merely engaging in the Council's discussion and debate about a matter in which the Councilmember had an interest. The Commission's broad interpretation of "participation" is also consistent with the state law upon which the City's Ethics Ordinance is based. See Md. Code Ann., State Gov't Art., § 15-512(a)(2) (recognizing that participation in a legislative matter involves more than just voting on the matter). Accordingly, the Commission concludes that Commissioner X's request that the CTC consider the initiation of a public access channel at a CTC meeting constitutes prohibited "participation" by Commissioner X in the matter. Similarly, if Commissioner X were to make a presentation to the CTC regarding the matter, he would be engaging in prohibited participation in the matter. Therefore, the Commission concludes that Commissioner X's request to the CTC's staff liaison that a discussion of the initiation of a public access channel be added to the CTC's meeting agenda constitutes a violation of section 38-11(A)(1), and that if Commissioner X were to make a presentation to the CTC about the matter while he remains a member of the CTC, he would further violate section 38-11(A)(1). Similarly, the Commission is of the opinion that, so long as Commissioner X remains a member of the CTC, he should refrain from discussing the issue of a public access channel with other members of the CTC or with any other City official or employee.

B. Section 38-11(B)(1), Prohibited Interests.

As noted above, as a Director of Corporation Y, Commissioner X has an interest in Corporation Y for purposes of the Ethics Chapter, and the establishment by CTC of a public access channel would have a direct financial impact upon Corporation Y. Section 38-11(B)(1) prohibits City officials and employees from holding an interest in a business entity "when the interest may be substantially and materially affected, in a manner distinguishable from the public generally, by the performance or nonperformance of the covered person's official duty." Given

that the City's initiation and funding of a public access channel is necessary for Corporation Y to fulfil its corporate purpose, we believe that it would have a substantial and material impact upon Corporation Y. Commissioner X's submission of a request to the CTC's staff liaison to add the discussion of the initiation of a public access channel to the agenda of CTC's upcoming meeting constitutes the performance of his official duties as a member of the CTC. Similarly, if Commissioner X were to make a presentation to the CTC about the initiation of a public access channel during a CTC meeting, he would be performing his official duties. Because the initiation of a public access channel by the CTC may have a substantial and material impact upon Corporation Y, the Commission concludes that Commissioner X's request to add the matter to the CTC's meeting agenda constitutes a violation of section 38-11(B)(1) and that he would further violate section 38-11(B)(1) if he were to make a presentation to the CTC or even discuss the matter with the CTC while he remains a member of the Commission.

C. Section 38-13, Abuse of Position

_____ Section 38-13 prohibits City officials and employees from "us[ing] the prestige of his or her office to advance his or her own private interest or the private interest of any other person." As discussed above, the CTC's initiation of a public access channel would benefit Corporation Y because Commissioner X formed Corporation Y for the purpose of operating a public access channel on behalf of the City. Commissioner X directly contacted the CTC's staff liaison and requested the inclusion of a discussion of the initiation of a public access channel on the agenda for the CTC's upcoming meeting. In addition, Commissioner X's email request was a response to an official email from the staff liaison to all of the members of the CTC notifying them of the upcoming meeting. Finally, Commissioner X, in his proposed presentation, expressly indicates that he is making the presentation as a member of the CTC, rather than as a City resident or as an officer of Corporation Y. Accordingly, the Commission concludes that Commissioner X's attempt to have the staff liaison include the matter on the CTC's meeting agenda constituted an abuse of his position as a member of the CTC and that section 38-13 prohibits him from making a presentation regarding the initiation of a public access channel while he is a member of the CTC.

IV. Conclusion.

Based on the facts provided and readily available to the Commission, we conclude that Commissioner X must refrain from participating in any way in City matters relating to the initiation of a public access channel while he remains a member of the CTC. In accordance with the broad meaning of the term participation, the Commission opines that Commissioner X must refrain from seeking to add the initiation of a public access channel to the CTC's agenda, making a presentation on the matter to the CTC or to any other City official or employee, and otherwise discussing the matter, either orally or in writing, with other Cable Television Commissioners or other City officials or employees, so long as he remains a member of the CTC.

The Commission also notes that Commissioner X's interest in Corporation Y may create

a conflict of interest during the renegotiation of the City's cable television franchise agreements as Corporation Y's interest in operating a public access channel may influence Commissioner X's position regarding matters that may arise during the negotiation such as the amount of fees and the number of PEG channels to be carried. The Commission stands ready to address such additional CTC matters as they arise.

The Ethics Commission understands that Commissioner X probably believes that establishing a public access channel would benefit the City of College Park and its residents. However, his interest in Corporation Y precludes him from participating in the CTC's consideration of matters relating to the initiation of a public access channel in the impartial manner required of City officials. If Commissioner X wishes to influence City policy regarding public access television, he should do so as a private citizen.

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