



# STATE ETHICS COMMISSION BULLETIN

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## Ethics Commission Issues Summary of the Conflict Law for Municipal Building Officials

In September, the Commission issued a summary of the conflict of interest law for municipal building officials that provides an overview of the application of the conflict of interest law, G.L. c. 268A.

Summaries are intended to provide general guidance to specific categories of public officials and employees concerning practical applications of the conflict law.

This summary discusses how the conflict of interest law helps municipal building officials ensure that their private interests and relationships do not conflict with their responsibilities as public officials. In addition, for certain municipal building officials, there may be statutes other than the conflict of interest law that will allow them to perform work which would otherwise be prohibited provided that they meet certain requirements.

Municipal building officials include, among others: building inspectors; assistant or associate building inspectors;

building commissioners; plumbing and gas fitting inspectors; wiring inspectors; septic system inspectors; and members of municipal boards with responsibilities for enforcing or overseeing municipal building codes and regulations.

Legislation other than the conflict of interest law may be applicable to certain types of building officials and may provide additional exemptions. For example, notwithstanding the restrictions of G.L. c. 268A, §17, municipal building officials may be able to work and be compensated in connection with matters in which the town has an interest provided they can meet the requirements of the statutes listed below. Individuals should consult with municipal counsel to determine if and/or how the statutes below or other statutes apply to them.

- G.L. c. 143, § 3Z allows part-time building inspectors to work in the area in which they are certified, licensed or registered provided that the town adopts

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## Commissioner Dolan Completes Term

Commissioner Elizabeth J. Dolan concluded her term in October 2004. Commissioner Dolan, a retired Superior Court judge and a Harwich resident, was appointed to the Commission by Acting Governor Jane M. Swift.

Chairman E. George Daher expressed his and the Commission's appreciation for the wisdom and good humor that Commissioner Dolan provided. Commissioner Dolan said she had enjoyed working with the staff, calling her term, "a good experience."

The non-partisan Commission consists of five members appointed to staggered, five-year terms. Three commissioners are selected by the Governor, one by the Secretary of State and one by the Attorney General. No more than two of the gubernatorial appointments and no more than three members of the Commission as a whole may be from the same political party.

Commissioner Dolan's replacement will be appointed by Governor Romney.

## Ethics Primer: Gifts and Gratuities (Part II -Receiving)

*Periodically, the Bulletin will discuss a particular area of the conflict of interest law. The information provided is educational in nature and should not be considered legal advice. Persons with questions about a specific situation should contact the Ethics Commission for free confidential advice.*

The state's conflict of interest law, G. L. c. 268A, and the financial disclosure law, G. L. c. 268B, restrict gifts and gratuities that public employees may receive. The phrase "public employee" includes all Massachusetts state, county and

municipal officials and employees, whether part-time or full-time, paid or unpaid, elected or appointed. Depending on the amount and source of a gift, issues may be raised under G.L. c. 268A, §3, §23 and G.L. c. 268B, §6.

Section 3(b) prohibits a public employee from requesting or receiving anything of substantial value which is given for or because of an official act or act within the public employee's

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From the Executive Director

*“College Professors  
and the Conflict Law”*

*The Ethics Commission recently issued an opinion regarding state college professors assigning textbooks from which they receive royalties or other financial benefits.*

*Like other state employees, professors in the state college system are subject to the conflict of interest law, which prohibits state employees, absent an exemption, from participating in a particular matter in which they have a financial interest.*

*In order for professors to assign textbooks that they have written and from whose sale they will financially benefit, two steps must occur. First, they must fully disclose the decision that they are going to make concerning their textbooks and the amount of the royalties they will receive from the proposed sales to their appointing authority and then they must receive a written determination from their appointing authority indicating that they may participate because their financial interest in the textbook selection decision is not so substantial as to affect the integrity of their service to the Commonwealth. Copies of this disclosure and the appointing authority's written determination must be filed with the Commission.*

*The opinion notes that the conflict law does not prohibit professors from selecting their own or any other textbook. What the law requires, prior to such selection, when one's financial interest will be affected by the decision, is a full disclosure and a review by one's appointing authority in order to protect the integrity of governmental decision-making.* Peter Sturges

## Commission Members Fall, 2004

E. George Daher, Chair  
Christine M. Roach, Vice-Chair  
J. Owen Todd  
Tracey Maclin

Carol Carson  
Editor

## Educational Seminar Program Available

The Commission's Public Education Division offers free educational seminars introducing the conflict law to elected officials, appointed employees and unpaid volunteer board members at the state, county and municipal levels.

Presentations provide a basic understanding of the principles of the law and explain how to avoid potential conflicts which may arise between public officials' and employees' private interests and their public positions.

Topics covered during a conflict of interest seminar include: restrictions on receiving gifts, contracting with government agencies, acting on matters in which family members and business associates have financial interests and leaving government to work for a company that contracts with the government. Included in each seminar is a facilitated discussion based on hypothetical, yet realistic, situations.

In recent years, thousands of public employees have attended these educational seminars. Seminars are sponsored by state and county agencies, municipalities and professional organizations.

In some instances, the educational seminars have become part of other training programs. For example, the Office of the Inspector General sponsors the Massachusetts Certified Public Purchasing Official Program which promotes professionalism and excellence in public procurement by

preparing participants to make best value procurements for their jurisdictions. Educational seminars are part of the curriculum and provide an integral part of the training provided to procurement officials.

Under a law passed in December 2002, the Massachusetts Association of School Committees provides newly elected school committee members a minimum of eight hours of training, including conflicts of interests. "Ethics seminars are a regular part of our training. They are, to the surprise of many, interesting and entertaining. They also provide our members with valuable and useful information," said executive director Glenn Koocher.

Some municipalities and government agencies have established requirements that include attending ethics seminars. For example, selectmen in the Town of Wareham adopted a policy in 2002 requiring all appointed board members to attend ethics training in order to be eligible for reappointment.

The Massachusetts Interlocal Insurance Association, which provides risk management services to most municipalities in the Commonwealth, recognizes the seminar program in its Rewards Program that offers members the opportunity to earn credits toward discounts on premiums for completing loss prevention activities.

To arrange for a seminar, please contact the Commission at 617-727-0060.

## Staff notes

Staff Counsel Laura Koepnick joined the Commission in September 2004. Ms. Koepnick served as counsel for the U.S. Air Force between 1998 and 2004. She earned both a Bachelor's degree and a Master's degree at the University of Wisconsin and earned a law degree at the University of Wisconsin Law School.

Brett Wingard has been promoted to Senior Investigator. Prior to joining the Commission in 2000, Mr. Wingard

worked as an investigator in the New Hampshire Public Defenders Office. He is a graduate of the University of New Hampshire and earned a Master's degree from the University of Massachusetts in Boston.

K. Julie Lee, a second year law student at New England School of Law, is serving as an intern as part of an administrative law clinic. She is an Alaskan native who graduated from Boston University.

## Recent Enforcement Matters

*The Ethics Commission investigates numerous cases alleging violations of the conflict of interest and financial disclosure laws each year. While the Commission resolves most matters confidentially, it resolves certain cases publicly.*

*A disposition agreement is a voluntary written agreement entered into between the subject and the Commission in which the subject admits violating the law and agrees to pay a civil penalty. Disposition agreements are matters of public record once a case is concluded.*

*The Commission does not comment on any matter under investigation, nor does the office confirm or deny that it has received a specific complaint. The identity of any complainant is kept confidential.*

*Full texts of Disposition Agreements can be found on the Commission's website, [www.mass.gov/ethics](http://www.mass.gov/ethics).*

**In the Matter of Kathy Barrasso** - The Commission fined former Dennis Housing Authority (DHA) Executive Director Kathy Barrasso \$6,000 for using her position to provide salary advances to herself and other DHA employees, and allowing employees to use sick and vacation time they had not accrued. According to a Disposition Agreement, Barrasso, who served as executive director between 1985 and 2002, violated § 23(b)(2) of the conflict law by:

- Depositing 28 of her own paychecks, on several of which she had altered the dates, into her checking account before she had actually earned them
- Altering the dates and distributing paychecks to subordinates when they requested to receive their paychecks before they had earned them
- Allowing a person who had been friendly with Barrasso's husband and who worked for the DHA between July and December

2001, to commence his DHA employment with 6.25 vacation days and 6.25 sick days, and allowing him to be paid for a total of 54.25 sick and vacation days he had not earned at a cost of over \$6,000 to the DHA

- Allowing five other DHA employees to take almost 60 days of unearned vacation or sick time at a total cost of \$6,450 to the DHA

**In the Matter of Thomas E. Burnett** - The Commission fined Whitman Board of Public Works Chairman Thomas E. Burnett \$2,000 for violating the state's conflict of interest law, G.L. c. 268A, §23(b)(2), by having a town mechanic make a tailgate for Burnett's truck at a discounted price using DPW resources. Burnett also paid \$350 to Whitman as part of the settlement. Burnett failed to address whether the mechanic could use any DPW resources; the mechanic's understanding under these circumstances was that he could. The mechanic took approximately 10 hours, eight of which were on town time, to make the tailgate. He did all the work at the DPW garage using town equipment and welding supplies. The value of the town time and supplies was approximately \$350. Burnett and the mechanic did not discuss payment until after the work was completed. Burnett paid the mechanic \$100 for the work. The mechanic's charge for this work would ordinarily have been \$300. Burnett also asked the mechanic to attach a hitch, which he supplied, and repair a wire cage on Burnett's flatbed

trailer. The mechanic did the work at the DPW garage on his own time. Each job took an hour or two. Burnett did not pay anything for this work.

**In the Matter of Harold Cole** - The Commission issued a Disposition Agreement concluding public proceedings against former Randolph Department of Public Works (DPW) Water Division employee Harold Cole. Cole paid a \$15,000 fine for violating the state's conflict of interest law, G.L. c. 268A, by receiving pay for hours he had not worked. The Commission received \$5,000 as a civil penalty; the remaining \$10,000 was reimbursed to the Town of Randolph for unearned payments Cole was not entitled to receive. Many of Cole's weekly paychecks included payment of \$50 or more for hours that he did not work. Cole earned approximately \$20 per hour. By repeatedly receiving unearned payments of \$50 or more for hours he did not work, Cole violated § 23(b)(2).

**In the Matter of Robert F. Ford** - The Commission fined former Foxboro Police Officer Robert F. Ford \$5,000 for improperly receiving direct school department payments for police work. By using his position to negotiate and receive these payments, Ford violated G.L. c. 268A, the state's conflict of interest law. Ford, whose police officer duties were primarily to act as the school resource officer, violated § 23(b)(2) of the conflict law by receiving \$15,900 in direct school department payments between fall 2000 and June 2002 for police work. For the same

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## Litigation Update

*The Executive Director, and by delegation, the Commission's Legal Division attorneys, have special assistant attorney general status. This status permits Legal Division attorneys to represent the Commission in court proceedings, under the oversight of the Office of the Attorney General. The Commission has recently been involved in one litigation matter.*

### **John Doe v. State Ethics Commission**

John Doe has appealed the Superior Court's decision that the Commission has authority to issue summonses to

compel testimony during a preliminary inquiry. This matter now is pending in the Massachusetts Supreme Judicial Court, which recently granted the Commission's Application for Direct Appellate Review.

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time period, he was paid approximately \$22,000 in overtime by the police department. The Foxboro Police Department policy requires all payments to police officers for acting as police officers be made by the police department. While Ford was aware of this policy, in fall 2000 he worked out an arrangement to receive payments directly from the school department. The arrangement was not known to or approved by the police department. The arrangement continued until June 2002, when the police chief became aware of and terminated the arrangement. The Agreement notes that being paid by both the police department and the school department for overtime raises concerns about possible “double-dipping,” which were investigated by the Foxboro Police Department. The investigation ended when Ford resigned his position.

#### [In the Matter of Hugh Joseph Morley](#)

- The Commission fined Braintree Electric Light Department (BELD) Electrical Engineering Manager Hugh Joseph Morley \$3,000 for violating § 23(b)(2) of G.L. c. 268A, the conflict of interest law by receiving free golf and baseball tickets provided by employees of Power Line Models (PLM), a corporation that provided consulting, design and engineering services to BELD, services Morley supervised as a BELD manager.

Morley worked for PLM in 1996 before he began working at BELD in 1997. At BELD, he was responsible for overseeing PLM projects. He recommended that PLM be hired for additional projects; supervised PLM’s performance on those projects; and reviewed and recommended for approval PLM’s invoices. Between 1998 and 2001 PLM did approximately \$267,000 in business with BELD. Morley supervised 80 percent of that business. During that time, PLM provided Morley with four tickets, each with a face value of \$30, to Boston Red Sox games at Fenway Park on five occasions. Thus Morley received \$600 worth of tickets. Morley was offered and accepted the tickets in what were referred to as “calibration calls” in which the PLM principal would telephone Morley to make certain that Morley was satisfied with PLM’s work and offer him the tickets. Morley also received two rounds of golf totaling \$116 from PLM. The afternoon golf outings followed a morning business meeting

in PLM’s offices. By accepting tickets and golf that were given to him because of his official position, Morley violated 23(b)(2).

#### [In the Matter of Matthew St. Germain](#)

- The Massachusetts State Ethics Commission issued a Disposition Agreement concluding public proceedings against Berkley contractor Matthew St. Germain. St. Germain paid a \$2,000 civil penalty for violating the state’s conflict of interest law, G.L. c. 268A, § 3(a), by offering money to two Berkley Board of Health (BOH) members to obtain a certificate of compliance for a septic system. According to the Disposition Agreement, on Saturday, January 22, 2000, St. Germain met BOH members James Romano and Steven Rapoza to obtain a certificate of compliance for a septic system at 142 Bryant Street. St. Germain offered \$100 cash to each of them for signing the certificate. BOH regulations do not call for any payment for the execution of a certificate of compliance.

### **SECTION BY SECTION THE CONFLICT OF INTEREST LAW, G. L. c. 268A**

- Section 3(a) prohibits anyone from offering a state employee anything of substantial value for or because of any official act to be performed by such state employee.
- Section 23(b)(2) prohibits a public employee from using his or her position to obtain for the employee or others an unwarranted privilege of substantial value not properly available to similarly situated individuals.

## **New Summary Provides Guidance Municipal Building Officials**

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- G.L. c. 166, § 32A allows wiring inspectors to work as electricians provided that the town adopts this statute and the wiring inspectors meet certain conditions.
- G.L. c. 142, § 12 allows plumbing and/or gas fitting inspectors, who do not receive an annual salary, to work as plumbers or gas fitters provided that they meet certain conditions. Plumbing and/or gas fitting inspectors

who receive an annual salary may perform the work of a journeyman plumber or gas fitter only outside the area over which they exercise jurisdiction as an inspector. What constitutes an “annual salary” is determined by the Board of Professional Licensure.

- G.L. c. 111, § 26G allows septic system installers who are appointed or elected to the Board of Health to work as septic system installers

provided that the town adopts this statute and the septic system installers meet certain conditions.

The summary can be found on the Commission’s website at [www.mass.gov/ethics/sum17.htm](http://www.mass.gov/ethics/sum17.htm).

For more information about the law, municipal building officials should contact their Town Counsel or City Solicitor, or the Legal Division of the State Ethics Commission at (617) 727-0060.

## Legislation Passed Providing the Ethics Commission with Limited Regulatory Authority

House Bill 5113, *An Act Authorizing the State Ethics Commission to Provide Exemptions from the Conflict of Interest Law*, was signed into law on November 18, 2004 as Chapter 399 of the Acts of 2004. Governor Mitt Romney filed the bill, which will provide the Ethics Commission with limited regulatory authority, in August, 2003. Speaker Salvatore F. DiMasi identified the bill as a priority soon after his term as speaker began and it moved quickly through the Legislature with the support of Senate President Robert E. Travaglini.

The law provides the Commission with rule-making authority to create “safe harbors” for conduct that may be prohibited by the literal language of the law but that does not offend its

purpose.

The bill received bipartisan support from elected officials as well as a number of private individuals and organizations.

At a hearing before the Joint Committee on State Administration in September 2003, testimony in support of the bill came from Attorney General Thomas F. Reilly, City of Boston Corporation Counsel Merita Hopkins, Boston College Law School professor and former Ethics Commissioner R. Michael Cassidy, John Montgomery, partner in the law firm Ropes & Gray LLP and chairman of the 1995 Special Committee on Ethics, and Leonard Kopelman of Kopelman & Paige PC.

In addition, representatives from

Common Cause, the Massachusetts Municipal Association, the Massachusetts Association of School Committees, and the Massachusetts Chiefs of Police Association all testified in support of the bill.

“The passage of House 4113 provides the Commission with the flexibility to create reasonable exemptions through an open and transparent regulatory process,” said Executive Director Peter Sturges. “By addressing conduct regulated by the conflict of interest law more efficiently and fairly, respect for the conflict of interest law will be enhanced. The Commission looks forward to working with all the interested parties to create regulations that will clarify and simplify the conflict of interest law.”

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official responsibility. (Similarly, under §3(a), no one may give or offer such gifts to public employees.) In addition, G.L. c. 268B, §6 specifically prohibits public employees or members of their immediate family from soliciting or accepting gifts with an aggregate value of \$100 or more in a calendar year from any legislative agent. (Legislative agents are likewise prohibited from offering or giving such gifts.) Next, under G.L. c. 268A, §23(b)(2), public employees are prohibited from using or attempting to use their position to obtain for themselves or others unwarranted privileges of substantial value that are not properly available to similarly situated individuals. Finally, even if a gift or gratuity is not of substantial value or does not fall within the prohibitions discussed above, G.L. c. 268A, §23(b)(3) will, in many situations, require public employees to disclose to their appointing authority, the gift and their relationship with the giver.

#### 1. The Gratuity Prohibition

##### What are gifts and gratuities?

G.L. c. 268A does not define the terms gift and gratuity; instead, the law prohibits “anything of substantial value.” Gifts may include honoraria

and any free or discounted items or services, such as meals, entertainment event tickets, golf and travel expenses, for which payment is normally required. Anything a public employee accepts is an unlawful gift or gratuity if it is: (a) of substantial value and (b) offered for or because of an official act or an act under the employee’s official responsibility.

##### What is substantial value?

Anything worth \$50 or more is considered to be “of substantial value” for purposes of the conflict of interest law. To determine substantial value, the Commission may consider, for example, the cost per person of entertainment hosted by the giver, what it would cost the public to purchase an item or the actual cost incurred by the giver in acquiring the gift given to the public employee. In some situations, the value of a gift will not be its retail price. The giver may have paid more, for example, than the face price of a ticket. (In such instances, the receipt of such tickets may be an unwarranted privilege. See the discussion below of G.L. c. 268A, §23(b)(2).) Similarly, the value of a two-year-old computer is likely to be significantly less than its cost while the value of an item purchased many years ago that has become a

collector’s item may be significantly greater than its cost. Finally, some items, e.g., ordinary and customary plaques or similar items honoring a public employee’s dedication or outstanding service, may, due to the inscription honoring the employee, have little value once so inscribed.

There are also other special cases that public employees should keep in mind. For example, where the gift is a meal, the value of the meal will include the tax and tip paid as well as the retail (menu) price of the meal itself. In addition, where a public employee is accompanied by a spouse, family member or guest, the value of the meal of the companion of the public employee is included as part of the \$50 “substantial value” threshold. Finally, under some circumstances, the Commission will consider a group or series of gifts from the same source, that are individually less than \$50 in value but add up to \$50 or more, to be in the aggregate a gift of substantial value for G.L. c. 268A purposes. For example, a meal and an entertainment event ticket from the same giver, each valued at less than \$50, together could be valued at more than \$50.

##### What is an “official act?”

The term “official act” is defined in the conflict of interest law as “any

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decision or action in a particular matter or in the enactment of legislation.” Official acts would include, for example, voting on a matter before a governmental body, preparing a Request For Proposals or RFP for a public agency, serving on a hiring committee or making a policy recommendation to one’s supervisor.

### What is “official responsibility?”

The term “official responsibility” is defined in the conflict of interest law as “the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action. Official responsibility turns on the authority to act, not on whether that authority is, in fact, exercised. Even if a public employee abstains from all participation, he or she cannot shed his or her “official responsibility” for those matters if such responsibility exists.

### What makes the gratuity unlawful?

The Supreme Judicial Court has stated that there must be a “link” between a gift and a particular official act. Gifts offered and accepted solely as a gesture of goodwill would not violate §3 (although the acceptance of such gifts raises issues under § 23 for the public employee, as discussed below).

In general, therefore, a gift received as a reward or a thank you for an official act that a public employee has taken or will take, or to influence or induce any such official act or act under the public employee’s official responsibility will be considered to be for or because of the official act.

Whether a gift is unlawful depends on the circumstances surrounding the gift. Such circumstances could include the identities and relationship of the giver and the recipient, the intent of the giver and the recipient, the timing of the gift, whether the recipient has acted or will act on matters affecting the giver, and the effect, if any, of the gift on the employee’s official acts. Other factors may include whether the gift is

“repeated, planned and targeted,” whether it is a business expense, whether a personal friendship or reciprocity exists, the nature, amount and quality of the gift or the location of the entertainment and the sophistication of the parties. In summary, the Commission will look at all of the circumstances surrounding the gift.

### 2. Gifts from lobbyists

In addition to the restriction of § 3, lobbyists (commonly referred to as legislative agents) may not offer or give gifts to public employees if the gifts have an aggregate value of \$100 or more in a calendar year. In G.L. c. 268B, a gift is defined as a “payment, entertainment, subscription, advance, services or anything of value, unless consideration of equal or greater value is received.” The definition excludes a reported political contribution, a commercially reasonable loan made in the ordinary course of business, an inheritance, or gifts from certain family members.

It does not matter why the gifts are given. For example, a gift worth \$100 from a legislative agent violates §6 even if the agent and the public employee are personal friends and the gift is given solely out of personal friendship. (Note: Most gifts to public employees that violate §6 are also prohibited by G.L. c. 3, §43, which applies to executive agents as well as legislative agents and is even more restrictive. For more information regarding the application of G.L. c. 3, s. 43, public employees should contact the Public Records Division of the Secretary of the Commonwealth.)

### 3. Gifts Under the Code of Conduct Unwarranted Privileges

Whenever a public employee accepts a gift of substantial value given not for or because of a specific official act but because of his position, the conflict of interest law’s provision prohibiting the use of position to secure unwarranted privileges is implicated. Under the conflict of interest law, a public employee may not “knowingly, or with reason to know . . . use or attempt to use his official position to secure for himself or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals.” Such gifts are

unwarranted unless there is a reasonable justification or officially authorized basis for the gifts such as a law, regulation, ordinance or by-law permitting the gifts to be made.

### Appearances and Disclosures

Whenever a public employee is offered or receives anything of value, even if not of substantial value, the conflict of interest law is still implicated. Section 23(b)(3), the so-called “appearance” of conflicts of interest section, prohibits a public employee from acting “in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person.” If a “reasonable person” could conclude that the public employee would be “improperly influenced” by the giver, or that the giver would “unduly enjoy [the public employee’s] favor,” or that the public employee would “act or fail to act” as a result of such undue influence, the public employee must disclose in writing “the facts which would otherwise lead to such a conclusion” prior to acting on the matter of interest to the giver. The intent of this restriction is to let the public employee’s appointing authority and/or the public know the relevant circumstances in advance, and, that by “giving it the light of day treatment,” cause the public employee and his appointing authority, if any, to recognize the issue and deal with it appropriately. (For more information on making disclosures, see [Ethics Commission Primer: The Code of Conduct.](#))

### Conclusion

Gifts to any public employee - whether paid or unpaid, elected or appointed - are not expected or required in order to do business with the government. For additional information, see Advisories [04-01: Free Tickets and Special Access to Event Tickets](#) and [04-02: Gifts and Gratuities](#). Please contact the Ethics Commission’s Legal Division at (617) 727-0060 for advice.