

## COMMISSION ADVISORY 04-02

### GIFTS AND GRATUITIES

This advisory<sup>(1)</sup> addresses the application of the conflict of interest law (Chapter 268A of the Massachusetts General Laws) to public employees<sup>(2)</sup> who are offered gifts or gratuities of substantial value in connection with their work or because of the position that the employee holds. The conflict of interest law contains three provisions that prohibit or significantly limit a public employee's ability to accept gifts or gratuities under these circumstances.

First, the gifts and gratuities provision prohibits public employees seeking or accepting anything of substantial value for or because of their official acts or any act within their official responsibility.<sup>(3)</sup> Next, 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.<sup>(4)</sup> Finally, even if a gift or gratuity is not of substantial value or does not fall within the first two prohibitions, the conflict of interest law will, in many situations, require public employees to disclose to their appointing authority the gift and their relationship with the giver.<sup>(5)</sup> Public employees who are offered or accept a gift or gratuity must ensure that they comply with all provisions of the law, which are discussed in Part I: The Gift and Gratuities Provision, Part II: Unwarranted Privileges; and Part III: Appearances and Disclosures. Part IV discusses gifts that comply with Chapter 268A and Part V discusses gifts from legislative agents under G. L. c. 268B.

The simplest and best rule that public employees can follow to further the public's trust and to ensure compliance with the conflict of interest law is to decline an offer of a gift or gratuity that is made in connection with their work or their position. If public employees believe that the acceptance of a gift is appropriate they should first seek advice from agency or municipal counsel or the State Ethics Commission.

#### **I. The Gifts and Gratuities Provision (§ 3)**

For purposes of the gratuity provision, whenever a public employee is offered anything from a private party, he must first ask himself two questions: (1) whether the thing being offered is of "substantial value" and, if so, (2) whether it is being offered for or because of any official act or act within his official responsibility that he performed or will perform.

##### **(A) Substantial Value**

The Ethics Commission and the Supreme Judicial Court have interpreted the term "substantial value" to mean anything with a value of \$50 or more.<sup>(6)</sup> Calculating the value may be done in any of several ways. For example, the legally recognized retail value may apply. Sometimes, the giver's cost for the item is deemed a more accurate assessment of substantial value. For example, the giver's cost may be considered to determine the value per person by dividing the total cost by the number of recipients. In addition, individual gifts that are less than substantial value may be combined to determine if something of substantial value has been offered. For example, a gift of two tickets, each valued at \$35, to a public employee and her spouse would be deemed a gift of substantial value to the public employee. A discount valued at \$50 or more off goods or services that the official purchases would be of substantial value. Finally, the ability to purchase a scarce ticket at its nominal value may also be of substantial value if most individuals may obtain the ticket only by paying a premium of substantial value.<sup>(7)</sup>

- Example (*Face Value*): If the face value of a sporting event ticket to the public were \$50 or more, the ticket would be of substantial value.
- Example (*Premium Value*): A giver purchased a ticket with a face value of \$30 but paid a premium cost of \$100. The cost of the ticket would be of substantial value.
- Example (*Cost Per Person*): A lobbyist picks up the tab for dinner for ten people. The total cost is \$750, including tax and tips.<sup>(8)</sup> Each individual attending the dinner would be deemed to have received a \$75 dinner, which would be of substantial value.
- Example (*Aggregate Value*): A series of five free passes, each worth \$10, given to a single public employee will be of substantial value because the combined value of the series is \$50. Similarly, a consistent pattern of free meals from one source to a single public employee over a period of time would be of substantial value if the combined value of the free meals is worth \$50 or more.
- Example (*Discount*): Public employees have been invited to attend an event at a discounted rate. If the public at large were invited to attend at \$100 per person and the public employees were invited to attend at \$50 per person, then the public employees would have been offered something of substantial value.
- Example (*Scarce Tickets*): Public employees have been offered scarce tickets to a sporting event or a concert and the giver has offered the tickets at their face value. These same tickets, however, are not available to the public, by any means, unless the public were to pay a premium price of \$50 or more above the face value. The public employees who paid only the face value would be deemed to have received something of substantial value.<sup>(9)</sup>

### **(B) For or Because of Official Acts or Acts Within Official Responsibility**

The Legislature provided specific guidance by defining the following terms in the conflict of interest law. "Official act" is any decision or action in a particular matter or in the enactment of legislation.<sup>(10)</sup> "Particular matter" is "any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property."<sup>(11)</sup> Finally, "official responsibility" is "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."<sup>(12)</sup>

Whenever public employees are offered anything from a private party, they must ask whether there is a link between the gift and an official act or act within their official responsibility. The Commission determines whether a link is established by reviewing all the circumstances. Such circumstances may include, for example, the identities or relationship of the giver and the recipient, the giver's and recipient's expressed intents, the timing of the gift, whether the recipient has acted or will act on matters affecting the giver, and the effect of the gift on the recipient's acts. In addition, the Commission will consider whether the gift is repeated, planned or targeted, whether it is a business expense, whether there is personal friendship or reciprocity between the giver and the recipient, the nature, amount and quality of the gift, and the location of the entertainment and the sophistication of the parties.<sup>(13)</sup>

Because the prohibition applies to acts "performed or to be performed," a reward of substantial value for a past act may violate the law just as does a gift of substantial value in anticipation of a future act.

- Example: A private individual deals officially with a public employee and invites him out to supper to discuss the standard that the public employee should use to evaluate his proposal against his competitor's proposals, all of which are under the public employee's review. The bill amounts to \$50 or more per person and the private individual picks up the tab. The private party and the public employee do not have a significant social relationship outside of work and they have not developed a pattern of picking up each other's tabs on any type of alternating basis.
- Example: A private party has concluded a meeting in the public employee's office during which they discussed an upcoming permit application. A week later, the public employee is invited to play golf at the private party's club. The cost to the private party is \$50 or more and the private party offers to pick up the cost. The two

- individuals do not socialize and have not played golf together until now. The permit application is still pending.
- Example: A business association's representatives regularly meet at the State House with legislators who specialize in association issues. A couple of weeks after a significant association bill has been approved by the Legislature, and news reports indicate that the Governor will sign it, association representatives offer the bill's sponsors tickets to a concert. The face value of each ticket is \$50 or more.

In each of the above examples, the facts suggest that there is a link or nexus between the private party's gift and an official act or act within the public employee's official responsibility. Therefore, the public employee should either decline the invitation or offer to pay his share of the tab or the cost of the ticket paid by the giver to comply with the conflict of interest law's gratuity provision.

## II. Unwarranted Privileges (§ 23(b)(2))

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. This is because 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."<sup>(14)</sup>

- Example: A city councilor calls a theater in the city, identifies himself as a Councilor, and asks for free tickets worth at least \$50.<sup>(15)</sup>
- Example: Members of the planning board, conservation commission, zoning board of appeal, and the board of health accept gift certificates worth \$50 from a developer for "all their hard work over the last year."
- Example: A superintendent accepts from the school system's maintenance staff free landscaping and painting services for his house.
- Example: The municipality's public safety personnel accept discounts worth 10% off the price of any used car from a local dealer who offers such a discount only to public safety officials in his town.<sup>(16)</sup>

In each of the above examples, the public employee has used his position by accepting a gift given primarily because of his position. Under such circumstances, the gifts are privileges of substantial value. They are unwarranted because there is no reasonable justification or officially authorized basis such as a law, rule, ordinance or by-law for the gifts, and they are not properly available to similarly situated individuals. As in the case of a gratuity, the public employee should decline or pay for the gift.<sup>(17)</sup>

## III. Appearances and Disclosures (§ 23(b)(3))

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. This provision, § 23(b)(3), which involves so-called "appearances" of conflicts of interests, 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." This provision considers all the circumstances, including such factors as the type and value of the gift, substance and significance of the matter before the public employee, and the personal relationship between the donor and the recipient. For example, a "reasonable person"<sup>(18)</sup> 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, when the public employee is in a position to take official action on matters involving the giver or of interest to the giver.<sup>(19)</sup>

The conflict of interest law provides, however, that "it shall be unreasonable to so conclude" if the public employee discloses in writing "the facts which would otherwise lead to such a conclusion" prior to acting on the matter of interest to the giver. Appointed public employees must make such a disclosure in writing and give it to their appointing authority. Elected officials must make the disclosure "public in nature," meaning there must be a public record of the disclosure. Elected municipal officials may file such a disclosure with the public employee who keeps

public records, such as a municipal clerk. Elected state officials may file such disclosure with the Ethics Commission.

The disclosure should be made before the public employee acts on the matter of interest to the giver.<sup>(20)</sup> The intent of this restriction is to let the official's appointing authority and/or the public know in advance, and, by "giving it the light of day treatment" in advance, cause the public employee and his appointing authority, if any, to recognize the issue and deal with it appropriately.

- Example: A public employee and his old friend meet to discuss a public issue of interest to his friend's business client. The two friends regularly get together socially, and regularly cover the tab for each other. Now that the friend offers to pick up the tab, as he would usually do when it was "his turn," the public employee is concerned about what to do. A reasonable person could conclude that the public employee might be influenced by his private friendship and/or the generosity of his friend.
- Example: A private individual has a permit application pending with a public employee and invites the employee out to lunch to discuss the application. The bill is likely to be about \$40 per person and the private individual has offered to pick up the tab. The private party and the public employee do not have a social relationship outside of work and have never before had lunch together.
- Example: A private individual who seeks to become a vendor for public contracts offers the public employee in charge of contracting free use of a vacation home on Cape Cod. The public employee politely declines the offer.

Each of the above examples creates an appearance of a conflict of interest. To eliminate such an appearance, the public employee must disclose in writing the relevant facts of his relationship with these individuals before accepting the private individual's offer, or acting on the pending matter.

#### IV. Gifts that Comply with Chapter 268A

There are several contexts in which accepting a gift, even if of substantial value, will not violate the conflict of interest law.<sup>(21)</sup>

- Example: Gifts from family and from long-time friends, with whom the public employee customarily exchanges gifts, generally will not violate chapter 268A. Gifts from old friends for events such as birthdays or weddings are not prohibited. These gifts do not violate the conflict of interest law because they are personal and not linked to specific official acts or given because of an individual's public position.
- Example: Retirement gifts generally do not violate the conflict of interest law.<sup>(22)</sup> Co-workers might offer group gifts in honor of one's retirement. Retirement gifts may also be accepted from private parties. Such gifts generally do not violate the conflict of interest law because they are, if of reasonable value, warranted provided that there is no link between the giver and a specific official act. Although "honoring Secretary X for 35 years of public service" is not linked to any specific act, "honoring Secretary X for his handling state project Y" suggests a link to a specific act.
- Example: Gifts to a public agency, for the agency's use, do not violate chapter 268A. For example, a gift of personal computers for use in a school's computer laboratory does not violate the conflict of interest law because the gift is for public, rather than private use. The agency, however, must have the legal authority to accept the gift for its use. The conflict of interest law, alone, does not answer that question.
- Example: Holiday gifts such as fruit baskets may be accepted if accepted on behalf of a public employee's agency and shared with all agency employees and/or the public, if applicable, thereby making them available for public rather than private use.

#### V. Gifts from Legislative Agents (G. L. c. 268B)<sup>(23)</sup>

In addition to the above restrictions, G. L. c. 268B, § 6 prohibits certain "public employees" and "public officials" and members of their immediate family from soliciting or accepting from any "legislative agent,"<sup>(24)</sup> (commonly known as lobbyists), gifts<sup>(25)</sup> with an aggregate value of \$100 or more in a calendar year. "Public employee," is anyone who holds "a major policymaking position in a [state or county] governmental body."<sup>(26)</sup> "Public official" means anyone holding a "position for which one is nominated at a state primary or chosen at a state election."<sup>(27)</sup> As a result, this

requirement does not apply to elected or appointed municipal employees or office holders.

Section 5(g)(5) of G.L. c. 268B requires individuals who must file SFI's to disclose the identity of the donor and the value of any gifts aggregating more than \$100 in a calendar year if the source of those gifts "is a person having a direct interest in legislation, legislative action, or a matter before a governmental body; or if . . . the source of [the] gift(s) is a person having a direct interest in a matter before the governmental body by which the recipient is employed." For county and state employees who meet the G. L. c. 268B definitions of "public employee" or "public official," this disclosure is a requirement that is separate and distinct from G. L. c. 268A, §§ 3(a) and 23(b)(2) and 23(b)(3).<sup>(28)</sup>

## VI. Conclusion

The conflict of interest law was enacted to promote the public's confidence and trust in the Commonwealth's public employees. The receipt of gifts and gratuities, particularly when of substantial value, negates the trust that the public is entitled to place in public employees that public, not private, interests are furthered when the employee performs his duties. Such gifts and gratuities also raise concerns that the public employee is, in effect, receiving compensation and benefits over and above what the taxpayer has authorized. For these reasons, the conflict of interest law substantially regulates gifts and gratuities offered to or accepted by public employees.

This advisory is general in nature. The examples in the advisory are representative and not all-inclusive. Public employees are encouraged to seek specific legal advice about the application of the conflict law to gifts and gratuities by contacting the State Ethics Commission at 617-371-9500.

## Approved: May 12, 2004 FOOTNOTES

<sup>1</sup>The Commission issues Advisories periodically to interpret various provisions of the conflict of interest law. Advisories respond to issues that may arise in the context of a particular advisory opinion or enforcement action but which have the potential for broad application. It is important to keep in mind that this advisory is general in nature and is not an exhaustive review of the conflict law. For specific questions, public employees should contact their state, county, or municipal counsel (as applicable) or the Legal Division of the State Ethics Commission at (617) 371-9500. Copies of all Advisories are available from the Commission office or online at [www.mass.gov/ethics](http://www.mass.gov/ethics).

<sup>2</sup>The term "public employee" in this advisory, except as otherwise noted, refers to state, county or municipal employees who are "performing services for or holding an office, position, employment, or membership in [state, county, or municipal] agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis." See G.L. c. 268A, §§1(d), (g) and (q). The term "public employee" also includes anyone who is a special state employee, special county employee, or special municipal employee, as defined in G. L. c. 268A, §§ 1(m), (n), and (o).

<sup>3</sup>G.L. c. 268A, § 3(b).

<sup>4</sup>G.L. c. 268A, § 23(b)2

<sup>5</sup>G.L. c. 268A, § 23(b)(3).

<sup>6</sup>*Life Insurance Association of Massachusetts, Inc. v. State Ethics Commission*, 431 Mass. 1002, 1003 (2000). G. L. c. 268A does not define the term "substantial value."

<sup>7</sup>These examples are not meant to be all-inclusive.

<sup>8</sup>*Life Insurance Association of Massachusetts* at 1003.

<sup>9</sup>See Advisory 04-01, *Free Tickets and Special Access to Event Tickets* for additional information.

<sup>10</sup>G.L. c. 268A, § 1(n).

<sup>11</sup>G.L. c. 268A, § 1(k).

<sup>12</sup>G.L. c. 268A, § 1(i).

<sup>13</sup>*In re: Life Insurance Association of Massachusetts*, Docket No. 528, May 12, 2003.

<sup>14</sup>G.L. c. 268A, § 23(b)(2).

<sup>15</sup>Depending upon the circumstances of the city councilor's official business with the theater, his conduct could also implicate G. L. c. 268A, § 3(b).

<sup>16</sup>By contrast, an industry wide discount available to a broad category of public safety personnel in the Commonwealth would not violate the law. *See e.g., EC-COI-95-5.*

<sup>17</sup>See Advisory 04-01, *Free Tickets and Special Access to Event Tickets* for additional information.

<sup>18</sup>The "reasonable person" standard focuses on the perceptions of citizens in the community, not the perceptions of the players in the situation. *In re Hebert*, 1996 SEC 800, Docket No. 499.

<sup>19</sup>G.L. c. 268A, § 23(b)(3).

<sup>20</sup>The Commission appreciates that there may be circumstances that would require the public official to act first, then disclose to his appointing authority the relevant facts. For example, a police officer may have to first arrest someone who is endangering the public before he has time to disclose, in writing, to his chief of police that the person he arrested is a friend or relative or someone who, last week, offered him a discount simply because he is a police officer.

<sup>21</sup>These examples are not the only types of gifts that would not violate the conflict of interest law.

<sup>22</sup>Certain public employees must also comply with the testimonial dinner law, G.L. c. 268, § 9A.

<sup>23</sup>G.L. c. 3, § 43 also regulates items that legislative agents may provide to public employees and generally prohibits legislative agents from offering or giving gifts, as defined in G. L. c. 268B, § 1, of any kind or nature, and from paying for meals or beverages.

<sup>24</sup>"Legislative agent" means any person who, for compensation, does any act to promote, oppose or influence legislation. G.L. c. 268B, § 1(k).

<sup>25</sup>"Gift means a payment, entertainment, subscription, advance, services or anything of value, unless consideration of equal or greater value is received; 'gift' shall not include a political contribution reported as required by law, a commercially reasonable loan made in the ordinary course of business, anything of value received by inheritance, or a gift received from a member of the reporting person's immediate family or from a relative within the third degree of consanguinity of the reporting person or of the reporting person's spouse or from the spouse of any such relative." G.L. c. 268B, § 1(g).

<sup>26</sup>G.L. c. 268B, § 1(o).

<sup>27</sup>G.L. c. 268B, § 1(q), (p). These definitions specifically exclude members of the United States Congress and the office of regional district school committee member elected district-wide.

<sup>28</sup>G.L. c. 268B, § 5(g)(5) requires individuals who must file SFI's to disclose the identity of the donor and the value of any gifts aggregating more than \$100 in a calendar year if the source of those gifts "is a person having a direct interest in legislation, legislative action, or a matter before a governmental body; or if . . . the source of [the] gift(s) is a person having a direct interest in a matter before the governmental body by which the recipient is employed."