

New York City Conflicts of Interest Board

Notice of Adoption of Final Rules

NOTICE IS HEREBY GIVEN PURSUANT TO THE AUTHORITY VESTED IN THE NEW YORK CITY CONFLICTS OF INTEREST BOARD by Section 1043 of the City Charter that the Conflicts of Interest Board has adopted Board Rules that codify the circumstances by which public servants may use City time, City resources, and their City positions to fundraise to benefit the City or not-for-profit organizations.

The proposed Rules were published in the City Record on March 20, 2019, and a public hearing was held on April 24, 2019. No testimony or comments were received. The Conflicts of Interest Board now adopts the following Rules.

Statement of Basis and Purpose

Board Rules § 1-14 reflects and reaffirms a principle the Board has long held: the City benefits from private donations to City agencies or to not-for-profit organizations serving the City. The Board seeks to encourage this philanthropy because it is beneficial to the City and its residents, particularly at times when City government faces budget challenges that affect its ability to provide programs and services to its residents. Thus, when public servants request the Board's advice regarding whether Chapter 68 permits them to solicit contributions from private donors, the Board has consistently recognized the City purpose in a public servant using City time, City resources, and his or her City position to solicit contributions for programs and services that benefit New Yorkers.

This City purpose must, however, be weighed against the potentially coercive effect of a public servant's solicitations, as well as any private interests that a public servant may have in making such solicitations. Setting this balance is essential to the Board's mission, articulated in Charter § 2600, "to preserve the trust placed in the public servants of the city, to promote public confidence in government, to protect the integrity of government decision-making and to enhance government efficiency."

This rule represents the synthesis of decades of advice the Board has provided to public servants regarding the solicitation of donations to fund programs and services of City government or of not-for-profit organizations that serve New Yorkers. The Board’s numerous advisory opinions on this topic include Advisory Opinion Nos. 1991-10, 1992-15, 1992-21, 1992-27, 1993-15, 1993-26, 1994-29, 1995-5, 1995-7, 1995-27, 1998-14, 2003-4, and 2008-6. Most notably among these prior advisory opinions, the Board in Advisory Opinion No. 2003-4 articulated a comprehensive framework to permit a City agency’s employees to solicit funds for the City and for not-for-profit organizations closely affiliated with the agency.

Since then, the New York City Council enacted Local Law No. 181 of 2016, codified in Chapter 9 of Title 3 of the New York City Administrative Code (“Chapter 9”). Among other things, Chapter 9 requires a not-for-profit organization affiliated with elected officials, either directly or through their agents (such as commissioners of City agencies with respect to the Mayor), to report certain of its donations to the Board on an annual basis.

This rule interprets the “catch-all” provision of Charter § 2604(b)(2), which states that “[n]o public servant shall engage in any business, transaction, or private employment, or have any financial or other private interest, direct or indirect, which is in conflict with the proper discharge of his or her official duties.” This provision was included by the drafters of the comprehensively amended Chapter 68 “in recognition of the fact that the specific prohibitions set forth in [Chapter 68] cannot address all conflict of interest situations which may arise in the future and that the [Conflicts of Interest] Board must retain the flexibility to handle new situations as they arise.” Volume II, Report of the New York City Charter Revision Commission, December 1986 – November 1988, at 175.

This rule codifies the conditions under which a public servant may solicit donations. Specifically, it identifies: (1) the entities for which a public servant may solicit donations; (2) the persons or entities from whom a public servant may solicit donations; (3) the disclaimer a public servant must make in connection with the solicitation; and (4) the disclosures a City agency must make about its fundraising activities.

1) For Whom a Public Servant May Solicit Donations

Paragraph (a)(1) of Board Rules § 1-14 identifies potential beneficiaries of a public servant's solicitations. Because "[i]t is of course clear that the City itself is a permissible beneficiary," A.O. No. 2003-4 at 2, a public servant could solicit donations for his or her City agency or office, as well as for any other City agency or office the public servant's agency head designates after obtaining the written approval of the head of the other agency or office. Some not-for-profit organizations are closely affiliated with an agency or office by virtue of an agency head exercising control over the organization as part of his or her City position. These organizations, which include entities such as the Fund for Public Schools (affiliated with the New York City Department of Education) and the Fund for Public Health in New York City (affiliated with the New York City Department of Health and Mental Hygiene), are regulated by Chapter 9 precisely because they are affiliated with elected officials or their agents. Thus, this rule recognizes that, where an agency head exercises control over an organization subject to Chapter 9 as part of his or her City job, fundraising for the organization by that office or agency's employees may occur as if such fundraising were for the City itself.

Finally, a public servant may solicit donations for the benefit of any other not-for-profit organization designated by the public servant's agency head pursuant to paragraph (b), that is, not-for-profit organizations that have a clear and direct nexus with the City and its residents and

with the mission or duties of the City agency or office. As the Board has previously observed in Advisory Opinion No. 2008-6 in the context of solicitations for unaffiliated not-for-profit organizations, an arts organization in California or an affordable housing provider in Buffalo would not be permissible beneficiaries pursuant to paragraph (b). See A.O. No. 2008-6 at 7. Similarly, a not-for-profit organization dedicated to increasing affordable housing in the City might well be an appropriate beneficiary of fundraising by some agencies, such as the New York City Department of Housing Preservation and Development, but not by other agencies, such as the New York City Department of Cultural Affairs. Id.

Subparagraph (a)(1)(iv) and subdivision (b) reflect the prohibition set forth in Charter § 2604(b)(3) that a public servant may not “use or attempt to use his or her position as a public servant to obtain any financial gain, contract, license, privilege or other private or personal advantage, direct or indirect, for the public servant or any person or firm associated with the public servant.” Thus, paragraph (b) states that an agency head may not designate an organization as an appropriate beneficiary of agency solicitations if the agency head is “associated,” within the meaning of Charter § 2601(5), with the organization or an employee of the organization. Similarly, even if a public servant’s agency head has designated an organization as the appropriate beneficiary of agency solicitations, subparagraph (a)(1)(iv) prohibits a public servant from soliciting donations to that organization if the public servant is associated, within the meaning of Charter § 2601(5), with the organization or an employee of the organization.

2) From Whom a Public Servant May Solicit Donations

Paragraph (a)(2) permits a public servant to solicit donations when such solicitations are directed to the general public, such as in a public service advertisement, a speech, a flyer, a robo-

call, or a mass mailing. As the Board has previously observed, when solicitations are directed to the general public, “there is less danger that any particular person or entity will receive, or be perceived to receive, preferential treatment as a result of a donation,” and “since [the solicitation] is not directed at any particular individual or entity, the danger of coercion is virtually nil.” A.O. No. 2003-4 at 17-18. Indeed, paragraph (a)(2) recognizes that this slight risk of coercion “is outweighed by the public benefit derived from permitting such solicitations.” *Id.* at 19.

Solicitations directed toward a specific individual or firm—such as one-on-one phone calls, meetings, and personal letters—“are effective precisely *because* they are inherently coercive.” A.O. No. 2003-4 at 19. In recognition of this, paragraph (a)(2) permits a public servant to direct a solicitation to an individual or firm provided that the individual or firm does not have a “particular matter” pending before the public servant, as defined in Charter § 2601(17). By prohibiting solicitations to those individuals who or firms that have a particular matter pending before the soliciting public servant, the rule balances the benefit to the City of the solicitations while “minimiz[ing] the likelihood of coercion and the appearance that the donor may receive inappropriate access or other preferential treatment as a result of the donation.” A.O. No. 2003-4 at 20. This prohibition on solicitations is limited to the soliciting official; thus, an agency could erect firewalls that prevent a soliciting official from having any involvement in making, affecting, or directing the particular matter.

3) What Disclaimer a Public Servant Must Make in Connection with the Solicitation

Paragraph (a)(3) requires a public servant to accompany any solicitation with a disclaimer that a contribution will not affect the disposition of any business dealings with the City or provide special access to City officials. This requirement mitigates the likelihood of coercion and the appearance that a donor may receive preferential treatment.

4) What Disclosures a City Agency Must Make about its Fundraising Activities

Subdivision (c) codifies reporting requirements for an agency's fundraising activities, which provide an additional safeguard to ensure that City agencies' fundraising activities are legally compliant. The agency head is required to report information to the Board regarding donations of \$5,000 or more received by the agency during the previous calendar year, as well as the name of any not-for-profit organization, designated pursuant to paragraph (b), for which agency employees solicited donations.

A City agency is required to report donations of \$5,000 or more the agency received. In selecting this threshold, the Board codifies the threshold articulated in A.O. No. 2003-4. As with the disclosures required by Chapter 9, the agency's disclosures are to be made publicly available by the Board. The deadline for reporting donations received during the previous calendar year is February 28, the same deadline for agencies to report to the Board, pursuant to Board Rules § 1-02(a)(2), the titles and names of public servants who have substantial policy discretion. Because subdivision (c) makes this reporting a requirement of Charter § 2604(b)(2), non-compliance would be a violation punishable by fine, pursuant to Charter § 2606(d).

Subdivision (d) permits an agency head to make a written request to the Board that disclosure of a donor's name and/or amount of donation not be made public and permits the Board, in response to such a request or on its own initiative, to determine that disclosure of a donor's name and/or amount of donation not be made public. The standard for such privacy determinations is the same standard the Board adopted in implementing Chapter 9. See Board Rules § 3-04(c). The deadline for an agency head to make a written request pursuant to subdivision (d) is January 31, midway between the end of the reporting year (December 31) and the deadline for reporting donations (February 28).

Text of the Proposed Rule

New material is underlined.

[Deleted material is in brackets.]

Section 1. Section 1-14 of Title 53 of the Rules of the City of New York is amended to read as follows:

§ 1-14 [Reserved.] Official Fundraising.

(a) For purposes of Charter § 2604(b)(2) and Charter § 2604(b)(3), a public servant may use his or her position as a public servant to solicit a donation provided that all of the following conditions are met:

(1) The solicitation seeks a donation for one of the following:

(i) the City agency or office served by the public servant;

(ii) another City agency or office designated by the public servant's agency head, with the written approval of the head of the other agency or office;

(iii) a not-for-profit organization subject to Chapter 9 of Title 3 of the Administrative Code over which the public servant's agency head exercises control as part of his or her City position; or

(iv) a not-for-profit organization designated by the public servant's agency head pursuant to subdivision (b) of this section, provided that the public servant is not associated, within the meaning of Charter Section 2601(5), with the organization or an employee of the organization.

(2) The solicitation is directed either to the general public or to an individual or firm that does not have a particular matter pending before the public servant.

(3) The solicitation is accompanied by a disclaimer that a contribution will not affect any business dealings with the City or provide special access to City officials.

(b) An agency head may designate in writing one or more not-for-profit organizations for solicitations made by agency or office employees pursuant to subdivision (a) of this section, provided that both of the following conditions are met:

(1) the not-for-profit organization has a clear and direct nexus to the City and its residents and with the mission or duties of the City agency or office; and

(2) the agency head is not associated, within the meaning of Charter Section 2601(5), with the organization or an employee of the organization.

(c) Pursuant to Charter § 2604(b)(2), each agency head must report to the Board annually by February 28:

(1) the name of any individual or firm that made one or more donations totaling \$5,000 or more to the agency during the previous calendar year, the total amount of these donations, and whether the donation was cash or an in-kind donation; and

(2) the name of any not-for-profit organization designated by the agency head pursuant to subdivision (b) of this section for which agency employees solicited donations during the previous calendar year.

(d) An agency head may submit to the Board a written request that disclosure, pursuant to subdivision (c)(1) of this section, of one or more of its donors and/or the amount of donation not be made public. The written request must be submitted no later than January 31 for the previous calendar year and must explain why the release of such information to the public may cause harm, threats, harassment, or reprisals to the donor or to individuals or property affiliated with the donor. Whether or not an agency head has submitted a request pursuant to this subdivision, the Board may on its own initiative grant privacy as to any information

submitted by an agency head, upon a finding by the Board that the release of such information would pose a risk to the safety or security of any person.

- (e) For purposes of this section, an elected official, including a District Attorney, is the agency head of the staff members in his or her office. The Speaker of the New York City Council is the agency head of the central staff of Council, and a Council Member is the agency head of the staff of his or her office.