



MONTGOMERY COUNTY ETHICS COMMISSION

Steven Rosen
Chair

Kenita V. Barrow
Vice Chair

Montgomery County Ethics Commission
Annual Report for Calendar Year 2017

February 23, 2018

I. Introduction

Section 19A-6(f) of the Montgomery County Public Ethics Law requires the Ethics Commission (the Commission) to publish an annual report. The report is to summarize the actions the Commission has taken during the preceding calendar year and describe each waiver it approved and advisory opinion it issued during the year.

The mission of the Commission is to promote the public's trust of County government through the independent administration, including enforcement, of laws designed to ensure the impartiality of County employees, including elected officials, in the execution of their responsibilities. It does this through the administration of three programs: financial disclosure, lobbying disclosure, and outside employment approval -- and through myriad other activities.

The Commission currently has five members which is a full complement under the Public Ethics Law. They, along with the respective dates of their terms' expiration, are:

Steven Rosen, Chair	10/2019
Kenita V. Barrow, Vice Chair	10/2019
Barbara Fredericks	10/2017
Rahul Goel	10/2020
Claudia Herbert	10/2017

There were no changes to the membership on the Commission in 2017. In accordance with the Public Ethics Law, members whose terms have expired serve until they are reappointed or the Council confirms a successor.

In 2017, the Commission made substantial progress towards its primary objectives for the year. Going into the year 2017, the Ethics Commission reported the following objectives over and above the expectation to continue to successfully conduct required operations during the year:

MONTGOMERY COUNTY ETHICS COMMISSION

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- 1) Establish mandatory training for public financial disclosure filers on a three year cycle;
- 2) Establish and implement a new financial disclosure platform prior to the launch of the 2017 annual financial disclosure;
- 3) Obtain approval from the County Council for ethics regulations.

The steps taken to implement these objectives are described in the substantive program sections further below.

The Commission met in regular Public Meetings 10 times during 2017. The Commission also conducted ten Administrative Meetings following regular Public Meetings. (The Commission holds administrative meetings following its regular monthly meetings to consider matters that are non-public.) The Commission also conducted one Administrative Meeting by phone.

Major Objectives for 2018

The Commission will continue to focus on the management of its core programs, the financial disclosure system, the lobbying program and the outside employment approval process. The Commission has three continuing priorities for 2017:

- 1) Consolidate the program, established in 2017, for mandatory training for executive branch public financial disclosure filers;
- 2) Implement the new financial disclosure platform launched December 28, 2017;
- 3) Obtain approval from the County Council for ethics regulations and minor changes to the ethics law.

The education objective is to ensure that the County's most senior managers and employees receive one hour of in-person ethics training at least once every three years.

Changes to the Financial Disclosure System (FDS) have been implemented, and Commission staff is working to ensure filers can file required financial disclosures using the new system and that the system is operating as intended.

The Commission submitted ethics regulations to the County Council in December 2016 and submitted revised regulations to the County Council in November 2017. There are pending issues that are likely to require resolution, particularly as regards the processes and standards for approving outside employment of police. The Commission is hopeful that these issues can be resolved in ways that satisfy policy objectives for police and requirements of the ethics law.

II. Status of Programs and Operations

Ethics program statistics:

Performance Measures	Actual 2013	Actual 2014	Actual 2015	Actual 2016	Actual 2017
Number of Issuances of Formal Opinions, Waivers, or Guidance	11	6	17	28	22
Number of Lobbyists Registered	177	199	230	262	270
Number of Lobbyist Activity Reports	216	251	350	372	405
Number of Financial Disclosure Statements for Calendar Year	2034	2037	1651	1702	1764
Number of Outside Employment Requests	1157	975	1089	1568	1006

This annual report summarizes the work of the Commission in each of the following areas:

- 1. Financial Disclosure**
- 2. Outside Employment**
- 3. Lobbying**
- 4. Complaints, Investigations and Hearings**
- 5. Advisory Opinions, Interpretation and Advice, and Waivers**
- 6. Education**
- 7. Legislative and Regulatory**
- 8. Outreach**
- 9. Administration**

1. Financial Disclosure:

The Public Ethics Law promotes the public's confidence in the integrity of County employees by requiring certain employees, including elected officials, to file financial disclosure reports that are required to be made publicly available. The reports detail financial holdings and relationships so that conflicts of interest between an employee's County duties and the employee's personal activities and interests can be identified and addressed. The Public Ethics Law requires filings of financial disclosure reports when individuals are first appointed to a filing position, annually thereafter, and when terminating from a filing position. The Commission prepares financial disclosure forms and makes them available electronically and maintains reports filed by employees; it currently administers the electronic filing system for reporting and coordinates with the Office of Human Resources and all County agencies regarding the status of filers. It also resolves all anomalous circumstances and questions associated with the filing of financial disclosure reports.

In 2015, major changes to the financial disclosure provisions in the Public Ethics Law were enacted. As a consequence, Ethics Commission staff, working closely with the Department of Technology Services, made significant changes to the online filing system to address the statutory changes for all filings made in calendar year 2016. For the most part, the changes made facilitated compliance. Due to changes in required content of the online form, the so-called "copy data" feature could not be used in 2016 to copy data from a previously filed report. This feature was reinstated for the 2016 annual reports filed in 2017 as data in 2016 filings corresponded with data required to be supplied in 2017.

The roll-out of annual financial disclosure and submission of forms was smooth in 2017, and compliance with the requirement to file a disclosure report was universal, with any stragglers being encouraged to and eventually filing reports without any Ethics Commission enforcement actions being undertaken.

There were 1764 financial disclosure forms completed by County employees in 2017. Successful program administration is dependent on the accuracy of the database of employees and their status as filers. It is also dependent on the employees who file the forms and on County senior management who are the designated reviewers of forms. Lastly, it is dependent on County human resources liaisons and managers to follow-up with employees who have not filed and to obtain final reports from employees who are terminating from filing positions. Members of certain County boards, commissions, and committees, who are considered "public employees" for purposes of the public ethics law, are also required to file reports. As these persons are not normally tracked in the County's personnel system, a separate system has been established to track the status of these persons.

With respect to full-time County employees, there was one hundred percent compliance with the requirement to file annual and final financial disclosure reports, as the County withholds the final paycheck of employees until a final disclosure statement has been filed. There are instances where the Commission is not notified of filing employees' departure from service, and the employee is paid without having filed a final disclosure. Due to notification and enforcement challenges associated with obtaining these reports, on occasion Commission staff treats the last

filed report by the filer as a final report. This also occurs with some terminating board, commission, and committee volunteers who terminate service without filing a disclosure report after leaving County service.

Finally, as a consequence of the Financial Disclosure System being previously hosted on Windows 2003 web servers, which are no longer supported by Microsoft, the financial disclosure system was overhauled in 2017 and rebuilt on an ASP.NET application and deployed to a web server that is supported. This was a major undertaking for the Ethics Commission, for which a dedicated appropriation of \$180,000 was included in the Commission's FY 2017 budget. The system rebuild was led by the Department of Technology Service's Chris Daniel, with the programming work being conducted by Bobby John. Ethics Commission staff members Erin Chu, Program Manager, and Kelly Uhas, Program Specialist, established system specifications and provided multiple iterations of reviews and testing to ensure system functionality. The new system was launched in December 2017.

2. Outside Employment: The Public Ethics Law requires that County employees obtain approval from the Commission prior to engaging in any employment other than County employment.

For employees other than sworn police, the Commission has an effective online system built by the Department of Technology Services for employees to make requests for outside employment. The system processes the requests for review by the employing department's management and the Ethics Commission. The Commission's staff prepares all requests for consideration by the Commission, to include obtaining additional information from requestors and County agencies and conducting preliminary legal analysis of requests. The Commission approves requests, as appropriate, setting conditions on approval as necessary to ensure compliance with ethics requirements, and staff notifies requestors by letter of the disposition of requests by the Commission. The Commission publishes approved Outside Employment information required to be made publicly available by the Public Ethics Law.

The Commission approved 303 requests for outside employment in calendar year 2017 for employees other than sworn police. This compares to 568 in CY 2016, 262 approvals in CY 2015, 139 in CY14, 168 in CY 13 and 137 in CY 2012. The reduction from the prior year was anticipated, as the high number from the prior year resulted from major changes to the management of the outside employment program during 2016.

While the online system was launched in June of 2015, part of the implementation plan for the new system took effect in June 2016. Prior to the institution of the new system, outside employment approvals either had a specified termination date or they did not, with the majority having no termination date. Outside employment approvals were effective back to the implementation of the ethics law in the early 1980's. As many persons terminate or move on from outside employment positions over time, the list of approved outside employment did not provide continuous insight or currency to which County employees are actually engaged in outside employment. This diminished the accuracy and utility of the list for management and compliance purposes.

To bring some contemporaneity and integrity to the approved outside employment list, the Ethics Commission determined that outside employment approvals would last for a maximum of three years. To further bring integrity to the outside employment system, the Commission determined that one year after the launch of the new system, all prior paper approved outside employment requests would expire; any person who had obtained outside employment under the old paper system would, in order to continue in approved outside employment, have to submit a new request for outside employment using the new online system by June 24, 2016. That this procedural change would occur was announced to all County employees by the Chief Administrative Officer through multiple MCG-All emails. As a result of this approach, the Ethics Commission now has a current list that it publishes which is also incorporated into dataMontgomery's publicly available information of all currently approved outside employment of County employees.

The new system allows for substantial benefits in program management as Commission staff has insight to all pending applications for outside employment. Previously, an employee filling out a paper application would submit the paper through the employee's chain of command and the Commission would have no notice or opportunity to ensure the process was operating effectively until it received the paper form after it had been processed by the employee's agency.

Outside employment of sworn police.

Sworn police do not use the online system for employees and instead use the form created by the Department of Police in connection with policies and practices developed by the Department in consideration of collective bargaining processes. These police forms are then submitted to the Ethics Commission for processing and approval. The Ethics Commission approved 449 new applications for sworn police outside employment and processed 254 renewals of outside employment for sworn police.

For several years, the Ethics Commission has been challenged by the process and standards used in connection with the outside employment of sworn police. In December of 2016, the Commission submitted a proposed regulation to the County Council that would have detached the Ethics Commission from review of police outside employment requests. That proposal was revised and resubmitted to the County Council on November 17, 2017. The revised proposal reflects the Ethics Commission's intent to ensure that the applicable standards for review are clear and consistent with government ethics principles; the Commission's roles and responsibilities are defined; and that the approach to be taken has the approval of the County Council. The regulatory proposal is discussed further in 7. Legislative and Regulatory, below.

3. Lobbying: The Public Ethics Law requires persons meeting certain criteria and thresholds who communicate with County employees to register as lobbyists and to file semi-annual activity reports with the Commission. Annual registration fees are required and are paid to the Commission and processed and deposited into the General Fund.

Since CY 2013, lobbying registration and activity reporting has been effected through an online

application developed by the Commission and the Department of Technology Services. The system has made registration easier for registrants, allowed data to be captured electronically rather than by manual processes of Commission staff, and promoted transparency for the public in accessing the online data.

These systems have resulted in almost instantaneous availability of lobbying information on the Ethics Commission's website.

<https://www2.montgomerycountymd.gov/Lobbyist/ActivityReport.aspx>

As a result of having implemented a lobbying filing system with reliable data sets, Commission staff has focused additional time on proactive steps to educate those who might meet registration thresholds in the Public Ethics Law to register as lobbyists.

As the system is easy to use, registering lobbyists' compliance with requirements is very high. For example, 100 percent of required semi-annual reports on lobbying activity for the last three years (including 2017) have been filed. This compliance rate is in stark contrast to the system in place prior to 2013 where compliance was irregular and there were no systems in place to measure compliance.

Since FY13, registration numbers have increased substantially and receipts of registration fees have more than doubled, from \$13,500 in FY 2013, to \$35,500 in FY 17. The total receipts for calendar year 2017 are \$30,675. The Commission believes the increase in registrations is, among other things, attributable to the ease of compliance through the online system and proactive management of the lobbying registration program to include identification of possible lobbyists who may be required to register and notification of those persons by the Commission of lobbying registration requirements.

4. Complaints, Investigations and Hearings: Pursuant to the Public Ethics Laws, the Commission receives complaints and, as appropriate: conducts investigations and hearings, makes findings, and imposes sanctions and penalties. During 2017, one formal complaint of an ethics violation that fell within the jurisdiction of the Commission was received. This complaint was referred for investigation by the Commission. The Commission received a report of investigation regarding the complaint and, after reviewing the report, decided there was insufficient information for the Commission to find reasonable cause that any person had violated the ethics law; the Commission believed that there were gaps in the investigative report and referred the matter back to the investigator for additional information. Subsequently, the Commission was notified that the original complainant thought the matter should be closed. In the absence of sufficient evidence to constitute reasonable cause, and in light of the request of the complainant to close the matter, the Ethics Commission closed the matter and notified the investigator that the matter was closed.

There were no pending formal complaints at the close of 2017.

Aside from formal complaints, many issues were brought to the attention of the Ethics Commission during 2017 including several "complaints" that did not meet the criteria for filing a

formal complaint under the Public Ethics Law. Matters that do not raise issues within the jurisdiction of the Commission are closed or referred to a more appropriate office for disposition. Others are brought to the attention of the Commission and considered and addressed by the Commission. When appropriate, matters are coordinated with the County Attorney or the Inspector General.

5. Advisory Opinions, Interpretation and Advice, and Waivers: The Ethics Commission is expressly authorized to interpret the Public Ethics Law and advise persons as to its application. It does this proactively or in response to or as a result of informal inquiries. In addition, the Commission is authorized to publish advisory opinions and grant waivers of ethics law requirements, as appropriate. The Commission is required to publish its advisory opinions, or, in the event an opinion is not published, state the reasons for not publishing the opinion.

The Commission published five advisory opinions during calendar year 2017, all of which can be found at:

<https://www.montgomerycountymd.gov/Ethics/Decisions/Opinions/2017.html>

The Ethics Commission issued 17 waivers, which are published at:

<https://www.montgomerycountymd.gov/Ethics/Decisions/waivers/2017.html>

Summaries of the opinions, waivers and guidance appear below. The decisions made were limited to the facts presented and no assumption should be made to the application of the opinion to any other circumstances.

Advisory Opinion 17-01-001

A Fire and Rescue Service employee inquired as to whether he may post or use images and video of him on the job for MCFRS in connection with a political campaign. The employee also inquired about how campaign related press inquiries to the County about him and his County job should be handled.

The Commission noted that a number of State and County laws, regulations and policies regulate the intersection between an employee's political activities and the employee's responsibilities to the County as an employee. The Commission observed that both State and County law provide that a County employee may participate in political campaigns, including running for elected office. On the other hand, the Commission observed that State law provides that an employee of a local governmental entity may not engage in political activity "while on the job during working hours".

The Commission reviewed the relevant law; it indicated that the State and County laws, including the County's ethics law and the County's Personnel Regulations make clear that political activity, including running for office, is to be kept separate from the conduct of County duties, and that an employee is not to use County or agency title, County time, property, uniform or insignia, or vehicles in furtherance of political activities.

Accordingly, the Commission stated that it would be inappropriate for the employee to be conducting political activities while the employee is on County time. This would include answering campaign related phone calls, sending campaign emails or posting to social media while on the job.

While the Commission, citing Administrative Procedure 6-1, noted that County policy allows employees on a limited basis to conduct minimal personal activities while on the job, it concluded that this does not extend to political activity being conducted during duty hours, which appears to be expressly prohibited by State law and County law and regulation. Any political activity must be conducted other than while in duty status, and County resources, such as internet access and phones, may not be used for these purposes.

The Commission stated that it would be appropriate for the employee in his capacity as a candidate to generally communicate facts regarding his government position and his accomplishments as an employee. The Commission, citing to Advisory Opinion 06-04-004, had previously opined that the County's prestige of office provision does not preclude a public employee from listing accomplishments as a public employee in campaign literature while seeking elective office. While it would be an abuse of office to leverage the details of one's public service to advance a private business, the Commission indicated that in the context of running for public office, what a candidate does in public service is a matter of public interest. Therefore, the employee as candidate can communicate publicly about his duties and accomplishments as a County employee.

The ethics law precludes the employee from having images and videos created for the purpose of showing him "on the job" at MCFRS to advance his political campaign. The Commission indicated that the creation of such materials could interfere with County operations or appear to pressure or obligate another County employee to contribute to a political cause or campaign or to perform work or provide services to a political cause or campaign.

The Commission had previously determined that an employee could appear in uniform in a photograph on that employee's campaign website. See Advisory Opinion 10-06-008. Therefore, to the extent that an employee wishes to use an existing personal photograph (or a photograph in the public domain) of himself in uniform in connection with his candidacy, that would be permissible, as long as there is no suggestion or implication that the County or the MCFRS endorses the candidacy.

The employee also inquired as to how press inquiries regarding his campaign should be handled. The Commission indicated that any press inquiries should go to the MCFRS or to the County's Public Information Office, and the employee should have no County role in handling these inquiries. The MCFRS and Public Information Office should consult with the Ethics Commission or the County Attorney's Office regarding its handling of such issues.

The Ethics Commission consulted with the County Attorney's Office prior to issuing the opinion.

Advisory Opinion 17-01-002

This opinion concerned application of lobbying registration and reporting requirements. A lobbyist inquired whether registration was required in connection with negotiations with executive branch officials regarding the construction of a building in the County and matters related to incentives associated with the enterprise. The byproduct of the negotiation was considered by the County Council as it required consideration in the context of capital spending and budgeting legislation.

The first question was whether persons who had negotiated with the executive branch were required to register as lobbyists on behalf of the corporation. The corporation stipulated that no person on the negotiating team met the threshold for registering for seeking to influence executive action pursuant to 19A-21(a)(2) at any time.

The law has separate thresholds for lobbying for legislative action and lobbying for executive or administrative action. Unlike the lobbying registration threshold for legislative action, the payment of compensation to a person to influence executive or administrative action by a County agency is not counted towards meeting the lobbying registration threshold. See Advisory Opinion 13-3-004, May 21, 2013. The lobbying registration threshold for seeking to influence executive or administrative action focuses on just the provision of services or conveyance of benefits to County employees rather than all amounts spent or compensation received in connection with efforts to influence action.

The Commission found that the agreement arrived at between the corporation and the executive branch required (and presumably was known to require) subsequent consideration by the County Council, did not somehow turn communications intended to influence executive action into communications for legislative action. As a consequence, the applicable requirements for registration were those concerning lobbying for executive action. Applying those standards, registration of the persons at issue was not required.

Also, the corporation inquired whether the corporation's registered lobbyist, in filing required semi-annual activity reports, should include expenses associated with the negotiations with executive branch officials in the reports for the periods in which the negotiations occurred.

The Commission concluded that the corporation's expenditure of compensation to its representatives to try to influence executive action and other expenses that do not count toward the thresholds for lobbying registration was not required to be reported on activity reports filed by the corporation's registered lobbyist.

Section 19A-25 of the County Code requires each registered lobbyist to report "total expenditures on lobbying." While "lobbying" is defined by 19A-4(k) as including attempts to influence legislative, executive or administrative action, the Commission concluded that the reporting requirement was not intended to include expenses which would not count towards any registration threshold. Only expenses that would be counted towards registration thresholds in 19A-21 should be included in activity reports required by 19A-25.

Advisory Opinion 17-04-006

The Commission on Common Ownership Communities (CCOC) requested an advisory opinion with respect to three scenarios about implementing part of its mandate to educate common ownership community officials and residents on responsible governance.

The CCOC asked three questions: 1. Can attorneys who practice before the CCOC volunteer to participate in seminars presented by the CCOC or prepare forms, checklists, and other similar documents which the CCOC will offer associations without becoming subject to the County's ethics laws applicable to public employees? 2. Can attorneys who practice before the CCOC be compensated to participate in these seminars or in preparation of the documents offered associations without becoming subject to the County's ethics laws applicable to public employees? 3. Can volunteer panel chairs, who are public employees, participate in the seminars and prepare forms, checklists, and other similar documents the CCOC will offer?

The Commission addressed the issues as follows:

I. Use of Attorneys (Unaffiliated with the CCOC) To Participate in Seminars

The question of whether volunteers are subject to the ethics laws is a function of whether they are "public employees" under the County's ethics law. Under 19A-4(m) of the Public Ethics Law, the issue is whether a volunteer will exercise any responsibility for "government-funded programs, procurement or contract administration for an agency."

The Commission concluded that whether these persons are taking on responsibility for the CCOC's education program, or a portion thereof, really comes down to what is being asked of them. For example, if responsibility for the administration of the program remains with the CCOC and its employees, but a volunteer attorney appears at a seminar and delivers the curriculum the CCOC has developed or approved pursuant to the requirements of 10B-6(f), it would not appear that responsibility for the administration of the program would be with the volunteer attorney. On the other hand, if the CCOC seeks to have a volunteer lawyer develop curriculum pursuant to the authority in 10B-6(f)(1) or assigns to the volunteer total responsibility for running a seminar, including scheduling, notifications, materials and instruction, it would appear that it had turned over a portion of the responsibility for execution of its educational mandate to the volunteer.

The Commission noted that there is a continuum of possibilities, and if the CCOC does not want volunteers to be considered public employees subject to the public ethics law, it must ensure that responsibility for CCOC programs is not delegated to the volunteers. To be clear, having volunteer attorneys deliver CCOC curriculum would not by itself establish these volunteers as "public employees."

II. Compensation of Attorneys to Provide Services

The second question asked by the CCOC was whether attorneys who practice before the CCOC can be compensated to participate in these seminars or in preparation of the documents offered without being becoming subject to the County's ethics laws applicable to public employees. The answer to this is yes, the County can contract through its procurement policies and practices to

hire persons to perform services. These contractors would not be public employees and instead would be subject to the requirements of the County Code Chapter 11, Article XII, Ethics in Public Contracting.

The Commission noted that whether there are any legal ethics considerations flowing from the attorneys being licensed in Maryland and representing parties before a government agency which is separately compensating the attorney is beyond the scope of the jurisdiction of the Montgomery County Ethics Commission and may be appropriate for addressing to the Maryland Office of Bar Counsel.

III. Volunteer Panel Chairs Assisting with Training Activities

The third question concerned whether volunteer panel chairs could participate in the seminars and prepare forms, checklists, and other similar documents the CCOC will offer. The Commission concluded that as these individuals are already considered public employees, having the individuals perform additional duties does not result in a change in their status as public employees, with the ethics law being fully applicable to their activities.

The Commission cautioned that as a quasi-judicial entity with the power to decide cases that affect the “livelihood” of the individual attorneys, the CCOC should be particularly sensitive to the notion that persons who practice before it may feel hard-pressed to refuse to participate in a “volunteer” program, and that the attorneys who participate in these activities may expect special and unspoken consideration in representing clients in matters before the CCOC. Furthermore, the Commission recommended that the CCOC’s acceptance of responding individuals to participate in the volunteer program be based on pre-stated minimum qualifying criteria. And, the Commission recommended that these persons who are recruited as volunteers be counseled that these speaking opportunities and participation in CCOC programs should not be used for advancement of their “livelihood” or to advance any individual or business’s financial interest.

The Commission concluded that where volunteers are utilized by an agency to advance an agency’s interests, but those same volunteers have the potential to gain by agency action, concerns about improper influence and the appearance of such should be at the forefront in the design of the agency’s program.

Advisory Opinion 17-06-007

The Commission considered whether a Department may, consistent with Public Ethics Law requirements, arrange for a former employee of the Department to work as a “contract Program Manager” in Central Operations, Division of Solid Waste Services, Department of Environmental Protection. The individual sought to be brought on previously served the Department as a Senior Engineer working on the same project that he would serve as the contract Program Manager.

Section 19A-13(a) of the Montgomery County Public Ethics Law provides that: A former public employee must not work on or otherwise assist any party, other than a County agency, in a case, contract, or other specific matter if the employee significantly participated in the matter as a public employee.

The Department sought to use an Intergovernmental Agreement with the Maryland Environmental Service (MES) to hire the individual from the engineering firm with which he is associated. MES is an instrumentality of the State of Maryland that carries out essential governmental functions. MES will not profit from the arrangement for services of the individual to the County.

The question, from an ethics standpoint, is whether, through the contemplated arrangement, the former public employee would be “assist[ing] any party, other than a County agency. . .” or whether, instead, the contract Program Manager position is to “assist a County agency” under 19A-13(a). Assuming the other elements of 19A-13(a) are met, the former is prohibited while the latter would be permissible.

The Commission noted that the County may directly contract with former employees for personal services. Where the contract is between the County and the former employee directly and not through an organized business entity, the former employee would not be “assist[ing] any party.” The Commission also observed that in a certain sense, any contract the County enters into is for “assistance” to the County as the County pursues its objectives. In most contracts, while there is an alignment between the County’s interests and those of the contractor, the interests are not identical. The contractor is subject to meeting the terms and requirements of the contract, with performance being monitored by County contract officials.

In the instance of a personal services contract where an individual is being hired to be a “contract Program Manager”, the services expected are like those of a County employee and the work is for a County agency. Under such a contract, the person providing services would not be entitled to benefits or merit status as a County employee, but would be subject to contract terms for meeting service requirements.

Section 19A-13(a) is aimed at preventing, at least in part, “switching sides” where a party other than the County is able to take advantage of the special knowledge acquired in the context of an employee’s County employment and use it for private advantage. A former employee who participated significantly in a matter could use the knowledge learned while an employee to leverage an advantage for a new employer against the interests of the government or even third parties. Where a former employee will be providing contract-employee services to the Government on matters on which the former employee used to work, there is little risk of the knowledge being leveraged for the benefit of third parties.

Under the circumstances presented, the Commission concluded that the conduct that 19A-13(a) aims to prevent was not implicated. As MES would not be profiting from the arrangement, the Commission found that there appears to be no risk of information being leveraged to the advantage of another party. To emphasize the notion that the contract is to assist the County, the requesting Department emphasized its substantial need for the expertise of the former employee. The arrangement with MES is for the convenience of the government in using the existing Intergovernmental Agreement vehicle to bring the individual in to serve the County. The Ethics Commission concluded that the work being done is to assist the County and no other party and, therefore, falls outside the scope of 19A-13(a). This opinion was limited to the facts presented by the requestor.

Advisory Opinion 17-08-014

A Community Health Nurse II with the Department of Health and Human Services (DHHS), Infectious Disease division, sought a waiver of the outside employment prohibition of Montgomery County Public Ethics Law Section 19A-12(b)(1)(B). In her job for the County, the employee works as a nurse for the human immunodeficiency virus (HIV) clinic. The request for a waiver was supported and endorsed by the DHHS.

The Ethics Commission denied the waiver and issued an advisory opinion stating its rationale for the denial.

The ethics law provides that unless waived by the Ethics Commission, a County employee is prohibited from working for an entity that "negotiates or contracts with the County agency with which the public employee is affiliated." In addition, pursuant to section 19A-11 of the Public Ethics Law, the employee is prohibited from working as a County employee on matters affecting her outside employer and on matters where her outside employer is a party. Accordingly, because the employee's County job would relate to the employee's job with the employer, the employee requested a waiver of 19A-11 as well.

The outside employer's contract with DHHS is for tobacco cessation related activities. For the outside employer, the employee would work as a Tobacco Treatment Specialist. Her work for the outside employer would be funded by the County pursuant to its contract with the outside employer for tobacco cessation activities.

Not only would the outside employment be funded by the County, the employee's job with the County intersects with the proposed outside employment as a Tobacco Treatment Specialist. Many patients at the HIV clinic require tobacco cessation care. While on County duty, the employee would receive referrals from the physicians that work with her in the HIV clinic of persons who may benefit from tobacco cessation counseling. These referrals would occur during her regular work hours at the HIV clinic. She would introduce herself to the patient and give them a questionnaire to complete and set up a time during her lunch hour or after her scheduled work time for them to meet with her in her capacity as an employee of the outside employer.

The Commission may waive the prohibition of 19A-12(b)(1) where the employment is not likely to create an actual conflict of interest. A waiver of the prohibition of 19A-12 on outside employment with an agency contractor can also be granted where "the waiver is needed to ensure that competent services to the County are timely and available" or that "failing to grant the waiver may reduce the ability of the County to hire or retain highly qualified public employees." To waive the conflict prohibition in 19A-11 of the County Code to expressly allow the employee to work in her County job on matters affecting the outside employer's contract for tobacco cessation services, the waiver would need three findings (see 19A-8(a)): 1) the best interests of the County would be served by granting the waiver; 2) the importance to the County of a public employee or class of employees performing official duties outweighs the actual or potential harm of any conflict of interest; and 3) granting the waiver would not give a public employee or class of employees an unfair economic advantage over other public employees or members of the public.

DHHS cited to the benefits of the tobacco cessation effort and to the employee's expertise and status in the HIV medical clinic as establishing her to be the "perfect smoking cessation facilitator for this population. . . . Her involvement in both programs also allows [the employee] to provide a measure of continuity of care if her HIV clients happen to participate in the contracted smoking cessation program."

DHHS indicated the potential for abuse is small as the execution of the employee's role would not affect the amount of funds paid on the contract between DHHS and the outside employer. DHHS further stated that any conflict is outweighed by the benefit the HIV clients would receive from the involvement of the employee. DHHS also recommended that if the Ethics Commission is unwilling to grant a full waiver, that the Commission grant a waiver temporarily to allow DHHS time to alter the contract with the employer for FY19 to mitigate the conflict.

The Commission found that there is an actual conflict of interest between the employee's outside employment and her County position as actions the employee would be taking in her official capacity affect her outside employer and the work she performs for the outside employer.

The Commission did not believe the employee, with DHHS's concurrence, had demonstrated how the waiver was needed to ensure competent services are timely and available or that failing to grant the waiver relates to the issue of employee retention. With respect to the requested waiver of 19A-11, the Commission indicated that it does not believe the County's best interests would be served by granting the waiver. However worthy the cause, the establishment of a County contract that permits a private entity to compensate a County employee in matters relating to the exercise of the employee's County job is antithetical to the ethics law.

The Commission would not condone a purposeful intermingling of the employee's public and private activities: the employee would, while on the County job, be making arrangements with County patients for them to receive services from the same employee working for the outside contractor. The Commission also decided against temporarily waiving the ethics law to permit the built-in conflict of interest for the DHHS employee.

Waivers.

The Ethics Commission processed a substantial number of waiver requests in 2017. The continuation of a high volume of waiver requests from 2016 results from the more robust outside employment system that has increased compliance with and attention to statutory requirements concerning outside employment.

The vast majority of the waivers issued involved outside employment requests. In particular, a public employee must not, pursuant to § 19A-12(b)(1)(B) of the Public Ethics Law, be employed by a business that negotiates or contracts with the County agency with which the public employee is affiliated, unless the Ethics Commission grants a waiver. Many employees are notified of the prohibition after they have submitted a request and it has been reviewed by management or the Ethics Commission.

Many of these waiver applications involve employees of the Department of Health and Human Services (DHHS) and are granted as there is no relationship between the conduct of the employee's County duties, the duties performed in the outside position, and the contract between the County and the outside employer. In short, there is no actual conflict of interest. All but one of the 17 waivers issued in 2017 followed this model, with 12 waivers being issued to employees of DHHS. The details of these waivers are not incorporated into this report as they are repetitive.

The Ethics Commission has been reluctant to issue waivers in circumstances where an employee's position with an outside organization is directly funded by the DHHS, where there is likely to be direct interaction between the employee in conducting the outside work and the Department, or where the employee's official County duties involve the outside employer. For example, in Advisory Opinion 17-08-014, discussed above, the Commission denied a request for a waiver where the employee's outside position was funded by DHHS and the employee's County job related to the outside employer. Also, these waivers are routinely conditioned on the employees not making, in their official capacities, any referrals to the outside entity or working on matters that are the subject of the contract between the outside employer and the County.

Waiver 17-07-011 was a waiver for a class of persons rather than for an individual. The waiver request was received from the DHHS for Public Health Services, School Health Services Nurses and Technicians from the prohibition of 19A-12(b) of the Public Ethics Law on outside employment with an entity that contracts with the employee's County department.

The Ethics Commission granted the waiver request, subject to certain conditions. School Health Nurses and School Health Room Technicians are typically 10 month employees who often seek to supplement their incomes through summer jobs when school is not in session. This outside employment is almost universally unrelated to these employees' positions at the schools. Because of the substantial number of contracts and grants between DHHS and various hospitals and health care organizations that do business in Montgomery County, these employees are frequently confronted with the prohibition contained in the County Code at 19A-12(b) on outside employment with an organization that contracts with the employee's department.

There are a substantial number of employees (approximately 410 as of the request date) who fall in the class of persons for whom this waiver was sought. The DHHS found it administratively burdensome to process the waiver requests as the employees involved require substantial assistance in understanding the requirements for a waiver, applying those requirements to their particular situations, and preparing the needed waiver materials.

The school nurse and technician positions are focused internally on school populations and are not naturally prone to conflicts of interest as the work has minimal impact on persons and entities outside the school population. Moreover, given the partial-year obligation associated with these positions, it is natural that these employees would seek outside employment in their chosen field, health care, during the period school is in summer recess. Given the volume of the requests, the relative burden on the employees, DHHS, and the Commission in the processing of the waivers, and the absence of significant concerns of conflicts of interest, the Commission issued a class waiver on the basis that the outside employment of the school nurses and technicians is not likely to create an actual conflict of interest.

The Commission placed limitations on the scope of the waiver. The waiver does not apply in the following circumstances: where the outside employer is directly affected by the County employee in the performance of County duties; where the employee's position with the outside employer is funded by the Department through a contract or other vehicle; or where the work being performed by the employee in the outside position would involve the employee's making representations on behalf of the outside employer to the Department. Under these circumstances, employees would need to use the processes outlined in 19A-8(b) to request an individual waiver from the Ethics Commission.

In addition, employees in conducting official duties may not refer any person to the employee's outside employer for services. (This condition is not applicable where a person is referred by the employee to the nearest local hospital, and the local hospital is the outside employer.) Also, while working with the outside employer, no services can be provided to a person that the employee has served while conducting official duties. (This condition is not applicable when a local hospital is the outside employer.) With the limitations on the requested class waiver in place, nothing these employees would be doing in their official roles would involve or affect their outside employers, and nothing they would be doing in their outside jobs would relate to or involve their County position or Departmental funds. Accordingly, pursuant to this waiver, School Community Health Nurses and School Health Room Technicians can engage in outside employment with entities that contract with the Department notwithstanding the prohibition in 19A-12(b), as long as the conditions of this waiver are complied with.

The waiver did not negate the requirement for the class of employees to which the waiver applies to submit requests for outside employment under 19A-12(a) of the Public Ethics law.

6. Education: The Commission conducts public education and other information programs regarding the Ethics Law. Commission staff routinely provides individual instruction on filling out and review of financial disclosure forms, outside employment requests and lobbying reports, and other matters falling within its jurisdiction.

Ethics Commission staff participated in biweekly orientation sessions for all new County employees. This activity, conducted since April of 2014, has resulted in several hundreds of new County employees receiving basic information about their responsibilities under the County's ethics law each year.

Mandatory ethics training for executive branch public financial disclosure filers was announced April 26, 2017, through an email by Fariba Kassiri, Assistant Chief Administrative Officer. The Office of Human Resources Training and Organizational Development Division provided support in the implementation of this County-wide training compliance initiative. From May to December 2017, Commission staff conducted 37 one-hour sessions; 12 of those sessions were in the EOB auditorium, and the rest were around the County at various locations. Of the remaining 25 sessions, 13 were open to employees from all County agencies and 12 were dedicated sessions at particular agencies.

The original number of persons in the target group of employees (executive branch financial disclosure filers) was 1266 employees. The exact number is variable as it increases when new public filers come on board and decreases when individual employees (who had not yet been trained) depart from service. As of November 17, 2017, the Commission had trained 1260 persons, which includes a few persons who attended the training but were not executive branch filers. 135 employees had yet to receive the training. Some of these are newer employees and the rest were unable to attend any of the 25 open training sessions. In implementing the mandatory training compliance requirement, employees were given a year from June 30, 2017 to take the training; so, it will not be until the end of FY 18 that any employees are actually in “noncompliance” with the training requirement.

In addition to the training being monitored through OHR’s learning management system, the Ethics Commission is tracking compliance and notifying, with the help of HR liaisons, those who have yet to take the training. Commission staff is not allowing persons who show up for training more than 10 minutes late to enter the training sessions and Commission staff tries not to extend credit to those who miss a substantial portion of a session, such as those who leave early to address other business. Where the Commission is able to identify such employees, the employee is notified that they are not receiving credit and are informed that they may attend the portion of the session that they missed. In short, the Commission staff is treating the training as a compliance program.

Going forward, the Commission plans to continue the program as follows.

- Beginning in January of 2018, the Commission will notify new executive branch employees entering filing positions of their obligation to take the training within 6 months of the date the employee began in an executive branch public filing position.
- The Ethics Commission will establish a monthly training session, in either a human resources training facility or at another suitable location. This training is intended to cover those who have yet to take the training, the new filers, and any other persons who want to take ethics training.
- Those who have taken the training will be notified 90 days before the end of their 3 year training cycle of the need to take the training again. These notices will begin on a rolling basis in February 2020 for those persons who took the training in 2017.
- The Chief Administrative Officer’s office will be notified periodically (not less than annually) of those persons who are required to take the training but have not and any who have failed to take the training within the required timeframe. In instances where there is systemic failure of an agency’s employees to take the training, the agency director will be notified of the issue.

In addition to those training activities, Commission staff provided additional ethics education at the annual meetings of Boards, Commissions, and Committees with the County Executive in April 2017.

7. Legislative and Regulatory: The Commission recommends and prepares new ethics legislation and regulations.

In October of 2017, the Ethics Commission was notified by the State Ethics Commission of recent changes to State ethics law, with instructions to local jurisdictions to enact conforming local law.

In November 2017, the Ethics Commission submitted to the County Council recommended changes to the County's ethics law to address the issues identified by the State Ethics Commission. In particular, the Commission recommended the adoption of a conflict of interest prohibition on participating in matters affecting a party for whom a public employee was, in the past year, required to register as a lobbyist. The Commission also recommended another provision intended to meet State requirements to prevent elected officials from lobbying the County for one year after leaving County service. And, the proposal also addressed a State requirement to disclose in a public filer's financial disclosure statement information about entities that have engaged a spouse of a public filer to lobby the County.

The State Ethics Commission is also requiring that local jurisdiction's ethics laws protect from disclosure financial disclosure statement information about public filers' home addresses. The proposal addressed this requirement.

In addition to the provisions being required by the State Ethics Commission, the Commission recommended an amendment to Section 19A-21 to 19A-23 of the Public Ethics Law concerning lobbying registration. Current County law requires persons lobbying on behalf of a person or entity to obtain a written authorization to do so from the person or entity (or its authorized agent) on whose behalf the lobbyist will be appearing. This requirement tracked a State ethics law requirement; but the State ethics law dropped this requirement as unnecessary. The process of obtaining these signatures creates what the Ethics Commission considers to be an unnecessary step, complicating and delaying registration compliance. The suggested amendment would conform the County's registration provision to the State law provision.

The Commission also recommended changes to 5A-4 and to 8A-32 of the County Code which would delete references to disclosures being made pursuant to Chapter 19A. The disclosures contemplated by these provisions do not correlate to 19A as there is no provision in 19A for confidential financial disclosure or disclosures that are limited to information about related activity and interests. The persons covered by the existing provisions of law are not public employees as defined by the County's ethics law, and if disclosure is appropriate, it should be made to the organizations themselves and not made part of the financial disclosure program for County employees, which is established in accordance with County and State ethics law.

Regulations Submitted to Council for Approval

After the major (and minor) revisions to the Public Ethics Law in 2015 and early 2016, the Ethics Commission focused on preparing regulations to replace existing regulations and to provide new guidance to County employees on several topics. This effort culminated in a

submission on December 16, 2016, by the Ethics Commission to the County Council of a package of proposed regulations. These regulations proposed policies and procedures for addressing violations of the Public Ethics Law; policies and procedures for requesting approval for outside employment; guidance concerning misuse of prestige of office and improper influence; guidance on gift acceptance; and ranges of value for financial disclosure by elected officials. The proposed regulations had been published in the County register in September 2016, and County employees had been notified of the opportunity to comment on the proposed regulations.

After receiving the perspective of Council staff and in further reflection on comments received to the proposed regulations, the Commission revised the proposed regulations, particularly with respect to the treatment of outside employment for sworn police. In the 2016 version of the regulation, sworn police were excluded from coverage of the regulation and particular provisions applicable only to sworn police were removed. The effect of this would have been to exclude sworn officers from the outside employment approval process required of all public employees pursuant to the Public Ethics Law. The proposed regulation was revised and republished in June of 2017 in the County register, with sworn police added back into the coverage of the outside employment requirements under the purview of the Commission.

The Ethics Commission sent a revised proposal to the County Council on November 17, 2017. The memorandum supporting the proposal detailed the Commission's concerns regarding outside employment of sworn police. From the Ethics Commission's perspective, many of the allowances provided for by the County's collective bargaining agreement ("CBA") with the Fraternal Order of Police ("FOP") in connection with outside employment are antithetical to the County's ethics laws and the notion that employees may not use County equipment or the prestige of office for private gain; the notion that the application of the County's ethics law has been, in effect, negotiable under the collective bargaining process is itself remarkable. Police use County equipment and uniform in outside employment activities and otherwise perform services, such as security services, which inevitably result in contacts between officers while working in outside jobs and the Police Department. Typically, the application of the ethics law results in distancing an employee's personal activities from an employee's agency jurisdiction.

The Ethics Commission is concerned with the fundamental conflict of police officers serving two masters, especially when the outside employment is in County uniform. From the Commission's perspective, there is no way to remove the appearance that the officers will operate to the advantage of their outside employer paymasters rather than the public interest. The outside paymasters' interests are never perfectly aligned with the public interest. What exists for the officer is a conflict of interest.

The Ethics Commission has been concerned that its practice of approving requests that offend ethics principles has, in effect, perpetuated an illusion that these outside employment activities were consistent with the ethics law. Accordingly, the Ethics Commission's December 2016 proposal submitted to the County Council was to detach the Ethics Commission from the police outside employment approval process altogether. If, in other words, the Ethics Commission was not involved in the process, it would be clear that the approval of police outside employment was pursuant to processes distinct from the administration of the County's ethics law.

The Department and Council staff and others expressed concerns about the omission of sworn police officers from the Commission's December proposal for the outside employment approval process. Accordingly, the Commission is no longer proposing that police officers' outside employment be omitted from the outside employment process subject to the County ethics law, but instead that the police outside employment be treated like the outside employment of other public employees. The Ethics Commission cannot see how, absent express legislative approval by the Council, the provisions of the ethics law and regulations can be collectively bargained away. In other words, County law, including the ethics law, applies equally to all persons unless the Council specifically provides otherwise in law or regulation.

To be sure, the Commission still believes that the use of uniforms and Government equipment to advance the private interests of those who employ police officers and the police officers themselves offends ethics principles. Nonetheless, the Commission's proposed regulations continue to permit the use of uniforms and Government equipment for traffic direction or uniformed security-related outside employment, **if the County Council approves the Police Department's proposed outside employment executive regulation, which would authorize that practice.** The view of the Ethics Commission is that if the County Council wishes to authorize these activities because doing so is good public policy, it should approve the Police Department's proposed outside employment executive regulation, which largely mirrors the collectively bargained provisions regarding outside employment.

However, there are four areas where the Commission believes the current practice under the CBA are either antithetical to the ethics law, or inconsistent with the procedures the Commission applies to all other public employees, and are not supported by a public policy rationale.

First, to make the outside employment of police more consistent with the ethics law, the Commission, pursuant to the regulation, would prohibit officers from being employed by outside employers within the district to which the officer is assigned. The ethics law prohibits outside employment with entities regulated by the employee's County agency and employment relationships that could reasonably be expected to impair the impartiality and independence of judgment of the public employee. The Ethics Commission views outside employment of an officer in the very district that the officer is assigned as creating a conflict of interest under the ethics law. As members of the community where a specific district is located, private employers are, in effect, regulated by that district. Working outside employment in the same district to which an officer is assigned creates an appearance that an officer may show favoritism in the manner in which he executes his official job due to the officer's being on the payroll of a person or entity operating in the officer's district. Moreover, there is an appearance that special dispensation might be accorded the outside employer when a call is made by an officer acting on behalf of that employer to the district where officer works. The calls being made are, in the case of security services, a likely event and raise questions about misuse of the prestige of office for private gain: will a call received by a district police station from an officer assigned to that station but who is engaged in outside employment be treated the same way as a call from other members of the public? Will preferential treatment be given to outside employers of police officers by other district officers? While the Ethics Commission is concerned about security services provided by police officers anywhere in Montgomery County, especially where that

service is in uniform and using County equipment, when the officer's outside employment is in the very district where the officer is assigned officially, the employment can be reasonably expected to impair the independence and impartiality of the employee and the employee's colleagues in the district and falls in the zone of prohibited outside employment.

When officers provide uniformed security services in the same district to which they are assigned, the confusion as to whether a police officer is acting in his capacity as a County employee or in outside employment can be even worse than it is when police engage in police-like work in other districts. Also, when it turns out that a private employer of a number of County police officers as security guards is charged with running a major criminal enterprise, such as drug distribution, it would be reasonable, even without any evidence, for a member of the public to ask whether officers working for the criminal turned a blind eye to questionable activity because they were receiving a paycheck from the criminal. It, of course, would be one thing (and bad enough) to turn a blind eye to such activity when engaged in outside employment outside one's work jurisdiction; but when the criminal activity is in the district to which an officer is assigned, the appearance of the possibility of turning a blind eye begins to associate even more strongly with a failure to execute official responsibilities. This appearance is a foreseeable consequence of approving officers to receive paychecks for providing private security services in the County, and especially in the district where they work officially. Conflict of interest laws are designed to prevent the very asking of the question of whether officers will relax their official responsibilities with respect to persons paying them for private services.

Second, the proposed ethics regulation would prohibit an officer from using the uniform while teaching or instructing a law enforcement topic for a college or university, a practice presently permitted under the CBA. Engaging in compensated activity using the uniform both constitutes a misuse of prestige of office and County insignia and creates confusion as to whether the employee is conducting an activity in an official capacity.

Third, the proposed regulation would require police officers to use the same on-line forms and follow the process followed by other employees seeking outside employment. The forms currently filled out by officers do not ask the same questions as the ethics request form filled out by other employees. Most of the questions police forms address concern the 100 or so rules particular to Article 27 of the CBA. Many of these rules do not concern ethics principles (e.g., proof of Worker's Compensation coverage, rules dictating who can initiate an offense report, use of Criminal Justice Information Services, etc.) Not only is the Ethics Commission not involved in administering those 100 rules, the forms do not ask some basic questions about ethics compliance that are asked in the Commission's online form.

The current proposal contemplates that to request outside employment sworn police would do what every other County employee is required to do - which is go online and fill out the Ethics Commission form. The form would be processed through the online system the same way it works for everyone else. To address the particular rules for police, we would likely create extra questions designed to find out whether the outside employment is security related or involves traffic control. If the employment is security related or involves traffic control, then the Commission would know not to apply otherwise applicable ethics provisions regarding the use of County equipment and uniform for private gain.

The Commission expects that Police Department practices regarding outside employment, including the filling out of the current forms used by the Department, will continue. That process should be separate from Ethics Commission review. While it may seem burdensome to officers to have to comply with police requirements as well as an Ethics Commission process, that is a result of having a separate set of rules driven by collective bargaining rather than statutory ethics requirements. Moreover, the Ethics Commission online form is very easy to complete.

Fourth, the CBA provides that outside employment may be approved on an “indefinite” basis. A few years ago the Commission concluded that indefinite approval of outside employment was unwise, given possible changes over time in an employee’s County-assigned work and outside-employer assigned work. The Commission now approves outside employment for a maximum period of three years.

The Ethics Commission expressed its unanimous discomfort as regards the current state of affairs, with the Commission involved in approving outside employment of sworn police that clearly is contrary to ethics principles and law. There is a sense that the Commission should not approve any outside employment request it is not comfortable with, but there is also among some members a recognition that unwinding and updating long-standing processes does not have to be done in a way that ignores history. The Commission also is unanimous in its view that whatever is in place, the Commission's roles and responsibilities must be clear and right now they are not. The Commission’s proposal makes it much clearer what the Commission is to do. The Commission would review and treat the police just like everyone else, with the exceptions in a Council-approved Police Department executive regulation. In those areas, the police would operate pursuant to direction of the MCPD, although the Commission would still "review" and "approve" the outside employment submissions under the ethics law and the Commission’s regulation.

The approach of the Ethics Commission with the revised submission makes an effort to treat police outside employment -- with any exceptions set out in a Council-approved Police Department executive regulation -- like all other County outside employment.

The Ethics Commission made a number of other minor changes to the regulation based on comments received.

8. Outreach and Other Activities: The Staff also serves as the principal public resource on the County’s ethics laws, to include managing a website that reflects Commission programs, activities, and publications such as annual reports, approvals of outside employment requests, lobbying data, and waivers and opinions.

9. Administration: The Staff of the Commission is responsible for assuring that Commission meetings are run in accordance with the Open Meetings Act and other applicable law. The Staff informs and advises the Commission as to all material matters under its jurisdiction; Commission

staff is also responsible for budget, procurement, human resources, and resource management for the operation of the office in accordance with Montgomery County policies, and attends required training in these and other office management areas.

For the Commission:



Steven Rosen, Chair