ADVISORY OPINION NO. 2015-09

Issued on June 4, 2015, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **City Clerk** asks whether the Ethics Act permits the city to solicit private donors to contribute funds to allow it to qualify for a grant to replace a local swinging bridge.

FACTS RELIED UPON BY THE COMMISSION

The Requester states that the City owns a pedestrian bridge dating to the early twentieth century that has fallen into disrepair and is quickly becoming unusable. The City intends to seek a grant in the amount of roughly $500,000 to replace the bridge, but it must contribute $100,000 in matching funds. The City cannot afford the $100,000, and would like to ask private donors to contribute the money.

A study commissioned by the county housing authority found that about 17 percent of workers in the area where the bridge is located walk or bike to work. The study speculates that those workers walk or bike to work because about 16 percent of City households do not have vehicles available to them due to their low incomes. The bridge, if replaced, would provide those workers a route safer than downtown. The bridge is also considered a "key link" to the area's planned bike trails. The City expects it to be used by tourists and visitors because it is adjacent to a tourist attraction.

The City Clerk also states that a non-profit organization intends to build a residential drug-treatment center near one end of the bridge and the bridge would allow those residents better access to potential worksites when they are ready to seek employment.

CODE PROVISIONS AND LEGISLATIVE RULES RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(c)(1) states, in relevant part:

> A public official or public employee may not solicit any gift unless the solicitation is for a charitable purpose with no resulting direct pecuniary benefit conferred upon the official or employee or his or her immediate family.

158 W. Va. C.S.R. § 7.6 states, in relevant part:

> 6.1. Public officials and public employees may solicit gifts for a charitable purpose when there is no resulting direct pecuniary benefit to the public official or public employee or an immediate family member.

6.2. The Ethics Commission may recognize programs or activities as involving a charitable purpose on a case-by-case basis.

6.7. State government agencies and the governing bodies of political subdivisions may solicit funds to support or underwrite agency programs which are statutorily created or authorized and are intended to help the poor and disadvantaged. If a state government agency or governing body of a political subdivision seeks to solicit funds for use by the agency for any other purpose, then the state government agency or governing body of a political subdivision must first seek permission from the Executive Director of the West Virginia Ethics Commission or the Ethics Commission through issuance of a formal Advisory Opinion. The Executive Director or Ethics Commission may only authorize such a solicitation if it serves a public purpose....

ANALYSIS

The Ethics Act generally prohibits public officials and employees from soliciting funds for donations to their entity. There are two exceptions to this rule. First, if the solicitation has a charitable purpose without resulting direct pecuniary benefit to the public servant or an immediate family member, the solicitation is permissible under W. Va. Code§ 6B-2-5(c)(1) as long as the Ethics Commission recognizes the program as "charitable." *See* 158 W. Va. C.S.R. §§ 7.6.1 and 7.6.2.

Second, 158 W. Va. C.S.R. § 7.6.7 permits the governing bodies of political subdivisions to solicit funds to support or underwrite agency programs which are statutorily authorized and are intended to help the poor and disadvantaged. Agencies which seek to solicit funds for use by the agency for any other purpose must seek permission from the Ethics Commission through issuance of a formal Advisory Opinion. The Ethics Commission may only authorize such a solicitation if it serves a public purpose.

In the past, the Commission has approved solicitations on behalf of an adult and elder abuse and neglect conference,[1] an environmental protection information booth,[2] programs that benefit disadvantaged youth,[3] scholarships for the poor or disadvantaged,[4] a bicycle safety program,[5] a health care program for disadvantaged children,[6] a public health program,[7] a hunter safety education program,[8] and a county "Day at the Legislature" open to the public,[9] among others.

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[1] Advisory Opinion 94-14.
[2] Advisory Opinion 95-29.
[3] Advisory Opinion 93-08.
[4] Advisory Opinion 96-36.
[5] Advisory Opinion 97-19.
[6] Advisory Opinion 99-37.
[7] Advisory Opinion 2005-02.
[8] Advisory Opinion 2007-01.
[9] Advisory Opinion 2014-01.

Conversely, the Commission has denied solicitation for police equipment, [10] law enforcement training,[11] and expressions of sympathy.[12] The chief rationale for denying entities the ability to solicit for a particular reason is that solicitation of funds to pay "internal administrative costs," such as the purchase of police equipment and training classes, does not serve a public or charitable purpose. As explained in Advisory Opinion 2005-02, "the overriding purpose of the solicitation must be to provide a benefit to the public as opposed to defraying ... internal administrative costs."

Here, the Requester seeks to solicit money from private donors in order to qualify the City to seek a grant to replace a pedestrian bridge. The question, then, is whether this solicitation will help the poor and disadvantaged or serve a public purpose, or whether it instead is an attempt to defray administrative costs.

While infrastructure repairs are generally the responsibility of city governments, in the instant situation the City cannot afford to devote the $100,000 necessary to procure a grant needed to replace the bridge. If the City does not replace the bridge, it will soon become unusable. The public, especially the more underprivileged citizens who walk to work, would be harmed by the loss of the bridge.

Accordingly, based on the facts provided, it is hereby found that the proposed solicitation primarily provides a benefit to the public and helps the poor and disadvantaged as opposed to defraying internal administrative costs.

Therefore, the Commission holds that it is permissible for the City to solicit donations to allow it to qualify for a grant to replace the local swinging bridge.

However, to avoid an appearance of conflicted interests, City officials or employees should not orally solicit donations from individuals or businesses that are regulated by the City. A written solicitation to the public or business community at large, newspaper advertisements, and other broad-based public solicitations are permissible. Solicitations should contain a statement stating that donations are purely voluntary and donors will not receive preferential treatment from the City in exchange for a donation. Finally, the Ethics Commission recommends that the City not accept donations from any business or individual against whom the City has litigation pending.

This Advisory Opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester must contact the Commission for fwther advice as it may alter the analysis and render this opinion invalid.

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[10] Advisory Opinions 92-06 and 2012-08.
[11] Advisory Opinion 90-176.
[12] Advisory Opinions 2010-19 and 2014-07.

This Advisory Opinion is limited to questions arising under the Ethics Act, W. Va. Code § 68-1-1, et seq., and does not purport to interpret other laws or rules. This opinion is based on the specific facts of this request, and may not be relied upon in other situations.

/s/ R. Kemp Morton, Chairman
Kemp Morton, Chairman