

Administration responses to EDRP Questions –

JUNE 2021

From Tim Burke (6/4 meeting):

- 1) *How does the Ohio Ethics Commission keep information (including the names of those reporting wrongdoing) confidential given Ohio's Public Records Laws?*

RESPONSE: Ohio public records law provides for a number of exemptions, one of which is records whose release is prohibited by state or federal law. ORC 149.43(A)(1)(v). The laws governing the Ohio Ethics Commission require that all items related to a complaint, inquiry or investigation be kept confidential. ORC 102.06(F). Therefore, the release of information maintained by the Ethics Commission is prohibited by state law and is not subject to a public records request.

- 2) *City's fraud, waste and abuse hotline: How is it promoted? Does it also include unethical conduct?*

RESPONSE: The current hotline will take all types of complaints, including those related to ethics or corruption. In the last year they have only received 12 complaints, a number of which did not relate to the City but related to other governmental agencies. The internal audit manager, Lauren Sundararajan, reviews any complaints and directs them to the appropriate City office if outside the scope of Internal Audit. For example, they do not investigate sexual harassment or human resources complaints, those are forwarded to HR for investigation and resolution. Currently ethics complaints are sent to the Law department for resolution. Complaints may also be forwarded to the City Manager when appropriate. In terms of publicizing the hotline, the primary way it is publicized is through the City's website.

From Ann Marie

- 1) *Would a code of conduct created and issued by the City Manager would cover legislative staff in the Mayor and Council offices?*

RESPONSE: It would only cover City employees who are not part of the legislative staff. To the extent the panel wants to recommend a code of conduct that would cover the legislative staff, Council would have to adopt one that would cover its staff, and the Mayor's office would have to adopt one that covers its staff.

MAY 2021

From Guy Guckenberger:

- 1) *Ohio Rev. Code 4113.52 provides whistleblower protections, <https://codes.ohio.gov/ohio-revised-code/section-4113.52>. Does this statute's protections extend to the report of wrong doing related to development and related activities in the city of Cincinnati?*

RESPONSE: Yes this does apply in Cincinnati.

- 2) *Is there any reason for the city of Cincinnati to enact a similar ordinance? The recommendation might be to designate the reporting agency. It is supposed to be the "prosecuting authority" and would therefore be within the City Solicitor's Office. Within the law department, the complaint could go to a good government and ethics officer that has some investigatory authority and reports to the City Solicitor. If the ethics officer is an attorney, their investigations made for purposes of advising the City Solicitor could be protected as privileged communications.*

RESPONSE: Cincinnati's municipal code does provide protections for City employees who report suspected wrongdoing. C.M.C. 308-79 provides whistleblower protection as follows:

C.M.C. 308-79

- (a) No employer shall discharge, suspend, demote or take any other adverse employment action in retaliation against an employee who discloses to any governmental agency an activity, policy or practice of the employer that the employee has reasonable cause to believe is in violation of law or in violation of a rule or regulation enacted pursuant to law.
- (b) No employer shall discharge, suspend, demote or take any other adverse employment action in retaliation against an employee who provides information to or testifies before any governmental agency conducting an investigation, hearing or inquiry into any violation of law by the employer or any violation by the employer of a rule or regulation enacted pursuant to law.
- (c) As used in this section, the term "governmental agency" means:
 - (1) The United States Congress, the Ohio General Assembly, the council of the city of Cincinnati, any elected governmental body and any member or employee thereof;
 - (2) Any federal or state judiciary and any member or employee thereof or any grand jury;
 - (3) Any federal, state or local regulatory, administrative, investigative or public agency or authority or any instrumentality thereof;
 - (4) Any federal, state or local law enforcement agency and any member or employee thereof;
 - (5) Any federal, state or local department of an executive branch of government; and

- (6) Any division, board, bureau, office, committee or commission of any of the governmental agencies described above.
 - (d) The provisions of this section may be enforced by an appropriate proceeding in equity in the Court of Common Pleas.
 - (e) In addition to the available civil remedies, any violation of this section shall be a misdemeanor of the first degree.
- 3) *What confidentiality protections does a whistle blower have under Ohio law? Do any jurisdictions give confidentiality protections to whistle blowers?*

RESPONSE: There are protections against retaliation in Ohio Revised Code §4113.52(B), that prohibit an employer from taking disciplinary or retaliatory action against a whistleblower. An employee may bring a civil action for violation of this section. The Ohio Attorney General's Office has both a "public corruption" tip line and website (<https://www.ohioattorneygeneral.gov/Individuals-and-Families/Victims/Submit-a-Tip/Public-Corruption>) where concerns about corruption may be reported either anonymously or with attribution by both employees and the public. As the website points out, an anonymous report is harder to investigate.

If whistleblowers provide their names to a public agency as part of a complaint or tip, then their identities will not be confidential under Ohio public records laws. The City is subject to Ohio public records laws and has no authority to protect identities or other information that is required to be disclosed under state records laws. Accordingly, the confidentiality protections for whistleblowers outside of Ohio are not directly applicable to the City. If there remains interest on the EDRP in understanding practices outside Ohio, please let us know and we can look into it.

- 4) *The EDRP ordinance states the panel should: "Recommend whether contract awards should be prohibited to developers who made campaign contributions to council candidates within the prior twenty-four months." Ohio Rev. Code 3517.13 restricts the award of unbid government contracts of more than \$500 where contributions more than \$1,000 have been made within the 2 previous years to a holder of public office who can award the contract or to the campaign committee of the office holder.*

The solicitor says R.C. 3517.13 does not restrict city contracts based on contributions to city council members because the city manager, not council, has the authority to award contracts. Is there any reason an ordinance could not be modeled after R.C. 3517.13 to effectively provide similar restrictions on the award of contracts where approvals, such as development incentives, zoning changes, etc. leading to a contract award, must be voted on by council, notwithstanding that council may not have authority to award the contract?

RESPONSE: City Council could enact an ordinance that restricts donations for persons doing business. Such an approach might be similar to the ordinance proposed to EDRP by CM Goodin to restrict acceptance of donations from entities engaged in "City

business.” City business in this context could include, for example: zoning approvals that come before City Council for approval, firms/persons having goods/services contracts with the City (possibly triggered by a dollar threshold), economic incentives that come before Council for approval, and sale of City property that comes before City Council for approval. Any such ordinance would have to be reviewed by First Amendment counsel to ensure it does not exceed the limits of local authority under applicable law.

- 5) *The EDRP ordinance also states the panel should: "Recommend whether the City should establish a hotline by which any citizen, including developers, can report in confidence any inappropriate request or demand from any public servant, elected or otherwise."*

What cities or other governmental units have established whistle blower or hotline programs that cover inappropriate conduct by elected officials, employees, citizens, or businesses related to government functions, particularly economic development? What do the programs that have been established provide?

RESPONSE: As mentioned above, there is a hotline/whistleblower program in Ohio. There are numerous whistleblower programs at the federal level, including through the Department of Justice’s Office of the Inspector General (<https://oig.justice.gov/hotline/whistleblower-protection>). These programs typically protect federal employees and federal contractors that report wrongdoing. If the panel desires additional detail on how these programs work, please let us know.

- 6) *As pointed out by Ann Schooley, Ohio Rev. Code 3517.13 already restricts the award of unbid government contracts based on political contributions. In her opinion the statute does not apply to City Council. The question I have for the Solicitor is whether a similar ordinance could be written that does apply to City Council.*

RESPONSE: Such an ordinance would likely be permissible under the City’s home rule authority so long as it doesn’t run afoul with First Amendment rights.

From Tim Burke:

- 1) *We have discussed at some length the importance of transparency with some discussion of the City maintaining a searchable data base of the campaign donations received by the City’s elected officials. Some elected officials maintain more than one political account. It may be what is sometimes referred to a Leadership PAC, or a Federal non connected PAC, or under certain circumstances a fund for another possible office. Such funds, done properly, are perfectly legal, but often overlooked. I would like to hear from the Solicitor as to if the City can require its elected officials to file copies of reports for any of the political funds they control so they may posted on the City’s searchable data base along with their City Council or Mayor’s campaign financial reports.*

RESPONSE: Ohio Law does not specifically provide for Leadership PACs. They exist under federal law and register with the Federal Elections Commission (“FEC”). For

purposes of compliance with Ohio law, they are treated as federal, state, and local (“FSL”) PACs and are governed by Ohio Revised Code §3517.107. FSL PACs are required to file reports with the FEC and when spending money in connection with a state or local election also with the Ohio Secretary of State. The panel could recommend that elected officials who control FSL PACs file any reports that are submitted to either the FEC or the Ohio Secretary of State with the Cincinnati Elections Commission.