

## **Anne Arundel County Ethics Commission**

### **Advisory Opinion**

**99-212**

#### **Issue:**

Whether a member of the county council can accept the offer, made by a cable television franchisee, to film a five minute speech with the franchisee, for local broadcast over a CNN network, or over a local origination channel.

#### **Background:**

Members of the county council were invited by a local franchisee to film a speech that will be broadcast locally on CNN. The speech will be conducted in an interview format, with the council member drafting the questions in advance, and preparing the answers in advance as well. The "questions" will be asked by an employee of the cable operator. The five minute spot will air locally on CNN, pursuant to an agreement between CNN and the franchisee. The filmed interview will become the property of the franchisee and presumably can be televised on a local origination channel. A local origination channel is a channel for the development and broadcast of programs of local interest, subject to the discretion of the franchisee. The franchisee can also sell advertising on this channel. The franchisee has also filmed 18 second public service announcements in which members of the council were asked to read a pre-written message of public interest that can also be aired on CNN or the local origination channel. It should be noted that these "interviews" have also been conducted with other non-county governmental officials, and representatives of non-governmental entities, such as charitable organizations.

Cable television franchises are issued by the county, and are operated according to a franchise agreement negotiated between the county and the franchisee. The council's role in the negotiation and execution of a cable franchise agreement is significant. The council determines the need for the creation of a franchise, and establishes the criteria to be required of applicants for the franchise. The council can establish terms and conditions of the franchise agreement, and is the ultimate authority to determine whether a franchise will be approved or extended. The council also has the authority to revoke a franchise for failure of the franchisee to abide by the law or with the terms of the agreement.

The franchisee that is the subject of this inquiry, operates five non-exclusive franchises in the county. Four of these franchises have expired or will expire in the current year, and are currently under negotiation for renewal of the franchise. One of the franchises may expire because of the franchisee's failure to request a renewal within the time required by law. As to this latter franchise, the county is not required to negotiate a renewal of the franchise agreement. In fact, renewal of a franchise is not a certainty in any case, but is subject to the ultimate decision

of the county council. The council can change the duration of the franchise and can amend the PEG fees that a franchisee will pay to the county for the operation of the public, educational, and government access channel.

It should be noted that this year is the first time that this particular franchisee has offered this type of air time to a county council member, and it may be the only franchisee that has ever done so. The same franchisee recently invited an Assistant Director of the Department of Planning and Code Enforcement, representing the county Office of Cable Communications, to attend the anticipated National Football Conference Championship game at FedEx Field, as a guest of the franchisee. The intended recipient declined the invitation, citing the Public Ethics Law, §3-106(b).

### **Discussion:**

Section 3-106 of the Public Ethics Law, Article 9 of the Anne Arundel County Code, is relevant to this inquiry. This section generally prohibits the acceptance of gifts from "controlled donors". It is clear that a cable television franchisee is a controlled donor because: 1) it does business with the county; 2) it is regulated by the county; and 3) it has financial interests that will be substantially and materially affected, in a manner distinguishable from the public generally, by the performance of the official duties of the members of the county council.

If the offer to film and broadcast a speech by members of the county council is a "gift", as defined in §1-101(l) of the ethics law, it may not be accepted by the council members. A gift is defined as ". . . something of value that is given, regardless of the form, without adequate and lawful consideration. . .", including, ". . . unless specifically excluded by a provision of this article, any gratuity, favor, discount, entertainment, hospitality, loan, or forbearance." This definition is to be liberally construed to accomplish the purposes of the ethics law - specifically, to guard against improper influence or the appearance of improper influence. §1-102.

Even the most conservative construction of "something of value" would necessarily include the offer of free air time. Under the usual circumstances, air time on a commercial channel, including CNN, would cost money. Although it is called a public service, this free air time is of value to any elected official who would like to have continuing media visibility on that official's own terms. In this case, the council members are being offered an opportunity to promote themselves, in contrast to a "real" interview, where the interviewer asks questions of its own choosing. In the latter case, the official is performing an official duty - responding to questions of public concern, or issues in the news. The resulting publicity to the official may be positive, or it may be negative. In the present case however, the elected official is creating what is in essence, a purely promotional opportunity. The five minute "interview" is not really an interview at all, but is rather a staged dialogue that may feature a list of the official's accomplishments, or positions on currently hot issues, or other politician-friendly messages. This type of air time is a thing of value that provides a benefit primarily to the official personally.

Further, if the official were a candidate for office, the offer of free air time would probably constitute a campaign contribution. According to the Election Code, Maryland Code (1957, as amended), Art. 33, §277,(k)(1), a "[C]ontribution means the gift or transfer, or promise of gift or transfer, of money or other thing of value to a candidate. . . to promote or assist in the promotion of the success or defeat of a candidate, political party, or question."

If the council members were candidates, the offer of free air time would be a contribution - a thing of value to promote the success of a candidate. The ethics law specifically exempts from its regulation political campaign contributions. But it is not an election year, and the council members are not strictly speaking, candidates. What would be a campaign contribution during certain years, would be an ordinary gift in other years.

**Conclusion:**

The offer of a five minute promotional opportunity, or "interview" as it has been dubbed, is in reality, the offer of a gift to the members of the county council, by a controlled donor. As a gift, it cannot be accepted unless it falls within a specifically permitted exception to the prohibition against accepting gifts from controlled donors. It does not. Even if it were a permitted exception, council members who accepted the gift would be precluded from participating in legislation that would affect the franchisee, under the provisions of §3-102(a) and (b)(2)(iii) of the Public Ethics Law.

The 18 second public service announcements are also gifts, albeit of lesser value. They are short and their message is written by the franchisee. The ethics commission could conclude that the value of the gift is nominal, and therefore a permitted exception under §3-106(c)(3). However, given the existence of pending franchise negotiations there is reason to believe that the gift is designed to impair the independent and impartial judgment of the council members. For this reason, this gift cannot be accepted. In light of this conclusion, the commission did not consider the applicability of §3-104, the prestige of office provision, to the participation by council members in public service announcements broadcast by the cable franchisee.

Date:

By: the Anne Arundel County Ethics Commission