

March 30, 2004

Re: IO-04-28

You inquired whether and to what extent, the Public Ethics Law affects your appearance before the Anne Arundel County Board of Appeals, in response to a subpoena issued to you by one of the parties in the case. You have been subpoenaed to appear and to bring documents. You have indicated that the only relevant document in your possession is an e-mail reply to a question you asked by e-mail. Specifically, you had e-mailed an employee asking for that employee's interpretation of a county code provision. When you received the response, you made it available publicly. The e-mail and your disclosure of it pre-date the filing of the case that is now before the board of appeals.

Three provisions of the ethics law are applicable to your inquiry: §5-104(a)(assistance or representation of a person before a county agency or in a matter in which the county has an interest; §5-107 (prestige of office); and §5-108 (use of confidential information).

On at least three previous occasions, the ethics commission has addressed the propriety of opinion testimony offered by county employees . In IO -97-27, the commission advised that the prestige of office provision, §3-104(a) (now §5-107) prohibited a council member from offering opinion testimony on behalf of one of the parties to the board of appeals. In IO-02-141, the commission advised that the same provision of law would prohibit a member of the county liquor board from offering opinion evidence before the city liquor board on behalf of an applicant for a liquor license. See also, AO-00-05. In all those opinions, the ethics commission further advised that the ethics law does not prohibit an employee from testifying as to relevant facts that may not be otherwise obtainable.

Section 5-104(a)(1) which was enacted by Bill 38-03, prohibits an employee from assisting a person before any governmental unit, or in any matter in which the county has an interest. An exception to this prohibition is for assistance or representation that is undertaken in the "performance of usual and customary constituent services without additional compensation". 5-104(b)(1). If your request for this e-mail opinion was undertaken for the edification of your constituents and not in anticipation of any dispute involving the county, the ethics commission is inclined to believe that you were performing a "usual and customary constituent service".

Section 5-108 prohibits an employee from disclosing confidential information, "that is not available to the public" for the economic benefit of another. It is possible that any relevant confidential information in your possession, when offered as evidence in this appeal, may provide an economic benefit to the appellant. For this reason, you may not disclose confidential information to the appellant in this matter. However, if as you stated, this information subpoenaed was previously made available to the public and is still available to the public, the ethics commission does not believe that your providing that same information in response to a subpoena would violate §5-108. While you may not provide opinion testimony with regard to this document, you may authenticate it if you are requested and able to do so.

Finally, as you know, the ethics commission received some of the information on which this opinion is based as late as yesterday, and has been asked to provide you with an opinion prior to March 31, 2004. Section 4-102(b) requires the commission to issue an opinion within 60 days of receiving the request for an opinion, or “more promptly if feasible and if circumstances require”. The ethics commission has asked that I request that in the future whenever possible, you provide it with adequate time to properly research and respond to your questions.

Thank you for your inquiry. If you have other questions, please contact me.

Sincerely,

Betsy K. Dawson
Executive Director