

## **Office of Government Ethics**

**93 x 22 -- 09/03/93**

### **Letter to the General Counsel of a District of Columbia Agency dated September 3, 1993**

This is in response to a request from [a] former [official of the District of Columbia] for an opinion on whether 18 U.S.C. § 208 applies to members of the Council of the District of Columbia. We conclude that the statute is applicable to members of the Council. This opinion is consistent with oral advice provided by one of our staff attorneys to a member of your staff prior to your written request. It is also consistent with previous advice on a similar question with respect to the applicability of 18 U.S.C. § 207 to members of the Council contained in our Informal Advisory Letter 86 x 18.

The language of 18 U.S.C. § 208 is clear in stating it applies to "an officer or employee of the District of Columbia, including a special Government employee." In your view "the legislative history of this statute seems to indicate that the legislative intent was to exclude legislative and judicial personnel from its application." In support of your view, you cite the Memorandum of Attorney General Regarding Conflict of Interest Provisions of Public Law 87-849, Feb. 1, 1963, 28 F.R. 985, and particularly the portion under the heading, Statutory Exemptions from Conflict of Interest Laws, which states:

Congress has in the past enacted statutes exempting persons in certain positions--usually advisory in nature--from the provisions of some or all of the former conflict of interest laws. Section 2 of the Act grants corresponding exemptions from the new laws with respect to legislative and judicial positions carrying such past exemptions. However, section 2 excludes positions in the executive branch, an independent agency and the District of Columbia from this grant. As a consequence, all statutory exemptions for persons serving in these sectors of the Government ended on January 21, 1963.

Although Congress exempted legislative and judicial positions that were exempt in former conflict of interest laws, section 2 of

the Public Law 87-849 stated in relevant part:

All exemptions from the provisions of sections 281, 282, 283, 284, 434, or 1914 of title 18 of the United States Code heretofore created or authorized by statute which are in force on the effective date of this Act shall, on and after that date, be deemed to be exemptions from sections 203, 204, 205, 207, 208, or 209, respectively, of title 18 of the United States Code except to the extent that they affect officers or employees of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, as to whom they are no longer applicable. (Emphasis added.)

Both the language of the statute and the Attorney General's memorandum make clear that officers or employees of the District of Columbia were not exempt from 18 U.S.C. § 208.

In your letter you state, "In 1973, Congress gave the District its own elected government with an executive branch, headed by the Mayor, and a legislative branch consisting of the Council." You also point to the District of Columbia Campaign Finance Reform and Conflict of Interest Act, which was passed by Congress on August 14, 1974 as title VI, section 601 of Pub. L. No. 93-376, 88 Stat. 465 (the "Act") and amended by section 14(b) of Pub. L. No. 93-635, 88 Stat. 2178, January 3, 1975. The Act was codified at D.C. Code § 1-1461. In your view the Act imposes conflict of interest standards on Council members that are less stringent than those contained in 18 U.S.C. § 208, but more appropriate to legislators. You contend that "this shows Congressional intent to impose the D.C. Code standards on Council members rather than § 208." The Act, as amended, is set forth in its entirety below:

(a) The Congress declares that elective and public office is a public trust, and any effort to realize personal gain through official conduct is a violation of that trust.

(b) No public official shall use his or her official position or office to obtain financial gain for himself or herself, any member of his or her household, or any

business with which he or she or a member of his or her household is associated, other than that compensation provided by law for said public official. This subsection shall not affect a vote by a public official:

(1) On any matter which affects a class of persons (such a class shall include no less than 50 persons) of which such public official is a member if the financial gain to be realized is de minimis; or

(2) on any matter relating to such public official's compensation as authorized by law; or

(3) regarding any elections law. If an action is taken by any department, agency, board, or commission of the District of Columbia, except by the Council of the District of Columbia, in violation of this section, such action may be set aside and declared void and of no effect, upon a proper order of a court of competent jurisdiction.

(c) No person shall offer or give to a public official or a member of a public official's household, and no public official shall solicit or receive anything of value, including a gift, favor, service, loan gratuity, discount, hospitality, political contribution, or promise of future employment, based on any understanding that such public official's official actions or judgment or vote would be influenced thereby, or where it could reasonably be inferred that the thing of value would influence the public official in the discharge of his or her duties, or as a reward, except for political contributions publicly reported pursuant to section 206 of this Act and transactions made in the ordinary course of business of the person offering or giving the thing of value.

(d) No person shall offer or pay to a

public official, and no public official shall solicit or receive any money, in addition to that lawfully received by the public official in his or her official capacity, for advice or assistance given in the course of the public official's capacity, for advice or assistance given in the course of the public official's employment or relating to his or her employment.

(e) No public official shall use or disclose confidential information given in the course of or by reason of his or her official position or activities in any way that could result in financial gain for himself or herself or for any other person.

(f) No member or employee of the Council of the District of Columbia or Board of Education of the District of Columbia shall accept assignment to serve on a committee the jurisdiction of which consists of matters (other than of a de minimis nature) in which he or she or a member of his or her family, or a business with which he or she is associated, has financial interest.

(g) Any public official who, in the discharge of his or her official duties, would be required to take an action or make a decision that would affect directly or indirectly his or her financial interests or those of a member of his or her household, or a business with which he or she is associated, or must take an official action on a matter as to which he or she has a conflict situation created by a personal, family, or client interest, shall:

(1) Prepare a written statement describing the matter requiring action or decision, and the nature of his or her potential conflict of interest with respect to such action or decision;

(2) Cause copies of such statement to be delivered to the District of Columbia Board of Elections and Ethics (referred to in this subchapter as the "Board"), and to his or her immediate superior, if any;

(3) If he or she is a member of the council of the District of Columbia or member of the Board of Education of the District of Columbia, or employee of either, deliver a copy of such statement to the chairman thereof, who shall cause such statement to be printed in the record of proceedings, and, upon request of said member or employees, shall excuse the member from votes, deliberations, and other action on the matter on which a potential conflict exists;

(4) If he or she is not the Mayor or a member of the Council of the District of Columbia, his or her superior, if any, shall assign the matter to another employee who does not have a potential conflict of interest, or, if he or she has no immediate superior, except the Mayor, he or she shall take such steps as the Board prescribes through rules and regulations to remove himself or herself from influence over actions and decisions on the matter on which potential conflict exists; and

(5) During a period when a charge of conflict of interest is under investigation by the Board, if he or she is not the Mayor or a member of the Council of the District of Columbia or a member of the Board of Education, his or her superior, except the Mayor, if any shall have the arbitrary power to assign the matter to another employee who does not have a potential conflict of interest, or if he or she has no immediate superior, he or she shall take such steps as the Board shall prescribe through rules and regulations to remove himself or herself from influence over actions and decisions on the

matter on which there is a conflict of interest.

(h) Neither the Mayor nor any member of the Council of the District of Columbia may represent another person before any regulatory agency or court of the District of Columbia while serving in such office. The preceding sentence does not apply to an appearance by such an official before any such agency or court in his or her official capacity or to the appearance by a member of the Council (not the Chairman) licensed to practice law in the District of Columbia, before any court or non-District of Columbia regulatory agency in any matter which does not affect his or her official position.

(i) As used in this section, the term:

(1) "Public official" means any person required to file a financial statement under § 1-1462.

(2) "Business" means any corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, organization, self-employed individual, holding company, joint stock, trust, and any legal entity through which business is conducted for profit.

(3) "Business with which he or she is associated" means any business of which the person or member of his or her household is a director, officer, owner, employee, or holder of stock worth \$1,000 or more at fair market value, and any business which is a client of that person.

(4) "Household" means the public official and his or her immediate family.

(5) "Immediate family" means the public official's spouse and any parent,

brother, or sister, or child of the public official, and the spouse of any such parent, brother, sister, or child.

The legislative history of the Act contains brief references to conflict of interest. The report of the House of Representative Committee on the District of Columbia, H.R. Rep. 93-1080 (1974) was silent on the subject. The only reference to conflict of interest in the Senate report is set forth below in its entirety.

#### Title V -- Conflict of Interest

This title declares that elective and public office is a public trust and that any effort to realize personal gain through official conduct is a violation of that trust.

It is the view of the committee that one principal means by which we may prevent public distrust of those who are chosen to conduct the affairs of the District government is to provide for disclosure of personal financial interests by candidates, elected officials, and high-ranking appointees of the District government. Not only should public officials be free from the undue influence of special interest groups and powerful favor-seeking individuals, but also the people must believe this to be so. This title, in addition to requiring the disclosure and reporting of financial interests, also sets forth certain procedures to be followed by public officials in potential conflict-of-interest situations, similar to those adopted by the Senate for its own members and employees.

S. Rep. 93-967 at 6 (1974). It should be noted that members of the United States Senate are subject to conflict of interest rules in addition to being covered by several of the criminal conflict of interest laws contained in chapter 11, title 18, United States Code. See, for example, Interpretative Rulings of the Select Committee on Ethics, Rule XXXVII, S. Prt. 101-18 (March 1989).

The report of the Conference Committee is also quoted in its

entirety:

### Conflict of Interest

The Senate amendment prohibited a public official of the District from using his office to obtain financial gain, accepting gifts for taking official action, disclosing confidential information resulting in financial gain. No official could accept membership on a committee or an assignment of responsibility which created a conflict of interest.

The House bill contained no such provision.

The Conference substitute conforms to the Senate amendment.

H.R. Rep. 93-1225 at 31-32 (1974).

We see nothing in the Act, nor in the legislative history to suggest that when Congress passed the District of Columbia Campaign Finance Reform and Conflict of Interest Act, it intended to amend 18 U.S.C. § 208. The Act does not purport to amend 18 U.S.C. § 208. The Act contains no reference to 18 U.S.C. § 208, nor any amendatory language. While the Act can be read to apply an additional layer of restrictions upon members of the Council, these restrictions are not inconsistent with 18 U.S.C. § 208. If the Congress had so intended, it could have exempted members of the Council from 18 U.S.C. § 208 when it amended that statute in the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 stat. 1716 (1989). Congress did not do so.

In our view, therefore, both the language of 18 U.S.C. § 208 and its legislative history support the position consistently held by this Office that 18 U.S.C. § 208 applies to members of the District of Columbia Council. In addition, neither the text of the District of Columbia Campaign Finance Reform and Conflict of Interest Act, nor its legislative history, nor the Attorney General's memorandum on the conflict of interest provisions of Pub. L. No. 87-849 shows legislative intent to exempt members of the Council from coverage by 18 U.S.C. § 208.

This opinion has been issued after consultation with the  
Office of Legal Counsel, Department of Justice.

Sincerely,

Stephen D. Potts  
Director