

## Local Government Ethics Law

### Opinions of the Office of the Attorney General

Subject: **Independent Local Government Agency Attorneys as "Local Government Officers"**

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November 1, 1991

Barry Skokowski, Sr.  
Deputy Commissioner  
Department of Community Affairs  
CN 800  
Trenton, New Jersey 08625-0800

Re: 91-0134: Independent Local Government Agency  
Attorneys as "Local Government Officers"  
pursuant to the Local Government Ethics Law.

Dear Deputy Commissioner Skokowski:

You have requested advice as to whether an attorney who is appointed to regularly provide advise and representation to an independent "local government agency," is a "local government officer" pursuant to the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 et seq. For the below stated you are advised that an attorney appointed to regularly provide advice and representation to an independent "local government agency, : is a "local government officer" pursuant to the Local Government Ethics Law and therefore, subject to its terms, particularly the requirement of filing a financial disclosure statement.

The Local Government Ethics Law was enacted on February

20, 1991 and became effective 90 days thereafter on May 21, 1991. L. 1991, c. 29, §27. The purpose of the Act is to provide a statewide method of governing the ethical conduct of local government officers and employees and requiring financial disclosure for local government officers. N.J.S.A. 40A:9-22.2(e). (See Attorney General Opinion No. 91-0093 (September 20, 1991) for a detailed description of the implementing provisions of the new Law).

To be subject to the requirement of filing a financial disclosure statement, one must satisfy the test of being a local government officer of a local government agency. N.J.S.A. 40A:9-22.6. The term "local government officer" is defined as,

any person whether compensated or not, whether part-time or full-time: (1) elected to any office of a local government agency; (2) serving on a local government agency which has the authority to enact ordinances, approve development applications or grant zoning variances; (3) who is a member of an independent municipal, county or regional authority; or (4) who is a managerial executive or confidential employee of a local government agency, as defined in section 3 of the "New Jersey Employer-Employee Relations Act," P.L. 1941, c. 100 (C. 34:13A-3), but shall not mean any employee of a school district or member of a school board. [N.J.S.A. 40A:9-22.3(g)].

Thus, a variety of persons serving in a "local government agency" are included within the definition of "local government officer."

In contrast to the term "local government officer" is the term "local government employee." This latter term is defined as any person, whether compensated or not, whether part-time or full-time, employed by or serving on a local government agency who is not a local government officer, but shall not mean any employee of a school district." N.J.S.A. 40A:9-22.3(f).

In order to understand who is a "local government officer" the term "local government agency" should be examined. A "local government agency" is defined as,

any agency, board, governing body, including the chief executive officer, bureau, division,

office, commission or other instrumentality within a county or municipality, and any independent local authority, including any entity created by more than one county or municipality, which performs functions other than of a purely advisory nature, but shall not include a school board. [N.J.S.A. 40A:9-22.3(e)].

The term "local government agency" encompasses a myriad of local government bodies and individuals. The definition is very broad and specifically, excludes only purely advisory bodies and school boards. Included as "local government agencies" are those local agencies which operate independently of a county or municipality. See Attorney General Opinion No. 91-0093 (September 20, 1991). (The opinion provides a partial enumeration of many "local government agencies." The listing is not intended to be all-inclusive). The members of independent local government agencies are generally "local government officers." Ibid.

Attorneys may serve local government agencies in a variety of capacities e.g. as a member of an agency, board, governing body, etc.; as an employee, or as the principal legal advisor to a local government agency. The focus of the instant inquiry is upon the last type of activity. To a large extent the municipal attorney or county counsel will often provide any necessary legal advice or representation to a municipality's or county's agencies. However, it is common for an attorney to be appointed to represent a "local government agency," which operates independently of the county or municipal.

We have previously determined that a municipal attorney, is per se a "local government officer". See Attorney General Opinion No. 91-0092 (September 20, 1991). This conclusion was based on the determination that municipal attorneys by the nature of their duties participate in the formulation of management policies and exercise independent legal discretion affecting issues of public concern. Indeed, members of the legal profession who do not occupy traditional management positions are often considered "policy makers". *Gregory v. Ashcroft*, \_\_\_ U.S. \_\_\_, 111 S.Ct. 2395, 2404, 115 L.Ed.2d 410, 427-428 (1991) (Judges were deemed to be policy makers). An attorney who advises a public body "wields considerable power and influence by virtue of his ability and opportunity to interpret the law and advise on legal matters. The force of his influence is subtle and pervasive." *Lafayette v. Bd. of Chosen Freeholders*, 208 N.J. Super. 468, 474 (App. Div. 1986). As such, we concluded that the office of municipal attorney was necessarily a "managerial executive" and therefore a "local

government officer". Attorney General Opinion No. 91-0092 (September 20, 1991). Also, we concluded that municipal attorneys by the nature of their position were intimately involved with the municipality's labor relation matters. Therefore, municipal attorney were deemed to be "confidential employees," and accordingly "local government officers". Ibid.

There are numerous "local government agencies" which operate as independent entities separate and distinct from a municipality or county (e.g. fire districts, local housing authorities, county improvement authorities.) These independent agencies typically have broad powers necessary to effectuate their statutory purposes including the power to employ staff and professionals. See e.g. N.J.S.A. 40:14A-7(12) (Sewerage Authorities). As previously noted, it is common for these independent agencies to appoint counsel to provide necessary legal advice and representation. An attorney whose skills are regularly utilized to advise a local agency is generally considered to hold an office. *Planning Bd. Tp. of West Milford v. Tp. Counsels of West Milford*, 123, N.J. Super. 135, 142 (Law Div. 1973); *Lehrhaupt v. Flynn*, 140 N.J. Super. 250 (App. Div. 1976), affirmed 75 N.J. 459 (1978). It follows for the reasons expressed in Attorney General Opinion No. 91-0092 (September 20, 1991) that an attorney appointed by an independent local government agency, to provide regular legal advice and representation to the agency are deemed "local government officers" for purposes of the Local Government Ethics Law. This conclusion is consistent with the intent of Senator Paul Contillo, the principal sponsor of the Local Government Ethics Law. Scarinici, *Ethics Enforcement: A New Role for the Local Finance Board*, Kraft & Mchanimon Municipal Bond News, p. 2 (June 1991).

However, an attorney who regularly advises a local agency as its "chief legal officer" must be contrasted with an attorney who serves the agency in a special, limited capacity (e.g. special labor counsel, bond counsel, or to handle a particular tort action). This latter representation is more akin to an independent contractor and, in our view, would not be subject to the new Ethics Law. See Attorney General Opinion No. 91-0092 (September 20, 1991). In determining whether an attorney services a local agency as its chief legal officer or in a special limited capacity, it is appropriate to examine the resolution or other document which authorized the appointment. These may be occasions when this examination does not resolve the matter. In these circumstances you should seek the guidance of this office.

Therefore, you are advised that an attorney appointed to

provide regular legal advice to an independent entity, which is a "local government agency," is a "local government officer" for purposes of the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 et seq., and is subject to the requirements of the Law, in particular to the requirement of filing a financial disclosure statement.

Very truly yours,

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ATTORNEY GENERAL

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