

The New York City Council's Approach to Ensure Compliance with Conflicts of Interest Laws in the Discretionary Funding Process

By Elizabeth Fine and James Caras



The budget for the City of New York was close to \$60 billion for fiscal year 2010. About one percent of these monies funded local organizations around the City that were designated by Members of the New York City Council and by certain other City elected officials. These local initiatives

provide essential funding for many organizations that are central to the fabric and functioning of the City.

In recent City budgets, discretionary funding has provided \$12 million for indigent defense legal services, over \$10 million for City Senior Centers, including money for the actual facilities, meals served and transportation, over \$20 million for after school programs, as well as the City's only shelter bed program for gay and lesbian homeless youth and the City's only rape crisis center. Indeed, the Mayor's agency heads often anticipate that the Council will provide funding for programs on which the agencies have come to rely on an ongoing basis. Local organizations in New York have come to rely on this discretionary funding in planning their City programs and services.

Discretionary funding for local organizations grew steadily in New York City, from a relatively small program in the 1980s, to increasing throughout much of the 1990s, and is currently a more significant amount of funding, albeit still a very small percentage of the overall City budget. The press and government watchdog groups demanded greater transparency and stronger safeguards for the spending of City funds. Indeed, there were a small number of individuals and organizations that abused or misused the City funds. While these instances were only a tiny fraction of the thousands of groups that received discretionary funding, this abuse threatened to undermine the confidence of the public in the entire program. The New York City Council has taken steps to address these concerns through the adoption of a set of best practices for discretionary funding.

Safeguards now in place over the City's discretionary funding process are far more rigorous than those we have been able to find in any other jurisdiction in the country where a legislature has the authority to



directly fund organizations. These reforms ensure that (1) the organizations funded are legitimate not-for-profit organizations; (2) the organizations are actually capable of performing the services for which they receive funding; (3) the elected official(s) sponsoring the funding for each organization have no

conflicts of interest relating to the organization; and (4) the process for funding each organization is transparent to members of the public.

The lynchpin of these reforms has been the introduction of a "pre-qualification" process for all recipients of City Council discretionary funds. As part of this process, groups are rigorously vetted to ensure that they are properly registered charities (or properly exempt from registration), that they have not been the subject of investigations, audits or evaluations that reveal a lack of integrity or ability to provide services, and that the funding will be used for a proper City purpose. To ensure proper implementation of the City's Conflicts of Interest Laws to the discretionary funding process, this process also requires Council Members and organizations to provide certifications concerning conflicts of interest.

This article will review the City's procurement and Conflicts of Interest Laws, how these laws apply to the discretionary funding process and the safeguards that have been implemented to ensure compliance with those laws. While the Council continues to assess and improve its practices in this area, the measures that the Council has taken to date are significant and serve as a model for other legislative bodies around the country that seek to uphold the highest standards in their own local discretionary funding programs.

I. New York City Procurement Law Authorizing Discretionary Funding

In New York City, discretionary funding is specifically provided for by rule of the Procurement Policy Board (PPB), which is charged under the City Charter with making rules to govern the procurement process.¹ The general policy of the PPB Rules is that government purchases of goods and services should be accom-

plished through a competitive process. However, the PPB Rules create an exception to this general rule. PPB Rule 1-02 states that “[t]he source selection requirements of these Rules shall not apply to *contract awards made from line item appropriations and/or discretionary funds to community-based not-for-profit organizations or other public service organizations identified by elected City officials other than the Mayor and the Comptroller.*” (Emphasis added.) Thus, the PPB Rules specifically allow the Council and Borough Presidents to allocate funding directly to not-for-profit organizations.

II. New York City Laws and Rules Relating to Council Members’ Roles in Discretionary Funding

New York City’s Conflicts of Interest Laws are designed in large part to make certain that City officials act in the interests of the City and not in their own personal interests. By applying the Conflicts of Interest Laws strictly to the discretionary funding processes, the Council has sought to ensure—and reassure the public—that Council Members make discretionary funding decisions based on the City’s needs, and not based on their relationships or personal financial interests.

New York City Conflicts of Interest Laws govern the activities of all City officials and employees, including members of the New York City Council. The laws are contained in Chapter 68 of the New York City Charter. The New York City Conflicts of Interest Board (COIB) implements the laws through the Rules of the Board, its advisory opinions, and through enforcement actions.

There are several broad provisions of Chapter 68, as well as Board rules that apply generally to public officials and have implications for Council Members when taking action on discretionary funding.

Two sections of the New York City Charter provide overarching direction on the use of office by a public servant. First, Section 2604(b)(2) prohibits any public servant from engaging in “[A]ny business, transaction or private employment or having any financial or other private interest, direct or indirect, which is in conflict with the proper discharge of his or her official duties.” Second, Charter section 2604(b)(3) prohibits a public servant from using his or her position “to obtain any financial gain, contract, license, privilege or other personal advantage, direct or indirect, for the public servant or any person or firm associated with the public servant.”² These provisions apply to a wide range of public servant’s activities, and COIB has relied on these provisions in an array of enforcement actions. For example, COIB has cited these sections of the law in enforcement actions against individuals who (i) used City time or resources

to pursue an online degree, (ii) had subordinates perform their personal errands, (iii) used their City positions to seek private clients, (iv) used City computers and e-mail accounts in an amount substantially in excess of the *de minimis* amount permitted by the City, and (v) in many other situations where public servants have failed to uphold the fundamental principles of public trust reflected in these key provisions of the Charter.³

Chapter 68 of the Charter also addresses the unique role and challenges faced by elected officials. In particular, the Charter explicitly recognizes the need for flexibility in the application of Conflicts of Interest Laws so that elected officials, and in particular Members of the City Council, may exercise their official duties. For example, Council Members are not required to recuse themselves from voting on a matter when a personal private interest is at stake, but instead are often allowed to disclose that interest on the record.⁴ This is to allow the Council Member to exercise his or her essential functions.⁵

Through a series of advisory opinions, including most notably a 2009 Advisory Opinion, COIB has interpreted the Charter and has given the language practical effect in the context of Council Members’ actions on discretionary funding.⁶ Additionally, COIB has always recognized certain fundamental facts about the role that Council Members play and the communities that Council Members serve. In particular, COIB recognizes that Council Members often represent communities where they grew up, where they have family and friends who are civic-minded and who are also leaders in the community, working in government, business, the non-profit sector and often serving on the boards of local organizations. Council Members themselves often have numerous ties to businesses and organizations in their communities, and even on occasion have outside employment at these organizations. COIB has sought, in its many advisory opinions, to strike an appropriate balance between the need to guard against inappropriate personal advantage and the potential to disenfranchise the constituents of the elected official. The recommendations of the Board differ depending on what action the Council Member is taking, whether it is an essential function of their job, such as voting on the budget, as opposed to an official action which is less essential or is ceremonial. What may be considered a permissible action for a Council Member when voting on legislation may not necessarily be allowed if instead the Council Member is sponsoring legislation or discretionary funding.⁷

III. The Roles of Council Members in the Discretionary Funding Process

Members of the City Council have two primary responsibilities when it comes to discretionary fund-

ing: sponsoring funding, and voting on budget-related legislation that provides funding. In its 2009 Advisory Opinion, COIB has articulated guidelines for Council Members to follow that are specific to Council Members' official actions in each of these two contexts.

First, Council Members sponsor specific organizations for funding. Every Council Member is allotted a certain amount of funding for local initiatives and programs for youth and for the elderly in their districts. The Council Members have broad discretion to decide how to allocate the funds to organizations providing services to their constituents. They also have a role in selecting organizations for funding pursuant to various city-wide and other Council initiatives.

COIB has set out specific guidelines and restrictions on what Council Members may and may not sponsor depending on their own involvement with the organizations, or the affiliation of a person with whom they are associated. In general, a Council Member may not sponsor funding for an organization where such sponsorship would conflict with the discharge of his or her official duties or would result in a privilege or personal gain for the Council Member or a person or firm associated with the Council Member. COIB analyzed how this general principle applies to different factual scenarios where the Council Member, a person "associated" with a Council Member, or a member of the Council Member's staff has an affiliation with an organization for which the Member proposes to sponsor funding.

COIB ruled that a Council Member may not sponsor funding for any organizations where he or she has a paid position with an organization, is an unpaid member of the board of directors of the organization, or where a person "associated" with the Council Member has a paid position with the organization and is reasonably likely to benefit from that funding.

On the other hand, COIB concluded that a Council Member may sponsor funding for an organization where the Member serves on the board of directors *ex officio* as part of his or her Council duties, where the Member is an honorary, unpaid or non-voting member of the board of directors with no legal rights or responsibilities, and where the Member is a dues-paying member of an organization where the dues are nominal and the membership is sizable. COIB also determined that a Council Member may sponsor funding for an organizations when a person "associated" with the Council Member is a paid employee or paid officer or director of the organization, as long as there is no reasonable likelihood that the associated person will benefit from that funding, where a person "associated" with the Council Member is an unpaid member of the board of directors, or where the Council Member's staff person has an affiliation with the organization.

The second key responsibility for Council Members in the discretionary funding process is the act of voting on the final City budget at budget adoption, and when funding is designated for an organization, transferred from one agency to another, or transferred from one organization to another. The Charter recognizes the responsibility of voting on matters as an essential Council Member function.⁸ Accordingly, COIB applies the Conflicts of Interest Laws differently for voting than for sponsoring legislation. In particular, pursuant to Advisory Opinion No. 2009-2, COIB has determined that even where a Council Member may not sponsor funding, it is nonetheless permissible for the Council Member to vote on the funding, because this vote is an essential function the withholding of which would disenfranchise the Council Member's constituents. However, the Council Member must, in certain circumstances, disclose the affiliation with the organization on the record of the Council proceedings and must follow up such disclosure with notice to the Conflicts of Interest Board.⁹ In particular, a Council Member must disclose on the official records of the Council and to COIB when the proposal up for a vote contains funding for an organization at which the Member has a paid position, is an unpaid member of the board of directors, or where a person "associated" with the Council Member has a paid position and is reasonably likely to benefit from that funding.

COIB's guidance in Advisory Opinion 2009-2 provides greater clarity for Council Members on what discretionary funding they may and may not sponsor, and what they must disclose on the official records of the Council. The New York City Council has reviewed this guidance and developed its own protocols to ensure compliance. Today, Council Members not only are able to comply with the law, but often refrain from proposing funding for organizations to avoid even the appearance of a conflict of interest.

IV. Council Discretionary Budget Conflicts of Interest Compliance Program

The Council has taken a number of steps to comply with City laws, rules and guidance from the Conflicts of Interest Board and to ensure that Council Members also comply with these requirements.

First, prior to sponsoring funding for a program, each Council Member must complete an application that includes a conflicts of interest disclosure section. In this section, the Council Member must either certify that he or she has no potential conflicts of interest with the group proposed to be funded or complete a form describing the relationship that the Council Member or any individual on the Council Member's staff has with any person involved with the organization. The Council's General Counsel's Office then assists the Council

Member in determining whether the relationship prohibits the sponsorship of the proposed funding. The Council's General Counsel's Office works closely with staff at COIB in making these determinations.

Second, as a further check for potential conflicts of interest, each organization applying for discretionary funding must affirm whether or not any elected official of the City, or person associated with an elected official, is an employee, consultant, director, trustee or officer of the organization or has any other financial interest in the organization.

Third, Council Members now are asked to sign a written disclosure prior to the adoption of the budget or the adoption of any legislative action which effectively changes groups receiving discretionary funding. They are asked to review all the groups proposed to receive discretionary funding in any given Council action—both those that they are sponsoring as well as those sponsored by their colleagues. They must either attest that they have no conflicts with the groups being awarded discretionary funding in the action on which they are voting or disclose any potential conflicts. In accordance with the requirements of Chapter 68 and the opinions of the COIB, relationships between Council Members and groups receiving discretionary funding sponsored by other Council Members are generally not prohibited and do not preclude the Council Member with the relationship from voting on the funding action. However, certain of these relationships are required to be disclosed in the official record of the proceedings at which the vote is taken. For example, Council Members have disclosed that they were voting on a resolution providing funding for schools that their children attend, hospitals where family members work, and universities where they themselves serve as adjunct professors. These written disclosures prior to the adoption of the budget or subsequent Council actions relating to discretionary funding enable the Council's Office of the General Counsel to work with Council Members and COIB to ensure that proper disclosures are made where necessary.

V. Challenges and Next Steps

The Council's discretionary budget compliance program has proven enormously effective in many regards. In particular, it has served to increase awareness of the City's Conflicts of Interest Laws. The Conflicts of Interest Laws do not necessarily prohibit a Council Member from funding groups because of these relationships, but each factual situation where there is a relationship must be analyzed based on COIB's guidance. Council Members are much more conscious of what organizations they may sponsor for funding, and when they must disclose a relationship on the official records of the Council. At the same time, however, further challenges remain with respect

to building a strong system to guard against inappropriate conflicts of interest in the discretionary funding process.

First, the process is extremely burdensome for the Council Members. Each Member has a changing staff and often a vast network of relatives and other individuals with whom he or she is "associated" in the community. These individuals are entering and leaving jobs and joining boards. A Council Member can face a daunting challenge just keeping track of all these relationships. Additionally, when the Council budget contains as many 5,000 groups, a Council Member is responsible for knowing, and in some cases disclosing, whether he or she is "associated" with any one at any of those 4,000 to 5,000 groups. The list of groups is not ready to be distributed until 24 hours prior to the adoption of the City's budget, leaving Council Members little time to review this list. Council Members are therefore having trepidations about signing a form because of the potential to overlook a potential conflict of interest.

Second, the process is burdensome for the Council staff. Passing a budget is an intense and time-sensitive process. It is often a race against time. It was absolutely critical to add a vetting process for the organizations to ensure their legitimacy and capacity to provide services. Add to that the need to cross-check these groups with the Council Members' relationships, and it becomes an enormous undertaking. Adding another layer of due diligence adds to the pressures at the time of adoption.

Third, because of other transparency measures adopted by the Council, budget resolutions are considered on a regular basis, and the disclosure process now takes place year-round, resulting in volumes of paperwork and substantial repetition.

Fourth, there are questions still about what should be covered under the Conflicts of Interest Laws and whether they go far enough. Some have suggested a broader definition of "associated" person for the purpose of discretionary funding. Others have suggested that there be an ongoing disclosure requirement for the organization and Council Member during the life of the City contract. Every step to strengthen requirements adds to the burden of compliance, and, at some point, the system will either collapse of its own weight or the possibility of innocent error will undermine the effort to be in compliance.

The Council will continue to consider these challenges. In the meantime, the process in place has sent an important message to the public that City funds are being used to fund necessary services and programs in the community, and is worthy of emulation by legislative bodies around the state and the nation.

Endnotes

1. See NYC Charter Section 311 and PPB Rule 1-02.
2. A person or firm “associated” with a public official includes a spouse, domestic partner, child, parent, or sibling, or a person with whom the public servant has a business or other financial relationship. It also includes a firm in which the public servant has a position or ownership interest. See Sections 2601(5) and (12) of the Charter. Additionally, a public servant is considered to have a position with a firm if he or she is an officer, director, trustee, an employee, holds a management position in a firm, or serves as the firm’s attorney, agent, broker or consultant. See Charter Section 2601(b)(18).
3. See, e.g., http://www.nyc.gov/html/conflicts/downloads/pdf2/Enforcement_Case_Summaries.pdf. See NYC Charter Section 2604(b)(1)(a). NYC Charter Section 2604(b)(1)(a) states with respect to conduct prohibited by the Charter that “in the case of an elected official such action shall not be prohibited, but the elected official shall disclose the interest to the conflicts of interest board, and on the official records of the council or the board of estimate in the case of matter before those bodies.”
4. See, e.g., Advisory Opinions Nos. 92-22 and 94-28, permitting Council Members to take actions, such as voting on legislation, even if such actions benefited persons with whom they were associated. It also ensures that individuals, organizations and businesses should not uniformly be disadvantaged, or essentially disenfranchised, because of the private interests or relationships of the elected official.
5. See COIB Advisory Opinion No. 2009-2.
6. *Id.*
7. *Id.* at pages 5-8.
8. See NYC Charter Section 2604(b)(1)(a).
9. *Id.*

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