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Advisory Opinion 14-22

(Acceptance of Gifts)

Summary: It would not be a violation of Article XXIX for the requester to accept a gift under the circumstances of this request.

I. Background

The requester works as Chief Deputy District Attorney for the Office of the District Attorney, 18th Judicial District. The requester's caseload primarily consists of homicide cases as well as some sexual assault matters. The requester was previously involved in a high profile case in which DNA evidence was a significant issue, and she encounters DNA evidence frequently given the types of cases she handles. As a result she is viewed as having significant expertise in the area of DNA as evidence in criminal trials. In 2013, based on this expertise, the requester was asked by the Aurora Police Department to participate on an Independent Review Panel to examine the destruction of DNA evidence by members of the Aurora Police Department's property unit.

As background, in June 2013 the Aurora Police Department discovered that DNA evidence in 455 cases had been prematurely destroyed by staff in the department's property storage unit. As a result the Chief of Police convened an internal audit group and an independent panel of five members of the law enforcement community to analyze the destruction of evidence and issue a report of findings. The requester participated on this panel and personally reviewed 373 cases

specifically related to incidents in Arapahoe County, and assisted in drafting the final Report, which was provided to the Commission. Although the requester did attend panel meetings during business hours, while she was compensated as an employee of the District Attorney's Office, she did the majority of the case review work on evenings and weekends during her personal time. During an award presentation in November 2014, the Acting Chief of the Aurora Police Department presented the requester and the other panel members with a framed letter of appreciation, a personalized pen and note pad desk set, and a gift card to the Capital Grill Restaurant valued at \$150. The requester believes the funds for the gift cards were approved for expenditure by the city commissioners of Aurora. The requester would like the IEC's opinion regarding the propriety of acceptance of the gift card.

II. Jurisdiction

The IEC finds that the requester is a "government employee" subject to the Commission's jurisdiction. Colo. Const. Art. XXIX, sec 2(1)(3).

In Position Statement 09-04, Definition of "Person," the Commission determined that the definition of "person" in Article XXIX, Section 2(4) and C.R.S. §2-4-401(8) includes the phrase "other legal entity," which the Commission found was broad enough to include a government agency or governmental subdivision. Therefore the City of Aurora qualifies as a person for Article XXIX analysis.

The requester is employed by the counties comprising the 18th judicial district and not the judicial branch, and is therefore a "government employee" pursuant to Article XXIX, Section 2(1).

III. Applicable Law

Section 1 of Article XXIX (Purposes and Findings) provides that:

- (a) The conduct of public officers, members of the general assembly, local government officials and government employees must hold the respect and confidence of the people;
- (b) They shall carry out their duties for the benefit of the people of the state;
- (c) They shall, therefore, avoid conduct that is in violation of their public trust or that creates a justifiable impression among members of the public that such trust is being violated;
- (d) Any effort to realize personal financial gain through public office other than compensation provided by law is a violation of that trust.

Section 3 of Article XXIX (Gift Ban) states in relevant part:

(2) No public officer, member of the general assembly, local government official, or government employee, either directly or indirectly as the beneficiary of a gift or thing of value given to such person's spouse or dependent child, shall solicit, accept or receive any gift or other thing of value having either a fair market value or aggregate actual cost greater than fifty dollars (\$50) in any calendar year, including but not limited to, gifts, loans, rewards, promises or negotiations of future employment, favors or services, honoraria, travel, entertainment, or special discounts, from a person, without the person receiving lawful consideration of equal or greater value in return from the public officer, member of the general assembly, local government official, or government employee who solicited, accepted or received the gift or other thing of value.

§24-18-104(1)(b): A public officer, a member of the general assembly, a local government official, or an employee shall not "[a]ccept a gift of substantial value or a substantial economic benefit tantamount to a gift of substantial value: (I) Which would tend improperly to influence a reasonable person in his position to depart from the faithful and impartial discharge of his public duties or (II) Which he knows or a reasonable person in his position should know under the circumstances is primarily for the purpose of rewarding him for official action he has taken.

IV. Discussion

A. The gift in this instance does not implicate Article XXIX because lawful consideration was given in return.

Since the value of the gift card is \$150, it would appear on its face to violate the restrictions of Article XXIX. Article XXIX prohibits any covered local government official or government employee from accepting or receiving a gift over \$50 in value. (*Note*, the gift amount was increased in 2011 to \$53, *see* Position Statement 11-01, Adjustment to the \$50 Gift Limit.)

However, the plain language of Article XXIX indicates that the gift in this instance is not subject to the gift ban provision.

Because Article XXIX, Section 3(1) states that a gift may not be accepted unless there is consideration, the ban does not apply in this matter, as, based on the facts presented here, lawful consideration was given. Black's Law Dictionary defines the term "consideration" as "[s]ome right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility, given, suffered, or undertaken by the other." In this instance, the benefit provided by the requester in exchange for the gift card is her expertise in the area of DNA evidence, and her work on the Panel, including the co-authoring of the report titled "Independent Review Panel Investigation Into the Destruction of Evidence at the Aurora Police Department Final Report." As Chief Deputy District Attorney, the Requester's primary job duty is to represent the People of the State of Colorado in felony trials, primarily homicide cases. Her participation on the Panel was separate and apart from her standard job duties, although it is clear that her position with the Office of the District Attorney and the expertise she gained handling cases where DNA is at issue was the basis for her being asked to participate. The panel did not review DNA evidence relating to homicide cases, and the majority of the cases at issue were either already prosecuted or were cases that would not be filed. Thus her role on the panel was not duplicative of job duties for which she was already being compensated by the Office of the District Attorney. In fact, as the requester has pointed out, much of the review work took place during her personal time at night and on weekends.

Therefore, because the requester provided a valuable service to the City and the Department through her participation on the panel, which comprised lawful consideration for the gift card she received and her efforts in this regard were not duplicative of work for which she was already being compensated, the ban in Article XXIX does not apply. As to the other items received, a framed letter and personalized pen and note desk set, they also do not violate the gift ban

pursuant to Article XXIX, Section 3(3)(b) as unsolicited items of trivial value. Because the Commission does not believe the gift ban applies to this case, it is not necessary to examine whether any of the other exceptions in Article XXIX are applicable.

B. The acceptance of the gift in this instance would not result in an appearance of impropriety.

In Advisory Opinion 09-06 (Service on the Board of a Nonprofit Entity) the Commission found that “[a]ppearances of impropriety can weaken public confidence in government and create a perception of dishonesty, even among government officials who are in technical compliance with the law.” Page 8. Article XXIX emphasizes that public employees should avoid any conduct, which may violate the public trust or appear to violate the public trust. *See also* Advisory Opinion 09-06, page 3 and C.R.S. §24-18-103. In this instance, there appears to be no circumstance in which an appearance of impropriety would result, nor would public confidence in government be weakened by the acceptance of this gift. Additionally, through her participation, the requester was performing a duty for the benefit of the people of the state by addressing the problems that lead to the untimely destruction of DNA evidence.

Requester’s supervisor, the Assistant District Attorney, and the elected District Attorney were both present during the ceremony and were aware of the items that were given to her. The Assistant District Attorney states they did consider whether there would be an appearance of impropriety based on the receipt of the items; however, because of the amount of work invested into the project, its importance, and the candid nature of the findings issued in the report, they determined the gift was not inappropriate and no appearance of impropriety would result.

V. Conclusion

The Commission believes that acceptance of the gift card and other items from the City of

Aurora under the circumstances of this request does not constitute a violation of Article XXIX. The Commission cautions public officials and employees that this opinion is based on the specific facts presented here and that different facts could produce a different result. The IEC, therefore, encourages individuals with particular questions to request more fact-specific advice through requests for advisory opinions and letter rulings.

The Independent Ethics Commission

Rosemary Marshall, Chairperson

Matt Smith, Vice-Chair

Bob Bacon, Commissioner

William Leone, Commissioner (*Dissenting*)

Bill Pinkham, Commissioner

February 13, 2015

Commissioner Leone Dissents from the Opinion:

I respectfully dissent from Advisory Opinion 14-22 issued on February 13, 2015. I am convinced that the requestor performed services that are of a value that more than equals the amount of the award given, and that she spent her own time on evenings and weekends to perform these services. I am similarly convinced that both the Aurora Police Department and the Arapahoe County District Attorney's Office believe in good faith that the review of DNA lab procedures and the resulting reforms and disciplinary action were objective, sufficient and appropriate. However, I also believe that the requestor's service in the review process implicated her official duties as a prosecutor, at least in the eyes of the public. Especially given the events of recent months which have challenged police departments, prosecutors and law enforcement officials throughout the United States to question and scrutinize the objectivity of their conduct,

it is bad policy and unnecessarily taints the process by having the agency investigated reward the investigator with a cash gift that exceeds the limits of Article XXIX. Although it is common within law enforcement agencies to recognize good work and uncommon sacrifice by members of the law enforcement community with plaques and the like, the granting of a cash award between agencies raises a different question. And, tempted though we might be to say that a \$150 gift card to a restaurant would not be sufficient inducement to cause a well-regarded and exemplary career prosecutor to be influenced in the performance of her work, the voters established \$50 (now \$53 as a result of inflation) as the threshold for gifts. The potential appearance of impropriety that results could easily have been avoided. I doubt that any ethical constraint would have prevented the District Attorney from giving the requestor time off from her normal duties to perform the review or even paying a bonus for her work on the review on behalf of the DA's office as a reward for the additional time and sacrifice made by the requestor. It is a part of the DA's office's function to be a guardian of citizen rights and to vigorously investigate and correct errors and defects in the administration of justice that might affect the integrity of its prosecutions. My complaint is with the giving of a gift by the Police Department to the person who was in part responsible for investigating its conduct, and who will continue to perform the important role of the attorney for the People of the State of Colorado, including, on occasion, as a check and balance to law enforcement.

By dissenting from AO 14-22, I intend no criticism of the elected District Attorney, or the requestor, nor do I suggest any infirmity in the review that was undertaken or in the resulting reforms and disciplinary actions. However, one purpose of Article XXIX was to press elected officials and other public servants to be mindful of the appearance of impropriety. Here, the requestor did the right thing by seeking an opinion regarding the gift. I had hoped that, on

reflection, the office of the District Attorney would have reconsidered the wisdom of accepting the gift and set a higher standard.