

TO: Greenburgh Town Board
Greenburgh Town Clerk

OPINION 2010-9

Background

On September 29, 2010, an elected Town official, pursuant to Section 11D(2) of the Code of Ethics, requested an advisory opinion from the Board of Ethics regarding the official's giving written input to the Town Attorney, who is acting as a hearing officer on an appeal from the Town official's denial of a request for documents made under the Freedom of Information Law ("FOIL").

According to the facts presented to the Board of Ethics, the appeal implicates both the legality of acts taken by the Town official and facts relevant thereto.

Opinion

Normally any Town resident can communicate with any Town official. That is part and parcel of a democracy. The Town official who requested the advisory opinion presumably has a legitimate interest in having correctly stated what the official believes are legal and factual matters relevant to the official's performance of duties. The Town official, being an elected Town official, is a resident of the Town, and nothing in the Code of Ethics restricts the right of communication with public officials because one is an elected Town official (other than the provisions of Section 4L, none of which are relevant to this situation). Thus, the Board of Ethics does not believe that there is any restriction in the Code of Ethics against this Town official seeking in writing that the Town Attorney, in his role as a hearing officer on an appeal from denial of a request made under FOIL, consider certain legal matters and factual information.

There is no ethical reason why Town decisions should not be informed by the most fulsome legal and factual input. However, the Board of Ethics notes that there are several unique features here: The Town official who submitted the request for an advisory opinion is the official who took the act being appealed and the official's actions are therefore the subject of the appeal. This is akin to being a party in the appeal. Also, while the Town official acted in an administrative capacity in denying the FOIL request, it appears to the Board of Ethics that the Town Attorney in acting as a hearing officer of the appeal is acting in a quasi-judicial capacity. Furthermore, and what probably separates this situation from most, is the fact that the Town official and the hearing officer both have full-time positions in the Town of Greenburgh and virtually daily interactions at Town Hall.

Given that the Town official in question is the official whose administrative act is being appealed and the full-time positions at Town Hall of both that official and the official hearing the appeal, the Board of Ethics believes, without finding that it would be a violation of the Code of Ethics to do otherwise, it would be "best practices" for the Town official to send the appealing party a copy of the input and the hearing officer to give the appealing party a reasonable opportunity to respond in writing.

This opinion is rendered under Section 11D(2) which authorizes the Board of Ethics to render advisory opinions and Section 11H which authorizes the Board of Ethics to make recommendations regarding ethical conduct of public officers.

Nothing in this Opinion addresses the merits of the FOIL appeal in general or in particular how the hearing officer should deal with the substance of the legal matters and factual information presented by the Town official and/or any response received from the appealing party.

BY THE BOARD OF ETHICS

Adopted at October 19, 2010 Meeting

Voting For: Mr. Constantine
Mr. McLaughlin
Mr. Rivera
Mr. Scott
Mr. Sigal