

**ADVISORY OPINION
CONFIDENTIAL
Case No. 10021.A
, 2010**

[John Smith]

Chicago, IL 606

You are [a high-ranking City official], and deal closely with a Chicago sports team, ["T"]. You have been in contact with our office about an unwritten arrangement you had with [T] under which you could purchase tickets at face value. Our Executive Director recommended to you last month, that, although the City's Governmental Ethics Ordinance does not prohibit this arrangement, it would be prudent and would mitigate any appearance of impropriety for you to go above and beyond what the law requires and discontinue it, which you have done. You have also asked the Board for more formal advice explaining how the Ordinance applies, and whether you can still purchase your own personal season tickets. This opinion fully explains the Board's conclusions and advice.

FACTS. You first contacted our office and explained that you, and, to your understanding, [others in similar positions] could contact [T] directly and buy tickets for face value, as many as desired, for any home game. You said that you paid face value for all tickets you requested through this arrangement over the years you have been in office, and that these tickets were requested of you by others and you then made them available to the requesters and were reimbursed from them for exactly what you had paid [T] for the tickets: their face value. You said you have kept detailed records of every such transaction. At your suggestion, Board staff spoke last year with a [T officer], who confirmed that [T] offers this same arrangement to all [similarly situated government personnel] in the state, that other [organizations] extend the same courtesy.

Board staff then extensively researched relevant legal authority and found that no case law exists from which the Board could conclude that this ability to purchase tickets at face value was prohibited by the Ordinance, or was a "gift," or which would guide the Board in valuing it if it were a gift. Board staff then advised you that it believed that nothing in the Ordinance prohibited this arrangement, but that the arrangement did present an appearance of impropriety based on the "special access" to tickets priced at face value that you and other [City] officials have (this you knew, which is why you sought our advice). Staff advised you that it would bring your questions to the full Board.

After the full Board's discussion of the matter at its June 2009 meeting, we authorized our Executive Director to advise you that: i) nothing in the Ordinance prohibits this practice; but ii) it creates an appearance of impropriety; and thus iii) if you were to request to purchase tickets for games or events for which a

reasonable person would likely need to pay at least \$50 in excess of the tickets' face value, you should consult the Board for more formal advice.

On [date], you did ask our office to address more formally: i) whether the Board advises you to discontinue the practice; ii) were you to discontinue it, what you should explain to callers inquiring about tickets; iii) how you can ensure that those callers wouldn't use your name if they then were to contact [T] after your office refers them; and iv) whether you would be prohibited from buying your own personal [T] season tickets. At our direction, our Executive Director advised you, and this opinion more fully explains, that: i) in the interest of prudence, and to avoid the appearance of impropriety, the Board recommends that you discontinue this practice, even though, we emphasize, it is not prohibited by the Ordinance and you would be thereby going "above and beyond" what the Ordinance requires; ii) you or your staff advise persons who contact your office asking whether you can obtain [T] tickets for them that your office has discontinued that practice, and they should contact [T] directly; iii) you inform [T] in writing that you have discontinued this practice; and finally, iv) nothing in the Ordinance prohibits you from continuing to purchase your own season tickets from [T] , on the same conditions and terms as any other season ticket applicant or holder. Our analysis follows.

LAW AND ANALYSIS.

1. The "Arrangement." We will first address the Ordinance's application to the ticket "arrangement." Two provisions of the Ordinance's gift restrictions section are relevant.

First, § 2-156-040(b) of the Ordinance prohibits any person from giving or offering to give to any City official or employee (or to his or her spouse, domestic partner, minor children or other family members living in the same home), and prohibits them from accepting, anything of value, based on an explicit or implicit mutual understanding that the City official's or employee's votes, official actions, decisions or judgments concerning City business would be influenced thereby. There is nothing in facts presented to or the record before this Board that would warrant a conclusion that there was any understanding between you and [T] that any of your [official City] decisions would be influenced by this "arrangement." We conclude that this section of the Ordinance does not apply here.

Second, Section 2-156-040(c) of the Ordinance prohibits a person who has an "economic interest in a specific City business, service or regulatory transaction" from giving, directly or indirectly, to any City official or employee whose decision or action may "substantially affect" that transaction (or to his or her spouse, domestic partner, minor children or other family members living in the same home)--and it prohibits any of them from accepting--"any gift" of "an item or service other than a gift with a value of less than \$50." Further, there is a \$100 gift cap from any one such source in a calendar year.

You have asked us to assume, for purposes of this opinion, that [T has] an economic interest in one or more specific City services and/or regulatory transactions, and that you can make decisions substantially affecting those transactions.

Therefore, the relevant questions are:

- i) whether the opportunity to buy tickets at face value can be considered a gift to you from [T] (this is a question only if those tickets are in high demand, and/or other potential purchasers who do not request tickets through you might need to pay more than face value for comparable tickets); and, if so,
- ii) whether we can ascribe a value to that opportunity; and if so,
- iii) would the ascribed value of the opportunity be more than \$50 for any given ticket or more than \$100 in a calendar year.

A "yes" answer to all three questions would mean that the arrangement is prohibited by the Ordinance.

The Ordinance defines a "gift" as "any thing of value given **without** consideration or expectation of return." § 2-156-010(m) (emphasis added). Here, however, you have paid [T] full face value for all tickets you have ever requested through this arrangement. In other words, you **have** given consideration—namely, the face value of the tickets, which is the same price at which [T] would sell the tickets to anyone else. If we follow this analysis, then, there would be no gift to you, because you always paid full face value for the tickets—the items were given **with** consideration. For this reason alone, the Board could conclude flatly that there is no "gift" here, as the term is defined in the Ordinance. We note at this point that at least one other ethics commission seem to have drawn precisely the same conclusion.¹ But, we also note, as have still other ethics commissions, ethics commentators, and journalists, that the potential thing of value here, gift or not, is the "special access"—the ability to pay face value for high-demand tickets for which others might well have to pay a premium, and the ability to avoid inconvenience and uncertainty (that is, what economists blandly call "transaction cost").² And we have not yet resolved whether the consideration

1. The Kentucky Legislative Ethics Commission, addressing whether state legislators could pay face value for assured tickets to the Kentucky Derby, concluded, in effect, that there is no gift or "anything of value" given or accepted when legislators paid face value for those hard-to-get seats: "The Commission believes that ... 'anything of value' does not include anything for which the recipient pays or gives full value. If a legislator pays the face value of a ticket then he or she is not accepting anything of value ..." See Opinion of Legislative Ethics Commission 98-5, at 2. (1998).

2. See, e.g. Massachusetts State Ethics Commission Advisory 04-01 (2004); "Lawmakers Score Ticket Deal," Wall Street Journal, November 4, 2009; "Lawmakers can buy [Sugar Bowl] tickets at face value," New Orleans Times-Picayune, December 12, 2007; "Need Cubs, Sox Playoff tickets? Ask Your alderman," Chicago Sun-Times, September 23, 2008; "Playoff tickets no trouble for most politicians Cubs, Sox extend ticket offers to political circles," Chicago Tribune, September 28, 2008; and the statement from the Executive Director of Citizens for Responsibility and Ethics in Washington: "Anytime you have access to something that regular people don't

you gave, namely, the face value of the tickets, constitutes consideration for **that** value, or, what that value is.

In our 24+ year history, the Board has not decided any cases that give us firm guidance in addressing these issues.³ But several other jurisdictions have. Our review of the decisions and materials from these other jurisdictions' ethics commissions shows that not one of them has ever concluded that a government official who was offered and partook of this "special access," by that fact alone, under circumstances like those present in this case (where a public official pays face value for tickets, pursuant to a long-standing arrangement) violated its ethics laws. However, as we previously advised you to do—and as you have done—those other jurisdictions' ethics commissions counsel government officials to seek advice in specific instances. Various rationales are adduced: i) this "special access" is not considered to be a gift or "thing of value" because the maximum

have, it should be considered a gift. Regular people can't call the Major League Baseball office and get tickets," cited in Wall Street Journal, *supra*.

3. The only cases that we could find addressing valuation of given items are Case Nos. 88005.A and 88070.A. There, an alderman and a City Council staff member asked whether and how 56 non-transferable movie passes, valid during a specified duration of time, could be valued and used, and whether White Sox attendance passes could be valued and used. Because the alderman and staff member were not asked to pay for these passes, we assumed that they were gifts, and concluded that, as movie prices vary according to the time of the screening, "the value of the gift corresponds to the market value of the benefits which are potentially afforded to the recipient." That is, we decided to use the maximum possible value of each pass and multiply it by the number of passes offered (the most expensive admission price, not the matinee; or the maximum number of games multiplied by announced seat prices). But the valuation in those cases was still confined to the published movie ticket or seat prices, albeit the maximum ticket prices. And those prices were readily ascertainable. We could certainly use this measure here, as have other jurisdictions, and it would correspond to face value. Moreover, [T] would not (and could not) charge anyone more than the stated ticket price, which is what you've paid. So, following the logic of these cases, we would come back to stated ticket price. But this still begs the question of what is the "market value" of the "benefits potentially afforded to the recipient"—the face value of the ticket price may well not measure the value of convenience and of guaranteed access to [certain high-demand events].

In other words, much depends on how we construe the phrase "market value ... potentially afforded to the recipient." So, aside from stated ticket price, just what is the value of a ticket for any given [sports event]? Obviously, that depends. It may be more—or less—than the stated ticket price. Some economists would contend that the true market price for a sports ticket can be measured only approximately, or *ex post facto*, or only on the day of game, using data from sales within the reasonable geographical area surrounding [the event venue] where prospective buyers approach prospective sellers and vice-versa. We believe that in practice, it would always be possible to come to an approximate valuation of one or more tickets to any [event], but it would require a very large outlay of resources to determine, and, more importantly, need to be *a posteriori*—this price could not be known in advance. This, of course, makes such a measure unhelpful as a guide for future transactions, not to mention that it would not be worth the cost of figuring out. The value of any premium over face ticket value that a reasonable purchaser would pay for a [T] (or any sports, or indeed any entertainment event) ticket depends on a myriad of factors that vary widely: the date, [T's] place in the standings, the weather, the opponent and its place in the standings, the [lineups], how much time before the [event] remains at the time the transaction is consummated, the aggressiveness and bargaining prowess of the buyer and seller, etc. To come to a meaningful general, *a priori* or abstract rule to determine the "market price" that a reasonable purchaser would pay over face ticket value for any given event is, in our view, exceedingly difficult and unnecessary. Thus it would not be reasonable for this Board to advise you that the law requires you to apply such a rule whenever someone requests that you obtain tickets for them, nor would it be reasonable to advise you that the law requires you to contact the Board for guidance in every such instance. Perhaps this kind of problem is what the apocryphal French philosopher (some say it was the title of a lost essay by German philosopher Immanuel Kant) had in mind when he said "what you suggest may be all very well in practice, but it will never work in theory."

price that the original seller could ask has been paid to that seller⁴; ii) as described above, the value of the item is considered to be its face value—even if a typical ticket-seeker would likely need to pay a premium over face value to a ticket broker, scalper or other reseller, so that, if this "special access" is a gift, it has no value⁵; or iii) this "special access" may be a gift, but there is no accurate or useful way to measure its value.⁶ Either way, no jurisdiction's ethics commission has found that a public official who is offered and partakes of this "special access" violates its ethics laws, though some have pointed out that, if evidence exists that a public official has taken action that, in the specific situation, would constitute exploiting or misusing his or her position to be able to purchase high-demand tickets at face value, or receive them free of charge—in other words to force an offer where none existed—then he or she might violate provisions covering the proper use of one's government position or authority.⁷

4. See footnote 1, *supra*.

5. This is the way that the Florida, Nebraska and Rhode Island Ethics Commissions address the issue. See Council on Governmental Ethics Laws Discussion Forum, January 17, 2008 et seq. As discussed in this opinion, we need not, given our advice and conclusion, address whether this "access" is a "gift." See also U.S. House Ethics Manual, House of Representatives Committee on Standards of Official Conduct, p. 73.

6. This point seems indisputable. Cf. footnote 3, above. Our counterparts in New York City, analyzing this question, have concluded that the ability to purchase tickets at face value cannot be said to violate their gift restrictions, which effectively prohibit the receipt of a gift with a value of \$50 or more. The Board wrote: "While it may be argued, where the public servant pays face value, that no value is conveyed, it is probably more accurate to conclude that the value cannot be reasonably calculated." It then concluded that, while this special access will not violate the gift prohibitions of the New York City Charter, it may in certain circumstances violate the prohibition on misuse of one's City position. See New York City Conflicts of Interests Board Advisory Opinion No. 2000-4, pp. 15-16.

7. See New York City Conflicts of Interests Board Advisory Opinion No. 2000-4, pp. 15-16. But see also Massachusetts State Ethics Commission Advisory 04-01 (2004). There, the Commission addressed whether public officials offered the chance to purchase tickets at face value to events for which the same access is not available to the general public may do so under the Massachusetts law, which prohibits a public official/employee for knowingly using his official position to secure for himself or others unwarranted privileges or exemptions of "substantial value." The Commission's opinion states that:

"special access to purchase tickets not available to the general public is also a special benefit or privilege. Such access to tickets may ... be unwarranted. Even though there may not be a readily assigned value to such access, the Commission has found that certain privileges of no immediately ascertainable dollar or monetary value may also be of substantial value. In determining whether special access provided to a public official/employee to purchase a ticket or tickets to an event is "an unwarranted privilege or exemption of substantial value [that is, worth more than \$50], the Commission will look at the totality of the circumstances. The fundamental question, in each case, is whether a reasonable person wishing to attend the event would pay \$50 or more over face value to purchase the ticket or tickets that the public official is being provided the opportunity to purchase at face value."

Id. at 2-3. The Commission concludes by stating that "public officials and employees are encouraged to seek specific legal advice about the application of the ... law to the purchase of tickets when offered ... special access to purchase [them]." While we appreciate the Massachusetts Commission's analysis of its law, we decline to adopt this as a standard for interpreting Chicago's Governmental Ethics Ordinance, in part because, as we discuss in footnote 3, above, we believe it is not useful as a guide for public officials in advance, because it effectively shifts the burden of becoming the economist onto the public official (or possibly to the ethics commission), and in part because we believe that, for us to conclude that a public official "misused" or "exploited" his City position, there must be evidence before us of "affirmative" actions of solicitation taken, beyond merely accepting, from time to time, a long-standing offer—for example, evidence indicating that a public official forced or created, by virtue of his or her position, an offer to obtain tickets where none existed.

Having studied these materials and opinions carefully, the Board is of the opinion that, in order to advise you with respect to how best to comport your conduct with not only the letter of the City's Governmental Ethics Ordinance, but also its spirit, it is unnecessary to go through the necessarily extensive statistical analysis of determining whether this arrangement constitutes a gift to you (and therefore to other City officials or employees), and if so, its value. Instead, we will simply recommend that, because you are in position to substantially affect [T's] City transactions, you "cut the Gordian knot" and discontinue the arrangement—as you have already done. Cf., e.g. Case Nos. 87078.A and 91046.A (Board concluded that arrangements, one involving distribution of movie passes, the other a large amount of free [professional sports team's tickets] had not violated the Ordinance's gift provisions, but nonetheless recommended that the value of passes used be limited to \$50 in order to avoid the perception of impropriety, and to ensure that future conduct would be clearly and without question within the bounds of the Ordinance). In this way, you will avoid an appearance of impropriety, help mitigate the possibility that the public's confidence in government would be undermined by the practice of public officials taking advantage of "special access" to tickets with price and convenience terms that others would not enjoy, and lessen the perception of special treatment that such an arrangement engenders.

We stress that we are not concluding that, as a matter of law or fact, such access constitutes a gift to you. Nor have we found it necessary to or have we actually placed a value on this "special access" in a meaningful way that would help you and other [City] officials *ab initio*, or in advance. And, we stress, this opinion and our recommendations do not necessarily apply to all City employees or officials offered a similar arrangement with [a sports team or entertainment company or venue] , especially to those who, unlike you, are not now or typically in a position to substantially affect the[ir] City transactions. Instead, we are advising you pragmatically recommending that, as you have

It appears that the paradigm case involving allegations that a public official used or exploited his official position in this manner to secure an unwarranted privilege may unfold in New York State, the official being the sitting Governor of New York, David Paterson. We note that your question and the situation in which you found yourself is **different** from that of Governor Paterson. He has been charged by the New York State Commission on Public Integrity with: 1) violating his state's gift ban by soliciting, receiving and accepting free (and subsequently, face value in that he offered to pay for them after the fact) tickets to Game 1 of the 2009 World Series at Yankee Stadium; and 2) exploiting his official position to secure an "unwarranted privilege" by directing his staff to contact the Yankees and solicit tickets for him, his son and his son's friend, tickets which, the Commission alleges, he "would not have been able to obtain ... for the price that he obtained them at [face value] but for the fact that he is Governor and directed his staff to solicit the tickets directly from the Yankees"; and 3) allowing the backdating of checks so that the tickets would no longer be free, but paid for; and 4) falsely testifying under oath. See "In the Matter of an Investigation into Governor David A. Paterson's Acquisition of World Series Tickets," Notice of Reasonable Cause, March 3, 2010. Governor Paterson's case may well also raise and cause to be decided the issue of when and whether a public official is attending a sports event in his official capacity, and thus whether and when **free** tickets are acceptable. As to that issue, we note that the Chicago's Governmental Ethics Ordinance has an analogous provision, § 2-156-040(d)(iv), but again stress that **those** issues, possibly to be addressed in Governor Paterson's case, are **not** issues here, and this opinion should **not** in any way be understood to address them.

recognized, it is best to put the letter of the law aside on this issue and act from a sense of the law's spirit (*ex legibus*), as well as caution and prudence and the knowledge that by following this recommendation, you will help foster public confidence in government.

As our office previously advised you, we recommend that you or your staff advise anyone who contacts your office and asks whether you can obtain [T] tickets for them that your office has discontinued the practice, and they should contact [T] directly. To protect against someone improperly using your name when calling [T] , we also recommend that you inform [T] , in writing, that you have discontinued this practice, so that [its] box office is on notice that anyone who attempts to use your name is doing so without your authority. We also thank you for bringing this issue to our attention, and for your demonstrated willingness to follow both the letter of the law and its spirit.

2. Your Season Tickets. Finally, we address the issue of your own personal season tickets. There is nothing in the facts presented that indicate that you are receiving any special treatment or discounts from [T]. You purchase and renew your season tickets on the same terms and conditions as anyone else. This Board has long recognized that nothing in the Ordinance is intended to curtail the rights that City officials or employees have to engage in market-rate transactions with local businesses, even those with whom they deal in their City positions. What the Ordinance's fiduciary duty, improper influence and conflicts of interests and use of City-owned property provisions do prohibit is a City official or employee from improperly using his or her City position or authority for personal gain or discounts not available to others, and there are no facts before us in this case that would warrant us to draw such a conclusion. See Cases 88039.A (alderman entitled to discount on car price on same terms as any member of the public); 02023.Q and 06012.Q (aldermen entitled to negotiate home purchases and discounts on same terms as any member of the public).

Moreover, under the Ordinance, you do not, by virtue of being a [T] season ticket-holder, have an "economic interest" in [T] , or its owner, because, we determine, this is a benefit or opportunity that is afforded equally to all citizens of the City--indeed, to all living [T] fans, wherever they are.⁸ See § 2-156-010(l)(d). In this context, you are, under the Ordinance, entitled to be a [T] fan to the same degree as any other [T] fan, and to demonstrate this unique form of devotion financially and spiritually in the same way as any other season-ticket holder or would-be season-ticket holder. Thus, as a [T] season ticket-holder, you are not restricted, under the Ordinance's Conflict of Interests and Improper Influence sections (§§ 2-156-030(a) and -080(a) and (b)), from taking, making or influencing City decisions or actions or votes that affect [T].

8. This Board is aware of the fact that there may well be certain [people who are not interested in purchasing T season tickets]. More importantly, however, the fact that some residents or citizens of the City choose not to or are financially unable to take advantage of this opportunity does not affect our legal analysis on this point. The key is that they could, and you have no legally recognizable unfair advantage.

ADVICE, RECOMMENDATIONS AND DETERMINATION. We advise you that: i) out of an abundance of caution, and to avoid even the appearance of impropriety, you discontinue this practice, although, we emphasize, it is not prohibited by the Ordinance and you would be thereby going "above and beyond what the law requires"; ii) you and your staff advise persons contacting your office about whether you can obtain [T] tickets for them that your office has discontinued that practice, and they should contact [T's] box office directly; and iii) you inform [T] in writing that you have discontinued this practice. Finally, we determine that, although you are able to substantially affect [T's] transactions, nothing in the Ordinance prohibits you from continuing to purchase your own season tickets from [T] , as a private citizen, subject to the same terms and conditions as any other season ticket holder or applicant, while performing your [official City] duties.

The Board's opinion does not necessarily dispose of all the issues relevant to this case, but is based solely on the application of the City's Governmental Ethics Ordinance to the facts stated in the opinion. If those facts are inaccurate, please notify us, as a change in facts may change our advice or recommendations. We also note that other rules, regulations or laws may apply to this case.

RELIANCE: This opinion may be relied upon by any person involved in the specific transaction or activity with respect to which this opinion is rendered.

Miguel A. Ruiz, Chair