

Review of Annual Disclosure Reports

By Julia Davis

Introduction

Annual disclosure by public officials most at risk of a conflict of interest is an essential component of a municipal ethics program. However, disclosure in and of itself does not deter conflicts of interest; review of the information provided is critical for the disclosure to be effective in combating conflicts of interest. This article will discuss the reviews that can and/or should be conducted by the municipal agency administering the disclosure program.



Reviews for Completeness

The first review of an annual disclosure report that the administering entity must do is to ensure that the report submitted is complete and that critical information has not been omitted. The method of filing the report determines how extensive this review must be. If the report filed is a paper report, the filer can easily submit an incomplete report. Since the method of submitting the report—on paper—does not contain an automatic check for completeness, the agency administering the annual disclosure report must manually view each and every report to ensure that the report is complete. Jurisdictions that have filers submit paper reports generally do so because they do not have the resources for an electronic annual disclosure application; these jurisdictions would face similar challenges to obtain the resources to manually check that reports submitted are complete, especially since review of paper reports can be time consuming and onerous.

In contrast, if the annual disclosure report is filed electronically, the electronic filing application can be designed so that an incomplete report cannot be filed. The application can be programmed so that all or critical questions must be answered before the filer can submit a report. There are two advantages to this system: one, as previously stated, the filer cannot submit an incomplete report; and, two, significant staff time and resources are not required to manually check for completeness. However, total completeness may not be achievable and some review may be necessary.¹

Conflict Reviews

The report itself can and should also be reviewed for any potential conflicts of interest. Any review for potential conflicts, whether on the face of the report or through comparison of the report to other databases or

documents, requires the reviewer to be familiar with the jurisdiction's ethics laws, as explained below. Without such knowledge, the reviewer will not know which answers in a report might raise an actual or potential conflict of interest and which ones will not.

When familiarizing oneself with the jurisdiction's ethics code, the reviewer must insure that the annual disclosure is tailored to that code. If the report is tailored to the jurisdiction's ethics laws and requires only information that would reveal an actual or potential violation of the applicable laws, any "yes" answer and substantive response would highlight an actual or potential conflict violation and there would be little to no work required to review a report. However, where the annual disclosure form is not tailored to the jurisdiction's ethics rules—the usual case in New York State—the reviewer must first separate out those questions and answers that would not reveal a conflict of interest under the applicable ethics laws, and exclude them when determining whether a potential conflict of interest exists. Where the annual disclosure report is not tailored to the jurisdiction's ethics laws, a "yes" answer and substantive response would not necessarily reveal a conflict of interest under the law, and significant resources, as well as analytical skills, will be required to conduct a substantive review. New York City's annual disclosure report, which is based on state law,² requires disclosure of information that would not be a conflict under the City's ethics laws. So, for example, an affirmative response to the question requiring information concerning gifts in the amount of \$1,000 or more from a single donor over the course of the reporting year does not reveal a violation of the prohibition against accepting a gift of \$50 or more from a single donor who does business with the City.³

Once the ethics law against which the report is to be compared is identified and the determination whether the report is tailored to those laws is made, review of the report for actual or potential conflicts can be conducted. In the easiest case, the filer provides information in the body of the report that, in of itself, discloses a potential or actual conflict, and the conflicts review can then be conducted on the face of the report. So, for example, in a jurisdiction where the ownership interest of a spouse or domestic partner is imputed to the filer and the report requires disclosure of the ownership interests of the filer's spouse and whether any such firms do business with the filer's agency, a reviewer will know that a potential conflict of interest exists when the filer discloses that his or her spouse's or domestic partner's company does business with the agency that employs the filer.⁴ In this case, the review has identified a potential conflict without reference to any other documents

or databases and the administering agency can insure that the filer is not involved in those business dealings, on behalf of either the municipal agency or the private company, as discussed below.⁵

In addition to reviewing the face of the report to identify actual or potential conflicts of interest, reviews should compare the report with information and databases relevant to that report. For example, if the rules of the municipality require permission for a second job with a company that does business with the municipality, and the entity collecting and reviewing the annual disclosure reports is also responsible for granting that permission, the reviewer should insure that the filer has obtained such permission. This review will likely require a check of the administering entity's database of those employees who have obtained permission for outside employment to determine if the filer obtained such permission, as well as checking the list or database of all vendors to the municipality to determine if the outside employer has business with the municipality.⁶ If the filer has not received such permission, the administering entity should inform the filer of the need either to obtain permission for the otherwise prohibited position or to leave the position.

The reverse review should also be undertaken: the names of all employees to whom the ethics board has granted permission to hold an otherwise prohibited second non-municipal position should be compared with the list of filers to determine if they are filers. If any of the employees who have been granted permission for such second positions are filers, their reports should be reviewed to insure that they have disclosed the non-municipal position. If the job was permitted but not reported, the filer should be instructed to amend the report to disclose the job.⁷ If the job was reported, even though permission was denied, the matter should be referred to the appropriate unit or entity responsible for enforcement of the conflicts of interest laws.⁸

"Public" Reviews

Annual disclosure programs are required to have avenues for the public, whether members of the press or private citizens, to view and obtain portions of annual disclosure reports.⁹ Journalists often review the reports and publish articles discussing their findings. These "reviews" may focus on high level municipal officials generally¹⁰ or on numerous officials filing from a particular agency.¹¹

Journalists often view annual disclosure programs as a device to combat corruption, rather than a tool to prevent actual or potential conflicts of interest.¹² Nevertheless, press accounts of public officials, usually those at a high level who receive press attention, often raise potential conflicts of interest or other issues of concern to an ethics body. When a potential conflict is raised by

a press report, care must be taken in choosing when and how to communicate that conflict to the public official in question. When communications about potential conflicts are based on information obtained from internal documents and databases, reviewers can generally rely on the accuracy of the underlying facts. When the ethics body determines that it should alert a public official to a potential conflict raised by a newspaper article, the body must be judicious in its account of whether the article actually raises a conflict of interest. For example, the letter to the filer could qualify its assessment of the ethics violation that the article apparently raises with the phrase "if the facts set forth in the article are accurate and complete" rather than affirmatively state that the facts known to the agency present a conflict.

Procedure for Reviews

Reviews will only have impact on the filing population if the filer is notified of the potential or actual conflict of interest and advised as to what he or she must do to cure the violation. Notification should be made in writing, whether by email or mail, and should advise the filer both of the grounds for the agency's conclusion that a potential or actual conflict of interest exists and of the specific steps he or she must take to become compliant with the applicable ethics rules. Such steps might include either obtaining permission for a second position or leaving that position if a filer who has not obtained permission for the position or amending a report to include a position for which permission has been obtained but not reported. Finally, a deadline by which any such action needs to be taken should be imposed.

Reviews should be conducted as often as the reports are filed, e.g., annual reviews for annual disclosure. Ideally, every report submitted should be reviewed, both for completeness and potential conflicts. After notifications to the filer are made, the administering entity should follow up during the year before the next annual disclosure is made to insure that the filer has taken the necessary action(s) requested. For those filers who do not respond to the administering agency's notifications, the reports of the following calendar year should be reviewed to determine whether, for example, the filer continues to report a second job for which he or she has not obtained the requisite permission. If the filer has failed to do so, the administering entity could make one final notification to the filer of the need to address the apparent conflict violation and then, if there is no response, refer the matter for enforcement.

The reviews that can be conducted, whether initially for completeness or potential conflicts of interest or annually thereafter for follow-up reviews, may depend on the personnel available to conduct these reviews. Larger jurisdictions with agencies charged with administering annual disclosure programs will likely be better able to review the reports submitted. However, a

jurisdiction with a large number of filers might find it a challenge to review all submitted reports, especially if such reports are submitted on paper.

Where the entity administering annual disclosure does not have such personnel available to it (e.g., where an ethics board's members are themselves unable to review the reports and the board lacks any staff assigned to it), the task of reviewing reports will prove to be challenging. Use of staff from other agencies or temporary non-municipal personnel could be employed to conduct the reviews, but either of these options may create problems. First, personnel conducting the reviews might require significant training and supervision to become familiar with the underlying conflicts laws and to identify a potential conflict on a report. For example, personnel might need to be trained to access and view reports contained in an electronic filing application. Second, if portions of the report are confidential and may not lawfully be disclosed outside of the entity charged with collecting the reports, only the public portion of the report could be reviewed, or the reviewing personnel must be designated as staff of the administering entity for the purposes of review.¹³

Conclusion

In these days of budget constraints, locating and allocating the appropriate resources for reviews may very well represent a challenge to the entity administering a municipality's annual disclosure program. However, reviews of annual disclosure reports must be conducted for an annual disclosure program to be effective. Any reviews must compare the report against the applicable law, and filers must be advised of any potential or actual conflict that are revealed and the method to cure or prevent it. As annual disclosure is an ethics tool, and not a corruption prevention device, the goal of any review program should be to bring a filer into compliance with the jurisdiction's ethics code.

Endnotes

1. For example, if an electronic application is designed so that a filer must choose within a drop down menu to complete an answer, the filer whose response is not included in that drop down menu cannot submit his or her application. To combat that scenario, applications can be built so that inserting an explanation in a comment field will override the need to choose within the drop down menu. In this case, review to insure completeness of an electronically filed report would still be required but could be limited to those reports for which a comment field has been utilized.
2. General Municipal Law § 811(1)(a-1).
3. Compare New York City Administrative Code § 12-110(d)(8)(d) with New York City Charter § 2604(b)(5) and 53 RCNY § 1-01(a).
4. See NYC Charter §§ 2604(a)(1), 2601(12), 2601(16); NYC Admin. Code § 12-110(d)(11).
5. The majority of reviews aim to cure actual violations of the jurisdiction's ethics rules but may also address and prevent potential violations. For example, if a filer's spouse works at a firm that does business with the filer's agency, the review can ensure that the filer has not been involved with any of the agency's interactions with that firm, and recuses himself or herself from any such interactions in the future.
6. The review should not be limited to the administering entity's internal databases but should include any other available municipal or public databases that might be relevant to a filer's report. In addition to the municipality's database of vendors with which it has contracts or from which it purchases services or supplies, there may be available records concerning land ownership and transfers as well as licenses or permits the municipality has issued.
7. The administering agency may wish to add a statement on the annual disclosure form that reporting information in the annual disclosure report does not constitute disclosure to, or a request for permission from, the ethics board or other body that grants such permission.
8. While this article has discussed reviews for a second job for which there has been a failure either to obtain the requisite permission or for a report that fails to disclose one for which permission had been obtained, the universe of reviews is not so limited. Reviews could be conducted for disclosure of prohibited political positions, unauthorized reimbursed travel, or any other interest or position which violates the jurisdiction's ethics code.
9. See General Municipal Law § 813(18)(a)(1) (requiring that annual disclosure reports filed with the Temporary State Commission on Local Government Ethics be made public); 1987 N.Y. Laws ch. 813, § 26(c) (providing that, upon the expiration of the Commission on December 31, 1992, its powers, duties, and functions devolve upon the municipality's ethics board or, in the absence of a municipal ethics board, upon the municipality's legislative body). See, e.g., NYC Admin. Code § 12-110(e).
10. See, e.g., "Cathie's officially in the Black," New York Daily News, 8/3/11, Page 2.
11. See, e.g., "Council's checks & balances," New York Post, 7/20/11, http://www.nypost.com/p/news/local/council_checks_balances_ntiMCugs2Xj7rnTFom7bhP (retrieved 6/12/12).
12. In fact, annual disclosure reports do not usually disclose criminal activity, as bribes or other illegal conduct are rarely reported. Reports are usually employed in criminal prosecutions to support a charge of false filing for failure to disclose an unlawful gain or illegal activity, such as in the state prosecutions of former New York City Police Commissioner Bernard Kerik for failing to include as a gift the cost of renovations of his Riverdale apartment for which he did not pay contractors in his annual New York City disclosure reports (see Bronx County District Attorney Press Release, <http://bronxda.nyc.gov/information/2006/case47.htm> (retrieved 6/12/12)) or of former New York State Senator Joseph Bruno who allegedly lied on his state financial disclosure report to conceal the true origin of illegal payments (see, e.g., <http://abclocal.go.com/wabc/story?section=news/local&id=6621192> (retrieved 6/12/12)).
13. If the ethics body has a board, its members could complete this task, but utilizing personnel in what are usually volunteer positions might be an unreasonable drain of those resources.

The author serves as Director of Financial Disclosure and Special Counsel at the New York City Conflicts of Interest Board, the ethics board for the City of New York. She previously served as an assistant district attorney in Kings County, a principal court attorney to an Acting Supreme Court Justice, and an inspector general at the New York City Department of Investigation. The views contained in the article are the author's and do not necessarily reflect the opinion of the author's current or former employers.