

**CONFIDENTIAL**

**Advisory Opinion**

**[Sam W.]**

**Case No. 04055.A, Post-employment**

**January 12, 2005**

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You are the \_\_\_\_\_ of the City's Department of [Q] \_\_\_\_\_. On October 1, 2004, you requested an advisory opinion addressing whether the City's Governmental Ethics Ordinance restricts [Mary K] \_\_\_\_\_, a former [Q] [title] \_\_\_\_\_ (who retired from City service in May \_\_\_\_\_ 2004) from serving as a consultant to the [R] \_\_\_\_\_. With your permission, Board staff communicated extensively with both [Mary K] \_\_\_\_\_ and the [R's] \_\_\_\_\_ Executive Director [Mr. G.] \_\_\_\_\_. As explained in this opinion, the Board has determined that the Ordinance prohibits [Mary K] \_\_\_\_\_, for one year after leaving her City service, i.e. until May \_\_\_\_\_ 2005, from assisting or representing [R] \_\_\_\_\_ (or any other person) with respect to work (including meeting with or contacting [Q] personnel or potential [R] partners from other public [service]-related organizations), that: 1) involves or requires assessment of or coordination with [Q] policies, grants, programs, public [service] initiatives or technologies; and 2) that will or would reasonably be expected to be directed toward City action, or in which the City's involvement would be substantial.

**FACTS:** [Mary K's] City Career. [Mary K] \_\_\_\_\_ began her City career with the City's [L] \_\_\_\_\_ Agency (now defunct) in June 1980, as the Director of Planning Information Systems. Her responsibilities in that position included managing the department's information systems and research activities and directing studies for [service] facilities planning and hospital financial analyses. In September 198 \_\_\_\_\_, she became [Q]'s [title] \_\_\_\_\_ Planning, Policy and Resource Development, the position she held until her retirement. She was responsible for directing the department's planning, policy government relations and development functions. Among her chief duties and accomplishments were: 1) creating a database of hospital profiles, including each institution's market share, information on patient origins, average daily census, sources of payment, and other data; 2) directing [Q]'s first strategic plan, which allowed for outsourcing and privatization initiatives; 3) serving as [Q]'s Chief Information Officer, which included directing the installation of a clinic information system; 4) managing the grants development unit, which identified potential grant opportunities and wrote and reviewed grant applications submitted to and by [Q]; 5) directing all major [service] policy initiatives sponsored by the City, including the Strategic Plan and the Violence Prevention Plan. During her tenure, she established [R] \_\_\_\_\_, in 1993, and served as one of [R's] Board members until \_\_\_\_\_ retiring \_\_\_\_\_ from City service. It is these last three functions that the Board will examine in depth, because they relate directly to [Mary K's] \_\_\_\_\_ post-City employment activities.

[R] was established in 1993, with three founding Board members: [Dr. Y]

; [Ms. N] ; and [Mary K] (who also served as [R's] Secretary/Treasurer). She occupied the slot reserved for a Board member appointed by the other two. Organized under § 501(c)(3) of the Internal Revenue Code, [R] was established to enable [Q] to apply for grants for which a City agency would not itself be eligible (for example, from certain private foundations), which were too small to make the City's comparatively burdensome application process and management cost effective, or which required quick implementation.<sup>1</sup> In accepting these grants, either directly from the source (including public sources or private sources ), or from the [Q] itself, [R] has typically contracted to serve as a "fiscal agent" or fiscal monitor for [Q] or other organizations performing "programmatically work" under public [service]-related grants.<sup>2</sup>

[R] was originally staffed by volunteer efforts of its Board, including [Mary K] , but, in 1994, began to hire its own staff. [R's] current Executive Director [Mr. G] said that [R] had in the past hired personnel who were pre-selected and interviewed by [Q] (for example, epidemiologists), but that it now retains the authority to hire its own employees. [R] currently employs three staff members (all accountants) . [R] receives no funding from line items in the City's (or [Q]'s) budget; its operating funds derive entirely from fees it earns from contracting as a fiscal agent on (or as a direct recipient of funds under) various grants made by public and private agencies such as the [Federal Source], State of Illinois and Cook County Departments of [Q] , the University of [V], [Q], and [P] Foundation. According to information provided by [Mr. G] , [R] currently is involved in twelve projects. On four of these, [R] is under contract with [Q] to act as a fiscal monitor of grant funds [R] receives from the [Federal Source]; the [Q] manages or performs the programmatic work under a sub-contract with [R]. [Q] personnel assisted [R] in drafting the grant applications on these programs, although the [R] is the grantee. With respect to the other eight, [R] serves as fiscal agent for programs operated by the State and County Departments of [Q] , the University of [V] and various private foundations. However, [Mr. G.] said, although [Q] is not a grantee or sub-grantee under these programs, there has been what he described as a "close historical relationship" between [R] and [Q]—in some, [Q] has performed or assisted in programmatic work, or has received either an endorsement from [Q] (for its grant application). You said, though, that such an endorsement from [Q] is not necessary, and you are aware that [R] is involved in programs requiring no [Q] participation or endorsement.

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1. [R's] current Mission Statement states that it is "[A]n independent not-for-profit 501(c)(3) organization that works in collaboration with the Chicago Department of [Q] and other organizations dedicated to supporting effective public [service] capacity and enhancing the [service] of the greater Chicago community. [R] is committed to responding quickly and effectively to public [service] challenges." [Mary K] explained that [R] was not established by [Q] in any official sense, but by the three founding members in the interest of promoting public [service], the local public [service] agency ([Q]), and other organizations.

2. A "fiscal agent" or "fiscal monitor" is contractually responsible for ensuring that grant funds are properly expended and accounted for, and for reviewing monthly cash flow reports and operating expenses, including salaries, travel, and education. "Programmatic work" is the actual work done under a grant, e.g. distributing literature, performing testing on program participants, administering [service] care services, etc. The four programs are: 1) [E] is a \$16 million grant to [Q], and [R] has a contract with [Q] to serve as its fiscal monitor; in the remaining three programs, [R] is a direct recipient of [Federal Source] grant funds and contracts with [Q] to perform programmatic work, i.e. collect data and report back to the [Federal Source]; these programs are 2) Monitoring [conditions] in persons in corrections facilities; 3) the [F] ; and 4) the [O] Program.

[Mr. G] also said that, in the last three years, [R] has been moving toward an “arms’ length” relationship with [Q]. This includes relocating into its own offices (out of [Q]’s office .), and toward a model in which [R] applies for grant funds from, for example, the [Federal Source] or private foundations , then, if appropriate, contracts with the City to serve as fiscal agent—the City performing the programmatic work as a sub-grantee under [R]’s grant. In addition, [Mr. G] said, [R] intends to apply for grants in which it will perform its own programmatic work, and is soon hiring an epidemiologist for this purpose. However, [Mr. G] said that, in his view, much of [R]’s work has involved and would continue to involve [Q] in some manner: in order to identify the specific public [service] care-related needs of Metropolitan Chicago, [Q] has been and will continue to be consulted, although [R] and [Q] are moving toward contracting with each other in some instances in order to replicate an arms’ length relationship whereby [Q] may provide “in-kind” services to [R] (e.g. evaluating its program reports), for a fee to be determined. He said that he cannot foresee any [R] program that would not have at least this level of [Q] involvement, as that is intrinsic to [R]’s mission. [Mary K.] said, however, that, in her view, [R] will be establishing relationships with organizations other than [Q], and that, while [R] may approach the City for programmatic assistance on some projects, that step would occur, if at all, only after the grant is applied for and secured. You confirmed this as well.

[Mary K.] was one of [R]’s three founding Board members, and served as its Secretary and Treasurer until retiring from City service, when she also left [R]’s Board. According to [N] , [Mary K.] was involved in the process of deciding which programs would be appropriate for [R] , and which for [Q], and how [Q] would coordinate its efforts with [R] to apply for and manage and monitor grants and programs.<sup>3</sup> However, [Mary K.] said that, during her [City employment] , [N] and [R]’s other Directors met regularly regarding matters involving [R] and [Q] without her participation or knowledge. She said that she did not have a primary decision-making role regarding [R] programs, but that [N] made them, together with [R]’s first two Executive Directors . [Q] program managers, she said, independently approached [Mr. G] , [R]’s third and fourth Executive Directors, and from time to time, she would offer “general advice” about how the City and [R] might structure programs, such as the [T] initiative (explained in more detail below). All but three of [R]’s programs, she said, were begun without her participation. Section 3.3 of the [R]’s current by-laws provides that one member of the Board “shall be appointed by the Commissioner of the Chicago Department of [Q] and/or his or her designee.” [Mary K.] said that neither you nor [N] appointed her to her Board position, although, in 1995, after she, [N] and [Y] resigned from the Board, [N] requested that [R]’s Board re-appoint him to it, which it did. You also confirmed that, although he was the sole [Q] employee on [R]’s Board, this role was not a part of her official City responsibilities, and she did not report on [R] activities to you, nor did you think of or utilize [Mary K.] as [Q]’s representative on the [R] Board. [Mary K.] said that her service on [R]’s Board was never a duty or responsibility associated with her [City position] , and that she was actually not permitted to serve on the Board in her official capacity. Likewise, she does not recall ever

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3. In connection with an earlier, separate matter that involved the relationship between [R] and [Q], staff from the Board of Ethics spoke extensively with [N] and [Mary K.] . Case No. 95032.CNS. Partly as a result of that case, [N] , [Y] and [Mary K.] each resigned from [R]’s Board. In 1995, [Mary K.] was re-appointed by [R]’s then other Board members.

reporting either to you or [N] regarding [R's] activities, though she does recall that [R] business came up incidentally and occasionally.

[Mary K] did confirm that she regularly attended meetings of [R's] Board for over ten years, and that at those meetings (held outside of his regular City working hours), grant opportunities, [R's] capacity, and, on occasion, strategic direction were discussed. [R's] Executive Director would present, in summary form, a status report on its program portfolio, but, [Mary K] said, she does not recall much discussion of particular projects or programs, except for two: the [A] program (now over) and [T] grant. She said that she herself did not provide strategic direction to [R's] Board at these meetings, and that the Board did not make strategic decisions. Her role on the Board, she said, was not to advise on strategic management, although she has expertise in that area. Rather, she stated, her role on the Board was to provide "general governance" and financial oversight, as its treasurer.<sup>4</sup>

[Mary K] also said that her role within [Q] was to develop strategy and increase the department's grant capacity—that is, to guide [Q] in setting policies and pursuing public [service] initiatives, programs and technologies that furthered those policies. She said that she directed all major [service] policy initiatives sponsored by City government in her 20-year tenure. These responsibilities included identifying grant opportunities, directing preparation of grant applications and managing staffing matters, but it generally did not include making decisions within specific programs, grants or contracts. There were, however, three specific [R] programs in which she was involved in her official [Q] capacity, and she explained that involvement as follows:

- i. [T] . She advised you and the [Q] program director, regarding how [R] could serve as fiscal agent for the City in a grant [Q] received from the [Federal Source], thereby facilitating an expedited program startup. She said he had no role in the decision to [R] beyond this technical advice, and was not involved in the structuring or managing the program once it began. In addition, she served as a second signature on checks issued by [R] to participating institutions, in her capacity as [R's] Treasurer, but she relinquished that role to the current Board President. She stated that she played no role in reviewing the fiscal agent contract, and did not even have a perfunctory treasurer's role, as the [Q] program director insisted that he not be a second signature on checks.

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4. [Mary K] explained that, while, in theory, boards should be involved in strategic management, little if any strategic management was done by [R's] Board. When [N] was the Board's President, she set the direction or delegated it to the first Executive Director. By the time both of them left their positions with [R], [R] had a portfolio of revenue-generating projects, and the Board settled into an oversight- governance role, not a strategy making role. The Board seldom met, for some years only having the minimal required meetings; Board participation was spotty with high turnover; and the lack of strategic direction setting role was the cause of some Board member resignations. The Board was more concerned with routine operations and financial matters and not strategy. In her tenure on the Board, strategic planning was a topic at Board meetings only twice that she recalls, and each time it was raised and led by another Board member, and no strategic plan was ever produced. It was this lack of strategic management that led the Board to engage her as a consultant. If she were already doing this, she said, the Board could have simply encouraged her to stay on as a Board member and saved [R] the expense. She also explained that, from her experience in strategic management, it is not unusual for lay boards to be more concerned with operational and financial oversight than with strategic issues which are delegated to the executive director or board president, or simply not done. In this regard, she said, this Board was typical.

- ii. Systems Tracking and Capacity Enhancements. In this grant to [R] from the Foundation, the City receives no funds, and neither the Foundation nor [R] has a contract with the City. [R] and [Q] work in collaboration to carry out the grant's goals. Her role was to assist in writing the grant proposal, and manage the aspects of the program that involved the public [service] infrastructure in the City, viz. tracking the capacity and quality of Chicago's system. The program considers data from more than services sites across the city. These data are compiled in a report used to inform decision making regarding the establishment and ongoing operations of local services.
- iii. [P]. In this grant to [R] from the University of [V] and private sources, which supports a community engagement initiative, there is no City contract. [Q] provides technical assistance and management support of the program. [Mary K] said that he supervised a senior manager who in turn supervised [Q]'s community engagement coordinator.

[Mary K's] Proposed Work with [R]. On 2004, [Mary K] entered into a consulting contract with [R] to provide to it, as an independent contractor, the services summarized here:

- clarify [R's] strategic direction through supporting the Board in strategic planning activities, including design and facilitation of the planning process and drafting of reports
- identify national, regional and local forces and trends that may impact [R]
- identify potential strategic partners, research partnership opportunities, negotiate partnership agreements with the Board's approval, and build relationship with strategic partners, like [Q]
- identify potential funding opportunities and negotiate resource arrangements (he stressed that he would not have the authority to negotiate contracts; rather, his role would be to develop options and serve as a resource for the negotiating team)
- develop a program portfolio based on [R] capacities
- represent and promote [R] to external stakeholders and potential partners (like the Institute, or the Foundation, for example)
- recommend and develop ways to increase program and service capacity
- manage projects conducted by [R]
- build an internal program capacity through strategic partnerships, a pool of contract consultants, and recruit staff
- assist as needed in the ongoing management of [R]

He explained that this means advising [R] on general business development, staffing needs, representing and "marketing" [R] and its capacity to potential grant sources, and helping it to identify where it offers value, and how it can increase the value it offers to grant sources and to the [Q]. He said that examples of how these duties might be carried out include:

- Attending national, state and local meetings where public [service] issues are discussed, and then reporting on the implications for opportunities for [R]. These opportunities (e.g. upcoming grant source) might involve [R] alone, or [R] with other partners including [Q], where appropriate

- Identifying grant announcements from the federal register or other sources and advising [R] on how it might apply alone or in partnership with other organizations
- Drafting a strategic plan for [R] and conducting a Board retreat on strategic planning.
- Designing promotional materials for [R], e.g. a brochure
- Meeting with foundations to promote [R's] capabilities and drafting proposal outlines
- Identifying staff or consultants for [R] to hire that will give [R] capacity in certain areas (e.g. data analysis, writing a grant proposal, providing organizational support to an organization for which [R] serves as fiscal agent)
- Identifying organizations or projects for [R] to serve as fiscal agent (e.g. Consortium, the Chicago and Cook County Council and the Suburban Access project)
- Meeting with external organizations, including [Q] on occasion, to discuss potential partnership opportunities (e.g. [R] could partner with other organizations for care data collection and analysis and it might make sense at some point to approach [Q] if there is a data source which belongs to [Q] or [Q]'s involvement would strengthen the project).

[Mary K] said that she believes that none of this work needs to involve [Q] directly, and that her role in involving [Q] would be based on [Q]'s position in the public [service] arena, not on her prior employment with [Q]. Other direct business relationships between [Q] and [R] might continue, she said, as they do now, without her involvement, as they would grow out of the routine interaction between [R] staff and [Q] senior managers.

#### **LAW, ANALYSIS AND CONCLUSIONS.**

1. Section 2-156-100(b). Section 2-156-100(b) of the City's Governmental Ethics Ordinance, entitled "Post-Employment Restrictions," states:

No former official or employee shall, for a period of one year after the termination of the official's or employee's term of office or employment, assist or represent any person in any business transaction involving the City or any of its agencies, if the official or employee participated personally and substantially in the subject matter of the transaction during his term of office or employment; provided, that if the official or employee exercised contract management authority with respect to a contract this prohibition shall be permanent as to that contract.

[Mary K], a former City employee, is prohibited by this section, for one year after leaving City service (i.e. until 2005), from assisting or representing any person or client (including [R]) in a business transaction involving the City if, during her City service, she participated personally and substantially in the subject matter of that transaction. Also, she is permanently prohibited from assisting or representing any person (such as [R]) in a contract if, during City service, she exercised "contract management authority" with respect to that contract.

A. Permanent Prohibition. The Ordinance's permanent prohibition is not at issue with respect to [Mary K's] consulting work for [R], as the facts presented do not warrant the conclusion that she exercised contract management authority with respect to any of [Q]'s contracts with [R]. However, from the description of [Mary K's] [Q] duties, it is clear that she exercised contract management authority with respect to other City contracts and grant agreements. Therefore, in the event that her post-City employment plans change and/or involve other

organizations, institutions, employers or clients that have contracts or grant agreements with [Q] not addressed in this opinion, this Board advises that she contact it for specific advice, as there may well be permanent and additional one year prohibitions that would restrict her ability to work for or assist those persons.

#### B. One-Year Prohibition.

The issue before this Board, then, is whether and how the Ordinance's one-year prohibition applies to [Mary K's] proposed consulting work with [R]. Pursuant to the Ordinance, [Mary K] is prohibited, for one year after leaving City employment (i.e., until 2005) from assisting or representing [R] (or any other person) with respect to work that: 1) involves any subject matter in which she participated personally and substantially during her City employment; and 2) constitutes a business transaction involving the City.

i. Subject Matter. This Board's review of [Mary K's] official City's responsibilities throughout her career with the City (and *not* her work as a Board member of [R] for ten years) indicates that she was [Q]'s lead policy and programmatic strategist, and that her most important objectives were to develop and increase [Q]'s grant capacity and to guide it in setting policies and pursuing public [service] initiatives, programs and technologies that furthered those policies. This performance included identifying grant opportunities and directing preparation of grant applications on [Q]'s behalf. That, this Board concludes, is a subject matter in which she participated personally and substantially during her City employment. Therefore, [Mary K] is prohibited, under the Ordinance's one-year post-employment provision, from assisting or representing [R] (or any other person, employer or client) on any "business transaction involving the City" (see below) that involves, as its subject matter, assessment of or coordination with [Q]'s policies, grants, programs, public [service] initiatives, or technologies.

ii. Business Transaction Involving the City. The practical issue in this case is factoring how [Mary K's] work for [R], which is, in essence, to consult to and assist [R] in managerial and strategic planning and business development, would entail a "business transaction involving the City," that is, would involve or necessitate an assessment of or coordination with [Q]'s policies, grants, programs, public [service] initiatives, or technologies. This Board notes here that [Mary K's] consulting contract with [R] is not itself a business transaction involving the City. See Case No. 00002.A. However, some of the projects on which she would work on behalf of [R] might well constitute "business transaction[s] involving the City," as this Board has interpreted that phrase. In Case No. 92035.A, the Board stated that

"[T]he Ordinance refers to a transaction 'involving the City,' rather than 'with the City.' The transaction need not be a direct one with the City, if the City's involvement in the larger transaction is substantial, so that, for example, the transaction in which the former employee is acting is directed toward City action or its parameters are set by the City."

Case No. 92035.A, p. 8. That is, even if the City is not directly a party to the transaction (or contract, for example), a project may still involve the City if its involvement is "substantial," or the project is directed toward some City action, or the City "sets" the "parameters" of the transaction. This Board has addressed analogous issues in a recent opinion. In Case No. 04006.A, a former City employee who, after leaving City service, was serving as the Executive Director of a non-profit

organization (which had a City contract) was advised that he was prohibited for one year from contacting City personnel about, or advising the organization about, ongoing or proposed projects that were directed toward or would reasonably be expected to lead up to City action (such as financial assistance, contracts, permits or other approvals), because by doing so, he would be advising or assisting persons on business transactions involving the City. The prohibition also extended to contacts made by this former employee to City personnel about, or advising the non-profit or its members about, ongoing or intended City regulatory efforts, assistance or programs.

Applying that holding to [Mary K's] \_\_\_\_\_, this Board concludes that any work she performs for [R] \_\_\_\_\_, or any grant or research partnership opportunity that she identifies, "paves," negotiates or fosters on [R's] \_\_\_\_\_ behalf, that: 1) involves or necessitates an assessment of or coordination with [Q]'s policies, grants, programs, public [service] initiatives, or technologies; and 2) will or would reasonably be expected to be directed toward City ([Q]) action, or in which the City's ([Q]'s) involvement would be substantial, would constitute a business transaction involving the City, in whose subject matter [she] \_\_\_\_\_ has participated personally and substantially. Thus, [Mary K] \_\_\_\_\_ is prohibited, until \_\_\_\_\_ 2005, from assisting [R] \_\_\_\_\_ or its staff with respect to work (including meeting with or contacting [Q] personnel or potential [R] \_\_\_\_\_ partners from other organizations such as the [Federal Source], \_\_\_\_\_ Institute or \_\_\_\_\_ Foundation), that involves or requires assessment of or coordination with [Q] policies, grants, programs, public [service] initiatives or technologies and that will or would reasonably be expected to be directed toward City action, or in which the City's involvement would be substantial (such as, but not limited to, for example, an endorsement by, or a contract with, or determination or official ruling by, [Q]). However, the following activities would not be included in this prohibition: i) consulting on the [R's] \_\_\_\_\_ purely "internal" or non-[Q] matters, such as identifying consultants or possible employees, designing promotional materials, drafting a strategic plan (to the extent that activity does not require contact with [Q] personnel), recommending and developing ways to increase [R's] \_\_\_\_\_ program and service capacity, assisting in [R's] \_\_\_\_\_ ongoing management, and managing projects conducted by [R] \_\_\_\_\_ that do not involve [Q] as either a contractor, sub-contractor or as a technical or programmatic advisor; ii) identifying grant announcements or reporting on national, regional or local forces and trends that impact the \_\_\_\_\_ environment in which both [R] \_\_\_\_\_ and [Q] operate; iii) "marketing" [R] \_\_\_\_\_ to potential funding sources (other than [Q]) for grants or programs not directed toward or reasonably expected to entail [Q] action, involvement or recommendation; or iv) identifying organizations or projects to or for which [R] \_\_\_\_\_ could serve as fiscal agent (for example, the \_\_\_\_\_ Consortium), unless such projects are directed toward substantial City involvement, or have their parameters set by the City.

The Board further advises you, [Mary K] \_\_\_\_\_ and [R] \_\_\_\_\_ that, if this conclusion does not sufficiently address or resolve how the one-year prohibition may apply to any specific project or to [Mary K's] \_\_\_\_\_ work thereon that arises before \_\_\_\_\_ 2005, more specific guidance should be sought from this Board at the appropriate time.

2. Section 2-156-070. The Board also cautions that every former City employee, including [Mary K] \_\_\_\_\_, is prohibited, under Section 2-156-070, "Use or Disclosure of Confidential Information," from using or disclosing of confidential information acquired through City employment. Confidential information, for purposes of this section, means information that may not be obtained under the Illinois Freedom of Information Act, as amended.

**DETERMINATION.** The Board determines that the Ordinance prohibits [Mary K] , for one year after leaving his City service, i.e. until 2005, from assisting or representing [R] (or any other person) with respect to work (including meeting with or contacting [Q] personnel or potential [R] partners from other organizations), that: 1) involves or requires assessment of or coordination with [Q] policies, grants, programs, public [service] initiatives or technologies and: 2) that will or would reasonably be expected to be directed toward City action, or in which the City's involvement would be substantial.

The Board's determination does not necessarily dispose of all the issues relevant to this situation, but is based solely on the application of the City's Governmental Ethics Ordinance to the facts stated in this letter. Other City rules or policies may also apply. If the facts stated are incorrect or incomplete, please notify us immediately, as any change may alter the determination.

**RELIANCE:** This opinion may be relied upon by: 1) any person involved in the specific transaction or activity with respect to which this opinion is rendered; and 2) any person involved in any specific transaction or activity that is indistinguishable in all its material aspects from the transaction or activity with respect to which this opinion is rendered.

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Darryl L. DePriest,  
Chair