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MUNICIPALITIES REQUIRED TO ADOPT CODES OF ETHICS

Dennis Huffer, Legal Consultant
January 2009

THE UNIVERSITY of TENNESSEE
MUNICIPAL TECHNICAL ADVISORY SERVICE

In cooperation with the Tennessee Municipal League

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Dennis Huffer, Legal Consultant

January 2009

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The Municipal Technical Advisory Service (MTAS) was created in 1949 by the state legislature to enhance the quality of government in Tennessee municipalities. An agency of the University of Tennessee Institute for Public Service, MTAS works in cooperation with the Tennessee Municipal League and affiliated organizations to assist municipal officials.

By sharing information, responding to client requests, and anticipating the ever-changing municipal government environment, MTAS promotes better local government and helps cities develop and sustain effective management and leadership.

MTAS offers assistance in areas such as accounting and finance, administration and personnel, fire, public works, law, ordinance codification, and wastewater management. MTAS houses a comprehensive library and publishes scores of documents annually.

MTAS provides one copy of our publications free of charge to each Tennessee municipality, county and department of state and federal government. There is a $10 charge for additional copies of "Municipalities Required to Adopt Codes of Ethics."

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MUNICIPALITIES REQUIRED TO ADOPT CODES OF ETHICS

Dennis Huffer, Legal Consulstant

T.C.A. § 8-17-103 requires municipalities to adopt a code of ethics by ordinance. The ordinance restrictions must apply to boards, commissions, authorities, corporations, and other entities created or appointed by the municipality, except the school board. The school board adopts its own code, and it may use a model provided by the Tennessee School Board Association.

The act charges the UT Municipal Technical Advisory Service (MTAS) with developing model ethical standards for municipalities. **Municipalities are not required to adopt the MTAS model, but if they do not, they must send a copy of the ordinance they adopt to the Tennessee Ethics Commission. Municipalities that adopt the MTAS model must simply notify the commission in writing that the MTAS model was adopted, along with the date of adoption.** The proposed MTAS model ordinance provisions accompany this bulletin.

The act also affects entities created by interlocal agreement under the state's general Interlocal Cooperation Act (T.C.A. §§ 12-9-101 *et seq.*) or otherwise. These entities must adopt an ethics code. Rather than requiring the ethics provisions to be enacted by the governing boards of these entities, however, the act requires the agreement itself to be amended to include the ethics standards. Therefore, municipalities participating in interlocal agreements should take steps to ensure that the agreement is amended to include ethical standards. The accompanying model code of ethics provisions can be used for this purpose.

The act requires local ethics standards to include two restrictions: (1) rules setting limits on and/or providing for reasonable and systematic disclosure of gifts or other things of value received by officials or employees that affect or appear to affect their discretion, and (2) rules requiring reasonable and systematic disclosure by officials and employees of personal interests that affect or appear to affect their discretion. In the MTAS model, we have combined these two restrictions with other ethics provisions that municipalities have commonly adopted. These model provisions are meant to replace the existing provisions in the municipality's code of ordinances or simply to be added as a new chapter if the code has no similar provisions.

In the first footnote in the proposed model, we note several state statutes that establish ethical provisions for municipal officials and employees. We include these references along with the ethical restrictions in the proposed ordinance provisions so that municipal officials and employees can consult one source to determine most of the ethical restrictions that apply to them.

As noted, many municipalities already have ordinances that prohibit the city's officials and employees from accepting any gift or thing of value that could be interpreted as an attempt to influence the officer's or employee's actions with respect to city business. Many have ordinances prohibiting officials and employees from using their positions for personal gain. Many municipalities also have adopted ethics regulations by personnel policy or as part of an employee handbook. Some have ordinances requiring disclosure of personal interests that could affect their decisions.

The question probably will arise whether municipalities can simply send the Ethics Commission a copy of their existing ordinances that prohibit gifts, using a position for personal gain, etc., and thus satisfy this new law. In most cases this will not be adequate. Although most cities already have ordinances that are more restrictive on receiving gifts and other things of value than those required by the act, most do not meet the disclosure requirement of personal interests. This is perhaps because there is a state law requiring these disclosures for elected officials (T.C.A. §§ 8-50-501 *et seq.*), and municipal officials have seen no need to expand on this law.

The ethics act uses the future imperative "shall adopt" in requiring local governments to enact these ethics provisions. It has no provision recognizing that existing ordinances or policies might be adequate. And, as noted above, most existing ordinances do not require disclosure of personal interests in addition to that already required under state law. For these reasons — and possible ouster for failing to do so — most municipalities would be better advised to adopt either the MTAS model or their own ordinance.

CODE OF ETHICS

Section-by-Section Summary and Explanation

SECTION 1. This section provides that the code of ethics adopted by the municipal governing body applies to all full-time and part-time elected and appointed officials, whether compensated or not. It also applies to members and employees of separate boards, authorities, and commissions created by the municipality except the school board, which adopts its own code. This includes planning commissions, boards of zoning appeals, beer boards, airport authorities and housing authorities, among others. These applications of the code of ethics are mandated by the Ethics Act passed by the General Assembly.

SECTION 2. The Ethics Act passed by the General Assembly requires that "personal interests" that affect or appear to affect the actions of municipal officials and employees must be disclosed, but the state statute does not define "personal interests." This section defines those interests. This is a broad definition and is much more encompassing than the state's conflict of interests laws. It includes ANY financial, ownership, or employment interest of an official or employee in a business or entity the municipality does business with, regulates or supervises. It also includes these interests of the listed family members of the official or employee. It includes situations in which the official, employee or family member is negotiating employment with an affected entity. There is some overlap with indirect interests under state law, but most of the situations to which this provision in the code of ethics applies will not be covered by the conflicts of interests laws. An example would be a family member of a member of the governing body who is an employee of a business seeking to do business with the municipality. This would not be a direct or indirect conflict of interests under the state law, but it would be a personal interest that would have to be disclosed under this definition. This section provides that when there is an overlap with the conflicts of interests laws, those laws take precedence.

SECTION 3. This section requires an official with the responsibility to vote to disclose any of his or her personal interests that might affect his or her discretion before the vote so that they appear in the minutes. The state statute does not require an official with a personal interest to recuse himself from voting. The implication of the statute is to the contrary and that after disclosure the official may vote. Nevertheless, this section allows, but does not require, the official to recuse himself.

SECTION 4. This section applies to employees and officials who must exercise discretion in matters that do not require a vote. The official or employee should, when possible, disclose the personal interest before the exercise of the discretion. Again, recusal is not required, but this section allows it when it is permitted by law, charter, ordinance or policy of the municipality.

SECTION 5. This section prohibits an official or employee from taking any money, gift, favor, or other gratuity from anyone other than the municipality for the performance of the official's or employee's regular duties or that gives the appearance of attempting to influence the discretion of the official or employee in carrying out municipal business. This is a somewhat modified version of a provision that most municipalities already have on the books.

An alternative to this gift prohibition that is allowed by the state ethics statute would be to allow gifts and gratuities up to a certain amount but to require reporting of those items. MTAS decided on prohibition because it is simpler to implement and because most cities already have similar provisions.

SECTION 6. This section prohibits officials and employees from disclosing confidential information and from disclosing any other information with the intent to result in financial gain. Again, these are common provisions in ethics ordinances that some cities have already adopted.

SECTION 7. This section prohibits officials and employees from using or authorizing the use of municipal time and facilities for their own financial gain. It also prohibits this for other entities or individuals unless it is authorized by

contract or lease determined by the governing body to be in the best interests of the municipality. This is a provision similar to ones that have been adopted by many municipalities.

SECTION 8. This section prohibits officials and employees from using their position to make private purchases in the name of the municipality and from using their position to gain privileges or exemptions that are not authorized by charter, general law, ordinance, or policy. These provisions are similar to provisions adopted by many municipalities.

SECTION 9. This section prohibits outside employment by officials or employees if the outside work interferes with municipal duties or is in conflict with any provision of the charter, any ordinance, or any policy of the municipality. Many municipalities have adopted similar provisions.

SECTION 10. This section provides methods for bringing and investigating complaints of violations of the code of ethics. The city attorney is designated as the ethics officer and may issue written opinions when requested on whether certain conduct would comply with the code of ethics and other applicable law. The city attorney is designated to receive and investigate complaints about officials and employees who are not members of the governing body. The attorney may request that the governing body designate another person or entity to act as ethics officer when he or she has a conflict of interests. The governing body must determine the merit of complaints against its members. If the governing body determines that a complaint warrants further investigation, it must authorize the investigation by the city attorney or another person or entity chosen by the governing body.

An alternative to appointing the city attorney as ethics officer would be to appoint another individual, such as another attorney or a retired judge. If a municipality chooses to do this, it probably would want to provide for the appointment of the ethics officer after each municipal election. The position could be compensated or uncompensated, although it is unlikely many individuals would be willing to serve if the position is not compensated. Another acceptable alternative would be to establish a board of ethics to perform these functions. For municipalities that choose this alternative, MTAS suggests a three-member board to be appointed by the governing body. Terms probably should be three years.

Because many municipalities already have personnel policies that deal with some of the same behaviors regulated by the code of ethics, this section provides that when a violation of the code of ethics also constitutes a violation of a personnel or civil service policy, rule, or regulation, the violation would be handled as a violation of the personnel provisions rather than as a violation of the code of ethics.

This section also provides for a "reasonable person" interpretation and enforcement of the code of ethics.

MTAS chose the above provisions for designating the ethics officer and for handling ethics complaints for the model code of ethics because they seemed simpler, less costly, and most appropriate for most Tennessee municipalities.

SECTION 11. This section provides for punishment for violations. Elected officials and appointed members of boards and commissions are punishable as already provided by law and, in addition, are subject to censure by the governing body. Appointed officials and employees are subject to disciplinary action.

Municipalities that adopt the **MTAS Model Code of Ethics** must send a notice that it has been adopted, including the date of adoption, to the Tennessee Ethics Commission. Municipalities that do not adopt the MTAS model must send a copy of the ordinance they do adopt to the Ethics Commission. Send the notice to:

Tennessee Ethics Commission
201 4th Avenue, N., Suite 1820
Nashville, TN 37243

E-mail: bruce.androphy@state.tn.us

CODE OF ETHICS[1]

SECTION 1. Applicability. This chapter is the code of ethics for personnel of the municipality. It applies to all full-time and part-time elected or appointed officials and employees, whether compensated or not, including those of any separate board (except school board), commission, committee, authority, corporation, or other instrumentality appointed or created by the municipality. The words "municipal" and "municipality" include these separate entities.

SECTION 2. Definition of "personal interest."

(1) For purposes of Sections 3 and 4, "personal interest" means:
   (a) Any financial, ownership, or employment interest in the particular entity or person that is the subject of a vote by a municipal board not otherwise regulated by state statutes on conflicts of interests; or
   (b) Any financial, ownership, or employment interest in the entity or person to be regulated or supervised; or
   (c) Any such financial, ownership, or employment interest of the official's or employee's spouse, parent(s), stepparent(s), grandparent(s), sibling(s), child(ren), or stepchild(ren).

(2) The words "employment interest" include a situation in which an official, an employee or a designated family member is negotiating possible employment with a person or entity that is the subject of the vote or that is to be regulated or supervised.

(3) In any situation in which a personal interest is also a conflict of interest under state law, the provisions of the state law take precedence over the provisions of this chapter.

SECTION 3. Disclosure of personal interest by official with vote. An official with the responsibility to vote on a measure shall disclose during the meeting at which the vote takes place, before the vote and so it appears in the minutes, any personal interest that affects or that would lead a reasonable person to infer that it affects the official's vote on the measure. In addition, the official may recuse himself[2] from voting on the measure.

SECTION 4. Disclosure of personal interest in nonvoting matters. An official or employee who must exercise discretion relative to any matter, other than casting a vote, and who has a personal interest in the particular person or entity being regulated or supervised that affects or that would lead a reasonable person to infer that it affects the exercise of the discretion shall disclose the interest on a form provided by and filed with the recorder before the exercise of the discretion when possible. In addition, the official or employee may, to the extent allowed by law, charter, ordinance, or policy, recuse himself from the exercise of discretion in the matter.

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[1] State statutes dictate many of the ethics provisions that apply to municipal officials and employees. For provisions relative to the following, see the *Tennessee Code Annotated* sections indicated:

Campaign finance — T.C.A. Title 2, Chapter 10.

Conflict of interests — T.C.A. §§ 6-54-107, 108; 12-4-101, 102.

Conflict of interests disclosure statements — T.C.A. §§ 8-50-501 *et seq.*

Consulting fee prohibition for elected municipal officials — T.C.A. §§ 2-10-122, 124.

Crimes involving public officials (bribery, soliciting unlawful compensation, buying and selling in regard to office) — T.C.A. § 39-16-101 *et seq.*

Crimes of official misconduct, official oppression, misuse of official information — T.C.A. §§ 39-16-401 *et seq.*

Ouster law — T.C.A. §§ 8-47-101 *et seq.*

A brief synopsis of each of these laws appears in the appendix of the municipal code.

SECTION 5. Acceptance of gratuities, etc. An official or employee may not accept, directly or indirectly, any money, gift, gratuity, or other consideration or favor of any kind from anyone other than the municipality:

(1) For the performance of an act, or refraining from performance of an act, that he would be expected to perform, or refrain from performing, in the regular course of his duties; or

(2) That might reasonably be interpreted as an attempt to influence his discretion, or reward him for past exercise of discretion, in executing municipal business.

SECTION 6. Use of information.

(1) An official or employee may not disclose any information obtained in his official capacity or position of employment that is made confidential under state or federal law except as authorized by law.

(2) An official or employee may not use or disclose information obtained in his official capacity or position of employment with the intent to result in financial gain for himself or any other person or entity.

SECTION 7. Use of municipal time, facilities, etc.

(1) An official or employee may not use or authorize the use of municipal time, facilities, equipment, or supplies for private gain or advantage to himself.

(2 An official or employee may not use or authorize the use of municipal time, facilities, equipment, or supplies for private gain or advantage to any private person or entity, except as authorized by legitimate contract or lease that is determined by the governing body to be in the best interests of the municipality.

SECTION 8. Use of position or authority.

(1) An official or employee may not make or attempt to make private purchases, for cash or otherwise, in the name of the municipality.

(2) An official or employee may not use or attempt to use his position to secure any privilege or exemption for himself or others that is not authorized by the charter, general law, or ordinance or policy of the municipality.

SECTION 9. Outside employment. An official or employee may not accept or continue any outside employment if the work unreasonably inhibits the performance of any affirmative duty of the municipal position or conflicts with any provision of the municipality's charter or any ordinance or policy.

SECTION 10. Ethics complaints.

(1) The city attorney is designated as the ethics officer of the municipality. Upon the written request of an official or employee potentially affected by a provision of this chapter, the city attorney may render an oral or written advisory ethics opinion based upon this chapter and other applicable law.

(2) (a) Except as otherwise provided in this subsection, the city attorney shall investigate any credible complaint against an appointed official or employee charging any violation of this chapter, or may undertake an investigation on his own initiative when he acquires information indicating a possible violation and make recommendations for action to end or seek retribution for any activity that, in the attorney's judgment, constitutes a violation of this code of ethics.

(b) The city attorney may request that the governing body hire another attorney, individual, or entity to act as ethics officer when he has or will have a conflict of interests in a particular matter.

(c) When a complaint of a violation of any provision of this chapter is lodged against a member of the municipality's governing body, the governing body shall either determine that the complaint has merit, determine that the complaint does not have merit, or determine that the complaint has sufficient merit to warrant further investigation. If the governing body determines that a complaint warrants further investigation, it shall authorize an investigation by the city attorney or another individual or entity chosen by the governing body.

(3) The interpretation that a reasonable person in the circumstances would apply shall be used in interpreting and enforcing this code of ethics.

(4) When a violation of this code of ethics also constitutes a violation of a personnel policy, rule, or regulation or a civil service policy, rule, or regulation, the violation shall be dealt with as a violation of the personnel or civil service provisions rather than as a violation of this code of ethics.

SECTION 11. Violations. An elected official or appointed member of a separate municipal board, commission, committee, authority, corporation, or other instrumentality who violates any provision of this chapter is subject to punishment as provided by the municipality's charter or other applicable law and, in addition, is subject to censure by the governing body. An appointed official or an employee who violates any provision of this chapter is subject to disciplinary action.

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