**ADVISORY OPINION**

**CONFIDENTIAL**

To: The Honorable Alderman Y

cc: The Honorable Alderman X

Date: March 14, 2018

Re: Case 18006.A

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**Executive Summary.** On [date], the Board Chair received a call from a [media] reporter. The reporter asked whether Alderman X violated the City’s Governmental Ethics Ordinance (the “Ordinance”) by [stating on the record that an order proposed by another alderman be referred to a specific City Council Committee] at [a] City Council meeting. The reporter said that Alderman X [took this action] while an order sponsored by Alderman Y was being read aloud and on the record by the Clerk, who was reciting aldermanic orders and the City Council Committees to which they were assigned. The reporter told the Chair that Alderman X’s law firm has represented persons named in the order. The Chair told the reporter he was unfamiliar with the situation and could not give him an opinion.

As discussed below, the Order sponsored by Alderman Y formally requests, on behalf of the City Council, that the City’s Law Department take appropriate steps to initiate reassessments in various properties listed in the Order on the grounds of disproportionate disparity between assessed value and fair market value.

The next morning, Alderman Y called the Board’s Executive Director and asked [the Executive Director] to advise him whether Alderman X violated the Ordinance’s conflicts of interest provisions by [making this statement on the record of the Council meeting]. [The Executive Director] asked Alderman Y whether the statement would have been captured on the video and transcript of the meeting. Alderman Y replied that it should be. [The Executive Director] told Alderman Y the Board would look into it.[[1]](#footnote-1)

For the reasons explained below in this advisory opinion, on the facts presented, the Board has determined that Alderman X did not violate the Ordinance by [making this statement on the record of the Council meeting].

**Jurisdiction**. Pursuant to §2-156-380(l) of the Ordinance and Board Rule 3-1, the Board has the power and duty “to render advisory opinions with respect to the provisions of the City’s Governmental Ethics Ordinance based upon a real or hypothetical circumstances, when requested … by a [City] official or employee …” Both aldermen are, of course, City officials. Thus, one alderman may request an advisory opinion addressing whether the other’s conduct did or might violate the Ordinance, and the Board has the duty, and authority, to render that opinion.

**Facts.** Board members and legal staff have viewed the video and transcript of the [date] City Council meeting. In the video (which is available on the City Clerk’s website), Alderman X’s voice is audible, suggesting, on the record, that an Order sponsored by Alderman Y (the “Order”), be referred to [Committee 1], not to [Committee 2], the committee the Clerk’s representative first read aloud and the committee to which the Order was apparently originally assigned.[[2]](#footnote-2) The Order, which this Board has also reviewed, would, if passed, formally request, on behalf of the City Council, that the City’s Law Department take appropriate steps to initiate reassessments of the properties listed in it on the grounds of disproportionate disparity between Assessed Value and Fair Market Value. The Clerk’s representative did not read the addresses of the properties aloud.

Board members and legal staff also have reviewed public records of the Cook County Assessor’s Office and County Board of (Tax) Review, available on those agencies’ websites, as well as the current Rules of Order and Procedure of the City Council.[[3]](#footnote-3)

From this review, the following material facts are clear:

(1) Once Alderman X [made his statement] the Order was referred without debate, by operation of City Council Rule 42, to the Committee on Committees, Rules and Ethics (the “Rules Committee”). Per Rule 42, the Rules Committee shall report its recommendation to the Council at the next regular meeting;

(3) One property listed in the Order is [Property 1], another is [Property 2];

(4) The public “decision search” website of the Cook County Board of Review shows that an attorney from the law firm (the “Firm”) was the attorney of record for tax year 2016 for Property 1], and that the Firm represented appellants in such proceedings on this property in [previous years];

(5) The public “decision search” website of the Cook County Board of Review also shows that attorneys from the Firm were attorneys of record for tax year 2016 for [Property 2] and that the Firm represented appellants in such proceedings [in prior years] ; and

(6) On his 2017 Statement of Financial Interests, filed with our office[,] Alderman X discloses that he is an [owner] of the Firm.

On [date], [the Executive Director] received an affidavit from Alderman X . In it he affirms, *inter alia*: (i) he [made the statement at the City Council meeting] in accordance with City Council Rules because he thought an order that the Law Department take the action described was not a [Committee 2] matter; and (ii) at no time prior to or during the meeting did he receive a copy of the Order or know that any specific addresses were listed in the Order, or know that any of the Firm’s clients were involved in any way in the Order, or have any knowledge or reason to believe his personal financial interests were in any way impacted by the Order; and (iii) after the meeting ended, he asked his staff for a copy of the Order, which is where he first saw the properties listed in it; and (iv) at the next meeting of the Rules Committee, he intends to withdraw his request that the Order be referred to [Committee 1] and will recuse himself from any further discussions or votes on the Order.

Board legal staff was also told by City governmental personnel familiar with City Council practices and procedures (and unaffiliated with either alderman) that there is no formal rule or informal custom or practice by which City Council members must, or out of courtesy do, inform each other of what is in Orders, etc. they sponsor. Anecdotal observations made to our staff indicate that, on occasion, City Council members have handed the City Clerk orders, etc. at the last minute, without sharing their content with all or some of their aldermanic colleagues. In any event, all City Council matters do get posted on the Clerk’s website, though not during the Council meetings, in “real time.”

**Relevant Law.** Three (3) related provisions of the Ordinance are relevant. The first two are contained in “Improper Influence,” §2-156-030. It states:

(a) No official or employee shall make, participate in making or in any way attempt to use his position to influence any city governmental decision or action in which he knows or has reason to know that he has any financial interest distinguishable from its effect on the public generally, or from which he has derived any income or compensation during the preceding twelve months or from which he reasonably expects to derive any income or compensation in the following twelve months.

(b) No elected official, or any person acting at the direction of such official, shall contact either orally or in writing any other city official or employee with respect to any matter involving any person with whom the elected official has any business relationship that creates a financial interest on the part of the official … or from whom or which he has derived any income or compensation during the preceding twelve months or from whom or which he reasonably expects to derive any income or compensation in the following twelve months.  In addition, no elected official may participate in any discussion in any city council committee hearing or in any city council meeting or vote on any matter involving the person with whom the elected official has any business relationship that creates a financial interest on the part of the official, or the domestic partner or spouse of the official, or from whom or which he has derived any income or compensation during the preceding twelve months or from whom or which he reasonably expects to derive any income or compensation in the following twelve months.

The third is “Conflicts of interest; appearance of impropriety,” §2-156-080(a). It states:

(a) No official or employee shall make or participate in the making of any governmental decision with respect to any matter in which he has any financial interest distinguishable from that of the general public, or from which he has derived any income or compensation during the preceding twelve months or from which he reasonably expects to derive any income or compensation in the following twelve months.

**Questions Presented.** Numerous related questions are raised by these facts.

1. Did Alderman X violate §2-156-030(a) by participating in the “decision” or “action” by which the Order was referred to the Council’s Rules Committee (by operation of Rule 42) while he either: (i) “knew or had reason to know” he had a financial interest in this action distinguishable from its effect on the public generally (by virtue of the Firm’s representation of applicants before the Cook County Board of Review); or (ii) derived or expected to derive income or compensation from the action by which this Order was referred to the Rules Committee? Did he have a “financial interest” “distinguishable from its effect on the public generally” in this sequence of events? Was this sequence a “decision” or an “action?”

2. Did he violate §2-156-030(b), by either:

(i) orally contacting another City official or employee (here the Clerk’s representative), with respect to the Order, while he had a business relationship with the Firm’s clients/applicants named in the Order that created a financial interest on his part? or while he had derived income or compensation from either of these clients during the twelve months preceding [the date of the City Council meeting], or reasonably expected to derive income or compensation from them in the twelve months following [the date of the City Council meeting]?; or

(ii) participating in a “discussion” on the Order – a City Council matter involving applicants in these tax matters, persons with whom he had a business relationship that created a financial interest on his part, and/or persons from whom he derived income or compensation during the twelve months preceding [the date of the City Council meeting], or from whom he reasonably expected to derive income or compensation in the twelve months following [the date of the City Council meeting]? Was the sequence of events by which the Order was referred to the Rules Committee a “discussion?”

3. Did he violate §2-156-080(a) by participating in the making of a governmental “decision,” namely the “decision” by which the Order was referred, per Rule 42, to the Rules Committee while he had a financial interest in this “decision” distinguishable from that of the general public (by virtue of the Firm’s representation of persons [or properties] named in the Order)? Was the action by which the Order was referred to the Rules Committee a “decision?”

**Analysis**. The Board will address and apply these provisions to the facts presented.

1. §2-156-030(a). There are two (2) ways that a City employee or official can violate this provision. This is an *in rem* prohibition, meaning that, for [a City employee or official] to have violated it, [the employee or official] must at least have had a financial interest *in* or derived compensation or income *from the matter*, that is, from the action by which the Order was referred to the Rules Committee.[[4]](#footnote-4)

The first is by making, participating in the making of, or using his City position to influence any City governmental decision or action in which decision or action he “knows or has reason to know that he as any financial interest distinguishable from its effect on the public generally.” Alderman X’s affidavit states he had no knowledge of the parties named in the Order at the time he [made this statement on the record of the Council meeting] and no one, whether on his staff or not, had informed him of these parties’ identities at any time prior to his [statement.] On this affirmation, the Board concludes that he did not violate this sub-provision of §2-156-030(a). It requires, as a necessary element of a violation, that he had to know or have had reason to know that the Firm’s clients were named in the Order.[[5]](#footnote-5)

The second is by making, participating in the making of, or using his City position to influence any City governmental action from which he derived any compensation or income during the last twelve months or reasonably expects to derive any income or compensation in the next twelve months. We conclude that Alderman X did not violate this sub-provision of §2-156-030(a), for two reasons. First, any income or compensation the Firm (and thus he) would derive that might be related to the Order would be from the Firm’s clients (likely through its client’s tax savings), *not* from this action to switch the committee that would consider this Order from [Committee 2] to Rules (then possibly to [Committee 1]). That is, he did not stand to derive income or compensation from this action or matter itself; his income or compensation was solely from the persons involved. (*Cf.* Case No. 94017.A: the Board determined that a City employee did not violate this provision by making a recommendation that his residential tenant be awarded a contract by his department, absent a showing that he expected some additional compensation on top of his lease payments for making the recommendation, or that his tenant would terminate the lease unless the recommendation were made—his income came solely from the lease, not from the recommendation.[[6]](#footnote-6)) Second, Alderman X did not know the Firm’s clients were involved or named in the Order, thus in any way implicated [when he made the statement.] Fundamental fairness and equity dictate that, without such knowledge, he could not have violated this sub-provision of §2-156-030(a). Thus, we hold that a City employee or official, like Alderman X, cannot be held to have violated §2-156-030(a) unless he knew or had reason to know that he derived or could reasonably expect to derive income or compensation from a City Council decision, or, as here, action.

For these reasons, we conclude, based on the facts presented, Alderman X did not violate §2-156-030(a).

2. §2-156-030(b). This section, in contrast to §2-156-030(b), is an *in personam* prohibition, and thus requires a more intricate analysis. It is more stringent than §2-156-030(a), and thus “easier” for an alderman/attorney to violate. It is tied not to any particular matter, but instead to “persons,” including clients of an alderman’s law firm. As we have recognized in previous cases involving aldermen with outside law practices, it requires aldermen who are partners (or have “of counsel” status) in law firms to remove themselves from City Council discussions or any *other* City matters involving clients of their outside law practices, before *any* City department, including City Council – even where the Council or other City matters are unrelated to the legal work they or their firms do for these clients. *See, e.g.*, Case Nos. 11045.A; 12049.Q; 15032.Q; *cf.* Case Nos. 93048.A and 95011.A (both issued prior to the enactment of §2-156-030(b)). In effect, they cannot participate in any City Council “discussions” or votes in matters involving their firm’s clients (and, although not at issue in this case, they cannot advocate for or communicate on behalf of their outside clients with City government personnel in any other City department, or direct their staff to do so – in effect, they may not serve as their outside law firm’s clients’ aldermen as to interacting with any City employees, officials, or departments). They also cannot attempt to influence matters involving any client of their law firm before any City department other than City Council, such as, for example, the Departments of Procurement Services or Buildings.

However, we again brush up against an issue of fundamental fairness: how can a [City official or employee] be held to have violated this provision if he did not know his law firm’s clients were involved in the matter? While (in a related but different context) an alderman who maintains an outside law practice must scour records of pending City Council matters and recuse himself from them and report that he is so recusing to the Clerk and Board of Ethics if he has a business relationship with the client that creates a financial interest for him, or has derived or expects to derive income or compensation from the client in the last or next twelve months, *that report must be made within four (4) days of the Clerk’s delivery to him of the introduction of the matter, “or as soon thereafter as the member is or should be aware of such potential conflict of interest.*”[[7]](#footnote-7) [emphasis added]

The overarching point is that an elected official cannot reasonably be held to have violated §2-156-030(b) if he did not know or have reason to know, at the time he contacted another City official or employee with respect to a matter or participated in a discussion on a matter, that his law firm’s client was involved in the matter. While such a circumstance may be rare – an alderman who is a partner in a law firm *can* reasonably be expected to know who his law firm’s clients are, he *cannot* reasonably be expected to know which persons or parties are named in proposed legislation or legislative orders unless he has been afforded a chance to review that legislation or order or is informed of the parties involved in it by his colleagues, staff or other City employees or officials. That is precisely what occurred (actually, what did *not* occur) here. Had Alderman X been given a chance to review the Order before it was read aloud by the Clerk, we may well come to a different conclusion.[[8]](#footnote-8) In other words, while §§2-156-030(a)[[9]](#footnote-9) and (b) do not explicitly contain the language “know or have reason to know,” or, in legal terms, a *scienter* requirement, the Board concludes that those sections cannot fairly be read otherwise.

For these reasons, we conclude, based on the facts presented, Alderman X did not violate §2-156-030(b) by [making this statement on the record of the Council meeting] even though his Firm represented the owners/applicants of two (2) properties listed in the Order and received or expect to derive compensation or income from them in the past or next twelve months.[[10]](#footnote-10)

3. §2-156-080(a). This provision prohibits a City official, like Alderman X, from making or participating in a City “decision” in a matter in which he has a financial interest distinguishable from that of the general public, or from which matter he has derived or expects to derive income or compensation in the year preceding and the year following his participation in the “decision.” This too is an *in rem* prohibition – meaning that, for him to have violated it, he must at least have had a financial interest *in* or derived compensation or income *from the matter*, that is, from the action by which the Order was referred to the Rules Committee.

Our analysis above, with respect to the second way in which a City employee or official can violate §2-156-030(a), is apropos here. Any income or compensation the Firm, and thus Alderman X, would derive that might be related to this Order would be from the Firm’s clients, not from this action, which involves the proper City Council Committee to consider the Order. Alderman X stands to derive no income or compensation from this action; rather, any compensation or income he would derive would be from the persons involved (his law firm’s clients) – and related to decisions or actions other than those of the City Council (that is, the Cook County Assessor or the Board of Tax Review). Moreover, we again state, as a matter of basic equity and fairness, because Alderman X did not know the Firm’s clients were involved in the action and in his [making this statement on the record of the Council meeting], he did not violate this section of the Ordinance. Therefore, we hold here that a City employee or official cannot be held to have violated §2-156-080(a) unless he knew or had reason to know that he has a financial interest in it or knew or had reason to know that he derived or reasonably could expect to derive income or compensation from it. Neither is the case here.

For these reasons, we conclude, based on the facts presented, Alderman X did not violate §2-156-080(a).

**Determinations**. For the reasons explained above, the Board has determined that Alderman X did not violate the Governmental Ethics Ordinance by [making the statement as to referring the matter to Committee1] [at the] City Council meeting when the Clerk read aloud the substance of [the Order], which names properties owned or represented by his law firm’s clients. This is for two (2) reasons: (i) Alderman X did not know or have reason to know that these properties were named in the Order; thus, as a matter of fundamental fairness, cannot be charged with a “conflict of interests” violation if he did not know or have reason to know there was a conflict or potential conflict, even though his law firm (thus he, as a partner in it) did receive or reasonably can expect to receive compensation from these clients; and (ii) he had no financial interest in the *matter*, namely, the issue of which City Council committee would consider this Order.

**Reliance.** The Board’s determinations are based solely on the application of the Governmental Ethics Ordinance to the facts summarized in this opinion. Other laws, such as those covering the conduct of Illinois attorneys, may apply. If the facts stated are incorrect or incomplete, please notify our office immediately, as any change may alter our determinations. Please note, as well, that this opinion may be relied upon by any person involved in the specific transaction or activity with respect to which this opinion is rendered.

**Reconsideration**. Either the person requesting this opinion, Alderman Y, or its subject, Alderman X, may request that the Board reconsider it by sending written notice to our Executive Director within 14 City business days, that is, on or before April 3, 2018. The Board can reconsider its opinion only if the request contains an explanation of material facts or circumstances that were not before the Board in its deliberations on the opinion. *See* Board Rule 3-8(1).

Our office appreciates the opportunity to advise both of you.[[11]](#footnote-11) If either of you have further questions about this matter, please contact our office.

Sincerely,

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

William F. Conlon, Chair

1. We note here that, by law and Board Rule, the Board is not authorized to issue an opinion to a reporter, unless the reporter is personally and directly involved the situation giving rise to the request. Put in legal terms, reporters do not have “standing” to receive Board opinions unless they are personally and directly involved in the situations about which they seek the opinions. *See* §2-156-380(l) of the Ordinance and Board Rule 3-1, both available on the Board’s website. [↑](#footnote-ref-1)
2. The Board expresses no opinion on which Committee ought rightfully to consider this Order, because that question: (i) falls outside our jurisdiction and is governed by City Council Rules, which the Board has no authority to interpret; and (ii) is irrelevant to answering the questions addressed in this opinion, which involve the propriety, under the Ordinance, of Alderman X *himself* [making the statement] or for that matter “calling” any committee. If he had instead [“called” Committee 3, thereby] suggesting that the Order go to Committee [3], the issues addressed in this opinion would still be ripe, because, as discussed below, public records show that Alderman X’s law firm represented appellants in proceedings on properties named in the Order in the twelve months prior to [the City Council meeting]. [↑](#footnote-ref-2)
3. These are available on the City Clerk’s website: <http://www.chicityclerk.com/city-council-news-central/rules-order> [↑](#footnote-ref-3)
4. While we need not decide whether the referral to the Rules Committee was a “decision” – as it was automatic and non-discretionary – we do conclude that it was an “action.” *See* Black’s Law Dictionary, which defines “action,” among other things, as “something done” or “an act or series of acts.” [↑](#footnote-ref-4)
5. The Board is of course aware that it could be argued that Alderman X might have inferred from the circumstances surrounding the Order that one or more of his law firm’s clients were named in it. But, speculation is insufficient for this Board to conclude that he had reason to know that any of his firm’s clients were named in the Order, and thus that he may have had a financial interest in the action distinguishable from its effect on the public generally. [↑](#footnote-ref-5)
6. Note, however, that the Board decided this case three (3) years before §2-156-030(b) was enacted. Had §2-156-030(b) been in effect in 1994, the Board would have strongly advised the employee not to make this recommendation because of his contractual relationship with his tenant—but the Board could not have said this would violate §2-156-030(b) because that provision applies only to elected officials. This illustrates the nuanced difference between *in rem* and *in personam* prohibitions, discussed in the body of this opinion. It also illustrates one of the challenges Board staff and members and in ethics commissions throughout North America face: advising a person in advance to refrain from doing something is at times not the same inquiry as determining, after the fact, whether he violated the Ordinance by doing it. [↑](#footnote-ref-6)
7. This language and standard come from §2-156-080(b)(2), a provision not at issue in this case, because that provision deals only with City Council votes (no vote was taken as to the Order in this case), and only for certain types of Council matters named in that provision, tax matters not being one of them.

   [↑](#footnote-ref-7)
8. We note here that, in his Affidavit, Alderman X states that he intends to withdraw his request that the Order be referred to [Committee 1], and will not participate in any future discussions or votes relating to it, either in committee or before the full Council. In fact, now that he knows his law firm’s clients are involved in the matter, he *must* so recuse himself, per §2-156-030(b), because it involves persons from whom he has or reasonably can expect to derive income or compensation. Moreover, should the Order be approved, and the Law Department decide to intervene in proceedings involving the Firm’s clients, there would be an additional restriction, of which we know he is aware: pursuant to §2-156-090(b), entitled “Representation of Other Persons,” he could not derive any income or compensation from the representation of any person in a proceeding before any tax appeal body because the City would then be a party and the person’s interests would be adverse to the City. [↑](#footnote-ref-8)
9. The second sub-provision thereof, to be more precise. [↑](#footnote-ref-9)
10. We need not reach the issue, raised in the second sub-provision of §2-156-030(b), of whether that interchange was a “decision” in which Alderman X participated. [↑](#footnote-ref-10)
11. Per Board Rule 3-7, a copy of this formal Board opinion is being sent to both the person who requested the opinion, Alderman Y, and the subject of the opinion, Alderman X. [↑](#footnote-ref-11)