

**CITY OF TALLAHASSEE
INDEPENDENT ETHICS BOARD**

AO 2024-03 – February 20, 2024

**MISUSE OF PUBLIC POSITION
ORD. NO.: 2-8**

**SOLICITATION OR ACCEPTANCE OF GIFTS
ORD. NO.: 2-15**

*To: The Honorable John Dailey, Mayor
City of Tallahassee, Florida
300 South Adams Street
Tallahassee, FL 32301*

SUMMARY #1:

Under the City of Tallahassee Ethics Code, a covered individual does not misuse his or her public position by joining other local dignitaries in donating a personal item to be used in a community scavenger hunt sponsored by a local radio station.

QUESTION #1:

Does a covered individual violate the Tallahassee Ethics Code ban on misuse of public position by participating in a community activity sponsored by a local business where he donates a personal item to be included in a scavenger hunt?

This question is answered in the negative.

The inquirer has been invited to participate in a scavenger hunt, sponsored by a local radio station, by donating a personal item for listeners to find. The station, Tally 99.9 (WXTY-FM) holds an event called “The Great Tallahassee Scavenger Hunt.” As part of the event, the station solicits personal items from well-known members of the community for the public to find.

As part of this event, the station has recently used items such as “Bobby Bowden’s Hat,” “Rob Nucatola’s Bow Tie,” and “Chief Osceola’s Tomahawk.” The station wishes to include an item of the inquirer, such as a pen or golf-related item, and to use his name.

Based on the information provided, it is unknown whether the inquirer intends to use his own personal property or City property. The use of City property would likely result in a violation; therefore, this analysis focuses on the conduct as if only private personal property would be used.

The City of Tallahassee Ethics Code prohibits any covered individual or city employee from improperly using his or her public position for the benefit of another. The applicable ordinance reads as follows:

No public official or employee of the city shall use or attempt to use their official position or any city property or resource which may be within their trust, or perform or fail to perform, their official duties, in a manner inconsistent with the proper performance of the official's or employee's office and which the official or employee knows or should know with the exercise of reasonable care will result in a special privilege, benefit, or exemption for the employee, official, or others.

§ 2-8, *Tallahassee Code of Ordinances* (2024).

In order to determine a violation of the Tallahassee Ethic Code's prohibition on a misuse of public position, the analysis must consider whether the inquirer's involvement in the radio station event is an act inconsistent with the proper performance of his duties that provides a benefit to himself or another as well as whether his involvement is itself the use of an official position.

First, we consider whether the inquirer or the radio station experiences a benefit. In this case, the radio station will experience a benefit as it hopes to attract listeners by publicizing an event that will include the name of a City elected official. This finding, however, is not conclusive to the analysis. Prior to 2022, the Tallahassee Ethics Code prohibited any benefit to the official or another person or entity. In response to recommendations by the Tallahassee Independent Ethics Board, the City Commission amended the ordinance so that the act providing the benefit must be inconsistent with the proper performance of the person's duties. *See*. Ord. No. 22-O-16AA, § 1 (April 4, 2022).

Next, we consider whether participating in this scavenger hunt is an act not consistent with the proper performance of the inquirer's duties. All members of the City Commission regularly engage with the local media. Upon a review of city policies, there does not appear to be any prohibition or restriction regulating elected officials' communication or engagement with the media. To the contrary, the act is almost expected. The Mayor and City Commissioners regularly appear on news broadcasts, in print news, and for interviews with television and radio stations. Additionally, the Mayor and City Commissioners regularly participate in events where they engage with the public, such as when they are recognized as dignitaries in parades and private events.

In addition to the practice of engaging with the media and the public, it is important to note that the use of an official job title is not enough to constitute a misuse of public position. When reviewing complaints alleging misuse of public position, the Florida Commission on Ethics has found that a person subject to the ethics code does not violate the misuse of public position statute when using their official title in a private capacity, although this determination depends on the context of the use of the title.

The Commission found no probable cause for misuse of public position when a respondent, who served as a city commissioner, created and used stationary that included the seal of her city,

her official title, and her name, in order to write voters, endorsing and recommending candidates for elected office. *See In re Ilene Lieberman* (Comm'n on Ethics Compl. No. 90-71).

The Commission also refused to find probable cause for misuse of public position where a highway patrolman wore his official uniform while appearing in a television commercial for a candidate for the state legislature, finding that the uniform was part of his persona and used for protected constitutional speech. *See In re John Curlee* (Comm'n on Ethics Compl. No. 89-45).

While not speaking to facts presented for an advisory opinion, the Commission declared that not all uses of an official title are benign. For instance, the Commission opined that an elected official using his or her title in a written correspondence with a debtor or creditor could be seen as an inappropriate act. *See* CEO 91-35 (July 19, 1991).

As in *Liebermann* and *Curlee*, the inquirer here is known as the City's mayor, and the title itself is part of his personal persona. The use of the title itself for this event would not constitute an improper use of his official position.

While the simple act of providing an item for a scavenger hunt would not constitute a misuse of public position, the overall conclusion could change if the inquirer chooses to use City property for the scavenger hunt. It is highly recommended that the inquirer uses his own private personal property for the radio station's scavenger hunt.

Accordingly, based on the facts presented by the inquirer and this Board's reliance on those facts, the Tallahassee Independent Ethics Board finds that the inquirer would not violate the Tallahassee Ethics Code ban on misuse of public position if he participates in a radio station's scavenger hunt as long as he uses his own private personal property.

SUMMARY #2:

Under the City of Tallahassee Ethics Code, a covered individual may not participate in a community event sponsored by a city vendor as the publicity gained through that event would constitute a prohibited gift.

QUESTION #2:

Does a covered individual violate the Tallahassee Ethics Code ban on solicitation or acceptance of a gift by participating in a community activity sponsored by a city vendor where the covered individual will receive publicity?

This question is answered in the affirmative.

As previously stated, the inquirer has been invited to participate in a community scavenger hunt, sponsored by a local radio station. For the event, the inquirer would donate something belonging to the inquirer and then that item would be found by the public as part of the radio station's scavenger hunt.

The Tallahassee Ethics Code prohibits covered individuals from soliciting or accepting gifts when those gifts are from city vendors, lessees of city property, or lobbyists who appear before city government.

The applicable ordinance reads as follows:

No covered individual shall knowingly, directly or indirectly, accept or solicit a gift of any value from any person or business entity that the recipient knows, or should know with the exercise of reasonable care, is a vendor, lessee of city property, lobbyist or any principal or employer of a lobbyist who lobbies, sells or leases to the city, or from any potential vendor or lessee that is currently engaged in procurement or negotiations with the city or a bid protest.

§ 2-15(a), *Tallahassee Code of Ordinances* (2024).

For a violation to be found, all elements of this prohibited act must occur. The first element is determining whether the inquirer is subject to the applicable ordinance.

The gift ordinance under the City of Tallahassee Ethics Code is limited to only covered individuals. The term "covered individual" is defined within the Tallahassee Ethics Code as follows:

Covered individual means:

- (1) Each public official;
- (2) Each employee and each member of a city board, commission, or council who is required by F.S. § 112.3145, to file an annual financial disclosure, including any employee with purchasing authority exceeding \$35,000.00; and
- (3) Each employee who is a procurement employee. "Procurement employee" means any city employee who has participated in the preceding 12 months through decision, approval, disapproval, recommendation, preparation of any part of a purchase request, influencing the content of any specification or procurement standard, rendering advice, investigation, or auditing or in any other advisory capacity in the procurement of contractual services or commodities, if the cost of such services or commodities exceeds or is expected to exceed \$10,000.00 in any fiscal year.

§ 2-4, *Tallahassee Code of Ordinances* (2024).

As the inquirer is a covered individual, the next step in the legal inquiry is whether the donor of the gift falls into one or more of three enumerated categories in local ordinance. Those groups are city vendors, lessees of city property, and lobbyists or those who employ lobbyists that appear before the City of Tallahassee.

The scavenger hunt is sponsored by the radio station, Tally 99.9. Operating out of northeast Tallahassee, Tally 99.9 broadcasts under the call sign WXTY-FM and is an “adult hits” station aimed primarily toward the Tallahassee media market. The correspondence received by the inquirer regarding the event as well as the station’s website states that the radio station is owned by the Adams Radio Group. According to FCC filings, ARG of Tallahassee LLC holds the license for the frequency used by Tally 99.9. According to the Florida Division of Corporations, ARG of Tallahassee LLC is a Delaware based limited liability company that changed its name to Adams Radio of Tallahassee LLC on July 05, 2023. Adams Radio of Tallahassee LLC owns a total of four (4) radio stations serving the Tallahassee media market.

A review of a city database shows that Adams Radio of Tallahassee LLC is a city vendor. The database does not show what products or services were purchased from Adams Radio of Tallahassee LLC. The purchase could be a regularly occurring expense that was subject to bid, or it could have been a one-time purchase made by staff pursuant to city procurement policies. Nevertheless, the Tallahassee Ethics Code does not distinguish between the size of purchases when defining a city vendor. Any person or entity that sells a good or service to the City of Tallahassee is by definition a city vendor who may not convey a gift, or anything of value, to a covered individual.

The final element to consider is whether the covered individual would receive a gift from the city vendor. The term “gift” is defined in the state ethics code and means:

“Gift,” for purposes of ethics in government and financial disclosure required by law, means that which is accepted by a donee or by another on the donee’s behalf, or that which is paid or given to another for or on behalf of a donee, directly, indirectly, or in trust for the donee’s benefit or by any other means, for which equal or greater consideration is not given within 90 days, including:

1. Real property.
2. The use of real property.
3. Tangible or intangible personal property.
4. The use of tangible or intangible personal property.
5. A preferential rate or terms on a debt, loan, goods, or services, which rate is below the customary rate and is not either a government rate available to all other similarly situated government employees or officials or a rate which is available to similarly situated members of the public by virtue of occupation, affiliation, age, religion, sex, or national origin.
6. Forgiveness of an indebtedness.

7. Transportation, other than that provided to a public officer or employee by an agency in relation to officially approved governmental business, lodging, or parking.
8. Food or beverage.
9. Membership dues.
10. Entrance fees, admission fees, or tickets to events, performances, or facilities.
11. Plants, flowers, or floral arrangements.
12. Services provided by persons pursuant to a professional license or certificate.
13. Other personal services for which a fee is normally charged by the person providing the services.
14. Any other similar service or thing having an attributable value not already provided for in this section.

§ 112.312(12)(a), FLA. STAT. (2023).

The state statute also provides a limited list of exceptions to the “gifts” definition. Upon a review of these exceptions, none would apply to the facts of this case.

The final determination is whether the participation in an event sponsored by a city vendor provides anything of value to the covered individual. In this case, the thing of value is the publicity provided to the covered individual. As the term gift is defined by state statute, we look to cases from the Florida Commission on Ethics to determine whether free publicity qualifies as a gift under state law.

In 1991, a State Representative was offered free space on a local billboard by an outdoor advertising company so that the State Representative could inform constituents of the services offered by his or her office. While the Commission did not find this act a violation of the state ethics code due to the donor not being a prohibited individual or entity, it did opine that the free publicity was a gift. *See* CEO 91-39 (July 19, 1991).

In 2005, the Florida Commission on Ethics relied on the 1991 case to decide a matter where the donor was from the list of individuals or entities subject to the statutory gift restricts. BellSouth Telecommunications wished to produce and broadcast public service announcements promoting its Lifeline and Link-Up programs. These programs were services offered to low-income individuals who may not otherwise have been able to afford phone service. Furthermore, the Florida Legislature had adopted legislation to “facilitate and require the promotion of these services the target population.” BellSouth intended to use “all members of the Legislature, the Governor and Cabinet, the Public Counsel, and members of the Public Service Commission” to appear in these public service announcements. The Florida Commission on Ethics held that those individuals who were subject to the gift statute could not participate in these public service announcements as the free publicity enjoyed by the participants represented something of value. *See* CEO 05-11 (June 7, 2005).

In 2008, the Commission also held that the Attorney General appearing in public service announcements produced and broadcast by a nonprofit organization would constitute a gift. In this case, the Commission found the advertisements did not run afoul of the state ethics code because the organization producing and broadcasting the advertisements was the Florida Commission on the Status of Women, a nonprofit, which did not fit one of the categories of individuals or entities subject to statutory gift restrictions. The opinion did, however, address the definition of gift and said, “we are persuaded that the situation described in your inquiry would constitute a gift to you, via the free exposure and publicity you will receive[.]” *See* CEO 08-2 (Jan. 30, 2008).

Also in 2008, a city commissioner sought to participate in public service announcements promoting an anti-littering campaign. The Florida Commission on Ethics held that, while the announcements were clearly for a worthy cause, the free publicity gained from these advertisements would constitute a gift to the elected official. Since the inquirer did not disclose the source of the public service announcements, the Commission was unable to issue an opinion as to whether the advertisements were permissible; however, the Commission did opine that the free exposure was a gift. *See* CEO 08-29 (Dec. 10, 2008).

During the recent global pandemic, a principal that employed state lobbyists wished to produce and air public service announcements pertaining to the state’s efforts to combat the spread of the COVID-19 virus. The company intended to use the “Governor, Lieutenant Governor, Surgeon General, Commissioner of Education, and other officials” in these advertisements. In its advisory opinion, the Commission stressed its understanding that the cause was worthy and for the greater good of society; however, it stated that its hands were tied by the existing law and found that the free publicity would constitute as a prohibited gift to those public officials subject to the state’s gift laws. The Commission clarified that its opinion did not impede the ability of reporting individuals to “engage in news conferences, make press releases, or be covered by the media.” *See* CEO 20-5 (April 15, 2020).


Based on the opinions of the Florida Commission on Ethics, the definition of the term “gift” under state statute does include free publicity received by a public official or employee. In this case, the same would be true. While the scavenger hunt appears to be an event done for the enjoyment of the community and clearly not for any improper purposes, the application of the local ethics code and its related statutory counterparts must be consistent.

Since the local ordinance governing gifts does not provide for gifts of nominal value, the local ethics code applies to this situation just as if an individual were accepting an expensive item. While the City of Tallahassee Independent Ethics Board may wish to reevaluate the ordinance and its applicability to gifts of nominal value, the law as it exists today is absolute.

Accordingly, based on the facts presented by the inquirer and this Board’s reliance on those facts, the Tallahassee Independent Ethics Board finds that the free publicity resulting from a covered individual’s participation in a scavenger hunt sponsored by a radio station who also happens to be a city vendor would be a prohibited gift and a violation of the City of Tallahassee Ethics Code.

ORDERED by the City of Tallahassee Independent Ethics Board meeting in public session on February 20, 2024, and **RENDERED** this 20th day of February 2024.

APPROVED:



Kristen S. Costa, Chair
Tallahassee Independent Ethics Board

ATTEST:



DWIGHT A. FLOYD
Independent Ethics Officer

APPROVED AS TO FORM:



JOHN LAURANCE REID
Board Counsel