

**Ethical Practices Board
Rochester, MN**

Annual Report 2010



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Ethical Practices Board 2010

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Linda Gentling (Secretary)

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Appointment: May 1, 2009 – April 30, 2011

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Appointment: July 29, 2010 – April 30, 2011

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Appointment: May 1, 2009 – April 30, 2012

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Appointment: September 30, 2010 – April 30, 2012

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Ethical Practices Board

Table of Contents

Annual Report 2010

Forward from the Chair	4
Introduction	.....	5
Authorization	.....	6
Organization	.....	6
Code of Ethical Standards	.....	6
Rules and Procedures	.....	7
Jurisdiction	.....	8
Complaint Disposition	.....	8
Inquiries <i>and</i> Administrative Matters	.....	9
Advisory Opinions	.....	10
Appendix A	.....	11
Appendix B	.....	14

Forward from the Chair

2009 having served as the inaugural year for the *Ethical Practices Board* (EPB or Board), I have been honored to serve as the Chairperson for 2010 – 11, the second year of operation for the *Ethical Practices Board*. While a code of ethical conduct has been present in both the Rochester City Charter and Rochester City Ordinance, a group had not previously existed that could serve as a body for deliberation of issues related to ethical conduct nor was there a clearly defined process for resolution of complaints. The creation of the *Ethical Practices Board* served to address these concerns.

The items of interest that have come to the *Board* this second year have been similar in nature to the items, issues and inquiries that had arisen in the recent experience of the Board. This year the Board has examined a citizen's complaint, and a number of items dealing with appointments to various city boards and commissions, discussion(s) of potential conflicts of interest possibly inherent in these appointments. The Mayor and the General Manager of Rochester Power Utility (RPU) meet with the Ethical Practices Board for informative discussions. As a result of these discussions, and the on-going review of current documents, the *Board* has recommended that the Mayor develop a Practice and Protocol for the appointment process that falls to his purview and the *Board* is satisfied that the current appointment practice for member(s) to the RPU Board are adequate at this time.

Perhaps most important among the goals of the Board is that of education. The *Board* received an invitation to participate in the Greater Rochester Leadership's membership education process. As a result of the invitation the *Board* Chairperson attended and participated as a panel member on January 13 for the organization's discussion regarding Diversity and Ethical Challenges. The panel activities and discussions were lively and the Chair's participation well received. In many instances an action which may occur that seems very innocent and without malice on the surface may in fact give rise to a violation. I am happy to report that the number of incidents reported during this year was low. The majority of the Board's activities were related to providing advice and guidance.

Again, it is a privilege to serve as a member and the current Chair for the *Ethical Practices Board* and I would ask that the following report please be accepted as a summary of the Board's activities for 2010.



Joseph F. O'Toole Jr., D. Min.
Chairperson

April 2011

Introduction

It is imperative that all persons acting in the public service not only maintain the highest possible standards of ethical conduct in their transaction of public business but that such standards be clearly defined and known to the public as well as to the persons acting in public service.

The proper operation of a democratic government requires that public officials be independent, impartial, and responsible to the people. Governmental decisions and policies must be made in the proper channels of the governmental structure. Public office may not be used for personal gain. Citizens must have confidence in the integrity of their government officials.

Public officials are agents of public purpose and hold office for the benefit of the public. They are bound to uphold the Constitution of the United States and the Constitution of the State of Minnesota, and to carry out impartially the laws of the nation, state and municipality so as to foster respect for all government. They are bound to observe in their official acts the highest standards of morality and to discharge faithfully the duties of their office regardless of personal considerations, recognizing that the public interest must be their primary concern.

In recognition of these goals, there is an established Code of Ethics for elected or appointed public officials, citizen volunteers, and candidates for public office. The purpose of the Code is to establish ethical standards of conduct for such persons by establishing acts which are incompatible with the City's best interests and requiring disclosure of private or financial interests in matters involving the City. The provisions and purposes of this Code of Ethics are declared to be in the best interests of the City of Rochester.

Authorization

The purpose of the City of Rochester Ethical Practices Board (Board) is to further the goals of the established Code of Ethics and as such the Board was formed via city ordinance in December 2008. The Board is comprised of five citizen members who are appointed by a committee consisting of the President of Rochester Community and Technical College, the Chancellor of the University of Minnesota Rochester and the highest ranking officer of the Olmsted County Bar Association not associated with the Rochester City Attorney's Office. Members serve a three year term and may serve up to two consecutive terms.

Organization

The Ethical Practices Board is composed of five members who are residents of the City and serve without compensation. Board members are appointed by an Appointing Committee.

The Board is organized with a chair, vice chair and secretary who are elected by the membership. Board members serve a three year term and may serve two consecutive terms.

No member of the Board may be an elected official, an appointed official, a city employee, related to a local official or city employee, a candidate for elected public office, a person who, for compensation, represents the private interests of others before the city council or mayor, or a paid campaign worker or political consultant of a current local official.

Board action requires the affirmative vote of at least three members of the Board.

Code of Ethical Standards

The Code of Ethical Standards is generally covered in Chapter 13 of the Rochester City Ordinances and covers a broad range of areas including conflict of interest, use of city property and improper conduct. The intent of the Code is to provide broad overview of expected conduct and in some cases offer specific guidance regarding certain activities. Areas not specifically covered in the Code may be addressed to the City Attorney's office or the Ethical Practices Board for further clarification. In some cases there may arise a topic not previously considered by the Code which may result in the issuance of a formal opinion by the Board.

Rules and Procedures

In carrying out its duties, several responsibilities for the Board are specified in the ordinance. Among these are the following.

- The Board shall have jurisdiction to review and make findings concerning any alleged violation of RCO Chapter 13 by any public official.
- To make notifications, extend deadlines, conduct investigations, make findings of fact, conclusions of law and order, review allegations and conduct hearings as needed to decide specific cases in which a violation of RCO Chapter 13 is alleged.
- To report its findings regarding any complaint to the person's Appointing Authority and to the City Administrator.
- To issue ethics opinions to public officials regarding the propriety of any matter within the Board's jurisdiction.
- To conduct a preliminary investigation of a filed complaint, or of any circumstance or situation of which the Board may become aware that appears to violate any provision of RCO Chapter 13.
- To cooperate with the human resources department in the design of ethics education seminars, and to promote the city's ethics program and high ethical standards in city government.
- To make recommendations for changes to the Code of Ethics or the governing ordinance which the Board believes would enhance their purpose.

Except as provided elsewhere in city ordinances, a Public Official who violates the Code of Ethics may be subject to disciplinary action up to and including termination of city employment/city volunteer duties.

An elected official or an appointed member of any board or commission, whose discipline is addressed by the City of Rochester Home Rule Charter or the Rochester Code of Ordinances and who violates the Code of Ethics may be subject to such disciplinary action as is provided by the Home Rule Charter or the Code of Ordinances.

Jurisdiction

The Code of Ethics pertains to and is applicable to public officials including elected officials and city employees as defined in RCO 13.01 Subd. 7. Also included, but not limited to, are members of the following boards and commissions:

- Building Code Board of Appeals
- Downtown Development District Advisory Board
- Ethical Practices Board
- Housing and Redevelopment Authority
- Heating, Ventilation and Air Conditioning Board of Review
- Housing Board of Appeals
- Music Board
- Park Board
- Planning and Zoning Commission
- Public Utility Board
- Library Board
- Zoning Board of Appeals

The Board has jurisdiction to review and make findings concerning any alleged violation of this chapter by any public official.

2010 Complaint Disposition

In 2010 there was a single formal complaint received by the *Board*. The complaint was reviewed in depth by the *Board*. On investigation it was readily determined that the Complaint was outside the purview of the *Board*. The citizen who submitted the Complaint was advised of the *Board's* finding.

In addition, several informal inquiries were received which resulted in resolution being rendered by the City Attorney's office and one inquiry that resulted in the Board issuing an Advisory document. Details related to these items may be found in the Appendix section(s) of this report.

Inquiries

Throughout the year the City Attorney's office receives a variety of inquiries related to ethical issues. The City Attorney is most often able to provide appropriate guidance almost immediately. For awareness, a summary of those issues is provided to the Board at each meeting and those that require further discussion are addressed as necessary. The following information summarizes the typical nature of the inquiries:

The question most frequently asked involved an elected official's ability to accept a free meal, gift, expression of appreciation or something else of value. More often than not, the free gift is also made available to non-public officials. Under state law, the elected official can accept the gift when non-public officials receive the same gift. Otherwise, state law will not allow gifts between a public official and someone who has a financial interest in a decision to be made by that official.

The second most asked question involved a council member who sits on a non-city board or commission. If that board or commission brings a matter before the City Council, must the council member abstain from any discussion or voting on the matter? The answer is no if there is an ordinance or contract requiring a council member to sit on the board or commission (such as the RPU Board or RCVB). The answer is yes if the council member's membership on the board or commission is voluntary (such as Boy's and Girl's Club, or RNeighbors).

There were several questions about the existence of a conflict of interest in a particular factual situation. If the elected official's financial or personal interest in the matter pending before the Council impairs his or her ability to fairly and independently judge the matter in the performance of his or her official duties, then there is a conflict of interest. If not, then there is no conflict of interest.

Administrative Matters

The Board has been active in discussions with city administration on procedural and other matters intended to facilitate public disclosure and access. These are contained in the minutes of the Board which are available at – www.rochestermn.gov. At the main page of the City of Rochester's web site please click on the tab – *Citizens*. When the *Citizens* drop down menu appears click on *Advisory Boards, Commissions and Committees* then click on the web site link next to the Ethical Practice Board's listing.

Advisory Opinions

The Board will occasionally issue an opinion in response to a general inquiry or formal complaint if it feels a response will be of value to help clarify an aspect of the Code of Ethics or be of instructional value to a broad range of individuals. In 2009 one such opinion was issued. The full text of opinions rendered may be found on the web site (<http://www.rochestermn.gov/ethics>) or may be viewed in the City Attorney's office. Following is a brief summary of opinion(s) issued this year. The full text may be found in Appendix A.

Opinion 09-01 – Whether a member of the City Council, or any other city board or commission should participate in any way in the discussion or vote on a matter the merits of which the member previously has stated his or her views.

It is the Board's opinion that a member of the City Council, or any other city board or commission should not participate in any way in the discussion or vote on a matter the merits of which the member previously has stated his or her views.

References: RCO Ch. 13.01 subd. 2, 13.04 subd. 1

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As a result of this Opinion (09-01) the Board found it necessary to provide further clarity to the Opinion and as a result published the "Advice to Prospective Candidates" document. This document is merely an advisory device. A full and complete copy of this document can be found in Appendix B of this report.

Appendix A

CITY OF ROCHESTER

**ETHICAL PRACTICES BOARD
OPINION #09-01**

Date Issued: September 3, 2009

- QUESTION PRESENTED -

WHETHER A MEMBER OF THE CITY COUNCIL, OR ANY OTHER CITY BOARD OR COMMISSION SHOULD PARTICIPATE IN ANY WAY IN THE DISCUSSION OR VOTE ON A MATTER THE MERITS OF WHICH THE MEMBER PREVIOUSLY HAS STATED HIS OR HER VIEWS.

- ETHICAL PRACTICES BOARD'S OPINION -

IT IS THE BOARD'S OPINION THAT A MEMBER OF THE CITY COUNCIL, OR ANY OTHER CITY BOARD OR COMMISSION SHOULD NOT PARTICIPATE IN ANY WAY IN THE DISCUSSION OR VOTE ON A MATTER THE MERITS OF WHICH THE MEMBER PREVIOUSLY HAS STATED HIS OR HER VIEWS.

- DISCUSSION -

Section of the Rochester Code of Ordinances ("R.C.O") 13.01, subd 2 provides that the "proper operation of a democratic government requires that public officials be independent, impartial, and responsible to the people." This ordinance further notes that "[g]overnmental decisions and policies must be made in the proper channels of the governmental structure."

R.C.O. §13.04, subd 1 also states that no public official “shall knowingly engage in a conflict of interest.” Subdivision 2 states a conflict of interest includes one who engages in any business or transaction which is incompatible with the proper discharge of one’s performance of official duties.

The Board has been asked to provide an opinion on the following question: Is it appropriate for a member of the City Council, or other city board or commission to express an opinion on a matter pending or expected to come before the Council, board or commission without abstaining from all discussion and voting on the matter when it does come before the public body.

The Board concludes that a member of the Council, board or commission cannot publicly or privately express a position on the merits of a pending matter prior to a full discussion of the matter at the Council, board or commission meeting or hearing and then fail to recuse himself or herself on the matter when it does come before the public body. By discussing and voting on a matter upon which the council member has stated his or her judgment, the member has compromised his or her ability to fairly and impartially listen to the testimony, weigh the evidence, apply the law and reach a decision. At a minimum, this action constitutes the appearance of impropriety as it strongly suggests the member possesses a bias, partiality or prejudgment on a matter that comes to the public body for a recommendation or final decision.

A member of a public body cannot engage in any action that would impair the member’s independent judgment or action in the member’s performance of official duties. A public expression of predisposition on the merits of a matter prevents a public official from participating in the discussion of and voting on the same matter when it comes before the public body. In order to maintain his or her ability to fairly and impartially determine a matter that comes before the public body, a member should either refrain from making public judgments concerning the merits of the proposal or be prepared to not participate in any way in the discussion of or voting on the matter when it comes before the public body.

Accordingly, it is the Board’s opinion that a member of the City Council, or any other City board or commission should not participate in any way in the discussion or vote on a matter the merits of which the member previously has stated his or her views.

So as to not compromise the member’s ability to have all of the facts available when making a decision or recommendation, the Board wishes to note those activities not prohibited by this Opinion. This Opinion does not prohibit:

1. A public body member from testifying or stating his or her position on a matter, and then recusing himself or herself from any and all discussion and voting on the matter when it reaches the body;
2. A public body member from attending meetings at which the merits of a pending proposal are discussed; or

3. A public body member from listening to constituents or interested parties seeking to inform the member concerning a pending proposal.

Finally, this Opinion is limited to those circumstances when the public body acts as a "quasi-judicial" body. In other words, this Opinion applies only when the public body conducts a public hearing, receives evidence, applies the law and makes a recommendation/decision. When the public body acts as a legislative body (adopts resolutions, enacts ordinances or establishes policies), the member need not be concerned with the limitations provided in this Opinion although best practices suggest the member maintain an open mind until full public input has been obtained.

- AUTHORITY -

This opinion is issued pursuant to R.C.O. §13.10, subd. 5(G) which authorizes the Ethical Practices Board "[t]o issue ethics opinions to public officials regarding the propriety of any matter within the Board's jurisdiction." The Board is primarily responsible to ensure compliance with the Code of Ethics as found in R.C.O. ch. 13. Accordingly, the issue addressed in this Opinion is within the Board's jurisdiction.

Ethical Practices Board

By Randy Staver
Chair

By Linda Gentling
Secretary

Appendix B

ETHICAL PRACTICES BOARD

ADVICE TO PROSPECTIVE CANDIDATES

As you prepare to campaign for the position of City of Rochester council member, you may decide to speak out publicly on certain pending land use/license/permit issues. For example, you may tell the voters of your support or objection to a pending development project, license application or land use ordinance. (Lawyers refer to these matters as “quasi-judicial” because they involve a public hearing before the City Council, the presentation of evidence and testimony, and a formal written decision by the Council.) If you decide to speak publicly on these types of matters, the City of Rochester Ethical Practices Board wants to alert you to a formal opinion it issued in 2009 regarding a council member’s bias or prejudice on some matters that come before the City Council.

The Ethical Practices Board concluded that a council member cannot publicly express a position on the merits of a pending land use/license/permit matter and then vote on the matter when it comes before the City Council. By discussing and voting on a matter about which the council member has previously stated his or her judgment, the council member has compromised his or her ability to fairly and impartially listen to the testimony, weigh the evidence, apply the law and reach a decision. Such action would amount to a violation of the City’s Code of Ethics.

Again, this concern only applies to those pending matters involving a public hearing, testimony and a written Council decision on a specific project or matter. It does not mean that you could not speak in support or opposition to a city ordinance or rule in general. Those matters of policy are not covered by this opinion, nor does it apply to other matters that might come before or have previously been heard by the Council.

A copy of the Board’s formal opinion can be found at http://www.rochestermn.gov/departments/mayor/boards/epb/pdf_documents/EPB%20Opinion%2009-01.pdf. If you have questions about this Alert, including help understanding which issues are considered “quasi-judicial” and which are not, please contact the Rochester City Attorney.

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