

**CITY OF MADISON
OFFICE OF THE CITY ATTORNEY
Room 401, CCB
266-4511**

Date: November 20, 2018

FORMAL OPINION NO. 2018-002

TO: Mayor Soglin
All Alders

FROM: Michael P. May
City Attorney

RE: The Ethics Code and Receipt of Books

Introduction.

We often receive questions on the receipt of books. For many years, our office opined that a book fell within the definition of “anything of value” (sec. 3.35(2)(a), MGO) and thus any incumbent¹ could not accept the book under the proscription of sec. 3.35(5)(a)1., MGO, or would have to pay for the book.

Recently, however, I have become less certain of this opinion. I questioned the difference between providing a book containing pages of information that the person wanted the government official to see, or providing a 100-page government report, or reprints of magazine articles, or any other collection of information the resident wanted to supply to the official. We do not place restrictions on providing information in one format. What makes a book different?

After looking at the law and interpretation of a similar state law provision by the State Ethics Commission, I have changed my opinion. For the reasons explained below, books related to the responsibilities of the incumbent’s position would qualify as educational or informational materials, and receipt of those books would not violate the Ethics Code.

Question Presented.

Does the City’s Code of Ethics, sec. 3.35, MGO, forbid an incumbent from receiving a free book?

¹ Under the City’s Ethics Code, an “incumbent” is an elected official, an employee, or any member of a City board, commission or committee. Sec. 3.35(3), MGO.

Short Answer.

No. Generally, if the book provides information or educational material that relates to the duties of the incumbent, the Ethics Code does not prevent the receipt by the incumbent.

Analysis.

1. The Ordinances.

The City's Code of Ethics is sec. 3.35, MGO. Local codes are authorized by sec. 19.59(1m), Wis. Stats.

Sec. 3.35(5)(a), MGO, provides in part:

1. Use of Office or Position. No incumbent may use or attempt to use her or his position or office to obtain financial gain or anything of value ... for the private benefit of herself or himself
2. Influence and Reward. No ... incumbent may solicit or accept from any person or entity, directly or indirectly, anything of value if it could reasonably be expected to influence the incumbent's vote, official actions or judgment

Sec. 3.35(5)(g) provides in part:

(g) Receipt of anything of Value. No incumbent may receive and retain ... anything of value except in accord with Sec. 3.35(6).

Sec. 3.35(6) does not provide a relevant exception.

The City's ordinance regulating lobbying is sec. 2.40, MGO. Sec. 2.40(4) provides in part:

(a) No lobbyist may:

....

2. Furnish to any City of Madison official or employee ...

c. Food, meals, beverages, money or any other thing of pecuniary value ...

...

(f) Paragraph (a)2. does not apply to the furnishing of educational or informational material by a lobbyist or principal to a City official or employee, or acceptance thereof by a City official or employee.

As will be noted below, these ordinances are modeled on similar state statutes.

2. "Anything of Value" or "Educational or Informational Material"?

On its face, the Ethics Code would seem to outlaw receipt of books because they are "anything of value" or of "pecuniary value." Such a reading runs into immediate difficulties when we look at the Lobbying Ordinance.

Sec. 2.40 regulates lobbying before the City. The City regulates lobbyists much more intensely than other members of the public. Yet, the City's ordinance, in sec. 2.40(4)(f), MGO, explicitly says that lobbyists can furnish City officials or employees with "educational or informational material" without violating the Lobbying Ordinance's ban on giving City officials "any other thing of pecuniary value."

What is a book if not educational or informational material? Why would a lobbyist and City officials get a pass on such a gift under the Lobbying Ordinance, when the general populace and City officials do not get such a pass under the Ethics Code?

The Wisconsin Ethics Commission administers the State Lobby Law, sec. 13.61, Wis. Stats., *et seq.*, and the state Ethics laws, sec. 19.45 *et seq.* for both State and Local Officials. The City's Ethics Code and Lobbying Ordinance were modeled on these state laws, and the Madison City Attorney often looks to opinions of the Ethics Commission in interpreting our local ordinances. In 2006, the Ethics Commission was asked about a number of matters related to state officials attending conventions. The Ethics Commission stated at two points:

A state public official attending a conference or convention may accept educational or informational material or other item for the purpose of conveying it to the State of Wisconsin for the use or benefit of state office or agency.

2006 *Wis. Eth Bd* 04, ¶19 and summary.

The opinion itself does not address the "educational or informational material" ruling. Nor does it suggest the ruling is limited to convention attendees.

Our office followed up by calling the Ethics Commission. Staff of the Ethics Commission advised us that it was their opinion that council members may accept books because they qualify as educational or informational materials. During this conversation, the Ethics Commission pointed to Wisconsin lobbying statutes, which the Commission also enforces, to explain the reasoning behind their opinion.

The Wisconsin state lobbying statutes and ethics statutes are similar to Madison's ordinances. For example, like Madison's ordinances, an elective State official or candidate for an elective state office, may not accept anything of pecuniary value from a lobbyist. However, the furnishing of educational or informational material by a lobbyist is explicitly permitted under this statute, and under Madison's Lobbying Ordinance. The

Ethics Commission opined that council members would not violate the Madison Ethics Code by accepting a book because even lobbyists, who are held to a much higher level of scrutiny, are allowed to give educational or informational material to State officials, and to Madison incumbents under our ordinances. Lobbyists are held to a high level of scrutiny because they are paid to lobby State or local officials and must register with the State or with Madison to lobby legally. The Ethics Commission concluded council members may accept books from residents because they qualify as educational or informational materials and because residents are not held to the same high level of regulation as lobbyists.

I find this analysis persuasive.

The only other way to interpret the State laws and Madison ordinances would be to conclude that the Ethics Code has overruled *sub silentio* the “educational or informational material” exception in the lobbying laws. That is, while the lobby law has an exception, the Ethics Code does not, and therefore the Ethics Code controls, even for lobbyists. I reject this analysis.

Such a conclusion runs afoul of well-established rules of statutory construction: laws seeming to be in conflict should be interpreted to be in harmony, if possible, *In re Gilbert*, 2012 WI 72 ¶42, and that an implied repeal of a law is not favored, *Heaton v. Larsen*, 97 Wis. 2d 379, 392-93, 294 N.W. 2d 15 (1980). I would violate both of those principles if I were to read the Madison Ethics ordinance to repeal the exception in the lobbying ordinance.

Finally, there is an additional reason for a consistent interpretation of these laws: protecting the First Amendment rights of free speech and to petition the government.² Nobody contends that a Madison resident, or a registered lobbyist, could not provide any elected official or any incumbent with written materials on a topic of public interest. This could include copies of magazine articles, or academic studies, or even material copied from books. There is no reasonable distinction between such “educational or informational material”, which may be provided to an incumbent without penalty, and providing a book.

Subject to the limitations discussed in the final section of this opinion, I conclude that Council members, and all incumbents, may accept books that pertain to their public duties.

3. Limitations on receipt of books or other educational materials.

First, in line with the determination of the State Ethics Commission, the book must relate to the duties and responsibilities of the incumbent. When discussing broad policy

² The First Amendment to the U.S. Constitution, applicable to the States through the 14th Amendment, provides in part: “Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

questions, many topics may be relevant to the incumbent. I suppose it might be difficult to find, say, that a standard cookbook related to any incumbent's duties – although one might suppose that, say, a special cookbook on farm to table meals might be relevant to the Food Policy Council. Incumbents should carefully examine the topic and nature of any gifts of books to be sure the book relates to their duties. If it does not, the incumbent should either return the book or pay for it.

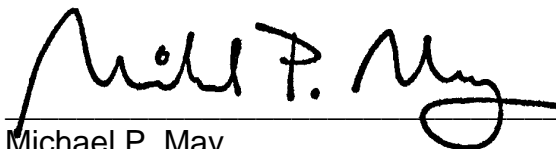
Second, a resident giving an incumbent a single book on an issue before the City is very different than showering an incumbent with a complete library on public policy issues around the world. Thus, in determining whether items are allowable educational or informational materials, or simply large gifts of such value as to be prohibited under the Ethics Code, we must pay attention to the size and scope of the gift.

Finally, remember that under the Ethics Code, the rules prohibiting receipt of things of value do not apply to gifts unrelated to one's public role. Gifts from family members on birthdays, or holidays, are outside the scope of the general prohibition. Sec. 3.35(6)(a), MGO.

Conclusion.

Under limited circumstances, incumbents may receive books without violating the City's Ethics Code. The books must relate to the incumbent's duties and not be so lavish as to be beyond the definition of educational or informational materials.

SYNOPSIS: The Ethics Code does not prohibit an incumbent's receipt of books, so long as the books relate to the duties of the office and are not lavish. Under those circumstances, the book or books would be educational or informational materials, specifically allowed under the Lobbying Ordinance, and the same exception applies under the Ethics Code.

A handwritten signature in black ink, appearing to read "Michael P. May". The signature is written in a cursive style with a large, sweeping initial "M".

Michael P. May
City Attorney

CC: Department and Division Heads
Attorneys