

Merom Brachman, *Chairman*
Mark A. Vander Laan, *Vice Chairman*
Bruce E. Bailey
Megan C. Kelley
Julie A. Rutter
Elizabeth E. Tracy



OHIO ETHICS COMMISSION
William Green Building
30 West Spring Street, L3
Columbus, Ohio 43215-2256
Telephone: (614) 466-7090
Fax: (614) 466-8368

Paul M. Nick
Executive Director

www.ethics.ohio.gov

INFORMATION SHEET: ADVISORY OPINION NO. 2023-01
DONATIONS TO GOVERNMENT ENTITIES

What is the question in the opinion?

When can a private party donate to a public agency?

What is the brief answer in this opinion?

This opinion explains when the Ethics Law prohibits a donation to a public agency and clarifies how public agencies should analyze these donations. Donations to a public agency can be categorized as either “gifts” or “payments” as part of a public contact.

- Gifts: A donation made as a “gift” is provided without the expectation of something in return.
- Payments: A donation made as a “payment” is part of a contract with a public agency where the payment is being made in return for something from the public agency.

The difference between “gifts” and “payments” as part of a public contract is whether there is consideration. Consideration is a legal term that refers to something of value, such as money or a promise, that is given by one party in exchange for the promise of another party to perform a certain act. Simply, consideration is the reason or incentive for each party to enter into a contract.

If there is no consideration and the transaction meets the definition of gift, then the Commission’s previous advisory opinions regarding donations to public agencies apply. If there is consideration, then the transaction is not a gift, and the Commission’s previous advisory opinions regarding donations to public agencies do not apply.

To whom do the conclusions in this opinion apply?

The conclusions apply to all similarly situated public officials or public employees considering donations to their public agency.

Why did the Commission issue this opinion?

In a previously issued Informal Advisory Opinion, the Commission acknowledged that there is a difference between donations to public agencies and payments made to lessen potential negative effects of a project on a community.¹ While the previous opinion did not directly address the distinction, the Commission stated it would address the distinction in a future opinion.

For more information, please contact:

Paul M. Nick, Executive Director; or
Christopher Woeste, Lead Advisory Attorney

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2023-01 IS ATTACHED.**

Syllabus by the Commission:

- (1) Public agencies must carefully consider donations from private entities to determine whether the Ethics Law prohibits the donation. To evaluate the donations, the public agency must determine if a donation is a “gift” or “payment” as part of a public contract.
- (2) A donation made as a “gift” is provided without the expectation of something in return. A donation made as a “payment” is part of a contractual exchange with a public agency where the payment is being made in return for something from the public agency. The difference between a “gift” and a “payment” is consideration.
- (3) Consideration is a legal term that refers to something of value, such as money or a promise, that is given by one party in exchange for the promise of another party to perform a certain act. Simply, consideration is the reason or incentive for each party to enter into a contract. If a donation to a public agency is offered with the expectation of something in return, then there is consideration. If there is consideration in a transaction with a public agency, then the donation is not a gift, but rather a “payment” as part of a public contract.
- (4) If a donation is made to a public agency as a “gift” without consideration, then the Commission’s previous advisory opinions regarding donations to public agencies apply. The Commission has outlined a five-part test to determine when and how a public agency may accept a “gift” donation, cautioning that:
 - i. All gifts/donations must be voluntary;
 - ii. Gifts/donations cannot be promised, offered, or given with the purpose of improperly influencing officials or employees of the recipient agency;
 - iii. Agency officials and employees cannot base any official actions or decisions on a person’s or company’s contributions or failure to contribute;
 - iv. No agency official or employee can derive any personal benefit or use from the gifts/donation; and
 - v. Officials and employees cannot endorse or indicate that the agency endorses the donor’s goods or services.
- (5) If a donation is made to a public agency as a “payment” for a public contract, then the Commission’s previous advisory opinions on gifts, including the five-part test above, do not apply. However, other restrictions in the Ethics Law still apply to the “payments.”
- (6) Public agencies should be mindful that a public contract that benefits an individual public official or public employee may be subject to the restrictions in the public contract law. The definition of public contract includes all donations to public agencies, both “gifts” and “payments” as part of public contracts. Whenever a public agency acquires goods or services, including receiving a donation, there is a public contract. If a public official or employee has an interest in or could profit from a “gift” or “payment” to a public agency, then the restrictions in the public contract law would apply.

Introduction

This advisory opinion clarifies when the Ethics Law prohibits a donation to a public agency. The public agency must determine if the donation is a “gift” or a “payment” as part of a public contract. A donation made as a “gift” is provided without the expectation of something in return. A donation made as a “payment” is part of a contractual exchange with a public agency where the payment is being made in return for something from the public agency.

When is a Donation to a Public Agency a Gift?

The difference between “gifts” and “payments” as part of a public contract is whether there is consideration.² Consideration is a legal term that refers to something of value, such as money or a promise, that is given by one party in exchange for the promise of another party to perform a certain act.³ Simply, consideration is the reason or incentive for each party to enter into a contract. A person cannot provide a “gift” when something is expected in return for the “gift.”

For example, if a company builds a park for a city to insulate residents from the noise of a storage facility in exchange for approval of the project from the city, then the donation of the park is not a “gift.” The company is offering the park as consideration to get a public contract with the city, so the donation does not meet the definition of a “gift.”

Sometimes it can be difficult to determine if there is consideration in a transaction.⁴ Some conditions on a donation may not rise to the level of consideration.⁵ While the distinction can be subtle, the motives of the parties and the element of bargaining⁶ help to determine when there is consideration.⁷ Additionally, if the value of the promise and the value received by the public agency are equivalent, it may indicate the presence of consideration.⁸

This distinction between “gifts” and “payments” is supported by both the Internal Revenue Service’s policy regarding charitable contributions and the Commission’s precedents discussed below.

Internal Revenue Service (“IRS”) Policy

The IRS looks to consideration to determine if a donation can be categorized as a charitable contribution from a donor.⁹ The IRS recognizes that a donation generally will not be a charitable gift “if the contributor expects a substantial benefit in return.”¹⁰ The IRS then applies a two part test to determine if “(1) the value of the property transferred to charity exceeds the fair market value of any goods or services received in exchange, and (2) the excess payment is made ‘with the intention of making a gift.’”¹¹

Commission Precedents Regarding Gifts

The Commission’s prior opinions on reporting gifts on financial disclosure statements rely on the same distinction. If a person pays the fair market value for a gift, then the person is not required to include it as a “gift” on his or her financial disclosure statement.¹² The Commission has determined that the payment of the fair market value for a “gift” constitutes consideration.¹³ The Commission also determined that if a public official pays the fair market value of a meal at a

charity event, then the public official is not required to disclose the “gift” on the official’s financial disclosure statement.¹⁴

In another example, the Commission considered donations to a public agency in an Informal Advisory opinion issued to an Ohio Department of Natural Resources (ODNR) employee.¹⁵ The ODNR employee owned a company that sought to “donate” 50 acres of land to ODNR in exchange for wetland mitigation credits.¹⁶ The Commission stated that this “donation” was a public contract because ODNR would be acquiring property in exchange for the ODNR employee receiving wetland mitigation credits.¹⁷ Since there was consideration on both sides of the transaction, the donation was not a gift, and the Commission did not apply the donation to public agency test.¹⁸

Therefore, if there is any element of consideration, then the donation is not a gift. If a donation is not a gift, then the Commission’s precedents on donations to public agencies would not apply. However, if a donation is a gift, meaning there is no consideration, then the Commission’s previous advisory opinions to public agencies still apply.

Donations to Public Agencies Test

The Commission has stated that a public official or employee cannot accept a gift from an “improper source” when the gift would have an improper influence on the official’s or employee’s public duties.¹⁹ An “improper source” is any person who is doing or seeking to do business with, interested in matters before, or regulated by a public agency.²⁰ However, an otherwise “improper source” is not prohibited from providing a donation to a public agency if the donation does not benefit an individual public official or employee. These donations are not of such character as to manifest an improper influence on public officials or employees in their public work.²¹

The Commission has outlined a five-part test to determine when and how a public agency may accept a donation without violating the Ethics Law, cautioning that:²²

- i) All gifts/donations must be voluntary;²³
- ii) Gifts/donations cannot be promised, offered, or given with the purpose of improperly influencing officials or employees of the recipient agency;²⁴
- iii) Agency officials and employees cannot base any official actions or decisions on a person’s or company’s contributions or failure to contribute;²⁵
- iv) No agency official or employee can derive any personal benefit or use from the gifts/donation;²⁶ and
- v) Officials and employees cannot endorse or indicate that the agency endorses the donor’s goods or services.²⁷

Part three of the test helps assure that the company’s donation, or failure to provide a donation, does not influence a public official or employee’s decision to enter into a contract.²⁸ The Commission has stated, “[a]lthough R.C. 102.03 does not prohibit companies from making voluntary donations to a state agency that are of a general nature or for a general purpose, R.C. 102.03 does prohibit direct payments to a state agency that are made in connection with the agency’s consideration of the company’s interests.”²⁹ This test still applies to gifts to public

agencies. However, this test does not apply to “payments” made to public agencies as part of public contracts because those public contracts that include an element of consideration are not gifts.³⁰

All Donations to Public Agencies are Public Contracts

The definition of “public contract” contained in the Ethics Law is broader than the common law definition of contract.³¹ “Public contract” includes any purchase or *acquisition*, or a contract for the purchase or acquisition, of property or services by or for the use of the public agency.³² All donations to public agencies are public contracts because the donation would provide goods or services to the public agency.³³

Since donations to a public agency are public contracts, the public contract law (R.C. 2921.42) would also apply. The public contract law applies to all public officials and employees.³⁴ A person who is not a public official is not subject to the restrictions in the public contract law.³⁵ Therefore, the public contract law restrictions would not apply to private entities donating to a public agency.³⁶

Payments to Public Agencies

If a “donation” to a public agency includes consideration, then it is not a gift but rather a “payment” as part of a public contract. These payments are not subject to the test for donations to public agencies discussed above. For example, if a company offers to provide a park to insulate residents from the noise of a storage facility as part of bargained for exchange to get approval for the project from the city, then the park is a payment as part of the public contract with the city. The Ethics Law does not prohibit these types of contractual arrangements.

Public agencies should be mindful that a public contract that benefits a public official or employee is subject to the restrictions in the public contract law, even if the benefit is related to the public official’s job duties.³⁷ For example, the Commission has stated that if a public agency enters into a contract that includes travel expenses for individual employees, then this contract is not prohibited as long as the expenses are necessary for conducting essential official business.³⁸ However, an individual benefit beyond what is necessary for conducting essential official business would be prohibited by the Ethics Law.³⁹

Conclusion

Limited to questions arising under Chapter 102 and Sections 2921.42 and 2921.43 of the Revised Code, it is the opinion of the Commission, and the Commission advises that:

- (1) Public agencies must carefully consider donations from private entities to determine whether the Ethics Law prohibits the donation. To evaluate the donations, the public agency must determine if a donation is a “gift” or “payment” as part of a public contract.
- (2) A donation made as a “gift” is provided without the expectation of something in return. A donation made as a “payment” is part of a contractual exchange with a public agency where the payment is being made in return for something from the public agency. The difference between a “gift” and a “payment” is consideration.

- (3) Consideration is a legal term that refers to something of value, such as money or a promise, that is given by one party in exchange for the promise of another party to perform a certain act. Simply, consideration is the reason or incentive for each party to enter into a contract. If a donation to a public agency is offered with the expectation of something in return, then there is consideration. If there is consideration in a transaction with a public agency, then the donation is not a gift, but rather a “payment” as part of a public contract.
- (4) If a donation is made to a public agency as a “gift” without consideration, then the Commission’s previous advisory opinions regarding donations to public agencies apply. The Commission has outlined a five-part test to determine when and how a public agency may accept a “gift” donation, cautioning that:
- i. All gifts/donations must be voluntary;
 - ii. Gifts/donations cannot be promised, offered, or given with the purpose of improperly influencing officials or employees of the recipient agency;
 - iii. Agency officials and employees cannot base any official actions or decisions on a person’s or company’s contributions or failure to contribute;
 - iv. No agency official or employee can derive any personal benefit or use from the gifts/donation; and
 - v. Officials and employees cannot endorse or indicate that the agency endorses the donor’s goods or services.
- (5) If a donation is made to a public agency as a “payment” for a public contract, then the Commission’s previous advisory opinions on gifts, including the five-part test above, do not apply. However, other restrictions in the Ethics Law still apply to the “payments.”
- (6) Public agencies should be mindful that a public contract that benefits an individual public official or public employee may be subject to the restrictions in the public contract law. The definition of public contract includes all donations to public agencies, both “gifts” and “payments” as part of public contracts. Whenever a public agency acquires goods or services, including receiving a donation, there is a public contract. If a public official or employee has an interest in or could profit from a “gift” or “payment” to a public agency, then the restrictions in the public contract law would apply.



Merom Brachman, Chairman
Ohio Ethics Commission

¹ Ohio Ethics Commission Informal Advisory Opinion No. 2022-INF-0520 (Lecklider). This Formal Advisory Opinion is factually distinct from the Informal Advisory Opinion issued to Mr. Lecklider. In the opinion issued to Mr. Lecklider, there was no consideration in the transaction between Harvey Solar and the Township or Village for the solar project because the matter was not pending before the Township or Village. The Village and Township did not have the ability to approve the solar project and could not enter a contract with Harvey Solar that would enable the project to move forward.

² The Commission defined a “gift” as “[a] voluntary transfer of property to another without consideration.” Adv. Op. No. 94-003 citing Black’s Law Dictionary (5th ed. 1979); *see also* Inf. Adv. Op. No. 1998-INF-0409 (Connors)(“[A] gift is a voluntary transfer of property by one to another without any consideration or compensation therefore.”).

³ Black’s Law Dictionary (8th ed. 2004).

⁴ *Hamor v. Moore's Admrs.*, 8 Ohio St. 239, 242 (1858); *see also* Adv. Ops. No. 94-003, 96-003, and 2006-03.

⁵ “Courts have held that the charitable nature of a gift is not destroyed by the imposition of a naming restriction, even if some of the donated funds are to be used to highlight the name.” Restatement of the Law, Charitable Nonprofit Organizations, Section 4.01, Comment b(1)(F) (2021), citing *Heinlein v. Elyria Sav. & Trust Co.*, 75 Ohio App. 353, 361, 62 N.E.2d 284 (9th Dist. 1945); *see also* Rev. Rule 68-432, 1968-2 C.B. 104, 105; *see also* Treas. Reg. § 53.4941(d)-2(f)(2) (“[T]he public recognition a person may receive, arising from the charitable activities of a private foundation to which such person is a substantial contributor, does not in itself result in an act of self-dealing since generally the benefit is incidental and tenuous.”).

⁶ Consideration must be “bargained for” meaning that one party intends to induce the other to respond and the other party is induced by it. *See* 1 Restatement of the Law 2d, Contracts, Section 71 (1981).

⁷ 1 Restatement of the Law 2d, Contracts, Section 71, Comment b (1981) (“Even where both parties know that a transaction is in part a bargain and in part a gift, the element of bargain may nevertheless furnish consideration for the entire transaction.”).

⁸ 1 Restatement of the Law 2d, Contracts, Section 71, Comment c (1981) (“In most commercial bargains there is a rough equivalence between the value promised and the value received as consideration. But the social functions of bargains include the provision of opportunity for free individual action and exercise of judgment and the fixing of values by private action, either generally or for purposes of the particular transaction.”).

⁹ *Triumph Mixed Use Investments III, LLC v. Commissioner of Internal Revenue Service*, T.C. Memo. 2018-65.

¹⁰ *United States v. Am. Bar Endowment*, 477 U.S. 105 at 118.

¹¹ *Triumph Mixed Use Investments III, LLC v. Commissioner of Internal Revenue Service*, T.C. Memo. 2018-65 citing *United States v. Am. Bar Endowment*, 477 U.S. 105 at 117.

¹² Adv. Op. No. 96-003 (“The payment of consideration by an official or employee negates this required characteristic of a gift.”).

¹³ *Id.*

¹⁴ Adv. Op. No. 2009-03 (This opinion also relies on the IRS rules).

¹⁵ Inf. Adv. Op. No. 1999-INF-1217-4 (Trivisonno).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Adv. Op. No. 89-002.

²⁰ *Id.*

²¹ *Id.*

²² *See* Adv. Op. No. 89-002; *see also* Inf. Adv. Op. No. 2022-INF-0520 (Lecklider).

²³ Adv. Ops. No. 86-003 and 89-002.

²⁴ Adv. Op. No. 89-002.

²⁵ *Id.*

²⁶ Adv. Ops. No. 89-002 and 92-015; *see also* R.C. 2921.43(A).

²⁷ Adv. Op. No. 89-002.

²⁸ Adv. Ops. No. 89-013 and 92-015. Inf. Adv. Ops. No. 2004-INF-0630 (Patterson), 2009-INF-0722 (Readey), and 2022-INF-0520 (Lecklider).

²⁹ Adv. Op. No. 89-013. In Advisory Opinion No. 89-013, the Commission considered the difference between donations and payments of expenses to promote a company’s interests. A company sought to pay for public employees’ expenses when traveling to the company’s facilities to evaluate the potential vendor’s product. The payment of expenses would have directly benefited individual employees whose job duties included deciding whether to conduct business with the company. The Commission concluded that the payment was prohibited because it was an attempt to do indirectly what is R.C. 102.03 directly prohibits. The opinion noted the difference between these

“payments” and contracts for expenses that were permissible based on the Commission’s decision in Advisory Opinion No. 87-007.

³⁰ See generally Adv. Ops. No. 89-002 and 89-013. Notably, none of the gifts considered in past advisory opinions had consideration. See Adv. Op. No. 89-013 (“The companies had nothing specific to gain from their donations...”).

³¹ 1 Restatement of the Law 2d, Contracts, Section 1 (1981) (“A contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes a duty”); compare R.C. 2921.42(I)(1).

³² R.C. 2921.42(I)(1). Competitively bid formal written contracts and casual as-needed purchases are all public contracts. Adv. Op. No. 90-005. The allocation of community and economic development services, or urban revitalization services, through the use of loans, grants, tax exemptions, land reutilization programs, revenue bonds, or other similar programs or incentives, constitutes a “public contract” regardless of whether services are funded through local or federal money. Adv. Ops. No. 84-011, 85-002, 89-008, 90-003, 91-011, and 93-007. See *State v. Lordi*, 140 Ohio App.3d 561, 569 (2000), discretionary appeal not allowed, 91 Ohio St.3d 1523, 91 Ohio St.3d 1526, 91 Ohio St.3d 1536, motion for reconsideration denied, 92 Ohio St.3d 1422 (2001). Also, a subcontract under a public contract is a public contract because it, like the primary contract, is for the purchase or acquisition of goods or services by or for the use of the governmental agency involved. Adv. Ops. No. 85-002, 86-002, 86-009, and 88-001.

³³ R.C. 2921.42(I)(1); Adv. Ops. No. 82-004, 84-011, 85-002, 86-002, 86-009, 87-005, 88-001, 89-008, 92-014, 93-007, 2001-02, 2009-06, and 2021-01. For example, if a public official donates goods or services to his or her own agency, then there is a public contract between the public agency and the public official because the public agency is acquiring these goods or services. Adv. Op. No. 90-003.

³⁴ See R.C. 2921.01(A) (“public official” means any elected or appointed officer, or employee, or agent of the state or any political subdivision, whether in a temporary or permanent capacity, and includes, but is not limited to, legislators, judges, and law enforcement officers).

³⁵ Adv. Op. No. 2007-02.

³⁶ Public officials who are interested in donating to their own agency should review Advisory Opinion No. 90-003 for additional guidance.

³⁷ Adv. Op. No. 87-007.

³⁸ Adv. Op. No. 95-005; see also Adv. Op. No. 86-011 and 87-007. An individual benefit may also implicate the supplemental compensation prohibition in R.C. 2921.43. See Adv. Ops. No. 89-002 and 89-013.

³⁹ Adv. Op. No. 89-013.