

State Legislature Trips Up Local Government (Again) on Ethics

By Mark Davies

The New York State Legislature can't seem to get anything right these days when it comes to government ethics. Sadly, sometimes others must pay for their mistakes. This time, it's local government.

The most recent debacle has come in the form of "technical corrections" to Article 18 of the General Municipal Law,¹ the state law regulating conflicts of interest in all 10,000 municipalities in New York State.² Had the Legislature consulted with experts on government ethics, including the New York State Bar Association's Municipal Law Section, the Legislature would have avoided the mess it has now created for local government. But it didn't. So here's the bad news: the "technical corrections" repealed the authority of local ethics boards to redact from financial disclosure reports any information, including categories of amounts, not exempt from the Freedom of Information Law (FOIL); repealed the authority of such boards to exempt municipal officials from disclosing information relating to their spouses and unemancipated children; and eliminated the exemption from FOIL that financial disclosure records enjoyed. Here's how and why.

In addition to setting forth conflicts of interest provisions, anemic and unworkable as they are,³ Article 18 also mandates that every county, city, town, and village with a population of 50,000 or more must adopt a financial disclosure form, upon penalty of being subject to the lengthy state form.⁴ All other municipalities may adopt a financial disclosure form but are not required to do so.⁵ From January 1, 1991, until December 31, 1992, these provisions were overseen by the former Temporary State Commission on Local Government Ethics.⁶

The Commission's powers included, among others, the power to redact information from the public copy of the report upon request of the filer and the power to permit a filer to request an exemption from disclosing certain information relating to the filer's spouse or unemancipated children.⁷ Furthermore, the Commission was expressly made exempt from FOIL and the Open Meetings Law, with the exception of specified documents, namely the financial disclosure statements themselves, notices of delinquency sent by



the Commission to an official who failed to file his or her disclosure statement or filed a deficient statement, notices sent by the Commission to a filer stating that reasonable cause existed to believe that he or she had violated Article 18 or a local ethics code, and notices of civil assessment of penalties imposed by the Commission upon an official for violation of the financial disclosure requirements.⁸ Excluded from those exceptions, however, were the categories of value or amount, "which shall remain confidential," and "any other item of information" deleted by the Commission from the publicly available report upon the request of the filer.⁹

Municipalities that adopted a financial disclosure form (or voted to continue an existing form) were expressly granted, in that regard, "such other powers as are conferred upon the [Commission]"¹⁰ and were in fact required to confer those powers upon their local ethics board if the disclosure statements were to be filed locally and not with the Commission.¹¹ Accordingly, municipalities, in regard to financial disclosure reports, possessed the power to redact information from the public copy of the report upon request of the filer and the power to permit a filer to request an exemption from disclosing certain information relating to the filer's spouse or unemancipated children.¹² Furthermore, in the opinion of this author, who was the Executive Director of the Temporary State Commission throughout its existence, municipalities, in regard to the administration of financial disclosure mandates, were, like the Commission, exempt from FOIL and the Open Meetings Law.

These powers of municipalities and municipal ethics boards became even clearer upon the sunset of the Commission on December 31, 1992. The 1987 Ethics in Government Act, which enacted the financial disclosure requirements for political subdivisions and established the Commission, specified that the provisions of section 813, governing the powers and duties of the Commission,

shall remain in effect until and including December thirty-first, nineteen hundred ninety-two; upon the expiration of such provisions, the powers, duties and functions of the temporary state commission on local government ethics shall be transferred, assigned and devolved upon the respective board of ethics, if there be one, or if not, upon the governing body, of political subdivisions which are required

by the provisions of sections eight hundred eleven and eight hundred twelve of the general municipal law, or which have elected pursuant to such sections, to be subject to the jurisdiction of such temporary state commission....¹³

Clearly, therefore, upon the expiration of the Commission, its powers and duties, including the power to redact and exempt and its exemption from FOIL and the Open Meetings Law, devolved upon local ethics boards or, in the absence of a local ethics board, upon the municipality's governing body, in regard to financial disclosure.

Now the bad news. The "technical corrections" enacted by the Legislature, effective December 17, 2014, expunge from Article 18 all mention of the Temporary State Commission and section 813. The "technical corrections" repeal section 813 and delete references to the Commission in the other sections of Article 18. In particular, the conferral of the Commission's powers upon municipalities that adopt a financial disclosure form no longer exists. They may no longer redact information from a publicly available financial disclosure report nor may they exempt a filer from reporting information relating to his or her spouse or unemancipated children. No exemption from FOIL or the Open Meetings Law exists. Furthermore, categories of value and amount must now be provided to the public.¹⁴

Instead, the public availability of all municipal records relating to financial disclosure is now regulated solely by the Freedom of Information Law.¹⁵ Thus, inadvertently reported bank account numbers or home telephone numbers or addresses may still be redacted, but generally not other information on the report.¹⁶ In view of New York City's mandate that categories of amount and values be publicly disclosed and the Second Circuit's upholding of the legality of that requirement over privacy objections,¹⁷ any argument that values and amounts disclosed on municipal financial disclosure reports may be redacted is likely to fall on deaf judicial ears.

I hope that my analysis of these "technical corrections" is wrong. If one of our readers can indeed point out the error of my ways here, we will publish it in the next issue of the *Municipal Lawyer*.

Endnotes

1. 2014 N.Y. Laws ch. 490.
2. See Gen. Mun. Law § 800(4) (broadly defining "municipality").
3. See Temporary State Commission on Local Government Ethics, *Final Report*, 21 FORDHAM URB. LAW J. 1 (1993); Henry G. Miller & Mark Davies, *Why We Need a New State Ethics Law for Municipal Officials*, FOOTNOTES, Vol. 4, No. 2, at 5 (Winter 1996); Mark Davies, *Enacting a Local Ethics Law—Part I: Code of Ethics*, NYSBA MUNICIPAL LAWYER, Vol. 21, No. 3, at 4 (Summer

2007); Steven G. Leventhal, *Needed: A New State Ethics Code*, NYSBA MUNICIPAL LAWYER, Vol. 23, No. 4, at 16 (Fall 2009); Mark Davies, *How Not to Draft an Ethics Law*, NYSBA MUNICIPAL LAWYER, Vol. 24, No. 4, at 13 (Fall 2010).

4. N.Y. Gen. Mun. Law §§ 810(1) (defining "political subdivision" as a county, city, town, or village having a population of 50,000 or more) and 811(2) (providing that a political subdivision that failed to promulgate or elect to continue its own financial disclosure form by Jan. 1, 1991, would be subject to the state form set forth in Gen. Mun. Law § 812).
5. N.Y. Gen. Mun. Law § 811(1)(a) (permitting any municipality other than a political subdivision to adopt a financial disclosure form).
6. Former Gen. Mun. Law § 813; 1987 N.Y. Laws ch. 813, § 26.
7. Former N.Y. Gen. Mun. Law § 813(9)(h), (i).
8. Former N.Y. Gen. Mun. Law § 813(18).
9. Former N.Y. Gen. Mun. Law § 813(18)(a)(1).
10. Former N.Y. Gen. Mun. Law § 811(1)(c).
11. Former N.Y. Gen. Mun. Law § 811(1)(d).
12. See Mark Davies, *1987 Ethics in Government Act: Financial Disclosure Provisions for Municipal Officials and Proposals for Reform*, 11 PACE LAW REV. 243, 254-255 (1991).
13. 1987 N.Y. Laws ch. 813, § 26(c).
14. New York City is subject to different rules. See, e.g., N.Y. Gen. Mun. Law § 811(1)(a-1); N.Y.C. Admin. Code § 12-110; N.Y.C. Charter § 2603(k).
15. N.Y. Pub. Off. Law Art. 6, §§ 84-90. The Committee on Open Government has long disagreed with the author's conclusion that financial disclosure records of an ethics board are governed by Article 18 and not by FOIL. See, e.g., N.Y.S. Committee on Open Government, Advisory Op. No. FOIL-AO-f7731 (May 28, 1993), No. FOIL-AO-10481 (Dec. 10, 1997). In any event, the disagreement has now been mooted. Bob Freeman won. Davies lost. That a financial disclosure report is a "record" for purposes of FOIL appears indisputable. See N.Y. Pub. Off. Law § 86(4) (definition of "record"); N.Y.S. Committee on Open Government, Advisory Op. No. FOIL-AO-f8976 (July 18, 1995) ("financial disclosure statements, once they are maintained by or for the Town, would in my opinion constitute 'records' for purposes of the Freedom of Information Law"), No. FOIL-AO-13559 (Aug. 19, 2002).
16. See N.Y.S. Committee on Open Government, Advisory Op. No. FOIL-AO-13397 (June 24, 2002), No. FOIL-AO-13948 (March 20, 2003).
17. See N.Y.C. Admin. Code § 12-110(e); *Barry v. City of New York*, 712 F.2d 1554 (2d Cir. 1983). The New York City financial disclosure law before the Second Circuit required disclosure of categories of amount. Former N.Y.C. Admin. Code § 1106-5.0(b)(6), as enacted by Local Law No. 1 of 1975 and amended by Local Law No. 48 of 1979 (available at http://www.nyc.gov/html/conflicts/downloads/pdf3/fd_leg_hist/leg_his_fd_1975_to_2012_wlinks.pdf). With the repeal of section 813, the Committee on Open Government's reliance upon it as a guide to determine whether information on a disclosure form is publicly available would now seem misplaced, especially in view of the New York City law and the *Barry* decision. Cf. N.Y.S. Committee on Open Government, Advisory Op. No. FOIL-AO-f7731 (May 28, 1993), No. FOIL-AO-f9826 (Jan. 3, 1997).

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