

August 2, 2016

The Honorable Timothy J. McGinty
Cuyahoga County Prosecuting Attorney
The Justice Center, Courts Tower
1200 Ontario Street
Cleveland, Ohio 44113

SYLLABUS:

2016-026

A person may serve simultaneously as a member of the legislative authority of the City of Solon and Director of the Department of Regional Collaboration of Cuyahoga County so long as no conflicts of interest exist that cannot be mitigated or eliminated.



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OPINION NO. 2016-026

The Honorable Timothy J. McGinty
Cuyahoga County Prosecuting Attorney
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Cleveland, Ohio 44113

Dear Prosecutor McGinty:

We have received your request for an opinion whether a person may serve as Vice-Mayor and Council¹ member of the City of Solon while serving simultaneously as Director of the Department of Regional Collaboration of Cuyahoga County. You explain that this person serves as a member of the legislative authority of the City of Solon for Ward 6 and also was appointed Vice-Mayor. This person has served as Director of Regional Collaboration of Cuyahoga County since March 10, 2015, when he was appointed by the County Executive and confirmed by the Cuyahoga County Council.

A seven-question test is used to determine whether a person may serve in multiple public positions:

1. Is either of the positions a classified employment within the terms of R.C. 124.57?
2. Do the empowering statutes of either position limit employment in another public position or the holding of another public office?
3. Is one position subordinate to, or in any way a check upon, the other?
4. Is it physically possible for one person to discharge the duties of both positions?

¹ R.C. 731.01 declares that the legislative power of a city is vested in the “legislative authority.” The Solon Charter refers to the legislative authority as the “Council.” *See* Solon Charter, art. IV, § 1 (“[t]he legislative power of the City, ... shall be vested in a Council of seven members”). In this opinion, we use the terms “legislative authority” and “council” interchangeably.

5. Is there an impermissible conflict of interest between the two positions?
6. Are there local charter provisions, resolutions, or ordinances which are controlling?
7. Is there a federal, state, or local departmental regulation applicable?

2003 Op. Att’y Gen. No. 2003-010, at 2-69 to 2-70. “In order for two positions to be found compatible, all seven questions must be resolved in favor of compatibility.” 1989 Op. Att’y Gen. No. 89-052, at 2-218. To answer these questions, we need to understand the primary statutory duties and functions this person will have to carry out in each of the positions in question.

Duties and Functions of a Member of a City Legislative Authority and Alternate Vice-Mayor

The City of Solon has adopted a charter form of government pursuant to Ohio Const. art. XVIII, § 7. Article XVIII, § 7 of the Ohio Constitution declares that “[a]ny municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of [Ohio Const. art. XVIII, § 3], exercise thereunder all powers of local self-government.” Article XVIII, § 3 of the Ohio Constitution authorizes cities to “exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.”

The Solon Charter provides that “[t]he City of Solon shall have all the powers, general or special, governmental or proprietary, which may now or hereafter lawfully be possessed or exercised by municipalities under the laws of Ohio.” Solon Charter, art. III. “The legislative power of the City, ... shall be vested in a Council of seven members.” Solon Charter, art. IV, § 1. The Solon Charter further declares that:

All the legislative powers of the City of Solon, and all such other powers as may be granted by this Charter, together with all such powers as are now or may hereafter be granted by the laws of Ohio to boards of control, municipal tax commissions, boards of health or any other municipal commission, board or body now or hereafter created, shall be vested in the Council[.]

Solon Charter, art. IV, § 3. As Article IV, § 3 of the Solon Charter is the only provision in the charter addressing the powers of the legislative authority of the City of Solon, it is appropriate to look to the Revised Code for the legislative authority’s specific powers and duties. *Cf.* 1979 Op. Att’y. Gen. No. 79-111, at 2-372 (a municipal corporation with a charter is governed by the provisions of its charter rather than by provisions of the Revised Code, if there is any conflict between the two).

“The legislative authority of a city is primarily responsible for exercising the legislative power of the city.” 2009 Op. Att’y Gen. No. 2009-005, at 2-30; *see also* R.C. 715.01; R.C. 731.05. The legislative authority is authorized to pass ordinances and resolutions, R.C. 715.01; R.C. 715.03; acquire, hold, lease, possess, and dispose of city property, R.C. 715.01; R.C. 715.011; R.C. 715.21; R.C. 723.121; invest city moneys, R.C. 731.56; organize and maintain police and fire departments, R.C. 715.05; R.C. 737.21; establish, maintain and operate lighting, power, and heating plants, R.C. 715.06; and provide for the welfare of the persons and safety of the property in the city and make such regulations as authorized, R.C. 737.021; R.C. 737.04; R.C. 737.051; R.C. 737.21; R.C. 737.28; R.C. 737.37. The legislative authority prepares the city’s annual tax budget, R.C. 5705.28, and is responsible for levying taxes and assessments on real property within the city, R.C. 5705.03; R.C. 5705.07; R.C. 5705.19.

The person who serves presently as a member of the legislative authority of the City of Solon, previously served as Vice-Mayor of the City of Solon, and now serves as Alternate Vice-Mayor.² The Mayor appoints one of the seven legislative authority members to serve as Vice-Mayor, and appoints an additional legislative authority member as an Alternate Vice-Mayor, each for a term of two years. Solon Charter, art. V, § 6(a). Article V, § 6a of the Solon Charter indicates that the Vice-Mayor presides over all meetings of the legislative authority. The Vice-Mayor shall be the Acting Mayor when the Mayor is absent, unavailable, or unable for any reason to perform her duties, and shall also continue as member of the legislative authority with all the powers and duties attendant to the position. Solon Charter, art. V, § 6(b). Solon Charter, art. V, § 6(c) further declares that “[i]f the Vice-Mayor refuses to serve as Acting Mayor or if the Office of Vice-Mayor is vacant, the Alternate Vice-Mayor shall become Acting Mayor[.]” In the event that both the Vice-Mayor and Alternate Vice-Mayor refuse to serve as Acting Mayor, the legislative authority shall convene and appoint a person who meets the qualifications set forth in the Solon Charter, art. V, §2 to serve as Acting Mayor until a successor is duly elected and qualified. Solon Charter, art. V, § 6(c).

The Solon Charter does not confer additional duties on the Alternate Vice-Mayor until the Mayor is unable or unavailable to fulfill her responsibilities as Mayor. Thus for the Alternate Vice-Mayor to have any duties or exercise any powers with respect to that position, all three pre-conditions must be met: 1) the Mayor is absent, unavailable, or unable for any cause to perform her duties; 2) the Vice-Mayor refuses to serve as Acting Mayor or there is a vacancy with respect to the position of Vice-Mayor; and 3) the Alternate Vice-Mayor accepts the position of Acting Mayor. *See* Solon Charter, art. V, § 6(c).

² Minutes for the Solon City Council meeting of December 7, 2015, reveal that this person was appointed Alternate Vice-Mayor, and the Mayor appointed another council member to serve as Vice-Mayor. Thus, for the purpose of this opinion, we will evaluate his current position as Alternate Vice-Mayor, rather than Vice-Mayor, in addressing your compatibility inquiry.

At this time, the pre-conditions necessary to cause this legislative authority member as Alternate Vice-Mayor to be Acting Mayor are not present. Accordingly, with respect to the person who is the subject of your letter, at present “Alternate Vice-Mayor” functions as a designation or title associated with his position as a member of the legislative authority of the City of Solon rather than as an additional position held by the person. Currently, there is no indication that the Mayor is absent, unavailable or unable for any cause to perform her duties, or that the Vice-Mayor or Alternate Vice-Mayor will become Acting Mayor. Insofar as the legislative authority member’s designation as Alternate Vice-Mayor imposes no additional duties on him, we need not consider his designation as Alternate Vice-Mayor as a separate position held in addition to his position as a member of the legislative authority for the City of Solon and Director of the Department of Regional Collaboration of Cuyahoga County for the purpose of this opinion.³

Duties and Functions of the Director of the Department of Regional Collaboration of Cuyahoga County

“Article X, § 1 of the Ohio Constitution directs the General Assembly to provide by general law for the organization and government of counties.” 2011 Op. Att’y Gen. No. 2011-013, at 2-113. The constitution also authorizes a county to adopt and amend a charter under Ohio Const. art. X, § 3. *Id.* If a county has not adopted a charter, the county, in carrying out its governmental responsibilities, shall follow the general law enacted by the General Assembly. 2009 Op. Att’y Gen. No. 2009-051, at 2-381. In that instance a county may exercise only those powers conferred upon the county by the General Assembly. *Id.* When a county adopts a charter, the county may vary the system established by general law for the organization and operation of county government. *Id.* Cuyahoga County has adopted a charter form of government pursuant to Article X, § 3 of the Ohio Constitution. Article X, § 3 of the Ohio Constitution declares that a county charter “shall provide the form of government of the county” and “for the exercise of all powers vested in, and the performance of all duties imposed upon

³ If the pre-conditions provided in Article V, § 6(c) of the Solon Charter occurred, and this person accepted the Acting Mayor position, an analysis of compatibility involving the position of Acting Mayor and Director of the Department of Regional Collaboration of Cuyahoga County would be warranted, and a different conclusion might be reached. Insofar as the Mayor is the chief executive officer of the City, the Mayor is mandated to “execute, on behalf of the City, all contracts, conveyances, evidences of indebtedness and all other instruments to which the City is a party.” Solon Charter, art. V, § 5e. If this person served as Acting Mayor, his execution of a contract with the county while also serving as the Director of the Department of Regional Collaboration of Cuyahoga County would be an impermissible conflict of interest. *See* 2002 Op. Att’y Gen. No. 2002-039, at 2-252 (“a person may not hold positions of trust on two public entities that contract with each other”). An impermissible conflict of interest would render the two positions incompatible.

counties and county officers by law.” This means that, “[r]egardless of how a charter county chooses to restructure its government, . . . the charter must provide for the exercise of all powers and the performance of all duties imposed by statute on counties and county officers.” 1994 Op. Att’y Gen. No. 94-095, at 2-469.

The Cuyahoga County Charter declares that the County Executive is vested with the same powers and duties as a board of county commissioners under general law. *See* Cuyahoga County Charter, art. II, §§2.01, 2.03. The Director of the Department of Regional Collaboration is appointed by the County Executive, Cuyahoga County Code §202.13, and is subject to removal by the County Executive. The position of Director of the Department of Regional Collaboration was established by Cuyahoga County Ordinance No. O2011-0009 (eff. Apr. 25, 2011). Cuyahoga County Code, §202.13 provides, in pertinent part:

- A. A Department of Regional Collaboration under the supervision of the County Executive is hereby established to advocate for and promote cooperation and collaboration with and among the State of Ohio and other political subdivisions.
- B. The specific goals, duties and activities of the Department of Regional Collaboration shall be further determined by the County Executive who shall employ and supervise a Director and such number of deputies, assistants and employees as shall be reasonably necessary to assist the County Executive in carrying out the duties of the new Department of Regional Collaboration.
- C. A proposed operating budget shall be presented to Council for approval at such time as the County Executive is able to create a schedule of estimated revenues and proposed expenditures for the Department of Regional Collaboration.

The letter you provided to our office from the Cuyahoga County Interim Inspector General, dated March 5, 2015, states that the Director of the Department of Regional Collaboration reports directly to the Cuyahoga County Director of Law. According to information provided to us by your staff, the Department of Regional Collaboration is responsible for the following key projects or initiatives:

1. Advancing development through the Business Attraction and Anti-Poaching Protocol⁴ adopted by all 59 Cuyahoga County political subdivisions;
2. Advancing shared services and efficiency by working closely with the County's 59 mayors, city managers and trustees;
3. Assisting the County Executive and other department directors in efforts to expand county-provided services under the Executive's Western Reserve Plan;
4. Serving as liaison to the many networks across the region;
5. Coordinating local stakeholders with a vested interest in the responsible development and resilience of the Lake Erie watershed;
6. Providing leadership to local efforts to improve the public's health;
7. Leading efforts to develop a Center for Excellence in Local Government that will promote good government practices; and
8. Serving as the point of contact between [Cuyahoga] County and [the State of] Ohio and federal legislators and liaisons to advance the County's interest in state and federal legislation, policies and funding opportunities. (Footnote added.)

The Director of the Department of Regional Collaboration generally serves to facilitate cooperation among Cuyahoga County's political subdivisions to advance these initiatives and key projects.

Application of R.C. 124.57

The first question of the compatibility analysis concerns the application of R.C. 124.57, and asks whether a public office or employment is in the classified service for purposes of R.C. 124.57. R.C. 124.57(A) provides, in part:

⁴ The Business Attraction and Anti-Poaching Protocol expired December 31, 2014. The Cuyahoga County Business Retention and Attraction Protocol is a renewal of the original protocol with the same objectives, but does not have an expiration date.

No officer or employee in the classified service of the state, the several counties, cities, and city school districts of the state, or the civil service townships of the state shall directly or indirectly, orally or by letter, solicit or receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political party or for any candidate for public office; ... nor shall any officer or employee in the classified service of the state, the several counties, cities, and city school districts of the state, or the civil service townships of the state be an officer in any political organization or take part in politics other than to vote as the officer or employee pleases and to express freely political opinions.

“R.C. 124.57 ... prohibits a classified employee from holding a partisan elective office or engaging in partisan political activities, but does not apply to non-partisan elective offices.” 1989 Op. Att’y Gen. No. 89-022, at 2-101. Thus, we must determine whether a member of the legislative authority of the City of Solon and Director of the Department of Regional Collaboration of Cuyahoga County are in the classified civil service, and thus subject to R.C. 124.57’s prohibition.

A member of the legislative authority of the City of Solon is an elected position. *See* Solon Charter, art. 4, §1 (“[e]ach member of Council shall be a resident of and elected from each of the [seven] wards”). R.C. 124.11(A)(1) states that the unclassified service comprises “[a]ll officers elected by popular vote.” Thus, the position of member of the legislative authority of the City of Solon is in the unclassified service, and the prohibition of R.C. 124.57 does not apply.

R.C. 124.11(A)(3)(b) states that the “heads of all departments appointed by a board of county commissioners” are in the unclassified civil service. The Cuyahoga County Charter provides that “[t]he County Executive shall have all the powers and duties of an administrative nature under this Charter and such powers and duties of an administrative nature, except as otherwise provided herein, as are vested in or imposed upon boards of county commissioners by general law.” Cuyahoga County Charter, art. II, §2.03. The Director of the Department of Regional Collaboration is appointed and supervised by the County Executive. *See* Cuyahoga County Code, §202.13. *See also* Cuyahoga County Charter, art. II, §2.03(2) (the County Executive has the power to “appoint, subject to the confirmation by the Council, and remove County directors and officers and members of boards, agencies, commissions and authorities as are or may hereafter be created by or pursuant to this Charter, and such officers and members of boards, agencies, commissions and authorities as are provided by general law to be appointed by boards of county commissioners”). Inasmuch as Cuyahoga County has adopted a charter that specifies the authority of the County Executive to appoint county directors, the County Executive has the same powers as a board of commissioners of a county that has not adopted a charter. *See* R.C. 1.62(A) (“[r]eferences to particular county officers, boards, commissions, and authorities mean, in the case of a county that has adopted a charter under Article X, Ohio Constitution, the officer, board, commission, or authority of that county designated by or pursuant to the charter to

exercise the same powers or perform the same acts, duties, or functions that are to be exercised or performed under the applicable section of the Revised Code by officers, boards, commissions, or authorities of counties that have not adopted a charter”). Thus, the Director of the Department of Regional Collaboration of Cuyahoga County who is appointed by the County Executive is in the unclassified service of the county under R.C. 124.11(A)(3)(b). Therefore, R.C. 124.57’s prohibitions do not apply to the Director of the Department of Regional Collaboration of Cuyahoga County, and do not operate to prevent a person from holding the position of member of the legislative authority of the City of Solon and Director of the Department of Regional Collaboration of Cuyahoga County simultaneously.

Applicability of Constitutional Provisions, Statutes, Charter Provisions, Resolutions, or Ordinances Prohibiting the Simultaneous Holding of Two Public Positions

The second question of the compatibility analysis asks whether the empowering statutes of any of the positions limit the simultaneous holding of other public employment or another public office. The sixth question of the compatibility analysis asks whether there are local charter provisions, resolutions, or ordinances which are controlling. For ease of discussion, we will address questions two and six together.

Holding another position may be prohibited by the Ohio Constitution. 2004 Op. Att’y Gen. No. 2004-051, at 2-437. No provision of the Ohio Constitution prohibits a person from serving simultaneously as an elected member of the legislative authority of the City of Solon and Director of the Department of Regional Collaboration of Cuyahoga County.

R.C. 731.02, provides, in pertinent part, that “[e]ach member of the legislative authority [of a city] ... shall not hold any other public office, except that of notary public or member of the state militia, ... and no such member may hold employment with said city.” Thus, R.C. 731.02 generally prohibits a member of a city legislative authority from holding any other public office. However, a city that has adopted a charter form of government may establish qualifications for members of its legislative authority that differ from the qualifications in R.C. 731.02. Ohio Const. art. XVIII, §§ 3, 7; *State ex rel. Bindas v. Andrish*, 165 Ohio St. 441, 136 N.E.2d 43 (1956) (syllabus, paragraph 2). The Solon Charter establishes the qualifications of elected officers for the City of Solon:

With the exception of the office of Mayor, for whom qualifications are set forth in Article V, Section 2, each elective officer of the City shall be a resident of the City of Solon for 18 consecutive months immediately prior to the date of his election and shall be a qualified elector of his ward as of the date of his election and, during the term of his office, shall continue to be a resident of that ward and a qualified elector. *He shall hold no other elected public office*, except that of Notary Public or member of the State Militia or Reserve Corps of the United States, and *he shall not hold public employment with the City of Solon.*

Solon Charter, art. VIII, § 2a (emphasis added.)

R.C. 731.02 prohibits a member of a city legislative authority from holding “any other public office.” The Solon Charter prohibits a member of the city legislative authority from holding another *elected* public office, or public employment with the City of Solon. The Solon Charter provision thus conflicts with the broader provision of the statute. This means that the prohibition in R.C. 731.02 does not apply, and the Solon Charter provision controls. *See* 2008 Op. Att’y Gen. No. 2008-037, at 2-379 and 2-380 (“[u]nder Ohio home rule jurisprudence, in matters of local self-government a city charter prevails over a conflicting state statute”).

The position of Director of the Department of Regional Collaboration of Cuyahoga County is appointed by the County Executive; it is not an elected position. The position of Director of the Department of Regional Collaboration is not public employment with the City of Solon. Consequently, Article VIII, § 2a of the Solon Charter does not prohibit this person from serving as a member of the legislative authority of the City of Solon and Director of the Department of Regional Collaboration of Cuyahoga County. Also, no ordinance or charter provision of Cuyahoga County prohibits the Director of Regional Collaboration from being a member of the legislative authority of a city.

Other Applicable Federal, State, and Local Prohibitions

The seventh question concerns the applicability of federal, state, and local regulations that prohibit the simultaneous holding of several positions. We are not aware of any other applicable federal, state, or local prohibitions that limit the simultaneous holding of these public positions. Other than the charter provisions previously addressed, it is assumed, for the purposes of this opinion, no federal, state, or local regulations apply to the positions in question.

Physical Ability to Discharge Duties

The fourth question of the compatibility analysis asks whether it is physically possible for one person to hold simultaneously two positions and fully perform all the duties required of each position. “This is a factual question that is best resolved by the interested local officials since they may more precisely determine the time constraints and demands [of each position] imposed upon the person[.]” 2004 Op. Att’y Gen. No. 2004-051, at 2-438. In resolving this inquiry, “a person must be certain that he will be able to carry out the duties of both positions in a competent and timely manner.” *Id.* at 2-439. If there is a direct conflict between the times when the person is needed to perform duties in each position, so that the person is not available to be in both positions when required to be, the two positions are incompatible.

This person has served as the Director of the Department of Regional Collaboration of Cuyahoga County since March 10, 2015. There is no statutory requirement or provision of the Cuyahoga County Charter that establishes a standard work week comprising a minimum number of hours for the Director of the Department of Regional Collaboration, nor has the County Executive established specific working hours for this position. A member of a city legislative

authority is required to perform duties imposed by statute or by charter provisions. 2011 Op. Att’y Gen. No. 2011-008, at 2-60. “Where the nature of those duties requires him to be present at a particular time or place, or act in a particular manner, he must be able to do so.” *Id.*; *see, e.g.*, R.C. 3.17 (a member of a public body forfeits his position if he fails to attend at least three-fifths of the regular and special meetings held during any two-year period); *see also* Solon Charter, art. IV, § 4 (“[t]he Council shall hold at least one regular meeting in each calendar month”). We will presume that one person is physically able to discharge the duties of both positions.

If this person is required to be available to undertake responsibilities as member of the legislative authority of the City of Solon during the hours in which he is working as Director of the Department of Regional Collaboration of Cuyahoga County, he must use approved leave commensurate with the amount of time in which he is absent from his duties as Director of the Department of Regional Collaboration. *See* 2011 Op. Att’y Gen. No. 2011-008, at 2-60. Consistent with the foregoing guidance, the Cuyahoga County Interim Inspector General⁵ stated that this person’s “secondary employment is to be worked during non-County working hours, unless vacation or [compensatory] leave is used.” Even if there is not a direct conflict between the time demands of each position, this person may need to consider his ability to conduct and complete the necessary tasks associated with each position in a timely and competent manner.

Subordination and Control

The third question of the compatibility analysis asks whether either position is subordinate to or under the control of the other position or whether either position is a check upon the other.

The legislative authority of the City of Solon consists of seven members. *See* Solon Charter, art. IV, § 1. Each member of the city legislative authority shall be a resident of and elected from one of seven wards, and shall serve a term of four years. *Id.* “As an elected official, ... a member of the legislative authority of a city is responsible to the citizens who elected him.” 1993 Op. Att’y Gen. No. 93-016, at 2-87.

The position of Director of the Department of Regional Collaboration of Cuyahoga County is appointed by the County Executive. *See* Cuyahoga County Code, § 202.13. We understand that the Director of the Department of Regional Collaboration reports directly to the Cuyahoga County Director of Law. In his capacity as a member of the city legislative authority

⁵ You provided us a copy of the Cuyahoga County Interim Inspector General’s letter of March 15, 2015, which addressed this person’s secondary employment. The Inspector General is designated as the investigative officer for all issues arising under the County’s Ethics Ordinance. *See* Cuyahoga County Ordinance No. O2016-0002, § 407.01 (eff. May 27, 2016).

and Director of the Department of Regional Collaboration, this person is responsible to different authorities. Each position acts independently within its respective areas of responsibility and neither exercises supervision or oversees the operations of the other. Thus, the positions of member of the legislative authority of the City of Solon and Director of the Department of Regional Collaboration of Cuyahoga County are not subordinate to or a check upon each other.

Conflicts of Interest

The fifth question asks whether conflicts of interest confront a person who serves in two positions simultaneously. A conflict of interest exists “when an individual’s ‘responsibilities in one position are such as to influence the performance of his duties in the other position, thereby subjecting him to influences which may prevent his decisions from being completely objective.’” 1989 Op. Att’y Gen. No. 89-052, at 2-220 (quoting 1985 Op. Att’y Gen. No. 85-100, at 2-427).⁶ A person may not hold two public positions at the same time if he will be subject to divided loyalties and conflicting duties or be exposed to the temptation of acting other than in the best interest of the respective agencies or offices he serves. 2000 Op. Att’y Gen. No. 2000-025, at 2-168.

Whether a conflict of interest is impermissible, in the sense that it makes two positions incompatible, depends upon several factors:

[i]f our review discloses such conflicts, we must next determine the immediacy of the conflicts to see whether the conflicts may be sufficiently avoided or eliminated entirely so as to allow the person to serve simultaneously in both positions. The pertinent factors used in making this determination include, but are

⁶ Pursuant to R.C. 102.08(A), the Ohio Ethics Commission is authorized to render advisory opinions regarding the application of the provisions of R.C. Chapter 102, R.C. 2921.42, and R.C. 2921.43 to the conduct of public officials. *See, e.g.*, R.C. 102.03(D) (prohibiting a public official or employee from using the authority or influence of his office or employment “to secure anything of value or the promise or offer of anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person’s duties”); R.C. 2921.42 (prohibiting the use of official influence to obtain contracts that benefit a public officer or his family, and providing exceptions for certain situations in which the public officer does not participate); R.C. 2921.43 (prohibiting the receipt of improper compensation by a public official or public employee). In light of this express statutory grant of power to the Ohio Ethics Commission, the Attorney General refrains from issuing formal opinions on questions that are within the Commission’s exclusive jurisdiction. 1997 Op. Att’y Gen. No. 97-044, at 2-275 n.6; 1989 Op. Att’y Gen. No. 89-037, at 2-166 and 2-167. Thus, questions with respect to the applicability of R.C. Chapter 102, R.C. 2921.42, and R.C. 2921.43 to the positions at issue in this opinion should be directed to the Ohio Ethics Commission.

not limited to, the probability of the conflict, the ability of the person to remove himself from the conflict (should it arise), whether the person exercises decision-making authority in both positions, and whether the conflict relates to the primary functions of each position, or to financial or budgetary matters.

2006 Op. Att’y Gen. No. 2006-010, at 2-86 to 2-87. We now examine the potential conflicts of interest with respect to the positions of member of the legislative authority of the City of Solon and Director of the Department of Regional Collaboration of Cuyahoga County, and if conflicts of interest exist, whether they can be avoided or eliminated.

All legislative power of the City of Solon is vested in its legislative authority. *See* Solon Charter, art. IV, § 3. The legislative authority is the legislative branch and policy-making body for the city and its residents. The legislative authority considers the city’s goals, projects, and infrastructure improvements to determine appropriate expenditures of city moneys or decide when to request additional monies through tax levies as authorized to do so. *See* 2006 Op. Att’y Gen. No. 2006-034, at 2-317 (a city legislative authority is responsible for preparing and adopting the city’s tax budget and controlling the city’s finances); *see also* R.C. 731.47; R.C. 5705.28; R.C. 5705.281.

The primary duties and functions of the Director of the Department of Regional Collaboration are not delineated in a specific state statute, provision of the Cuyahoga County Charter, or ordinances adopted by the Cuyahoga County Council. We have reviewed the Department of Regional Collaboration’s list of initiatives and key projects provided by your office, and the *Cuyahoga County, Ohio 2016-2017 Budget Plan* in an effort to obtain a sense of the responsibilities of the Director of the Department of Regional Collaboration. The *Cuyahoga County, Ohio 2016-2017 Budget Plan* lists the major activities of the Department of Regional Collaboration as follows:

- Foster positive collaborative relationships with governmental and community partners;
- Facilitate and advance specific collaborative projects in the region;
- Promote economic growth of the region through collaboration; and
- Research and advocate for new methods of regionalization.

See Cuyahoga County, Ohio 2016-2017 Budget Plan, 91, https://fiscalofficer.cuyahogacounty.us/pdf_fiscalofficer/en-US/obm/2016-2017BudgetPlan.pdf. It appears that the Director of Regional Collaboration of Cuyahoga County is engaged in fostering amicable relationships among the 59 communities of Cuyahoga County, which includes the City of Solon. He also facilitates and advances specific collaborative projects in the county. In this capacity, he facilitates relationships and agreements for the purpose of establishing shared services agreements between political subdivisions within the county. The Business Attraction and Anti-Poaching Protocol agreement, which is referenced within one of the Department of Regional

Collaboration's initiatives, states that its purpose is to "facilitate interactions between the county and communities to facilitate economic development." Business Attraction and Anti-Poaching Protocol, http://regionalcollaboration.cuyahogacounty.us/pdf_regionalcollab/en-US/AntiPoachingProtocol.pdf. When describing the activity of facilitating specific projects in the region, the Director's role as "facilitator" is "one that helps to bring about an outcome (as learning, productivity, or communication) by providing indirect or unobtrusive assistance, guidance, or supervision." *Merriam-Webster's Collegiate Dictionary* 447 (11th ed. 2005) (defining "facilitator"). "Advance" means, *inter alia*, "to bring forward; to move forward ... to raise in rank, importance, etc; promote ... to help or hasten the success or completion of; further." *Webster's New World College Dictionary* 20 (5th ed. 2014). One of the key activities for the Department of Regional Collaboration is "advocating for new methods of regionalization." To advocate means "[t]o speak in favor of or defend by argument. To support, vindicate, or recommend publicly." *Black's Law Dictionary* 55 (6th ed. 1990). These descriptions suggest that the Director of the Department of Regional Collaboration of Cuyahoga County takes an active, rather than passive, role in the process of facilitating, advancing, and advocating for, regional collaboration among the communities within the county.

A person who serves as a member of the legislative authority of the City of Solon and Director of the Department of Regional Collaboration of Cuyahoga County may face conflicts of interests resulting from his duty to advance the interests and welfare of the City of Solon and his duty to advance the interests and welfare of the Cuyahoga County region. Impermissible conflicts of interest occur when a person who holds two positions at the same time is subject to divided loyalties, conflicting duties, or to the temptation to act other than in the public's best interest. 2011 Op. Att'y Gen. No. 2011-029, at 2-235; 2005 Op. Att'y Gen. No. 2005-023, at 2-231; *see also* 2003 Op. Att'y Gen. No. 2003-006, at 2-36 (a potential conflict of interest is present where one person who owes loyalty to two governmental entities must advocate a position on behalf of one to the potential detriment of the other). In his role as member of the legislative authority of the City of Solon, this person may be swayed to favor projects or services that will benefit the City of Solon rather than balancing the interests of other communities for the benefit of the entire county. Inherent in the position of legislative authority member is that such a member makes the most beneficial decision for the best interest of the city in serving the citizens that elected him. Conversely, in his role as Director of the Department of Regional Collaboration of Cuyahoga County, he may be tempted to promote those projects or interests that benefit the county, but such action may work to the detriment of the growth and economic well-being of the City of Solon. Consider three cities within Cuyahoga County, one being the City of Solon, competing for a new business to locate within its boundaries. If the Director of the Department of Regional Collaboration determines that the location of a new business within the City of Solon will likely be most economically advantageous to the county and in furtherance of the Department of Regional Collaboration's goals, he will recommend and advocate that the new business locate within the City of Solon. Regardless of whether any actions on the part of the Director of the Department of Regional Collaboration are economically sound or in the interest of improving the region as a whole, the other competing cities will assert that this person acts

with due regard to his loyalty and favoritism towards the City of Solon as that city's legislative authority member.

On the other hand, if this person does not promote the City of Solon as a favorable location for the new business, residents of the City of Solon may assert that he is affording the other communities preferential treatment in furtherance of county objectives. Whether his actions benefit the county or the city, the entity that does not benefit will assert partiality and unfairness. This principle was demonstrated in 1991 Op. Att'y Gen. No. 91-069 wherein the Attorney General advised that a township trustee and township liaison for the county engineer within the same county are incompatible. The opinion recognized that a township liaison serves many townships within the county. If he also serves as a township trustee, he "has both a greater interest in and responsibility toward matters concerning his own township than that of other townships within the county. He may also find himself subject to electoral pressures." 1991 Op. Att'y Gen. No. 91-069, at 2-327. In the present circumstances, this person's promotion of any of the communities other than the City of Solon may appear to prejudice the City of Solon. Likewise, promoting the City of Solon in a particular matter may be seen as short-changing the interests of the other communities within the county.

That a conflict of interest exists, however, does not automatically prohibit holding two positions at the same time. 1989 Op. Att'y Gen. No. 89-052, at 2-220. Each conflict of interest should be considered on its particular facts, and where the conflict is remote and speculative, the conflict of interest rule is not violated. *Id.* Factors to be considered in determining whether a conflict of interest is remote and speculative include the individual's ability to remove himself from the conflict and whether the conflict involves the primary functions of each position. 1979 Op. Att'y Gen. No. 79-111, at 2-372.

If, as a member of the legislative authority of the City of Solon, this person identifies a conflict of interest with respect to his position as the Director of the Department of Regional Collaboration, he will need to remove himself from all discussions, deliberations, decisions, or votes of the legislative authority regarding the matter that is the source of the conflict of interest. *See* 2006 Op. Att'y Gen. No. 2006-022, at 2-197 ("[i]n order to faithfully perform the duties of his office, a public officer must refrain from acting in situations where he has a conflict of interest"); *see generally* 2003 Op. Att'y Gen. No. 2003-006, at 2-37 and 2-38 (in a matter in which the objectivity of a public officer is impaired, the officer has a duty to abstain from participating in the matter). You have informed us that this person has abstained or recused himself from several matters that have come before the legislative authority of the City of Solon since he became Director of the Department of Regional Collaboration in March 2015. You also have indicated that the bases for the recusals are unknown. The reason for each abstention or recusal is not uniformly reflected in Solon City Council minutes. Thus, his abstentions and recusal may not be attributable solely to his position as Director of the Department of Regional Collaboration. We presume that this person has acted in good faith, recusing himself when a conflict of interest has presented itself in the course of his duties and responsibilities. *See State ex rel. Speeth v. Carney*, 163 Ohio St. 159, 186, 126 N.E.2d 449 (1955) (the general rule is that

“in the absence of evidence to the contrary, public officers, administrative officers, and public authorities, within the limits of the jurisdiction conferred upon them by law, will be presumed to have properly performed their duties in a regular and lawful manner and not to have acted illegally or unlawfully”).

We also must consider whether the conflict of interest relates to or is associated with a primary function or responsibility of either of his positions to determine whether the conflict of interest may be eliminated or mitigated. A primary statutory function of a city legislative authority is to handle city fiscal and budgetary matters, including the preparation of an annual tax budget. *See* 2011 Op. Att’y Gen. No. 2011-048, at 2-385 (“[d]iscussions, deliberations, and votes about a tax budget or appropriation measure and other fiscal matters related to the tax budget or appropriation measure are regularly undertaken ... since the tax budget or appropriation measure and its funding are matters that arise on an annual basis”). Decisions by a city legislative authority may rely upon cost-benefit analyses, which must factor in expenditures and the availability of city moneys in determining an appropriate budget that best serves the interests of the city in accordance with its goals and master plan. Availability of city moneys is instructive in whether a legislative authority may need to request additional moneys through tax levies. The authority of a city legislative authority to manage the city’s property, finances, investments, or its decision to request a levy for additional moneys, are matters that involve fiscal and budgetary concerns. Fiscal, tax, and budgetary matters “require the exercise of independent, decision-making authority, and involve essential, nondelegable responsibilities.” 2012 Op. Att’y Gen. No. 2012-008, at 2-57.

This person abstained from voting upon Ordinance No. 2015-16 on March 16, 2015, which was the City of Solon’s annual appropriation measure. *See* Solon City Council Minutes of March 16, 2015. On March 21, 2016, he did not abstain from voting upon the annual appropriation measure. The meeting minutes indicate that due to the Vice Mayor’s request, this person “advised [that] in the past he abstained from voting on the budget based on his position with the County. However, it has been determined that it is acceptable for him to vote on the budget.” *See* Solon City Council Minutes of March 21, 2016. 2006 Op. Att’y Gen. No. 2006-034, at 2-317, states that

a member of a city legislative authority may not continually abstain from participating in discussions, deliberations, negotiations, and votes concerning the city’s tax budget and finances since the making of decisions involving city budgetary and financial matters is a primary duty of a city legislative authority. As a member of a city legislative authority, a person is obligated to participate in discussions, deliberations, negotiations, and votes concerning the city’s tax budget and finances. *See* R.C. 5705.28; *see also* R.C. 5705.281. If a member of a city legislative authority continually abstains from participating in matters involving the city’s budget or finances, the member does not perform in a competent manner an important function entrusted to him as a member of the city’s legislative authority.

The state of a city's budget and appropriations are central to the legislative authority's decision-making when considering expenditures. To make reasonable, sound decisions about expenditures, a legislative authority member must be able to discuss and deliberate all aspects of the expenditure. And without the ability to deliberate the overall financial picture of the city and consider the impact of the expenditure thereon, the member of the legislative authority fails to fulfill his statutory duties. If this person frequently finds it necessary to remove himself from deliberations, discussions, decisions, and votes upon city financial, budgetary, and tax matters owing to his position with the county, one may question whether he is competently and completely fulfilling his obligations to the city. *See generally* 2004 Op. Att'y Gen. No. 2004-051, at 2-450 ("we would be remiss if we failed to caution you that given the number and nature of the potential conflicts of interest it may be impractical for the person to hold both of these positions at the same time"); *see also* 1941 Op. Att'y Gen. No. 3869, p. 445 (syllabus) ("[t]he office of mayor of a village is not per se incompatible with the position of chief clerk in the office of the county engineer, but may become so if the duties of each are so numerous or arduous as to render unlikely a proper execution of both").

Generally, a member of a legislative authority may abstain or recuse himself in the event of a conflict of interest without rendering the legislative authority powerless to act.⁷ Thus, with a seven-member legislative authority, it is unlikely that this person's recusal or abstention will inhibit the ability of the legislative authority to act; however, the Director of the Department of Regional Collaboration may not abstain or recuse himself with respect to his duties and responsibilities. He is the main actor and person responsible for completing the goals and initiatives of the Department of Regional Collaboration. We do not have a specific job description that clearly delineates the exact nature of all his responsibilities as Director of the Department of Regional Collaboration. We hesitate to conclude that there is an impermissible conflict. A conflict of interest may not materialize until a specific decision or project arises for the Director of the Department of Regional Collaboration in the scope of his duties. Until that time, we cannot entirely rule out the potential for a conflict of interest where the conflict is unable to be mitigated or eliminated. Accordingly, a person may simultaneously serve as a member of the legislative authority of the City of Solon and Director of the Department of Regional Collaboration of Cuyahoga County so long as no conflicts of interest exist that cannot be mitigated or eliminated.

⁷ Article IV, § 4 of the Solon Charter declares that

[a] majority of the members of the Council shall constitute a quorum for the transaction of business at any meeting of the Council, ... At any meeting at which a quorum is present, any ordinance or resolution may be passed or adopted, or any other action taken, by the affirmative votes of four members of the Council unless a larger number be required by the provisions of this Charter or by the laws of Ohio.

Conclusion

In sum, it is my opinion, and you are hereby advised that a person may serve simultaneously as a member of the legislative authority of the City of Solon and Director of the Department of Regional Collaboration of Cuyahoga County so long as no conflicts of interest exist that cannot be mitigated or eliminated.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE
Ohio Attorney General