

## **Local Government Ethics Law**

### Opinions of the Office of the Attorney General

#### **Subject: Emergency Management Coordinators and Councils as "Local Government Officers" pursuant to the Local Government Ethics Law**

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July 20, 1992

Barry Skokowski, Sr.  
Deputy Commissioner  
Department of Community Affairs  
CN 800  
Trenton, New Jersey 08625-0800

Re: 92-0109: Emergency Management Coordinators and  
Councils as "Local Government Officers" pursuant  
to the Local Government Ethics Law

Dear Deputy Commissioner Skokowski:

The question has arisen as to whether the county and municipal emergency management coordinators and the members of local emergency management councils, appointed pursuant N.J.S.A. App. A:9-40.1, N.J.S.A. App. A:9-42.1, and N.J.S.A. App. A:9-41 are "local government officers" pursuant to the Local Government Ethics Law. For the reasons stated below you are advised that the county and municipal emergency management coordinators are "local government officers" pursuant to the Local Government Ethics Law and are therefore subject to its terms, particularly the requirement of filing a financial disclosure statement. Further, you are advised that the members of local emergency management councils are "local government employees" subject to the terms of

the Local Government Ethics Law. However, they are not per se "local government officers" and therefore not required to file a financial disclosure statement.

The purpose of the Law is to provide a State-wide ethical code applicable to persons who serve in local government and to require "local government officers" to file annual financial disclosure statements. N.J.S.A. 40A:9-22.1. Generally, all local government agencies, except purely advisory bodies and school boards are within the scope of the Law. N.J.S.A. 40A:9-22.3(e). In the absence of action by the county or municipal governing body to establish a local ethics board, the Code of Ethics is enforced by the Local Finance Board in the Department of Community Affairs. N.J.S.A. 40A:9-22.4.

To protect the health, safety, and welfare of the public during an emergency the Legislature has established a comprehensive scheme by which the State, counties, and municipalities, shall plan for emergencies and implement emergency plans. N.J.S.A. App. A:9-30 et seq. At the local level every municipality and county is required to appoint an emergency management coordinator. N.J.S.A. App. A:9-40.1, N.J.S.A. App. A:9-42.1. The municipal and county emergency management coordinators are appointed for a three year term. Ibid. The municipal emergency management coordinator may be removed by the Governor for cause. N.J.S.A. App. A:9-40.2. The municipal coordinator is responsible for the planning, activating, coordinating, and conducting of emergency management operations within the municipality. N.J.S.A. App. A:9-40.4. The municipal coordinator, when conditions warrant, may proclaim a state of local disaster and issue and enforce orders necessary to implement emergency management operations. N.J.S.A. App. A:9-40.5. The appointment of a county emergency management coordinator is subject to the approval of the State Director of Emergency Services. N.J.S.A. App. A:9-42.1. Further, the county coordinator is subject to the supervision and control of the Director and the coordinator may be removed from office by the Director. Ibid. The county coordinator is responsible for the development, coordination, and activation of the county-wide mutual aid emergency management plan and for the activation of such emergency management facilities and services that are available from county government. N.J.S.A. App. A:9-42.2. Additionally, the county coordinator has the authority to declare a county-wide state of emergency and thereby implement the county emergency management plan. Division of State Police Directive No. 61 (November 19, 1986), Division of State Police Directive No. 100 (June 12, 1986).

Also, each municipality is required to create a local

emergency management council. N.J.S.A. App. A:9-41. The council consists of fifteen members who are appointed by the municipal appointing authority. Ibid. The municipal coordinator is an ex officio member of the council and he serves as the chairperson. Ibid. The duties of the council are to assist the municipality in establishing the various local volunteer agencies needed to meet the requirements of all local emergency management activities and to establish an adequate organization to assist in supervising and coordinating the emergency management activities of the local municipality. Ibid.

The initial inquiries are whether a local emergency management council is a "local government agency" and whether the municipal and county emergency management coordinators are employed by or serve a "local government agency." The Local Government Ethics Law, N.J.S.A. 40A:9-22.3(e), defines "local government agency" as

any agency, board, governing body, including the chief executive officer, bureau, division, office, commission or other instrumentality within a county or municipality, and any independent local authority, including any entity created by more than one county or municipality, which performs functions other than of purely advisory nature, but shall not include a school board.

The term "local government agency" encompasses a myriad of local government bodies. The definition is very broad and specifically excludes only purely advisory bodies and school boards. The local emergency management councils are more than purely advisory bodies, as they assist in the establishment and organization of the emergency management activities of the municipality. N.J.S.A. App. A:9-41. Accordingly, a local emergency council would be a "local government agency" for purposes of the Local Government Ethics Law. In turning to the municipal emergency management coordinator, he is an ex officio member and the chairperson of the local emergency management council. Ibid. Further, the coordinator is appointed for a specific term by the municipality and he is deemed a municipal officer. *Sutkowski v. Jackson Tp.*, 184 N.J. Super. 198 (Law Div. 1981). The county emergency management coordinator is appointed for a specific term by the county and he would similarly be considered a county officer. It may vary from county to county where a particular county emergent management coordinator is placed in the county's organizational scheme, eg. in a bureau, division, etc. However, the coordinator clearly serves the county as its

emergent management coordinator. It follows that the municipal and county emergency management coordinators serve a "local government agency."

The next inquiry is whether the council members and the municipal and county emergency management coordinators are "local government officers." Included as "local government officers" are 1) elected officials; 2) members of local bodies that have authority to enact ordinances, approve development applications, or grant zoning variances; 3) members of independent local authorities; and 4) persons who are "managerial executives" or "confidential employees." N.J.S.A. 40A:9-22.3(g). The Council members and coordinators are not within the first three classes of local government officers.

The fourth and last category of "local government officer" is a person "who is a managerial executive or confidential employee of a local government agency, as defined in section 3 of the 'New Jersey Employer-Employee Relations Act.'... , but shall not mean any employee of a school district or member of a school board." N.J.S.A. 40A:9-22.3(g)(4). As the Local Government Ethics Law makes specific reference to the definitions contained in the Employer-Employee Relations Act, it is necessary to examine the latter Act. The Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., provides a mechanism for the resolution of labor disputes in the private and public sectors. N.J.S.A. 34:13A-2. The Act is administered by the State's Public Employment Relations Commission (PERC). N.J.S.A. 34:13A-5.2.

The Act defines "managerial executives" of a public employer as

persons who formulate management policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices.... [N.J.S.A. 34:13A-3(f)]

"Confidential employees" of a public employer are defined as

employees whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate negotiating unit incompatible with their official duties. [N.J.S.A. 34:13A-3(g)]

The significance of "managerial executives" and "confidential employees" under the Employer-Employee Relations Act is that these individuals are excluded from membership in the local collective bargaining unit comprising of local public employees. N.J.S.A. 34:13A-5.3.

PERC has established guidelines for determining whether a person formulates management policy and direct its effectuation and is accordingly a "managerial executive."

A person formulates policies when he develops a particular set of objectives designed to further the mission of the governmental unit and when he selects a course of action from among available alternatives. A person directs the effectuation of policy when he is charged with developing the methods, means, and extent of reaching a policy objective and thus oversees or coordinates policy implementation by line supervisors. Simply put, a managerial executive must possess and exercise a level of authority and independent judgment sufficient to affect broadly the organization's purposes or its means of effectuation of these purposes. Whether or not an employee possesses this level of authority may generally be determined by focusing on the interplay of three factors: (1) the relative position of that employee in his employer's hierarchy; (2) his functions and responsibilities; and (3) the extent of discretion he exercises. [Boro. of Montvale, 6 NJPER 507, 508-09 (1980)]

Thus, the determination as to whether a person is a "managerial executive" requires an examination of the person's position in the local agency's hierarchy, his job function and responsibilities, and the amount of individual discretion exercised by the individual. The analysis of these three factors is very often a position-by-position determination.

The determination as to whether a person is a "confidential employee" also requires an individualized determination. PERC has narrowly construed the term "confidential employee." County of Essex, 17 NJPER 256, 257 (1991). The "key" to status as a confidential employee "is an employee's access to, and knowledge of, material used in labor relations processes including contract

negotiations, contract administration, grievance handling and preparation of these processes." Ibid. Specifically, PERC makes this case-by-case analysis as follows:

We (PERC) scrutinize the facts of each case to find for whom each employee works, what he does, and what he knows about collective negotiations issues. Finally, we determine whether the responsibilities or knowledge of each employee would compromise the employer's right to confidentiality concerning the collective negotiations process if the employee was included in a negotiating unit. [State of New Jersey, 11 NJPER 507, 510 (1985)]

Thus, a "confidential employee" has access to confidential information of the employer which is relevant to the labor relations of the local government agency.

In Attorney General Opinion No. 91-0093 (September 20, 1991) we examined in detail the terms "managerial executives" and "confidential employees" in the context of the Local Government Ethics Law. We noted in the Opinion that the Legislature in using these terms to define "local government officer" was attempting to adopt an approach that would identify persons of a high level with policy-making responsibilities. We determined in Opinion No. 91-0093 and in other related Opinions that certain persons serving in government were necessarily "managerial executives" or "confidential employee" and therefore "local government officers", because their statutory duties mandated that they exercise significant policy-making responsibilities. In examining the statutory duties of a local emergency council it establishes the various volunteer agencies needed to meet the requirements of local emergency management activities and establishes an adequate organization to assist in the supervision and coordination of local emergency management activities. However, these duties are generally administrative in nature and do not rise to the level of policy-making.

Accordingly, the members of a local emergency management council are not necessarily "managerial executives" or "confidential employees." While a specific fact analysis suggested in Attorney General Opinion No. 91-0093 (September 20, 1991) may result in the determination that the members of particular municipal emergency management council are "managerial executives" or "confidential employees", the statute establishing the council

does not lead to this per se conclusion. However, the council members are within the scope of the term "local government employee." Therefore, the members of a municipal emergency management council are subject to the statutory code of ethics provided by the Local Government Ethics Law, N.J.S.A. 40A:9-22.5, or a local code of ethics which is established in accordance with the Law, N.J.S.A. 40A:9-22.21.

In turning to the municipal and county emergency management coordinators, they perform similar duties. As noted previously, the municipal and county coordinators are general responsible for the planning, activating, and coordinating of emergency management operations within the municipality and county. N.J.S.A. App. A:9-40.4, N.J.S.A. App. A:9-42.2. The municipal coordinator may proclaim, in his discretion, a state of local disaster and issue and enforce orders to implement emergency management operations. N.J.S.A. App. 9-40.5. The county coordinator may similarly declare a county-wide state of emergency. Division of State Police Directive No. 61 (November 19, 1986), Division of State Police Directive No. 100 (June 12, 1986). These duties are significant and involve policy-making determinations. Thus, the county and municipal emergency management coordinators would be deemed "local government officers" pursuant to the Local Government Ethics Law.

For the foregoing reasons you are advised that a local emergency management council is a "local government agency" for purposes of the Local Government Ethics Law. Further, you are advised that the members of a local emergency management council are not per se "local government officers" for purposes of the Law. Rather, they are "local government employees" and are subject to the terms of the Local Government Ethics Law which govern the conduct of "local government employees." However, the county and municipal emergency management coordinators are "local government officers" for purposes of the Local Government Ethics Law and therefore subject to its terms, particularly the requirement of filing a financial disclosure statement.

Very truly yours,

ROBERT J. DEL TUFO  
ATTORNEY GENERAL

By: \_\_\_\_\_

John J. Chernoski  
Senior Deputy Attorney General