

PUBLIC NOTICE

**COMMUNITY AFFAIRS**

**DIVISION OF LOCAL GOVERNMENT SERVICES**

**LOCAL FINANCE BOARD**

**Notice of Action on Petition for Rulemaking**

**Local Government Ethics Law**

**N.J.A.C. 5:35-1.1 and 1.2**

Petitioners: New Jersey Foundation for Open Government, Inc. and Mr. John Paff.

**Take notice** that on August 31, 2015, the Local Finance Board received a petition for rulemaking from the above petitioners requesting the Board amend N.J.A.C. 5:35-1.1 and 1.2 to 1) place some time constraints within which the Local Finance Board must complete investigations of Local Government Ethics Law complaints; 2) make the existence of all records pertaining to Local Government Ethics Law complaints publicly available earlier in the process; and 3) restrict the Local Finance Board's ability to reject Local Government Ethics Law complaints when related matters are pending before a court or administrative agency. A notice acknowledging receipt of the petition and summarizing its contents was published in the October 5, 2015, New Jersey Register at 47 N.J.R. 2505(a).

**Take further notice that** this petition was considered by the Local Finance Board at its public meeting on October 14, 2015. At that time, the Board determined to refer the matter to Local Finance Board staff for further deliberation and recommendation pursuant to N.J.A.C. 1:30-

4.2(a)(3). A notice of action on the petition was published in the November 16, 2015, New Jersey Register at 47 N.J.R. 2886(a).

**Take further notice** that the Board certifies that the petition was duly considered pursuant to law and, upon due deliberation, the Board determined at its February 10, 2016 public meeting that the petition for the requested amendments to N.J.A.C. 5:35-1.1 and 1.2 shall be denied.

Petitioners' first request seeks amendments that would require the Local Finance Board to 1) endeavor to complete its preliminary investigation of a Local Government Ethics Law complaint within 60 days of the Board's receipt of same; 2) require, absent extraordinary circumstances, completion of the preliminary investigation within 120 days of receiving the complaint; 3) endeavor to complete investigation of an ethics complaint within one year of receipt thereof; and 4) require, absent extraordinary circumstances, completion of the investigation within 18 months of the Board's receiving the complaint. Petitioner Paff argues that such time constraints are necessary to ensure prompt resolution of complaints filed under the Local Government Ethics Law and swift discipline of the Law's violators, and accomplish the Legislature's stated objective of promoting the public's confidence in the integrity of its elected and appointed representatives. Mr. Paff states that, at the time of the petition, three of the ethics complaints filed by Mr. Paff had been pending for more than two years, with another complaint having been pending three years and five months. The Board notes that Notices of Violation were issued for two of the complaints referenced, 12-009 and 13-014, in August 2015.

With respect to complaints alleging violation of the Local Government Ethics Law, the Board's rules presently do not impose artificial deadlines on either the duration of preliminary investigations conducted pursuant to N.J.A.C. 5:35-1.1(d) or the duration of investigations

conducted pursuant to N.J.A.C. 5:35-1.1(f). Further, the Board questions whether the Local Government Ethics Law authorizes the promulgation of a regulatory “statute of limitations.” The Local Government Ethics Law does not impose a maximum time period for the duration of preliminary or formal investigations. The Board takes seriously its responsibility to investigate and adjudicate complaints alleging the violation of the Local Government Ethics Law. It processes and investigates complaints with due haste, while ensuring both the accuracy and completeness of its records before disposing of an ethics complaint. This is consistent with the Board’s statutory obligation to ensure the public’s confidence in the integrity of its elected and appointed representatives. N.J.S.A. 40A:9-22.2. Flexibility in the Board’s timeline for investigation enables staff to devote the time required to each investigation, in addition to all other staff assignments. It also permits staff to adapt to the unique realities of each investigation, achieving the most appropriate result.

Artificial deadlines imposed by regulation would hinder the Board’s complaint investigation and determination process. Each complaint varies in its complexity. The time required for full investigation can vary depending on factors such as the number of potential witnesses to be interviewed and the intricacy of legal issues being researched. In light of this reality, a rigid, fixed deadline only extendable in “extraordinary circumstances” would not be desirable. Petitioners also fail to make any showing as to the adequacy of his proffered timelines for complaint investigation and consideration, failing to demonstrate that these arbitrary timeframes are consistent with the Board’s fulfillment of its obligations under the Local Government Ethics Law.

Petitioners' second request seeks amendments that would require the Local Finance Board to make all documents pertaining to a complaint public after the preliminary investigation is completed. Currently, N.J.A.C. 5:35-1.2 states that any complaints, statements, information, or documents obtained or prepared by the Board staff or the Board are deemed confidential, except as necessary for the Board or its staff to conduct the preliminary investigation or investigation, until 30 days after the mailing of a Notice of Dismissal [of the complaint] pursuant to N.J.A.C. 5:35-1.1(h) or a Notice of Violation issued pursuant to N.J.A.C. 5:35-1.1(i). Petitioners argue that Local Government Ethics Law complaints should be treated similarly to civil and criminal complaints filed in Superior Court, which are considered public documents from the outset. Further, the petitioners argue that the Local Government Ethics Law does not require confidentiality with respect to ethics complaints, and that the current rules provide greater protection to public officials than is presently enjoyed by the general public.

The Board finds unconvincing the arguments recited above. Complaints under the Local Government Ethics Law differ from those heard in Superior Court in that a defendant does not provide an answer and/or defense at the outset of the proceedings, but rather the accused provides a response only after receiving the Notice of Investigation. The Notice of Investigation is issued only after the Board determines, upon conclusion of a preliminary investigation, that a complaint is not outside of its jurisdiction, frivolous, or without any reasonable factual basis. N.J.A.C. 5:35-1.1(e)2. It is only when a Notice of Investigation is issued that a formal investigation begins. *Id.* Petitioners seek the public release of accusations without the public having the benefit of the full set of facts concerning the complaint and defense of the respondent. Disclosure of unverified information provided to a State agency which may impact a person's

standing in the community or employment with a public agency does not meet the statutory intent of the Local Government Ethics Law, which seeks to “provide a method of assuring that standards of ethical conduct and financial disclosure requirements for local government officers and employees shall be clear, consistent, uniform in their application, and enforceable on a Statewide basis, and to provide local officers or employees with advice and information concerning possible conflicts of interest which might arise in the conduct of their public duties.” N.J.S.A. 40A:9-22.2.e.

If a Notice of Violation is issued by the Board, the individual having been found in violation of the Local Government Ethics Law is entitled to request an administrative hearing before the Board that is open to the public. N.J.A.C. 5:35-1.1(i).

The Board also notes the existence of a confidential process is not in any way unique to its procedure under the Local Government Ethics Law. For example, for attorneys facing disciplinary and ethics charges in New Jersey, a disciplinary matter and all written records associated with same must be kept confidential by the Director of the Office of Attorney Ethics until either the filing and service of a formal complaint, entry of a disciplinary stipulation waiving the filing of a formal complaint, approval of a motion for final discipline (based on a criminal or disorderly persons offense) or reciprocal discipline (from another state or agency), or the approval of a motion for discipline by consent. New Jersey Court Rule 1:20-9(a).

Petitioners’ third and final request seeks to require the Board to process and adjudicate Local Government Ethics Law complaints pertaining to matters that are pending in a court of law or another State administrative agency, with the exception of those complaints alleging facts substantially similar to the material allegations of a matter pending in a court of law or another

State administrative agency. Currently, the Board is barred from processing a complaint on a matter which is pending in a court of law or administrative agency of the State. N.J.A.C. 5:35-1.1(c). Petitioners argue that the current rule allows the Board to reject legitimate complaints alleging substantial ethical impropriety even if the other proceeding is only tangentially related to the ethics complaint.

The Board rejects petitioners' argument as it would require allocation of staff resources to the redundant investigation of matters that are the subject of parallel investigations or proceedings. The outcome of an investigation or proceeding, even if not directly on point with the ethics complaint, may nevertheless bear relevance to same. Given the frequent linkage between allegations of Local Government Ethics Law violations and criminal allegations of public corruption, avoiding duplicate investigations and proceedings avoids unnecessary and potentially detrimental overlapping, and the ability to use information gathered in the course of those external inquiries benefits the Board's ability to process its substantial ethics caseload. Complaints pertaining to matters pending in a court of law or another State administrative agency of the State are dismissed without prejudice, and can be filed anew when either the legal action or the other agency's review is concluded.

A copy of this notice has been mailed to the petitioners.