

Local Government & *Public Finance Law*

Attorneys Subject to Financial Disclosure Under N.J.S.A. 40A:9-22.6

By William P. Isele

Since its enactment in 1991, the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 et seq. (Ethics Law), has required “local government officers” to file annual financial disclosure statements. Attorneys work in various capacities in municipal government, from zoning and planning board counsel to part-time municipal judges, prosecutors and public defenders. Even after 20 years, the application of the financial disclosure requirements to some of these lawyers remains unclear.

History and Purpose

The Ethics Law was enacted to establish standards of ethical conduct and financial disclosure for local government officers and employees that were “clear, consistent, uniform in their application, and enforceable on a statewide basis.” N.J.S.A. 40A:9-22.2. Outstanding among its provisions was

Isele is of counsel in the Princeton office of Archer & Greiner PC. He serves as a member of the Municipal Ethics Board of the Borough of Milltown.

an annual financial disclosure requirement, applicable to “local government officers,” but not to “government employees.” N.J.S.A. 40A:9-22.6. The law required the Local Finance Board (LFB) in the Department of Community Affairs to develop a financial disclosure form, which municipal and county clerks would then make available to local government officers, either directly or through ethics boards, if such were established. Financial disclosure statements, covering the officer and his or her immediate family, are to be filed on or before April 30 each year.

Although the term “local government officer” is defined in N.J.S.A. 40A:9-22.3(g), questions arose immediately regarding who was required by law to file the form. However, only a single reported court decision, to date, addresses this question. In 1995, the Appellate Division ruled that members of local public library boards are “government officers,” and thus subject to the financial disclosure requirement. The court first reviewed the definition of “local government officer”:

Any person whether compen-

sated or not, whether part-time or full-time:

- (1) elected to any office of a local government agency;
- (2) serving on a local government agency which has the authority to enact ordinances, approve development applications or grant zoning variances;
- (3) who is a member of an independent municipal, county, or regional authority, or
- (4) 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,” P.L. 1941, c. 100 (N.J.S.A. 34:13A-3), 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). The court then turned to the definition of “managerial executive” found in the Employer-Employee Relations Act:

“Managerial executive” of a public employer means 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).

The court reasoned that the library trustees had the authority to rent space and construct buildings, make purchases, hire and fire staff, fix staff compensation, and make rules and regulations for the library, citing N.J.S.A. 40:54-12. The court also found that the board is obliged to make budgetary recommendations, hold and manage bequests and donations, and carry out a variety of financial transactions. As a result, the court concluded that members of public library boards are “managerial executives,” and obliged to file annual financial disclosure statements. *Department of Community Affairs v. Cook*, 282 N.J. Super. 207, 210 (App. Div. 1995).

Like library trustees, there are many individuals who serve their communities in various ways, who might not otherwise consider themselves “local government officers,” because they are neither elected officials, nor members of boards or authorities.

After the law was passed in 1991, the LFB sought the advice of the New Jersey Attorney General regarding this issue. As a result, numerous informal attorney general opinions were issued to the LFB in 1991 and 1992, as the LFB identified categories of individuals who might be included under paragraph (4) as “managerial executives” or “confidential employees.” The LFB lists these opinions (AGOs) by number and date and provides links to the texts of these opinions on its website: www.nj.gov/dca/divisions/dlgs/programs/ethics.html#4. County and municipal clerks have come to rely on these informal AGOs in developing their rosters of local government officers who are expected to file the annual financial disclosure forms. It must be emphasized, however, that informal attorney general opinions do not constitute legal authority, like court decisions. Their purpose is to provide advice to the LFB.

Municipal Attorneys

One of the first of these AGOs, #91-0092, issued on Sept. 20, 1991, opines

that municipal attorneys are “local government officers,” required to file annual financial disclosures. In providing this advice, the Attorney General’s Office reasoned as follows: “The position of municipal attorney — created by law pursuant to municipal ordinance — is a public office rather than a position created by a service contract.”

The Attorney General’s Office went on to distinguish the municipal attorney from attorneys who serve the municipality in a special, limited capacity, such as special labor counsel or counsel retained for an environmental or tort matter. The AG opined that these latter attorneys would not be subject to the requirements of the Ethics Law. The AG reasoned further: “Not all municipal attorneys may be persons who formulate management policies and who direct the effectuation of such policies. However, municipal attorneys by the nature of the duties of this office, participate in the formulation of management policies, and we believe that the office should be deemed a ‘managerial executive.’”

Board and Authority Attorneys

In AGO #91-0133, dated Nov. 1, 1991, the Attorney General’s Office opined that attorneys who regularly advise zoning boards of adjustment and planning boards are also subject to the financial disclosure requirements.

Like municipal attorneys, “planning and zoning board attorneys must exercise independent legal judgment and discretion affecting issues of public concern, albeit in the specialized area of land use,” the AG reasoned. “Further, an attorney who advises a public body wields considerable power and influence.”

The AG again recognized that there may be occasions when a zoning or planning board may hire an attorney for a specific issue, and such attorneys would not be subject to the disclosure requirements.

In opinion #91-0134, also dated Nov. 1, 1991, the Attorney General’s Office took a similar position regarding attorneys who regularly provide advice and representation to independent local authorities, such as fire districts and housing authorities.

Municipal Court Judges

However, in AGO #91-0096, dated Sept. 20, 1991, the Attorney General’s Office took the opposite position regarding municipal court judges, and opined that they are not subject to the financial disclosure requirements of the Ethics Law. The AG noted that the Supreme Court’s Code of Judicial Conduct does not require a judge, including a municipal judge, to make a financial disclosure. *Canon 5, Commentary (D)(6)*. The AG reasoned further that, to determine whether a municipal court judge or court clerk is a “managerial executive” would “require an analysis into the inner workings of the administration of the judicial branch of government,” which may be “an unwarranted interference in the affairs of the judiciary.” The AG concluded that municipal court judges, court clerks and other judiciary employees are not generally subject to the financial disclosure requirements of the Ethics Law.

Municipal Prosecutors and Public Defenders

Notwithstanding the detailed attention paid to this issue by the LFB, there has been no clear determination or advice with regard to whether municipal prosecutors or municipal public defenders are “local government officers,” and thus subject to financial disclosure. Some municipalities include them in their roster each year; some do not. While the purpose of the law was to provide “clear, consistent and uniform” standards, in this area, the standards remain unclear.

In AGO #91-0090, Sept. 20, 1991, the Attorney General’s Office concluded that *county* prosecutors are subject to the disclosure provisions. The AG reasoned that county prosecutors have authority to appoint assistant prosecutors and hire other staff. A county prosecutor is responsible for a budget, and is responsible for labor relations matters in his/her office. Based on these factors, the AG determined that the county prosecutor is a “managerial executive” under paragraph (4) of the definition of “local public officer.”

The same reasoning does not necessarily apply to municipal prosecutors. Municipal prosecutors in some larger cities may manage offices similar in size

and scope to those of county prosecutors. In many of New Jersey's smaller towns, however, municipal prosecutors are local attorneys who maintain private offices for the practice of law, supervise no municipal staff and hire no assistants. They do not manage a budget, or "run an office" in the municipality. They appear on court nights, settle some cases and try others. By and large, they do not formulate policy. While it may be argued that

municipal prosecutors exercise discretion in entering into "plea bargains" or amending charges, in fact they can only recommend that the court accept a plea to a lesser or other offense. The ultimate discretion lies with the municipal court judge. See: N.J.S.A. 2B:25-11, 2B:25-12.

In light of the foregoing, it is difficult to understand how some municipal prosecutors would meet the definition of "managerial executives." The same rea-

soning would apply to municipal public defenders, who are appointed to represent indigent defendants, but do not manage a staff, office or budget.

Accordingly, despite the Ethics Law's purpose to provide "clear, consistent and uniform" standards, it seems likely that the applicability of the financial disclosure requirements will continue to be determined on a case-by-case basis for these two categories of attorneys. ■