



OFFICE OF THE COUNTY ATTORNEY

Isiah Leggett
County Executive

Leon Rodriguez
County Attorney

MEMORANDUM

To: Glenn Wyman
Debt and Cash Management Manager
Department of Finance

Josephine Gilbert
Financial Programs Manager
Department of Finance

FROM: Scott R. Foncannon *SRF*
Associate County Attorney

DATE: June 3, 2008

RE: Use of Bank Accounts and County Funds for Non-County Purpose

You have asked the Office of the County Attorney to give you a written opinion on the following three questions:

1. Whether the bank accounts maintained by the County Police Department employees at banks throughout the County using the County's tax identification number are authorized County bank accounts under County law.
2. Whether the funds deposited in bank accounts maintained by the County Police Department employees are County funds and County revenue and therefore should be maintained in authorized County bank accounts subject to County oversight and reporting.
3. Whether the use of these funds as reported to the Department of Finance is for an appropriate public purpose.

Answer

1. The bank accounts maintained by the County Police Department are not authorized bank accounts under County law.
2. The bank accounts maintained by the individuals employed by the Police Department contain County funds and County revenue and should be deposited in authorized County accounts and maintained in accordance with County law and procedures as described in this memorandum.
3. The use of these funds as described to the Department of Finance, is not for an appropriate public purpose.

RELEVANT FACTS

During the 2006 year end audit process, the Department of Finance requested account verification from the various banks in which the County maintains accounts. As a result of this process it came to the attention of the Department that the Police Department maintained eight bank accounts using the County's tax identification number, that these accounts had not been authorized and set up by the Department of Finance, and that the accounts were not part of the County's accounting and oversight process for bank accounts. The County was previously made aware of two of the accounts: one maintained by the Family Crimes Division (FCD) at Chevy Chase Bank, and one maintained by the Emergency Communications Center (ECC) at the Bank of America. When the banks were asked to verify other accounts using the County's tax identification number, six additional accounts were verified: one each for the first, second, third, fourth, fifth and sixth police district stations.

The Department was advised that the money deposited into these accounts comes from vending machines located at the stations, sales of clothing with police logos on them, and donations from County citizens. None of these accounts are reflected in the County's general ledger or account balances for cash management purposes, nor have they been approved by or set up by the Department of Finance. All of the accounts have a Police Department employee listed as the custodian of the account, however, none of the employees were authorized by the Director of Finance to act as custodian of the accounts.

The accounts are used to pay for flowers, get well cards, gifts for retirees, memorial donations, savings bonds for births of children to employees, awards, charities, station activities, birthdays and meals for employees that work on holidays. The account balances are generally small and maintained under one thousand dollars. The account for the fifth district station in Germantown had a balance of over three thousand dollars as of June 1, 2006.

Based on this information, you have asked about the proper use of the County's tax identification number, who is authorized to open accounts for the County, and how these

accounts should be reflected in the County's accounting system. As related issues you would like to know whether the funds in these accounts are County funds (and should be reported with all other County bank accounts) and whether the expenditures described above are appropriate County expenditures.

DISCUSSION

The Montgomery County Charter designates the Department of Finance as the custodian of all County funds and directs the Department of Finance to "collect taxes, special assessments, license fees, and other revenue" along with other management and audit tasks, and to "perform such other functions as shall be prescribed by law." (Montgomery County Charter Section 214) The Montgomery County Code establishes the Department of Finance and delineates the specific duties of the Finance Director. (Montgomery County Code Section 1a-201(a), Section 20-38 and Section 20-41, respectively) The Director of Finance is required to audit the accounts, prescribe a system of accounts, and keep financial records. (Sections 20-30(a), 20-38(b) and 20-38(c)). In addition to these general duties of maintaining the financial records of the County, the Director of Finance is required to deposit all monies, checks, drafts and other receipts in such qualified banking institutions as designated from time to time by the Director, and shall receive all money paid to the County from any source. (Sections 20-5(a), 20-5(b) and 20-41). It is also the duty of the Director of Finance to make disbursements of County money in accordance with State and County law, the County charter and appropriations authorized by the County Council. (Section 20-42).

Each employee or officer receiving cash for the County is required to issue a receipt to the person paying cash, and all employees that handle funds of the County are required to be bonded to ensure that all County funds received by the employee will be paid over to the Director of Finance. (Sections 20-43 and 20-44(b)).

1. The bank accounts are not authorized County bank accounts and the funds received and deposited in these bank accounts are County funds and must be maintained in County authorized bank accounts.

The first two questions are related and it makes sense to answer them together. The Charter, together with the laws of Montgomery County, makes it clear that all County funds and all County revenue must be collected by the Department of Finance and deposited and maintained in County authorized accounts and documented within the County's system of accounts and records. The receipts from vending machines located at County facilities, restricted donations payable to the Montgomery County Police Department, or funds received from the sale of clothing with the County insignia or logo are all County revenues derived from activities on County property by County employees and should be deposited into authorized County bank accounts set up by the Department of Finance and subject to County accounting and oversight. The sources of these funds are actually subject to existing County policies, procedures and a County contract as follows:

1. Donations received by and on behalf of the County should be maintained in restricted donation accounts. The Department of Finance has an unwritten policy and procedure for creating restricted donation accounts. They should be maintained in a separate revenue fund, but they are part of the County funds and they are reported to the Council by the Department of Finance.

2. Monies needed for petty cash for various appropriate expenses within an office or department should be maintained in an appropriate petty cash account, which account should be set up according to Administrative Procedure 2-1, Petty Cash Funds. A copy of the Petty Cash Administrative Procedure 2-1 is attached to this memorandum.

3. The County also has a procurement contract for placing vending machines at County facilities. All vending machines at County facilities or located on County property should be installed and operated under the County Contract # 3502030078-8A, with all proceeds going to the County less commissions to the vendor as provided in the Contract. A copy of the procurement contract is attached to this memorandum.

2. The use of the funds as reported and described to the Department of Finance is not for an appropriate public purpose.

The County has broad legislative authority under Article XI-A of the Maryland Constitution and Article 25A Section 5 (s) of the Maryland Annotated Code to "pass such ordinances as may be deemed expedient in maintaining the peace, good government, health and welfare of the County." (Section 5(s), Article 25A, Annotated Code of Maryland) The "general welfare" grant of power has been broadly construed to allow charter counties to legislate beyond the powers specifically stated in the Express Powers Act. *Snowden v. Anne Arundel County*, 295 Md. 429 (1982). In the context of this particular situation these broad express powers are limited by the Montgomery County Charter and the requirement that public funds must be used for a public purpose. Section 311 of the Montgomery County Charter prohibits any expenditure in excess of the available unencumbered appropriation therefore. Further, the public purpose requirement dictates that public funds must be used for a public purpose. Article 15 of the Maryland Declaration of Rights; *Finan v. M. & C. C. of Cumberland*, 154 Md. 563, 565, 141 A. 269 (1928), *Frostburg v. Jenkins*, 215 Md. 9, 16, 136 A.2d 852 (1957).

There is little doubt that these funds have not been properly appropriated through the County budget process because the funds have never been reported through the County's system of accounts, so there was no appropriation for these expenditures. This expenditure of these funds violates the prohibition in Section 311 of the Charter.

With regard to the public purpose of the expenditures the cases have generally upheld the payment of public funds to private individuals as long as the public purpose is served. *Reyes v. Prince George's County*, 281 Md. 279, 380 A.2d 12 (1977). Generally, the legislative body is entrusted with the determination of what is a public purpose and the Court will not intervene unless a "perversion of the public funds to private purposes is obvious." *Board of Education v. Wheat*, 174 Md. 314, 199 A. 629 (1938).

The question of what is a public purpose is a difficult one, but “so long as the legislation has a substantial relation to the public welfare and can fairly be said to serve a public purpose, it is not the Court’s function to strike it down, merely because we fear it may lead to unwise or unfortunate results.” *Frostburg, supra*. As an example of an appropriate public purpose and expenditure, in *Snowden, supra*, the Court of Appeals found that a public law authorizing reimbursement of legal expenses to public employees for defense of criminal or civil charges arising out of the performance of their duties was an appropriate public expenditure.

In this situation with reference to the bank accounts, there is no County legislation to review but the general principle that the expenditure must serve a public purpose equally applies. There is no apparent public purpose for the payments made with these funds, but rather the payments are in the nature of gifts to employees or family members of the employees. Although the expenditures are commendable and not illegal per se they are not appropriate expenditures of County money and in my opinion do not meet the public purpose test.

CONCLUSION

For the reasons stated above, the funds deposited in the various accounts are County revenues and should be maintained in authorized County bank accounts and used for an appropriate public purpose. Office funds for the types of expenditures described above are not uncommon throughout County departments but they must not use County revenue to fund the account and must not use the County tax ID number for identification of the account.