Chair Tooley and members of the Board of Ethics (via Michael Henry),

After closely reading your June 22 letter, and understanding the Board's views, I am responding in order to clarify several matters about the bill that I've introduced. It has been mischaracterized in some quarters as a change or a relaxing of the Ethics Code, perhaps even allowing expensive gifts to officials. Unequivocally, it does no such thing.

In fact, it both improves transparency from City officials by requiring public reporting of items received from our agencies, which I hope the Board supports, and specifically states the exact definition of gift donor that was both the original intent of the legislation and the consistent interpretation of it for 22 years before the Board's Nov. 21 advisory opinion endeavored to change it. That change exceeds the Board's authority and puts us in a position where we are forced to act, one way or another, because of the inconsistency. Only the Council can legislate.

First, something I did not bring up when I met with the Board on June 20: When your advisory opinion in this matter was first released to me and City Council Staff Director Leon Mason on Nov. 21, your executive director, Michael Henry, specifically invited me to craft an amendment to clarify the obviously conflicting interpretations.

He wrote in email:
"Kevin and Leon – attached is a new opinion from the Board of Ethics regarding gifts and reporting of gifts. I understand that some members of Council may disagree with the section about gifts from city agencies and departments and you may wish to consider amending the Code of Ethics to clarify Council's intention." [emphasis mine]

The Board should not be surprised then that the Council is acting on that suggestion.

It is absolutely necessary that the Council act in order to resolve the conflict that now exists between the code and the Board's advisory opinion. Doing nothing is not a choice. This bill chooses to formally define "donor" using the original intent and understanding that's been agreed upon since the enactment of Sec. 2-60, an understanding that the Board itself shared up until this point. As I noted in our meeting, the Board agreed in the narrative of its opinion in Case 11-47 in 2011 that "the purpose of the gift section (2-60) of the Code of Ethics is to apply to gifts to city personnel from non-city persons or entities, although this is not clearly stated."

This amendment, therefore, clearly states that gift donors are non-City entities, as has always been the case. It goes no further than, nor retreats from, any provision of the Code. In fact, the amendment creates a new tool for transparency by requiring for the first time disclosure of items officials receive from other City agencies, including overnight travel expenses.

The Board's advisory has engendered genuine confusion over hundreds of routine and ethical daily interactions within City agencies, and over their reporting requirements. By equating City employees conducting City business with outside lobbyists working for private interests, and by putting City agencies in the same bucket as private corporations seeking to benefit from multi-

million dollar City contracts, the Board subjects City workers and agencies to the same restrictions, limitations and reporting requirements in Sec. 2-60 that apply to those lobbyists and vendors who have personal financial gain at stake. It unnecessarily categorizes many of their routine procedures as potentially unethical so that they require an inquiry, exemption, waiver or prohibition.

The Board's advisory could require that such benign activity as a City colleague picking up the check at a routine lunch of office mates be regulated, exempted or waived, and possibly tabulated and listed on gift reports, just like lunch with a lobbyist, depending on whether one of those treated to lunch is administering a departmental contract or otherwise is in the decision chain. When you consider the real difference if the check were being picked up by an outside lobbyist seeking the contract, the asymmetrical comparison is crystal clear and demonstrates why City agencies have never even been considered as donors.

The Board seemed dismissive of these concerns as trivial, but for hundreds of City employees engaging in hundreds of interactions per day, they are not. City employees are dedicated and ethical, and they want to follow clear guidance. The change you seek has muddied the waters with real problems, not manufactured ones as was implied at our meeting. I referred to this as a rabbit hole, and indeed there are innumerable potential problems of our own making if the Board's expanded definition were to be added to the Code instead of the current bill. Only a deliberative, collaborative and cooperative process culminating in a Council vote, not an advisory opinion from the Board, should be used to make such a substantial change to the Code.

Your letter erred in stating that the Code "contains no language stating, or even implying, that a Council member or other City official may accept (or solicit) from a City agency head or employee a gift paid for by funds appropriated by the City. Had the City intended such an exception, the Code certainly would have said so." First, fiscal rules already speak to those situations, and the Code has no need to state an exception to a provision that don't exist. You are disregarding that Sec. 2-60 was never intended to apply to City agencies as donors. As I showed via the memo from John Bennett, the retired City Council Staff Director who drafted, coordinated and led the discussions for both the 1995 and 2001 Ethics Code updates in which gift restrictions were added and strengthened, the intent was to restrict gifts from outside, non-City, entities. The effort included outside stakeholders such as Common Cause. Bennett stated there never was any suggestion or discussion during drafting and passage of the gift restrictions that they should apply to city agencies. The sole subject of discussion was gifts from non-City entities.

Further, the Board disregards the plain meaning of Sec. 2-60(a)'s second requirement that the City must have "an existing, ongoing, or pending contract, business, or regulatory relationship with the donor." The Board manipulates the straightforward meaning of this requirement by contending that because the City necessarily has its own internal processes, it exercises "direct official action" over itself.

This is circular reasoning. City agencies are inseparable from the City, which is a single, unified entity. A City agency does not seek a contract with itself. The Council doesn't award contracts to City agencies, and City agencies don't issue contracts. All contracts are issued to outside entities by the City and County of Denver, not by the Department of Public Works or Department of Aviation.

Neither a City agency nor any of its employees or managers monetarily profit, personally or privately, from the awarding of a contract. It is illogical that the City can be a donor to itself from its own funds. That is Peter paying Paul. The reason that outside entities are restricted in providing gifts to employees and officials is because they are the ones who personally and privately profit from City contracts. That's a crucial ethical element missing from the relationship between City agencies and their employees or officials.

Finally, amid all this discussion it should be noted that actual gifting by City agencies is an infrequent occurrence and as the Board has noted, typically involves items of trivial value. Most of them are produced as marketing, branding and promotional collateral for public distribution, and as part of those efforts are sometimes shared with employees and officials. Any potential undue influence within City relationships with which the Board is rightly concerned is adequately covered by fiscal rules, laws against embezzlement and the absolute requirement that City expenditures must have a municipal purpose.

All of the hypothetical wrongs the Board suggested would be enabled by my bill already are, and under my bill will remain, illegal acts under the Ethics Code and other provisions of the DRMC. Your suggestion that due to my amendment, a Council member could request and receive landscaping improvements from the parks department to a relative's back yard for a public meeting is preposterous. They already cannot do that now. It violates Sec. 2-67 of the Code of Ethics, using public office for private gain, plus embezzlement and the requirement for a municipal purpose. My amendment doesn't enable this in the least. The only time I've heard of such a thing was when Mayor Bill *"allegedly"* had a City crew install a putting green in his back yard with surplus golf course turf – long before the gift restrictions were adopted.

In truth, the City's regimen of regulations already effectively bars the type of expensive gift-giving for undue influence with which the Board is concerned. If the Board believes this should be strengthened, I am open to a collaborative, cooperative and deliberative process to discuss it, as we previously have done for major changes to the Code. That's the proper course. You've offered in your letter to work with Council on these issues. As the principal advocate on the Council for the Board's issues, I am willing to engage. In the meantime, CB 614 is necessary to bring clarity to the situation.

Thank you,

Kevin Flynn