



Agenda

January 6, 2011 – 3:00 p.m.

Governmental Center,
301 North Olive Avenue, 12th Floor
McEaddy Conference Room then
6th Floor Commissioners Chambers

Palm Beach County
Commission on Ethics
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Commissioners
Edward Rodgers, Chair
Manuel Farach, Vice Chair
Robin N. Fiore
Ronald E. Harbison
Bruce E. Reinhart

Executive Director
Alan S. Johnson

Administrative Assistant
Gina A. Levesque

Investigator
Mark E. Bannon

- I. Call to Order
- II. Roll Call
- III. Introductory Remarks
- IV. Approval of Minutes from December 2, 2010
- V. Complaint C10-006 (Executive Session)
- VI. Processed Advisory Opinions
 - a. RQO 10-032
 - b. RQO 10-040
- VII. Proposed Advisory Opinions
 - a. RQO 10-036
 - b. RQO 10-038-OE
 - c. RQO 10-039
 - d. RQO 10-041
- VIII. Executive Director Compensation (Commissioner Reinhart)
- IX. Workshop Items
 - a. Rules of Procedure Amendments 4.11 and 4.12 (self-initiated complaints)
 - b. Rules of Procedure Amendments 4.31, 4.32 and 4.33 (advocate conflicts of interest)
 - c. Proposed code revision: Public Records Exemption for Initial Complaints §2-260(f)
 - d. Sec. 2-443(c) Prohibited Contracts (waivers)
- X. Executive Director Comments
 - a. Referendum Committee Update
- XI. Public Comments
- XII. Board Comments
- XIII. Adjournment

MEETING: PALM BEACH COUNTY COMMISSION ON ETHICS

I. **CALL TO ORDER:** December 2, 2010, at 4:03 p.m., in the Commission Chambers, 6th Floor, Governmental Center, West Palm Beach, Florida.

II. ROLL CALL

MEMBERS:

Judge Edward Rodgers, Chair
Manuel Farach, Esq., Vice Chair
Dr. Robin Fiore
Ronald Harbison
Bruce Reinhart, Esq.

STAFF:

Alan S. Johnson, Esq., Commission on Ethics (COE) Executive Director
Mark Bannon, COE Investigator
Benjamin Evans, COE Intern
Sydone Thompson, Deputy Clerk

III. INTRODUCTORY REMARKS

Judge Edward Rodgers reminded everyone to either turn off or silence their cell phones. He stated that copies of the meeting's agenda were available at the podium. He said that public comments would be heard as noted in agenda item IX, and asked that public speakers observe the time limits when giving their statements. He added that if additional time was needed by a public commentator, the COE would try to make special accommodations.

IV. APPROVAL OF MINUTES FROM NOVEMBER 4, 2010

Dr. Robin Fiore requested that page 14, fourth bullet, second sentence of the November 4, 2010, minutes be amended to read:

If Ms. Mathews wins her personnel grievance because the County's policy was unclear, that did not affect the commission's determination that Commissioner Taylor had not violated the Code.

MOTION to approve the minutes of November 4, 2010, with the amendment made by Dr. Robin Fiore. Motion by Ronald Harbison, seconded by Bruce Reinhart, and carried 5-0.

V. PROCESSED ADVISORY OPINIONS

Alan Johnson, Commission on Ethics (COE) Executive Director (ED) stated that:

- At the last COE meeting on November 4, 2010, the committee instituted a consent agenda process for advisory opinions (AO) that were answered directly by the Code of Ethics (Code).
- Three processed advisory opinion letters, V.a. RQO 10-033-OE, V.b. RQO 10-034, and V.c. RQO 10-037-OE, were previously reviewed by the chair and processed. Unless the COE requested that one of the AO letters be pulled for discussion, item V. could be approved in one vote.

MOTION to approve accepting consent agenda item V. Motion by Bruce Reinhart, seconded by Dr. Robin Fiore, and carried 5-0.

VI. PROPOSED ADVISORY OPINIONS

VI.a. Request for Opinion (RQO) 10-032

Mr. Johnson stated that:

- In response to request RQO 10-032 from Palm Beach County Emergency Management Director Bill Johnson regarding travel reimbursements, staff recommended that the criteria for exempt travel reimbursements include:
 - travel on behalf of the County in performance of official duties;
 - payments by another governmental entity or organization of which the County was a member, where the travel was related to that official duty; and,
 - Listing the Federal Emergency Management Agency (FEMA) and the Florida Division of Emergency Management (FDEM) as governmental entities.
- Reimbursements could not be accepted from any County contractor, vendor, service provider, bidder, or proposer, without a waiver.

VI.a. – CONTINUED

- Notwithstanding any waivers, no reimbursement from a lobbyist or principal for more than \$100 could be accepted unless the reimbursement related to the official duties of the employee, and were on behalf of the County. Otherwise, the gift would constitute an exception to the gift law.
- Gifts of more than \$100 were reportable if they were not related to official duties on behalf of the County; and were allowable if they were not received from a lobbyist or principal party.
- A reimbursement could be considered a gift.
- Based on the facts presented, COE direction was sought for future AO relating to reimbursements. The AO response issued to Mr. Johnson for RQO 10-032 stated that:

Since your questions were general in nature, and involved future speculative acts and circumstances based upon past events, the commission cannot opine other than to offer general guidelines under the Code.

- A general AO response could have been drafted regarding RQO 10-032 without identifying the originating County department that made the request. However, for illustrative purposes, the parties were identified for future AO reference.

Manuel Farach suggested that language in section 2-444(e)(1) relating to Exceptions be modified. He said that any reimbursement by someone other than the County could be considered a gift. The language in the Code referenced by Mr. Farach stated:

As previously indicated, any reimbursement that is not specifically related to the performance of your official duties for use solely by the County in conducting its official business, would be considered a gift and subject to the prohibitions and reporting requirements as set forth in the Code.

VI.a. – CONTINUED

Mr. Johnson stated that:

- Direction was needed to modify the language in section 2-444(e)(1) of the Code which stated, “As previously indicated, any reimbursement by an outside entity, vendor, provider, bidder or proposer...” as the rule could be applied to FEMA and FDEM.
- The two presenting issues as related to the Code were reimbursements and prohibitions against reimbursements. Mr. Johnson explained that:
 - Any work-related reimbursement received from a governmental entity would not be considered a gift, and would be excluded as a gift.
 - Any gift received, including those received from a lobbyist in solicitation and performance of official duties, would not be considered a gift.
 - Any other reimbursement would constitute a gift, and would either be prohibited, if received from a lobbyist and more than \$100 was reportable.
- The proposed modifications could both be tabled and discussed at a later meeting, or the COE could resolve the matter and vote on the proposed language modifications at today’s meeting.

Mr. Farach suggested that RQO 10-032 be placed on the consent agenda for the next COE meeting.

MOTION to approve accepting that the Commission on Ethics table item VI. RQO 10-032 until the next meeting on January 6, 2011, and revise the language in the advisory opinion. Motion by Ronald Harbison, seconded by Bruce Reinhart, and carried 5-0.

VII. WORKSHOP ITEMS

(CLERK'S NOTE: Mr. Johnson gave a PowerPoint presentation at this time and asked that the COE reserve their questions until the end of the presentation.)

VII.a. Processing Complaints (P/C and Final Hearings)

Mr. Johnson said that:

- Public records and Florida Sunshine Law (Sunshine Law) exemptions were established by Florida State statutes (F.S.S.). The COE adopted only State statutes that specifically applied to local State ethics commissions.
- The COE was a tribunal that functioned in a quasi-judicial capacity for complaint cases. It was explained that:
 - The respondent was the only party to the case, and the accused party was entitled to due process rights. The advocate's role was similar to that of a prosecutor.
 - The Code and the State statutes stipulated that the complainant was not permitted to attend the probable-cause hearing.
 - The complainant was permitted to attend the final hearing and address the tribunal as a witness for the respondent or the advocate.
 - The complainant could, in a public forum, make statements regarding a complaint case once a final determination was made by the COE.
- The purpose of today's workshop was to educate the public and the COE about the probable-cause hearing process.
- With respect to legal sufficiency, the ED was required to divulge information from sworn complaints to the COE.
- The probable-cause process was open to the public. The release of information was delayed so that the respondent could be protected until sufficient trustworthy facts were confirmed.

VII.a. – CONTINUED

- Public Records Exemption, section 2-230(f), Rule 3.3, of the Code stipulated that members of the press raised concerns that the probable-cause process was not transparent because the entire process was not open to the public.
- The procedural statute that extended State COE rules to local commissions was F.S.S. 112.324. Mr. Johnson explained that:
 - F.S.S. 112.324, section (2)(a) addressed public records, and differed from the County's Code, which stipulated that the complaint was publicized, but records obtained during the investigative process was not publicized.
 - Mr. Johnson suggested that at a later meeting, the COE could address the differences in the language of the County's Code versus the language in the State's statute.
 - F.S.S. 112.324, section (2)(b) addressed the Sunshine Law, the COE executive session, the case determination process, and the release of case-related documents to the public.
 - F.S.S. 112.324, section (2)(c) incorporated section (2)(a) and section (2)(b) of the State statute and explained that records would either be released at the request of the respondent or upon a probable-cause determination by the COE.
 - A probable-cause hearing could result in a complaint being dismissed, or a finding of probable cause could be substantiated. The COE could also instruct ED staff to conduct further investigations on existing complaints.
- Concerning the COE Rules of Procedure, Rule 4.2(e) adopted F.S.S. 112.324 and stipulated that the COE would hold an executive session during the probable-cause hearing. It was explained that:
 - If legal sufficiency was unsubstantiated, the complaint would not be brought before the COE. A recommendation of dismissal would then be made by the ED.

VII.a. – CONTINUED

- If legal sufficiency was substantiated, then the ED would assign an advocate to litigate the case.
- The ED had retained 15 volunteer advocates who were former public defenders and assistant state attorneys. One advocate would be assigned to each probable-cause complaint from the investigatory phase to its conclusion.
- No written protocol currently existed for the advocate selection process. The current 15 volunteer advocates were seasoned attorneys with at least eight years' experience who were now in private practice.
- In the future, advocates would be matched to cases according to their expertise. Conflict of interest subject matter was also incorporated into the advocate training process.
- Rule 4.3 of the Code stipulated that the advocate would review the investigator's report and make written recommendations. If the advocate requested a public hearing, he or she would be required to make a recommendation and provide a statement of charges.
- Concerning Probable-Cause Determinations:
 - Rule 5.1 stipulated that the advocate's recommendation would be provided to the respondent no less than 10 days before the probable-cause hearing. The respondent would then be given an opportunity to respond to the allegations.
 - Rule 5.3 required that within 10 days of the probable-cause hearing, the respondent should be notified of his or her right to attend the hearing.
 - Rule 5.4 stipulated that the probable-cause hearing was not subject to the Sunshine Law. The participants in the probable-cause hearing were the respondent, advocate, investigator, COE, ED, and the minutes clerk. Evidentiary documents would also be examined during that session.

VII.a. – CONTINUED

- Rule 5.5 stipulated that the respondent and advocate would be permitted to make a brief oral presentation. As in a prosecution, the advocate would be the first party to speak because he or she had the legal burden of presenting trustworthy facts.
- Rule 5.6 correlated with section 2-260(c) of the Code and stipulated that the purpose of the hearing was to determine whether probable cause existed.
- During the probable-cause process, the COE could request that further investigation be conducted on a complaint or continue the hearing, at which no information would be released to the public.
- The COE could either determine that no probable cause existed, that the case be dismissed or settled, or that a letter of advice be issued on the matter. All case information would become public once the determination on the complaint was made by the Code.
- Concerning Findings of Probable Cause:
 - Rule 5.8 stipulated that upon written request by the respondent, a probable-cause hearing would be held within 30 days unless a good cause request to extend the hearing date was made. The COE could also decide to schedule the final hearing.
 - Rule 5.9 stipulated that the final hearing must be held within 30-to-90 days of the probable-cause determination unless the hearing date was extended for good cause.
 - In order to expedite the probable-cause process:
 - the chairman or his designee would review the discovery items;
 - a COE designee, could, in lieu of the entire commission, be appointed to facilitate the public hearing, file motions, hear depositions, and review witness lists;

VII.a. – CONTINUED

- the advocate could file a motion to dismiss the case at any time during the process; and,
- The COE was the final arbiter on all hearings.
- Concerning Public Hearings:
 - Once additional municipalities conceded to the COE's jurisdiction, a three-member COE panel would be created in lieu of the entire commission, and at the designation of the chairman, to adjudicate public hearings.
 - Rule 6.2 explained the process by which the facts of the statutes and the Code were tracked.
- Concerning Public Hearing Procedures:
 - The advocate was the first party to present an argument, followed by the respondent. Rebuttal would be permitted only at the COE's discretion.
 - Opening and closing statements could be made by the respondent, but the complainant's witness would not be permitted to speak.
 - Section 2-260.1(3) of the Code explained the rights of the respondent and advocate during the public hearing. Hearsay would be allowed, but could not be used by the tribunal as the basis for the final decision.
 - The COE had the authority to regulate the hearing process and ensure that the hearing was not prolonged due to the presentation of redundant information.
- Concerning dismissals made during the hearing process, the COE had the ability to dismiss a case, issue a letter of advice, or issue a letter of instruction to the respondent instead of proceeding to a final hearing.

VII.a. – CONTINUED

- Concerning Public Order Imposing Penalties:
 - As per the rules of the Code, the COE determined the penalty to be imposed.
 - The final order must be issued within 12 months of the complaint, although good-cause extensions could be issued. The final order could also be postponed until a restitution hearing was held.
 - The final order stipulated the imposed penalty, and a determination of “intentional” or “unintentional” was made at the case’s conclusion.
- Respondents had a right to settle a case that was brought against them, but the settlement could be ratified only by the COE.
- Concerning appeals:
 - Once the final order was issued by the COE, the respondent had 30 days in which to file an appeal with the Florida Circuit Court (Circuit Court).
 - Rules in the Code governed the respondent’s financial capability to pay hearing costs. The COE was exempt from such fees.
 - The COE could, at its discretion, suspend a final order. The Circuit Court could overturn a COE decision on appeal.

Judge Rodgers recommended that the COE establish rules of procedure for the hearing process and append a provision in which advocates could be recused from a case due to issues of conflict of interest. Ronald Harbison stated that Judge Rodgers had a valid point.

Mr. Johnson stated that:

- Section three of the COE’s Rules of Procedure was the general rule that addressed complaints.

VII.a. – CONTINUED

- A template for the recusal of an advocate from a case could be drafted for COE review.
- A respondent could exercise due-process rights on a probable-cause hearing and request that an advocate be replaced on a probable-cause hearing.
- General rules for advocates could also be developed.
- Amendments to the rules and procedures section of the Code could be provided to each COE member for review prior to the next meeting in January 2011.

Mr. Farach said that an agreement could be incorporated into the rules and procedures section of the Code so that each advocate could be bound by the Florida Bar Association's (Bar) rules of discipline. He said that by applying those standards, instances of conflict of interest or appearances of impropriety could be averted.

Mr. Johnson stated that he agreed with Mr. Farach's proposal and added that:

- The advocates could be notified that the COE had adopted the Bar's conflict rules.
- The Web site for the Bar's rules would be provided to the COE members via email.
- The public release of complaints would be discussed at the next COE meeting in January 2011.
- Changes to the Code would not be instituted until the ordinance drafting committee (drafting committee) completed the vetting process.

Mr. Farach said it was concerning that the COE had been used by opponents during the election process to politically attack sitting County commissioners. He said that this could be a greater issue once the remaining 36 municipalities conceded to the COE's jurisdiction. He expressed the opinion that the reputation and work of the commission could be quickly tarnished by fabricated allegations made during the election process.

VII.a. – CONTINUED

Dr. Fiore asked for an explanation as to why the Code was written in its current format as opposed to the State's format.

Mr. Johnson said that before the next COE meeting, he would confer with Assistant County Attorney Leonard Berger for clarity on the matter because Mr. Berger was the prime author of the Code.

VII.b. Press Releases/Releasing Documents to the Press

Mr. Johnson stated that press releases were made when COE Investigator Mark Bannon was hired, and when the advocates were trained at the Legal Aid Society.

Mr. Farach stated that he favored the release of information to the press even if it had been published on the ED's Web site.

Mr. Johnson explained that:

- The issue was the appropriateness of releasing information to the press, such as circumstances surrounding a complaint's dismissal.
- If the COE entered into an executive session and determined that there was no legal sufficiency on a case, the COE could then indicate whether such information should be formulated into a press release.

Mr. Farach reiterated that he agreed with the issuance of press releases, and Bruce Reinhart concurred.

Mr. Reinhart stated that:

- All COE-related information should be released. Otherwise, it would appear that the commission prioritized certain decisions over others.
- Another issue was whether the information was being distributed fairly.

VII.b. – CONTINUED

- A synopsis with the following format could be issued after each COE meeting:
 - Introductory language such as, “On Thursday, November 2, 2010, the COE met and took the following actions...” ; and,
 - Bulleted notes and a disclaimer that additional information was forthcoming and could be accessed from the COE’s Web site.

Dr. Fiore cited her agreement with Mr. Reinhart’s suggestion. She asked whether the public could subscribe to a COE mailing list in order to receive press releases.

Mr. Johnson communicated that currently he did not have a mailing list or email subscription in place for press releases, but that he would explore its formulation.

Judge Rodgers stated that there should be some distinction made between editorialized releases and factual information.

Mr. Johnson explained that staff could draft a synopsis of COE meetings after its completion.

Judge Rodgers recommended that a press release procedure be formulated and that a designee be assigned to answer any public inquiries pertaining to such releases.

Mr. Harbison suggested that rules be developed regarding ex parte communication.

Mr. Johnson stated that the Rules of Procedure section of the Code contained the provision that if a COE member were contacted directly regarding a complaint or case, that commission member could be required to recuse himself or herself.

Mr. Reinhart suggested that a rule or procedure be established to address instances when members of the public inquired of COE members about commission-related matters outside of COE meetings.

VII.b. – CONTINUED

Mr. Johnson explained that:

- In the public hearing process, the final determination would be publicized, in contrast with the probable-cause hearing where an executive session would be held. Once the case was either dismissed or a finding of probable cause was made, the case information and minutes would then be released to the public.
- Judges were prohibited from being contacted directly during the course of ongoing litigation. It was unclear whether similar rules existed that would prohibit an individual from making face-to-face contact with a judge in a public forum after a decision was rendered on a case.

Mr. Reinhart suggested that when approached, COE members could inform members of the public that they were precluded from discussing COE decisions outside of commission meetings.

Mr. Farach said that:

- A prohibitive rule should not be created, but he did agree with the intent of such a rule.
- As a part of the public process, commissioners should be allowed to voice disagreements freely about opinions or decisions made by fellow commissioners.
- He would volunteer to abide by the proposed rule, but he was uncomfortable with the imposition of such a rule on the entire commission.

Mr. Johnson suggested that the COE consider the issue further and decide whether the matter should be placed on a future COE meeting agenda.

Dr. Fiore stated that while it was understandable that members of the public would attempt to pose questions to commissioners outside of meetings, some commission members had been followed to the parking lot after meetings and that harassment was unwelcomed.

VII.b. – CONTINUED

Mr. Farach said that:

- Since the commission operated in a quasi-judicial capacity, the ED could request that Mr. Berger clarify the methods of contact that were permitted with COE members prior to adjudicatory hearings.
- Florida Supreme Court decision Schneider, which set forth ex parte contacts in County or City commissions could apply to the COE in this instance.

Mr. Johnson explained that in response to public inquiries, the commission could choose to engage and discuss, remove themselves from such situations, or to refer inquiries to the ED.

Mr. Reinhart suggested that the COE discuss methods and forms of public information dissemination. He stated that in light of the social media market, the commission could consider whether to open a Twitter or Facebook account.

In response to Dr. Fiore's inquiry Mr. Johnson said that:

- In public hearings, the respondent may or may not be represented by an attorney. The respondent's attorney would work with the COE advocate, but not the COE.
- Language in the complaint form notified the complainant not to contact the COE directly, but no such language existed on the form for the respondent's form. Customarily, a cover letter was sent to the respondent informing them of the complaint. The language in the ED's cover letter could be modified to inform litigants that direct contact with COE members was prohibited, and that any inquiries had to be relayed to ED staff only.
- Rule 5.4 of the Code referred to the respondent as an "alleged violator." The language "alleged violator" could be stricken and replaced with the language, "respondent requests in writing that said proceeding be public."

MOTION to approve amending Rule 5.4 of the Code with the proposed changes made by Alan Johnson. Motion by Bruce Reinhart, seconded by Dr. Robin Fiore, and carried 5-0.

VII.b. – CONTINUED

Mr. Johnson proposed that Rule 5.4(1) be amended and that language be added to reflect that for probable-cause hearings, the COE would adjourn the public meeting and reconvene in an executive session.

MOTION to approve amending Rule 5.4(1) to the Rules of Procedure with the changes proposed by Alan Johnson. Motion by Dr. Robin Fiore, seconded by Bruce Reinhart, and carried 5-0.

Mr. Farach stated that in its current form, Rule 5.4(1) was drafted with the assumption that the complaint and hearing were publicized, but that under the State ethics commission rules, the complaint would not be made public. He asked how the matter would be treated if a private complaint were made.

Mr. Johnson explained that:

- Rule 5.4(1) stipulated that investigative findings and information contained in the complaint was confidential and exempt.
- At the next COE meeting, the commission could include the complaint's details as non-disclosed, but the Rule of Procedure would not change. The section of the Rule pertaining to publicizing the complaint could also be modified.

Mr. Farach suggested striking the language in Rule 5.4(1), "Upon receipt," and replacing it with, "When called upon to make a probable-cause determination of a legally sufficient complaint."

Mr. Johnson stated that in a previous processed complaint, the respondent agreed in writing to publicize the details of the complaint. Rule 5.4(1) would not have applied in that instance, he said.

AMENDED MOTION to approve accepting the language in Rule 5.4(1) as proposed by Manuel Farach. Motion by Dr. Robin Fiore, seconded by Bruce Reinhart, and carried 5-0.

VII.c. Consideration of Code Revision to 2-443(a) *Misuse of Public Office or Employment*

Mr. Johnson stated that:

- During the COE meeting of November 4, 2010, the committee tabled the discussion until the full complement of the commission could be present at today's meeting.
- Currently, prohibitions against misuse of public office in the Code, if not financial in nature, did not constitute a Code violation.
- The prosecution of former Commissioner Jeff Koons would not have violated the Code because it was not financially motivated. In another incident a North Florida commissioner involved in an automobile accident told the other motorist that he, "owned the police." Although no financial misuse existed, the actions of both officials constituted corrupt intent. Therefore, the definition of "corruptly" should be added to the Code for non-financial violations.
- Staff recommended that the language in Article 13, Section 2-443(a) of the Code relating to the misuse of public office or employment be revised to state, "or to corruptly secure, or attempt to secure a special privilege, benefit, or exemption."
- Upon COE approval, the proposed language modification would be recommended to the drafting committee that reported to the board.
- Based on the cases litigated in the Florida Appellate Court, the use of the word "corruptly" underscored intent.

Mr. Reinhart said that the drafting committee's legal counsel would likely wordsmith the Code if warranted. He added that conceptually, he supported the ED's recommendation.

MOTION to approve accepting the proposed changes in Section 2-443(a) of the Code, as indicated by Alan Johnson. Motion by Manuel Farach, seconded by Ronald Harbison, and carried 5-0.

VII.d. Definition of Lobbyist

Mr. Johnson stated that:

- In the advisory opinion RQO 10-030, Rachel Ondrus, Executive Director of the County legislative delegation, attempted to rent an apartment from a woman whose husband was a lobbyist for the State legislature.
- The Code defined lobbyist, but not lobbying. Staff recommended that lobbying be taken in the context of, “lobbying one’s department, or government.” Otherwise, the Code’s language would be inconsistent.

Dr. Fiore said that she did not agree with the proposed language change and would not vote for it.

Mr. Johnson explained that:

- The COE did not have the authority to revise the proposed language change.
- The lobbyist registration ordinance defined lobbying as, “any County government, entity, or department.” No definition of lobbying existed in the Code that applied chiefly to the \$100 gift law limitation.
- Inconsistencies in the language of the advisory board section of the Code defined lobbyist as anyone who lobbied an advisory board or any department under an advisory board’s authority.

Dr. Fiore commented that elected officials, subject to term limits could use their positions to secure future elected offices. She said that it would not matter who lobbied them now, because there was a narrow horizon for how corruption was perceived.

VII.d. – CONTINUED

Mr. Reinhart said that:

- Although Dr. Fiore made some valid points, the issue was a fairly complex policy decision that could generate contrasting points.
- Unless there existed a strong sense of unanimity within the commission, the drafting committee could consider the recommendations made by the COE. It was suggested that the COE not make a recommendation on this issue.

Mr. Johnson stated that since he would be representing the COE on the drafting committee, he was uncomfortable voicing an opinion regarding the lobbyist definition.

Dr. Fiore suggested that Mr. Johnson convey to the drafting committee that while the COE could not reach a consensus, it had a range of views on the matter.

Mr. Reinhart proposed that:

- Since the drafting committee's process would be ongoing and COE members debated rigorously on the definition of a lobbyist, the commission could call a meeting in an attempt to reach a consensus.
- In the capacity of ED, and absent specific direction from the COE, Mr. Johnson should not take a position on the matter.

Mr. Johnson reiterated that although he would not make opinions on such matters he supported the COE's attempts to reach a consensus.

VII.e. UNSCHEDULED ITEM

DISCUSSED: Board of County Commissioners Waivers.

Mr. Reinhart said that the November 4, 2010, minutes reported that the commission had tabled the issue of waivers. He inquired whether the issue of waivers was ripe for discussion at today's meeting or at a future COE meeting, because it was not added to today's agenda.

VII.e. – CONTINUED

Mr. Johnson stated that the item was inadvertently omitted from today's meeting agenda because it was his understanding that the issue of waivers had been resolved. He said that the item would be brought back to the COE once the drafting committee started the vetting process, but that it could also be discussed at the January 6, 2011, COE meeting. The board conceded to the ED's proposal.

VIII. EXECUTIVE DIRECTOR COMPENSATION DISCUSSION – (COMMISSIONER REINHART)

Mr. Reinhart stated that:

- Mr. Johnson was asked to add item VIII. to today's agenda because in the capacity of ED, he was not allowed to add the item to the agenda. The COE also needed to discuss Mr. Johnson's performance evaluation and whether it was appropriate and economically feasible to reconsider his salary at this time.
- When Mr. Johnson accepted the ED position, he agreed to accept a salary less than his previous salary. In the next four months, Mr. Johnson's work on the drafting committee would add another facet to his responsibilities.
- Mr. Johnson was asked to collect data on comparable salaries to the ED's job descriptions, or positions within County government that were analogous to the ED's position.

Assistant County Administrator Brad Merriman stated that Mr. Johnson had asked the County's human resources department (HR) to assist in developing a nationwide salary survey for the ED position. He said that the survey had been provided to the COE at today's meeting.

Dr. Fiore stated that:

- She recalled that, the COE's initial discussions during the ED recruiting process revealed that the position was best suited for an attorney. The advertised ED salary range did not consider that factor.
- The ED's job description was similar to the Inspector General's (IG) position, yet the ED's salary was less than the IG's salary.

VIII. – CONTINUED

Mr. Merriman stated that:

- To his recollection, the IG position was benchmarked at a higher rate as per salary surveys. It was believed by County staff, citizen groups, and other individuals involved in the recruiting process that the scope and responsibilities of the IG would outweigh the ED's duties.
- The County was comfortable that the IG's and ED's salary ranges were comparable. However, it was within the jurisdiction of the COE to adjust the ED's salary.

Judge Rodgers remarked that initially the County decided that the COE would select the candidate and the County would negotiate the salary.

Mr. Merriman said that the COE had recommended the final salary that was negotiated with Mr. Johnson.

Mr. Reinhart recollected that once the ED candidate was selected, the County negotiated with Mr. Johnson, and the County provided the COE with a contract for ratification and eventual approval.

Mr. Farach commented that the ED's salary was at the upper end of the advertised salary range.

Mr. Harbison asked whether the County considered that the ED's position could have been filled by an attorney.

Mr. Merriman explained that:

- Employing an attorney for the ED position was a preference, not a requirement. When the COE's position was contemplated, it was anticipated that two positions would have been filled: one for the ED, and another for an attorney in the ED's office.
- The COE could increase the ED's compensation, but the final salary had to fall within the County's pre-established salary range.
- Salary range was determined by comparing educational requirements and functional responsibilities with local market data and the County's organizational structure.

VIII. – CONTINUED

- He would was not prepared to identify which County positions were comparable to the ED's prior to conferring with HR staff.

Judge Rodgers expressed concern that the COE's credibility could be questioned if Mr. Johnson's salary was increased after holding the position for four months.

Dr. Fiore stated that after Mr. Johnson was selected for the position, the COE agreed that his salary would be reviewed within six months because it was apparent that he was underpaid.

Mr. Merriman stated that:

- As per the ordinance, the COE had the authority to increase the ED's salary within the pre-established range, which was contingent on the County's budget.
- The ordinance stipulated that HR would provide staff assistance to the COE during the hiring process. Salary ranges varied among County employees according to years of service.

Mr. Reinhart reiterated that the ED's responsibilities were increasing, and that HR assistance was warranted at this time to determine Mr. Johnson's new salary.

Mr. Farach asked for further explanation on the survey relating to the City of Los Angeles' salary program.

Mr. Merriman explained that the step program stipulated that an employee would receive annual salary increases which would be capped at the latter salary range. He said that there were very few positions similar to the ED's nationwide that could be used for the salary analysis.

Judge Rodgers recommended that the COE vote on reevaluating the ED's salary and the procedure that would be used to execute that process.

Mr. Reinhart asked whether a COE member could be designated to collect the ED's salary data and meet with County HR staff to formulate a salary proposal for the entire commission.

VIII. – CONTINUED

Mr. Merriman said that he would consult with Mr. Berger for legal clarification on the procedure.

MOTION to approve accepting that the COE establish a salary review committee, undertake a formal review of Mr. Johnson's compensation, and discuss the findings at a future meeting. Motion by Bruce Reinhart, seconded by Dr. Robin Fiore, and carried 5-0.

MOTION to approve accepting that pursuant to Mr. Berger's approval, Bruce Reinhart would be appointed to work with the County human resources department to review the compensation for the executive director's position. Motion by Dr. Robin Fiore, seconded by Ronald Harbison, and carried 5-0.

Judge Rodgers recommended that a deadline be assigned to the review.

Mr. Reinhart suggested that the matter be placed on the COE's January 6, 2011, meeting agenda. He said that if his review was not completed by the next meeting, then a status report would be provided to the COE.

IX. PUBLIC COMMENTS – None

X. EXECUTIVE DIRECTOR COMMENTS

X.a. Referendum Update

Mr. Johnson stated that:

- David Baker had been nominated for appointment to the drafting committee. The COE's recommendation would be presented to the board on December 7, 2010.
- He attended the League of Cities (LOC) meeting where Kurt Bresner of the City of Boynton Beach (Boynton Beach) and Mike Worenstein of the Town of Lantana (Lantana) were nominated by the LOC for the drafting committee.
- Both nominees were knowledgeable and had been involved in the ethics process from its inception. Boynton Beach and Lantana were the only municipalities that conceded to the jurisdiction of the IG and COE.

X.a. – CONTINUED

- His role on the drafting committee was to represent the COE regarding the Code, the lobbyist registration ordinance, and the post-employment ordinance. Monthly status reports would be provided to the COE.
- The next COE meeting was scheduled for January 6, 2011.

(CLERK'S NOTE: See page 25 for additional comments on item X.)

XI. BOARD COMMENTS

XI.a. Manuel Farach, Esq. – None

XI.b. Dr. Robin Fiore

Dr. Fiore stated that a March 2011 COE appearance was scheduled at the Florida Atlantic University campus in the Town of Jupiter. She added that a COE appearance had also been held at Palm Beach Atlantic University (PBAU), and it was anticipated that future appearances would be scheduled at colleges and universities. She concluded by wishing everyone happy holidays.

XI.c. Ronald Harbison – None

XI.d. Bruce Reinhart, Esq.

Mr. Reinhart expressed gratitude to fellow COE members for their work on the commission and wished everyone a happy new year.

XI.e. Judge Edward Rodgers

Judge Rodgers stated that Boynton Beach should be commended for its efforts to uphold ethical practices. He said that it was important for the COE to demonstrate sincerity, legitimacy, and need, because the commission in its efforts to uphold morality had become leaders.

(CLERK'S NOTE: Item X. was discussed at this time.)

X. EXECUTIVE DIRECTOR COMMENTS – Continued from page 24

X.b. UNSCHEDULED ITEM

DISCUSSED: Executive Director's Budget and Interns.

Mr. Johnson stated that:

- The ED's budget was \$70,000 less than forecasted for the 2010 fiscal year.
- The ED's office had applied for a University of Miami (University) Law School program where new graduates worked as interns in governmental and non-profit organizations and were paid a monthly stipend of \$2500 by the University. In January 2011, the University would be contacted about the status of the application.
- No additional information had been learned on the issue of liability insurance.
- The ED was exploring whether PBAU could provide interns for the ED's office.

X.c. UNSCHEDULED ITEM

DISCUSSED: Gift Law.

Mr. Johnson stated that:

- Boynton Beach distributed a letter to vendors informing them that employees were prohibited from accepting gifts for the holidays. The item was added to today's agenda following discussions with Judge Rodgers.
- County officials and employees should be cautioned that gifts received from lobbyists, or vendors that employed lobbyists, were prohibited.
- Any gift of more than \$100 that was not received from a family member was reportable at the end of each year.

(CLERK'S NOTE: The numerical sequence of the agenda was restored.)

XII. ADJOURNMENT

MOTION to adjourn the meeting. Motion by Bruce Reinhart, seconded by Dr. Robin Fiore, and carried 5-0.

At 6:19 p.m., the chair declared the meeting adjourned.

APPROVED:

Chair/Vice Chair



Palm Beach County Commission on Ethics

Commissioners
Edward Rodgers, *Chair*
Manuel Farach, *Vice Chair*
Robin N. Fiore
Ronald E. Harbison
Bruce E. Reinhart

Executive Director
Alan S. Johnson

December 28, 2010

Bill Johnson, Director
Palm Beach County Emergency Management
Department of Public Safety
20 South Military Trail
West Palm Beach, FL 33415-3130

RE: RQO 10-032
Reimbursement of Travel Expenses

Dear Director Johnson:

Your request for advisory opinion to the Palm Beach County Commission on Ethics has been received and reviewed. The opinion rendered is as follows:

YOU ASKED in your email dated October 22, 2010, whether the Palm Beach County Emergency Management Department (EMD) employees should consider the reimbursement of travel expenses by a state governmental entity as a gift? You also requested that the opinion cover acceptance of future travel expenses from other governmental, as well as non-governmental entities, and gave several examples of past reimbursement occurring prior to the adoption of the Palm Beach County Code of Ethics. Additional information was provided in a telephone conversation with you on October 29, 2010.

IN SUM, since your questions are general in nature and involve future speculative facts and circumstances based upon past events, the Commission cannot opine other than to offer general guidelines under the Code.

- So long as the travel is on behalf of the county and in the performance of your official duties, reimbursement of travel expenses by "other governmental entities or by organizations of which the county is a member" may be accepted "if the travel is related to that membership." These reimbursements are not considered gifts under the Palm Beach County Code of Ethics.
- You may not accept, directly or indirectly, payment of travel expenses by a "county contractor, vendor, service provider, bidder or proposer" that is not a governmental entity or organization of which the county is a member unless the prohibition is specifically waived by the Board of County Commissioners (BCC). Therefore, you may not accept reimbursement from WebEOC, a county vendor, without a waiver.
- Notwithstanding any waiver by the Board of County Commissioners, you may not accept a reimbursement in excess of \$100.00 from a lobbyist, principal or employer of a lobbyist unless the reimbursement is for travel expenses directly related to the performance of your official duties in conducting official business.



Palm Beach County Commission on Ethics

Commissioners

Edward Rodgers, Chair

Manuel Farach, Vice Chair

Robin N. Fiore

Ronald E. Harbison

Bruce E. Reinhart

Executive Director

Alan S. Johnson

THE FACTS as we understand them are as follows:

In the past, EMD personnel have been reimbursed for travel expenses by the Federal Emergency Management Agency (FEMA) and the Florida Division of Emergency Management (FDEM) for training and other official functions. Both FEMA and FDEM are governmental entities. The travel to be reimbursed or paid by these entities is EMD business related.

Likewise, in the past, EMD personnel have been reimbursed for travel expenses by "Volunteer Florida" for a conference related to their official duties. Volunteer Florida is a non-profit, non-governmental agency. The travel paid for by Volunteer Florida is EMD business related. Volunteer Florida is a non-profit organization funded in part by the State of Florida and *has provided services to Palm Beach County during hurricane and other emergencies in the past*. You further identified Volunteer Florida as a "coalition" of various volunteer groups that also provide emergency services, and stated that the county is not a member of Volunteer Florida.

In addition, EMD personnel have been reimbursed for travel expenses in the past by WebEOC. WebEOC is a private, for-profit business, and is a vendor of Palm Beach County.

THE LEGAL BASIS for this opinion is found in the following relevant sections of the Palm Beach County Code of Ethics:

§ 2-443(e) Accepting Travel Expenses.

No official or employee shall accept, directly or indirectly, any travel expenses including, but not limited to, transportation, lodging, meals, registration fees and incidentals *from any county contractor, vendor, service provider, bidder or proposer*. The board of county commissioners may waive the requirements of this subsection by a majority vote of the board. The provisions of this subsection do not apply to travel expenses paid by other governmental entities or by organizations of which the county is a member if the travel is related to that membership. (Emphasis added)

This section does not apply another governmental entity, or organization of which the county is a member and the expenses are related to the membership. Therefore, the FEMA and FDEM functions are excluded from the prohibition against accepting travel expenses.

Volunteer Florida is not a governmental entity and the county is not a member of the organization. In addition, based on the facts you have provided, it would appear that Volunteer Florida is a service provider to the county. The prohibition therefore applies and may be waived by the Board of County Commissioners (BCC).

WebEOC is a private vendor doing business with the county, therefore the prohibition applies. You may not accept, directly or indirectly, any reimbursement for travel expenses without a waiver. In addition, any reimbursement must be connected to the performance of your official duties or it would be considered a gift and potentially violate lobbyist gift limitations (see below).



Palm Beach County Commission on Ethics

Commissioners

Edward Rodgers, Chair

Manuel Farach, Vice Chair

Robin N. Fiore

Ronald E. Harbison

Bruce E. Reinhart

Executive Director

Alan S. Johnson

§ 2-444 Gift Law

§2-444(a) No county commissioner or employee, or any other person or business entity on his or her behalf, shall knowingly solicit or accept directly or indirectly, any gift with a value of greater than one hundred dollars (\$100.00) from any person or business entity that the recipient knows is a lobbyist or any principal or employer of a lobbyist.

§2-444(d) *Gift Reports.* Any official or employee who receives a gift in excess of one hundred dollars (\$100.00) shall report that gift.

§2-444 (e) For the purposes of this section, "gift" shall refer to the transfer of anything of economic value, whether in the form of money, service, loan, travel, entertainment, hospitality, item or promise, or in any other form, without adequate and lawful consideration. Food and beverages consumed at a single setting or a meal shall be considered a single gift, and the values of the food and beverage provided at that sitting or meal shall be considered the value of the gift.

§ 2-444(e)(1) *Exceptions.* The provisions of subsection (e) shall not apply to:

- e. Gifts solicited by county employees on behalf of the county in performance of their official duties for the sole use by the county in conducting official business.

As previously indicated, any reimbursement that is not specifically related to the performance of your "...official duties for use solely by the county in conducting its official business" would be considered a gift and subject to the code of ethics prohibitions and reporting requirements as follows:

- No reimbursement/gift may be accepted in excess of \$100.00 from a lobbyist, principal or employer of a lobbyist.
- A reimbursement/gift in excess of \$100.00 received from an individual or entity other than a lobbyist, principal or employer of a lobbyist must be reported pursuant to the requirements of sec. 2-444(d)

It is the responsibility of the county official or employee to know, prior to accepting a reimbursement/gift in excess of \$100.00, whether a contractor, bidder, proposer or service provider offering the reimbursement for travel expenses lobbies county government.

Lastly, sec. 2-444(c) prohibits the acceptance of a reimbursement/gift of any value whatsoever because of an employee or official's past, present or future performance of an official public action or legal duty.

IN SUMMARY, based upon the facts and circumstances you submitted, you may be reimbursed for travel expenses "paid by other governmental entities" such as FEMA and FDEM. You may also be reimbursed for travel expenses by organizations where the county is a member and your travel is related to that membership.



Palm Beach County Commission on Ethics

Commissioners

Edward Rodgers, *Chair*

Manuel Farach, *Vice Chair*

Robin N. Fiore

Ronald E. Harbison

Bruce E. Reinhart

Executive Director

Alan S. Johnson

You may not be reimbursed by any "county contractor, vendor, service provider, bidder or proposer" unless you obtain a waiver from a majority of the BCC. This would apply to WebEOC, a county vendor, and to Volunteer Florida, as your facts indicate that they provide services to the county.

Notwithstanding any waiver, if the reimbursement is from a lobbyist, principal or employer of a lobbyist who lobbies any part of the county government, you may not accept reimbursement in excess of \$100.00 unless the expense was generated by you in your official capacity and for the performance of your official duties for the county. Lastly, if the reimbursement is not from a lobbyist, principal or employer of a lobbyist, is waived or does not involve a "county contractor, vendor, service provider, bidder or proposer" and your participation is not "on behalf of the county in performance of" your official duty, then the reimbursement would constitute a gift and if in excess of \$100.00 must be reported.

This opinion construes the Palm Beach County Code of Ethics ordinance, but is not applicable to any conflict under state law. Inquires regarding possible conflicts under state law should be directed to the State of Florida Commission on Ethics.

Please feel free to contact me at 561-233-0724 if I can be of any further assistance in this matter.

Sincerely,



Alan S. Johnson
Executive Director



Palm Beach County Commission on Ethics

Commissioners
Edward Rodgers, *Chair*
Manuel Farach, *Vice Chair*
Robin N. Fiore
Ronald E. Harbison
Bruce E. Reinhart

Executive Director
Alan S. Johnson

December 9, 2010

Anna Stewart
Drowning Prevention Coalition of Palm Beach County
405 Pike Road
West Palm Beach, FL 33411

Re: RQO 10-040
Gift law exclusions

Dear Ms. Stewart,

Your request for advisory opinion to the Palm Beach County Commission on Ethics has been received and reviewed. The opinion rendered is as follows:

YOU ASKED in your e-mail of December 7, 2010, whether you, as an employee or volunteer of Drowning Prevention Coalition of Palm Beach County (DPC), a county governmental entity, may solicit donations from county vendors or other individuals or businesses, for use by the DPC for county purposes.

IN SUM, since the solicitations are made and donations are used on behalf of the county department for use, "solely by the county in conducting its official business", they are not considered to be gifts under the code of ethics. Therefore, gift prohibitions and reporting requirements of the code do not apply.

THE FACTS as we understand them are as follows:

You are the Manager of the Drowning Prevention Coalition of Palm Beach County. The DPC is funded in part by Palm Beach County and The Children's Services Council of Palm Beach County, a non-profit organization. Notwithstanding the funding source, DPC is an entity of Palm Beach County government within the Palm Beach County Fire Rescue Department.

You have been given the task by your direct supervisor, a Deputy Chief of Palm Beach County Fire Rescue, to find additional funding for the DPC. The purpose of the funding would be the continuation of the county free swim lesson program for underprivileged and special needs children. The form of the donations would be monetary as well as material product donations such as bathing suits, towels and sunscreen for use by the participating children.



Palm Beach County Commission on Ethics

Commissioners

Edward Rodgers, *Chair*

Manuel Farach, *Vice Chair*

Robin N. Fiore

Ronald E. Harbison

Bruce E. Reinhart

Executive Director

Alan S. Johnson

THE LEGAL BASIS for this opinion is found in the following relevant section of the Palm Beach County Code of Ethics:

Sec. 2-444(e) – For the purposes of this section, “gift” shall refer to the transfer of anything of value...

- (1) Exceptions. The provisions of subsection (e) shall not apply to:
e. Gifts solicited by county employees on behalf of the county in performance of their official duties for use solely by the county in conducting official business.

Since the solicitations are made by you as a county employee, on behalf of the county for use solely by the county and the resulting donations solicited in the performance of your official duties are in fact used by the county for county purposes, they are not gifts under the definition as provided by the code of ethics. Any solicited gift not used exclusively for county purposes would be considered a gift and subject to the prohibitions and reporting requirements within the code. Lastly, you must not use any donated item, money or material, for your personal benefit as that would violate sec. 2-443(a) and be a misuse of your public office or employment.

IN SUMMARY, the code of ethics allows you to solicit and accept donations for DPC so long as you are doing so in your official capacity and solely for a county purpose.

This opinion construes the Palm Beach County Code of Ethics Ordinance, but is not applicable to any conflict under state law. Inquiries regarding possible conflicts under state law should be directed to the State of Florida Commission on Ethics.

Please feel free to contact me at (561) 233-0724 should you have any further questions in this matter.

Sincerely,



Alan S. Johnson

Executive Director
Commission on Ethics

ASJ/gal

January 10, 2011

Maite Reyes-Coles, MA
Coordinator of Independent Living Services
Coalition for Independent Living Options, Inc.
6800 Forest Hill Blvd.
West Palm Beach, FL 33413

RE: RQO 10-036
Misuse of office/voting conflicts

Dear Ms. Reyes-Coles,

The Palm Beach County Commission on Ethics has considered your request for an advisory opinion, and rendered its opinion at a public meeting on January 6, 2011.

YOU ASKED in your emails dated November 19, 2010, whether a vendor, who appears before your advisory commission, may post an advertisement in your outside employer's newsletter and website, without violating the code of ethics. You provided additional information in an email dated November 30, 2010.

IN SUM, based on the facts you have submitted, so long as you or your outside employer do not benefit financially, it is not a violation of the code of ethics for the Coalition for Independent Living Services to list opportunities for accessible housing on its newsletter and website, even though at least one of the private companies listed may receive future funding from the Commission on Affordable Housing, of which you are a member appointed by the Board of County Commissioners.

THE FACTS as we understand them are as follows:

You are the Coordinator of Independent Services for a private, non-profit corporation, the Coalition for Independent Living Services, Inc. (CILO). You are not an officer or director for CILO. In your capacity as an employee you have been asked by the developers of a housing complex, Hammond Park, to allow them to publicize opportunities for accessible housing in the CILO newsletter and website. You also serve on the Commission for Affordable Housing, and in this role you vote on matters that include the disbursement of funds from certain grants for developers to provide low-interest loans for use in building affordable housing. The developers of Hammond Park have received such loans in the past, and you believe they may be appearing before your commission to ask for additional funding in the future.

The listing of service providers in CILO's newsletter and on its website would be published solely for the purpose of offering your consumers information as to services they may find useful. Neither you personally, nor CILO receive any financial benefit from publishing this information. The opportunity to

list available services is offered cost free to any organization or person that CILO feels offers services that are appropriate for their consumers.

THE LEGAL BASIS for this opinion is found in the following relevant sections of the Palm Beach County Code of Ethics:

The Palm Beach County Code of Ethics Section 2-444, *Definitions*, states in relevant part:

Official or employee means any official or employee of the county, whether paid or unpaid...and members appointed by the board of county commissioners to serve on any advisory, quasi judicial, or any other board of the county, state, or any other regional, local, municipal, or corporate entity. (emphasis added)

Based on the fact that you were appointed to the Commission on Affordable Housing by the Board of County Commissioners, you fall under the jurisdiction of the code of ethics for any actions taken as a member of the Commission on Affordable Housing.

Under the prohibitions listed in Section 2-443(a), *Misuse of public office*, you may not use your position on the Commission for Affordable Housing to benefit yourself, an outside employer or business (i.e., CILO), customer or client, or non-profit organization of which you are an officer or director. You have advised that neither you nor CILO benefit financially from this listing service. Further, this service would be offered not only to Hammond Park, but to any service provider deemed appropriate by CILO for its consumers. So, there does not appear to be any financial gain for Hammond Park that is not available to others similarly situated.

Under the same analysis, there also does not appear to be a voting conflict under Section 2-443(b), *Voting Conflicts*, which would necessitate you disclosing and abstaining from any vote of the Commission on Affordable Housing involving Hammond Park, so long as you do not use such a vote to financially benefit yourself, an outside employer or business, customer or client, or non-profit organization of which you are an officer or director.

IN SUMMARY, based on the information you have provided, it is not a violation of the code of ethics for the Coalition for Independent Living Services to list opportunities for accessible housing on its newsletter and website at no charge, even though at least one of the private companies may receive funding for building such housing from the Commission on Affordable Housing, of which you are a member appointed by the Board of County Commissioners.

Although not part of your request for an advisory opinion, your emails have disclosed that your outside employer, CILO, has current contracts or other transactions for goods and services with Palm Beach County. You further indicated that you are aware that such a relationship constitutes a prohibited contractual relationship under Section 2-443(d), *Exceptions and waivers*, and that you are required to obtain a waiver from the Board of County Commissioners to continue to serve on the Commission for

Affordable Housing. In that regard, you have presented a copy of your written request for such a waiver, dated October 1, 2010. This request was sent to the Department of Housing and Community Development, asking that they make the formal request for a waiver to the Board of County Commissioners (BCC). As of the writing of this opinion that request has not yet been acted on by BCC. This Commission takes no position on your request for a waiver.

This opinion construes the Palm Beach County Code of Ethics ordinance, but is not applicable to any conflict under state law. Inquiries regarding possible conflicts under state law should be directed to the State of Florida Commission on Ethics.

Please feel free to contact me at 561-233-0724 if I can be of any further assistance in this matter.

Sincerely,

Alan S. Johnson
Executive Director

ASJ/meb

January 10, 2011

William R. Merkle
Attorney at Law
Woolbright Corporate Center
1901 South Congress Ave., Suite 120
Boynton Beach, FL 33426-6549

RE: RQO 10-038 OE
Prohibited contractual relationship/misuse of public office or employment

Dear Mr. Merkle,

The Palm Beach County Commission on Ethics has considered your request for an advisory opinion, and rendered its opinion at a public meeting on January 6, 2011.

YOU ASKED in your letters dated November 10, 2010, and November 16, 2010, whether your client, who is employed by the City of Boynton Beach as a Chief Electrician working for the Utilities Department, may work as an electrical sub-contractor for private companies that provide contracted electrical work on various projects for the City of Boynton Beach Building Department.

IN SUM, based on the facts you have submitted, as long as your client's outside business does not enter into any contracts or other transactions for goods or services with the City of Boynton Beach, and is operated outside of city business hours, he is not in violation of §2-443(c) *Prohibited contractual relationships*. Notwithstanding, he cannot use his official position as a city employee to obtain a financial benefit for himself, a relative, household member, outside employer or business, customer or client, or non-profit organization of which he is an officer or director as defined in §2-443(a) *misuse of public office or employment*.

THE FACTS as we understand them are as follows:

You advised that your client, Keith L. Ellis, is employed by the City of Boynton Beach as a Chief Electrician, working in the Utilities Department. Mr. Ellis is also the sole owner of KE Control and Electrical Service, Inc. (KE). KE will sometimes act as a sub-contractor for other private electrical contractors who you refer to in your letter as "customers." On occasion, these private contractors will enter into contracts to provide services for the City of Boynton Beach through the Building Department. When KE sub-contracts on these projects, payment for this work is made by the private contractor and not by the city. You further advise that these contracts between the City and your client's "customers" are entered into following a competitive bidding process, and that your client has no influence over the

persons who award these bids, no enforcement, oversight or administrative responsibilities pertaining to these contracts, and no connection to these projects within his employment with the city.

THE LEGAL BASIS for this opinion is found in the following relevant sections of the Palm Beach County Code of Ethics:

The Palm Beach County Code of Ethics Section 2-442, *Definitions* states in relevant part:

Outside employer or business includes:

- (1) Any entity, other than the county, the state, or any other regional, local, or municipal government entity, of which the official or employee is a member, official, director, or employee, and from which he or she receives compensation for services rendered or goods sold or produced, or
- (2) Any entity located in the county or which does business with or is regulated by the county *in which the official or employee has an ownership interest.* (emphasis added)

According to the information you have provided, KE is by definition an outside business owned by your client, Keith L. Ellis, an employee of the City of Boynton Beach. You advised that KE is not the electrical firm entering into the contractual relationship with the City of Boynton Beach, and acts only as a sub-contractor on any city projects.

Section 2-443, *Prohibited conduct*, states as follows in relevant part:

- (c) *Prohibited contractual relationships.* No official or employee shall enter into any contract with or other transaction for goods or services with the [city]. *This prohibition extends to all contracts or transactions between the [city] or any person or agency acting for the [city], and the official or employee, directly or indirectly, or the official or employee's outside employer or business.* (emphasis added)

Mr. Ellis would not be in violation of Section 2-443(c) of the code of ethics under the facts you have submitted, as KE does not maintain contracts or transactions with the City of Boynton Beach.

Please further advise your client that Section 2-443(a) of the code of ethics also prohibits him from using his official position with the city to benefit himself, a relative, household member, outside employer or business, *customer or client*, or non-profit organization of which he is an officer or director.

Section 2-442, defines a customer or client as:

"any person or entity to which an official or employee's outside employer or business has supplied goods or services during the previous twenty-four (24) months, having, in the aggregate, a value greater than ten thousand dollars (\$10,000.00)."

As stated above, Section 2-443(a) essentially prohibits your client from using his official position as an employee of the City of Boynton Beach to benefit himself or his "customer" (the actual contractor he works for on a city project) financially in a manner not shared with similarly situated members of the general public. He has an ongoing responsibility not to use his official position or office with the city to gain such a financial benefit.

IN SUMMARY, based on the facts and circumstances you submitted, Keith L. Ellis is not prohibited from using his outside business to sub-contract electrical work on city projects, where he does not enter into any contract or other transaction for goods and services with the city, has no enforcement, oversight or administrative responsibilities as a city employee under these contracts, and does not use his position as a city employee to gain any financial benefit for himself, a relative, household member, outside employer or business, customer or client, or non-profit organization of which he is an officer or director.

This opinion construes the Palm Beach County Code of Ethics ordinance, but is not applicable to any conflict under state law. Inquiries regarding possible conflicts under state law should be directed to the State of Florida Commission on Ethics.

Please feel free to contact me at 561-233-0724 if I can be of any further assistance in this matter.

Sincerely,

Alan S. Johnson
Executive Director

ASJ/meb

January 10, 2011

Connie Roy-Fisher
Studio Sprout Inc.
P.O. Box 420
Jupiter, FL 33468

RE: RQO 10-039
Prohibited contracts

Dear Ms. Roy-Fisher,

The Palm Beach County Commission on Ethics has considered your request for an advisory opinion, and rendered its opinion at a public meeting on January 6, 2011.

YOU ASKED in your emails dated November 22, 2010, and November 24, 2010, whether it is permissible for you, as a member of the Friends of the Mounts Botanical Gardens (Friends), a volunteer advisory board that advises and assists this county run facility, to submit a bid for contracted improvements to this facility. You provided additional information in telephone conversations to staff members of the Commission on Ethics.

IN SUM, based on the facts you have submitted, and those gleaned from staff conversations with Allen Sistrunk, Director of Mounts Botanical Gardens (Mounts), Friends is an advisory board composed of volunteers who are appointed by the Friends board itself through an internal selection committee. No member of Friends is appointed by the Board of County Commissioners (BCC) and Friends serves an advisory and support role with Mounts. As such, members of Friends are not county officials or employees as defined by Section 2-444 of the code of ethics. Therefore, you are not prohibited under the code from entering into a contractual relationship with the county to provide goods or services to the county.

THE FACTS as we understand them are as follows:

You are a member of an advisory board known as Friends of the Mounts Botanical Gardens (Friends). Members of this board provide support and advice to the county run facility known as Mounts Botanical Gardens (Mounts). Members are selected by the Friends board itself through an internal selection committee. None of the board members are appointed by the Palm Beach County Board of County Commissioners.

Mounts has issued a proposal to make improvements to its property, known as the "Shade and Color Island-Bridge and Overlook Improvements," through the county's Art in Public Places program. The budget for these improvements is \$137,000. Applications to be considered for this contracted work have been accepted from various "landscape artists," including you in your capacity as a private landscape artist. The determination of who is awarded this contract will not be based on a sealed bid, but will be chosen by a "selection committee" based on factors related to specific artistic proposals for the project. As a private landscape artist, you have submitted an application to be awarded this project in conjunction with another local artist.

The Chair of the Friends board is on the selection committee for this project. You will not be on the selection committee. The Chair has advised you that the Friends board sees no conflict with your submission.

THE LEGAL BASIS for this opinion is found in the following relevant sections of the Palm Beach County Code of Ethics:

The Palm Beach County Code of Ethics Section 2-442, *Definitions*, states in relevant part:

Official or employee means any official or employee of the county, whether paid or unpaid...and members appointed by the board of county commissioners to serve on any advisory, quasi judicial, or any other board of the county, state, or any other regional, local, municipal, or corporate entity. (Emphasis added)

Based on the fact that you were not appointed to Friends by the Board of County Commissioners, you are not a county official and do not fall under the jurisdiction of the code of ethics.

IN SUMMARY, based on the information you have provided, it is not a violation of the code of ethics for you, as a member of Friends of the Mounts Botanical Gardens, to contract to supply goods or services to the county.

Although not prohibited from participating under the Code of Ethics, the Commission on Ethics recommends that, in order to avoid the appearance of impropriety, neither the chair nor any other member of Friends participate in the selection process on bids or proposals in which a member of Friends is a bidder or proposer.

This opinion construes the Palm Beach County Code of Ethics ordinance, but is not applicable to any conflict under state law. Inquiries regarding possible conflicts under state law should be directed to the State of Florida Commission on Ethics.

Please feel free to contact me at 561-233-0724 if I can be of any further assistance in this matter.

Sincerely,

Alan S. Johnson
Executive Director
ASJ/meb

January 10, 2011

Eric Lee Johnson, AICP
Development Department, Planning and Zoning Division
100 East Boynton Beach Boulevard
Boynton Beach, FL 33435

Re: RQO 10-041

Dear Mr. Johnson,

The Palm Beach County Commission on Ethics has considered your request for an advisory opinion, and rendered its opinion at a public meeting on January 6, 2011.

YOU ASKED a series of questions in your e-mails of December 21 & 22, 2010, involving your acceptance of a volunteer position to serve on the Board of Directors of a church in Delray Beach while being employed by the City of Boynton Beach. Specifically, you inquired as to whether: a gift or donation to the church is considered a personal gift to a board member; reimbursement of expenses by the church or a third party for travel on official church business is considered a reportable gift; your involvement in the purchase of property within Boynton Beach by the church is permissible.

IN SUM, as an employee of the City of Boynton Beach you are required to declare anything of value received in excess of \$100.00 if not specifically excluded from the definition of gift. A gift is anything of value. Reimbursement for church travel is not excluded as a reportable gift. You may not accept a gift with a value in excess of \$100.00 from a lobbyist, principal or employer of a lobbyist. If any of the reimbursements or donations comes from a person or entity that lobbies or employs lobbyists in Boynton Beach, the \$100.00 limit applies.

For gift reporting purposes, the solicitation of a gift on behalf of a religious organization, while it may not be reportable under the requirements of sec. 2-444(d) as it pertains to you as an individual officer or director, may be prohibited under sec. 2-444(a) if the donor that you solicit is a lobbyist, principal or employer of a lobbyist.

Lastly, you may not use your official position in Boynton Beach to financially benefit the church if you are a director or officer of the church. Therefore, while you may participate in the purchase of the property, you cannot assist the church or use your influence in any way in your official position as Planning and Zoning Department Planner.

THE FACTS as we understand them are as follows:

You are an employee of the City of Boynton Beach, Development Department, Planning and Zoning Division (P & Z). The functions of your position include review of P & Z land development applications

which include site plan, variance, rezoning and future land use map amendments within Boynton Beach. In your job, you typically review the work of private sector developers, contractors, architects, landscape architects, engineers and surveyors.

In your personal time, you are an active member of The Avenue Church (the Church), a church in Delray Beach. The Church has asked you to serve on their Board of Directors, effective January 1, 2011. The position would give you authority to write checks on their behalf and conduct other official church business. The Church is considering the purchase of property within the City of Boynton Beach and you may be called upon to participate in that purchase. At this time the Church conducts no business with the City of Boynton Beach.

In addition to other functions, you will be travelling on mission trips and conferences on behalf of the Church. Travel expenses for these church related trips may be reimbursed by money donated by individuals and businesses, either directly or indirectly through the Church. It is your belief that the individuals or businesses donating to the Church are "probably not vendors, but they may include bidders, proposers and service providers" in Boynton Beach. While you are not aware that any of the donations will come from lobbyists, principals or employers of lobbyists in Boynton Beach, you have not reviewed any lists of lobbyists, principals or employers of lobbyists maintained by the City. The Church itself does not employ a lobbyist or lobby within Boynton Beach.

THE LEGAL BASIS for this opinion relies on a number of sections within the code of ethics.

Sec. 2-443. Prohibited conduct.

- (a) Misuse of public office or employment. An official or employee shall not use his or her official position or office, or take or fail to take any action, or influence others to take or fail to take any action, in a manner which he or she knows or should know with the exercise of reasonable care will result in a financial benefit, not shared with similarly situated members of the general public, for any of the following persons or entities:
 - (7) A non-governmental civic group, union, social, charitable, or religious organization of which he or she (or his or her spouse or domestic partner) is an officer or director.

First and foremost, you may not use your position in Boynton Beach to financially benefit a religious organization of which you or your spouse or domestic partner are an officer or director. For example, if the Church were to purchase property within Boynton Beach, any use of your official position or office, any action that you may take, or influence you may exert on others that would financially benefit the Church in a manner "not shared with similarly situated members of the general public" would violate the misuse of office section of the code.

Sec. 2-443(e) of the code of ethics prohibits reimbursement for travel expenses, directly or indirectly, from any Boynton Beach vendor, contractor, service provider, bidder or proposer. A prohibited reimbursement may not be indirectly paid through the Church. There are exceptions where the travel is

reimbursed by a governmental entity or by organizations which Boynton Beach is a member if the travel is related to that membership. Church related business is not exempted. A majority of the city commission may waive this prohibition. You have an obligation to check with the City of Boynton Beach to ensure that any reimbursement paid to you directly or through the Church, is not from a person doing business with the City of Boynton Beach.

The following code sections apply to gifts:

Sec. 2-444(e) For the purposes of this section, "gift" shall refer to the transfer of anything of economic value, whether in the form of money, service, loan, travel, entertainment, hospitality, item or promise, or in any other form, without adequate and lawful consideration."

Sec. 2-444(a) No...employee, or any other person or business entity on his or her behalf, shall knowingly solicit or accept directly or indirectly, any gift with a value of greater than one hundred dollars (\$100.00) from any person or business entity that the recipient knows is a lobbyist or any principal or employer of a lobbyist."

Sec. 2-444(d)(2) All...officials or employees who receive any gift in excess of one hundred dollars (\$100.00) shall complete and submit an annual gift report..."

Sec. 2-444(c) No person or entity shall offer, give or agree to give an official or employee a gift and no official or employee shall accept or agree to accept a gift from a person or entity because of:

- (1) An official public action taken or to be taken, or which could be taken;
- (2) A legal duty performed or to be performed or which could be performed; or
- (3) A legal duty violated or to be violated, or which could be violated by any official or employee.

You must take great care in scrutinizing any person or entity who wishes to reimburse your church related travel expenses. These reimbursements are considered gifts and are prohibited if solicited or accepted from Boynton Beach contractors, vendors, service providers, bidders or proposers unless waived by the city commission. Your scrutiny is also necessary in any general solicitation for donations in excess of one hundred dollars (\$100.00), direct or indirect, made by you, or on your behalf by the Church and involving any lobbyist, principal or employer of a lobbyist. Such a gift from a lobbyist, principal or employer of a lobbyist is prohibited and may not be waived.

The issue of reimbursement/gift reporting requirements and prohibitions has been previously addressed by the Commission on Ethics. "It is the responsibility of the...official or employee to know, prior to accepting a reimbursement/gift in excess of \$100.00, whether a contractor, bidder, proposer or service provider offering the reimbursement for travel expenses lobbies county government."¹

It should be noted that gifts donated to a religious organization, not for the benefit of any individual, are not reportable as gifts by the individual officers or directors of that organization under sec. 2-444(d),

¹ RQO 10-032

however, the prohibition of acceptance or solicitation of gifts from lobbyists under sec. 2-444(a) apply to "any gift" solicited or accepted in excess of \$100.00 from those persons or entities. Therefore, your acceptance or solicitation of any such gift on behalf of the organization would be prohibited.²

IN SUMMARY, based on the facts and circumstances you have submitted, the Palm Beach County Code of Ethics does not prohibit you from volunteering to serve on the Board of Directors of The Avenue Church. Insofar as church related travel is concerned, you may not be reimbursed by persons and entities that are engaged in business with the City of Boynton Beach, such as vendors, contractors, service providers, bidders or proposers, unless you receive a waiver from the city commission. You may not, under any circumstances, accept any donations in excess of one hundred dollars (\$100.00), directly or indirectly, from a lobbyist, principal or employer of a lobbyist who lobbies Boynton Beach. You may not accept any gift/donation in return for an official act or the performance of a legal duty as an employee of the city. Any reimbursement to you is a gift and if not prohibited must be reported on an annual gift reporting form if in excess of one hundred dollars (\$100.00)

The purchase of land within Boynton Beach by the Church will certainly have the potential to create a conflict should issues emerge involving the Planning and Zoning Department. In that regard, you must not take any official action or influence others to take any official action that might benefit the Church.

Your duty to not use your official position to financially benefit a religious organization where you are an officer or director is ongoing.

This opinion construes the Palm Beach County Code of Ethics Ordinance, but is not applicable to any conflict under state law. Inquiries regarding possible conflicts under state law should be directed to the State of Florida Commission on Ethics.

Please feel free to contact me at (561) 233-0724 should you have any further questions in this matter.

Sincerely,

Alan S. Johnson
Executive Director
Commission on Ethics

ASJ/gal

² RQO 10-004

AGENDA ITEM IX(a)

RULES OF PROCEDURE AMENDMENTS

The COE rules of procedure have not been amended to reflect the adoption of changes to Art. V, sec. 2-260(b), allowing self-initiated complaints. In order to carry out the processing of a self-initiated complaint, staff must have the ability to inquire into, and obtain facts and circumstances to make a legal sufficiency determination. Staff recommends adoption of the following rules of procedure to allow for staff to obtain this information. Once complete, an inquiry will either be closed as without merit, or filed as legally sufficient at which time a case will be opened and the normal complaint process will be followed.

Staff recommends the following rule of procedure amendments:

4.11 Self-Initiated Complaints

The Inspector General, Executive Director of the Commission on Ethics or the State Attorney may initiate a sworn written complaint with the Commission on Ethics. Such complaint will be deemed legally sufficient.

4.12 Preliminary Inquiry of Commission on Ethics

In determining whether or not legal sufficiency exists to support a self-initiated complaint the Commission on Ethics may undertake a preliminary inquiry into the facts and circumstances involving a possible violation of an ordinance within its jurisdiction. A preliminary inquiry is not subject to public records disclosure.

4.12 Preliminary Inquiry Protocols

- a. Upon receipt of information which may form the basis of a violation, staff may review documents and conduct interviews prior to a finding of legal sufficiency.
- b. After conducting an inquiry, if no legal sufficiency is found, staff will prepare a memorandum of inquiry stating the facts and circumstances supporting its finding. A finding of no legal sufficiency after inquiry is thereafter subject to public records disclosure.
- c. Upon a finding of legal sufficiency, the matter under inquiry will be processed in accordance with Sections C and D as contained herein.

AGENDA ITEM IX(b)

AMENDMENT TO RULES OF PROCEDURE ADDING 4.31 ADVOCATE CONFLICT OF INTEREST

4.31 Advocate Conflict of Interest

At all times during the investigation and presentation of a legally sufficient complaint, the Advocate has an ongoing duty to seek justice without predisposition or bias. In that regard there is an ongoing duty to disclose to the Executive Director any financial, personal or professional interest in the proceedings immediately upon discovery of the conflict.

4.32 Replacement of Advocate upon Disclosure of Conflict

Upon disclosure of a conflict, the Executive Director shall immediately replace the Advocate and notify the Respondent.

4.33 Applicability of Florida Bar Rules of Professional Conduct

The Advocate shall be governed by *Chapter 4. Rules of Professional Conduct* as promulgated by the Florida Bar.

AGENDA ITEM IX(c)

PUBLIC RECORDS STATUS OF COMPLAINT

Currently, Florida Statutes exempt both the initial complaint and investigation from public records disclosure prior to a probable cause determination by the COE. The Palm Beach County Commission on Ethics code exempts the investigation but not the initial complaint.

§ 112.324(2)(a) and (3), Florida Statutes, state as follows:

"2(a) The complaint and records relating to the complaint or to any preliminary investigation held by...any county or municipality that has established a local investigatory process to enforce more stringent standards of conduct and disclosure requirements...are confidential and exempt from the provisions of § 119.07(1) and § 24(a), Art. I of the State Constitution." (emphasis added)

"(3) ...If, upon completion of the preliminary investigation, the commission finds no probable cause to believe that this part has been violated..., the commission shall dismiss the complaint...At that time, the complaint and all materials relating to the complaint shall become a matter of public record. If the commission finds...probable cause...it shall notify the complainant and the alleged violator in writing. Such notification and all documents made or received in the disposition of the complaint shall then become public records."

§ 2-260(f), Palm Beach County Code of Ethics, states as follows:

"Public records exemption...With the exception of the initial complaint filed in a matter, all records held by the commission on ethics are confidential and exempt from disclosure in a manner consistent with the provisions in Florida Statutes, § 112.3188(2)."

Staff analysis and recommendation

The provisions of the Palm Beach County Commission on Ethics code are in conflict with state statutes. Apparently, § 112.324(2)(a) and (3), Florida Statutes, were amended to exempt the complaints from public records after the code of ethics was drafted in late 2009 thus creating the conflict (see attached memo from Assistant County Attorney Leonard Berger). Therefore, in order to bring the code into compliance with state statutes, staff recommends the code be amended as follows:

§ 2-260(f) Public records exemption. The commission on ethics and its staff shall be considered "an appropriate local official" for the purposes of whistleblower protection provided for in Florida Statutes, § 112.3188(1). ~~With the exception of the initial complaint filed in a matter, all~~ The complaint and all records held by the commission on ethics and its staff related to an active preliminary investigation are confidential and exempt from disclosure in a manner consistent with the provisions in Florida Statutes, § 112.324(2)(a) and (3). Once a preliminary investigation is complete and a probable cause determination made, all other proceedings conducted pursuant to this subsection shall be public meetings within the meaning of Florida Statutes, ch. 286, and all other documents made or received by the commission on ethics shall be public records within the meaning of Florida Statutes, ch. 119.



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INTEROFFICE MEMORANDUM

TO: Alan Johnson, Executive Director
Commission on Ethics

FROM: Leonard Berger, Senior Assistant County Attorney

SUBJECT: Public Records Exemption

DATE: January 3, 2011

LB

This will serve a follow-up to our conversation. Palm Beach County Code of Ethics, Section 2-260(f), bases its limited public records exemption on Florida's Whistle Blower Statute. At the time the Ethics Code was adopted in December 2009, that was the sole legally available public records exemption. Several months later, the 2010 Florida Legislature adopted the more comprehensive public records and sunshine law exemptions, which took effect July 1, 2010.

While it is advisable to amend the Code of Ethics to reflect the change, the new state law is self-executing, meaning that the exemptions apply locally with or without the ordinance change. In this case, following state law would not violate the limited exemption in our code, it only adds to it.

LB/jg

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