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December 2, 2013

Honorable Priscilla A. Taylor, Mayor
301 North Olive Ave.
Suite 1201
West Palm Beach, FL 33401

Dear Mayor Taylor:

The Joint Legislative Auditing Committee's (Committee) meeting on November 4, 2013, included a presentation of the Legislature's Office of Program Policy Analysis and Government Accountability's (OPPAGA) report on the Palm Beach County Commission on Ethics (Commission). OPPAGA's report included recommendations related to the roles of the commissioners and staff, conflicts of interest, commissioner training, and accountability. Following the presentation, Roma W. Theus, II and Mark Herron provided testimony based on their experiences with the Commission on behalf of their clients. Their concerns centered on two primary issues: (1) the alleged tampering of an audio recording of a Commission proceeding, and (2) the processes and structure of the Commission (i.e., the probable cause panel is comprised of the same individuals who determine whether a violation has occurred).

We commend the Palm Beach County Board of County Commissioners (BCC) for its role in the creation of the Commission. However, we believe that the issues that have been brought to our attention warrant discussion, and possible action. The citizens of Palm Beach County expect and deserve a commission that is comprised of members and staff who are qualified and who serve to address potential ethics violations in a reasonable, transparent, and law abiding manner.

Honorable Priscilla A. Taylor, Mayor

December 2, 2013

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We respectfully request that the BCC review the findings and recommendations in the OPPAGA report and the comments made by Mr. Theus and Mr. Herron, as a starting point. Both the OPPAGA report and the transcript of Mr. Theus' and Mr. Herron's testimony are enclosed. A video of the Committee's meeting is accessible from the Florida Channel's website by selecting the "Video Library" tab and scrolling to the appropriate date. Mr. Theus provided numerous documents to the Committee; however, due to their large volume, they are not enclosed. Please contact either the Committee's staff or Mr. Theus if you wish to obtain these documents. We suggest that your review be thorough and consider all options that may potentially address the concerns that have been raised. You may wish to consult with staff and officials of other ethics commissions, both local and state. We understand that some changes may require revisions to the ordinance that created the Commission or even to state law. Please let us know if we can assist you.

We intend to send a packet of information regarding the alleged violation of law to the Office of the State Attorney for Palm Beach County. At the appropriate time, we suggest that you review the processes and personnel involved with meeting recordings to help ensure corrective action is taken, if necessary.

Please provide us with a written response regarding any discussion and action taken by the BCC or by the Commission on Ethics, in response to our request. We thank you in advance for your cooperation in addressing not only these concerns, but also other issues being faced by Palm Beach County.

Best regards,



Lake Ray
Chair



Joseph Abruzzo
Vice Chair

cc: Members of the Palm Beach County Board of County Commissioners
Robert Weisman, County Administrator
Robin N. Fiore, Chair, Palm Beach County Commission on Ethics ✓
Steven P. Cullen, Esq., Executive Director, Palm Beach County Commission on Ethics
R. Philip Twogood, Coordinator, OPPAGA

Enclosures: OPPAGA Report No. 13-10
Partial Transcript of the Committee's Meeting on November 4, 2013



October 2013

Report No. 13-10

Palm Beach County Commission on Ethics Was Created Using Several Best Practices; Some Processes Could Be Enhanced

at a glance

Our review of the Palm Beach County Commission on Ethics determined that while the commission was created using several best practices, it could benefit from

- clarifying commissioner and staff roles and responsibilities to better separate investigative, prosecutorial, and quasi-judicial functions;
- increasing awareness of conflict of interest issues in commissioner orientation and training and defining the terms bias, interest, and prejudice in procedures relating to disqualification of members from hearings;
- suggesting consideration of modifications to the county ethics code to address issues related to its expanded jurisdiction over municipalities, lobbyists, and vendors;
- enhancing commissioner training; and
- strengthening its performance accountability system by improving performance measures and developing a strategic plan.

Scope

As directed by the Legislature, this report examines the Palm Beach County Commission on Ethics' budget, operating procedures, and mechanisms for assuring compliance with operating procedures.

Background

From 2006 to 2010, citizens in Palm Beach County witnessed the public corruption prosecution of several elected officials. During this time, local business leaders established an ethics initiative and the state attorney convened a grand jury to address the ethical crisis facing the county. As a result of these and other efforts, the Palm Beach County Board of County Commissioners adopted ordinances in December 2009 to implement the grand jury's recommendations to establish a code of ethics, a county ethics commission, and an office of inspector general, and to strengthen lobbying regulations.^{1,2} In November 2010, county voters approved a referendum that made the county's 38 municipalities subject to the ethics code. In response, the county commission revised the ethics code effective June 2011.³

The commission fulfills numerous responsibilities via its five-member panel and professional staff.

The county's ordinance identifies the major responsibilities of the Palm Beach County Commission on Ethics, which include

- overseeing, administering, and enforcing the ethics code;
- investigating ethics complaints;

¹ The 2010 Legislature also appropriated \$200,000 for Palm Beach State College to create the Center for Applied Ethics to provide ethics training and to work with the Commission on Ethics and others in the community.

² Palm Beach County's original lobbyist registration, established in 2003, was revised in 2009 as part of the county's ethics initiative.

³ This revision was made pursuant to local referendum.

- issuing formal advisory opinions to persons who fall under the commission’s jurisdiction;
- training municipal and county officials and employees; and
- proposing changes to the ethics code.

The commission’s responsibilities regarding oversight, administration, and enforcement of the ethics code include specific provisions pertaining to prohibited conduct, acceptance of gifts, anti-nepotism, lobbyist registration, and post-employment. Prohibited conduct that can result in a violation of the code includes the misuse of public office or employment and corrupt misuse of official position.⁴ A lobbyist’s failure to register or the receipt by a government employee or official of certain gifts with a value greater than \$100 from a lobbyist can also result in a violation of the code.⁵

In addition, the commission, along with one delegate each from the state attorney’s office and the public defender’s office for the Fifteenth Judicial Circuit, serves as the Inspector General Committee. The Inspector General Committee selects the inspector general, determines whether or not to renew the inspector general’s term, and participates in the removal of the inspector general.

The commission is composed of five members appointed by the leaders of various civic, educational, and professional associations; commissioners serve staggered four-year terms. The commission is empowered to select an executive director using a competitive process and establishes the director’s salary. The executive director appoints and oversees commission staff, which currently includes a staff counsel, two

investigators, and an intake manager who fulfill various functions.⁶ The commission’s Fiscal Year 2013 budget totaled \$589,402, with funding derived from county ad valorem tax revenues. Employee salaries and benefits comprise the bulk of the commission’s expenditures.

Several factors must be considered when evaluating the commission’s performance. The commission has been in full operation for a relatively short period (about three years), and much of its first several months of operation was spent hiring an executive director and staff; developing and adopting bylaws, rules of procedures, and operating processes; and developing training materials and programs.⁷ Therefore, not enough time has elapsed to fully evaluate the commission’s effectiveness.

There are few local government ethics commissions or boards in Florida or other states with which to compare the Palm Beach County Commission on Ethics and benchmark its performance. To identify best practices for local ethics bodies, we examined relevant academic literature and research center publications, reviewed the governing laws and annual reports of other local, state, and federal ethics commissions and boards, and interviewed governmental ethics experts. We then reviewed the commission’s design, policies, and procedures within the context of recommended best practices.

Findings

The commission was created using several best practices and has achieved a number of milestones

Best practices used during the establishment of the Palm Beach County Commission on Ethics include the commissioner selection process, required ethics training for local government officials and employees, and the ability to issue

⁴ An individual cannot use his/her position when he/she knows or should know with an exercise of reasonable care that it would result in special financial benefit to the individual, his/her spouse, domestic partner, relatives, etc. Corrupt misuse of an official position refers to an official action taken with wrongful intent for the purpose of receiving financial benefit which is inconsistent with the proper performance of one’s public duties.

⁵ No vendor, lobbyist, or principal or employer of a lobbyist who lobbies an advisory board or any county or municipal department that is subject in any way to the advisory board’s authority, influence or advice, shall knowingly give, directly or indirectly, any gift with a value greater than \$100 in the aggregate for the calendar year to a person who the vendor, lobbyist, or principal knows is a member of that advisory board.

⁶ The intake manager’s duties include receiving complaints; answering the hotline; maintaining the training schedules; managing the commission’s website; and performing administrative functions related to purchasing, inventory, payroll, and travel.

⁷ The commission’s initial board members were sworn in on February 23, 2010, and its first executive director was selected in April 2010.

advisory opinions. Several features of the commission's complaint process also are consistent with best practices described by ethics experts. In addition to establishing operational policies and procedures, from June 2010 to May 2013, the commission issued 250 advisory opinions and processed 60 ethics complaints.

Palm Beach County's ethics ordinances incorporate several recommended best practices.

Experts suggest that the selection of ethics commissioners separate and apart from local elected officials is central to maintaining a commission's independence. The leaders of the following entities each appoint one of the five members of the Palm Beach County Commission on Ethics: the Palm Beach County Association of Chiefs of Police; Florida Atlantic University; the Palm Beach Chapter of the Florida Institute of Certified Public Accountants; the Palm Beach County League of Cities; and local bar associations.

Experts also agree that local ethics commissions should emphasize training and education for those subject to ethics laws. The Palm Beach County Commission on Ethics provides both in-person and online training to individuals covered by the county's ethics code.⁸ The commission also helps educate these individuals through its advisory opinions.⁹ The county's ethics code is a concise document (approximately 12 pages) that cannot cover every possible situation that an elected official or employee might face. Consequently, an individual who is uncertain about interpreting the ethics code can request an advisory opinion concerning his or her specific circumstances.

Some aspects of the commission's complaint process also reflect practices recommended by some ethics experts. (See Appendix A for a detailed discussion of the complaint process.) For example, the commission receives two types of complaints—sworn complaints and unsworn or anonymous

complaints. Allowing the submission of anonymous complaints can encourage individuals to come forward when they have knowledge of an ethics violation. Without anonymity, individuals may fear retaliation for filing a complaint.

In addition, the commission maintains the confidentiality of complaint information until it has determined whether probable cause exists to indicate a violation. Such confidentiality helps to protect respondents from potentially damaging false allegations. Moreover, the commission's ordinance also allows individuals to appeal a commission decision to the circuit court, which further protects the rights of the individual.

Since its inception, the commission has achieved a number of milestones.

Initial appointments to the ethics commission were completed in February 2010, and the commission hired an executive director in April 2010. The commission's first steps included adopting by-laws and rules of procedure to guide its operations and decision-making processes. In addition to developing and implementing a complaint processing system, the commission also developed procedures for issuing advisory opinions.

As shown in Exhibit 1, during the period from June 2010 to May 2013, commission staff processed 60 complaints.¹⁰ Of these complaints, 36 (60%) were dismissed for lack of legal sufficiency and 1 was rescinded. Of the 23 complaints that were found to be legally sufficient, 10 were dismissed at probable cause hearings.¹¹ The commission found probable cause that a violation occurred in 9 cases; 5 of these cases resulted in settlement agreements, respondents in 3 of these cases were issued letters of instruction, and 1 complaint was scheduled for a final hearing.

⁸ The commission also provides training to community groups upon request.

⁹ The Palm Beach County Commission on Ethics' ordinance provides that employees, officials, lobbyists, and vendors within the commission's jurisdiction may request an advisory opinion to advise them of the standard of duty under the ethics code that applies to their situation.

¹⁰ Complaint disposition information presented in the exhibit is primarily based on data provided by the commission as of May 1, 2013. However, the disposition of some complaints was re-categorized by OPPAGA staff based on a review of supporting documents and orders. For example, the disposition of several complaints that were legally sufficient but dismissed due to lack of probable cause was refined to indicate that letters of instruction were also issued for these cases.

¹¹ For four complaints, the commission found that while the complaints were legally sufficient, there was not probable cause to believe that a violation occurred and a letter of instruction would be appropriate.

**Exhibit 1
Most Complaints Processed by Commission Staff from June 2010 to May 2013 Were Dismissed for Lack of Legal Sufficiency**

Complaint Disposition	2010 ¹	2011 ²	2012	2013	Total
Not Legally Sufficient	7	21	5	3	36
Legally Sufficient – No Probable Cause Found	2	3	4	1	10
Legally Sufficient – No Probable Cause Found, Letter of Instruction Issued	1	0	3	0	4
Legally Sufficient – Probable Cause Found, Letter of Instruction Issued	1	0	2	0	3
Legally Sufficient – Probable Cause Found, Respondent Pled	0	3	1	1	5
Legally Sufficient – Probable Cause Found, Final Hearing Scheduled	0	0	1	0	1
Complaint Rescinded	0	1	0	0	1
Total	11	28	16	5	60

¹ The commission issued its first final order regarding a complaint in August 2010.

² The Palm Beach County Board of County Commissioners adopted changes to the ethics code to include the county’s 38 municipalities effective June 2011.

Source: OPPAGA analysis of Palm Beach County Commission on Ethics complaint data as of May 1, 2013, and review of commission complaint reports and orders.

The commission issued 250 advisory opinions from June 2010 to May 2013. As shown in Exhibit 2, these opinions addressed a wide range of subjects, including charitable solicitations and fundraising, contractual relationships, lobbyist registration, misuse of office, and travel expenses. During our review, commission staff reported that requests for advisory opinions have declined. Staff attributed the decline to increased awareness of the ethics code by county and municipal officials and employees. Moreover, the commission’s advisory opinions provide a body of advice on a range of topics that individuals can reference for information.

**Exhibit 2
Commission Advisory Opinions Have Addressed a Wide Variety of Subjects**

Subject	Number ¹
Gift law	89
Misuse of office or employment	52
Charitable solicitation/fundraising	27
Contractual relationships	27
Outside employment	18
Jurisdiction of the commission	11
Travel expenses	10
Lobbyist registration	6
Employee discounts	4
Political fundraising/contributions	4
Advisory board member waiver	2
Pension plan – employees/officials	2
Contingency fee prohibition	1
Nepotism	1

¹ The numbers in the exhibit sum to more than 250 because the commission classified four advisory opinions as addressing two subjects.

Source: OPPAGA analysis of Palm Beach County Commission on Ethics data.

During the period from June 2010 to May 2013, commission staff participated in 218 live training sessions for public officials and employees, vendors and lobbyists, and members of community organizations. The commission’s executive director, staff counsel, and lead investigator, all of whom have law degrees, conduct in-person training. The commission also provides training through DVDs and streaming videos available on the commission’s website. Commission staff also audits local governments to ensure that employees have taken required ethics training and have completed and signed training acknowledgement forms.

Clarification of roles could improve the commission’s complaint processes

The Palm Beach County Commission on Ethics’ complaint process includes investigative, prosecutorial, and quasi-judicial functions. Best practices emphasize the importance of separating these functions; that is, assigning different entities to conduct these activities. However, the commission’s procedures and practices may sometimes result in a blurring of these functions.

A related issue arises regarding requirements for the commission to both sit as a probable cause panel and to determine the outcome of a final hearing.

Commission practices sometimes blur the roles of investigators and the staff counsel. A lack of separation between the commission's investigative and prosecutorial functions occurs because its procedures and practices provide for investigators to go beyond gathering facts when completing investigations. Specifically, commission investigators may draw conclusions about or make preliminary recommendations as to the existence of probable cause.¹² In contrast, Florida Commission on Ethics investigators do not make recommendations of probable cause, leaving this function to those prosecuting the case.

In addition, due to its small size, commission staff may serve in different capacities, which results in blurred roles and less separation between key functions. For example, the commission's staff counsel serves as the primary advisor to the commission regarding commission business (e.g., advising the commission regarding policy or procedural matters). However, while the commission often uses volunteer advocates to act as prosecutors, the staff counsel and lead investigator may also serve as prosecutors for complaints during probable cause determinations.^{13, 14}

¹² During the course of our review, commission staff reported that investigators no longer make recommendations as to probable cause. However, our review of commission files identified at least one instance in April 2013 where the investigative report included a recommendation as to the existence of probable cause.

¹³ The lead investigator would not act as a prosecutor for complaints he investigated, but rather for those conducted by the commissioner's second investigator. Nevertheless, the lead investigator reviews the final investigative report.

¹⁴ The county ethics commission's ordinance provides that the commission shall retain legal counsel to serve as the advocate and prosecute cases before the commission. The executive director may serve as advocate if he/she is a member of the Florida Bar in good standing. In addition, the commission has established a pro bono volunteer advocate program to prosecute ethics complaints; under the program, private attorneys from the community serve as advocates to earn pro bono hours to report to the Florida Bar.

According to ethics experts, the lack of separation between investigative and prosecutorial functions may dispose commissioners toward accepting staff recommendations and advice as to probable cause. Specifically, commissioners may be more inclined to rely on staff's advice and opinions compared to an outside volunteer advocate since commissioners depend on staff to assist them in ongoing commission business. Using staff in the role of advocates, while allowed by the commission's ordinance, may also raise concerns about the advocate's independence.

To preserve separation of investigative and prosecutorial functions, some experts recommend that a small commission outsource either its investigative or prosecutorial functions. The Florida Commission on Ethics follows this practice and employs its own investigators but relies on the Florida Attorney General's Office to prosecute complaints. During the course of our review, the Palm Beach County Commission on Ethics' executive director reported that he planned to increase the number of volunteer advocates available to serve as prosecutors for cases heard by the commission.

The use of volunteer advocates provides both advantages and disadvantages. Advantages are two-fold: volunteer advocates may be perceived as having greater independence, and their use reduces the commission's costs. Commission staff estimated annual cost savings of \$200,000 from using volunteer advocates.¹⁵ The disadvantages are also two-fold: the use of different volunteers on an infrequent basis may result in an ongoing, steep learning curve and may cause them to depend heavily on commission staff to understand the ethics code and the precedents from prior cases.

Commissioners determine both probable cause and the outcome of a final hearing. The ethics commission's ordinance requires the commission to determine probable cause as to whether the evidence suggests a violation has occurred. After a finding of probable cause, an individual accused

¹⁵ Estimate is based on a rate of \$275 per hour.

of a violation can negotiate a settlement agreement or request a public hearing that would be conducted by the commission. To date, settlement agreements, rather than public hearings, have been used to resolve most ethics complaints where probable cause was found. The current process, however, may encourage individuals to settle given that the same commissioners who found probable cause will conduct the final hearing.

In contrast, the Florida Commission on Ethics refers cases to the Division of Administrative Hearings (DOAH) if a final hearing is required. The commission could consider recommending changes to the ethics code that could strengthen the ethics complaint process by authorizing hearing officers to conduct final hearings. However, the use of hearing officers would increase commission costs. Currently, DOAH charges \$146 per hour plus travel expenses for hearing officers.

Conflict of interest provisions continue to be a source of concern for commissioners and others

Prevailing state law addresses conflicts of interest in terms of decisions by officials and employees on matters that involve a financial interest. The Palm Beach County Code of Ethics also addresses voting conflict guidelines for government employees and officials. However, Palm Beach County ethics commissioners usually make decisions that do not directly affect financial expenditures like those made by a typical government official or employee who transacts government business, expends public funds, or votes regarding government projects. Rather, commissioners' decisions usually fall into one of two categories: approving advisory opinions or resolving ethics complaints.

Clarification of terms regarding conflicts of interest may help commissioners as they conduct commission business. Regular disclosure and explanation of prevailing state law and local ordinances may also help the public better understand commission decisions regarding conflicts.

Ethics commissioners express concern regarding potential conflicts that do not involve financial interests. State law defines conflict of interest as “a situation in which regard for a private interest tends to lead to a disregard of a public duty or interest.”¹⁶ The law clarifies the Legislature’s intent to protect the public and establish standards for the conduct of elected officials and government employees where conflict exists.¹⁷ Specifically, state law prohibits a public official from voting on public matters that inure to his or her special private gain or the special private gain of others, such as relatives or business associates.¹⁸

Given the proximity of commissioners to the community they serve, it is not surprising that a commissioner might know someone accused of an ethics violation or someone seeking an advisory opinion. Even with no financial interest at issue, a commissioner could desire to recuse or disqualify him- or herself to avoid even the appearance of a conflict.

To address conflict of interest and related questions, the Palm Beach County Commission on Ethics sought clarification from the Florida Commission on Ethics and the Florida Attorney General’s Office, although neither entity has direct authority over the commission. The Attorney General’s Office advised commissioners that state law requires officials to recuse themselves when they or a member of their family would gain financially by voting on a matter before them.¹⁹

Thus, commissioners have determined that if issues do not meet the threshold of a financial interest, they cannot recuse themselves from voting even if they know the parties involved. However, commissioners continue to express concern about and find themselves subject to criticism because of perceived conflicts of interest in adjudicating complaints and approving advisory opinions.

¹⁶ Section 112.312(8), *F.S.*

¹⁷ Section 112.311, *F.S.*

¹⁸ Section 112.3143(3)(a), *F.S.*

¹⁹ Section 112.3143, *F.S.*

The commission could benefit from clarifying commissioner disqualification terms and procedures. The Palm Beach County Code of Ethics includes standards regarding voting conflicts for government officials and employees. In addition, commission procedures provide guidelines concerning commissioner conflicts that might exist in probable cause or final hearings, proceedings where respondents have protected due process rights. Specifically, commission rules of procedure provide that the advocate or the individual responding to a complaint may file a motion to disqualify a commissioner for bias, interest, or prejudice, accompanied by an affidavit stating the particular grounds for the motion.²⁰

However, concerns exist regarding commission procedures and issues of potential commissioner bias, interest, or prejudice. The terms bias, interest, and prejudice are not defined in commission procedures and may be unclear and interpreted differently based on a participant's experience and expertise.

Further, the procedures specify that unless good cause is shown, all motions for disqualification shall be filed with the commission at least five days prior to the hearing at which the commissioner is expected to participate. Personal bias against a particular individual based on a prior relationship may be readily apparent to someone accused of an ethics violation. However, other issues of bias, interest, or prejudice based on individual or group characteristics may not be apparent until commissioners begin discussing a case. As a result, parties may be unaware of bias or prejudice until a hearing is already in progress. In such a situation, the procedures appear to support the respondent's good cause to raise an issue of bias during a hearing.²¹ Nevertheless, respondents could feel that making an accusation of bias against a commissioner is not in their best

interest given commissioners' overlapping prosecutorial and quasi-judicial roles.

To address conflict of interest concerns, the commission could emphasize such issues in its commissioner orientation and training and provide for explicit definitions of the terms bias, interest, and prejudice in its procedures relating to disqualification of members. In addition, each public and closed commission meeting could commence with the chairperson asking if members have any disclosures concerning the matters before the commission. In this way, commissioners could be on the record about any current or prior relationships with individuals before the commission even if the issues do not meet the financial benefit threshold of a conflict of interest. The commission could also use these disclosure discussions as an opportunity to explain how prevailing state law and local ordinances guide their decisions regarding conflicts of interest.

The impact of recent changes to expand the commission's jurisdiction may warrant consideration of code revisions

Several changes have been made to the ethics code since the county first adopted it in 2009. For example, in 2010, the code was revised to allow for outside employment for county employees under certain circumstances. To date, the most significant change occurred in 2011 when voters made all 38 municipalities subject to the Palm Beach County Code of Ethics. Other changes included adding vendors to the county gift law and expanding prohibited acts to include corrupt misuse of official position. Recent changes may warrant consideration of additional revisions to certain ordinances concerning appointments, lobbyists, and vendors.

The commission's expanded jurisdiction changes the nature of appointments and could diminish its independence. In creating the ethics commission, the county established its independence through the commissioner appointment process. Commissioners were selected by groups whose leaders were not subject to the county ethics code.

²⁰ According to the commission's rules of procedures, the motion shall be ruled on by the commissioner whose disqualification is sought, based on the legal sufficiency of the motion and affidavit.

²¹ The ethics commission's procedures regarding bias, interest, and prejudice are similar to those of other ethics entities, including the Miami-Dade County Commission on Ethics and Public Trust and the City of Jacksonville Ethics Commission.

Expansion of the ethics code to include the county's 38 municipalities means that groups whose leaders are now subject to the code appoint ethics commissioners. For example, the Palm Beach County League of Cities, whose board of directors is composed of municipal officials, appoints one of five commissioners that now oversee ethics in the county's municipalities. Further, the municipal chiefs of police are now subject to the code as is their association president, who appoints an ethics commissioner.²² To preserve its independence, the commission may want to recommend revising the ethics code regarding the appointment process to replace the Palm Beach County League of Cities and the Palm Beach County Association of Chiefs of Police with other independent entities.

Vendors and lobbyists are now subject to the county ethics ordinances but not required to receive training. The county established its initial lobbyist registration ordinance in 2003. In 2009, the county commission amended the lobbying ordinance to bring lobbying enforcement under the Commission on Ethics and added additional lobbying provisions to the ethics code. In 2011, vendors were incorporated into the ethics code gift law provisions.²³

The gift law prohibits government officials and employees from soliciting or accepting gifts of any value in return for or because of the way they perform their duties. The law also prohibits lobbyists, vendors, or principals or employers of lobbyists that lobby local government from giving gifts to officials and employees. The law does not require the reporting of certain gifts, including those received from relatives, domestic partners, or dependents, and awards for professional or civic achievement. Officials or employees who receive a reportable gift in excess of \$100 must submit an annual gift disclosure form or a copy of state-required gift forms. Commission staff reviews gift forms and may initiate an inquiry based on information provided in the forms.

²² The current and one of the two immediate past presidents of the Palm Beach County Association of Chiefs of Police were municipal chiefs of police.

²³ While the commission enforces the lobbyist registration law, staff does not oversee or maintain the registration system.

While the commission offers free training for lobbyists and vendors, the training is not mandatory. Best practices, such as those used by Miami-Dade County, the City of Chicago, and some other local governments, require lobbyists and/or vendors to undergo ethics training prior to engaging in business in their respective jurisdictions. Commission staff indicated that the issue of vendor training could be addressed through local government contracts with provisions to require training as a condition of doing county or municipal business. Alternatively, the commission could consider recommending changes to the county ethics code to require vendors and lobbyists to take the training. The requirement could be modeled after current provisions for government officials and employees, which require initial ethics training and periodic updates.²⁴

The commission could benefit from enhanced commissioner training

Best practices indicate that the effectiveness of government ethics commissions can be enhanced by providing commissioners with the orientation and training required to perform their responsibilities. Palm Beach County Commission on Ethics members reported that when they were initially appointed to the commission, they took the same online training on the ethics code as local government officials and employees. Some commissioners also reported that they attended training that staff provided to various groups, reviewed copies of documents, such as the ethics code, and were offered one-on-one training by the commission's staff.

While it is useful for ethics commissioners to initially attend or view an ethics training session for local officials and employees and read related materials, such training does not provide commissioners with specific guidance in performing their responsibilities. The commissioners should receive additional training

²⁴ Section 2-446 of the Palm Beach County Code of Ethics provides that the "county administrator or municipal administrator as applicable shall establish by policy a mandatory training schedule for all officials and employees which shall include mandatory periodic follow-up sessions. This policy may also address ethics training for entities that receive county or municipal funds as applicable."

that, at a minimum, includes commission procedures for hearing complaints and ensuring due process, including rules of procedure and evidence and issues of bias, prejudice, and interest; methods for understanding and analyzing complaint information and commission precedent; preparation and issuance of advisory opinions; and compliance with open records and sunshine laws.²⁵

Experts also note that it is important for ethics commissioners to have annual continuing education. Such training could serve as a refresher and cover any changes in ethics laws at the state and local level. It could also provide a forum for commissioners to learn about best practices in government ethics programs.

The commission could improve its performance accountability system

Like other government entities, the Palm Beach County Commission on Ethics should be accountable for and provide information to citizens regarding its effectiveness. To do this, the commission needs a performance accountability system and a strategic plan that includes clearly stated goals and objectives that provide expectations for its activities and measures for assessing its progress in meeting these expectations.

The commission includes some performance information in its annual reports, such as the number of

- advisory opinions issued;
- in-person trainings conducted;
- complaints investigated and their disposition; and
- reviews conducted that found governmental entities with employees not in compliance with ethics training requirements.²⁶

²⁵ During the course of our review, the commission began efforts to improve commissioner training. In July 2013, the commission authorized its staff to develop a revised training program for commissioners.

²⁶ During the course of our review, commission staff also began to survey online and in-person training participants to assess their satisfaction with the training experience.

These measures, while useful, primarily assess program outputs, which represent counts of the number of products produced in a single year. Additional information could be provided on the commission's timeliness in completing activities (e.g., the average number of days taken to determine whether a complaint is legally sufficient or the number of days to respond to a request for an advisory opinion) or trends in the number of complaints investigated and advisory opinions issued over a multi-year period. Changes, whether increases or decreases, in complaints or requests for advisory opinions over a multi-year period could be used to direct the commission's education activities or other resources to help government officials and employees gain a better understanding of their responsibilities under the ethics code.

In addition, the commission could collaborate with stakeholders to develop a survey to identify the reasons for changes in commission activities (e.g., increases or decreases in complaints and advisory opinions) and the impact of these and other activities on improving the climate of ethics in the county. For example, a survey could be used to determine the training benefits to local government employees by assessing their knowledge of the ethics code; the percent of local government employees who believe that their agency leaders and supervisors pay attention to ethics; and the percent who believe that individuals caught violating ethics rules are appropriately disciplined. Governments at the federal, state, and local level have used surveys of this kind to gauge the effect of ethics reforms.

The commission should also develop a strategic plan that identifies major issues facing the commission, presents strategies to address the issues, and specifies measurable goals and objectives for evaluating its progress and performance. Developing a strategic plan would also provide commissioners with a means for reaching a consensus regarding the commission's focus in the coming years as well as guidance on what it hopes to accomplish.

Appendix A

The Palm Beach County Commission on Ethics Complaint Process Involves Numerous Steps

A major activity of the Palm Beach County Commission on Ethics is complaint processing. (See Exhibit A-1.) The commission receives two types of complaints—sworn complaints, including self-initiated complaints, and unsworn or anonymous complaints. Sworn complaints are submitted in writing and sworn to before a notary public by the person filing the complaint. The county inspector general, the state attorney, or the commission’s executive director may also self-initiate complaints if they become aware of possible violations. For example, if the inspector general conducts an audit that identifies a violation that falls within the commission’s jurisdiction, the inspector general could refer the matter to the ethics commission.

The commission also receives unsworn complaints, which are typically from individuals that contact its hotline or who otherwise report or send information anonymously alleging an ethics violation. Depending on the nature of the complaint, commission staff conducts a preliminary inquiry to gather additional information, if necessary. If an anonymous or unsworn complaint appears to contain information regarding a potential violation, the commission’s executive director self-initiates a sworn complaint.

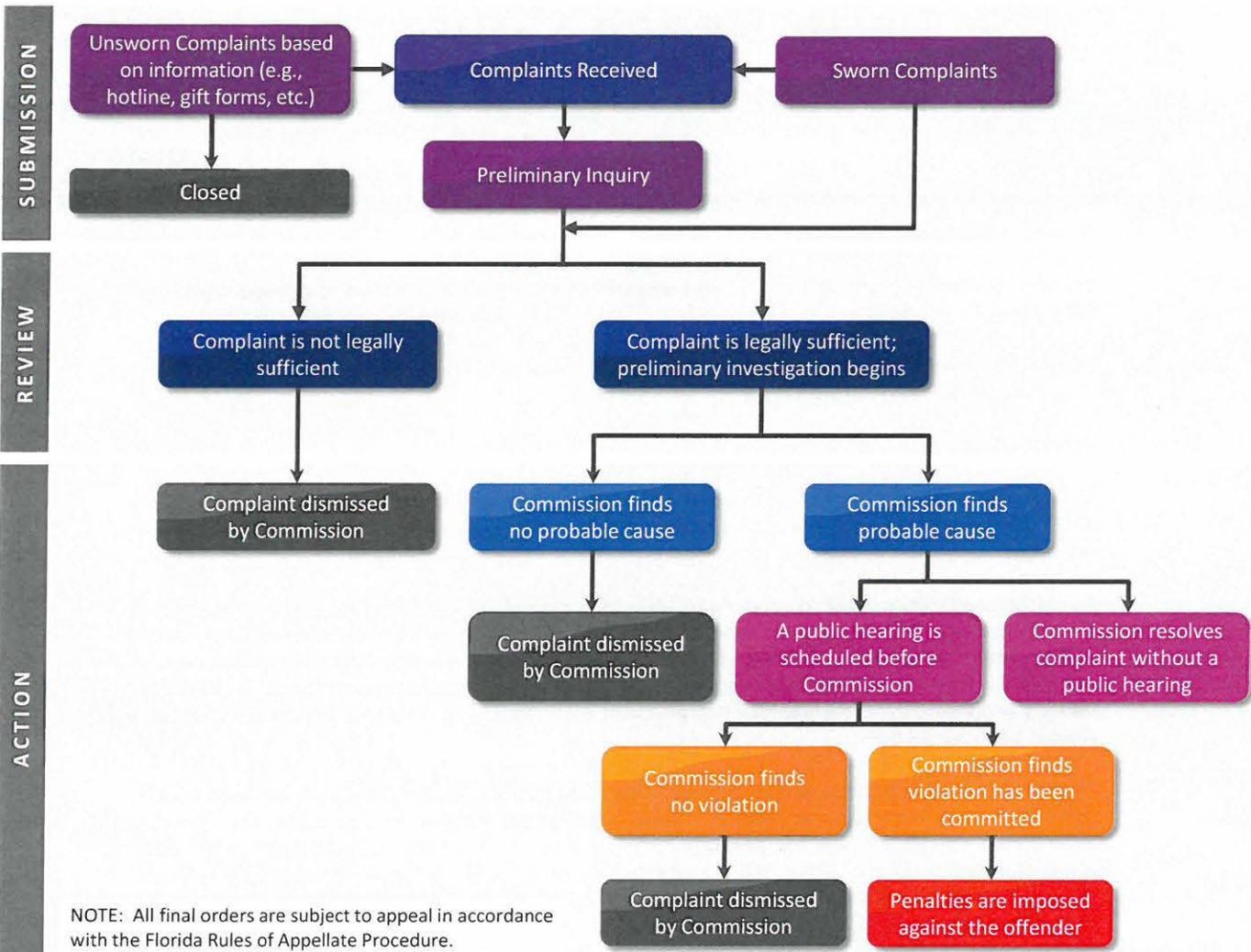
Following an initial inquiry, complaints must meet two important thresholds in order to move forward. First, the commission’s executive director must determine if the complaint is legally sufficient. Legal sufficiency requires that a complaint be in writing on a form prescribed by the commission, allege that a violation occurred that is within the commission’s jurisdiction, and be sworn before a notary public. For legally sufficient complaints, commission staff investigates the allegations, gathers evidence, takes sworn testimony from witnesses, and writes a report of investigation findings. Staff presents to the commission for dismissal all complaints that do not meet legal sufficiency criteria.

Second, the commission must determine whether probable cause exists that a violation has occurred. Following a completed investigation, the commission’s staff counsel or a volunteer advocate prepares a recommendation to the commission for or against a finding of probable cause. If no probable cause is found, the case is dismissed.

If commissioners determine that the violation was unintended or inadvertent, they could dismiss the case with a letter of instruction to the individual. Otherwise, the commission may enter into a negotiated settlement with the violator or order a public hearing.

Exhibit A-1

The Commission's Complaint Process Includes Many Steps from Submission to Final Action



NOTE: All final orders are subject to appeal in accordance with the Florida Rules of Appellate Procedure.

Source: Palm Beach County Commission on Ethics.



Palm Beach County Commission on Ethics

Commissioners
 Robin N. Fiore, Chair
 Patricia L. Archer, Vice Chair
 Daniel T. Galo
 Salesia V. Smith-Gordon
 Michael S. Kridel

Executive Director
 Steven P. Cullen

R. Philip Twogood, Coordinator
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 111 West Madison Street #312
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Sent via email only to: Collins-gomez.kara@oppaga.fl.gov
twogood.philip@oppaga.fl.gov

Re: *Palm Beach County Commission on Ethics Was Created using Several Best Practices; Some Processes Could Be Enhanced, Draft Report*

Dear Mr. Twogood,

The Palm Beach County Commission on Ethics discussed, in public sessions on September 12 and October 3 2013, your request to provide an official response to the captioned report. Kindly accept this as that response.

The background section of the report captures adequately some of the history leading up to the formation of the commission. It is important to note that many dedicated individuals including the electorate, county officials, interested citizens and groups, commissioners and staff are responsible for today's Commission. In creating and helping the Commission evolve, the singular mission of these stakeholders is to provide an ethically and legally sound framework which promotes public trust in government. That task is sometimes difficult and controversial.

The report correctly observes several dynamics that make the commission unique. It has only been in operation for approximately three years. In crafting the ordinances, establishing rules and procedures, hiring an executive director and staff and developing training programs, the founding commissioners and many others literally created the agency "out of whole cloth." There are only a few similar agencies nationwide. When the agency's small size (five volunteer commissioners and a staff of five) and modest budget (\$589,000 in FY 2013) are considered, its accomplishments to date are impressive. In recognition of these efforts, the National Association of Counties conferred its Achievement Award upon Palm Beach County in 2011 for the ethics initiative.

In establishing the Commission and its procedures, as well as amending the Ordinances and Rules, the goal has always been to utilize best practices. The report correctly notes that such best practices include the commissioner selection practices, requiring training, issuing advisory opinions, following an orderly complaint handling process, maintaining confidentiality, having detailed rules regarding probable cause and final hearings, and ensuring due process rights, including an appellate process.

Thank you for recognizing the "number of milestones" the Commission has achieved since its inception. These accomplishments include the establishment of the Commission according to the best practices discussed above. Also, between June 2010 and May 2013:

- 60 formal complaints were processed.
- 250 advisory opinions were issued in 14 different subject areas
- 218 live training sessions were conducted
- Audits of all local governments were conducted to ensure training compliance

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In response to each of the report's findings:

Finding 1: "Commission practices sometimes blur the roles of investigators and the staff counsel."

Response: This finding describes some of the dynamics inherent in a small staff. Specifically, staff counsel may both serve as both as policy and procedure advisor to the commission as well as serve as advocate. Additionally, staff counsel and the lead investigator (also an attorney) may serve as advocates during probable cause hearings and trials. As long as the roles of advocate and legal advisor to the Commission do not overlap in a given case, the First District Court of Appeal has found no legal prohibition against the consolidation of investigative, prosecutorial and adjudicative authority in a single agency. (McAlpin v. Criminal Justice Standards and Training Commission, Case # 1D12-2819, September 13, 2013)

To preserve independence and save costs, a volunteer advocate program has been created and expanded. This program provides for the use of skilled pro bono attorneys prosecuting cases before the Commission. The Commission may also consider the feasibility of utilizing the services of a full or part-time advocate at a future time.

Budgetary constraints likely prohibit the outsourcing of either investigative or prosecutorial functions. It is estimated that doing so would increase the budget by 100-200%. The investigative staff does not make any recommendation as to findings of probable cause. The Commission believes that the current system best balances competing concerns while maintaining fiscal control.

Finding 2: "Commissioners determine both probable cause and the outcome of a final hearing."

Response: The Commission on Ethics Ordinance sections 2-260 (d) and 2-260.1 require commissioners to perform both functions. The standard for determining probable cause is whether there are reasonably trustworthy facts and circumstances for the Commission to believe that a violation has occurred. The standard at a final hearing is proof by clear and convincing evidence. Commissioners, serving in a quasi-judicial capacity, are fully capable of separating these functions and judging the evidence against the (different) legal standards. Circuit judges perform these differing functions frequently. Outsourcing the trial function to DOAH judges may raise legal issues and/or be cost prohibitive.

There is some sentiment in the Commission both for and against supporting changes to the Ordinances and Rules in favor of outsourcing the trial function. This matter was taken under advisement and staff was directed to further study the issues. This matter may be taken up in the future.

Finding 3: "Conflict of interest provisions continue to be a source of concern for commissioners and others."

Response: State law requires commissioners to vote on business before the Commission unless they meet the grounds for recusal (Fla. Stat. §286.012, Palm Beach County Code of Ethics §2-443). Only a significant statutory change, which the commissioners have no control over, would allow them to recuse themselves for other than financial reasons. The current practice is to disclose relationships even where no financial conflict exists. The commission may consider the adoption of rules to define these disclosure practices.

Finding 4: "The commission could benefit from clarifying commissioner disqualification terms and procedures."

Response: The existing disqualification procedure is in line with the general law of judicial recusal. The commissioner against whom a disqualification motion is directed hears the motion. A commissioner faced with a motion to disqualify filed outside of the time restrictions of the Rule would have discretion to hear the motion. A Rule change permitting a motion to be filed at any time may be considered.

Finding 5: "The commission's expanded jurisdiction changes the nature of appointments and could diminish its independence."

Response: The composition of the Commission fits the purpose for which it is intended. Moreover, any change in the way commissioners are appointed would require a recommendation for such change, the work of a drafting committee and approval by the Board of County Commissioners. Any of the other existing appointing entities (including the local bar associations, the CPA Institute and Florida Atlantic University) could easily have members within their ranks subject to the Code of Ethics.

Finding 6: "Vendors and lobbyists are now subject to the county ethics Ordinance but are not required to receive training."

Response: The countywide Lobbyist Registration Ordinance was effective on April 2, 2012. Live training was provided for vendors and lobbyists before the effective date. A video training has been available through our website since the effective date and is currently being revised. Live training presentations continue to be available upon request. Any change to require training for vendors and/or lobbyists and/or principals, or employers of lobbyists would require a recommendation for such change, the work of a drafting committee and approval by the Board of County Commissioners. The costs associated with providing mandatory training, and maintaining oversight of this function, may be prohibitive. It may be possible to increase the awareness of vendors and lobbyists of the availability of existing training. Staff will undertake to make the access to training materials more visible on the new Commission website. The Commission may revisit this issue in the future.

Finding 7: "The commission could benefit from enhanced commissioner training."

Response: Staff has just completed a comprehensive commissioner training video. This, approximately 8-hour, program includes a comprehensive review of all Ordinances, Rules, Procedures, investigative overview, advisory opinions, quasi-judicial functions, best practices during hearings and the Sunshine Law. All commissioners have been provided with a complete copy of all Ordinances, Rules, Policy and Procedure Manuals and the Government in the Sunshine Manual. Yearly updates and retraining are planned.

Finding 8: "The commission could improve its performance accountability system."

Response: Staff has expanded the performance measures contained in the annual budget documents. Additionally, surveys have been placed on the website to collect user data. Website analytics have been implemented to identify patterns of use. Surveys distributed at trainings collect data on the effectiveness of training and to gauge the effects of ethics reforms. These data will be used to develop enhanced strategic plans.

The Commission, staff and all of the stakeholders in Palm Beach County remain fiercely loyal to the ethics movement. We feel that this agency has accomplished much in its short tenure. Our dedication to continue that effort, and support the effectuation of changes to policies and practices when appropriate, is strong. Thank you for your report and this opportunity to respond. We also appreciate very much the professionalism and courtesy of the team through its leader, Kara Collins-Gomez during this process.

Respectfully Submitted,



Steven P. Cullen
Executive Director
Palm Beach County Commission on Ethics

SPC/gal

Copies to: COE Website, COE Staff, COE Commissioners

The Florida Legislature
Office of Program Policy Analysis
and Government Accountability



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Project supervised by Kara Collins-Gomez (850/717-0503)

Project conducted by Mary Alice Nye and Tom Roth

R. Philip Twogood, Coordinator

JLAC Committee Meeting

November 4, 2013

Partial Transcript

Palm Beach County Commission on Ethics – OPPAGA Report 13-10

Chair: Roma Theus.

Mr. Theus: Thank you, sir. My name is Roma Theus and I represent Ms. Victoria McCullough. I presented a lengthy executive summary and numerous exhibits to OPPAGA. I want to furnish to the Committee a copy of the executive report. The underlying documents are all in the possession of OPPAGA. What my executive summary, I believe, demonstrates is that there are serious problems so far as protecting the Constitutional rights of people who appear before the Commission on Ethics. Part of it is structural. Mr. Cullen is correct in his determination that there are different standards of proof at the probable cause level and at the hearing level. Where he is deficient is not recognizing it's the same authority making both decisions. Put in terms that I think all of us understand, it would be like the state attorney of Leon County deciding probable cause and then guilt or innocence. You have the same situation with the Commission of Ethics. The same commissioners decide the issue of probable cause and then the same commissioners then decide culpability or non-culpability. The issues involved are quasi-criminal; they're not just civil because the purpose of a commission on ethics is to punish. You're reprimanding. You're taking action against citizens. You're affecting their reputations. A determination of unethical conduct is a stigmatizing kind of thing. The burden of proof of clear and convincing evidence is for that specific purpose. So, the Constitutional issues are very significant. They must be remedied. The issue of seeking to recuse a commissioner is especially troublesome. As in a courtroom, you can seek to recuse a judge. The judge considers the motion. But, in a court, if the judge denies the motion, you have appellate relief. Before the Commission of Ethics, you don't. Their code of procedure does not allow you to appeal from the denial of a motion to disqualify. That is, recuse a judge. That is problematical from where I stand. And, it's cited in this executive summary which I will make available to you.

There also seemed to be a preoccupation on the part of the Commission in the matter concerning Ms. McCullough which was joined with a matter concerning Mayor Robert Margolis of Wellington for consideration in early 2013. There were repeated references to what commissioners had read in the newspapers; rumors, innuendo, that they had heard and it would appear, reliance on it. Hearings were held on January 10, 2013, and February 7, 2013. At the hearing on January 10, after some preliminary remarks, introduction of the participants, discussion was turned over to, or questioning, to various commissioners. One of the commissioners was Commissioner Galo. He began his comments by stating he was sick and tired of millionaires and billionaires in Wellington, fighting with one another and having their problems brought to the Commission. And, he made repeated references to warring groups or factions of economic interest in Wellington. My client stood up when those remarks began to be made. I motioned to her and said to her "Please, sit down." She made audible remarks to the effect "No one can speak to me like that." The intake manager for the Commission turned to both of us and audibly stated "This is all being tape-recorded." The relevance of that exchange is

going to be shown in just a moment. We went forward and we resolved my client's matter with a letter of instruction. The circumstances she faced were singular. A hotly contested election, multiple law suits being filed. Triple re-counts – two, mechanical or computer, one hand of the election results before the council was seated. The winning council members had to raise funds to represent and defend themselves in lawsuits. Her contributions were to legal defense funds. So, this entire situation was extraordinary. It had never happened before. After her matter was resolved, I decided maybe I should get a copy of the tape recordings that were made. And, I was furnished those tape recordings. The tape recording of January 10 did not contain the reference I've just mentioned to you. And, so, I had to make a decision. That decision was to engage a company out of New Jersey called 'Professional Audio Laboratories.' The principal of it is Mr. Paul Ginsberg. I am going to give you his report. He is a contract employee for the FBI, numerous U.S. Attorneys' offices and the CIA. He is one of the best forensic audio experts in the country. Among other things, he is handling the original 911 tapes from September 11, 2001. He is also handling the matters concerning the 911 tapes from the Newtown massacre. He is an exceptional professional. Mr. Ginsberg came to Florida. He listened to copies of the tapes. He examined the tape recording equipment of the Commission on Ethics. Mr. Ginsberg determined, to a scientific certitude that there was an edit made to the tape recording of January 10. The edit appears at the time when Mr. Galo was making his comments. I have a copy of that full report which I will also make available to this Auditing Committee.

I have discussed the matter of prejudice, bias, but I want to elaborate somewhat. Every citizen, regardless of economic status, is entitled to equal treatment before the law. No one should walk into a courtroom, a hearing room, and be the subject of discrimination because of their economic status. Whether rich, middle class, poor, or otherwise. That happened here. It was patent. At the hearing on February 7, it was detected that one of the commissioners, who is now the chair of the committee, made the comment that if certain funds contributed to a legal defense fund, were returned to Ms. McCullough. The quote was "So McCullough could just go shopping." That is an expression of bias, of prejudice. That does appear on tape. Ms. McCullough had explained her situation fully to the investigators involved, cooperated fully. She had provided a year of bank statements to show that there was no impropriety. And, she had explained that there was no *quid pro quo* whatsoever that related to her matter. There was speculation, guess work on the part of the Commission that Ms. McCullough had opposed a project of real estate development in Wellington called The Equestrian Village Project. She never did. She explicitly explained to the investigator in a taped interview that she never had. The investigator never followed up on that advisement from Ms. McCullough. At a hearing on May 2, that very same investigator admitted that he had confused two projects all together, that Ms. McCullough had not received or been the beneficiary of any *quid pro quo* on any project and he thus, by that admission, put the issue of probable cause for her matter in question. Despite that finding, and I have a copy of that transcript which I'll furnish to the Commission as well, this Committee as well, and which has furnished to OPPAGA already. The Commission has made no apology, made no recognition explicitly to Ms. McCullough. The investigative procedures and techniques are deficient. When Ms. McCullough explained in detail, and actually made a little drawing on a table showing schematically that she had no objection to The Equestrian Village Project and that the investigator was apparently confusing two

matters, he never followed up on it. A simple check with the Village of Wellington would have clarified that issue without question. It simply didn't happen. So, I have concerns about the Commission on Ethics. There are Constitutional issues. There are procedural issues as well. The people of Florida deserve better. My purpose in coming to the Committee today is to make certain to the best extent that I can that this is aired publicly and that no person is ever subjected to what my client experienced on January 10 and February 7 of this year. If you will, I'll produce these items for you that I have. This is the full report of Mr. Ginsberg, Professional Audio Laboratories, Inc., together with charts from his examination equipment showing detection of the editing.

Chair: Mr. Theus, I will make sure that copies are distributed to all members of the Committee. Mr. Vice Chair.

Mr. Theus: And, as a final item, I would like to bring to the Committee's attention that....

Chair: Mr. Theus, if we could have . . . Vice Chair is recognized.

Rep. Ray: Mr. _____, I have a question that I think we need to pose. If what I'm understanding is correct, this would be a public record that has been audited [edited] and that's a deliberate violation of law because it's a public record before a public body that has been deliberately audited [edited] and therefore, there's criminal activity that's gone on. Is that correct?

Chair: If the report findings are true, I believe that would be a felony in the law, yes.

Mr. Theus: That's my understanding assuming that those findings....

Chair: Mr. Theus, if you could please hold until you're recognized. You're recognized.

Mr. Theus: Yes, sir. And, another thing I wanted to bring to the Committee's attention is that there appear to be two modes of enforcement that apply to the Commission on Ethics. There is one mode of enforcement if you're an ordinary citizen, but there appears to be a different standard if you're a member of the Commission on Ethics. One of the commissioners, Ronald Harbison, who is steeped in ethics matters, procedures, so forth, violated the Code of Ethics while sitting as a commissioner. He made a political contribution to a United States senatorial candidate. When that was discovered, he resigned from the Commission on Ethics. But, that was after he had dealt with matters concerning Ms. McCullough, Mayor Margolis and others. There was no self-reporting. When you make a political contribution, it's not something that you forget. It's a conscious, deliberate act. It is also prohibited by the Code of Ethics. Commissioner Harbison resigned. To my knowledge, no action has been taken with respect to him. In fact, he was given an award after he resigned.

Chair: Senator Bradley, you're recognized.

Sen. Bradley: I just...more in the spirit of because it seems like a lot of the purpose of this presentation is to make a public statement on behalf of your client, which is very compelling. And, I understand, obviously, it is something of great concern to her because she hired

competent counsel and took the time to have you come to Tallahassee and lay out all the facts and I appreciate all of that. You just made a statement about somebody I don't know. I don't know any of these folks. I just want to make sure I understand. You said that one of the commissioners, and when you use the term 'commissioner' you're not talking about a Board of County Commissioner, you're talking about a commissioner ...

Mr. Theus: Palm Beach County Commission on Ethics.

Sen. Bradley: Right. That commissioner made a political contribution and that was a violation of what?

Mr. Theus: Of the Palm Beach County Code of Ethics.

Sen. Bradley: Okay. So when you say the Code of Ethics, you're not talking about the State law, you're talking about when an individual is appointed as a commissioner to the Commission on Ethics they at that point forfeit the right to make political contributions?

Mr. Theus: Correct.

Sen. Bradley: And, this individual did make one? Is that your point?

Mr. Theus: Yes, sir.

Sen. Bradley: Okay. Just wanted to make sure I understand.

Mr. Theus: And, secondly, there's another individual who's on the Palm Beach County Commission on Ethics. That individual has received a gift that exceeds the amount set out in the Palm Beach County Code of Ethics from a registered lobbyist for Waste Management, which is a vendor for Palm Beach County. That, too, would appear to be a violation of the Palm Beach County Code of Ethics. To my knowledge and awareness, no action has been taken with respect to that. The purpose of bringing this forward is to state simply this – the Code of Ethics should apply even-handedly to everyone. And, if there's probable cause that should be found it should be found whenever and wherever it exists. Period. I have come to this Committee today on behalf of my client to highlight what happened to her and to try and take those steps to make sure that no citizen in Florida ever has this happen again. I have been a lawyer for 41 years. Never have I been in any proceeding in any state, in any federal court, where I saw the likes of behavior and conduct that I saw before the Palm Beach County Commission on Ethics. Mr. Cullen pointed out that are five members on the Commission. Three of them are lay people. They do not have experience with court proceedings, judicial and jurisprudential concepts and procedures. When you're making decisions that affect the reputations and integrity of your citizens, you're required to comply with the law and with judicial concepts and precepts. There can be no exception. So, I am here speaking about my client, but what happened to her can happen to anyone and the purpose is remedial to make sure it doesn't happen again. That's why I'm here.

Chair: Senator Hays, you're recognized.

Sen. Hays: Thank you, Mr. Chairman. Sir, did, was this Commission established by the Palm Beach County Commission?

Mr. Theus: Yes, sir, it was.

Sen. Hays: And, did you take your complaints to them? And, if so, what reaction did you get from them?

Mr. Theus: I haven't taken it to them yet. I may take it to them. I will also be submitting certain materials to the Palm Beach County State Attorney's office. First and foremost, aware that the audit by the this Committee was taking place, I wanted to bring those matters to the attention of this Committee. I will also bring it to the attention of the Palm Beach County Commission.

Sen. Hays: So, you're not expecting any particular action from us today. Is that correct?

Chair: Senator Hays, the reason I asked Senate President for an OPPAGA review is because I wanted to make sure that we in the Legislature have our facts regarding what they're doing right, what they're doing wrong, how this came to be specifically, as I believe our OPPAGA pointed out during the presentation. There isn't, I mean, even around the country, that we can base off of what is going on in Palm Beach County. I fully plan to look at this legislatively, maybe set some unified standards of how, if a county is going to form an ethics commission, how they should be trained, how they should conduct themselves and what should be in place. I believe because of the significance – it's not just one case, they said there are 60 cases, it's being used, clearly seems to be, as a political football, in campaigns, out to hurt people. And, OPPAGA, correct me if I'm wrong, but if something is filed, they have to hear it, at least probable cause. So, a lot is going on locally in my district, in the county that I represent and I want to make sure that we are doing everything that we can from the State's perspective to make sure that citizens and elected officials are not being subject to things that they shouldn't be subject to. So, the point of the testimony today, I wanted to hear on the record from OPPAGA and from anybody, even from the other side, that's involved of how this unusual procedures are going about in our state.

Mr. Theus: Mr. Chairman, just for the record, what I'm going to be furnishing to you are my executive summary to Ms. Cara Collins-Gomez, Staff Director of OPPAGA, dated July 9, 2013; my letter of June 12, 2013, to Ms. Cara Collins-Gomez attaching exhibits. One of which is the résumé exhibit 3 to that letter of Mr. Paul Ginsberg, the principal of Professional Audio Laboratories, the transcript of the hearing of May 2, 2013, in which the investigator for Ms. McCullough's matter admits that he was confused about the facts that related to her matter and there was no *quid pro quo* possible under any circumstances that related to her matter. Mr. Ginsberg's report, itself, and a gift disclosure form concerning Patricia Archer, a sitting member of the Palm Beach County Commission on Ethics, regarding a gift exceeding the amount permitted by the Palm Beach County Code of Ethics dated September 12, 2012.

Chair: Thank you, sir. Mark Herron.

Mr. Herron: Mr. Chairman, members of the Committee, my name is Mark Herron. I represented Bob Margolis in some proceedings before the Palm Beach County Ethics Commission. I'm not going to dwell on any of the specifics of that proceeding. My purpose in coming here today is to really talk about process and process is one of the things that OPPAGA defined, or identified, in its report as being an issue that needs to be addressed by the Palm Beach County Ethics Commission. This is also an issue that needs to be addressed, I think, with some of these other Ethics Commissions that are around the state and that are popping up and Senator Latvala's going to have a hearing on that this afternoon to a certain degree on these other Ethics Commissions. But, I would just ask you, and I think Senator Hays kind of got the picture of when Mr. Theus was up here making his presentation, but imagine that the same person can file the complaint against you, can determine the legal sufficiency of that complaint, can investigate that complaint, can determine what information they're going to put in their report of investigation, leaving out, perhaps, information they've gathered that is favorable to the accused, or the respondent. That same person or entity can determine probable cause, it can conduct the hearing, it can determine what evidence comes in, it can determine what weight is given to that evidence. It can make a determination as to a violation and impose the penalty. That's a problem. That's a real problem. And, that's the problem that I think OPPAGA was trying address in its report, that issue of this one entity being able to do all those functions. Now, Mr. Cullen says the determination, it's easy for the Commission to make that determination because there's a different standard for probable cause versus the standard for a finding of a violation. Well, that's true. That part's true. The only problem is when you commissioners sitting up at probable cause and they tell you that no matter what you say about this, don't fly it in this Commission because I'm not going to go for it at the hearing is a problem. The other thing that's a problem in this proceeding is that when one has the temerity to suggest that a member has bias. What we found with respect to the Palm Beach County Ethics Commission is they kind of circle the wagons and the other four members who are left, when you file that challenge to a person's membership on the Commission with some problem, those other four members make statements that this person has been unfairly accused and unjustly challenged. Now, why is it important that the process change is the fact that person needs to have the ability to have a fair hearing in front of a neutral fact-finder. The State Ethics Commission does that, the State Elections Commission does that. All the regulatory boards of DBPR, they have probable cause panels. And, by statute, what happens is the members that sit on the probable cause panels can no longer participate in the final adjudication of the case if it comes back before the board. That is a matter of state law. This problem needs to be addressed and it can be addressed, I think, by the Palm Beach County Ethics Commission. I think it can be addressed by state statute, as well. That it's applicable to Palm Beach County, as well as to any other local entity that has this type of set up. And, there's more of them than one might think. It's not just the big counties. In fact, the other day I was working on a project for a client and found out there's a similar process in Longboat Key. So, the City of Longboat Key has a process with their own little Ethics Code that goes before their own little body and they can do that kind of thing.

Finally, and this is a little bit beyond what it is, but one of the things that the OPPAGA report talked about was the lobbyists and the training of the lobbyists. What we find as, in going through this, and I worked on a study over the summer, was that cities,

counties, special districts all have now are developing special, individual, unique codes for lobbying registration, lobbying reporting, as well as the definition of a lobbyist. That's one of the issues in the Palm Beach Code, too. Their definition of a lobbyist is a little different than everybody.... But then again, if you're working in a particular area in the state, let's say around Orange County, you might have to deal with Orange County, Osceola County, the airport authority, the expressway authority, the City of Orlando, the City of Kissimmee. And, all those entities have different reporting requirements and different penalty structures and different ways to deal with things. But, again, back to the OPPAGA report, there is a need for some legislation that separates those functions between the investigative function, which I think the Commission can handle well, but once they find probable cause, there needs to be a mechanism to allow the person accused, if they want to. If they want to, not necessarily mandate it, but if they want to, to request a hearing before a neutral fact-finder so that neutral fact-finder can hear the evidence, weigh the evidence and make the determination based on clear and convincing evidence. I thank you for your time.

Chairs' Discussion:

Following the presentation and testimony, the Chairs discussed possible action to be taken on behalf of the Committee. This action included sending a letter to the Palm Beach County Board of County Commissioners and contacting the Attorney General's Office. Subsequent to the meeting, staff of the Attorney General's Office indicated that the appropriate office to investigate complaints related to alleged violations of law is the local State Attorney's Office.