



Palm Beach County Commission on Ethics

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December 1, 2011

Diana Grub Frieser, City Attorney
City of Boca Raton
201 West Palmetto Park Road
Boca Raton, FL 33432

Re: RQO 11-099
Voting Conflicts/Misuse of Office

Dear Ms. Grub Frieser,

The Palm Beach County Commission on Ethics (COE) considered your request for an advisory opinion and rendered its opinion at a public meeting held on November 30, 2011.

YOU ASKED whether an elected official, whose outside employer is a large national bank or financial institution, is required to abstain in every instance any client or customer of the outside employer appears before her board.

IN SUM, elected officials are prohibited from voting on a matter that would financially benefit themselves, their outside employer, or a customer or client of their employer, in a manner not shared with similarly situated individuals or entities. A customer or client is clearly defined as a person or entity to which the official's business or outside employer has supplied goods or services during the previous 24 months of a value in excess of \$10,000. The prohibition attaches when the official knows of the conflict, *or should know with the exercise of reasonable care*. Knowledge may be direct or constructive. There is no bright line definition of reasonable care. Reasonableness necessarily depends on the facts and circumstances presented.

However, in the absence of a nexus between the employer, customer or client and the matter before the City Council, or other evidence of apparent or direct knowledge by the official of the relationship between the official's outside business or employer and its customer or client, a violation is unlikely.

THE FACTS as we understand them are as follows:

You are the City Attorney for the City of Boca Raton (the City). Recently, the City of Boca Raton issued a Request for Letters of Interest (Request), which asked any individual or entity to submit proposals, suggestions, or comments on how best to improve, use or develop a City property. The Request was broad and did not restrict submissions to vendors, developers, planners but was open to the general public. The City received numerous responses and the City Council is currently reviewing the proposals.

A member of the City Council is an employee of a large national bank with a vast number of customers/clients in the City and around the country. The official is employed in one division and generally has knowledge of matters or clients within her division. Matters may come before the City

Council including proposals from persons or entities who may meet the definition of "customer or client" provided by the Code of Ethics. Moreover, there may be clients who do significant business with the Councilmember's outside employer, but with whom the Councilmember would not be familiar.

As the city attorney, you are concerned about the absence of a specific standard or duty of care required by your elected councilmember in researching and determining who is and is not a customer or client of your employer banking institution.

THE LEGAL BASIS for this opinion is found in the following relevant section of the Palm Beach County 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 special financial benefit, not shared with similarly situated members of the general public, for any of the following persons or entities:

- (1) Himself or herself;
- (4) An outside employer or business of his or hers, or of his or her spouse or domestic partner, or someone who is known to such official or employee to work for such outside employer or business;
- (5) A customer or client of the official or employee's outside employer or business;

Section 2-443(a) prohibits elected officials from using their official position to take or fail to take any action *if they know or should know with the exercise of reasonable care* that the action would result in a special financial benefit not shared with similarly situated members of the general public, for certain entities or persons including themselves, their outside business or employer, or a customer or client of their outside employer or business. A customer or client is defined 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 months, having in the aggregate a value greater than \$10,000.¹

Section 2-443(c) *Disclosure of voting conflicts*, similarly requires a public official to abstain and not participate in any matter coming before his or her board or commission which would result in a *special financial benefit* to the persons or entities listed in the misuse of office section above, while §2-443(b) *Corrupt misuse of official position*, prohibits an official from *corruptly* using his or her office to obtain any benefit for *any* person or entity. *Corruptly* means done with a wrongful intent, inconsistent with the proper performance of an official's public duties.

In prior opinions, this commission addressed the scenario where an official is an owner or employee of a business and knows that a person or entity, who is a customer or client of their employer or firm, will be petitioning their government entity.² In these situations the official or employee knows of the customer client relationship and their question to the commission has been whether they can vote on the matter despite the relationship because the customer or client is similarly situated to the general public.

¹ §2-442

² RQO 11-092 (Elected official may vote on contracts between her government-client and the government she serves, provided that the inter-local agreement is unrelated to the firm's business relationship with the government client). *See also* RQO 11-078 (advisory board member prohibited from voting to financially benefit their spouse's employer); RQO 11-029 (elected official prohibited from voting to financially benefit a non-profit she serves as an officer or director).

Conversely, your request does not involve special financial benefit issues, but asks for guidance on the issue of the standard of care, if any, required of an official who may not have actual knowledge of an existing conflict. The potential for this scenario is magnified when an official is employed by a national or international entity with thousands of employees who provide diverse services to hundreds of thousands of customers.

Under State law, Florida Statute 112.3143(2) governs voting conflicts for public officers.³ Notably, the state statute requires actual knowledge whereas the Palm Beach County Code requires actual or constructive knowledge. Accordingly, where state opinions require actual knowledge on the part of an official, the Palm Beach County Code includes imputed knowledge from the surrounding facts and circumstances.

Additionally, you submitted State Commission on Ethics opinions that find certain customer or client relationships to be too remote to constitute a conflict under state law.⁴ Unlike state law, §2-443(a) and (c) specifically enumerate and define a customer or client of an official's outside business or employer and prohibit official action giving special financial benefit to these entities. State law permits local ethics laws to impose "more stringent standards of conduct and disclosure requirements."⁵

There is no bright line definition of *reasonable care*.⁶ In determining whether or not a conflict exists, the code does not require any particular degree of research or due diligence on the part of a public official. As compared to the gift law, where county officials have easy access to databases enabling them to identify vendors, lobbyists and their principals, there is no public database to access customers or clients of private companies for potential voting conflicts. When examining evidence of constructive knowledge, factors to be considered may include the size of the business as well as the official's position. For example, greater knowledge of significant customers or clients may be imputed to the owner of a small business as opposed to a counter clerk of a multi-national corporation. Likewise, evidence of corporate customers or clients of a particular department within a large corporation with whom an official deals personally is relevant in determining knowledge.

In order to sustain a violation, the COE must find by clear and convincing evidence that a public official or employee committed that violation. Such a finding must be *based upon competent substantial evidence in the record*.⁷ In a case involving the receipt of a gift as a quid pro quo, the Florida Supreme Court analogized the knowledge component of the state's *unauthorized compensation* statute⁸ to criminal theft statutes that similarly hold a person accountable for trafficking in property that *he knows or should know was stolen*.⁹ While constructive knowledge may be proven by circumstances, the act by itself (i.e., accepting a gift) would not be sufficient to prove the offense.

³ "...any state public officer voting in an official capacity upon any measure which would inure to the officer's special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom the officer is retained or to the parent organization or subsidiary of a corporate principal by which the officer is retained..."

⁴ CEO 06-21, CEO 05-17, CEO 94-37

⁵ §112.326, Florida Statutes

⁶ RQO 11-101 (pending COE approval) (This opinion discusses similar issues relating to the standard of care required of officials, however, RQO 11-101 involves financial benefit to a customer or client of an official's relative which is not an enumerated conflict under §2-443(a) or (c)).

⁷ §2-260.1(g)

⁸ §112.313(4) ("No public officer...shall, at any time, accept any...thing of value when such public officer...knows, or, with the exercise of reasonable care, should know, that it was given to influence a vote or other action...")

⁹ *Commission on Ethics v. Barker*, 677 So2d 254 (Fla. 1996) (While constructive knowledge may be sufficient to pass constitutional muster, the court indicated "At the same time, however, we note that proof that something of value was given to a public official who might be in a position to help the donor one day, without more, would not establish a violation of §112.313(4)")

Therefore, to be constitutional, a financial conflict violation may only be sustained if the official had actual or constructive knowledge of the conflict. In cases involving a large national corporation, without a nexus between the official, his outside employer and a client who brings an issue or project before the Council, there are few practical ways to vet all possible transactions and relationships to determine financial benefit. Clearly, if a person or company comes before a governing body, and the official knows them as a customer or client of his or her outside employer, the conflict is apparent. An official proceeds at his or her peril if the lack of knowledge amounts to *willful blindness*, however, if there is no apparent financial nexus, and the circumstances indicate no direct or constructive knowledge on an official's part indicating a special financial benefit to their employer or client, then the likelihood of a violation is greatly diminished, if not eliminated.

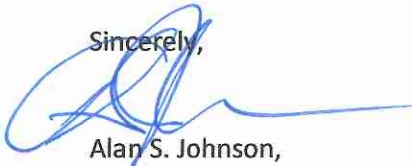
IN SUMMARY, the financial misuse of office and voting conflicts sections of the code prohibit an official from using his or her official position to specially financially benefit his or her outside employer or a person or entity who he or she knows or reasonably should know is a customer or client of his outside employer as defined by the code.

There is no bright line definition of reasonable care. Nor is there a requirement that a particular level of scrutiny be undertaken by public officials regarding the business interests of customers or clients of their employer or business. A determination of whether or not an official or employee knows or should know of a conflict of interest can only be made on a case by case basis, based on the facts and circumstances presented. Circumstantial evidence of knowledge is relevant, however, a violation may ultimately be sustained only by clear and convincing evidence that there was actual or constructive knowledge of the financial conflict.

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

ASJ/mr/gal