



Palm Beach County Commission on Ethics

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April 6, 2012

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

Re: RQO 11-120
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 April 5, 2012.

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. A related request was submitted on November 1, 2011 and an opinion was published as to the reasonable care standard regarding knowledge of a conflict.¹ Subsequently, you submitted additional requests on November 30, 2011 and December 19, 2011 asking whether the term *similarly situated members of the general public* would eliminate the customer or client conflict under these circumstances.²

IN SUM, based on the facts you have submitted, an official who is employed by a large national bank as a "business banker" at a local bank branch and responsible for opening small business/customer accounts, does not automatically have a conflict under §2-443(a) (5) of the Revised Code of Ethics when customers of the bank appear before her due to the fact that the pool (i.e., number of similarly situated persons) of bank customers is sufficiently large to avoid a violation of the Code. The numerosity of the customer pool may be so large that a general customer, without more, is considered a member of the "general public."

However, this rule is not complete protection. A significant customer or client may not be similarly situated to other normal and usual bank customers because of the benefit that may flow to the banker's employer. Similarly, customers or clients who directly conduct business with the employee/official or do business within the official's particular department, store or branch are not similarly situated to the large majority of nationwide customers or clients who have no such nexus to the official.

THE FACTS as we understand them are as follows:

¹ RQO 11-099

² An additional advisory opinion request is being processed regarding the calculation of goods and services in the context of banking fees for service. RQO 11-116

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 threshold definition of *customer or client* provided by the Code of Ethics.³

The councilwoman's outside employer is Citibank, the 3rd largest banking company of the 53 FDIC-insured institutions operating within the County. Nationally, Citibank reported total assets of \$1.3 trillion dollars, 9.5% of the total assets reported by every FDIC-insured institution in the United States. In its 2010 Annual Report, Citibank states that it has 13.1 million retail customers in North America and over 21 million credit card accounts. Citibank has approximately 13 branches in Palm Beach County, 53 in Florida and 1,331 nationally located in 19 states. The councilwoman is a "business banker" at a local branch of Citibank within Boca Raton. She has no supervisory authority and is responsible for opening small business/customer accounts.

As the City attorney, you are requesting an interpretation as to the misuse of public office or employment section of the code, specifically whether or not the size and volume of customers of a national banking institution eliminates a conflict of interest in the context of similarly situated members of the general public.

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

³ §2-442 Definitions. 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 (24) months, having in the aggregate, a value greater than ten thousand dollars (\$10,000).

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 \$10,000.⁴

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, not shared with similarly situated members of the general public, 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 a prior opinion, this commission addressed the issue of voting conflicts involving customers or clients of an elected official's outside employer.⁵ In that instance, the employer was Florida Power and Light (FPL) and the commission determined that normal and usual customer or clients of FPL would be similarly situated and therefore there would be no special financial benefit conflict of interest. The COE stated as follows:

FPL is a publicly regulated utility and maintains an effective monopoly among users of electric power in the Town of Jupiter and throughout the State of Florida. As such, most, if not all persons and entities coming before your council would be similarly situated members of the general public, insofar as their being customers or clients of your outside employer. Therefore, under these circumstances, there is not inherent special financial benefit. Notwithstanding, depending upon the facts, there could be a scenario where a specific customer or client is not similarly situated with other customers of FPL. Additionally, you must take care to avoid using your official position to give a special financial benefit to FPL. In that regard, this commission cannot opine as to speculative factual scenarios.

The question then becomes whether or not the FPL opinion should extend to a national banking institution with a significant customer base, but not a monopoly as was the case with FPL. A number of Florida Commission on Ethics opinions focus "on the size of the group or class of persons to be affected by a measure in determining whether the gain or loss to a public officer within the group would be "special" within the meaning of section 112.3143, unless there are circumstances that are unique to the officer which would distinguish the public officer's gain or loss from that of other members of the group..."⁶ Using this matrix, a number of opinions have found groups of several hundred or more similarly situated individuals who stand to benefit from a measure would be sufficient to eliminate a "special" gain or loss.⁷ While the Florida COE issued its opinions in the context of personal financial benefit to the voting member, the concept is analogous to the issues involving customers or clients of an official. If the similarly situated group of affected persons is large, and the person benefiting is not a unique customer or client, the appearance of conflict is diminished.

There is no bright line as to when a customer or client of a large national entity is unique, and the COE will not opine as to speculative factual scenarios, there are some factors that may assist assessing conflict. For example, a significant customer or client may not be similarly situated to others. Likewise,

⁴ §2-442

⁵ RQO 11-038

⁶ CEO 93-12 (April 22, 1993), CEO 90-71 (October 19, 1990), CEO 91-72 (December 6, 1991), CEO 96-62 (March 16, 1996).

⁷ RQO 10-013 (the COE determined that aviation and airports advisory board members were similarly situated to the approximately 600 airport users and therefore no conflict of interest existed in voting on an airport tax issue)

customers or clients who directly conduct business with the employee/official or are known within the official's particular department, store or branch may not be similarly situated to the large majority of nationwide customers or clients with no nexus to the official.

In this instance, the councilwoman is a business banker at an individual branch of Citibank. Customers or clients of Citibank who deal directly with her or her branch may not be similarly situated to other customers who have no direct or indirect nexus or connection to her. Therefore, personal or branch clients may present a conflict. Normal and regular bank customers with no nexus or personal connection to the councilwoman may not present such a conflict.

IN SUMMARY, under the specific facts presented, where a normal and usual customer or client of a large national bank with over 13 million customers in 19 states appears before a municipal official who works in one local branch of the bank, a conflict may not exist where there is no nexus between the official or the official's branch office and the customer, and the customer is not otherwise unique and therefore not similarly situated with other ordinary and usual customers of the bank.

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/mcr/gal