



OATH OF OFFICE

March 1, 2012 1:15 pm – 1:30 pm
Governmental Center,
301 North Olive Avenue, 6th Floor
Commissioners Chambers

Palm Beach County
Commission on Ethics
2633 Vista Parkway
West Palm Beach, FL 33411
561.233.0724
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Commissioners
Edward Rodgers, Chair
Manuel Farach, Vice Chair
Robin N. Fiore
Ronald E. Harbison
Bruce E. Reinhart

Executive Director
Alan S. Johnson

Staff Counsel
Megan C. Rogers

Executive Assistant
Gina A. Levesque

Senior Investigator
Mark E. Bannon

Senior Investigator
James A. Poag

Administration of the Oath of Office as Commissioners of the Palm Beach County Commission on Ethics by the Honorable Peter M. Evans, Senior County Court Judge of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida

Dan Galo has been appointed by the Palm Beach County Police Chiefs Association

Manny Farach has been re-appointed to a second term by the presidents of the F. Malcolm Cunningham, Sr. Bar Association of Palm Beach County, the Hispanic Bar Association of Palm Beach County and the Palm Beach County Bar Association

The term of office is four years.



Agenda

March 1, 2012 – 1:30 pm
Governmental Center,
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Commissioners Chambers

Executive Session from 1:45pm to 4:00pm Regular Agenda will begin at 4:15pm

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Investigator

James A. Poag

- I. Call to Order
- II. Roll Call
- III. Election of Chair and Vice Chair for new term
- IV. Introductory Remarks
- V. Approval of Minutes from February 2, 2012
- VI. Executive Session
 - a. C11-026
 - b. C11-027
 - c. C11-028
- VII. Presentation of 2011 Annual Report
- VIII. Processed Advisory Opinions (Consent Agenda)
 - a. RQO 12-007
 - b. RQO 12-011
- IX. Items Pulled from Consent Agenda
 - a.
- X. Proposed Advisory Opinions
 - a. RQO 11-118
 - b. RQO 11-121
 - c. RQO 12-008
 - d. RQO 12-009
 - e. RQO 12-010
- XI. Boca Raton Voting Conflicts
 - a. RQO 11-116
 - b. RQO 11-120
- XII. Executive Director Comments
- XIII. Public Comments
- XIV. Adjournment

**OFFICIAL MEETING MINUTES
OF THE
PALM BEACH COUNTY COMMISSION ON ETHICS
PALM BEACH COUNTY, FLORIDA**

FEBRUARY 2, 2012

**WEDNESDAY
1:45 P.M.**

**COMMISSION CHAMBERS
GOVERNMENTAL CENTER**

I. CALL TO ORDER

II. ROLL CALL

MEMBERS:

Judge Edward Rodgers, Chair
Manuel Farach, Esq., Vice Chair
Robin N. Fiore, Ph.D.
Ronald E. Harbison, CPA
Bruce E. Reinhart, Esq. – Arrived later

STAFF:

Mark E. Bannon, Commission on Ethics (COE) Senior Investigator
Alan S. Johnson, Esq., COE Executive Director
Gina A. Levesque, COE Executive Assistant
James A. Poag, COE Investigator
Megan C. Rogers, Esq., COE Staff Counsel

ADMINISTRATIVE STAFF:

Latoya Osborne, Deputy Clerk, Clerk & Comptroller's Office

III. INTRODUCTORY REMARKS

Judge Edward Rodgers requested that all cellphones be silenced. He stated that anyone wishing to speak should submit a public comment card with the agenda item included. All public comments would be limited to three minutes and should be relevant to items on the agenda, he added.

IV. APPROVAL OF MINUTES FROM JANUARY 4, 2011

Commissioner Manuel Farach stated that on page 9 of the January 4, 2011, meeting minutes, the bullet point that read, "Sufficient procedural safeguards were in place as Chief Yanuzzi testified," should include the word, "stated," instead of the word, "testified," since Chief Yanuzzi was not under oath at the time. Judge Rodgers requested that the correction be made.

Commissioner Farach stated that he believed that the February 7, 2012, date included in the last bullet point on page 18 was incorrect.

Commission on Ethics (COE) Executive Director Alan S. Johnson replied that the correct date was February 9, 2012; however, the date was incorrectly stated at the meeting. He added that a motion could not be made to amend the minutes to include the correct date since it was not stated as such.

Judge Rodgers suggested that the committee make a motion to correct the scrivener's error. Commissioner Farach said that the correct date could be included in brackets within the minutes, or that a clerk's note with the correct date could be added.

MOTION to approve the minutes as amended. Motion by Robin Fiore, seconded by Ronald Harbison, and carried 4-0. Bruce Reinhart absent.

RECESS

At 1:50 p.m., the chair declared the meeting recessed for an executive session.

RECONVENE

At 4:02 p.m., the meeting reconvened. At the chair's request for a roll call, Judge Edward Rodgers, Manuel Farach, Robin Fiore, Ronald Harbison, and Bruce Reinhart were present.

V. EXECUTIVE SESSION

V.a. C12-001

Commissioner Farach read the public report and finding of no probable cause as follows:

Complainant, Alan S. Johnson, Executive Director of Commission on Ethics, filed the above-referenced complaint on January 4, 2012, alleging a possible ethics violation involving respondent Kimberly Mitchell, a West Palm Beach City Commissioner.

Count 1 of the complaint alleges that on November 25, 2011, respondent misused her official position by using resources of an on-duty City employee and City telephone equipment to resolve an issue concerning her personal, residential Comcast service, and knew or should have known through the exercise of reasonable care that these resources provide a financial benefit to herself, her spouse, or household members that was not available to the general public.

Count 2 of the complaint further alleges that her acts or omissions were done with wrongful intent and for the purpose of obtaining a benefit in a manner that was inconsistent with the proper performance of her public duties. Count 2 alleges Kimberly Mitchell encouraged the improper use of City personnel and resources in her telephone discussions with the on-duty employee, and in particular by the accolades she expressed to this employee when the repair appointment was changed to an earlier date through the efforts of the employee.

Pursuant to Chapter 8, Article XIII, Section 2-443(a), Misuse of public office of employment, prohibits a public official or employee from using their official position to take any action, or to influence others to take any action, in a manner which he or she knows or should know, will result in a special financial benefit, not shared by members of the general public, for any person or entity listed in Section 2-443(a)(1-7), which includes the official or employee and their spouse, domestic partner, or household member.

V.a. – CONTINUED

Article XIII, Section 2-443(b), Corrupt misuse of official position, prohibits any official or employee from using his or her official position or office, or any property or resource which may be within his or her trust, to corruptly secure or attempt to secure a special privilege, benefit, or exemption for himself, herself, or others. For the purposes of this subsection, “corruptly” means done with a wrongful intent and for the purpose of obtaining, or compensating or receiving compensation for, any benefit resulting from some act or omission of an official or employee which is inconsistent with the proper performance for his or her public duties.

Pursuant to Chapter 2, Article V, Division 8, Section 2-258(a) of the Palm Beach County Code of Ethics, the Commission on Ethics, is empowered to enforce the County code of ethics.

On December 30, 2012, the complaint was determined by staff to be legally sufficient. The matter had been brought to the attention of the Commission on Ethics staff by an anonymous complainant and pursuant to Commission on Ethics Rule of Procedure 4.1.3, a preliminary inquiry was commenced. After obtaining sworn statements from material witnesses and documentary evidence sufficient to warrant a legally sufficient finding a Memorandum of Legal Sufficiency was filed and an investigation commenced pursuant to Article V, Division 8, Section 2-260(d). Information obtained during the inquiry was adopted into the investigation and presented to the Commission on Ethics on February 2, 2012, with a staff recommendation that probable cause exists that a code of ethics violation occurred. Thereafter, the Commission conducted a Probable Cause hearing.

The Commission reviewed and considered the investigative report, documentary submissions, recommendation of staff, written response of the respondent, as well as oral statements of the respondent and of the advocate. At the conclusion of the hearing, the Commission on Ethics determines that no probable cause exists in this matter.

Accordingly, we find that there are insufficient reasonably trustworthy facts and circumstances for the Commission on Ethics to believe that the respondent violated section 2-443(a) or (b) of the Palm Beach County Code of Ethics.

V.a. – CONTINUED

Therefore it is ordered and adjudged that no probable cause exists and the complaint against respondent, Kimberly Mitchell, is hereby dismissed.

Done and ordered by the Palm Beach County Commission on Ethics (COE) in public session on February 2, 2012. Signed: Edward Rodgers, chair.

VI. REVISION TO RULES OF PROCEDURE, SECTION 2

Mr. Johnson requested that this item be tabled to the March 2012 COE meeting.

Commissioner Harbison said that he wanted to comment regarding the public report and finding, but that he would waive those comments until the item was rescheduled.

VII. PROCESSED ADVISORY OPINIONS (CONSENT AGENDA)

VII.a. Request for Advisory Opinions (RQO) 12-005

VII.b. RQO 12-006

MOTION to approve the consent agenda. Motion by Robin Fiore, seconded by Bruce Reinhart, and carried 5-0.

VIII. ITEMS PULLED FROM THE CONSENT AGENDA – None

IX. PROPOSED ADVISORY OPINION

IX.a. RQO 12-001

The COE Staff Counsel Megan C. Rogers, Esq. stated the following:

- City of West Palm Beach (City) Fire Chief Carlos Cabrera submitted the following request for an advisory opinion.
 - In 1997, the City Fire Rescue Department sought new software for tracking Emergency Medical Services reports. After a product search, Code 3 Software (Code 3), a company that was partially owned by Carlos Cabrera, was chosen.

IX.a. – CONTINUED

- Since acquisition, Code 3 had provided software and support to the City.
- The City renewed its licensing contract with Code 3 in 2006; however, the support contract automatically renewed annually.
- In late 2012, the City would transition to County-based software and would no longer receive software or support from Code 3.
- Staff had submitted the following for COE approval:
 - The Code of Ethics (Code) prohibited an employee or his/her outside business from entering into a contract with a public employer, unless one of several exceptions applied.
 - Based on the facts submitted, the employee's outside business was not prohibited from fulfilling the terms of its licensing agreement with the City if it was entered into prior to the Code's effective date. However, all agreements, specifically the software agreement, entered into or renewed after June 1, 2001, were subject to the Code's contractual relationships prohibition. However, an exception to the prohibition existed if an employee's company was the only source of supply within a city, provided that the employee fully disclosed his or her interest in the outside company to the City and the COE.
 - Chief Cabrera disclosed that he was a partial owner, the software creator, and that Code 3 was the sole servicer of the software.
 - An employee was not prohibited from entering into or maintaining a contract with his/her public employer as its sole provider; however, the employee may not use his/her official position to give or influence others to give his/her outside business a special financial benefit.

MOTION to approve the proposed advisory opinion letter RQO 12-001. Motion by Bruce Reinhart, seconded by Manuel Farach, and carried 5-0.

IX.b. RQO 12-002

Ms. Rogers stated the following:

- City Ethics Officer Norm Ostrau asked whether municipal employees may accept scholarship dollars from a local nonprofit organization, Prime Time Palm Beach County (Prime Time), to attend professional certification programs at Palm Beach State College (PBSC).
- Staff had submitted the following for COE approval:
 - Public employees and officials were not prohibited from accepting those scholarship dollars, provided there was no quid pro quo, special treatment, or privilege given to the nonprofit organization in exchange for offering these scholarships.
 - Neither PBSC nor Prime Time was a vendor or City lobbyist.
 - According to the Code, the awarded scholarships were not reportable gifts as long as they were related to an employee's educational training costs.

MOTION to approve the proposed advisory opinion letter RQO 12-002. Motion by Robin Fiore, seconded by Ronald Harbison, and carried 5-0.

IX.c. RQO 12-003

Ms. Rogers stated the following:

- County employee and board liaison Carol Langford asked whether the Code prohibited a County lobbyist from being appointed to a County advisory board, namely, the Commission of Affordable Housing Advisory Board (CAHAB).
- Staff had prepared a supplemental memorandum regarding the nature of the CAHAB, its duties, its role, and the lobbyist's role.

IX.c. – CONTINUED

- By Florida statute, jurisdictions that received State Housing Initiative Partnership (SHIP) funds were required to establish community housing boards or committees. A minimum of 11 members with specific housing-related experience was required to serve on each board or committee. The CAHAB's primary objective was to make program and funding recommendations to the Board of County Commissioners (BCC) for SHIP and private income development trust funds.
- The CAHAB reviewed the bid's compliance; however, it did not determine who would be the project's eventual developer.
- The first potential advisory board member that had been suggested to sit on CAHAB was an executive of the Gold Coast Biller's Association (GCBA), and was a registered County lobbyist. The GCBA members represented the overarching interest of county homebuilders as compared to individual homebuilders who could come before the CAHAB in some capacity.
- The second potential advisory board member was not a registered County lobbyist, but was a registered State lobbyist, and worked for the East Coast Chapter of Associated General Contractors of America. She also generally represented the overarching interest of contractors and developers rather than a specific developer.
- Staff had submitted the following for COE approval:
 - The Code did not prohibit lobbyists from serving on County or municipal advisory boards.
 - An advisory board member was prohibited from using his/her official position to give themselves, his/her outside employer, or a customer or client of his/her outside employer, a special financial benefit not shared with similarly situated members of the general public.
 - Voting on a client's proposal, participating in conversations, or attempting to influence fellow board members or County staff would constitute a misuse of office.

IX.c. – CONTINUED

- The prohibition extended to advisory board members, or someone using the members' official positions on his/her behalf.

Commissioner Robin Fiore stated that she was satisfied with Ms. Rogers' research since she was concerned with a BCC lobbyist sitting on a board that advised the BCC. She said that she had concerns regarding the broad wording of the proposed opinion letter. She suggested verbiage explaining that no problem existed in the current situation since the potential board members represented associations and not particular individuals.

Ms. Rogers suggested and the COE agreed that staff could include the language: based upon these facts and circumstances that are before the commission at this point in time.

Mr. Johnson suggested adding the language, "based on the specific facts and circumstances submitted," after the words, "In summary," and before the words, "the Code of Ethics does not prohibit a registered lobbyist."

Commissioner Reinhart suggested that the proposed opinion letter specifically state the words: this lobbyist. Mr. Johnson replied that the language should be, these lobbyists, since two individuals were discussed.

MOTION to approve proposed advisory opinion RQO 12-003 as amended to include the suggested language. Motion by Robin Fiore, seconded by Ronald Harbison, and carried 5-0.

IX.d. RQO 12-004

Ms. Rogers stated the following:

- A law-firm partner who was part of a County quasi-judicial board asked whether he must abstain and not participate in voting when someone appearing before his board was represented by the nonprofit Legal Aid Society (LAS) where two law-firm partners served as an officer and the other as a board director.

IX.d. – CONTINUED

- Staff had submitted the following for COE approval:
 - The Code’s misuse of office and voting conflicts section was construed in the desire to limit potential misuse of a public duty to treat all citizens and entities on an equal footing where the official had a financial conflict.
 - The Code directly prohibited only those persons, or their spouses or domestic partners, serving as a nonprofit officer or director, from participating and voting on issues that may specifically financially benefit that nonprofit.
 - Under the circumstance submitted, the official was not required to abstain from voting.
 - Legal Aid Society representation by licensed attorneys was pro bono, and did not result in a financial benefit to an individual lawyer or his/her firm. However, if a law-firm associate appeared before the official’s advisory board on behalf of a law firm client, the official must abstain and not participate in the matter.
 - Should a law-firm associate appear before the official’s advisory board on behalf of a pro bono LAS client, and the law firm would not benefit financially, the official was not prohibited from hearing and participating in the matter under the Code; however, the attorney should consult the Florida Bar’s Rules of Professional Conduct (Rules).
- Donated dollars for pro bono hours of LAS representation was not a Code violation.

MOTION to approve proposed advisory opinion letter RQO 12-004. Motion by Bruce Reinhart, seconded by Manuel Farach, and carried 5-0.

Commissioner Fiore suggested that the proposed opinion letter remain consistent when referencing the law firm by uppercasing the word, firm, specifically on page 2, last paragraph.

Mr. Johnson clarified that the word, Firm, was uppercased when referring to the law firm itself, and was lowercased when referring to any qualified firm.

IX.d. – CONTINUED

Referencing page 2, the second paragraph, Ms. Rogers stated that the Code referred to a person(s) who was known to work for the outside employer.

Mr. Johnson clarified that the words, the firm, referenced twice in lowercase, should be revised to read, the Firm, in uppercase.

Ms. Rogers clarified that the letter's reference to Rule 4-6.1(b) of the Florida Rules regarding pro bono services was aspirational, and not a requirement, and that staff would revise the language to reflect the clarification.

Staff agreed to include the changes as discussed.

X. BOCA RATON VOTING CONFLICTS

Mr. Johnson stated that RQO 11-116 and RQO 11-120 were related only by jurisdiction and should be voted on separately. He said that both RQOs were submitted by City of Boca Raton Attorney Diana Grub-Frieser.

X.a. RQO 11-116

Mr. Johnson read the following synopsis as follows:

The City Attorney asked how the \$10,000 threshold value of goods or services provided to a customer or client of an official or employee's outside employer is calculated when the employer is a large national financial institution. Secondly, in the event that an official and employee's outside employer is divided into operational departments and/or divisions, should all goods and services for all departments be included in the calculation of the threshold amount.

Lastly, does the reference in the Code to the "previous 24-month period" suggest that each time a matter comes before a governing body, an official recalculate the aggregate value of goods or services provided to a customer or client of his/her outside business or employer to ascertain whether \$10,000 has been reached.

X.a. – CONTINUED

Mr. Johnson read staff's recommendation in summary as follows:

A customer or client is defined as a person or entity to which an official's outside employer or business has provided at least \$10,000 worth of goods or services during the past 24 months. With respect to a banking institution, \$10,000 means the value of the total goods or services provided –

Mr. Johnson clarified that the term, value, was not based on the receipts, but the actual value of the goods or services provided. He continued:

– to a customer or client over the course of a 24-month period whether in the form of goods, fees, financial services –

Mr. Johnson clarified that the term, financial services, could include mortgage interest costs. He continued:

– if the mortgage is serviced by the bank itself. There is no bright line regarding actual or constructive knowledge of that status of the customer or client –

Mr. Johnson said that the bright line determination in RQO 11-009 had established who a customer or client was, and that a customer or client's status would be actual or constructive knowledge. He continued:

– and that includes the existence and the amount of goods and services provided.

Mr. Johnson said that someone could ascertain that an individual was a customer or client, but would be unable to reasonably ascertain if that individual exceeded the threshold since it was a fact-sensitive determination. He concluded:

Lastly, the existence of a conflict is determined at the time an official is required to act in his or her official capacity.

Commissioner Fiore asked whether staff's recommendation adequately addressed Ms. Grub-Frieser's concerns regarding the calculation of the aggregate value of goods or services. Mr. Johnson replied that although RQO 11-116's synopsis did not address the aggregate concerns, the proposed opinion letter did.

X.a. – CONTINUED

MOTION to approve proposed opinion letter RQO 11-116. Motion by Robin Fiore.

MOTION DIED FOR LACK OF A SECOND.

Commissioner Reinhart stated that his concern was that the letter's language insinuated that the COE would need to evaluate the application of the Code's Section 2-443 based on whether an individual appearing before a governing body or official was similarly situated to all Citibank customers, or that all Citibank customers were similarly situated to the general public. He said that the determination should be based on whether the customer was receiving a special benefit, compared to a wide variety of people versus a small variety of people.

Mr. Johnson replied that:

- Any customer or client appearing before a governing body or official would be receiving a financial benefit.
- The issue was the determination of whether the relationship between the customer or client and the employee eliminated the conflict or the perception of a conflict.
- The COE should discuss RQO 11-120 first, since its approval would help to determine RQO 11-116's language.

X.b. RQO 11-120

Judge Rodgers said that he would allow public comment at this time.

Palm Beach County League of Cities (LOC) Assistant General Counsel Jennifer Ashton, Esq. said that she supported staff's recommendation; however, she said that the COE should be cautious and the language should be broader since no two situations were the same. She said that the Code's misuse of office section did not adequately address situations involving customers or clients of large corporations. She suggested changing the language, are not similarly situated, to, may not be similarly situated; and changing the language, would present a conflict, to, may present a conflict.

X.b. – CONTINUED

Commissioner Fiore said that the COE had been repeatedly asked to include bright lines in its language approval, which was different from Ms. Ashton's suggestion of including broader language. Ms. Ashton replied that she was suggesting cautiousness, since situations could have different circumstances that could change overall determinations.

Commissioner Harbison said that each case would be judged on its particular facts and circumstances. Judge Rodgers stated that the letter included language that a conflict's existence would be determined by the facts at the time that the act was committed.

Ms. Ashton stated that she preferred softer, rather than absolute language. Commissioner Harbison replied that he supported softening the language.

Mr. Johnson stated that Ms. Ashton's suggested revisions on page 4 of RQO 11-120 were as follows:

- The second line in the first and second paragraphs which read, are not similarly situated, would read, may not be similarly situated.
- The next to last line in the second paragraph which read, would present a conflict, would read, may present a conflict.

Commissioner Farach stated that the COE members should not draw a bright line since they did not believe that an automatic Code violation would be present.

Commissioner Reinhart reiterated that the COE members should concern themselves with what special benefit a particular individual would be receiving compared to a large class of similarly situated individuals, rather than the employer of that particular individual.

(CLERK'S NOTE: Time was allowed for the COE members to read the final determination for RQO 11-099 regarding Florida Power and Light customers.)

Commissioner Reinhart stated that he disagreed with the conclusion of the previous RQO, 11-099; however, he said that it was consistent with the staff recommendation for RQO 11-120.

MOTION to approve proposed opinion letter RQO 11-120 as amended to include the changes as discussed. Motion by Ronald Harbison.

X.b. – CONTINUED

Commissioner Fiore suggested adding a sentence to address Commissioner Reinhart's concerns.

Mr. Johnson suggested voting on RQO 11-120 before RQO 11-116 since RQO 11-120's language was embedded in RQO 11-116.

MOTION WITHDRAWN.

Commissioner Reinhart stated that he did not believe that the RQO 11-120's vague language answered Ms. Grub-Frieser's question.

Mr. Johnson stated that:

- Staff fashioned questions based on the general content of the request.
- Staff rarely received requests for advisory opinions that specifically laid out a series of facts.
- Ms. Grub-Frieser requested general guidance on RQO 11-120, and the letter explained that the proper action would depend on each case's specific facts.

Commissioner Farach said that if the question was whether an automatic conflict would arise, the answer would be no; however, since it was a general question, the answer could go either way based on a case's specific facts.

City of West Palm Beach Ethics Officer Norman Ostrau stated that the Code's disclosure voting conflict section did not require knowledge or include the language, similarly situated members of the general public; therefore, the Code's language was flawed.

MOTION to table the discussion on RQOs 11-116 and 11-120. Motion by Manuel Farach.

Commissioner Farach suggested that staff work to shorten both RQO's language to provide guidance to the LOC and the Boca City Commission. He said that he volunteered to work with staff.

MOTION SECONDED by Robin Fiore.

X.b. – CONTINUED

Commissioner Harbison stated that he agreed with Commissioner Farach that the RQO's language should be revised so that more guidance could be given.

Mr. Johnson reminded the COE members that they could not discuss COE matters with one another outside of advertised meeting times. Commissioner Farach clarified that his suggestion was for one commissioner to work with staff to revise the language.

UPON CALL FOR A VOTE, the motion carried 5-0.

XI. EXECUTIVE DIRECTOR COMMENTS

XI.a.

DISCUSSED: Term Limits and Reappointment.

Mr. Johnson stated that Commissioner Farach had been reappointed for an additional four-year term. He said that Commissioner Reinhart had reached the end of his COE term; however, he was unsure who the replacement would be. The Swearing-In ceremony of Commissioner Farach and the new commissioner would take place at the March 2012 meeting, he added.

XI.b.

DISCUSSED: Congratulations and Thanks.

Commissioner Fiore thanked Commissioner Reinhart for his service.

Commissioner Harbison said that he appreciated Commissioner Reinhart's contributions and intellect throughout his term. He congratulated Commissioner Farach on his reappointment.

Commissioner Farach commented that the COE members and staff would miss Commissioner Reinhart.

Commissioner Reinhart said that he was grateful to have met and worked with his fellow COE members and staff. He thanked the staff members for their hard work.

XII. PUBLIC COMMENTS – None

XIII. ADJOURNMENT

At 5:36 p.m., the chair declared the meeting adjourned.

APPROVED:

Chair/Vice Chair

Item VII – Annual Report

Staff Analysis

In conjunction with National Ethics Awareness Month staff has prepared and released its first calendar year annual report (2011). Distribution will be mainly electronic and is available to the public on our website at www.palmbeachcountyethics.com. A synopsis presentation of the report is attached and staff will make a brief presentation to the COE including budgetary, advisory opinion, community and government outreach and complaint processing activities undertaken during the past calendar year.



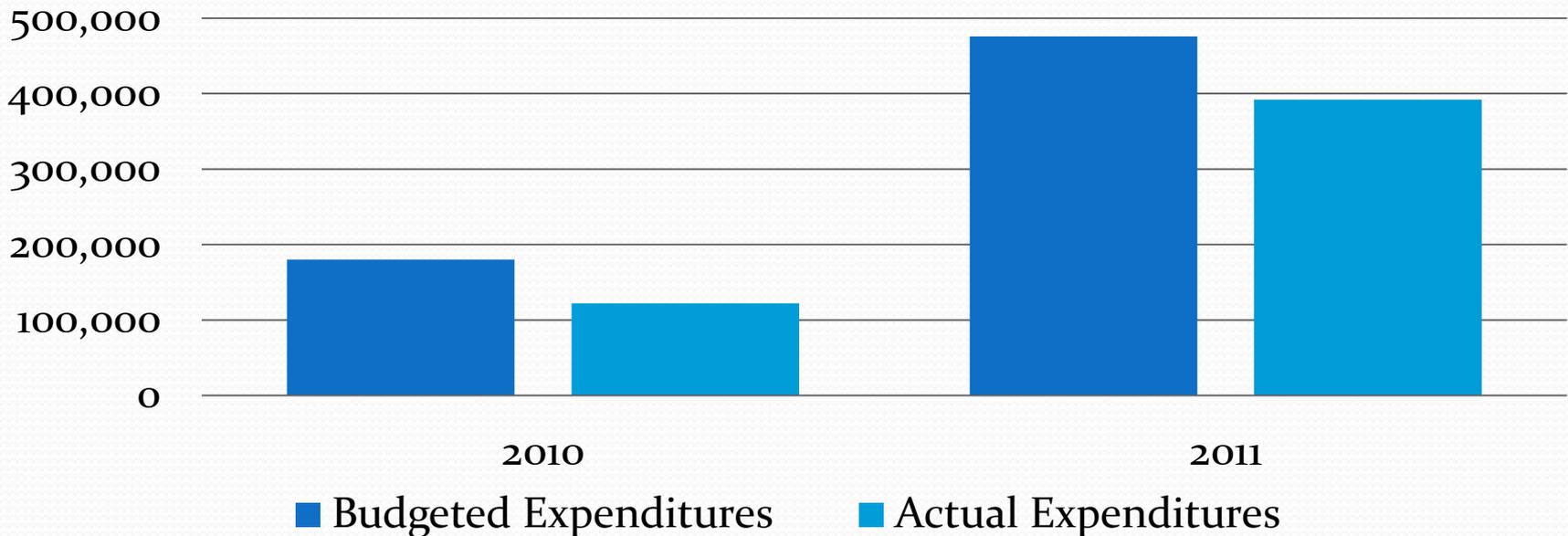
2011 Annual Report

Palm Beach County Commission on Ethics

Alan S. Johnson
Executive Director

Fiscal Report

Commission on Ethics General Revenue Fund Expenditures



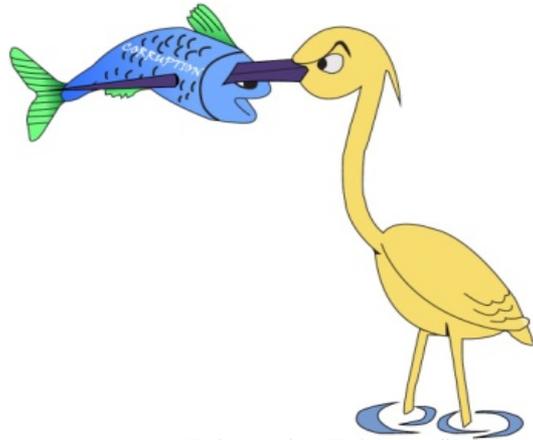
In 2010, the COE expended 62% of budgeted expenditures. In fiscal year 2011, the COE expended 82% of budgeted expenditures, a savings of 3% over projected savings. As of February 1, 2012 the COE has spent 16.47% of its budget, putting the department on track to spend approximately 66 % of its 2012 budget.

Education

- **92** in-person trainings with county and municipal employees, officials and advisory board members
- **150** DVD's to County and municipal departments
- **35** presentations to community organizations including:
 - Rotary Clubs of Boca Raton, Palm Beach and Palm Beach Gardens
 - Leadership Palm Beach County
 - Tri-Rail Commission Forum
 - Wilkes Honors College, FAU
 - Florida Institute of Certified Professional Accountants
 - Palm Beach County Bar Association
 - Lake Worth, Delray Beach, and Pahokee Chambers of Commerce

Education

- Ethics Awareness Day
 - Inaugural event: *Building Ethics*
 - November 18, 2011
- Interactive Ethics Quiz
 - Available at www.palmbeachcountyethics.com/ethics_quiz.htm



“Edgar the Ethigret”
Created by Ryan Watstein
Palm Beach State College-Graphic Design

Question 1

The Parks and Recreation Department is going to plant new trees in a local park. Dave, the procurement officer for the department, has a nephew with a landscaping business that can supply the trees. However, Dave's nephew is offering the trees at a slightly higher price than his competitors. What should Dave do?

- 1) Buy the lowest priced trees.
- 2) Buy the trees from his nephew because he could use the business.
- 3) Ask his nephew to lower the price so he could buy the trees from him.
- 4) Not participate in this procurement.

That is Correct!

Question 1 of 15

clear x back < submit >

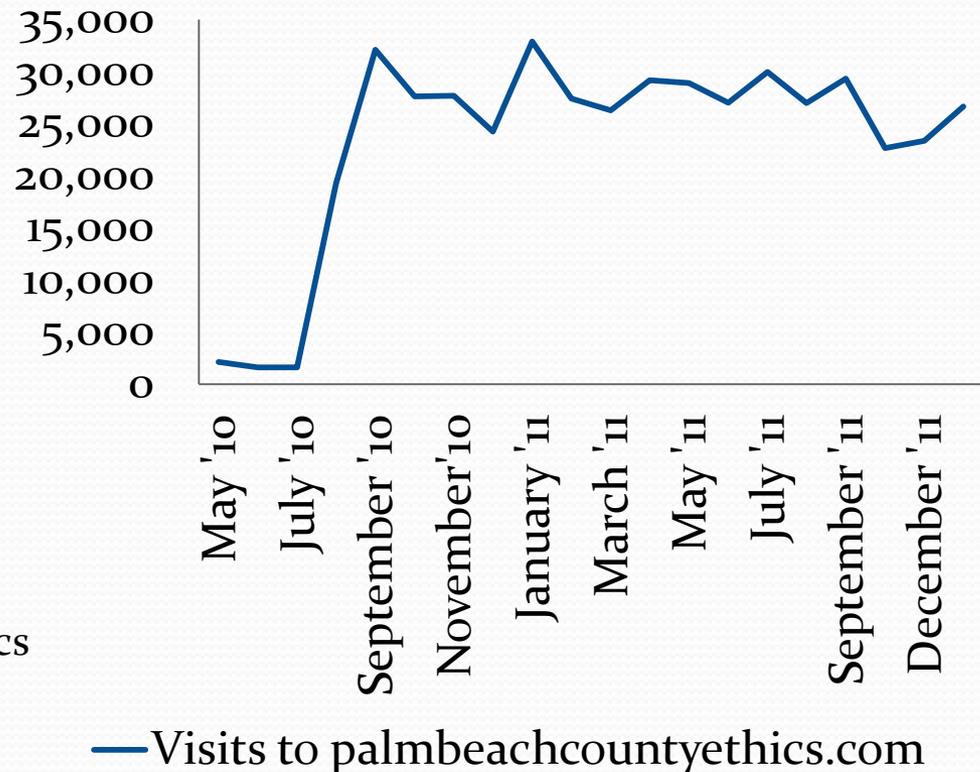
- Internship Program
 - Palm Beach State College
 - Palm Beach Atlantic University

Legislative Activities and Initiatives

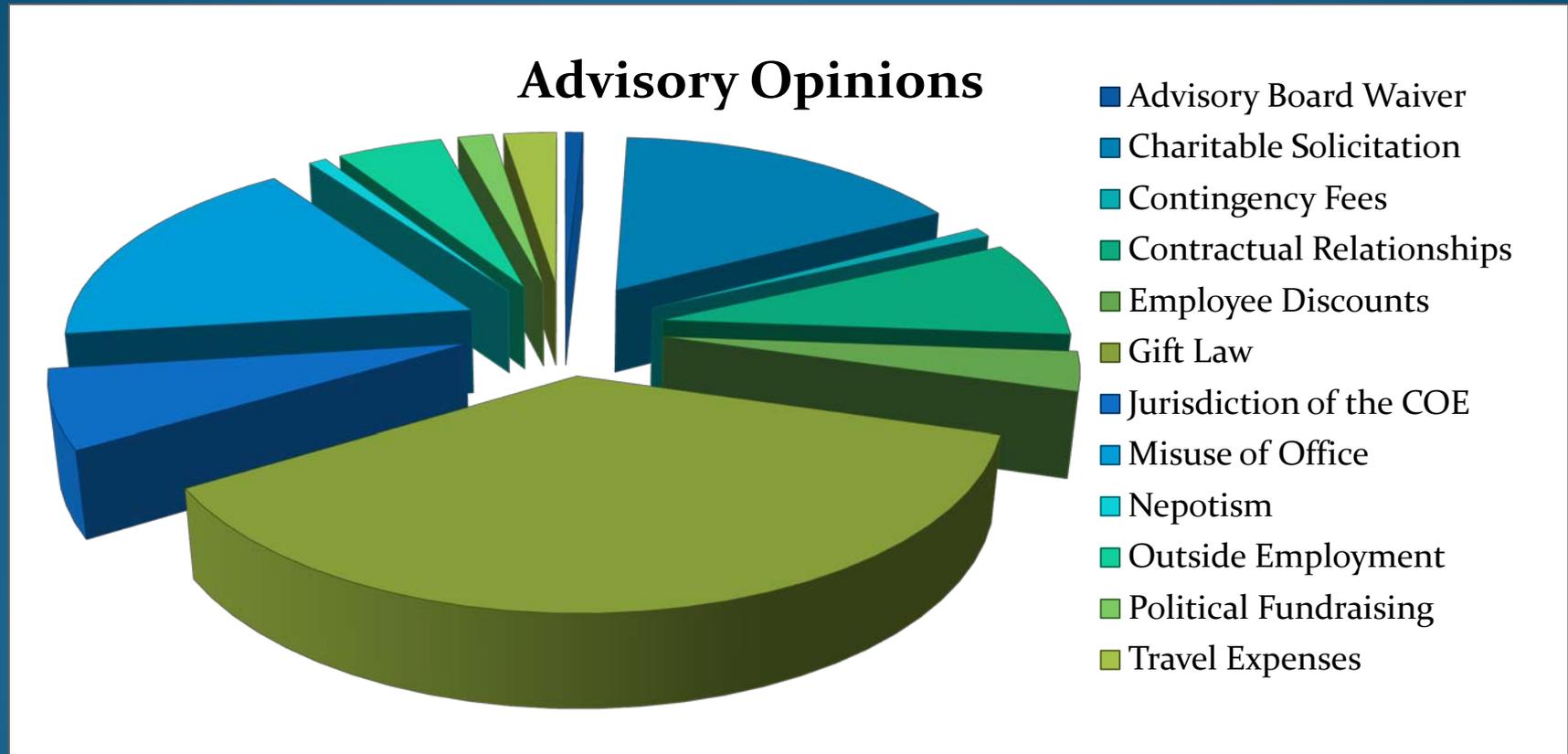
- Revised Code of Ethics and Commission on Ethics Ordinances
 - The Commission was actively involved in reviewing and revising the Commission on Ethics and Code of Ethics Ordinances to include municipal governments.
 - Effective June 1, 2011
- County-wide Lobbyist Registration Ordinance
 - Commission staff has worked with the Palm Beach County League of Cities and County administration to establish a county-wide lobbyist registration ordinance and streamline the lobbyist registration process.
 - Effective April 2, 2012

COE At Your Fingertips: *PalmBeachCountyEthics.com*

- Multimedia
 - Channel 20 programming
 - Interactive Quiz
- Training
 - Streaming videos for employees, advisory board members and officials
- Searchable Database of Opinions
- Lobbyist and Vendor Databases
- Building Ethics
 - Gateway to information on local ethics movements around the country
- Request an opinion or file a complaint
 - ethics@palmbeachcountyethics.com



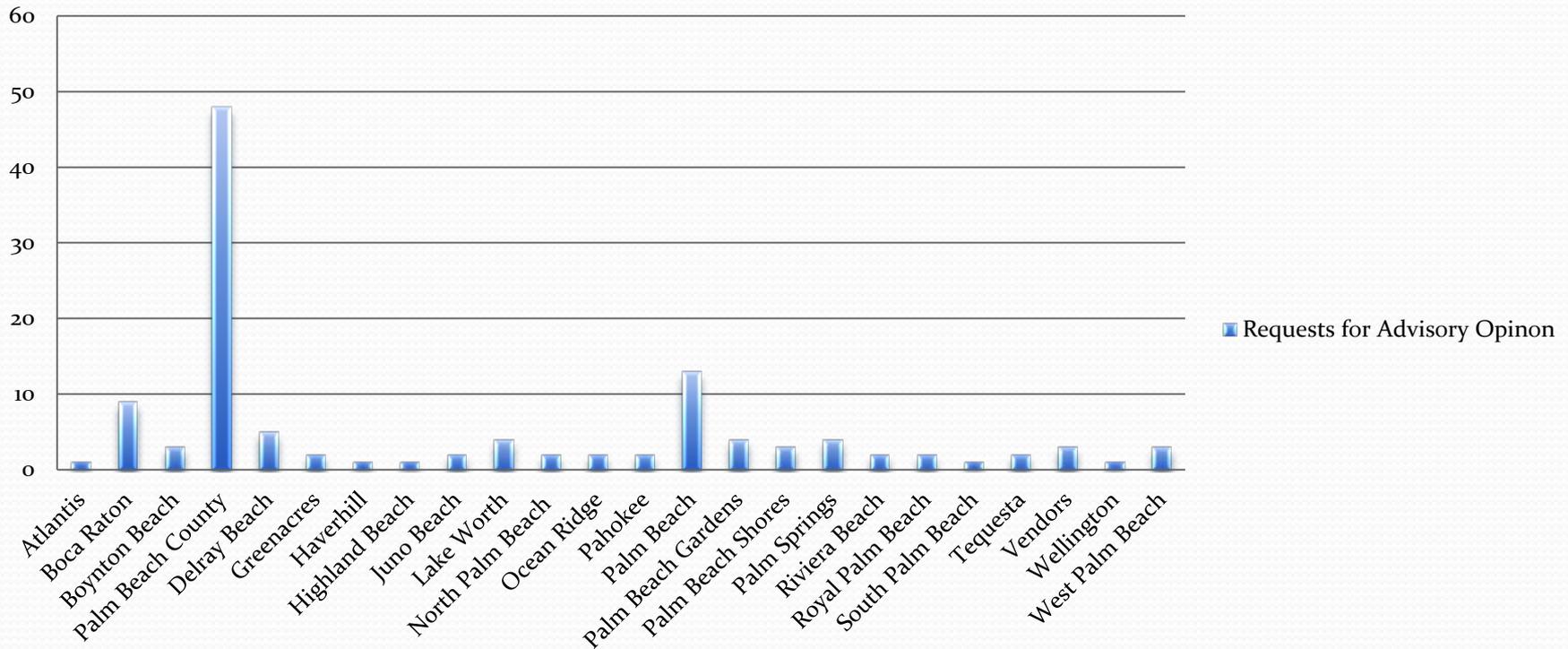
Advisory Opinions: Ask First, Act Later



In 2011, the COE issued 123 advisory opinions. Copies of every advisory opinion issued since the Commission's establishment are available in PDF format at www.palmbeachcountyethics.com/opinions.htm

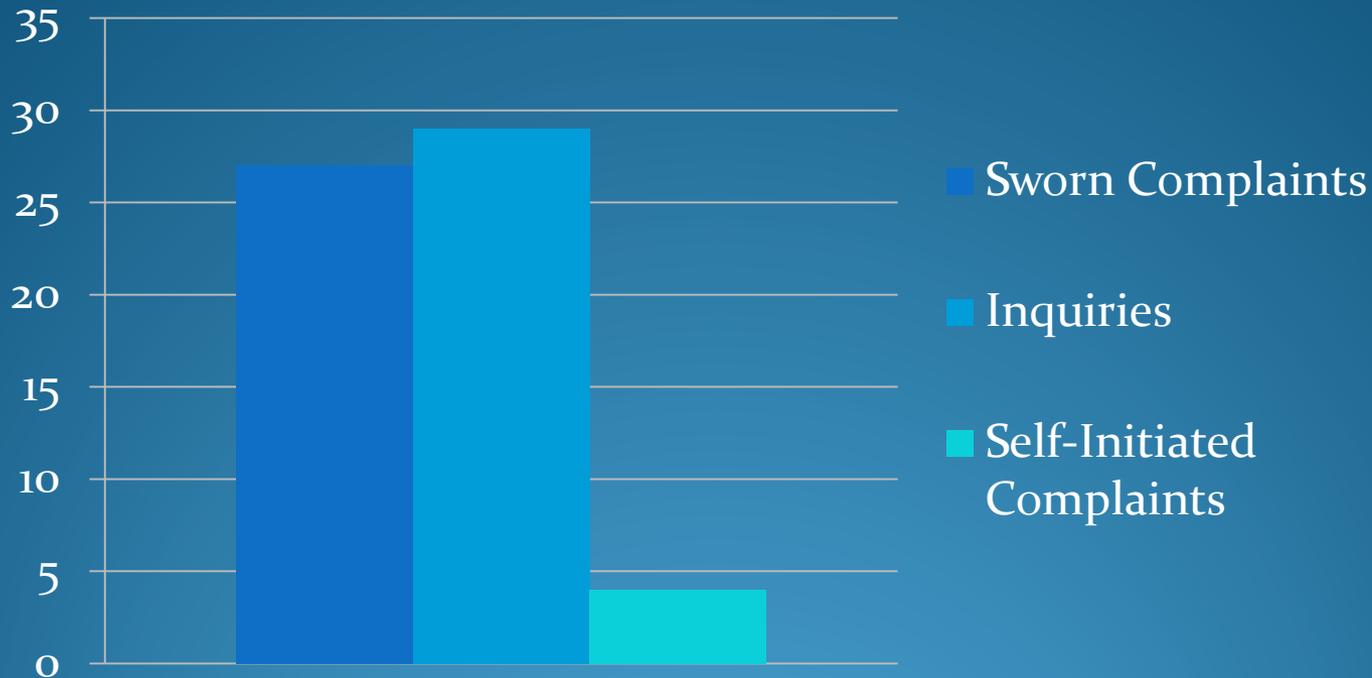
Advisory Opinions

Breakdown of Requests for Advisory Opinion by Entity



In June, 2011 the jurisdiction of the COE expanded by referendum to all 38 municipalities within Palm Beach County, doubling the number of public employees and volunteer officials within the Commission’s jurisdiction as reflected in the breakdown of requests for advisory opinion by entity.

Complaints and Investigations

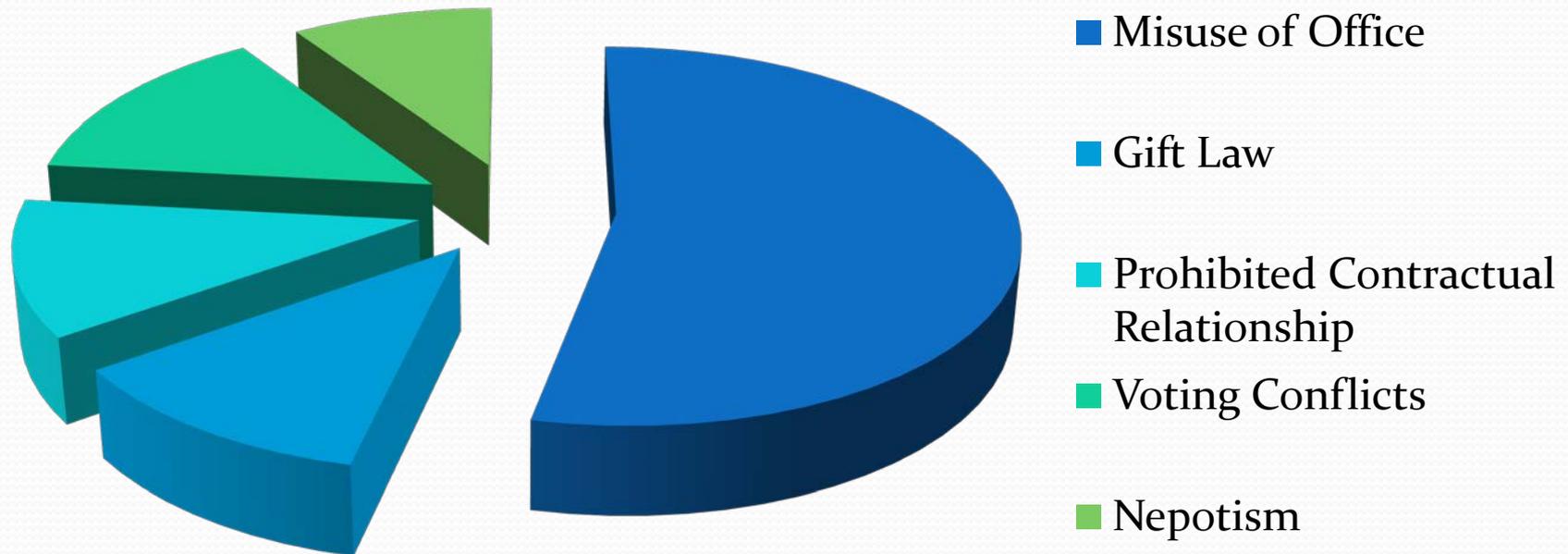


- In 2011, the COE received 27 sworn complaints, 29 anonymous complaints and self-initiated 4 complaints.

- 20 sworn complaints were dismissed for lack of legal sufficiency, 2 cases are pending and 6 complaints were found to be legally sufficient.

Summary of Complaints Filed

January 1, 2011 through December 31, 2011



•Of the 6 cases found to be legally sufficient, 3 were dismissed at probable cause hearings. The COE found probable cause in 2 cases which resulted in settlement agreements.



Town of
Cloud Lake



Village of Wellington

ITEM VIII – PROCESSED ADVISORY OPINIONS

RQO 12-007 Todd Blake (MEB)

A county fire rescue employee asked whether unsolicited gift cards given by a homeowners association to Palm Beach Fire Rescue (PBFR) employees at a specific PBFR station serving the residents in that area, used by station personnel to purchase food items for preparing meals for on duty employees at the station, is either prohibited or reportable as a gift by the Gift Law portion of the PBC Code of Ethics.

Staff submits the following for COE approval: the Code of Ethics does not prohibit the distribution of unsolicited gift cards donated by residents of a homeowners association as a holiday gift to a particular PBFR station for the collective use by its employees, where the gifts are not from vendors or lobbyists of their government employer, and are not in exchange for the past, present or future performance of an official act or legal duty or otherwise constitute a quid pro quo for an official action.

If the individual value of the gift per employee (total value divided by the number of employees) exceeds \$100, the gift must be reported by each individual employee pursuant to the requirements of the code of ethics.



Palm Beach County Commission on Ethics

Commissioners

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

Executive Director

Alan S. Johnson

February 21, 2012

Todd Blake, Battalion Chief
Palm Beach Fire Rescue
15450 Jog Road
Delray Beach, FL 33446

Re: RQO 12-007
Gift Law/Holiday Gifts

Dear Chief Blake,

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

YOU ASKED whether unsolicited gift cards given by a homeowners association to the Palm Beach Fire Rescue (PBFR) employees at a specific PBFR station serving the residents in that area, which are then used by station personnel to purchase food items for preparing meals for on duty employees at the station, is either prohibited or reportable as a gift by the Gift Law portion of the PBC Code of Ethics. Additional information was obtained during telephone discussions between you and COE staff.

IN SUM, the Code of Ethics does not prohibit the distribution of unsolicited gift cards donated by residents of a homeowners association as a holiday gift to a particular PBFR station for the collective use by its employees, where the gifts are not from vendors or lobbyists of their government employer, and are not in exchange for the past, present or future performance of an official act or legal duty or otherwise constitute a quid pro quo for an official action.

If the individual value of the gift per employee (total value divided by the number of employees) exceeds \$100, the gift must be reported by each individual employee pursuant to the requirements of the code of ethics.

THE FACTS as we understand them are as follows:

You are the Battalion Chief for Palm Beach Fire Rescue (PBFR) and supervise fire rescue units in unincorporated Delray Beach. One of the PBFR stations for which you have command authority, PBFR Station #45, provides emergency fire fighting and rescue services for an area that includes homeowners and residents living in the Highpoint of Delray West development (Highpoint). The Highpoint Homeowners Association (the Association) is neither a vendor nor lobbyist of the county. The Association, on behalf of the residents of Highpoint, decided to send Publix gift cards totaling \$225 in value to Station #45 last December as a general holiday gift for Station employees. There was no solicitation by PBFR employees made to the Association for these gift cards, and the gift cards were sent

as a holiday gift for the purpose of showing general appreciation for the station employee's overall service to this community.

Ultimately, the gift cards were used to purchase food from Publix to be used in preparing meals for on duty station personnel. In accordance with county policy, PBFR emergency personnel generally consume their on duty meals at their assigned station, unless out on a call for service. There are twenty-four (24) employees assigned to Station #45, each working one of three (3) shifts that provide twenty-four hour emergency service coverage for the local community. The gift cards were split between the three shifts to use for purchasing food items. As the Battalion Chief you were unsure as to the requirements of gift disclosure under the PBC Code of Ethics, so you personally filed a Gift Form listing the \$225 gift cards, but listed "Station 45" as the actual recipient of the gift cards.

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

Section 2-444(a)(1) of the Code of Ethics, prohibits PBFR employees from accepting, directly or indirectly, gifts valued at more than \$100, annually in the aggregate, from any county vendor or lobbyist.

Section 2-444(a)(2) prohibits county vendors and lobbyists, or employers or principals of lobbyists from giving these prohibited gifts to persons they know are county employees, including PBFR personnel.

Section 2-444(e) prohibits *any* person or entity from offering, giving or agreeing to give a gift of any value to any county or municipal official or employee, as well as prohibiting any official or employee from accepting or agreeing to accept a gift of any value, because of the performance or non-performance of an official act or legal duty. (Emphasis added)

Section 2-444(f), Gift reports, requires any official or employee who *receives a gift in excess of one hundred dollars (\$100)* to report that gift in accordance with the disclosure requirements of the Code.

And finally, Section 2-444(g), defines a gift as, "the transfer of *anything of economic value*, whether in the form of money, service, loan, travel, entertainment, hospitality, item or promise, or in any other form, *without adequate and lawful consideration*. (Emphasis added)

The issue of accepting holiday gifts has been addressed in previous advisory opinions.¹ Unsolicited gifts that are not given for the performance of a specific public action or legal duty, but rather as a general expression of appreciation are generally not prohibited by the code, unless the gift is solicited from a vendor or lobbyist or the value exceeds \$100 and is given by a lobbyist or vendor of their public employer. If the gift is solicited, great care must be taken to ensure that no vendor or lobbyist is solicited.²

If the individual value of the disbursed gifts exceeds \$100 they must be reported in a manner as required by the code, however, because the gift was for the benefit of the entire station, the amount of

¹ RQO 11-103, RQO 11-110, RQO 11-111

² RQO 11-110

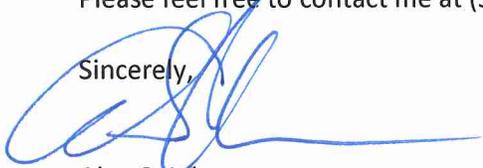
the benefit is divided among those who received a benefit. Under the circumstances you identified, the \$225 value would be equally divided among the twenty-four shift personnel, for an individual value of approximately \$9.38 per employee; therefore, the individual gifts are not reportable under the code.

IN SUMMARY, providing that the unsolicited gift cards given to PBFR Station #45 are not based on any official act or legal duty or other quid pro quo arrangement, the Code of Ethics does not prohibit residents of the Association from donating Publix gift cards for the general use of employees of PBFR Station #45 as a holiday gift. Because the individual value of the gifts does not exceed \$100, no gift report is required.

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/meb/gal



Palm Beach County Commission on Ethics

Commissioners

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

Executive Director

Alan S. Johnson

February 23, 2012

Mr. Brian H. Berke
100 Australian Ave., Suite 200
West Palm Beach, FL 33406

Re: RQO 12-011
Accepting Travel and Related Expenses

Dear Mr. Berke,

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

YOU ASKED in your email of February 17, 2012, whether you are permitted to attend a professional development conference and receive travel and related expense reimbursement from a vendor of Palm Beach County. Your attendance is for educational purposes and will be in your official capacity.

IN SUM, you are not prohibited from attending a professional development conference in your official capacity. In order to be reimbursed for travel expenses by a vendor of the county, you or any county employee-recipient of the travel grant dollars will need to obtain a waiver from the Board of County Commissioners. Other than travel expenses, you may not accept a gift in excess of \$100 from a vendor, lobbyist, principal or employer of a lobbyist who sells, leases to, or lobbies your government employer, Palm Beach County.

THE FACTS as we understand them are as follows:

You are a Manager of Employee Safety and Loss Control for Palm Beach County. You, and several members of your staff, are members of the American Society of Safety Engineers (ASSE), and your memberships are paid for by the County. ASSE is a vendor of Palm Beach County. In order to increase member participation in meetings, the local chapter of the ASSE is offering a \$1,550 stipend for a current member to attend the ASSE's national professional development conference in Denver, Colorado, June 3-6th. In order for a member to be eligible for this stipend, they must participate in at least three Gold Coast Chapter Meetings between October 2011 and May 2012. The recipient will be chosen by a random drawing from a list of all interested, qualified members during the chapter's May meeting and the recipient must accept or decline the grant offer within one week. In order to receive the stipend, the recipient must provide the chapter with evidence of participation in the conference and submit a copy of all travel receipts for reimbursement.

THE LEGAL BASIS for this opinion may be found in the travel reimbursement section of the Code of Ethics:

Section 2-443(f) Accepting travel expenses.

No official or employee shall accept, directly or indirectly, any travel expenses including, but not limited to, transportation, lodging, meals, registration fees and incidentals from any county or municipal contractor, vendor, service provider, bidder or proposer as applicable. The board of county commissioners may waive the requirements of this subsection by a majority vote of the board...

In order to be reimbursed by the ASSE, a vendor of the County, you or any county employee accepting the stipend will need to obtain a waiver from a majority of the BCC. The waiver process will serve to make the transaction transparent. In addition, if your attendance is in your official capacity and for educational or governmental purposes, reimbursement in excess of \$100 is not considered a gift as defined by §2-444(g) of the gift law and therefore does not need to be reported.¹

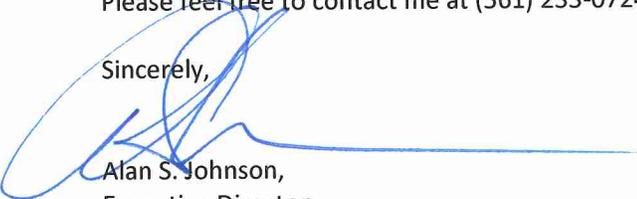
In addition, while attending the seminar, you may not accept a gift in excess of \$100, other than waived travel reimbursement as described above, from a vendor, lobbyist, principal or employer of a lobbyist who lobbies, sells or leases to the County.² Lastly, you may not accept anything of value in exchange for the past, present or future *official action taken or legal duty performed*.³

IN SUMMARY, based upon the facts and circumstances you have submitted, you are not prohibited from attending the ASSE's annual professional development conference, and receiving reimbursement from a County vendor for travel expenses, provided you obtain a waiver from the BCC. You are prohibited from accepting anything of a value in excess of \$100, annually in the aggregate, other than travel related expenses, from a vendor, lobbyist, principal or employer of a lobbyist of the County. If you receive something valued in excess of \$100 from a non-vendor/lobbyist of the County, such a gift is not prohibited; however, it is reportable.

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

¹ §2-444(g)(1)h. Registration fees and other related costs associated with educational or governmental conferences or seminars and travel expenses either properly waived or inapplicable pursuant to section 2-443(f), provided that the attendance is for governmental purposes, and attendance is related to their duties and responsibilities as an official or employee of the county or municipality

² RQO 11-047, 2-444(a)(1)

³ §2-444(e)

ITEM X – PROPOSED ADVISORY OPINIONS

RQO 11-118 Leonard Berger (ASJ)

A County Attorney asked whether the contingent fee prohibition, as contained in the Palm Beach County Code of Ethics, applies, in bond underwriting matters, to investment or financial advisors, underwriters, investment banks, credit enhancers, sureties, bond, underwriter or issuer's counsel, bank or disclosure counsel, title insurers or ratings agencies, where the normal and customary compensation for these services are contingent upon an action or decision of government.

Staff submits the following for COE approval: When acting in the normal course of their profession, financial services professionals involved in the public issuance of bonds are not prohibited from contractual arrangements or compensation contingent upon the closing of the subject transaction. This arrangement is ordinary and customary in the bond underwriting industry. Bond underwriting professionals are regulated by State and Federal law and compensation paid under this sort of contract comes from the monies financed.

RQO 11-121 Norman Ostrau (ASJ)

A City Ethics Officer asked whether procedures in place regarding solicitation of vendor donations for a City of West Palm Beach sponsored 4th of July event which includes a "VIP tent" area not open to the public are in compliance with the revised code of ethics

Staff submits the following for COE approval: based upon the facts and circumstances submitted, the solicitation by public employees of vendor contributions to a City sponsored event is not prohibited by the code if the contributions are solicited or accepted on behalf of the City for use solely by the City for a public purpose. Donations such as these are excluded from the definition of gift. However, the solicitation of donations from City vendors by City employees in order to provide City employees and officials and their invited guests a VIP area not open or available to the public is prohibited by the Code of Ethics.

RQO 12-008 Rebecca Caldwell (ASJ)

A County employee asked whether she could accept two tickets, with a face value of \$125 each, to a banquet given by a non-profit trade organization that lobbies the Palm Beach County government where she would receive a plaque honoring her work in creating a county-wide "universal building permit application."

Staff submits the following for COE approval: county and municipal employees are not prohibited from accepting an award for civic or professional achievement. The code prohibits employees from accepting a gift with a value, in the annual aggregate, of more than \$100 from a lobbyist or principal of a lobbyist who lobbies the employee's government entity. Therefore should the value of the tickets to the event exceed \$100, the employee must return the difference to the organization.

RQO 12-009 Anthony Strianese (MCR)

A municipal police chief asked whether Police Department employees could attend a non-profit organization sponsored employee awards dinner and if so what is required of the non-profit sponsor and of his employees.

Staff submits the following for COE approval: public employees, or any person or entity on their behalf, are prohibited from soliciting a gift of any value from a vendor, lobbyist, principal or employer or a lobbyist who sells, leases or lobbies their public employer, if the solicitation is for their own personal benefit, the benefit of their relatives or household members or the benefit of another employee.

This prohibition does not extend to soliciting or accepting donations from persons and entities who are not vendors, lobbyists, or principals or employees who sell lease or lobby their public employer, as long as there is no quid pro quo or other benefit given for the past, present or future performance an official act or legal duty.

Gifts in excess of \$100 are to be reported on an employee's annual Palm Beach County gift reporting form, unless one of several exceptions apply. The definition of "gift", specifically excludes awards for professional or civic achievement and accordingly do not have to be reported.

RQO 12-010 Nanci Simonson (MEB)

A municipal vendor asked whether her employer, Branch Banking & Trust Company (BB&T), may offer banking benefits, including fee waivers, and other discounted services to employees of municipalities who are BB&T customers and/or what effect offering these same benefits to all county or municipal employees, regardless of whether their government employer is a BB&T customer would have on BB&T's ability to offer public employee discounts.

Staff submits the following for COE approval: as a vendor of certain municipalities, BB&T is prohibited under the PBC Code of Ethics from offering a personal benefit to officials and employees of municipalities, if the value of the benefit is greater than \$100 annually in the aggregate for the individual employee or official, or if any benefit is offered as a quid pro quo for an official public action or the past, present or future performance of any legal duty. However, a similar offer *to all local governmental employees, regardless of whether their public employer is a banking customer of BB&T*, would not be prohibited by the gift law under the exception for publicly advertised offers made available to the general public.

March 2, 2012

Leonard Berger, Senior Assistant County Attorney
Palm Beach County Governmental Center
301 North Olive Avenue
West Palm Beach, FL 33401

Re: RQO 11-118
Contingency Fees

Dear Mr. Berger:

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 March 1, 2012.

YOU ASKED in your email dated December 14, 2011 whether the contingent fee prohibition, as contained in the Palm Beach County Code of Ethics, applies to investment or financial advisors, underwriters, investment banks, credit enhancers, sureties, bond, underwriter or issuer's counsel, bank or disclosure counsel, title insurers or ratings agencies, where the normal and customary compensation for these services are contingent upon an action or decision of government.

IN SUM, when acting in the normal course of their profession, financial services professionals involved in the public issuance of bonds are not prohibited from contractual arrangements or compensation contingent upon the closing of the subject transaction. This arrangement is ordinary and customary in the bond underwriting industry as compensation paid under this sort of contract comes from the monies financed.

THE FACTS as we understand them are as follows:

As an Assistant County Attorney you have been asked whether bond underwriting services compensated after approval amount to a prohibited contingency fee, prohibited under §2-443(g) of the code of ethics.

Palm Beach County, like many other government entities, approves issuance of bonds in a variety of contexts. The county approves both general and revenue bonds to fund capital projects. It also approves industrial development bonds on behalf of third parties to fund certain projects. Lastly, the county must approve bonds that are issued in the name of other government agencies, such as the Educational Facilities Authority and the Housing Finance Authority to fund the projects of these agencies.

In each case, the entity seeking project financing enters into multiple contractual arrangements with persons in the financial services industry to assist with the financial structuring and funding of the project. These persons include but are not limited to investment advisors, financial advisers, underwriters, investment banks, credit enhancers, sureties, bond counsel, underwriters counsel, issuer counsel, bank counsel, disclosure counsel, title insurers and ratings agencies. According to the terms of these contractual arrangements, compensation for financial services occurs only upon the closing of the transaction. This arrangement is ordinary and customary in the industry as compensation paid under this sort of contract comes from the monies financed.

However, before the closing of the transaction and the compensation that comes with it, one or more government approvals are required. At the very least, the County Commission must approve issuance of the bond and in some circumstances, must approve an application for development order or other development permit before a project can move forward. Therefore, compensation for the individuals described above is contingent upon approval of one or more Board of County Commission votes.

THE LEGAL BASIS for this opinion is found in the following relevant section of the revised Palm Beach County Code of Ethics, which took effect June 1, 2011.

Section 2-443(g) Contingent fee prohibition.

No person shall, in whole or in part, pay, give or agree to pay or give a contingency fee to another person. No person shall, in whole or in part, receive or agree to receive a contingency fee. As used herein, "contingency fee" means a fee, bonus, commission, or nonmonetary benefit as compensation which is dependent on or in any way contingent on the passage, defeat, or modification of: an ordinance, resolution, action or decision of the board of county commissioners or local municipal governing body as applicable, any employee authorized to act on behalf of the board of county commissioners or local municipal governing body as applicable, the county administrator or municipal administrator as applicable, or any action or decision of an advisory board or committee. *This prohibition does not apply to real estate brokers when acting in the course of their profession as regulated by §§475.001-475.5018, Florida Statutes, as may be amended. Nothing in this section may be construed to prohibit any salesperson from engaging in legitimate government business on behalf of a company from receiving compensation or commission as part of a bona fide contractual arrangement with that company provided such compensation or commission is ordinary and customary in the industry...*(emphasis added)

Compensation contingent upon government action is generally prohibited, however, there are exceptions if the fee is ordinary and customary in a given industry. While §2-443(f) specifically excludes real estate agents and salespersons *receiving compensation or commission as part of a bona fide contractual arrangement provided such compensation or commission is ordinary and customary in the industry*, it does not *ipso facto* include all other potential arrangements similar in nature to the specified exempted industries. Bond underwriting operates in a like manner to the real estate industry in that there is no compensation or commission unless and until the applicable governmental entity approves both the project and the issuance of the bond.

When reviewing the applicability of the Florida Code of Ethics as it pertains to contingency fees the Florida Supreme Court held that the prohibition did not extend to real estate agents, notwithstanding the fact that they were not specifically excluded by state statute. Where there was no evidence of corruption or improper influence and the contingent commission was not contrary to public policy, the

Court found the arrangement not to have violated the state contingency statute.¹ The court noted that real estate brokerage agreements have traditionally provided for fees contingent on the consummation of a sale, and that the industry is highly regulated under state statutes.² Similarly, bond underwriting is regulated by the Municipal Securities Rulemaking Board (MSRB), created by Congress in 1975, as well as by federal regulation under the Code of Federal Regulation.³

Additionally, considering the similarity between contingencies involving real estate agents, salespersons on commission and bond underwriting professionals, where the ordinary and customary manner of payment is upon completion of the contract or transaction, there is a rational basis for interpreting the code so as not to “lead to an unreasonable conclusion or defeat legislative intent or result in a manifest incongruity.”⁴

IN SUMMARY, based on the information you have provided, bond underwriting professionals are exempted from the contingency prohibitions of §2-443(g) from receiving compensation or commission as part of a bona fide contractual arrangement provided such compensation or commission is ordinary and customary in the bond underwriting industry.

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/gal

¹ Rotemi Realty, Inc. v. Act Realty Co., Inc., 911 So.2d 1181 (Fla. 2005), s112.3217, Florida Statutes.

² §§475.001-475.5018

³ CFR Title 17, Part 240

⁴ Las Olas Tower Company v. City of Ft. Lauderdale, 742 So2d 308 (4th DCA 1999), RQO 11-066 (extending the law enforcement outside employment filing exemptions of sec.2-443(e)(5)g to fire-rescue extra duty details)

March 2, 2012

Norman Ostrau, Ethics Officer
The City of West Palm Beach
P.O Box 3366
West Palm Beach, FL 33411

Re: RQO 11-121
Solicitation/Gifts/Public Purpose

Dear Mr. Ostrau,

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 March 1, 2012.

YOU ASKED in your letter dated December 19, 2011, whether procedures in place regarding solicitation of vendor donations for a City of West Palm Beach (the City) sponsored 4th of July event which includes a "VIP tent" area not open to the public are in compliance with the revised code of ethics.

IN SUM, based upon the facts and circumstances submitted, the solicitation by public employees of vendor contributions to a City sponsored event is not prohibited by the code if the contributions are solicited or accepted on behalf of the City for use solely by the City for a public purpose. Donations such as these are excluded from the definition of gift. However, the solicitation of donations from City vendors by City employees in order to provide City employees and officials and their invited guests a VIP area not open or available to the public is prohibited by the Code of Ethics.

THE FACTS as we understand them are contained in the attached COE Memorandum of Inquiry. A brief recitation of those facts is as follows:

For a number of years the City has held a 4th of July celebration (4th on Flagler) for the benefit of the public and funded by the City. At these events a separate area is created for the exclusive use of City officials, employees and their invited guests. Tickets to this VIP tent area have a face value of \$50, are distributed to City officials and employees, and are not made available to the public. The City provides funding for some aspects of the VIP area (tent, chairs), however, in-kind donations are solicited from City vendors by City employees, primarily for food and beverage. The VIP area is not established by the City Commission as a part of the 4th on Flagler event.

The 4th on Flagler VIP tent originated through the City Parks and Recreation Department (PRD). Included in the planning process are staff members and volunteers. The solicitation of vendor sponsors for the VIP tent is done by PRD employees. At the 2011 event, approximately 700 VIP tickets were printed and distributed to City officials, employees and their guests. The PRD determined the face value of the tickets to be \$50, however, based upon the amount of vendor donations per ticket, the actual value of the goods and services provided per attendee was determined to be under that amount at the 2011 event. Vendors contributing to the VIP area included Pepsi-Cola Enterprises, Brown Distributing Company and Duffy's Sports Grille. Those officials and employees receiving more than two tickets were required to report the amount as gifts under §2-444(f)(2)b. of the gift law section of the Code of Ethics.

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

Section 2-444(c) states as follows:

No county commissioner, member of a local governing body, mayor or chief executive officer when not a member of the governing body, or employee, or any other person or business entity on his or her behalf, shall knowingly solicit a gift of any value from any person or business entity that the recipient knows is a vendor, lobbyist or any principal or employer of a lobbyist where the gift is for the personal benefit of the official or employee, another official or employee, or any relative or household member of the official or employee.

An official or employee may not solicit a gift of any value from a City vendor if the gift is for his or her benefit, the benefit of a relative or *any other official or employee* of the City. Section 2-444(g)(1)e. provides an exception to the definition of gift where it is *solicited or accepted by municipal officials or employees on behalf of the municipality in performance of their official duties for use solely by the municipality for a public purpose.*¹ Under the facts you have submitted, the solicitation and acceptance of food and drink donations for the VIP area from City vendors is exclusively for the benefit of City officials, employees and their guests. There is no general admission ticket or other public admittance to the VIP tent. Additionally, the establishment of an exclusive VIP tent area was made by staff. The issue of public purpose was not subject to a transparent and public hearing and vote by the City Commission. Therefore, the *public purpose* exception to the gift law restriction does not apply.

IN SUMMARY, the current City staff procedure for soliciting donations for the 4th on Flagler VIP tent area violates the Code of Ethics insofar as the benefit of the solicitation is received by City officials, employees and their guests and therefore is not used *solely by the municipality for a public purpose.*

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

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

Sincerely,

Alan S. Johnson,
Executive Director

ASJ/gal

¹ RQO 10-027, RQO 10-040, RQO 11-021

March 2, 2012

Rebecca Caldwell, Director
Palm Beach County Building Division
2300 Jog Road
West Palm Beach, FL 33411

Re: RQO 12-008
Gift Law/Awards

Dear Ms. Caldwell,

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 March 1, 2012.

YOU ASKED in your phone call and follow-up emails dated February 3, whether you could accept two tickets, with a face value of \$125 each, to a banquet given by a non-profit trade organization that lobbies the Palm Beach County government where you are receiving a plaque honoring your work in creating a county-wide "universal building permit application."

IN SUM, based on the facts you have submitted, you are not prohibited from accepting an award for civic or professional achievement. The code prohibits your accepting a gift with a value, in the annual aggregate, of more than \$100 from a lobbyist or principal of a lobbyist who lobbies your government employer. Therefore to the extent the value of the tickets you receive exceeds \$100 you must return the difference to the organization.

THE FACTS as we understand them are as follows:

You are the Director of the Palm Beach County Building Department. As part of your duties, you are responsible for administration and enforcement of the various State and County Building, Zoning and Development Codes. In addition, you play a major role in developing and coordinating multi-agency programs, as well as coordinating efficiency and cooperation between Palm Beach County and various industry groups. Your responsibilities include enforcement of Land Development Codes in the construction process, and Building Codes in the development process. You are also responsible for staffing four advisory boards under the Building Division, including the Building Code Advisory Board (BCAB).

As part of your official duties you were one of two building officials that played a principal role in developing a "consensus based, legally correct, county-wide universal building permit application." According to an October, 2011, press release, "the Building Officials Association of Palm Beach County, Associated General Contractors, Gold Coast Builders Association and Associated Builders and

Contractors collaborated with the BCAB to develop a universal building permit application.” As a result, the county and all 38 municipalities within the county now have a standard application process resulting in “reducing red-tape, while retaining the integrity of the process.”

You have been asked to attend the annual banquet of the local chapter of the Associated General Contractors (AGC), a non-profit trade organization (501C-6), and to receive a plaque honoring your work in developing the universal building permit application. The AGC promotes general industry issues and concerns. Although it does not represent individual contractors, AGC does lobby Palm Beach County government on behalf of all member contractors. AGC also lobbies your division and their input is solicited by you in many cases. On rare occasions, you may get a phone call requesting that you review a specific situation on behalf of a member contractor.

The cost of a banquet ticket is \$125 per person and both you and your husband are invited to attend. Your attendance at this event is encouraged by your Director as a part of your official duties for the Building Department.

THE LEGAL BASIS for this opinion is found in the following relevant section of the revised Palm Beach County Code of Ethics, which took effect June 1, 2011.

Section 2-444(a) prohibits a public employee from accepting a gift with a value of greater than \$100 in the annual aggregate from a vendor, lobbyist, or principal or employer of a lobbyist who lobbies the employee’s public employer. AGC is the principal of a lobbyist who lobbies Palm Beach County.

However, §2-444(g)(1) provides a number of exceptions to the definition of gift. One such exception is an award for professional or civic achievement.¹ The award itself is, therefore, not considered a gift. While the award would not constitute a prohibited gift, the banquet itself would be considered a gift and may not exceed \$100 in value as it is sponsored by the principal of a lobbyist.² Therefore, the value in excess of \$100 must be returned to AGC as consideration within 90 days of the event.³

Another exception to the definition of gift involves gifts solicited or accepted by county employees on behalf of the county in performance of their official duties *for use solely by the county for a public purpose*.⁴ While your Director would like you to attend, the facts you have submitted do not appear to support the “solely for a public purpose” aspect of your attendance.⁵

Lastly, §2-444(g)(1)i. provides an exception to the definition of gift for tickets in connection with public events, appearances or ceremonies related to official county business, if furnished by a non-profit sponsor organization, provided the sponsor *does not employ a lobbyist*. AGC employs a lobbyist and therefore this exception does not apply.

IN SUMMARY, awards for civic or professional achievement are not considered gifts. However, the value of an awards banquet ticket, if in excess of \$100, is prohibited if given by a lobbyist, principal or

¹ §2-444(g)(1)c.

² RQO 11-048

³ RQO 10-005, §112.312(12)(a), Florida Statutes.

⁴ RQO 12-006, RQO 10-027, RQO 10-040

⁵ RQO 11-021

employer of a lobbyist who lobbies your public employer. The ticketed amount in excess of \$100 must be returned to the donor within 90 days.

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

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

Sincerely,

Alan S. Johnson,
Executive Director

ASJ/gal

PROPOSED

March 1, 2012

Chief Anthony Strianese
Delray Beach Police Department
300 W. Atlantic Avenue
Delray Beach, FL 33444

Re: RQO 12-009
Gift Law

Dear Chief Strianese,

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 March 1, 2012.

YOU ASKED in an email dated February 8, 2012 whether Delray Beach Police Department employees could attend a citizen-sponsored employee awards dinner and if so what is required of the non-profit sponsor and of your employees.

IN SUM, public employees, or any person or entity on their behalf, are prohibited from soliciting a gift of any value from a vendor, lobbyist, principal or employer or a lobbyist who sells, leases or lobbies their public employer, if the solicitation is for their own personal benefit, the benefit of their relatives or household members or the benefit of another employee.

This prohibition does not extend to soliciting or accepting donations from persons and entities who are not vendors, lobbyists, or principals or employees who sell lease or lobby their public employer, as long as there is no quid pro quo or other benefit given for the past, present or future performance an official act or legal duty.

Gifts in excess of \$100 are to be reported on an employee's annual Palm Beach County gift reporting form, unless one of several exceptions apply. The definition of "gift", specifically excludes awards for professional or civic achievement and accordingly do not have to be reported.

THE FACTS as we understand them are as follows:

You are the police chief for the City of Delray Beach (the City). For the past 9 years the City of Delray Beach Police Department (DBPD), in conjunction with the Delray Citizens for Delray Police (DCDP), has held an annual employee awards dinner. The DCDP is a 501(c)3 non-profit, police-community relations support group. Its purpose is to support the Delray Beach Police Department, "both morally and financially."

The DCDP provides annual scholarships for the children of sworn officers, sponsorships for an array of fundraisers and events for the purchase of equipment, and support for families of officers in times of need. You believe that in the past the DCDP may have solicited donations from vendors and lobbyists of Delray Beach. No member of the DBPD solicits on behalf of the DCDP. The DCDP is a civilian organization, and DBPD employees are neither members of the non-profit nor do they serve on the board of directors.

The awards dinner is held at the Delray Beach Marriott and costs \$38 per person. This includes dinner, coffee or tea plus one drink ticket. DBPD employees pay \$30 per person if they choose to attend and the DCDP incurs the \$8 additional expense plus the bar tab. The DCDP sponsors five awards: 1- Officer of the Year, 2- Employee of the Year, 3- Rookie Officer of the Year, 4- Investigator/Agent of the Year, and 5- Supervisor of the Year. Each recipient receives a plaque. The average cost for the plaques is \$220. The Officer and Employee of the Year recipients also receive \$500 cash awards from the DCDP. Rookie Officer, Investigator/Agent, and Supervisor award recipients receive \$200 cash awards.

In addition, over the course of the year, the DCDP solicits donations for condolence gifts, college scholarships for children of department employees and for training and equipment for the department itself.

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

Section 2-444(c) states as follows:

No county commissioner, member of a local governing body, mayor or chief executive officer when not a member of the governing body, *or employee, or any other person or business entity on his or her behalf,* shall knowingly solicit a gift of any value from any person or business entity that the recipient knows is a vendor, lobbyist or any principal or employer of a lobbyist where the gift is for the personal benefit of the official or employee, another official or employee, or any relative or household member of the official or employee. (emphasis added)

As currently proposed, DCDP is soliciting donations in order to provide for achievement awards and ticket discounts that will personally benefit DBPD employees and their families. While the Code of Ethics ordinarily would allow a non-profit associated with a municipal department or a non-profit honoring a public employee or official to solicit or accept donations on behalf of a charitable organization provided vendor and lobbyist donations in excess of \$100 are recorded on a log and filed with the COE¹, the code prohibits such solicitation from vendors or lobbyists if the gift will benefit *any* City employee.² Accordingly, solicitation of funds for the Awards Dinner and employee awards from vendors or lobbyists who vend, lease or lobby the City is prohibited.³

Solicitation of residents or any other person or entity that is not a vendor or lobbyist of the city is not prohibited, provided there is no quid pro quo or other benefit given for the past, present or future performance an official act or legal duty in exchange for the gift.

¹ §2-444(h)(2)

² §2-444(c)

³ Compare RQO 11-053 (public employee may accept a gift for outstanding performance or length of service donated by an *independent* civic organization as an award for civic or professional achievement as compared to here where a retirement gift would be solicited by a non-profit entity created for the benefit of the department).

Likewise, where DCDP solicits donations for condolence gifts, college scholarships for children of department employees, if the donation will personally benefit a DBPD employee or their families, they may not be solicited from vendors and lobbyists of the City.

THE RATIONALE for limiting solicitation of donations by employees and officials, or others on their behalf, from lobbyists and vendors of their public employer is grounded in the desire to avoid the appearance of obtaining a financial benefit through one's official position. As for gifts that do not involve lobbyists or vendors, general reporting requirements and other limitations serve to increase transparency and remove the appearance that donations are made to influence official decisions or improperly obtain access to public employees or officials.

Section 2-444(g) defines a gift as *"the transfer of anything of economic value"* and §2-444(f) requires employees to complete an annual gift disclosure report if the value of the gift exceeds \$100, unless one of several exceptions apply.

Sec. 2-444(g)

- (1) Exceptions. The provisions of subsection (g) shall not apply to:
- c. Awards for professional or civic achievement;

The definition of *"gift"*, specifically excludes awards for professional or civic achievement. For that reason, department employees are not required to report the value or receipt of such an award on their annual gift reporting form. As long as the benefit is truly an award for professional or civic achievement, and not a subterfuge to otherwise obtain a benefit for a wrongful purpose, the award is not considered a gift under the code.⁴ Based upon the facts and circumstances you have provided, the benefit of a plaque and cash gift of up to \$500, considering the significance of the award in question, fits within this exception to the definition of *"gift."*

Based upon the facts and circumstances you have provided, employees in attendance will receive slightly discounted tickets and the DCDP will cover the bar tab at the event. In addressing the gift law requirements, the Commission on Ethics adheres to the Florida standards outlined in §112.3148, Florida Statutes, and Chapter 34 of the Florida Administrative Code (FAC). The FAC suggests that when a gift is provided indirectly with the intent to benefit a public employee, it may be considered a gift to that employee. For example, if an employee brings their spouse and receives two discounted tickets, the value of the gift from the DCDP is \$16, plus the value of the beverages consumed from the DCDP paid bar tab. Therefore, assuming the value to be less than \$100, no gift report is required.

Sec. 2-444(g)

- (1) Exceptions. The provisions of subsection (g) shall not apply to:
- e. Gifts solicited or accepted by county or municipal officials or employees as applicable on behalf of the county or municipality in performance of their official duties for use solely by the county or municipality for a public purpose.

The solicitation of donations specifically earmarked to a public department for a public purpose would not constitute a gift under the code. Therefore, the DCDP is not prohibited from soliciting vendor and

⁴ RQO 11-048

lobbyist donations for training and equipment, so long as those donations are specifically solicited and earmarked for the operational needs of the DBPD as compared to an employee's personal use.⁵

Notwithstanding the gift law, financial and corrupt misuse of office code provisions would apply if the donations were solicited or accepted based upon a quid pro quo or other wrongful act or omission inconsistent with the proper performance of an official or employee's public duty.

Section 2-443(b), *Corrupt misuse of official position*, prohibits any official or employee from using his or her official position or office, or any property or resource which may be within his or her trust, to corruptly secure or attempt to secure a special privilege, benefit, or exemption for himself, herself, or others. For the purposes of this subsection, "corruptly" means done with a wrongful intent and for the purpose of obtaining, or compensating or receiving compensation for, any benefit resulting from some act or omission of an official or employee which is inconsistent with the proper performance of his or her public duties.

This section of the code would specifically prohibit a City employee from accepting any benefit, directly or indirectly, including awards for professional or civic achievement, if these sponsorships were corruptly linked in any way to a *quid pro quo* arrangement. *Corruptly* includes an act or omission that is done with a wrongful intent which is inconsistent the proper performance of public duties.

IN SUMMARY, DBPD officers and employees are not prohibited from accepting awards for professional or civic achievement. Awards for professional or civic achievement are not considered gifts under the gift law provisions of the code of ethics. However, neither DCDP employees nor anyone else on their behalf, are permitted to solicit donations from vendors, lobbyists, principals or employers of lobbyists of the City if the solicited donations will personally benefit themselves, a relative or household member or a fellow employee of the DBPD. Solicitation of donations from residents or other persons or entities who are not vendors or lobbyists of the City is not prohibited, provided there is no official quid pro quo offered in exchange for the donation.

DCDP may solicit donations from vendors, lobbyists and principals or employers of lobbyists if the donations are specifically solicited and earmarked for the operational needs of the DBPD and no quid pro quo benefit is given to the donor, as these solicitations would be for a public purpose and not for personal benefit.

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

⁵ See RQO 11-056 (PD employees permitted to solicit funds for a Police foundation where the funds are specifically earmarked for purchase of police equipment) also, see RQO 10-027, RQO 10-040.

March 2, 2012

Nanci Simonson, VP, Relationship Manager Business Deposit Services
Branch Banking & Trust Company, South Florida Region
110 East Broward Blvd., Suite 105
Ft. Lauderdale, FL 33301

Re: RQO 12-010
Gift Law/discounts

Dear Ms. Simonson,

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 March 1, 2012.

YOU ASKED in an email dated February 9, 2012, whether your employer, Branch Banking & Trust Company (BB&T), may offer banking benefits, including fee waivers, and other discounted services to employees of municipalities who are BB&T customers. In a follow up conversation on February 13, 2012, you asked what effect offering these same benefits to all county or municipal employees, regardless of whether their government employer is a BB&T customer would have on your ability to offer public employee discounts.

IN SUM, as a vendor of certain municipalities, BB&T is prohibited under the PBC Code of Ethics from offering a personal benefit to officials and employees of municipalities, if the value of the benefit is greater than \$100 annually in the aggregate for the individual employee or official, or if any benefit is offered as a quid pro quo for an official public action or the past, present or future performance of any legal duty. However, a similar offer to all local governmental employees, regardless of whether their public employer is a banking customer of BB&T, would not be prohibited by the gift law under the exception for publicly advertised offers made available to the general public.

THE FACTS as we understand them are as follows:

You are a Vice President of Branch Banking & Trust Company (BB&T), and Relationship Manager for Business Deposit Services. BB&T has several Palm Beach County municipalities as customers, some of which are full service customers and others who have loans with your bank but no other accounts. BB&T would like to offer all employees of its municipal customers, who choose to also Bank with BB&T, certain special benefits including fee waivers and discounted services. It is not mandatory that an employee enroll with your bank, however, you are merely offering another banking option to those who choose to bank with BB&T. You advise that the question has been raised as to whether or not this offer is "a conflict or ethics violation."

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

The Code of Ethics defines a vendor to include any person or entity who *currently sells goods or services...*to the county or a municipality. (Emphasis added)¹

Under this definition, BB&T is a vendor to those municipalities who use its banking services, including loans and other accounts as BB&T provides services to their government customers in the regular course of their business as a banking institution.

Section 2-444(a)(1) of the Code of Ethics, prohibits county and municipal officials and employees from accepting, directly or indirectly, gifts valued at more than \$100, annually in the aggregate, from any vendor or lobbyist of their governmental employer.

Section 2-444(a)(2) prohibits county and municipal vendors and lobbyists, or employers or principals of lobbyists from giving these prohibited gifts to persons they know are officials or employees of a governmental entity for whom they are vendors or that they lobby.

Section 2-444(e) prohibits any person or entity from offering, giving or agreeing to give a gift of any value to any county or municipal official or employee, as well as prohibiting any official or employee from accepting or agreeing to accept a gift of any value, because of the past, present or future performance or non-performance of an official act or legal duty.

Section 2-444(g), defines a gift as, “the transfer of *anything of economic value*, whether in the form of money, *service*, loan, travel, entertainment, hospitality, item or promise, or in any other form, *without adequate and lawful consideration*. (Emphasis added)

However, Section 2-444(g)(1)(f) offers an exception to the definition of gift for “Publicly advertised offers for goods or services from a vendor under the same terms and conditions as are offered or made available to the general public;”

Where a municipality is a banking customer of BB&T, the bank is a vendor of that governmental entity, and thus must abide by the Code regulations concerning gifts as listed in Section 2-444 of the Code, unless an exception to this rule applies, for example, as is found in 2-444(g)(1)(f) above.

In a previous advisory opinion, the COE was asked whether discounts offered by various restaurants within a municipality, some of which were vendors of the town, violated the Code of Ethics. In response, the COE opined, “Town employees are not prohibited from accepting discounted food at local restaurants, provided that the discount is not based on preferred official treatment of the vendor by the employee, the discount applies to all similarly situated government employees or officials, and it is not otherwise offered as a quid pro quo or to convey a special financial benefit in violation of the misuse of office sections of the code.”² This opinion was based on several factors, including that all participating restaurants were located within the town, the offer was for all town employees, and the offer included several restaurants that were not vendors of the town. By contrast, the BB&T discount is offered only to those municipal employees whose municipalities do business with BB&T and excludes all other municipalities where BB&T is not doing business. Under these circumstances, BB&T runs afoul of the “publicly advertised offers” exclusion to the extent that it becomes a targeted discount.³

Therefore, where BB&T is offering discounted services only to employees of municipalities with whom BB&T has a business relationship, BB&T in effect must abide by §2-444 of the Code, and may not offer this benefit to these targeted employees if the value of the benefit is greater than \$100 annually for any individual employee, or if any

¹ §2-442. Definitions

² RQO 11-054

³ RQO 11-002, RQO 11-007, 11-054 (“Regarding vendors, the COE determined that so long as discounts were not directed to a select individual or group of individuals singled out to receive a special discount not available to other similarly situated government employees, the general public discount exception may apply”)

benefit is offered as a quid pro quo for any official public action or the past, present or future performance of any legal duty.

However, in another opinion regarding a national corporate vendor and discounted services for public employees, the COE determined that so long as discounts were not directed to a select individual or group of individuals singled out to receive a special discount not available to other similarly situated government employees, the general public discount exception may apply.⁴ Based on this opinion, if BB&T wishes to offer this benefit to all municipal and county governmental employees across the board, then the discounts would not be targeted and the \$100 annual aggregate gift prohibition may therefore not apply.

Notwithstanding the gift law exception, misuse of office provisions prohibit any official or employee from using their official position to give a special financial benefit to themselves, relatives, household members or domestic partners or spouses, outside business interests including customers or clients, charitable organizations if they are an officer or director, or debtors or creditors other than financial institutions. Moreover, public officials or employees may not use their positions corruptly for the benefit of anyone. While an employee of a BB&T municipal customer may choose to bank with BB&T, and accepting a non-targeted discount may not constitute a gift, it may result in a misuse of office if the official or employee were to use their official position to specially benefit the bank.

IN SUMMARY, while you may not offer discounted banking services, if valued at greater than \$100, only to employees of municipalities for which you are a vendor, you may offer such discounts for all local governmental employees under the code exception for publically advertised offers available to the general public, so long as the discounted services are not offered as a quid pro quo for any official public action or the past, present or future performance of any legal duty.

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/meb/gal

⁴ RQO 11-064 (Nationwide cell phone carrier discounts for public employees)

ITEM XI – Boca Raton Voting Conflicts

Staff Analysis:

Two opinion requests were received from the Boca Raton City Attorney, Diana Grub-Frieser.

Staff Analysis:

Two opinion requests were received from the Boca Raton City Attorney, Diana Grub-Frieser.

In **RQO 11-116 (MCR)**, the City Attorney asked how the \$10,000 threshold value of goods or services provided to a customer or client of an official or employee's outside employer is calculated when the employer is a large national financial institution. Secondly, in the event that an official or employee's outside employer is divided into operational departments and/or divisions, should all goods and services for all departments be included in the calculation of the threshold amount. Finally, does the reference in the code to the "previous 24 month period" suggest that each time a matter comes before a governing body, an official recalculate the aggregate value of goods or services provided to a customer or client of their outside employer to ascertain whether or not the \$10,000 threshold has been met.

Staff submits the following recommendation (attached proposed advisory opinion):

A customer or client is defined as a person or entity to which an official's outside employer or business has provided at least \$10,000 worth of goods or services during the past 24 months. With respect to a banking institution, \$10,000 means the value of the total goods or services provided to a customer or client over the course of a 24 month period whether in the form of goods, fees, or financial services, including mortgage interest costs if the mortgage is serviced by the bank.

There is no bright line regarding actual or constructive knowledge of the status of a customer or client, including the existence and amount of goods and services provided. Knowledge is determined by the facts and circumstances presented. Lastly, the existence of a conflict is determined at the time an official is required to act in his or her official capacity.

In **RQO 11-120 (ASJ)**, the City Attorney 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, the City Attorney 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 certain circumstances.

The elected official'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 elected official is a "business banker" at a local

¹ RQO 11-099 (knowledge of a conflict is either actual or constructive and there is no bright line definition of "the exercise of reasonable care" as required under the §2-443(a) misuse of office provision of the code.)

branch of Citibank within Boca Raton. She has no supervisory authority and is responsible for opening small business/customer accounts.

Staff submits the following recommendation (attached proposed advisory opinion):

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 does not offer 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.

March 2, 2012

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

Re: RQO 11-116
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 March 1, 2012.

YOU ASKED how the \$10,000 threshold value of goods or services provided to a customer or client of an official or employee's outside employer is calculated when the employer is a national financial institution. Secondly, in the event that an official or employee's outside employer is divided into operational departments and/or divisions, should all goods and services for all departments be included in the calculation of the threshold amount. Finally, does the reference in the code to the "previous 24 month period" suggest that each time a matter comes before a governing body, an official recalculate the aggregate value of goods or services provided to a customer or client of their outside employer to ascertain whether or not the \$10,000 threshold has been met.

IN SUM, elected officials are prohibited from voting or participating in 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 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 an aggregate value in excess of \$10,000.

The size, scope or internal organization of an entity may affect whether a customer or client is a similarly situated member of the general public.¹ However, for the purpose of calculating the \$10,000 threshold, so long as the employer has provided \$10,000 in goods or services, which department provided those services has no significance.

Lastly, the relevant threshold amount is determined at the time a matter comes before a council, board or commission. Therefore, should a customer or client return to petition the council, the value of goods or services provided over the previous 24 months is calculated at that time.

THE FACTS as we understand them are as follows:

You are the City Attorney for the City of Boca Raton (the City). A City councilwoman's outside employer is Citibank, the 3rd largest banking institution operating within the County. Matters may come before the City Council, including proposals from persons or entities who may meet the threshold definition of *customer or client* of her outside employer as defined by the Code of Ethics.

¹ RQO 11-120

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.

Among its many financial products, Citibank provides savings and checking accounts, credit, home and automobile loans, and securities and investment services to individuals, businesses, governments and institutional investors. Fees for goods and services received by the institution include but are not limited to, mortgage interest payments, checking fees, overdraft charges and service fees.

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

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 the official, 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 \$10,000.²

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.

Citibank provides valuable goods and services to their customers including but not limited to, mortgages, checking and savings accounts, and overdraft and other service fees. Should a person or entity appear before an official who has actual or constructive knowledge of their status of a customer or client of his or her outside employer³, whether the official works for a bank with a million clients or a local paving company with 100 clients, when aware of the status the official may need to reasonably determine the aggregate value of their employers’ goods and services provided to that client. This calculation, \$10,000 in goods or services provided over the previous 24 months, is applicable every time a customer or client appears before an official.

To be sure, determining whether one client has met the \$10,000 threshold is far more complex in the context of a large national corporation as compared to a local small business. That being said, there is a reasonableness standard contained within the misuse of office provision; that an official *knows or should know with the exercise of reasonable care* that a person appearing before her is a customer or client (as defined by the code) of the official’s outside employer. Knowledge may be constructive or actual and there is no bright line definition of reasonable care.⁴ 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. 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

² §2-442. Definitions. *Customer or client*

³ See, RQO 11-099 (There is no bright line regarding the exercise of reasonable care in determining whether a person or entity is in fact a customer or client. The official must have actual or constructive knowledge of the status to be in violation of the misuse of office provisions)

⁴ RQO 11-101, RQO 11-099, *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)”)

few practical ways to vet all possible transactions and relationships to determine financial benefit. Where 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.⁵

Furthermore, as a customer of client of a national corporation, the person appearing before the official may be similarly situated to the general public. When a group of consumers is so considerable, for example the 13.1 million Americans who bank with Citibank, it can be said that that group is sufficiently representative of the general public. Depending upon the facts and circumstances, there may be no inherent special benefit being exchanged.⁶ Again, there is no bright line as to when a customer or client of a large national entity is unique, but there are several factors that may assist an official in assessing whether there is a conflict.⁷ When in doubt about a specific factual scenario, you are encouraged to request an advisory opinion.

IN SUMMARY, a customer of client is defined as a person or entity to which an official's outside employer or business has provided at least \$10,000 worth of goods or services during the past 24 months. With respect to a banking institution, \$10,000 means the aggregate of total goods or services provided to a customer or client over the course of a 24 month period whether in the form of goods, fees, or financial services, including mortgage interest costs if the mortgage is serviced by the bank.

There is no bright line regarding actual or constructive knowledge of the status of a customer or client, including the existence and amount of goods and services provided. Knowledge is determined by the facts and circumstances presented. Lastly, the existence of a conflict is determined at the time an official is required to act in his or her official capacity.

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

⁵ RQO 11-099

⁶ RQO 11-120

⁷ *Id.* (for example, a significant customer or a client of the employer or one who conducts business with an official's branch may not be similarly situated to the large majority of nationwide customers or clients with no nexus to the official).

March 2, 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 March 1, 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

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