



Agenda

February 2, 2012
Governmental Center,
301 North Olive Avenue, 6th Floor
Commissioners Chambers

Executive Session from 1:45pm to 3:00pm Regular Agenda will begin at 3:15pm

Palm Beach County

Commission on Ethics

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Commissioners

Edward Rodgers, Chair

Manuel Farach, Vice Chair

Robin N. Fiore

Ronald E. Harbison

Bruce E. Reinhart

Executive Director

Alan S. Johnson

Executive Assistant

Gina A. Levesque

Staff Counsel

Megan C. Rogers

Senior Investigator

Mark E. Bannon

Investigator

James A. Poag

- I. Call to Order
- II. Roll Call
- III. Introductory Remarks
- IV. Approval of Minutes from January 4, 2012
- V. Executive Session
 - a. C12-001
- VI. Revision to Rules of Procedure, Section 2
- VII. Processed Advisory Opinions (Consent Agenda)
 - a. RQO 12-005
 - b. RQO 12-006
- VIII. Items Pulled from Consent Agenda
 - a.
- IX. Proposed Advisory Opinions
 - a. RQO 12-001
 - b. RQO 12-002
 - c. RQO 12-003
 - d. RQO 12-004
- X. Boca Raton Voting Conflicts
 - a. RQO 11-116
 - b. RQO 11-120
- XI. Executive Director Comments
- XII. Public Comments
- XIII. Adjournment

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

JANUARY 4, 2012

**WEDNESDAY
1:40 P.M.**

**COMMISSION CHAMBERS
GOVERNMENTAL CENTER**

I. CALL TO ORDER

II. ROLL CALL

MEMBERS:

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

STAFF:

Mark E. Bannon, COE 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:

Barbara Strickland, 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.

IV. APPROVAL OF MINUTES FROM NOVEMBER 30, 2011 – Page 6

MOTION to recess for an executive session. Motion by Robin Fiore, seconded by Bruce Reinhart, and carried 3-0.

RECESS

At 1:41 p.m., the chair declared the meeting recessed to take up the executive session.

(CLERK'S NOTE: Commissioners Manuel Farach and Ronald E. Harbison entered the chambers.)

RECONVENE

At 2:24 p.m., the meeting reconvened with Judge Edward Rodgers, Manuel Farach, Robin Fiore, Ronald Harbison, and Bruce Reinhart present.

V. EXECUTIVE SESSION

V.a. C11-021

Commissioner Farach read the public report and final order of dismissal in summary as follows:

Complainant Suzette Peccoelli Rodriguez, a former employee of the City of Boynton Beach, filed the above-referenced complaint on October 14, 2011, alleging possible ethics violation involving respondent Laurie LaVerriere, the interim city manager of Boynton Beach. The complaint contended that Ms. LaVerriere used her position and authority as interim city manager to attempt to have complainant enter into an agreement known as a last-chance employment agreement in order to remain employed with the City of Boynton Beach, which last-chance employment agreement would allow for her termination without appeal if there were any further rules violations over the next three years. The Complainant states that this agreement violates her rights as an employee regarding the appeal of such a termination because the last chance agreement would not allow for an appeal. After choosing to not enter into the agreement, complainant was terminated from her city employment for undisclosed rules violation.

The complainant makes no allegation, nor does she present any evidence that indicates Ms. LaVerriere or any other person or entity listed under Section 2-443(a)(1-7) received any special financial benefit by offering her this agreement in lieu of termination.

V.a. – CONTINUED

Nor does she allege any facts to indicate that the offer by Ms. LaVerriere to enter into this agreement was a “corrupt” misuse of office. Assuming that all the allegations as presented by complainant are true, the offer to enter into this last chance agreement would not be in violation of the Code of Ethics (Code). The ethics commission accordingly dismissed the complaint on January 4, 2012, due to lack of legal sufficiency.

Done and ordered by the Palm Beach County Commission on Ethics (COE) in public session on January 4, 2012. Signed: Edward Rodgers, chairman of the COE.

V.b. C11-022

Commissioner Farach read the public report and final order of dismissal in summary as follows:

Complainant LaDonna Booth filed the above-referenced complaint on November 29, 2011, alleging a possible ethics violation involving respondent Conrad Ailstock, manager of the Palm Beach County Water Utilities Department. The complaint alleges that Mr. Ailstock corruptly misused his official position to secure a special benefit for Ms. Natalie Jones, who is the daughter of Ms. Dawn Jones, who is one of the subordinates, by allowing Ms. Natalie Jones to be rehired under the supervision of her mother and signing off on her timesheets.

After initial inquiry into this matter, complaint was determined by staff to be legally insufficient, with a recommendation of dismissal. The factual basis underlying this complaint has been previously addressed in other orders from this commission, namely, C11-019 and C11-020, with inquiry made and no legal sufficiency found in this particular inquiry.

Accordingly, it is the finding of the COE that the complaint against respondent Conrad Ailstock is hereby dismissed. Done and ordered by the COE in public session on January 4, 2012. Signed: Edward Rodgers, chair of the COE.

V.c. C11-023

Commissioner Farach read the public report and final order of dismissal in summary as follows:

Complainant LaDonna Booth filed the above-referenced complaint on November 29, 2011, alleging a possible ethics violation involving respondent Wayne Condry, the director of the Palm Beach County Human Resources Department. The complaint alleges that Mr. Condry corruptly misused his official position to secure a special exemption for Ms. Joan Myers, a former employee, by changing her rehire status prior to the expiration of the one-year waiting period described in Palm Beach County Merit rule 5, resulting in the former employee being rehired by Palm Beach County. After initial inquiry into this matter, the complaint was determined by staff to be legally insufficient and presented to the COE on January 4, 2012, with a recommendation to dismiss as legally insufficient.

The COE had reviewed the memorandum of inquiry and determined that the complainant had no personal knowledge or independent evidence that the respondent, Wayne Condry, corruptly used his official position to secure a special exemption in violation of Ordinance Section 2-443(b) of the Palm Beach County Code of Ethics. Accordingly, the COE dismisses the complaint on January 4, 2012, due to legal insufficiency.

Done and ordered by the Palm Beach County COE in public session on January 4, 2012. Signed: Edward Rodgers, chair.

V.d. C11-024

Commissioner Farach read the public report and final order of dismissal in summary as follows:

Complainant LaDonna Booth filed the above-referenced complaint on November 29, 2011, alleging a possible ethics violation involving respondent, Dawn Jones, procurement coordinator, Palm Beach County Water Utilities Department. The complaint alleges that Ms. Jones violated the County's nepotism policy by requesting her daughter, Natalie Jones, be employed as a temporary employee at the Water Utilities Department procurement section under her direct supervision.

V.d. – CONTINUED

After initial inquiry into the matter, the complaint was determined by staff to be legally insufficient and presented to the COE on January 4, 2012, with a recommendation of dismissal as legally insufficient.

The factual basis underlying this complaint had been previously addressed in C11-019 and C11-020 with inquiry made and no legal sufficiency being found in inquiry 11-023.

The COE reviewed the Memorandum of Inquiry and determined that the complainant has no personal knowledge nor independent evidence that the respondent, Dawn Jones, advocated for the employment of her daughter in violation of Section 2-445 of the Palm Beach County Code of Ethics.

Accordingly, the COE dismissed the complaint on January 4, 2012, due to legal insufficiency. Done and ordered by the COE in public session on January 4, 2012. Signed: Edward Rodgers, chair.

V.e. C11-025

Commissioner Farach read the public report and final order of dismissal in summary as follows:

Complainant LaDonna Booth filed the above-referenced complaint on November 29, 2011, alleging a possible ethics violation involving respondent Debra West, assistant director, Palm Beach County Water Utilities Department. The complaint alleges that Ms. West corruptly misused her official position to secure a special benefit for Natalie Jones, daughter of Ms. Dawn Jones, who is one of her subordinates, by allowing Ms. Natalie Jones to be hired under the supervision of her mother, and then signing off on her timesheets.

After initial inquiry into this matter, the complaint was determined by staff to be legally insufficient, and presented to the COE on January 4, 2012, with a recommendation of dismissal as legally insufficient. The factual basis underlying this complaint had been previously addressed in C11-019 and C11-020 with inquiry made and no legal sufficiency being found in inquiry C11-023.

V.e. – CONTINUED

The COE reviewed the memorandum of inquiry and determined that the complainant has no personal knowledge or independent evidence that respondent Debra West used her official position to secure a special benefit in violation of Section 2-443(b) of the Palm Beach County Code of Ethics, and accordingly dismissed the complaint on January 4, 2012, due to no legal sufficiency.

Done and ordered by the Palm Beach County COE in public session on January 4, 2012. Signed: Edward Rodgers, chair.

(CLERK'S NOTE: Item IV. was taken at this time.)

IV. APPROVAL OF MINUTES FROM NOVEMBER 30, 2011

Commissioner Farach made the following statements regarding the minutes from November 30, 2011:

- On page 15, the sentence starting with, Dr. Fiore stated that in addition to the language, should contain a final line in the paragraph to read, firm had not previously been given gifts.
- On page 17, Ms. Rogers' first bullet point should be changed to read, Elected officials were prohibited from voting on matters that would financially benefit themselves.
- On page 23, second bullet, the sentence was, Circumstances could occur where the official's son was standing next to an applicant. He did not understand what that meant in terms of a person standing next to an applicant.

The COE Executive Director Alan S. Johnson commented that he thought that his phrase was in terms of an appearance before a board or commission where the son was standing with an applicant. He said that although he could not recall the phrase specifically, that would be the context.

Commissioner Farach continued:

- On page 23, three paragraphs from the bottom, the sentence should read, Commissioner Farach expressed concern regarding a discussion of the *Goin* case in the proposed advisory opinion letter.

IV. – CONTINUED

MOTION to approve the minutes as amended to include the changes stated by Commissioner Farach. Motion by Manuel Farach, seconded by Robin Fiore, and carried 5-0.

VI. PROCESSED ADVISORY OPINIONS (CONSENT AGENDA)

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

REORDER THE AGENDA

(CLERK'S NOTE: Judge Rodgers suspended the agenda order to take up Items VIII.c. and VIII.d. in tandem.)

VIII.c. PROPOSED ADVISORY OPINION (RQO) 11-111

Mr. Johnson stated that the Town of Ocean Ridge (Town) police chief had inquired as to whether a municipal police department member could accept a \$50 gift card from a Town resident who was not a vendor or lobbyist of the Town. He said that a gift card was offered in appreciation rather than for any particular purpose.

Mr. Johnson said that the staff submitted the following for COE approval:

- A holiday gift of gift cards to all police department employees of an agency was not prohibited provided that the cards were not given in exchange for the past, present, or future performance of an official act or a legal duty.
- Because the official acts of police officers were of a discretionary nature, and the officers retained the power and authority to sanction or detain citizens under the law, gifts such as these may create an appearance of impropriety; therefore, municipalities may have policy and procedural rules banning such gifts.
- While such holiday gifts may not be prohibited under the Code, officers and department personnel must take great care not to take an official action or perform, fail to perform, or violate a legal duty because of a gift accepted by them or on their behalf.

VIII.c. – CONTINUED

- No reporting requirement existed for gifts amounting to less than \$100 in aggregate over the course of a year.

Commissioner Fiore commented that the Town resident was already a recipient of services, and that:

- The gift card fit the model of an exchange instead of a gift.
- A genuine gift was given with no hope of return, reciprocity, or mutuality.
- The staff description read: A holiday gift of gift cards to all police department employees is not prohibited, provided that it was not given in exchange for the past, present or future performance of an official act or a legal duty. Since the gift card was given only to people who had an official duty to provide those services, it was an exchange.

Commissioner Reinhart stated that the distinction to be made was whether the gift was in exchange for a specific or particular action, rather than for the general providing of police services. He said that clarifying language may have to be written.

Commissioner Harbison queried whether gifts cards were distributed from the department or distributed by the donor individually to each recipient.

Town Police Department Chief Chris Yannuzzi replied that either Town resident Robert Merkel or his wife had delivered a stack of gift cards with individual names written on them, and that they were delivered via interoffice mail.

Mr. Merkel stated that he gave \$50 cards to sworn police officers, dispatchers, and other department personnel names from a list that his wife's secretary had obtained.

Chief Yanuzzi confirmed that the Town's 14 police officers and 5 dispatchers had received the cards. Mr. Harbison thanked Chief Yannuzzi for taking the initiative with his ethics inquiry. Chief Yannuzzi thanked Mr. and Mrs. Merkel for their generosity.

VIII.c. – CONTINUED

Commissioner Reinhart recommended that the following additional facts be incorporated into the proposed advisory opinion:

- Mr. Merkel had not received specific, individualized services during the year that differed from other citizens.
- Chief Yannuzzi was able to monitor all the reports that came through his department.

Commissioner Harbison added that Chief Yannuzzi had supplied the list of recipients, rather than the donor directing the gift recipients.

Judge Rodgers said that he did not favor specificity. He recommended the approval of staff's recommendation and continuing reviews on a case-by-case basis.

Commissioner Farach said that added language should include:

- The COE had received public comment from Mr. Merkel and from Chief Yannuzzi;
- The COE had satisfied itself that no corrupt intent was evident; and,
- Sufficient procedural safeguards were in place as Chief Yannuzzi testified.

Commissioner Fiore stated that she wanted the staff description in the synopsis to be changed to add the wording, given in exchange for identifiable past, present or future acts, or specific acts. Mr. Johnson agreed to the addition.

MOTION to approve the proposed language additions suggested by Manuel Farach to be inserted into the proposed advisory opinion. Motion by Bruce Reinhart, and seconded by Robin Fiore.

At Judge Rodgers' direction, Commissioner Farach restated his comment that the COE was satisfied that sufficient procedural safeguards were employed by Chief Yannuzzi and the police department. Commissioner Reinhart added that the COE had also heard additional comment directly from Chief Yannuzzi which, coupled with the additional safeguards, satisfied the COE that no violation existed. Commissioner Farach agreed that Commissioner Reinhart's language reflected his sentiment.

VIII.c. – CONTINUED

Mr. Johnson said that the language changes could be made during the meeting or afterwards for the chair's approval.

MOTION to approve the RQO 11-111 proposed advisory opinion as modified by Robin Fiore and Manuel Farach's changes, with deference to the chair and to the vice chair as to the specific language to be incorporated. Motion by Bruce Reinhart, seconded by Manuel Farach, and carried 5-0.

VIII.d. RQO 11-112

Ms. Rogers made the following points during a presentation:

- Town employees were prohibited from using their official positions to give special financial benefits not shared with similarly situated community charitable organizations, or to nonprofit organizations of which they were officers or directors.
- Lending Chief Yannuzzi's name or official title to a fundraising effort would constitute the use of one's official position and employment to financially benefit a Town police department support group specially. Alternatives were to resign from the charity's position or to withhold the use of the Town's official position in order to solicit contributions in a personal capacity only.
- The police chief could send solicitation letters over his name without his title, and the Town's human resources department director could serve on a nonprofit board. They were not required to use their official titles while serving in those positions even though they would serve as a result of their employment.

Commissioner Harbison commented that another consideration was the competition for donations that existed among charities. He said that leveraging one's title gave an unfair advantage.

MOTION to approve proposed advisory opinion letter RQO 11-112. Motion by Manuel Farach, seconded by Bruce Reinhart, and carried 5-0.

Mr. Johnson reported that the COE executive director's office had received 123 advisory opinion requests in 2011 and 41 in 2010.

REORDER THE AGENDA

(CLERK'S NOTE: Judge Rodgers suspended the agenda order to take up Item VIII.b.)

VIII.b. RQO 11-107

Ms. Rogers stated that:

- The County Intergovernmental Coordination Program (Program) created by an interlocal agreement served to resolve disputes and to promote communications among municipalities, the School District, the South Florida Water Management District (SFWMD), and the County.
- The only Program members subject to the jurisdiction of the COE were those appointed by municipalities or by the Board of County Commissioners (BCC).
- Program participants who were not subject to the COE's jurisdiction included appointees of the League of Cities (LOC), the School Board, and the SFWMD.

The LOC Executive Director Radcliffe Brown stated that the LOC was a 501(4)(c) nonprofit organization and that some of its members were elected officials.

Ms. Rogers clarified that any LOC-appointed mayor or elected official who served on the Program's board would not be subject to the Code by nature of the LOC's appointment, but would instead be subject to the Code in his or her capacity as elected official.

Commissioner Fiore recommended that the COE create a paragraph describing the Code's requirements for inclusion in future interlocal agreements, and for posting on the COE's Web site.

MOTION to approve proposed advisory opinion letter RQO 11-107. Motion by Bruce Reinhart, seconded by Robin Fiore, and carried 5-0.

REORDER THE AGENDA

(CLERK'S NOTE: Judge Rodgers suspended the agenda order to take up Item VIII.f.)

VIII.f. RQO 11-115

Ms. Rogers stated that:

- The City of Boynton Beach's (City) lease agreement to the 501(c)(3) Schoolhouse Children's Museum and Learning Center (Museum) required the City's manager or appointee to sit on the board of directors.
- Staff's opinion was that public officials may not use their positions and titles to give the Museum special financial benefits not shared with similarly situated charitable organizations, even though they served on the board by direction of their government employer.
- Any solicitation for donations from officers on behalf of the charity by using official titles would constitute a violation of the Code's misuse of office section.

City Interim Manager Lori Laverriere asserted that she had not solicited for Museum donations in her official capacity. She asked for details concerning individual fundraising and advice as to whether she should abandon the effort.

Commissioner Farach replied that the COE's job was to interpret the Code and issue opinions by applying common-sense principles. He said that while the COE could not dispense advice, no issues would exist if no charitable solicitations took place.

MOTION to approve proposed advisory opinion letter RQO 11-115. Motion by Bruce Reinhart, seconded by Robin Fiore, and carried 5-0.

(CLERK'S NOTE: The agenda order was restored.)

VIII.a. RQO 11-104

The COE Investigator Mark E. Bannon stated that:

- This matter was resubmitted for the COE's consideration of a possible rules misinterpretation.
- The original submission concerned the Code's section that described nonprofits' 501(c)(3) solicitation guidelines, which did not apply to the County Municipal Clerks Association (MCA).

VIII.a. – CONTINUED

- A closer study of the Code's exceptions revealed that the MCA was not permitted to solicit anything from lobbyists or officials because contributions applied to members' education within all 38 municipalities.

MOTION to approve proposed advisory opinion letter RQO-11-104. Motion by Robin Fiore, and seconded by Ronald Harbison.

Commissioner Fiore commented that municipalities should commit to education, training, and pay so that their clerks could attend seminars. Mr. Johnson said that solicitations could be made of non-vendors and non-lobbyists for that purpose.

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

VIII.e. RQO 11-113

Ms. Rogers stated that staff agreed that a County medical examiner's employee was not prohibited from giving personal gifts to municipal-government vendor employees or lobbyists. She said that while the Code prohibited vendors from giving personal financial benefits to government employees, the reverse did not apply.

Commissioner Fiore commented that the gift-giving was ill advised even though the Code permitted it.

(CLERK'S NOTE: Judge Rodgers left the meeting.)

MOTION to approve proposed advisory opinion letter RQO 11-113. Motion by Bruce Reinhart, seconded by Ronald Harbison, and carried 4-0. Judge Rodgers absent.

VIII.g. RQO 11-117

Ms. Rogers stated that:

- Staff agreed that an advisory board member was not permitted to use his or her appointed office to give himself/herself or his or her outside business, or a customer or client of the outside business, a special financial benefit not shared with similarly situated members of the general public.

VIII.g. – CONTINUED

- When faced with a conflict, the board member must disclose the nature of the conflict, refrain from voting or participating, and file the required conflict disclosure form.

(CLERK'S NOTE: Judge Rodgers rejoined the meeting.)

- Prior to a vote taken on a preliminary matter, rather than a voting matter that would be going before other boards, the advisory board member in question would be unable to present a matter before the board in any capacity. The member would, however, be able to present it before the planning and zoning and other boards, but only in a private professional capacity.

Commissioner Farach referred to the opinion's last sentence of the paragraph beginning with, IN SUMMARY. He asked Ms. Rogers whether the meaning was that a business associate of the person asking the question could petition the Community Appearance Board (CAB). Ms. Rogers replied affirmatively, adding that it was permissible only if a business associate's official title was not mentioned in a presentation. A CAB member familiar with the business named in the petition must abstain from all parts of the conversation, she added.

Commissioner Farach expressed concern that the abstain provision was not included in that paragraph's final sentence. Ms. Rogers suggested adding: however, you must abstain and not participate in the matter.

Ms. Rogers said that an alternative would be to substitute the word, again, for however. Mr. Farach said that he agreed to the insertion of either word so long as the special restrictions were clear.

MOTION to approve proposed advisory opinion letter RQO 11-117. Motion by Manuel Farach, seconded by Robin Fiore, and carried 5-0.

VIII.h. RQO 11-118

Mr. Johnson stated that:

- Financial services professionals involved in the public issuance of bonds were not prohibited from contractual arrangements or compensation contingent upon the transaction closings, as they were ordinary and customary in the bond underwriting industry.

VIII.h. – CONTINUED

- Bond underwriting professionals were paid from monies that were financed so that no payment was made for unsold bonds. The industry should be exempted from contingent fee prohibitions of Section 2-443.
- Assistant County Attorney Leonard Berger, who had requested the opinion, was unable to attend today's meeting to provide background information. The item could be tabled until the next meeting, when he could be present.

Commissioner Harbison commented that a continued discussion with Mr. Berger present would benefit the public and the commissioners with the provision of examples of fees that were inappropriate.

MOTION to postpone a vote on item RQ 11-118 until the next meeting with Leonard Berger present. Motion by Bruce Reinhart.

Commissioner Farach stated that he believed the prohibition was to halt the overuse of contingency fee agreements' arrangements that conveyed a quid pro quo or a kickback. He said that a vote should be taken today so that any pending bond issues could be resolved before the COE next met.

Commissioner Fiore stated that her preference was to delay a vote in case bond issues were pending. Commissioner Harbison said that the public would benefit from hearing Mr. Berger's point of view.

MOTION seconded by Robin Fiore, and carried 4-1. Manuel Farach opposed.

VIII.i. RQO 11-123

Mr. Johnson stated that:

- The Code exempted other governmental entities from the definition of outside employer or business. That meant that a prohibition against a public employee working for an outside employer who had contracts with his or her government employer did not apply to that employee working part-time for another government.

VIII.i. – CONTINUED

- The County or any municipal government could apply through its own rules or by a more stringent condition or regulation concerning the outside employment by merit rule or by some other internal policy or procedure.

MOTION to approve proposed advisory opinion letter RQO 11-123. Motion by Bruce Reinhart, seconded by Manuel Farach, and carried 5-0.

RECESS

At 4:25 p.m., the chair declared the meeting recessed.

RECONVENE

At 4:42 p.m., the meeting reconvened with Judge Edward Rodgers, Manuel Farach, Robin Fiore, Ronald Harbison, and Bruce Reinhart present.

IX. BOCA RATON VOTING CONFLICTS

Mr. Johnson stated that:

- Staff sought direction for an advisory opinion that was requested by the City of Boca Raton. The issue was whether a rational and reasonable interpretation of the Code allowed for certain relationships where it was unlikely that there would be a financial benefit to either the company or to the employee if the nexus between the employee or the outside customer client was so distant that there was no public reason to have the employee abstain and not participate.
- He, Mr. Berger, and Ms. Rogers conferred to create the guidelines that appeared in the staff analysis regarding voting conflicts, and a COE discussion was requested.

Commissioner Farach stated that the guidelines represented a good start, and that no bright-line rule existed that identified Code violations. Mr. Johnson said that the Code contained the bright-line words: You may not financially benefit a customer or client of your outside business or employer. He said that a customer or client was bright-line defined as \$10,000 in goods or services provided to that customer or client over a 24-month period.

IX. – CONTINUED

Mr. Johnson continued: the County's Code was a standout among other counties. He said that most ethics codes described the relationship itself as opposed to the County's bright-line description of a customer or client of an outside employer with a \$10,000 threshold.

Commissioner Reinhart said that individual disclosures of each board member's employer could be made public as a step toward resolving relationship issues. Commissioner Farach said that the ethics ordinance drafting committee could choose to reconvene and discuss Code revisions in a public forum. Commissioner Fiore remarked that no urgency was evident, and that the ordinance, as written, was sufficient for the COE's purposes.

Mr. Johnson remarked that his staff planned to bring a request for an advisory opinion on this issue to the COE in February.

X. REVISION TO RULES OF PROCEDURE, SECTION 2

Mr. Johnson stated that the COE staff's analysis and revision recommendations were written to bring the rules of procedure in line with the actual realities of procedure. He said that although the COE may prefer to delay discussion until the next meeting, he sought permission now to omit the names of those requesting advisory opinions from the ethics' Web site and to redact their names within publications.

Commissioner Fiore stated that redactions would create suspicion rather than gratitude for free advice. Commissioner Harbison said that people had told him that they would not seek an opinion because they feared public reaction. Commissioner Reinhart said that a stigma may attach to those who requested their names to be redacted. Commissioner Farach said that while the State COE redacted names on request, the County COE had processed a greater number of requests than the State had accomplished because its transparency lent credibility.

Judge Rodgers stated that:

- He would prefer that the COE perform evaluations of actual situations rather than serve as an advisory board for people who sought approval for their planned actions.

X. – CONTINUED

- Written advisory opinions should be as brief as possible.

Mr. Johnson relayed an invitation from the county attorney to COE members to attend a County Financing Committee meeting where a summer bond issue would be discussed. He said that the inspector general (IG) would attend that meeting.

MOTION to postpone discussion of Item X. until the next meeting. Motion by Commissioner Harbison, and seconded by Commissioner Fiore.

Judge Rodgers said that he had discussed with Mr. Johnson the following:

- As chair of the IG Committee, he seldom interacted with the IG and received little information about the committee's ongoing activities.
- A conflict could exist if he asked COE members for their advice or suggestions concerning items he might wish to discuss with the IG.
- An open meeting on February 7, 2012, presented an opportunity for COE members to ask questions of the IG Committee on behalf of the ethics commission.

Mr. Johnson stated that it was inappropriate for the COE to discuss IG matters. He said that Judge Rodgers, as chair of the IG Committee, was permitted to speak to any of its members or staff about any issues in mind. He recommended that Judge Rodgers confirm his communication status with the IG's general counsel first, as he could not dispense legal advice.

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

XI. EXECUTIVE DIRECTOR COMMENTS – None

XII. PUBLIC COMMENTS – None

XIII. ADJOURNMENT

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

APPROVED:

Chair/Vice Chair

ITEM VI – REVISIONS TO RULES OF PROCEDURE, SECTION B. ADVISORY OPINIONS – STAFF ANALYSIS

Issue: When promulgating the COE Rules of Procedure, several sources were reviewed. The Code of Ethics section 2-260.9 is a general statement establishing jurisdiction to interpret the code through advisory opinions and specific procedures were to be promulgated pursuant to section 2-257(b). One source of information used was Miami-Dade County Commission on Ethics and Public Trust. The Advisory Opinion section contains protocols similar to those in use by Miami-Dade County at the time. A review of Section B, 2.1-2.9 reveals a number of these protocols are not consistent with the current process in use in Palm Beach County. Staff is requesting a review of our protocols and to conform the Rules of Procedure accordingly.

Staff Analysis and Recommendation:

The following Rules of Procedure are inconsistent with current application of sec. 2-260.9 by the COE and COE staff:

- 1) Section 2.5(b) requires all draft opinions to be reviewed by the Chairperson or Co-Chairperson before submission to the COE while section 2.5(d) gives the Executive Director discretion in submitting a draft or initial request directly to the COE.

Recommendation: 2.5(b) and (d) be amended to require The Executive Director to write or review (if written by a designee) draft opinions. Submission of all advisory opinions to the COE is mandatory, not discretionary. Since all opinions are submitted to the COE for review, section (c) is stricken since it makes submission discretionary.

- 2) Section 2.7 permits the Executive Director to respond to a request for advisory opinion without conferring with the COE where the facts of the request involve issues substantially similar to previously reviewed opinions or is answered by the plain language of the code. The ED does not have independent authority to issue opinions under sec. 2-260.9 which requires “an advisory opinion shall be rendered by the commission on ethics on a timely basis...”

Recommendation: Section 2.7 be stricken.

- 3) Section 2.5(f) references section 2.7 and 2.5(c) as to processing of opinions.

Recommendation: If all opinions must be reviewed by the ED and submitted to the COE, reference to alternative dispositions is inappropriate. Staff recommends striking the language of section 2.5 referencing sections 2.7 and 2.5(c).

- 4) After striking section 2.7, there is no protocol reflecting opinions that are currently reviewed under consent agenda, i.e., those opinions directly answered by prior opinions or the plain language of the applicable code section.

Recommendation: Creation of a new section (section (d)) which sets forth protocols for regular agenda and consent agenda opinions. With regard to consent agenda opinions, review and approval by the Chairperson or Co Chairperson is required.

ITEM VI – REVISIONS TO RULES OF PROCEDURE, SECTION B. ADVISORY OPINIONS (CHANGES MARKED)

SECTION B. ADVISORY OPINIONS

2.1 Subject of an Advisory Opinion

- a) The Commission will issue a written advisory opinion on the following laws to a person qualified to make a request under paragraph 2.3 of this section (relating to Persons Eligible to Receive an Advisory Opinion):
 - 1. CODE OF ETHICS, ARTICLE XIII SECTION 2-441 to 2-448 (Ordinance no. 2009-051)
 - 2. COMMISSION ON ETHICS, ARTICLE V SECTION 2-254 to 2-260 (Ordinance no. 2009-050)
 - 3. LOBBYIST REGISTRATION, ARTICLE VIII SECTION 2-351 to 2-357 (Ordinance nos. 2003-018/2005-055)
 - 4. POST EMPLOYMENT, ARTICLE VI SECTION 2-141 to 2-146 (Ordinance no. 88-30)
- b) The Commission will not issue an advisory opinion that concerns the subject matter of pending litigation known to the Commission.

2.2 Persons Eligible to Receive an Advisory Opinion

A person who is subject to any of the laws listed in paragraph 2.1 (a) of this section may request an opinion regarding the interpretation or application of any of the ordinances under the Commission's jurisdiction to himself or herself.

2.3 Request for an Advisory Opinion (Form Requirements)

All requests of advisory opinions must be in writing and contain the following information:

- a) Name, address and telephone number of the requesting party.
- b) Status of the requesting party through which jurisdiction of the Commission is invoked.
- c) A brief fact scenario forming the basis of the request for the advisory opinion. The fact scenario must contain all relevant information for which the requesting party seeks ethical guidance. This includes, but is not limited to, all relationships, personal and contractual, relevant to the requested advisory opinion.
- d) Advisory opinion may be submitted via U.S. Mail, fax, hand-delivered or e-mail directed to ethics@palmbeachcountyethics.com. No request will be processed that does not contain sufficient factual or identification information as required by this section.

2.4 Advisory Opinion Intake

- a) All requests for advisory opinions will be initially reviewed by the Executive Director or staff designee in a timely manner.

- b) A written acknowledgment of receipt will be sent to the requesting party by U.S. Mail, fax or e-mail response.
- c) An initial determination of jurisdiction will be made during the intake process.
- d) If jurisdiction is lacking, the requesting party will be sent a declination letter due to the lack of jurisdiction.
- e) If valid jurisdiction is determined, but the face of the request contains insufficient factual information, the requesting party will be contacted and asked for additional relevant information. Response is required within 30 days. The failure of the requesting party to respond with additional information will result in closure of the file.
- f) An advisory opinion request may be withdrawn by the submitting party in writing no later than ten days prior to the public meeting wherein the commission on ethics is to consider the request.

2.5 Processing Advisory Opinions

- a) Once jurisdiction and sufficient factual information are determined to exist on the face of the request, the Executive Director or his designee will make an initial substantive determination based on the Code of Ethics, Lobbyist Registration or Post Employment Ordinances.
- b) Once an initial determination has been made a draft advisory opinion letter will be written and reviewed by the Executive Director (when written by a designee). ~~and the Chairperson or Co-Chairperson of the COE.~~
- ~~c) The Executive Director and Chairperson or Co-Chairperson of the COE will then determine whether to submit the advisory opinion to the COE for review at the next regularly scheduled meeting.~~
- ~~d)c) The Executive Director will ~~may, at his/her discretion,~~ submit a draft advisory opinion or, in the alternative, the initial request for advisory opinion directly to the COE for advice, guidance or approval.~~
- ~~e)d) When the facts of the request involve issues substantially similar to previously reviewed advisory opinions, or the plain language of the appropriate County Ordinance directly answers the request without ambiguity, the Executive Director will submit a draft advisory opinion to the Chairperson or Co-Chairperson of the COE who will review the opinion and approve or recommend that it be submitted to the COE for advice, guidance or approval in accordance with rule 2.5(c). If preliminary approval is given, the Executive Director will respond prior to the next regular meeting, subject to consent agenda approval at that meeting.~~
- ~~f)e) Opinions set on the consent agenda may be removed during a COE meeting by request of a Commissioner. The opinion will then be discussed and voted on individually in a manner consistent with rule 2.5(c).~~
- ~~g)f) All requests for advisory opinion will be processed within a reasonable time. ~~and, unless otherwise processed as per subsection c above and/or paragraph 2.7 below, the written response is to be submitted to the COE for approval at the next regular meeting.~~~~

2.6 Expedited Responses

When the requesting party so indicates, and the facts support an expedited review of a request for advisory opinion, the Executive Director will confer with the COE Chairperson or Co-Chairperson to determine whether: to set the matter for review at the next scheduled meeting; to set a special meeting of the COE to review the request; or to have the Executive Director respond prior to the next regular meeting.

2.7 Response by the Executive Director

~~The Executive Director, or his designee, may respond to a request for advisory opinion without conferring with the COE when: the facts of the request involve issues substantially similar to previously reviewed advisory opinions; or the plain language of the appropriate County Ordinance directly answers the request without ambiguity.~~

2.8 Advisory Opinion Letter Form

- a) All advisory opinion letters shall contain the following:
- b) A brief recitation of the factual scenario as contained in the written request.
- c) The applicable sections of the relevant County Ordinance.
- d) An opinion as to whether the County Ordinances apply to the requesting party.
- e) An opinion as to whether the requesting party is/would be in compliance with the applicable County Ordinance.
- f) If deemed appropriate by the COE, additional comment regarding ethics, appearance of impropriety or similar advice to the requesting party based upon the factual scenario as presented.
- g) Signatures of the Executive Director or COE Staff Counsel.

2.9 Publication of Advisory Opinions

Each advisory opinion issued by the Commission shall be numbered, dated and published. All opinions shall be published with the name of the requestor redacted unless the requestor authorized the use of his or her name. Notwithstanding, the name of the requestor may be subject to public records disclosure pursuant to chapter 119, Florida Statutes.

ITEM VII – PROCESSED ADVISORY OPINIONS

RQO 12-005 Paula Bosquet

A municipal councilwoman asked whether the Code of Ethics limits or prohibits endorsement or support of partisan and non-partisan candidates for primary or general elections.

Staff submits the following for COE approval: the revised Palm Beach County Code of Ethics does not limit or regulate political activity or speech. Any regulation of political activity is controlled by state and federal law. In addition, the Commission cannot opine as to whether or not the non-partisan nature of your position is regulated by local municipal ordinance.

RQO 12-006 Chuck Magazine

A municipal employee asked whether a Veterans Advisory Commission member may solicit construction materials and services from past and potential vendors of the City of Boynton Beach (the City) solely for use by the City in constructing public monuments in a City park.

Staff submits the following for COE approval: there is no prohibition against a volunteer advisory board member soliciting or accepting a vendor or lobbyist gift of any amount provided the vendor or lobbyist does not vend or lobby the official's board or the department within the board's authority. Additionally, even if the vendor or lobbyist appears before the board or department, an official or employee is not prohibited from soliciting or accepting gifts in excess of \$100, annually in the aggregate, on behalf of his or her municipality in the performance of their official duties where these gifts are for use solely by the municipality for a public purpose. Notwithstanding, an advisory board member may not use his or her public office to obtain a special financial benefit or otherwise obtain a *quid pro quo* in exchange for these gifts.



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

Paula Bousquet, Councilwoman
City of Greenacres
500 Maleluca Lane
Greenacres, FL 33463

Re: RQO 12-005
Political Activity

Dear Councilwoman Bousquet,

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

YOU ASKED, in your email dated January 19, 2012, whether the Code of Ethics limits or prohibits your endorsement or support of partisan and non-partisan candidates for primary or general elections.

IN SUM, the revised Palm Beach County Code of Ethics does not limit or regulate political activity or speech. Any regulation of political activity is controlled by state and federal law. In addition, the Commission cannot opine as to whether or not the non-partisan nature of your position is regulated by local municipal ordinance.

THE FACTS as we understand them are as follows:

You are a sitting municipal councilwoman for the City of Greenacres (the City). Your position is non-partisan; however, you would like to sign endorsements in support of both partisan and non-partisan candidates in upcoming primary and general elections. In addition, you may wish to recruit candidates for City Council in the future. You intend to use your official title in these endorsements. Lastly, the endorsements are not in exchange for a benefit or anything of value.

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

The definition of financial benefit specifically excludes *campaign contributions authorized by law*.¹ In addition, *political contributions specifically authorized by state or federal law* are likewise excluded from the gift law.² The commission has previously opined on these exemptions.³ Notwithstanding these exclusions, an official has an ongoing duty not to use his or her official position to *corruptly secure or attempt to secure a special privilege, benefit or exemption for himself, herself, or others*. Corruptly

¹ §2-442. Definitions.

² §2-444(g)(1)a.

³ RQO 11-023, RQO 11-033

means done with a wrongful intent and in a manner inconsistent with the proper performance of their official duties.⁴

In previously addressing the issue of campaign contributions the commission stated:

The rationale for exempting campaign contributions from the gift laws can be found in both state and federal law. It is well established that supporting a political candidate financially is speech, and represents political expression at the core of the electoral process.⁵ Any law that burdens the right of association and free speech may be upheld only if it serves a compelling government interest and is narrowly tailored to serve that interest.⁶

IN SUMMARY, the Code of Ethics does not regulate or limit political activity that does not involve a corrupt misuse of official position. Therefore, the Commission on Ethics cannot opine on matters involving political activity and speech regulated by state and federal law unless they rise to the level of a corrupt misuse of office.

This opinion construes the Palm Beach County Code of Ethics Ordinance, but is not applicable to any conflict under state ethics or campaign law or any local municipal ordinance that may apply. Inquiries regarding possible conflicts under state law should be directed to the State of Florida Commission on Ethics. Inquiries regarding possible conflicts under state campaign finance laws should be directed to the Florida Division of Elections.

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

⁴ §2-443(b)

⁵ State v. Dodd, 561 So.2d 263 (Fla. 1990)(citing Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990)

⁶ State by Butterworth v. Republican Party of Florida, 604 So. 2d 477 (Fla. 1992)(citing EU v. San Francisco County Central Democratic Committee, 489 U.S. 214 (1989)



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

January 24, 2012

Chuck Magazine, Risk Manager
City of Boynton Beach
100 East Boynton Beach Blvd.
P.O. Box 310
Boynton Beach, FL 33425

Re: RQO 12-006
Gifts/Solicitation for Public Use

Dear Mr. Magazine,

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 February 2, 2012.

YOU ASKED in your email dated January 23, whether a Veterans Advisory Commission member may solicit construction materials and services from past and potential vendors of the City of Boynton Beach (the City) solely for use by the City in constructing public monuments in a City park.

IN SUM, there is no prohibition against soliciting or accepting a gift of any amount provided the vendor or lobbyist does not vend or lobby the volunteer official's board or the department within the board's authority. Additionally, even if the vendor appears before the board or department, an official or employee is not prohibited from soliciting or accepting gifts in excess of \$100, annually in the aggregate, on behalf of his or her municipality in the performance of their official duties where these gifts are for use solely by the municipality for a public purpose. Notwithstanding, an advisory board member may not use his or her public office to obtain a special financial benefit or otherwise obtain a *quid pro quo* in exchange for these gifts.

THE FACTS as we understand them are as follows:

You are the risk manager for the City and serve as staff liaison to the Veterans Advisory Commission (VAC) on behalf of the City. As part of your duties, you coordinate activities with the various City Departments as it relates to Veterans' issues. The City has created and appointed members to the VAC.

An issue has arisen where a member of the VAC has been in contact with a past and potential future City vendor to obtain donated concrete for use in a City Park as a base for approved veteran monuments. In addition, a private organization, Boynton Veterans Council (BVC), includes members of the VAC and is likewise soliciting free services and products for use in erecting these monuments in the City Park. The vendors being solicited do not lobby or appear before the VAC.

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

The Code of Ethics applies to officials and employees of Palm Beach County and the municipalities within the County.¹ Therefore, members of the VAC, appointed by the City Commission are within the jurisdiction of the code. Members of the BVC, a non-profit organization, are not subject to the code unless they are also members of the VAC.

Section 2-444(b)(1) states as follows:

No advisory board member, or any other person on his or her behalf, shall knowingly solicit or accept directly or indirectly, any gift with a value of greater than one hundred dollars (\$100) in the aggregate for the calendar year from any vendor, lobbyist, or any principal or employer of a lobbyist, who lobbies the recipient's advisory board, or any ...municipal department...that is subject in any way to the advisory board's authority.

However, even if prohibited under §2-444(b)(1), the gift law does not apply to *gifts solicited or accepted by municipal officials on behalf of the county or municipality in performance of their official duties for use solely by the municipality for a public purpose.*²

Under the facts you have submitted, the vendors being solicited do not appear before the VAC nor do they do business with your City Department. Therefore, the gift limitations under §2-444(b)(1) do not apply, whether or not the solicited items are for use by the municipality for a public purpose.

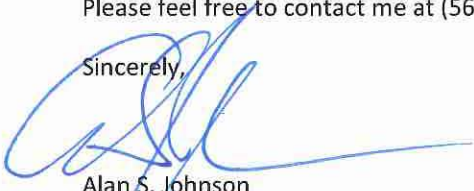
At no time may an official solicit or accept a financial benefit in exchange for the performance of their official duties.³ Nor may an official corruptly use their official position to benefit any person or entity.⁴

IN SUMMARY, members of the VAC are not prohibited from soliciting or accepting gifts from vendors who do not appear before their board or do business with the City department within the Board's jurisdiction. Nor are they prohibited from soliciting or accepting gifts valued in excess of \$100, annually in the aggregate, from vendors who do appear before the board, provided that the solicitation is in their official capacity for use solely by the municipality for a public purpose. At no time may a VAC member use their official position to obtain a *quid pro quo* personal benefit in exchange for an official action.

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 §2-444. Definitions. *Official or employee*

² RQO 10-027, RQO 10-040

³ §2-443(a)

⁴ §2-443(b)

ITEM IX – PROPOSED ADVISORY OPINIONS

RQO 12-001 Carlos Cabrera

A city Fire Chief asked whether an outside company he owns may continue to provide software support and receive compensation from the City of West Palm Beach (the City) for EMS software, previously provided to the City by his company, until a new County system is operational.

Staff submits the following for COE approval: as of June 1, 2011, the Code of Ethics prohibits an employee or their outside business from entering into a contract with their public employer unless one of several exceptions applies.

Based upon the facts submitted, the employee's outside business is not prohibited from fulfilling the terms of its licensing agreement with the City entered into prior to the effective date of the code of ethics. However, all agreements revised or renewed after June 1, 2011 are subject to the contractual relationships prohibitions of the Code of Ethics. An exception to this prohibition exists where an employee's company is the only source of supply within the City, provided there is full disclosure by the employee of their interest in the outside company to the City and the Commission on Ethics.

Lastly, notwithstanding that an employee is not prohibited from entering into or maintaining a contract with their public employer as a sole source provider, the employee may not use their official position to give or influence others to give their outside business a special financial benefit.

RQO 12-002 Norm Ostrau

A City Ethics Officer asked whether municipal employees may accept scholarship dollars from a local non-profit to attend professional certification programs at Palm Beach State College.

Staff submits the following for COE approval: public employees and officials are not prohibited from accepting scholarship dollars, provided that there is no quid pro quo or special treatment or privilege given to the non-profit organization in exchange for offering these scholarships. If awarded, so long as the scholarships are educational training costs related to an employee's duties and responsibilities to their government employer they are not reportable gifts.

RQO 12-003 Carol Langford

A County employee/board liaison asked whether the code prohibits a lobbyist who lobbies Palm Beach County from being appointed to a County advisory board.

Staff submits the following for COE approval: the code of ethics does not prohibit a lobbyist from serving on a county or municipal advisory board. However, advisory board members are prohibited from using their official position to give a special financial benefit, not shared with similarly situated members of the general public, to themselves, their outside employer or business or a customer or client of their outside employer or business. 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. The prohibition extends to the advisory board member, or someone using the member's official position on their behalf.

RQO 12-004 Jeffrey Garber

A County advisory board member asked if he must abstain and not participate in voting where a person appearing before his board is represented by the non-profit Legal Aid Society and two partners with his law firm serve as officials or board members of that non-profit.

Staff submits the following for COE approval: The misuse of office and voting conflicts sections of the code are grounded in the desire to limit potential misuse of a public duty to treat all citizens and entities on an equal footing where the official has a financial conflict. Accordingly, the code directly prohibits only those persons (or their spouse or domestic partner) serving as a non-profit officer/director from participating and voting on issues that may specially financially benefit that non-profit.¹ As a result an official is not required to abstain from voting under the circumstances submitted. Legal Aid representation is pro bono, required of individual licensed attorneys, and does not result in a financial benefit for an individual lawyer or his or her firm, however, should an associate of their firm appear before the official's advisory board on behalf of a firm client, the official must abstain and not participate in the matter. Should a member of the firm appear before the official's advisory board on behalf of a pro bono Legal Aid client, and the firm does not benefit financially, the official is not prohibited from hearing and participating in the matter under the code, however the attorney may want to consult the Florida Bar Rules Regulating Professional Conduct.

¹ Since this section does not apply to a board member who is not a director of a non-profit, we need not address whether or not the representation of a Legal Aid client constitutes a special financial benefit to Legal Aid itself.

February 3, 2012

Carlos Cabrera, Fire Chief
City of West Palm Beach
401 Clematis Street
West Palm Beach, FL 33401

Re: RQO 12-001
Contractual Relationships/Misuse of Office

Dear Chief Cabrera,

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 February 2, 2012.

YOU ASKED in your letter of January 9, 2012 whether a company you own may continue to provide software support and receive compensation from the City of West Palm Beach (the City) for EMS software, previously provided to the City by your company, until a new County system is operational.

IN SUM, as of June 1, 2011, the Code of Ethics prohibits you or your outside business from entering into a contract with your public employer unless one of several exceptions applies.

Based upon the facts you have submitted, your outside business is not prohibited from fulfilling the terms of its licensing agreement with the City entered into prior to the effective date of the code of ethics. However, all agreements revised or renewed after June 1, 2011 are subject to the contractual relationships prohibitions of the Code of Ethics. An exception to this prohibition exists where your company is the only source of supply within the City, provided there is full disclosure of your interest in the outside company to the City and the Commission on Ethics.

Lastly, notwithstanding your ability to enter into such a contract as a sole source provider, you may not use your official position to give or influence others to give your business a special financial benefit.

THE FACTS as we understand them are as follows:

You are the Fire Chief of the City of West Palm Beach (the City). In 1997, the City Fire Rescue Department established a committee to evaluate software for tracking Emergency Medical Services reports (EMS). The committee evaluated a number of products and recommended that the department purchase the "EMSexpress" system created by Code 3 Software (Code 3).

You are an owner of Code 3, a software company based in West Palm Beach. The City entered into a licensing agreement with Code 3 for use of the EMS software in 1998 and Code 3 has provided software

support and maintenance since that time. The software licensing agreement between Code 3 and the City was renewed most recently in 2006. Pursuant to the licensing contract, service and support of the EMS software was provided at no additional cost for thirty days. After that initial period, Code 3 agreed to provide software support on a yearly basis for an additional fee. The City may terminate or amend the support agreement on the anniversary of the contract date. The City did not terminate its agreement for software support with Code 3, and the support contract automatically went into effect after June 1, 2011. Code 3 has continued to provide software support to the City but based upon your position as Fire Chief, the company has not as of yet billed the City for the service since June 1.

The Fire Department is planning to change software in mid to late 2012. Palm Beach County Fire Rescue has developed EMS software and has offered it to the City. By using the new County software, the city hopes to address operational issues that have arisen since the County started dispatching for the City in 2007. Code 3 will not be involved in the operation or maintenance of the County software.

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

Action under the code of ethics is prospective, that is, a violation may not be sustained for events occurring prior to the effective date of the code.¹ This is true when the code affects substantive rights and liabilities, such as the underlying software contract between the City and Code 3.² Simply put, a person is not held responsible for conduct that was not prohibited at the time. Section 2-443(d) prohibits employees or their outside employer or business from entering into contracts or other transactions for goods or services with the government they serve, unless one of several exceptions apply. The software licensing agreement between the City and Code 3 was entered into in 1998 and renewed in 2006, prior to the enactment of the revised Code of Ethics on June 1, 2011. Therefore, the software licensing agreement is not subject to the contractual relationship prohibitions of the code.

However, the licensing contract between Code 3 and the City provides that on each anniversary of the contract execution date, the City may elect to terminate its service agreement with Code 3. We are of the opinion that any renewal or change in the terms of an existing contract after the effective date of the Code subjects the parties to the revised Code of Ethics provisions. Unless an exception applies, Code 3 is prohibited from contracting to provide ongoing software maintenance to the City. However, based on the information you provided, Code 3 is the sole supplier of maintenance within the City for the EMS software.³

Section 2-443(d)3 provides the following exception.

- (3) The outside employer or business involved is the only source of supply within the county or municipality as applicable and there is full disclosure by the official or employee of his or her interest in the outside employer or business to the county or municipality as applicable and the ethics commission prior to the purchase, rental, sale, leasing or other business being transacted.

¹ Art. V, Division 8, §2-260.6, *Landgraf v. USI Film Products*, 114 S.Ct. 1483, 1499 (1994) (A statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based on prior law).

² *Arrow Air, Inc. v. Walsh*, 645 So.2d 422 (Fla. 1994)(Whistleblower statute cannot be applied retroactively, since it created a new cause of action and affected substantive rights and liabilities)

³ The software itself has already been delivered and installed. The ongoing renewals are for maintenance only.

Code 3 is the exclusive provider of technical support for the EMS express system and is the only source of supply within the City. For Code 3 to continue to provide support for its software, you must disclose your interest in the company to the City of West Palm Beach and to the Palm Beach County Commission on Ethics. Based upon the information you provided, you have already disclosed the nature of your interest in the company to the City and this request for advisory opinion shall serve as your disclosure to the Commission.

In addition, §2-443(a) *misuse of public office or employment* prohibits employees and officials from using their official position to obtain a special financial benefit for themselves or their outside employer or business.⁴ Any attempt to use your official position as Fire Chief to influence the City or your department on behalf of Code 3, for a financial benefit not shared by similarly situated members of the general public, would violate the misuse of office section of the code. To be clear, a financial benefit is defined as anything of value.⁵

IN SUMMARY, public employees are prohibited from entering into contracts or other transactions with their public employer unless one of several exceptions applies. Based on the facts you have submitted, your outside business, Code 3 is the sole source provider of software support and maintenance for its EMSexpress software. Accordingly, Code 3 is not prohibited from entering into a contract with the City to provide such service provided there is full disclosure of your interest in the business in accordance with §2-443(d)3. Notwithstanding this exception to the contractual relationship prohibition, you have an ongoing responsibility to avoid using your official position to specially financially benefit your outside business, as to do so would constitute a misuse of your official position.

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

⁴ §2-443(a)1; §2-443(a)4; *Compare* RQO 11-037 (where a private resident inspector is a sibling of the town building inspector, the best practice would be to assign oversight responsibility to another town employee or official)

⁵ §2-442

February 3, 2012

Norm Ostrau, Ethics Officer
401 Clematis St. 5th Floor
West Palm Beach, FL 33401

Re: RQO 12-002
Scholarships/Gift Law

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 February 2, 2012.

YOU ASKED in your email dated January 9, 2012, whether City of West Palm Beach employees may accept scholarship dollars from a local non-profit to attend professional certification programs at Palm Beach State College.

IN SUM, public employees and officials are not prohibited from accepting scholarship dollars, provided that there is no quid pro quo or special treatment or privilege given to the non-profit organization in exchange for offering these scholarships. If awarded, the scholarships are educational training costs related to an employee's duties and responsibilities to their government employer. Accordingly, these scholarships are not reportable gifts.

THE FACTS as we understand them are as follows:

You are the ethics officer for the City of West Palm Beach (the City). Palm Beach State College (PBSC) is offering an educational program that provides "school age professional certification" and after school educator certificates for eligible members of the public. The certification program prepares enrollees to work with children 5 years and up in licensed afterschool programs. Prerequisites for the program include prior certification or other training, employment in a licensed childcare setting or after school program for children 5 to 12 years of age and mastery of the English language. Applicants must be at least 18 years old and have a high school diploma or GED. The program consists of two learning modules and costs \$222.40 for Florida residents.

The City offers after school programs for City residents. Eligible employees will benefit from the additional certification offered by the PBSC course, while students will benefit from educators with more training and experience.

Scholarship opportunities are available for this program to all applicants through Prime Time Palm Beach County, Inc. (PTPBC). All PBSC applicants are eligible for the scholarships whether they work for municipal, county, non-profit or for-profit after school programs. PTPBC is a non-profit organization that serves afterschool programs and practitioners by providing support and resources that increase program quality. Among other resources, PTPBC receives funding from Palm Beach County Children's Services Council and United Way. City employees eligible for the PTPBC scholarship dollars have not and do not intend to solicit donations on behalf of the non-profit. Based upon the information you provided, PTPBC does not vend, lease or lobby the City.

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

Sec. 2-444. Gift law.

- (g) For the purposes of this section, "gift" shall refer to the transfer of anything of economic value, whether in the form of money, service, loan, travel, entertainment, hospitality, item or promise, or in any other form, without adequate and lawful consideration...
 - (1) Exceptions. The provisions of subsection (g) shall not apply to:
 - 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 attendance is for governmental purposes, and attendance is related to their duties and responsibilities as an official or employee of the county or municipality;

County and municipal employees subject to the Code of Ethics are prohibited from soliciting or accepting gifts in excess of \$100 from vendors and lobbyists who vend, lease or lobby their government employer.¹ Moreover, employees may not solicit a gift of any value from a vendor or lobbyist of their government employer for their personal benefit, the benefit of a relative or the benefit of another public employee.² If an employee receives an allowable gift in excess of \$100, it is reportable unless one of several exceptions applies.³

PTPBC does not vend, lease or lobby the City. Accordingly, City employees, if eligible, may apply for and accept the non-profit scholarship dollars. If awarded, these scholarships are not reportable because they are an educational cost related to City employees' duties and responsibilities as afterschool educators.

Based on the facts you have submitted, the scholarships are neither prohibited nor reportable. However, City employees may not accept a personal financial benefit as a quid pro quo for an official action or performance of a legal duty or otherwise use their office corruptly to obtain any benefit from PTPBC.

IN SUMMARY, county and municipal employees are not prohibited from accepting scholarship dollars from an entity that does not vend, lease or lobby their governmental employer. Educational fees and costs related to an employee's governmental duties and responsibilities are not gifts as defined by the Code of Ethics and thus are neither prohibited nor 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(a)(1)

² 2-444(c)

³ 2-444(f)(2)

February 3, 2012

Ms. Carol Eddy Langford, Manager
Palm Beach County Mortgage and Housing Assistance
100 Australian Avenue N., 5th Floor
West Palm Beach, FL 33406

Re: RQO 12-003
Voting Conflicts/Misuse of Office

Dear Ms. Langford,

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 February 2, 2012.

YOU ASKED in your letter dated January 10, 2012 whether the code prohibits a lobbyist who lobbies Palm Beach County from being appointed to the Palm Beach County Commission of Affordable Housing Advisory Board.

IN SUM, the code of ethics does not prohibit a lobbyist from serving on a county or municipal advisory board. However, advisory board members are prohibited from using their official position to give a special financial benefit, not shared with similarly situated members of the general public, to themselves, their outside employer or business or a customer or client of their outside employer or business. 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. The prohibition extends to the advisory board member, or someone using the member's official position on their behalf.

THE FACTS as we understand them are as follows:

You are the manager of Mortgage and Housing Assistance for Palm Beach County (MHA), the department subject to the authority of the Commission of Affordable Housing Advisory Board (CAHAB). The CAHAB is authorized by Florida Statutes §420.9076 and oversees State Housing Initiatives Partnership Program funds. Section 420.9076(2) parts (a) and (c) require the Board of County Commissioners (BCC) to appoint members who are "actively engaged in the residential home building industry of affordable housing."¹ Unlike state established boards that act independently of the local governing body, the CAHAB is essentially an advisory board to the BCC.² Based upon the information you provided, several members of the CAHAB have resigned due to conflicts. You are considering submitting to the BCC two individuals who have disclosed their status as registered lobbyists. One of the potential candidates lobbies the state of Florida and the second candidate is a registered lobbyist in Palm Beach County.

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

¹ Florida Statute §470.9076 provides that should a local governing body be unable to appoint a citizen actively engaged in these activities in connection with affordable housing, based upon the presence of a conflict of interest by prospective appointees, or other reasonable factor, a citizen without regard to affordable housing may be appointed.

² Compare RQO 11-036 (Local boards authorized by state statute, whose members are appointed by local governing bodies but whose board operates independently of a municipal or county governing bodies are officials- not advisory board members)

The Code of Ethics does not prohibit a lobbyist who has no contractual relationship with the county from serving in their personal capacity as an advisory board member or an official.³ That being said, §2-443(a) prohibits all advisory board members, officials, and employees from using their official position to give themselves, their outside business, or a customer or client of their outside business a financial benefit, in a manner which they know 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. Section 2-443(c) similarly prohibits an advisory board member or official from voting on an issue or participating in a manner that would result in a special financial benefit attributable to themselves, their outside business or customer or client. A customer or client is defined as *any person or entity to which an official'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).*⁴

These provisions do not prohibit other employees of a board member's outside business from representing their client's interest in matters before their board. However, once a matter does come before the CAHAB, the advisory board member must 1) disclose the nature of the conflict before the board discusses the issue; 2) abstain from any discussion or vote and not otherwise participate in the matter; and 3) File a state voting conflict form (8B), submitting a copy to the CAHAB clerk and to the Palm Beach County Commission on Ethics (COE).

As with all advisory board members, any use of one's official title or position to obtain a special financial benefit for one of the seven entities prohibited by the code, including an outside employer, customer or client, would violate §2-443(a) *Misuse of public office or employment.*

IN SUMMARY, the Code of Ethics does not prohibit a registered lobbyist from serving on a county advisory board. However, no advisory board member may use his or her official position to give themselves, their outside business or employer, or a customer or client of their outside business or employer, a special financial benefit, not shared with similarly situated members of the general public. If a conflict exists, the advisory board member must abstain from voting and not participate in the matter before the board.

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

³ §2-443(d) places certain limitations on an official who has a contractual relationship with the public entity he or she serves. In cases where the official sits on a decision-making board and the contracts involve the board or department within its authority, membership on that board is prohibited unless a specific exception applies.

⁴ §2-442. Definitions

February 3, 2012

Jeffrey M. Garber, Esquire
Casey, Ciklin, Lubitz, Martens & O'Connell
515 North Flagler Drive, 20th Floor
West Palm Beach, FL 33401

RE: RQO 12-004
Voting Conflicts/attorney-client

Dear Mr. Garber,

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 February 2, 2012.

YOU ASKED whether you must abstain and not participate in voting as an advisory board member of the Palm Beach County Fair Housing/Equal Employment Board when a person appearing before your board is represented by the non-profit Legal Aid Society and your fellow law firm partners serve as officials or board members of that non-profit.

IN SUM, as an appointed official you are prohibited from using your official position as an advisory board member to give a special financial benefit, not shared with similarly situated members of the general public, to yourself, your outside business, a customer of client of your outside business or a nonprofit for which you serve as an officer or director. Once presented with such a conflict, you must *publicly disclose the nature of the conflict*, file the required state disclosure form, refrain from voting and not participate in, or influence the advisory board decision-making process. However, you are not prohibited from participating based upon a business associate's status as a non-profit director, unless your outside business or business associate will financially benefit in a manner not shared by similarly situated members of the general public.

THE FACTS as we understand them are as follows:

You are a partner at the law firm of Casey, Ciklin, Lubitz, Martens and O'Connell (the Firm) and serve on the Palm Beach County Fair Housing/Equal Employment Board (the Board). As a BCC appointee to the Board, you are an official as defined under the Code of Ethics. The Board is charged with hearing and adjudicating Fair Housing and Equal Employment Complaints following a determination by the Executive Director of the Office of Equal Opportunity (OEO) that there are reasonable grounds to believe that an unlawful or discriminatory practice has occurred. The Board is also responsible for approving conciliation agreements.

A partner within your firm serves on the Board of Trustees of the Legal Aid Society of Palm Beach County (Legal Aid) and a second partner serves on its Board of Directors. The Board routinely hears matters in which Legal Aid either prosecutes an employment/housing claim in its own name, or in which it serves as legal counsel for a party who has brought an employment/housing claim.

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 you from using your official position to give yourself, your outside business, a customer or client of your outside business, or a non-profit you serve as an officer or director a financial benefit, in a manner which you know 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. A customer or client is defined as a person or entity to which your firm has supplied goods or services in excess of \$10,000 over the previous 24 months.¹

Similarly, §2-443(c) prohibits you from voting on an issue or participating in a manner that would result in a special financial benefit attributable to yourself, outside business, client or non-profit entity as previously described. Essentially, the voting conflict section addresses the scenario whereby in voting or participating in the matter you would violate the misuse of office prohibitions of the code. In such a scenario you are required to 1) disclose the nature of your conflict before your board discusses the issue; 2) abstain from any discussion or vote or otherwise participate in the matter; and 3) file a state voting conflict form (8B), submitting a copy to the clerk of your Board and the Palm Beach County COE.

Based upon the specific facts and circumstances you have provided, you may not vote on a matter that would result in a special financial benefit to yourself, members of your law firm, the firm itself or a customer or client of the firm.

While your colleagues do serve Legal Aid in an officer/director capacity, you do not. The misuse of office and voting conflicts sections of the code are grounded in the desire to limit potential misuse of a public duty to treat all citizens and entities on an equal footing. Accordingly, the code prohibits only those persons (or their spouse or domestic partner) serving as a non-profit officer/director from participating and voting on issues unique to that non-profit.² As a result you are not required to abstain from voting under these circumstances. Legal Aid representation is pro bono and does not result in a financial benefit for the Firm, however, should an associate of the Firm appear before your advisory board on behalf of a Firm client, you must abstain and not participate in the matter. Should a member of your firm appear before your advisory board on behalf of a Legal Aid client you are not prohibited from hearing and participating in the matter. Not only is there no financial benefit to a law firm or individual lawyer as a result of representation in the context of pro-bono service, but moreover, members of the Florida Bar are required by Rule 4-6.1(b) of the Florida Rules of Professional Conduct to provide at least 20 hours of pro bono legal service to the poor each year. These hours are the *personal* responsibility of each member of the bar and the service hours inure to the individual attorney providing the representation, not to his or her firm.

¹ §2-442. Definitions. *Customer or client*

² Since this section does not apply to a board member who is not a director of a non-profit, we need not address whether or not the representation of a Legal Aid client constitutes a special financial benefit to Legal Aid itself.

IN SUMMARY, based on the facts and circumstances presented, provided that there is no special financial benefit to your law firm, the Code of Ethics does not prohibit you from participating and voting on a matter notwithstanding the fact that your business associates are directors of the Legal Aid Society, a non-profit organization, or represent pro bono clients before your board on behalf of Legal Aid.

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

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

PROPOSED

ITEM X – Boca Raton Voting Conflicts

Staff Analysis:

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

In **RQO 11-116**, 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**, 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 branch of Citibank within Boca Raton. She has no supervisory authority and is responsible for opening small business/customer accounts.

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.)

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

Based on the specific facts 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, may not have a conflict of interest under §2-443(a)(5) of the Revised Code of Ethics, if the number of similarly situated customers is sufficiently large enough to negate the appearance of conflict. If the pool of bank customers is so large that an individual customer or client can be considered similarly situated to members of the general public, then under these circumstances a normal and usual customer of the national banking institution who does not do business directly or indirectly with the official or the official’s branch office does not present the type of conflict contemplated by the code.

However, a significant customer or client may not be similarly situated to other normal and usual bank customers. 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.

February 3, 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 February 2, 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. 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.

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 \$10,000.¹

Section 2-443(c) *Disclosure of voting conflicts*, similarly requires a public official to abstain and not participate in any matter coming before his or her board or commission which would result in a special financial benefit, 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 employer², 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 past 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.³ 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

¹ §2-442. Definitions. *Customer or client*

² 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)

³ 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.⁴

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.⁵ 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.⁶ 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 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

⁴ RQO 11-099

⁵ RQO 11-120

⁶ *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).

February 3, 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 February 2, 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, may not have a conflict of interest under §2-443(a)(5) of the Revised Code of Ethics, if the number of similarly situated customers is sufficiently large enough to negate the appearance of conflict. If the pool of bank customers is so large that an individual customer or client can be considered similarly situated to members of the general public, then under these circumstances a normal and usual customer of the national banking institution who does not do business directly or indirectly with the official or the official's branch office does not present the type of conflict contemplated by the code.

However, a significant customer or client may not be similarly situated to other normal and usual bank customers. 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 are not 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 are not similarly situated to other customers who have no direct or indirect nexus or connection to her. Therefore, personal or branch clients would present a conflict. Normal and regular bank customers with no nexus or personal connection to the councilwoman may not present such a conflict.

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

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

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

Sincerely,

Alan S. Johnson,
Executive Director

ASJ/mcr/gal