

# Agenda

November 7, 2013 – 1:30 pm  
Governmental Center,  
301 North Olive Avenue, 6<sup>th</sup> Floor  
Commissioners Chambers

**Palm Beach County**  
**Commission on Ethics**  
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West Palm Beach, FL 33401  
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**Commissioners**

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

**Executive Director**

Steven P. Cullen

**Intake Manager**

Gina A. Levesque

**Staff Counsel**

Megan C. Rogers

**Senior Investigator**

Mark E. Bannon

**Investigator**

Anthony C. Bennett

- I. Call to Order
- II. Roll Call
- III. Introductory Remarks
- IV. Approval of Minutes from October 3, 2013
- V. Processed Advisory Opinions (Consent Agenda)
  - a. RQO 13-018
  - b. RQO 13-019
  - c. RQO 13-020
- VI. Items Pulled from Consent Agenda
  - a.
- VII. Proposed Advisory Opinions
  - a.
- VIII. Proposed New Rule of Procedure 1.6
- IX. Revision to Rule of Procedure 4.2
- X. Proposed New Rule of Procedure 6.4
- XI. OPPAGA – Final Report Issued 10/18/2013
- XII. Review of appearance on Nov. 4, 2013 before the Joint Legislative Auditing Committee
- XIII. Review of appearance on Nov. 4, 2013 before the Senate Committee on Ethics and Elections
- XIV. New COE Website
- XV. Executive Director Comments
- XVI. Commission Comments
- XVII. Public Comments
- XVIII. Adjournment

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

**OCTOBER 3, 2013**

**THURSDAY  
1:30 P.M.**

**COMMISSION CHAMBERS  
GOVERNMENTAL CENTER**

**I. CALL TO ORDER**

**II. ROLL CALL**

**MEMBERS:**

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

**STAFF:**

Mark E. Bannon, Commission on Ethics (COE) Senior Investigator  
Anthony C. Bennett, COE Investigator  
Steven P. Cullen, Esq., COE Executive Director  
Gina A. Levesque, COE Intake Manager

**ADMINISTRATIVE STAFF:**

Dominique Marseille, Deputy Clerk, Clerk & Comptroller's Office

**III. INTRODUCTORY REMARKS**

Chair Fiore stated that all electronic devices should be silenced.

Commission on Ethics (COE) Executive Director Steven Cullen, Esq., stated that a quorum existed.

**IV. APPROVAL OF MINUTES FROM SEPTEMBER 12, 2013**

Chair Fiore said that on page five of the minutes, under item IX., the text stated that “Commissioner Fiore said that some of the commissioners were reluctant to recuse themselves regarding conflict of interest.” She said that the sentence should include a phrase regarding the attorney general’s letter on recusal. She added that the sentence should read “Commissioner Fiore said that some of the commissioners were reluctant to recuse themselves regarding nonfinancial conflicts of interest in view of the attorney general’s letter.”

**MOTION to approve the September 12, 2013, minutes as amended. Motion by Patricia Archer, seconded by Michael Kridel, and carried 5-0.**

**V. PROPOSED SETTLEMENT C12-013**

Chair Fiore said that the Respondent’s representative and volunteer advocate were advised to review the wording of the proposed negotiated settlement and order. She added that an issue existed whether it was appropriate to rely to a conversation that the Respondent had with the State Attorney’s Office (SAO).

Commissioner Galo said that the authority was split on whether the Respondent’s statements to the SAO could be used against her in the COE’s decision. He added that the State could legally compel statements; however, they could not be used in a subsequent criminal matter.

Chair Fiore said that staff counsel had advised that the COE could accept or reject the negotiated settlement but could not edit, add, or subtract anything from it. She added that if the COE rejected the settlement another offer may not be made.

Volunteer Advocate Kai Li Fouts, Esq., said that the proposed settlement was a proper resolution. She said that new facts, which resulted after probable cause was found, were taken into consideration. She added that Respondent, Marlene Ross, had been forthright and cooperative.

The Respondent’s attorney, Scott Richardson, Esq. said that individuals entered into settlements since litigations were time consuming, expensive, and have no known results. He added that the proposal was fair for everyone concerned.

## V. – CONTINUED

Ms. Ross said that she was entering into the agreement voluntarily without coercion and that she understood the agreement.

### **MOTION to accept the negotiated settlement for C12-013. Motion by Salesia Smith-Gordon, seconded by Patricia Archer, and carried 5-0.**

Vice Chair Archer read the following final order:

Complainant Terry Aperavich, filed the above-referenced complaint on October 4, 2012, alleging possible ethics violations involving Respondent, Marlene Ross, City of Boynton Beach Commissioner. The complaint alleges two Code of Ethics violations:

Count 1 alleges that on or about July 7, 2011, and September 3, 2011, Respondent submitted false correspondence to Interim Boynton Beach City Manager, Laurie LaVerriere, regarding the City of Boynton Beach (the City) investigation into alleged lobbying activities of David Katz, in violation of Article XIII, Section 2-443(b), *Corrupt misuse of official position*, of the Palm Beach County Code of Ethics.

Count 2 alleges that on or about January 3, 2012, Respondent nominated Katz to serve on the City Financial Advisory Committee (FAC) to prevent the exposure of certain photographs that would cause her embarrassment, in violation of Article XIII, Section 2-443(b), *Corrupt misuse of official position*, of the Palm Beach County Code of Ethics.

Pursuant to Chapter 8, Article XIII, Section 2-443(b), *Corrupt misuse of official position* prohibits any official or employee from using his or her official position or office, or any property or resource which may be within his or her trust, to corruptly secure or attempt to secure a special privilege, benefit, or exemption for himself, herself, or others. For the purposes of this subsection, “corruptly” means done with a wrongful intent and for the purpose of obtaining, or compensating or receiving compensation for any benefit resulting from some act or omission of an official or employee which is inconsistent with the proper performance of his or her public duties.

## V. – CONTINUED

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

Based upon the filing of a sworn complaint, and pursuant to COE Rule of Procedure 4.1.3, a preliminary inquiry was commenced. Although it was determined that the initial complaint was not legally sufficient, after obtaining sworn statements from material witnesses and documentary evidence during the inquiry, sufficient competent evidence was obtained to warrant a legally sufficient finding. Thereafter, a memorandum of legal sufficiency was entered on November 15, 2012, a complaint was filed on November 19, 2012, by Alan Johnson, Executive Director of the COE, and an investigation was commenced pursuant to Article V, Division 8, Section 2-260(d). Information obtained during the inquiry was adopted into the investigation and presented to the COE on December 6, 2012, with a recommendation that probable cause be found that Code of Ethics violations occurred. At that time, the COE held a hearing in the matter and found that probable cause existed to believe that Respondent violated the Code of Ethics. The complaint was subsequently set for final hearing before the COE on March 21, 2013. Subsequently, on October 3, 2013, the COE advocate and Respondent submitted a negotiated settlement to the Commission for approval.

According to the negotiated settlement, Respondent agrees to pay a five hundred dollar (\$500) fine and accept a letter of instruction. Count two is dismissed.

Therefore it is:

Ordered and adjudged that this matter is concluded upon the payment of the aforementioned Five Hundred (\$500) Dollar fine and issuance of a letter of instruction.

## V. – CONTINUED

Done and ordered by the Palm Beach County Commission on Ethics in public session on this 3<sup>rd</sup> day of October. Signed by: Robin N. Fiore, Chair.

(CLERK'S NOTE: The clerk added the language as printed in the final order.)

Vice Chair Archer read the following letter of instruction:

Terry Aperavich (Complainant) filed the above captioned complaint against Marlene Ross, former City of Boynton Beach Commissioner (Respondent), alleging violations of the Palm Beach County Code of Ethics, Article XIII, Section 2-443(b), *Corrupt misuse of official position*. The complaint alleges, in part, that submitted false correspondence to Interim Boynton Beach City Manager, Laurie LaVerriere, regarding a City of Boynton Beach investigation into alleged lobbying activities of David Katz and nominated Katz to serve on the City Financial Advisory Committee (FAC) to prevent the exposure of certain photographs that would cause her embarrassment, in violation of Article XIII, Section 2-443(b), *Corrupt misuse of official position*, of the Palm Beach County Code of Ethics.

### **Facts and Analysis**

The facts as to Count One are as follows:

In July 2011, the City of Boynton Beach (the City) was conducting an investigation into alleged lobbying activity by David Katz regarding a towing contract with the City. At the time, the City had its own lobbyist ordinance which has subsequently been withdrawn and replaced with the Palm Beach County Lobbyist Registration Ordinance. Respondent, a sitting City Commissioner, was asked by the City Manager, pursuant to the City investigation, whether Katz had lobbied her regarding the towing contract issue. Katz prepared a letter stating that he had never lobbied Respondent, and Respondent signed the letter on July 7, 2011. Additionally, Respondent was asked by the City Manager to confirm the contents of the letter and did so in an email on September 3, 2011. She stated in the email that Katz had never lobbied her.

## V. – CONTINUED

As a result, Katz, who was fined \$750 for violating the City Ordinance by lobbying other officials, was not fined, exposed, or otherwise sanctioned for allegedly lobbying Respondent. According to the City Manager, had Respondent been truthful and forthcoming, Katz would “very possibly” have received additional fines for lobbying Respondent because there is a \$250 penalty per incident.

Subsequently, in August 2012, a complaint was submitted to the Public Integrity Unit of the Office of the State Attorney (SAO) alleging that Katz had harassed, intimidated, and pressured Respondent into falsifying the letter and email to the City Manager. In a sworn statement to SAO investigators and in documents submitted to the SAO investigators at their request, Respondent cooperated and candidly acknowledged that Katz had, in fact, lobbied her regarding the subject matter of the City investigation and that she had submitted false information to the City Manager. Respondent alleged that Katz had extorted her through his aggressive and harassing actions and that she was in fear that Katz was in possession or had knowledge of photographs and that he would publish or otherwise use his knowledge of these pictures to negatively impact her reputation and political career. Respondent’s relationship with Katz was longstanding and included his active participation in her campaigns for City Commissioner between 2007 and 2011. The only public statement made by Katz implying the existence of photographs was made at a City Commission meeting on September 4, 2011, approximately one year after the submission of false statements by the respondent.

### **Holding**

**Section 2-443(b) – Corrupt Misuse of Official Position**, states:

An official or employee shall not use his or her official position or office, or any property or resources which may be within his or her trust, to corruptly secure or attempt to secure a special privilege, benefit, or exemption for himself, herself, or others.

## V. – CONTINUED

For the purposes of this subsection, “corruptly” means done with a wrongful intent and for the purpose of obtaining, or compensating or receiving compensation for any benefit resulting from some act or omission of an official or employee which is inconsistent with the proper performance of his or her public duties.

**Section 2-260.3 – Dismissal of Complaints**, states in part:

Notwithstanding any other provisions of this division, the Commission on Ethics may, at its discretion: (a) dismiss any complaint at any stage of disposition should it determine that the public interest would not be served by proceeding further.

The Commission is mindful of the facts and circumstances surrounding this matter. According to the negotiated settlement and based on the facts set forth in this letter of instruction, Respondent admits that the allegations contained in Count 1 of the complaint could lead to a finding by the Commission that she used her official position to corruptly secure a special benefit for herself and Katz in a manner which was inconsistent with the proper performance of her public duties. The basis of this complaint was derived from a State Attorney Public Integrity Unit (PIU) investigation which began because Respondent came forward and cooperated with the State Attorney’s Office and admitted to the above acts. While Respondent alleged that Katz extorted her by fear, harassment, and intimidation, the PIU investigative report found that Respondent had voted against Katz’s interests on a number of occasions. Moreover, pursuant to the Boynton Beach ordinance in effect at the time, a lobbyist was defined as a person who was either employed and receives payment for or who contracts for economic consideration for the purpose lobbying on behalf of a principal. Respondent relied on the opinions of others that Katz was paid for and engaged in lobbying activities. Witness testimony revealed the Respondent’s statement to LaVerriere did not impede the overall investigation into Katz’s status as a lobbyist. LaVerriere notified Katz that her investigation determined that he did violate the Boynton Beach lobbying ordinance, and he was subsequently fined a total of \$750. Finally, following a finding of probable cause by the Commission, Respondent immediately resigned her position as a public official.



## V. – CONTINUED

In light of the facts and circumstances known, the Commission on Ethics has determined that the public interest would not be served by proceeding further, and this matter is appropriately addressed through imposition of a \$500 fine and issuance of this letter of instruction. The Commission on Ethics is of the strong belief that all public employees and officials are responsible for making sure their actions fully comply with the law and are beyond reproach. During your service as an elected official, you were an agent of the people and held your position for the benefit of the public. The people's confidence in their government is eroded when they perceive that official actions may be based upon private goals rather than the public welfare. Violations of the Palm Beach County Code of Ethics contribute to the erosion of public confidence and confirm the opinion of those who believe the worst about public employees.

You are hereby admonished and urged to consider the letter and spirit of the Palm Beach County Code of Ethics and apply them in all future actions as a member of any public body to which you may be a part.

This letter of instruction is issued by the Palm Beach County Commission on Ethics in public session on October 3, 2013. Signed by: Robin N. Fiore, Chair.

(CLERK'S NOTE: The clerk added the language as printed in the letter of instruction.)

Vice Chair Archer read the following order:

As part of the negotiated settlement, the Commission on Ethics imposes a five hundred dollar (\$500) fine. Therefore, it is hereby:

Ordered and adjudged that the Palm Beach County Board of County Commissioners, c/o the Palm Beach County Commission on Ethics, located at 300 North Dixie Highway, Suite 450, West Palm Beach, Florida 33401, shall have and recover from the Respondent, Marlene Ross, the sum of Five Hundred (\$500) Dollars. Said sum is to be made payable to the Board of County Commissioners in the form of a certified check or money order no later than November 3, 2013.

**V. – CONTINUED**

Pursuant to Article V, Division XIII, Section 2-260.1(g), this order may be enforced by application to any circuit court of the State of Florida, which shall have jurisdiction to order Respondent to comply with an order of the Commission on Ethics.

Done and ordered by the Palm Beach County Commission on Ethics in public session on this 3<sup>rd</sup> day of October, 2013. Signed by: Robin N. Fiore, Chair.

(CLERK'S NOTE: The clerk added the language as printed in the order.)

Chair Fiore announced that members of the public that wished to address the COE should fill out public comment cards.

**VI. PROCESSED ADVISORY OPINIONS (CONSENT AGENDA)**

**VI.a. RQO 13-017**

Chair Fiore said that the COE's executive director regularly employed a consent agenda for items that did not require discretion, interpretation, or have any particular issues. She added that commissioners could request that items be removed from the consent agenda for discussion.

**MOTION to approve processed advisory opinion RQO 13-017. Motion by Daniel Galo, seconded by Patricia Archer, and carried 5-0.**

**VII. ITEMS PULLED FROM CONSENT AGENDA – None**

**VIII. PROPOSED ADVISORY OPINIONS**

**VIII.a. RQO 13-016**

Mr. Cullen said that the advisory opinion referenced whether a county advisory board member could be awarded a competitive bid contract. He added that the opinion stated that if the advisory board member in question complied with all of the requirements pursuant to the County's ordinance and the sealed bid exceptions, the board member would not be prohibited from obtaining a contract under the Code.

## VIII.a. – CONTINUED

Commissioner Kridel said that the referenced advisory board dealt with appeals for issues related to previously submitted sealed bids and issues concerning those bids. He added that a sealed bid would have been processed before the advisory board saw it.

**MOTION to approve proposed advisory opinion RQO 13-016. Motion by Daniel Galo, seconded by Salesia Smith-Gordon, and carried 5-0.**

## IX. WORKSHOP

### **DISCUSSION RE: RESPONSE TO THE OFFICE OF PROGRAM POLICY ANALYSIS AND GOVERNMENT ACCOUNTABILITY (OPPAGA) REPORT**

Mr. Cullen said that he had completed a draft response to the eight findings of the Office of Program Policy Analysis and Government Accountability's (OPPAGA) draft report. He added that OPPAGA had no regulatory authority; therefore, the COE could take any action with the report.

**PUBLIC COMMENTS:** Iris Scheibl and Richard Radcliffe.

Vice Chair Archer said that although the League of Cities and the Chiefs of Police Association appointed COE members, they did not control the commission's decisions.

Chair Fiore said that the COE members believed that they represented every countywide citizen.

**ADDITIONAL PUBLIC COMMENTS:** Gale Howden, and Jennifer Gardener.

Chair Fiore said that the COE would discuss each finding in the OPPAGA report.

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

Mr. Cullen said that the First District Court of Appeal had reversed a September 13, 2013, appeal in a new case, *John McAlpin v. Criminal Justice Standards and Training Commission* by finding that the commission had obscured the role of staff counsel and advocate.

**PUBLIC COMMENT:** Dennis Lipp.

## IX. – CONTINUED

Commissioner Galo said that:

- The COE enforced the Code concerning previous matters that had inappropriately influenced people.
- The COE possessed the proper skills needed to consider whether an allegation was legally sufficient to warrant investigation and whether an investigation promoted a public purpose.
- The response to OPPAGA should indicate that the COE was considering alternatives to solve the issues raised in the report.

Vice Chair Archer suggested that the COE consider appointing a nonpaid three-attorney advisory board that would review and make recommendations, for preliminary-probable-cause cases, once a month. She added that an unpaid board would not increase the COE's budget.

Commissioner Galo said that the COE's role was to enforce the Code by directing staff how to investigate a matter. He added that the COE's role was prosecutorial and judicial.

Chair Fiore said that the COE's procedures had should be satisfactory for 99 percent of the cases that the commissioners would encounter. She suggested including a response that the McAlpin case would be reviewed and taken under advisement, and that the COE would review utilizing a full-time advocate.

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

Commissioner Fiore said that:

- The COE could respond that, it would take OPPAGA's finding under advisement, since the commissioners had differing opinions.
- Deciding whether the commissioners could determine probable cause and a final hearing's outcome should be discussed at the next COE meeting.
- An analysis of the McAlpin decision should be considered when making the determination.

## IX. – CONTINUED

- The response should state that since the COE members had differing opinions regarding OPPAGA’s findings, more discussion was needed.

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

Mr. Cullen said that State law and the attorney general’s opinion covered the response to finding 3.

Chair Fiore said that the response should be rephrased to state that the commissioners were constrained, rather than uncomfortable, with conflict of interest. She said that since the COE members could not recuse themselves, the perception of conflict of interest could exist, and disclosure was the only way to address it.

Commissioner Smith-Gordon suggested replacing the words, “if they feel uncomfortable,” with language stating that the perception of conflict must be announced regarding a financial interest.

Chair Fiore said that no affirmative duty to disclose relationships existed outside of one’s professional requirements.

Mr. Cullen said that he would review the COE’s procedures and bylaws regarding disclosure and recusal and amend the response’s language to include the changes discussed.

Finding 4: *“The commission could benefit from clarifying commissioner disqualification terms and procedures.”*

Mr. Cullen said that he believed OPPAGA’s report was referring to a trial since the report referenced trial rules.

Commissioner Galo said that the language in Finding 3 probably meant that someone who believed that a commissioner was unfit to make a final judgment could request recusal or disqualification.

## IX. – CONTINUED

Mr. Cullen said that the OPPAGA report had two issues with the COE. He said that the first issue was with the concept of bias, interest, or prejudice at trial, and the second issue was that those concepts had to be raised more than five days prior to a trial.

Chair Fiore said that commissioners accused of bias, interest, or prejudice should decide whether to disqualify himself or herself from voting on a matter. She added that procedurally issues were raised five days prior to a trial since a quorum was not always possible.

Mr. Cullen suggested that the COE change its rule to state that disqualification on a matter could be made at any time.

Vice Chair Archer agreed that the COE's rule should be changed to reflect OPPAGA's suggestions.

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

Commissioner Galo said that the COE's position should be that its members were selected not based on who they represented, but on each commissioner's experience. He suggested that the response include that the COE's makeup fit its function.

Chair Fiore suggested the wording, "The composition fits the purpose of the commission."

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

Chair Fiore said that training was available on the COE's Web site to any vendor or lobbyist.

Mr. Cullen said that video training was available, and upon request, live training could be conducted.

Chair Fiore suggested that the last sentence in the proposed response be moved to the beginning.

## IX. – CONTINUED

Vice Chair Archer said that training should be reviewed, since it was available but not required.

Assistant County Attorney Leonard Berger said that requiring the numerous County vendors and lobbyists to take training may be beyond the COE's mission. He added that lobbyists often came from other states, registered on the same day, addressed the board, and immediately left.

Chair Fiore suggested adding that for practicality and cost purposes, training was available but not required.

Commissioner Galo said that the response could state that the Ethics Ordinance Drafting Committee had considered and found the same issues to be an unworkable model.

Vice Chair Archer said that the model may be unworkable for vendors; however, newly registered lobbyists working for more than 30 days should take training.

Chair Fiore suggested that the COE's Web site include a tab that contained short understandable training materials. She added that when registering, staff could instruct lobbyists how to access the training.

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

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

Mr. Cullen said that the responses to Findings 7 and 8 had already been discussed and that he could provide OPPAGA with performance measures and other documentation with the changes.

Chair Fiore said that the COE could give OPPAGA a reference point where the changes occurred in the responses.

**MOTION to approve that the responses to OPPAGA's report, as amended, to include the revisions discussed. Motion by Patricia Archer and seconded by Daniel Galo.**

**IX. – CONTINUED**

**SUBSTITUTE MOTION to approve directing Mr. Cullen to draft the OPPAGA report responses, as amended, to include the modifications and corrections as discussed. Motion by Daniel Galo, seconded by Salesia Smith-Gordon, and carried 5-0.**

The following final responses are as submitted by Mr. Cullen to the OPPAGA report:

Finding 1: *“Commission practices sometimes blur the roles of investigators and the staff counsel.”*

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

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



## IX. – CONTINUED

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

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

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

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

## IX. – CONTINUED

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

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

Finding 4: *“The commission could benefit from clarifying commissioner disqualification terms and procedures.”*

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

Finding 5: *“The commission’s expanded jurisdiction changes the nature of appointments and could diminish its independence.”*

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

## IX. – CONTINUED

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

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

Finding 7: *“The commission could benefit from enhanced commissioner training.”*

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

## **IX. – CONTINUED**

Finding 8: *“The commission could improve its performance accountability system.”*

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

## **RECESS**

**At 3:38 p.m., the chair declared the meeting recessed for an executive session.**

## **RECONVENE**

**At 3:50 p.m., the meeting reconvened, and at the Chair’s request for a roll call, Vice Chair Archer, Chair Fiore, and Commissioners Galo, Kridel, and Smith-Gordon were present.**

## **X. REVISIONS TO RULE OF PROCEDURE 4.2.**

Mr. Cullen said that staff was proposing a change to rule 4.2, which contained language requiring legally insufficient complaints to be submitted to the COE for dismissal. He added that staff’s recommendation was to change the language to permit that legally insufficient complaints could be disposed shortly after being heard by the COE.

Mark Bannon, COE Senior Investigator, said that:

- No difference existed between fact finding for an inquiry other than, one was a sworn complaint and the other was unsworn.
- If an individual swore to a complaint that had no COE jurisdiction, the sworn complaint would have no legal sufficiency.

## **X. – CONTINUED**

- Any actions by the COE became public record regardless of whether they came before the commissioners.
- According to the ordinance, a sworn statement by Mr. Cullen, the Inspector General, or the State Attorney was considered legally sufficient.

Chair Fiore suggested that the COE include a consent agenda that would inform the commissioners of legally insufficient findings.

Commissioner Galo said that the commissioners should determine the necessity of reviewing staff's legally insufficient findings.

Mr. Bannon said that the rule could be written to state that the executive director would bring complaints before the COE in any form if he or she believed the matter should be discussed.

Commissioner Smith-Gordon asked about the process for filing a complaint that had not been sworn, if allegations contained in the complaint fit all of the requirements needed for the matter to go before the COE.

Mr. Bannon said that staff could ask the complainant to make a sworn complaint, or staff could gather enough documentary evidence or witness statements to show that a clear issue was present.

Vice Chair Archer expressed concern about the commissioners viewing findings that were dismissed by staff. She added that she preferred to view items deemed as legally insufficient on a consent agenda to see who the parties were and whether staff's final decision was correct.

Mr. Bannon said that staff would review how to keep the commissioners informed of all cases regardless of the findings. He added that staff could provide the commissioners with an executive summary of all completed cases.

**MOTION to table item X. until the next scheduled COE meeting. Motion by Patricia Archer and seconded by Daniel Galo.**

## **X. – CONTINUED**

Intake Manager Gina Levesque said that once a matter was determined to be legally insufficient, the complainant and the respondent were provided with a letter sent by email. She said that the letter with accompanying documents that COE staff had collected explained the disposition of the complaint.

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

## **XI. EXECUTIVE DIRECTOR COMMENTS**

### **XI.a.**

**DISCUSSED:** Commissioner Training and The Opinions Summary Project.

Mr. Cullen said that commissioner training should be available at the end of October 2013. He said that he had finished a year of opinion summaries, and that staff was hopeful that the project would be completed within 30 to 60 days. He added that staff had revised the survey form that was handed out to participants at live trainings so that they could gather more data that was consistent with OPPAGA's recommendations.

### **XI.b.**

**DISCUSSED:** Commission on Ethics' Web site.

Mr. Cullen said that work continued on the COE's Web site. He said that Ms. Levesque and the Information Technology Department would provide a Web site update at the next meeting. He added that staff had posted a new training video to the COE's Web site.

### **XI.c.**

**DISCUSSED:** The Volunteer Advocate Program.

Mr. Cullen informed the COE of the four new members of the volunteer advocate program from the Legal Aid Society. He added that staff wanted to conduct training for the advocates before the end of the year.

Chair Fiore suggested that the volunteer advocates receive thank-you letters after working on a case.

**XI.c. – CONTINUED**

Ms. Levesque said that volunteer advocates previously had received Florida Bar Association credits for their participation; however, the four-hour Bar-approved COE course had expired.

Chair Fiore said that the volunteer advocate training was available for review by the commissioners.

**XII. COMMISSION COMMENTS**

**XII.a.**

**DISCUSSED:** Recognition.

Vice Chair Archer commended Chair Fiore by saying that she was doing a great job of running the meetings.

Chair Fiore said that she appreciated the support from her fellow commissioners.

**XIII. PUBLIC COMMENTS – None**

**XIV. ADJOURNMENT**

**MOTION to adjourn. Motion by Daniel Galo, seconded by Salesia Smith-Gordon, and carried 5-0.**

**At 4:18 p.m., the chair declared the meeting adjourned.**

APPROVED:

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Chair/Vice Chair



# Palm Beach County Commission on Ethics

## Commissioners

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

## Executive Director

Steven P. Cullen

October 24, 2013

Monika D. Bowles, Director of Human Resources  
Village of Royal Palm Beach  
1050 Royal Palm Beach Boulevard  
Royal Palm Beach, FL 33411

Re: RQO 13-018  
Outside Employment

Dear Ms. Bowles,

Your request for an 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 an email dated October 1, 2013 if village employees with part-time outside employment, whether the secondary employer has contracts or another relationship with the village or not, need to fill out a waiver form.

IN SUM, based upon the facts you have submitted, it is necessary for employees desiring part-time employment with an outside employer who has contracts or other transactions with the Village to comply fully with Code of Ethics Sec. 2-443(e)(5), including filing the waiver form required under Sec. 2-443(e)(5)f.

THE facts, as we understand them are as follows:

As Director of Human Resources for the Village of Royal Palm Beach, you interact with and advise village employees covered by the Code of Ethics who may have outside part-time employment. Employees, and your office administering the part-time waiver form under Sec. 2-443(e)(5)f., may be unclear as to when they must file this form. You previously sought, and received, e-mail advice from former Executive Director Johnson regarding this matter on March 16, 2012. You now seek a formal advisory opinion as to when this form must be completed.

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

The Palm Beach County Code of Ethics Sec. 2-443(d) provides:

- (d) **Contractual relationships.** No official or employee shall enter into any contract or other transaction for goods or services with their respective county or municipality. This prohibition extends to all contracts or transactions between the county or municipality as applicable or any



person, agency or entity acting for the county or municipality as applicable, and the official or employee, directly or indirectly, or the official or employee's outside employer or business. Any such contract, agreement, or business arrangement entered into in violation of this subsection may be rescinded or declared void by the board of county commissioners pursuant to § 2-448(c) or by the local municipal governing body pursuant to local ordinance as applicable. This prohibition shall not apply to employees who enter into contracts with Palm Beach County or a municipality as part of their official duties with the county or that municipality. This prohibition also shall not apply to officials or employees who purchase goods from the county or municipality on the same terms available to all members of the public. This prohibition shall also not apply to advisory board members provided the subject contract or transaction is disclosed at a duly noticed public meeting of the governing body and the advisory board member's board provides no regulation, oversight, management, or policy-setting recommendations regarding the subject contract or transaction.

The Palm Beach County Code of Ethics Sec. 2-443 (e) (5) provides, in relevant part:


- (5) Notwithstanding any provision to the contrary, subsection (d) shall not be construed to prevent an employee from seeking part-time employment with an outside employer who has entered into a contract for goods or services with the county or municipality as applicable provided that:
  - a. The employee or relative of the employee does not work in the county or municipal department as applicable which will enforce, oversee or administer the subject contract; and
  - b. The outside employment would not interfere with or otherwise impair his or her independence of judgment or otherwise interfere with the full and faithful performance of his or her public duties to the county or municipality as applicable; and
  - c. the employee or relative of the employee has not participated in determining the subject contract requirements or awarding the contract; and
  - d. the employee's job responsibilities and job description will not require him or her to be involved in the outside employer's contract in any way including, but limited to, its enforcement, oversight, administration, amendment, extension, termination or forbearance; and
  - e. the employee demonstrates compliance with applicable merit rules regarding outside employment and obtains written permission from his or her supervisor; and
  - f. The employee has obtained a conflict of interest waiver from the chief administrative officer and the employee's department head of the county or municipality based on a finding that no conflict exists. The employee shall submit the request for waiver in writing and under oath. The request for the waiver shall be signed by the employee under oath or affirmation on an approved form provided by the Commission on Ethics. The document shall contain written acknowledgment of compliance with the provisions of (5) a. through (5) e. of this subsection, together with such pertinent facts and relevant documents that support such waiver. A waiver under this subsection must be approved by both the employee's supervisor and chief administrative officer of the county or municipality. The county or municipality shall record such waiver in the employee's personnel file and shall submit a copy of the waiver and all related documents to the commission on ethics. The commission on ethics in its discretion may elect to review, comment on, or investigate any waiver. The commission on ethics review or investigation shall not delay an employee's ability to take the part time employment.

In applying these two provisions to the matter you raise, Sec. 2-443(d) prohibits an employee from contracting with the municipality that they work for. Sec. 2-443(e)(5) provides a waiver process (meeting the conditions set out in sub-sections a. through e. and filing the waiver form under sub-section f.) for those employees who want to maintain part-time outside employment with an outside employer "...who has entered into a contract for goods or services with the county or municipality as applicable..." The conditions and processes of the part-time employment waiver (including filing the form necessary under Sec. 2-443(e)(5)f.) are only necessary when the employee wants to work for an outside employer who has contracts or other transactions for goods and services with the Village. The Code of Ethics does not regulate the part-time, outside employment of covered persons with employers not having contracts or other transactions with the county or municipality, as appropriate. The burden is on the employee seeking outside employment to accurately ascertain whether the part-time outside employer has contracts or transactions with the Village. When the outside employer does have such contracts or transactions, the employee may still work part-time for that employer when they fully comply with the conditions in Sec. 2-443(e) (5) a. through e. and file the form required by Sec. 2-443 (e) (5)f.

This opinion construes the Palm Beach County Code of Ethics applicable to the facts and circumstances you have raised.

Please feel free to contact me at 561-355-1915 if I can be of any further assistance in this matter.

Sincerely,



Steven P. Cullen, Esq.  
Executive Director

SPC/gal



# Palm Beach County Commission on Ethics

## Commissioners

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

## Executive Director

Steven P. Cullen

October 24, 2013

Sandra Mann, Environmental Program Supervisor  
PBC Dept of Environmental Resources Management  
2300 N. Jog Road, 4<sup>th</sup> Floor  
West Palm Beach, FL 33411-2743

Re: RQO 13-019  
Gift Law- Non-Profit Charitable Organization

Dear Ms. Mann,

Your request for an 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 e-mail of October 18, 2013 whether solicitations from personal friends (in no way connected with a county vendor, lobbyist or principal or employer of a lobbyist) on behalf of a non-profit organization, are reportable under the current Code of Ethics. None of these donations have exceeded \$50 in value. By email of October 21, 2013, you provided additional information about the organization and the solicitation.

IN SUM, based upon the facts submitted, the described solicitations (gifts) are not reportable as they do not meet the in excess of \$100 threshold or they meet the personal gifts exception. You are cautioned that each such gift must meet these requirements in order to be non-reportable. If there is any question about the status of the person solicited, the code permits solicitation where there is no quid pro quo or other special consideration, including any direct or indirect special financial benefit to the official or employee or to the person or entity being solicited, there is no pending application for approval or award of a nature before the county, and a solicitation form is filed.

THE FACTS, as we understand them, are as follows:

You are an employee of Palm Beach County. You want to support the work of a §501(c) (3) non-profit organization, Gold Coast Down Syndrome Organization. You are not an officer or director of the organization. As far as you know, no other county employee is an officer or director of the organization. You want to solicit donations to the organization in connection with a "buddy walk." These solicitations are directed only to personal friends via a Facebook posting and by sending a flyer about the event to a paraprofessional at your daughter's school. You will not solicit any contributions from any person or business entity that you know, or should know with the exercise of reasonable care is a vendor, lobbyist or any principal or employer of a lobbyist who lobbies or sells or leases to the county. There is no quid pro quo or other special consideration, including any direct or indirect special financial benefit to the official or employee or to the person or entity being solicited. There is no pending application for



approval or award of any nature before the county. You do not use county staff or resources in any solicitation.

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

Sec. 2-444 Gift law

- (f) Gift reports. Any official or employee who receives a gift in excess of one hundred dollars (\$100) shall report that gift in accordance with this section.
  - (1) *Gift reports for officials and employees identified by state law as reporting individuals.* Those persons required to report gifts pursuant to state law shall report those gifts in the manner provided by Florida Statutes, §112.3148, as may be amended. A copy of each report shall be filed with the county commission on ethics.
  - (2) *All other officials and employees who are not reporting individuals under state law.*
    - a. *Personal gifts.* All officials and employees who are not reporting individuals under state law are not required to report gifts in excess of one hundred dollars (\$100) so long as those gifts are given to the official or employee by a personal friend or co-worker and the circumstances demonstrate that the motivation for the gift was the personal or social relationship rather than an attempt to obtain the goodwill or otherwise influence the official or employee in the performance of his or her official duties. Factors to be considered in determining whether a gift was motivated by a personal or social relationship may include but shall not be limited to: whether the relationship began before or after the official or employee obtained his or her office or position; the prior history of gift giving between the individuals; whether the gift was given in connection with a holiday or other special occasion; whether the donor personally paid for the gift or sought a tax deduction or business reimbursement; and whether the donor gave similar gifts to other officials or employees at or near the same time. If the personal friend or co-worker is a vendor, lobbyist or principal or employer of a lobbyist that lobbies the county or municipality as applicable, then the official or employee shall not accept a gift in excess of one hundred dollars (\$100) in accordance with subsections (a)(1) and (b)(1).

Sec. 2-444 Gift law

- (h) Solicitation of contributions on behalf of a non-profit charitable organization.
  - (1) Notwithstanding the prohibition on gifts as outlined in subsections (a) and (b), the solicitation of funds by a county or municipal official or employee for a non-profit charitable organization, as defined under the Internal Revenue Code, is permissible so long as there is no quid pro quo or other special consideration, including any direct or indirect special financial benefit to the official or employee or to the person or entity being solicited. The solicitation by an official or employee as contemplated herein, is expressly prohibited if made to any person or entity with a pending application for approval or award of any nature before the county or municipality as applicable.
  - (2) To promote the full and complete transparency of any such solicitation, officials and employees shall disclose, on a form provided by the commission on ethics, the name of the charitable organization, the event for which the funds were solicited, the name of any person or entity that was contacted regarding a solicitation or pledge by the official or

employee, and the amount of the funds solicited or pledged if known. The form shall be completed legibly and shall be filed with the commission on ethics. The form shall be filed within thirty (30) days from the occurrence of the event for which the solicitation was made, or if no event, within thirty (30) days from the occurrence of the solicitation.

- (3) Officials and employees may not use county or municipal staff or other county or municipal resources in the solicitation of charitable contributions described in this subsection.

IN SUMMARY, Gifts under \$50 are not reportable as they do not meet the \$100 reporting threshold. Additionally, the reporting process for gifts in excess of \$100 required by Sec. 2-444 (f) (1) is inapplicable to your situation when the exception created by Sec. 2-444 (f) (2) "personal gifts" is satisfied. As long as these solicitations and any resulting gifts "...demonstrate that the motivation for the gift was the personal or social relationship rather than an attempt to obtain the goodwill or otherwise influence the official or employee in the performance of his or her official duties," they are not reportable. This section specifies the "factors to be considered" in making this determination. You are cautioned that each such gift would have to meet the "personal gifts" exception. Based upon the facts you have submitted, soliciting from personal friends and a personal acquaintance meets the "personal gifts" exception and these gifts are not reportable even if they do exceed the \$100 threshold. This is because the circumstances demonstrate that the motivation for the gift was the personal or social relationship rather than an attempt to obtain the goodwill or otherwise influence the official or employee in the performance of his or her official duties.

If there is any question about the status of the person solicited, Sec. 2-444 (h) permits solicitation where there is no quid pro quo or other special consideration, including any direct or indirect special financial benefit to the official or employee or to the person or entity being solicited, there is no pending application for approval or award of an nature before the county, and a solicitation form is filed. You may not use county staff or resources in any solicitation.

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

Please feel free to contact me should you have any further questions on this matter.

Sincerely,



Steven P. Cullen,  
Executive Director

SPC/gal





# Palm Beach County Commission on Ethics

## Commissioners

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

## Executive Director

Steven P. Cullen

Natalie Ceparano, Branch Manager  
JPMorgan Chase Bank  
10160 Northlake Blvd.  
West Palm Beach, FL 33412

RE: RQO 13-020  
Contractual Relationships

Dear Ms. Ceparano,

Your request for an 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 e-mail of October 25, 2013 whether your membership on a non-decisional purely advisory board, the West Palm Beach Water Advisory Board, would prevent your outside employer Chase Bank from contracting with the City. You provided additional information by e-mail of October 28, 2013.

IN SUM, this matter has been previously addressed by the Palm Beach County Commission on Ethics in RQO 12-040. As a City advisory board member, you are not prohibited from having a contractual relationship with your municipality providing that the subject contract or transaction is disclosed at a public meeting of the municipal governing body and your advisory board *provides no regulation, oversight, management, or policy-setting recommendations regarding the subject contract or transaction.*

THE FACTS as we understand them are as follows:

You are a branch manager of Chase Bank (Chase). You serve on the City of West Palm Beach Water Advisory Board. The board is purely advisory, non-decisional, and provides advice in matters relating to a long-range planning for the City's public water system and in matters relating to the development, use and management of water resources within the City. You have been appointed to this board by the mayor. At this time, Chase does not contract with the city.

Chase requires that you submit documentation stating that there are no statutes, ordinances, or bylaws, or other relevant legal authorities that permit or restrict the city from doing business with Chase or any of its subsidiaries or affiliates by virtue of your service on the board. You are seeking an advisory opinion as to whether or not Chase will be limited in any way by your current service to the City. Your employment with Chase is not related to any services that could potentially be provided by Chase to the City. Although Chase is the primary bank for the City of West Palm Beach its government banking unit in Miami, not the branch which you manage, handles that account.

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

The relevant portions of Section 2-442, *Definitions*, of the Palm Beach County Code of Ethics (the Code) define "Advisory Board" as any advisory or quasi-judicial board *created by* the local municipal governing bodies, and defines "Official" as a member appointed by the local municipal governing board to serve on any advisory, quasi-judicial or *any other board of the county, state, or any other regional, local, municipal, or corporate entity.* As an appointed member of the City of West Palm Beach Water Advisory Board, you are an advisory board member and subject to the Palm Beach County Code of Ethics.

Section 2-443(d) prohibits an official or advisory board member from entering into *any contract or other transaction for goods or services with their respective...municipality*. This prohibition extends to all contracts or transactions between the municipality, and the official, directly or indirectly, *or the official or employees outside employer or business*. The contractual relationships section of the code prohibits such relationships on the basis of your outside employer, not your specific job title or duties for that employer. However, this prohibition does not apply to advisory board members provided the subject contract or transaction is disclosed at a duly noticed public meeting of the governing body and the advisory board member's board provides no regulation, oversight, management, or policy-setting recommendations regarding the subject contract or transaction.

At this time, you have indicated that your employer has no intention of entering into a contract or transaction with the City. However, should Chase enter into a contract or transaction with the City, you are not prohibited from serving on the Water Advisory Board, so long as your respective board does not provide oversight, regulation, management or make policy recommendations regarding any contract between Chase and the City. If your advisory board should provide the above regulation or oversight, you would need to obtain a waiver of this provision by the City Commission so long as your board is purely advisory, otherwise, if you are on a decision-making advisory board, the contract or transaction would be prohibited by the Code.

In addition, in the future, should Chase do business with the City, you are prohibited from using your official position to specially financially benefit your employer, or otherwise corruptly obtain a benefit for Chase that is inconsistent with the proper performance of your public duties.

The COE cannot advise you regarding speculative facts and circumstances. In that regard, this opinion applies to those facts submitted and may not be considered by your employer as documentation that there is no potential conflict under the Code should the facts and circumstances change.

IN SUMMARY, under the facts and circumstances you have submitted, your outside employer is not prohibited from entering into a contractual relationship with the City of West Palm Beach based upon your appointment to serve on the City's Water Advisory Board, provided that the subject contract or transaction is disclosed at a public meeting of the municipal governing body and your advisory board *provides no regulation, oversight, management, or policy-setting recommendations regarding the subject contract or transaction*.

This opinion construes the Palm Beach County Code of Ethics Ordinance and is based upon the facts and circumstances that you have submitted. It 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) 355-1922 should you have any further questions in this matter.

Sincerely,



Steven P. Cullen,  
Executive Director

SPC/gal



## Item VIII – Proposed New Rule of Procedure 1.6

### Staff Analysis:

Based upon the Commission's unique status as a commission on ethics, there has been extensive discussion as to when it is appropriate for a Commissioner to vote and participate in probable cause determinations, final hearings and approval of advisory opinions. Staff has advised the commission that absent a financial nexus, abstention from voting is not allowed. However, commissioners have repeatedly voiced concern that even where a commissioner would not receive a financial benefit from COE action, voting under such circumstances would nonetheless be harmful to public perception. Mindful of this tension, it has been the practice of the Commission on Ethics, to disclose any and all personal or professional relationships with a person appearing before the board prior to taking any action even when abstention is not required by the Code. This proposed rule codifies this practice.

### Staff recommends the following supplement to the rules of procedure:

#### Rule of Procedure 1.6 Disclosure of conflicts

Commissioners should make reasonable efforts to keep informed about matters that could reasonably raise questions about his or her ability to conduct the proceedings impartially and disclose these matters on the record. These matters include: past, present, and current relationships and affiliations of a personal, a professional, or a financial nature. Commissioners should disclose such relationships, but are permitted to abstain from voting and participating in a proceeding **only** if their participation would result in a special financial benefit as described in §2-443(c) *Disclosure of voting conflicts*.



## Item IX – Revisions to Rule of Procedure 4.2

### Staff analysis:

Article V., Division 8, §2-260. Procedure on Complaints filed.

- (d) *Preliminary investigation and public hearing.* A preliminary investigation shall be undertaken by the commission on ethics **of each legally sufficient complaint** over which the commission on ethics has jurisdiction to determine whether there is probable cause to believe that a violation has occurred. If, upon completion of the preliminary investigation, the commission on ethics finds no probable cause to believe that a violation has been committed, the commission on ethics shall dismiss the complaint with the issuance of a report to the complainant and the respondent. If the commission on ethics finds from the preliminary investigation probable cause to believe that a violation has been committed, it shall set the matter for a public hearing and notify complainant and respondent via certified mail, hand delivery, or courier. The commission on ethics may conduct such further investigation as it deems necessary, and may enter into such stipulations and settlements as it finds to be just and in the best interest of the citizens of the county. (emphasis added)

Rule 4.2 of the COE Rules of Procedure, promulgated in 2010, contains language requiring legally insufficient Complaints to be submitted to the COE for dismissal. The language of §2-260 requires only legally sufficient Complaints to be submitted to the COE for a probable cause finding or dismissal. Legally insufficient Complaints are not actionable as a matter of law.

### Staff recommendation:

The Commission on Ethics ordinance provides that the COE Executive Director shall make a determination of legal sufficiency. The Commission on Ethics ordinance provides specific guidelines as to the legal sufficiency of a Complaint; it must be sworn, allege a violation of an ordinance within the jurisdiction of the COE occurring after the effective date of the code, filed within 2 years of the alleged violation and be based substantially on the personal knowledge of the Complainant. Requiring formal COE dismissal of legally insufficient Complaints creates unnecessary paperwork, an inefficient use of staff, and ultimately may result in unwarranted financial expense and wasted resources. It should be noted that aside from the fact that the Complainant files a formal Complaint under oath, a sworn Complaint is no different from an anonymous or unsworn tip.

Staff anticipates that there may be times where an initial determination of no legal sufficiency has been made but where a commissioner or commissioners wish to review the staff determination, gather additional information from investigators and have an opportunity to more fully discuss the determination with staff and his or her fellow commissioners. While any proceeding conducted by the Commission pursuant to a complaint is exempt from §286.011 Florida Statutes as set forth in §112.324(2) and (3), any and all communication between commissioners regarding a complaint must occur on the record in executive session. Accordingly, this revision provides a more efficient manner of dismissing clearly legally insufficient complaints while providing an outlet for additional review by the Commission.

Staff recommends that Rule 4.2 be amended as follows:

- d) The Executive Director or designee shall prepare a memorandum regarding the legal sufficiency of all complaints. ~~If the Executive Director or designee finds the complaint to be legally insufficient, the recommendation to dismiss the complaint must be presented to the Commission.~~ If the Executive Director or designee finds the complaint to be legally insufficient, the Executive Director or designee will provide the draft memorandum of no legal sufficiency to the Commission.
- e) Commissioners shall have seven (7) days to review the draft memorandum and contact the Executive Director. Upon review of the draft memorandum, a Commissioner may direct the Executive Director to submit the complaint for review in executive session at the next regularly scheduled meeting. Absent such request, the Executive Director or designee shall issue a finding of no legal sufficiency.
- f) ~~(e)~~ Upon a finding of no legal sufficiency by the Executive Director or designee, the complaint, memorandum of no legal sufficiency and all documents related thereto shall become a public record and constitute a public record.
- g) ~~(f)~~ Upon a finding of legal sufficiency and pursuant to Section 112.324, Florida Statutes, the Commission may meet in executive session to determine whether probable cause exists. at any time prior to a finding of probable cause and may find the complaint to be insufficient. Upon hearing the matter the commission may find probable cause; dismiss it, and notify the complainant that no investigation will be made or take such other action as may be appropriate. In any case where a complaint is found legally insufficient and dismissed, the public report and order dismissing the complaint together with the complaint itself and all documents related thereto shall become a public record and constitute a public record.

## Item X – Proposed Revisions to Rule of Procedure 6.4

### Staff Analysis:

The OPPAGA report suggested that the commission could benefit from clarifying commissioner disqualification terms and procedures. Currently, rule of procedure 6.4 governs disqualification of a commissioner for probable cause and final hearings. This rule allows the advocate, the respondent or counsel to the respondent to file a motion to disqualify a commissioner for bias, interest or prejudice, accompanied by an affidavit stating the particular grounds for the motion. This procedure is separate and distinct from the Code of Ethics voting conflicts section. The OPPAGA report noted that the terms bias, prejudice and interest are not defined in the rules of procedures and accordingly may be unclear and interpreted differently. Moreover, the current rule requires that all motions for disqualification must be filed with the commission at least five days prior to the hearing at which the commissioner intends to participate. Staff research of rules of procedure developed by boards with quasi judicial authority, Florida's Administrative Procedures Act, and model judicial disqualification rules indicates that the terms bias, prejudice and interest are not ordinarily defined in similar rules. For example §120.665 Florida Statutes, a section of Florida Administrative Procedures Act (APA) makes provision for the disqualification of agency personnel as follows:

- (1) Notwithstanding the provision of §112.3143, any individual serving along or with other as an agency head may be disqualified from serving in an agency proceeding for bias, prejudice, or interest when any party to the agency proceeding shows just cause by a suggesting filed within a reasonable period of time prior to the agency proceeding...

The Florida APA's procedure for disqualification mirrors that of the Commission's current rule without further definition of bias, prejudice or interest. Accordingly, staff recommends that the Commission revise its rules of procedure to allow for motions to be filed when the respondent or advocate becomes aware of a potential conflict. This revision in coordination with proposed rule 1.6 provides commissioners with opportunity disclose any and all personal or professional relationships with a person appearing before the board and in turn an opportunity for the respondent to raise issues of bias, prejudice or interest at that time.

### Staff recommendation:

#### 6.4 Disqualification of Commissioners

- a) Commission members may be disqualified from sitting as a member of the Commission at either the probable cause hearing or the final public hearing for bias, prejudice or interest by motion of the Respondent or Advocate but not by the Complainant. A member shall disqualify him or herself because of a financial interest.
- b) Unless good cause is shown, all motions for disqualification shall be filed with the Commission ~~at least five days prior~~ as soon as practicable. ~~to the hearing at which the Commissioner is expected to participate.~~ The motion shall be accompanied by an affidavit stating the particular grounds.

- c) Unless denied as untimely, the motion shall be ruled on by the Commissioner whose disqualification is sought; the ruling shall be based on the legal sufficiency of the motion and affidavit. If the motion and affidavit are found legally sufficient, the member shall disqualify himself or herself.
  
- d) Any Commissioner may recuse himself or herself, where to the Commissioner's own knowledge any of the grounds stated in the affidavit accompanying the motion for disqualification exist. The failure of a Commissioner to recuse himself or herself shall not be assignable as error or subject to review.



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

## *at a glance*

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

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

## Scope

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

## Background

From 2006 to 2010, citizens in Palm Beach County witnessed the public corruption prosecution of several elected officials. During this time, local business leaders established an ethics initiative and the state attorney convened a grand jury to address the ethical crisis facing the county. As a result of these and other efforts, the Palm Beach County Board of County Commissioners adopted ordinances in December 2009 to implement the grand jury's recommendations to establish a code of ethics, a county ethics commission, and an office of inspector general, and to strengthen lobbying regulations.<sup>1,2</sup> In November 2010, county voters approved a referendum that made the county's 38 municipalities subject to the ethics code. In response, the county commission revised the ethics code effective June 2011.<sup>3</sup>

The commission fulfills numerous responsibilities via its five-member panel and professional staff. The county's ordinance identifies the major responsibilities of the Palm Beach County Commission on Ethics, which include

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

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

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

<sup>3</sup> This revision was made pursuant to local referendum.

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

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

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

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

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

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

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

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

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

## Findings

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

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

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

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

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

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

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

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

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

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

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

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

<sup>8</sup> The commission also provides training to community groups upon request.

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

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

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

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

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

<sup>1</sup> The commission issued its first final order regarding a complaint in August 2010.

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

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

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

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

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

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

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

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

***Clarification of roles could improve the commission’s complaint processes***

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



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

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

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

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

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

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

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

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

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

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

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<sup>15</sup> Estimate is based on a rate of \$275 per hour.

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

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

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

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

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

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

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

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

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

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<sup>16</sup> Section 112.312(8), F.S.

<sup>17</sup> Section 112.311, F.S.

<sup>18</sup> Section 112.3143(3)(a), F.S.

<sup>19</sup> Section 112.3143, F.S.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

***The commission could benefit from enhanced commissioner training***

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

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

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

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

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

### ***The commission could improve its performance accountability system***

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

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

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

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

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

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

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

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

## ***Appendix A***

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

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

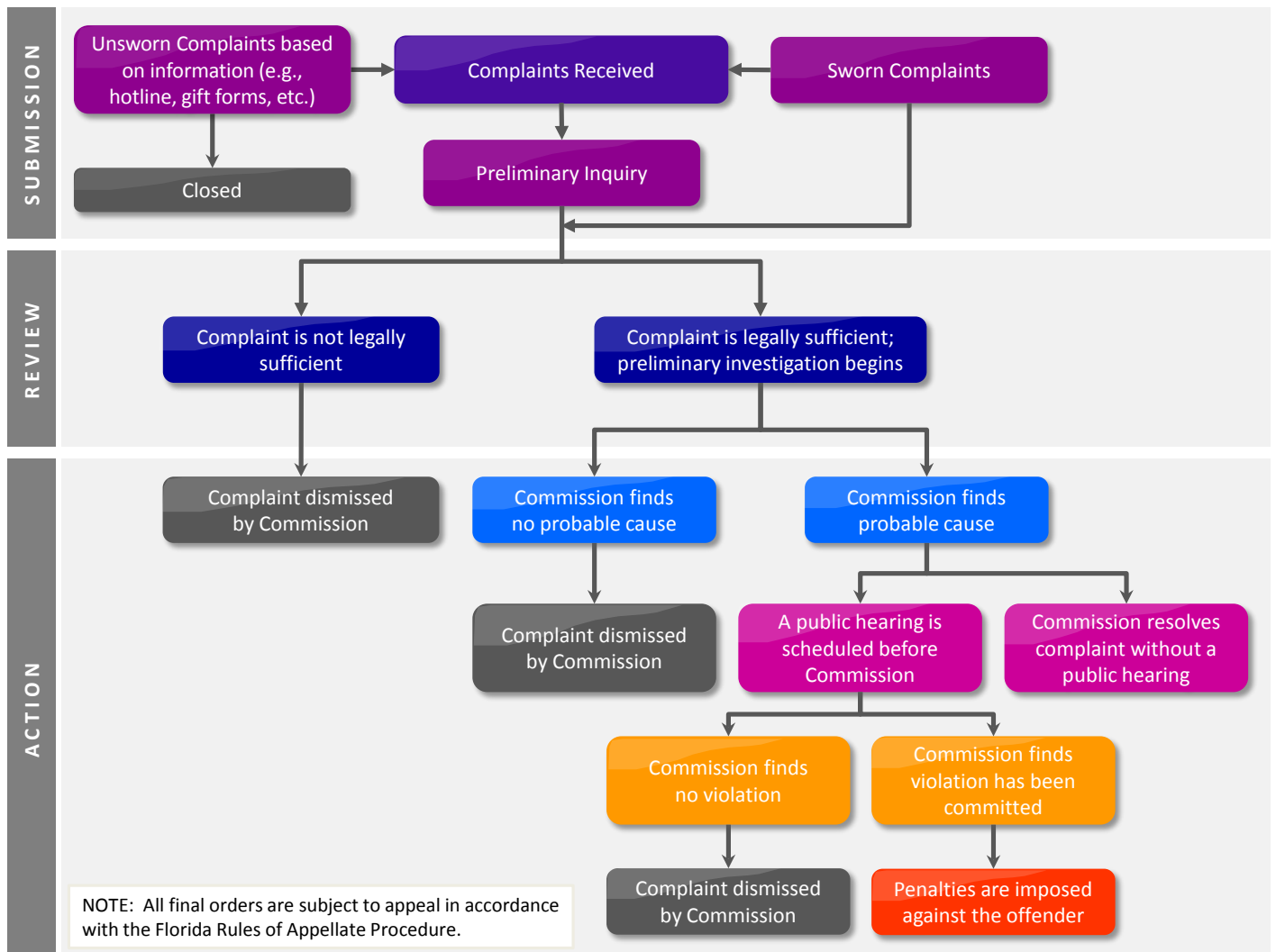
The commission also receives unsworn complaints, which are typically from individuals that contact its hotline or who otherwise report or send information anonymously alleging an ethics violation. Depending on the nature of the complaint, commission staff conducts a preliminary inquiry to gather additional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

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

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

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

**Exhibit A-1**  
**The Commission's Complaint Process Includes Many Steps from Submission to Final Action**



Source: Palm Beach County Commission on Ethics.



# Palm Beach County Commission on Ethics

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

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

Dear Mr. Twogood,

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

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

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

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

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

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

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In response to each of the report's findings:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully Submitted,



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

SPC/gal

Copies to: COE Website, COE Staff, COE Commissioners

# *The Florida Legislature*

## *Office of Program Policy Analysis and Government Accountability*



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