

Honesty - Integrity - Character

Palm Beach County

Commission on Ethics

300 North Dixie Highway
West Palm Beach, FL 33401

561.355.1915

FAX: 561.355.1904

Hotline: 877.766.5920

E-mail: ethics@pbcgov.org

Commissioners

Peter L. Cruise

Carol E. A. DeGraffenreidt

Michael S. Kridel

Michael H. Kugler

Rodney G. Romano

Executive Director

Mark E. Bannon

Intake and Compliance Manager

Gina A. Levesque

General Counsel

Christie E. Kelley

Investigator

Abigail Irizarry

Investigator

Mark A. Higgs

Agenda

July 9, 2020 – 2:00 p.m.

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

Meeting via Webex

- I. Call to Order
- II. Roll Call
- III. Introductory Remarks
- IV. Approval of Minutes from May 7, 2020
- V. Approval of Minutes from June 4, 2020
- VI. Publication of Order Re: Executive Session for C19-006
- VII. Processed Advisory Opinions
 - a. RQO 20-004
 - b. RQO 20-005
 - c. RQO 20-006
- VIII. Executive Director Comments
- IX. Commission Comments
- X. Public Comments
- XI. Adjournment

If a person decides to appeal any decision made by this Commission with respect to any matter considered at this meeting or hearing, (s)he will need a record of the proceedings, and that, for such purpose, (s)he may need to ensure that a verbatim record of the proceedings is made, which record includes the testimony and evidence upon which the appeal is to be based.

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

MAY 7, 2020

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

**COMMISSION CHAMBERS
WEISMAN GOVERNMENTAL CENTER**

I. CALL TO ORDER

II. ROLL CALL

MEMBERS:

Peter L. Cruise Chair
Michael S. Kridel Vice Chair
Carol E. A. DeGraffenreidt
Michael H. Kugler – Arrived later
Rodney G. Romano

STAFF:

Mark E. Bannon, Commission on Ethics (COE) Executive Director
Abigail Irizarry, COE Investigator I
Christie E. Kelley, Esq., COE General Counsel
Gina A. Levesque, COE Intake and Compliance Manager

ADMINISTRATIVE STAFF:

Marisa Valentin, Deputy Clerk, Clerk & Comptroller's Office (Clerking)
Samantha Fairclough, Deputy Clerk, Clerk & Comptroller's Office,
(Condensing)

(CLERK'S NOTE: Commissioner Michael Kugler joined the meeting.)

III. INTRODUCTORY REMARKS

Chair Peter Cruise commended Mark Bannon, COE Executive Director, and Christie Kelley, COE General Counsel, for the responses to information that they sent him regarding COE ordinance revisions.

IV. APPROVAL OF MINUTES FROM MARCH 5, 2020

MOTION to approve the March 5, 2020 minutes. Motion by Carol DeGraffenreidt.

Commissioner Carol DeGraffenreidt said that on page 6, the record should reflect that she did not agree with the findings.

Gina A. Levesque, COE Intake and Compliance Manager, said that commissioners' remarks made during a hearing were included in the record and the recording but not in the published order.

MOTION SECONDED by Michael Kugler, and carried 5-0.

V. REVIEW OF PROPOSED CHANGES TO COMMISSION ON ETHICS ORDINANCE

Mr. Bannon said that:

- Page 2 of the COE ordinance had a new addition on the commissioner removal process.
 - There was previously no way to remove a commissioner if he or she violated the County's Code of Ethics or the requirements for being a COE member.
 - The removal process was based on a sustained, substantiated violation.
 - If a commissioner did not resign, he or she could be removed by the entity that appointed them, or the COE could vote to remove them.

Regarding Section 2-257, Commissioner DeGraffenreidt asked why the term limits would be reduced from 2 years to 1 year.

Mr. Bannon remarked:

- A new commissioner only serving 1 4-year term would not have an opportunity to be elected to a leadership position as chair because generally the vice chair moved to the chair position.
- The BCC and most municipalities had 1-year terms, which gave everyone an opportunity to hold that position.

Regarding 2-257(a), Commissioner Michael Kugler asked whether both the chair and the vice chair would not be able to serve 2 consecutive terms.

Mr. Bannon responded that:

- The language did not state that it included the vice chair, but staff could revise the language to add the vice chair.
- Individual motions on each revision was not necessary because 1 motion would incorporate all the changes.

Mr. Kugler stated that the change was appropriate given the addition of the vice chair position into subsection (a).

Chair Cruise said that by consensus the revision as discussed would be made.

Mr. Bannon said that:

- Page 3 did not have any major changes.
- Items would be published to the COE website rather than sending them to the BCC.
- Chair Cruise previously suggested changing the words, “in conjunction with” to “in consultation with” for 2-257(d).

Commissioners Kugler and DeGraffenreidt supported changing the words to “in consultation with.”

Chair Cruise said that the COE decided to leave that portion out.

Commissioner Kugler asked whether the county administration would be offering only input or have the ability to make changes.

Mr. Bannon said that:

- Only the BCC could make changes because they approved the COE's budget.
- The words, "other public or private entities" were added because it dealt with conducting and developing training and entities did not need to be a government entity for training purposes.
- On page 4, the word, "conjunction," would be changed to the word, "consultation," in 2-259(a) and 2-259(b)
- Sending violations via telephone or electronic communications would be recognized as a secondary means for proof that someone received a written notice.
- The language, "the Commission on Ethics or hearing officer conducting a public hearing may order commission staff to conduct such further investigation," was added because it had taken place before.
- The inspector general language was removed from supervising COE investigations because the inspector general supervised his own investigations.

Commissioner Rodney Romano asked if telephonic or electronic communication would be valid by the courts or whether there should be triggering language.

Mr. Bannon responded that the secondary delivery option would only be used as extra backup.

Commissioner DeGraffenreidt asked why the words, "complainant and," were removed and only the respondent would be notified.

Mr. Bannon explained that:

- A complainant had no legal right to notice but would receive notice when a final hearing was scheduled.
- In most cases, a complainant in a public hearing would be subpoenaed as a witness.
- 2-260(f) stated that the COE would only review what the complaint said.
 - The revision gave the COE authority to add a charge or a count to a complaint or to file a new complaint.
- Initially, counsel to the COE could be a voluntary position.
 - The counsel position was now full-time.
 - The revision included that the COE executive director could also offer advice.

Commissioner Kugler asked what defined the process of selecting an advocate and what would be the additional cost to the COE.

Mr. Bannon remarked that:

- Advocates were volunteers, and it was challenging to solicit uncompensated advocates.
- At some point, the COE wanted to consider paying advocates.

Commissioner Kugler questioned how many presentations would take place with recommendations of probable cause or sanctions and how much those presentations would cost.

Mr. Bannon said that:

- An exact number could not be provided, but staff had a list of those who took the COE advocate training to become advocates.

- The cost to pay advocates would probably not be a significant impact.

Commissioner Kugler asked whether a savings provision should be considered if there was no budgetary item to pay advocates, and the executive director or the general counsel would make a presentation.

Mr. Bannon stated that:

- After performing investigations and making recommendations, the executive director or the general counsel should probably not be the entity to prosecute cases.
- The process of requesting volunteer advocates should continue.
- The language stating that counsel may serve on a volunteer basis could be stricken from 2-260(g), and the part that stated that the advocate may serve on a volunteer basis could remain.

Chair Cruise said that by consensus, the revisions as discussed would be made.

Mr. Bannon said that:

- Page 6 contained revised language that the COE should not become involved in a criminal prosecution until the investigation was completed.
- The language emphasized that the 2-year statute of limitation would be tolled at any time the COE could not perform its investigation.
- The revision added that the COE would suspend actions if the prosecutors believed that the COE's actions could be interfering in an investigation.
- The COE required that the prosecutors submit a letter or an email when their investigation was concluded.

Commissioner Kugler suggested adding a requirement that the COE should reach out to the prosecutors on a 60-day basis to verify whether the investigation was still ongoing.

Chair Cruise said that by consensus, language would be added that COE staff would ask the prosecutors at least every 90 days whether an investigation was completed.

Mr. Bannon said that:

- In 2015, the COE changed the ordinance to allow respondents the choice of having the COE or hearing officers hear probable cause or public hearings.
- There was no witness testimony when the COE conducted a probable cause hearing.
 - The COE would need to approve or not approve a finding based on a finding of fact or a finding of law, but the entire hearing would need to be transcribed.
 - The hearing officer could decide whether there was a violation, and then it would come back to the COE for sanctions.

Commissioner Kugler suggested that the language in 2-260(k) be changed to reflect that the hearing officer and not the executive director be given the witness list.

Mr. Bannon suggested changing it to COE staff for dissemination to the hearing officer and all parties.

Commissioner Kugler said that the language should be consistent throughout the ordinance.

Mr. Bannon agreed to change the language as discussed for both subsections (j) and (k).

Commissioner Kugler asked what the discovery rules were regarding a hearing.

Mr. Bannon said that evidence received in a public hearing was not strictly within the evidence code. He added that in the ordinance, a hearing officer could hear testimony if it was relevant.

Commissioner Kugler asked if the rules of civil procedure applied during a public hearing.

Mr. Bannon said that:

- The rules of civil procedure, such as taking depositions and the rights to any evidence, did apply during a public hearing.
- Evidence could be subpoenaed, but it would go through the COE.

Mr. Bannon said that:

- The COE or a hearing officer's decision was always subject to review by a circuit court.
- Enumerating the standard of discovery was unnecessary because the circuit court would apply rules of fairness and discovery with the exception of allowing certain evidence to come in based on deference to the ordinance.

Commissioner Romano asked whether all hearing officers would be members of the Florida Bar who were trained in due process.

Mr. Bannon said that:

- All hearing officers would be members of the Florida Bar and would undergo training.
- County magistrates could be selected as hearing officers.

Commissioner DeGraffenreidt suggesting adding language that "the rules of civil procedure apply." She added that respondents would want to know what the rules were and how they applied to them.

Commissioner Kugler said that:

- 2-260(b)(2)(j) stated, “A hearing officer may issue appropriate orders to effect the purposes of discovery and to prevent delay,” but it did not require that the hearing officer could allow depositions or a subpoena duces tecum.
- Language could be added after 2-260(b)(2)(i) and before 2-260(b)(2)(j) to include a section that stated, “The Florida Rules of Civil Procedure apply to discovery.”
- The language should give the hearing officer the power to order any additional discovery that was fair and just under the circumstances, and promoted the public integrity.

Mr. Bannon stated that the language as discussed could be added.

Chair Cruise asked what was considered knowledgeable under 2-260.1(a)(2).

Mr. Bannon said that a practicing attorney who handled civil litigation for about 20 years was probably knowledgeable about governmental ethics.

Commissioner Romano suggested substituting the word, “knowledgeable,” with “competent.”

Chair Cruise said that there was consensus to substitute the words, and he asked why the words, “Commission on Ethics” were struck 3 times on page 8 of 2-260.

Mr. Bannon said that the words were stricken because he assumed that the COE would allow a hearing officer to hear the final hearing.

Regarding 2-260(b)(2)(l)(4), Commissioner Kugler asked whether a reply could be filed to memoranda in opposition and whether it should include page limits.

Mr. Bannon said that there were no issues regarding page limits. He suggested the language, “The hearing officer can accept any additional information from either party that they deem is relevant on the motion.”

Commissioner Kugler suggested adding the words, “in post-limitations that they believe are appropriate.”

Chair Cruise said that there was consensus to add the language as discussed.

Mr. Bannon said that:

- Hearing officers would determine when they wanted the proposed orders.
- Once a proposed order was received, the hearing officer would probably not publish it, because the hearing findings and the sanctions could be published together.

Commissioner Kugler said that the section on page 9 was titled, “Public Order Imposing Penalty,” but the hearing officer determined the violation, and the COE imposed the penalty.

Mr. Bannon responded that the language could be revised to comport with Commissioner Kugler’s statement.

Chair Cruise asked about the sentences referring to notifying other entities that were stricken in 2-260.2 on page 9.

Mr. Bannon said that:

- Referring a matter to the State attorney or any other appropriate official or agency having authority to initiate prosecution did not mean that the COE was giving up jurisdiction but that the COE would wait until the investigation was completed.
- Referring the matter back to the COE when the appropriate official or agency did not want to file criminal charges was unnecessary because the COE already had the information.

Commissioner Kugler said that on 2.260.8(b), a tolling of the statute of limitation that was greater than the time period listed in the section should have the suggested language, “unless the tolling of the statute of limitations provides a greater time period,” such as tolling for the purpose of an investigation referred to in 2.260(i).

Mr. Bannon said that the State Attorney's Office requested the language because it could prosecute intentional violations with the same penalty as a first-degree misdemeanor.

Commissioner Romano expressed concern with the implication in 2.260.8(b) that an employee could be prosecuted for willful violation at any time while in public officer or employment.

Mr. Bannon stated that the COE had a 2-year statute of limitation.

Commissioner Kugler asked whether the language in both sections of 2.260.8 applied to the COE, the State Attorney's Office, or both.

Mr. Bannon responded that 2.260.8(a) applied to the COE, and 2.260.8(b) applied to the State to criminally prosecute for an intentional violation.

Commissioner Romano asked why the State's ability to prosecute depended on language in the COE's ordinance.

Mr. Bannon said that it was not a criminal statute violation but a County ordinance violation. He added that in order for the State to extend the statute of limitations within the COE's ordinance, it needed to be listed in the ordinance.

Commissioner Kugler said that if the COE was attempting to change any language in 2.260.8(b), it would need input from the State Attorney's Office.

Mr. Bannon said that staff would further review the matter.

PUBLIC COMMENT: Keith Davis.

Commissioner Romano said that he agreed with the language in 2.260.8(b) if it tracked Florida Statute 775.15.

Commissioner Kugler said that:

- 2.260.8(a) did not refer to a statute of limitations extension based on a prosecuting authority's tolling that the COE stand down because its work could interfere with a prosecutor's investigation.

- The COE would not be entitled to a statute of limitations extension if the language was not included.

Mr. Bannon responded that the language was contained elsewhere in the ordinance, but language would be added to the statute of limitations section.

VI. REVIEW OF PROPOSED CHANGES TO CODE OF ETHICS ORDINANCE

Mr. Bannon said that:

- The gift definition was moved to where the rest of the definitions were located.
- The lobbyist language on page 2 was amended for consistency with the COE's and the Florida COE's holding that registration as a lobbying was sufficient to prove that someone was a lobbyist.
- The existing definition of an official or employee in Section 2-442(5) could be an issue because it included whether he or she was paid or unpaid.
- The question became whether a volunteer for an organization fell within the Code of Ethics ordinance.
- Language was amended to distinguish volunteers that exercised discretionary authority versus those that did not.
- The language, "contract personnel and contract administrators performing a government function," was struck because its meaning became difficult to discern, and new language was added to better define what it meant.

Chair Cruise asked whether it would be better for COE purposes to have the State legislature determine who were and were not employees.

Mr. Bannon said that:

- State legislature decisions would generally override County ordinances.

- Listing municipal attorneys essentially as vendors in the ordinance would actually restrict their abilities, because they would be under the vendor guidelines.
- The definition of the word, “principal,” was added to clearly define who it applied to.
- Language was added to the vendor definition to distinguish a vendor who was involved in a transaction that exceeded \$500.

PUBLIC COMMENT: Keith Davis.

Mr. Bannon said that language was added to the bottom of page 4, section 7, stating that the COE would not necessarily have jurisdiction over someone who was elected or appointed to serve on a board because of his or her position, whether it was a nonprofit or governmental board.

Commissioner Kugler suggested adding the word, “required,” because certain officials were required to serve on boards as part of their official positions.

Mr. Bannon said that language could state, “shall not apply to any official or employee who is required to serve on the board of directors.”

Chair Cruise said that there was consensus to add the language as discussed. He asked whether constitutional officers were not covered in other areas of the ordinance and whether it could be constitutionally superseded.

Mr. Bannon said that:

- Palm Beach County Sheriff’s Office differed on the COE’s opinion that it had jurisdiction over a deputy who was appointed to an advisory board having nothing to do with his position.
- Language was added on page 5 to define the word, “participate.”

Vice Chair Michael Kridel said that after page 5, each succeeding page changed the words, “their” or “them” to “his or her,” but most dictionaries now accepted “their” or “them.”

Mr. Bannon said that:

- Language throughout the ordinance would be changed back to “their” or “them.”
- The term, “merit rule,” was replaced with the word, “policy,” because it originally applied to the County, and the 38 municipalities under the COE’s jurisdiction did not use the term.
- The Palm Beach County League of Cities added some language on page 7.
- Language on page 7, section (g), would include that the exception provision applied to police, fire rescue, and paramedic personnel if they worked for a municipality.
- Language on page 8, section (h), was cleaned up to basically say that lying on a job application would be an ethics violation.
- Language was edited on page 8, section 2-444(a)(2), to clarify the standard of reasonable care.
- Most of the revisions to page 9 involved cleaning up language.
- On page 9, using a fiscal year calendar to report gift disclosures was changed to using a standard calendar to alleviate any confusion.
- Language was cleaned up to say that the meaning of gifts to a State reporting individual would always be based on State law.
- Staff wanted to add language that nonreporting of a gift by a State reporting individual was not a violation if the State’s Code of Ethics said it was unnecessary to report the gift.
- On page 10, the word, “contemporaneously,” was removed, and language was added stating that no later than 10 days a copy of each report should be filed with the BCC or the COE after it was filed with the State.

- On page 10, language was revised to state that when a County or municipal employee filed a local report that was due annually, it would be based on a calendar year.
- The definition of gift law was moved to definitions.
- On page 11, the word, “vendor,” was replaced with the word, “lobbyist,” who could not buy tickets to events and give them as gifts.
- 2-444(h)(3) was eliminated because the COE should not interfere with a governmental entity that wanted to employ employees for a nonprofit event that it decided would serve a good public purpose.

Chair Cruise asked whether the decision that it would serve a good public purpose was determined by 1 member of a governing body.

Mr. Bannon said that generally those types of decisions were made by an entire commission.

Commissioner Kugler asked whether language should be crafted to state that, “Nothing that’s either stated in here or not stated in here prohibits a separate government entity from doing anything on their own.” He added that the language would apply to the Code of Ethics in general.

Mr. Bannon said that:

- The COE also could not write an advisory opinion that gave an employee permission to do something that violated municipal policies.
- Language that municipal policies still applied in municipal ordinances would probably not be necessary.

Commissioner Kugler said that he agreed that it was probably more appropriate to remain silent on the issue.

Mr. Bannon said that:

- No changes were made to the anti-nepotism language.

- On page 14, the word, “shall,” was replaced with the word, “may,” because the COE could not tell the State that it shall do something.

Chair Cruise asked about the sanctions that could be imposed by the COE.

Mr. Bannon said that State statutes limited a COE violation to \$500 per violation.

Chair Cruise asked whether the fine could be doubled.

Mr. Bannon responded that the COE did not have the authority to double fines because it would violate State law. He added that the COE could fine more than \$500, but there would need to be two separate counts.

VII. REVIEW OF PROPOSED CHANGES TO LOBBYIST REGISTRATION ORDINANCE

Mr. Bannon said that:

- Most of the changes involved clarifying the language, such as replacing the word, “database,” with the word, “registry,” on page 1.
- Lobbyists were required to file disclosures on how much they may have spent, even if no lobbying took place.
 - There were no sanctions for violating the reporting requirement.
 - Language was amended to include that lobbyists or the principals that they represented could withdraw their names from the lobbyist registration.

Commissioner Kugler said that the definitions on pages 1 and 2 should be consistent with the Code of Ethics definitions.

Mr. Bannon said that the definitions would be changed for consistency purposes.

Commissioner DeGraffenreidt said that the words, “shall mean,” and “will mean,” were used throughout the ordinance, and she asked whether there should be consistency.

Chair Cruise asked which of the two words had more force.

Mr. Bannon said that the words came from the original definitions.

Commissioner Kugler suggested using the word, "shall."

Mr. Bannon said that:

- The language would be changed to reflect Commissioner Kugler's suggestion.
- On page 3, the word, "fiscal," was replaced with the word, "calendar."
- Language was amended to state that a lobbyist was not required to file a statement if expenditures were no more than \$25.
- The language on page 6 basically stated that:
 - Lobbyists were required to report activities if there were any.
 - Failure to report lobbying activities would result in suspension until a required expenditure report was filed.
 - A first-time violation would include a suspension for an additional 90 days beyond the point that the expenditure report was filed.
 - A second violation would result in suspension of an additional 180 days.
 - Three violations would result in suspension of an additional 365 days.

Commissioner Kugler asked what would happen if someone lobbied while in violation of a suspension.

Mr. Bannon clarified that lobbying under a suspension was also a violation of the ordinance.

Chair Cruise asked what other action could be taken if someone lobbied while under a violation.

Mr. Bannon said that the sanction would be a \$250 fine per day not to exceed \$2,500 for an unregistered lobbyist who engaged in lobbying activity.

Chair Cruise asked whether the COE, under the circumstances, could prevent someone from continuing to lobby.

Mr. Bannon said that:

- Every municipal and county agency required that a log be signed stating whether someone was a lobbyist when visiting elected officials.
- Someone could lobby as a nonpaid volunteer for a nonprofit organization because that did not fall within the ordinance.

Commissioner Kugler asked if the COE should require that a lobbyist petition the COE to reregister after a 365-suspension or require that reregistering was no longer permitted.

Mr. Bannon said that a similar situation has never occurred, but the COE could authorize that requirement.

Commissioner Kugler suggested language that a suspension would be permanent after 3 violations, but after a period of time, the lobbyist could petition the COE to reregister.

Mr. Bannon said that staff would review the legality of adding the language, and bring back revised language during the June meeting.

VIII. EXECUTIVE DIRECTOR COMMENTS – None

IX. COMMISSION COMMENTS – None

X. PUBLIC COMMENTS – None

XI. ADJOURNMENT

Motion by Commissioner Romano, seconded by Commissioner DeGraffenreidt, and carried 5-0.

At 3:38 p.m., the chair declared the meeting adjourned.

APPROVED:

Chair/Vice Chair

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

JUNE 4, 2020

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

**VIA WEBEX TELECONFERENCE
GOVERNMENTAL CENTER**

I. CALL TO ORDER

II. ROLL CALL

MEMBERS:

Peter L. Cruise – Chair
Michael S. Kridel – Vice Chair
Carol E. A. DeGraffenreidt
Michael H. Kugler
Rodney G. Romano

STAFF:

Mark E. Bannon, Commission on Ethics (COE) Executive Director
Abigail Irizarry, COE Investigator I
Christie E. Kelley, Esq., COE General Counsel
Gina A. Levesque, COE Intake and Compliance Manager

ADMINISTRATIVE STAFF:

Marisa Valentin, Deputy Clerk, Clerk & Comptroller's Office

III. INTRODUCTORY REMARKS

Chair Peter Cruise expressed gratitude for the people who diligently worked on revising the Lobbyist Registration, Ethics Code, and Commission on Ethics ordinances.

IV. REVIEW OF PROPOSED CHANGES TO COMMISSION ON ETHICS ORDINANCE

Vice Chair Michael Kridel said that:

- twice yearly the COE convenes as a type of oversight committee for the Office of the Inspector General (OIG).
- the OIG's main function was auditing and accounting, and the basis of that function was forensic.
- without an extensive background in forensic accounting, commission members would be unable to understand the processes and outcomes of the OIG.

Commission on Ethics Executive Director Mark Bannon requested that the revised verbiage for the subsection pertaining to the qualifications of the Palm Beach chapter of the Florida Institute of CPAs' appointee be recorded (Section 2-255, subsection 4).

Vice Chair Kridel said that the language should read as follows; "The President of the Palm Beach chapter of the Florida Institute of CPAs shall be requested to appoint a single member who possesses at least five (5) years of experience as a certified public account (CPA) with forensic and/or government accounting or government auditing experience."

Commissioner Kugler requested that language be added to the ordinance outlining the process of penalty determination.

Mr. Bannon said that Section 2-260.1(6)(i), (Order Imposing Penalty), would include language stating that the commission had within 90 days in which to hold a hearing on imposing penalties and rendering an order, unless a good cause extension was granted by the Chair.

V. REVIEW OF PROPOSED CHANGES TO CODE OF ETHICS ORDINANCE

Mr. Bannon provided a brief overview of the proposed changes to the Code of Ethics Ordinance as outlined in the item backup and no further changes were suggested.

VI. REVIEW OF PROPOSED CHANGES TO LOBBYIST REGISTRATION ORDINANCE

Mr. Bannon provided a brief overview of the proposed changes to the Lobbyist Registration Ordinance as outlined in the item backup and no further changes were suggested.

VII. EXECUTIVE DIRECTOR COMMENTS

VII.a.

DISCUSSED: Recognition.

Mr. Bannon congratulated investigator Mark Higgs for earning his Certified Fraud Examiner credentials.

VIII. COMMISSION COMMENTS

VIII.a.

DISCUSSED: Recognition.

Vice Chair Kridel congratulated investigator Mark Higgs for earning his Certified Fraud Examiner credentials.

VIII.b.

DISCUSSED: Recognition.

Commissioner Kugler congratulated investigator Mark Higgs for earning his Certified Fraud Examiner credentials.

VII.c.

DISCUSSED: Recognition.

Commissioner Romano congratulated investigator Mark Higgs for earning his Certified Fraud Examiner credentials.

VII.d.

DISCUSSED: Recognition.

Commissioner DeGraffenreidt congratulated investigator Mark Higgs for earning his Certified Fraud Examiner credentials.

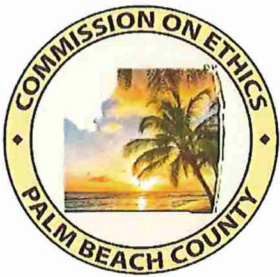
IX. PUBLIC COMMENTS – None

X. ADJOURNMENT

At 2:04 p.m., the chair declared the meeting adjourned.

APPROVED:

Chair/Vice Chair



Honesty - Integrity - Character

Palm Beach County Commission on Ethics

July 9, 2020
Page 24 of 32
Commissioners

Peter L. Cruise, Chair
Michael S. Kridel, Vice Chair
Carol E.A. DeGraffenreidt
Michael H. Kugler
Rodney G. Romano

Executive Director
Mark E. Bannon

June 23, 2020

Ms. Ellyn Bogdanoff, Esquire
Becker & Poliakoff
1 East Broward Blvd., Suite 1800
Ft. Lauderdale, FL 33301

Re: RQO 20-004
Cone of Silence

Dear Ms. Bogdanoff,

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:

QUESTION:

Question#1: Is there a conflict between the "cone of silence" language used by Palm Beach County's Purchasing Department in Requests for Proposals and the Palm Beach County Lobbyist Registration Ordinance (Ordinance)?

Question #2: If yes, does the Ordinance prevail, and is your client permitted to contact the Palm Beach County Board of County Commissioners (BCC) or their staff in a form other than in writing after its proposal has been determined to be non-responsive?

BRIEF ANSWER:

A conflict does not exist between the "cone of silence" language used by the Purchasing Department in Requests for Proposals and that used in the Ordinance. Therefore, your client is not permitted to contact any members of the BCC or their staff in a form other than in writing unless done at a public meeting until the BCC awards or approves a contract, rejects all bids or responses, or takes some action which ends the solicitation process.

FACTS:

You are an attorney representing Vector Media Holding Corporation (Vector Media). Vector Media responded to Palm Beach County's Request for Proposal No. 19-089 (RFP) Transit Advertising. Vector Media's proposal did not make it to the evaluation committee because it did not meet a provision that staff in the Purchasing Department deemed a fatal flaw and was determined to be non-responsive.

You believe that the language used in the RFP conflicts with Section 2-355(c) of the Ordinance. You stated that because Vector Media's proposal was determined to be non-responsive by the Purchasing Department staff, it was "rejected" by the county based on that non-responsiveness determination. You further believe that according to Section 2-355(c), Vector Media may now contact the BCC in a form other than in writing and outside of a public meeting because the cone of silence no longer applies to Vector Media.

The Section 2-355 of the Ordinance states in relevant part:

- (c) The cone of silence shall be in effect as of the deadline to submit the proposal, bid, or other response to a competitive solicitation. The cone of silence...shall remain in effect until such response is either rejected by the county...or withdrawn by the person or person's representative.

- (f) The cone of silence shall terminate at the time the board...or a county...department authorized to act on behalf of the board...awards or approves a contract, rejects all bids or responses, or otherwise takes action which ends the solicitation process.

The county incorporated the following "cone of silence" language in the RFP:

1.11 CONE OF SILENCE

Proposers are advised that the "Palm Beach County Lobbyist Registration Ordinance" prohibits a proposer or anyone representing the proposer from communicating with any County Commissioner, County Commissioner's staff, or any County Employee authorized to act on behalf of the Board of County Commissioners to award this contract regarding its proposal, i.e., a "Cone of Silence".

The "Cone of Silence" is in effect from the date/time of the deadline for submission of the proposal, and terminates at the time that the Board of County Commissioners, or a County Department authorized to act on their behalf, awards or approves a contract, rejects all proposals, or otherwise takes action which ends the solicitation process.

COE staff contacted Kathy Scarlett, Director of Purchasing for Palm Beach County, for additional information on this RFP and the RFP process. According to Ms. Scarlett, although the Purchasing Department staff reviews proposals and bids to determine if they are responsive to the requirements of the RFP, this determination is not a final rejection of any proposal or bid. Vendors with proposals or bids that have been deemed non-responsive have the ability to protest the non-responsive determination. If the protest has been denied by the Director of Purchasing, the vendor can request a Special Master Hearing on the non-responsiveness of the proposal or bid, and the Special Master will either uphold or deny the protest. Ms. Scarlett also stated that the BCC is the ultimate decision maker in awarding a contract, and the BCC did not authorize the Purchasing Department to award this contract on its behalf. The BCC can award or reject the contract that is recommended by staff. If the recommended contract is awarded, all other responsive and non-responsive proposals to the RFP/Contract are then rejected. At that point, the only remedy available to dispute a non-responsiveness determination is in circuit court.

ANSWER:

The Lobbyist Registration Ordinance states that "to preserve and maintain the integrity of the governmental decision-making process, it is necessary that the identity and activities of certain persons who engage in efforts to influence the county commissioners, members of the local municipal governing bodies, mayors or chief executive officers that are not members of local municipal governing bodies, county and municipal advisory board members, and county and municipal employees on matters within their official duties, be publicly and regularly disclosed."

In other words, the key to preserving and maintaining the integrity of the governmental decision-making process is transparency. In order to achieve transparency, the Ordinance prohibits all oral communication between any person seeking the award of a competitive solicitation and county or municipal elected officials or their staff or any employee authorized to act on behalf of the county or the municipal governing body to award a particular contract.¹

Section 2-355(c) of the Ordinance states that this "cone of silence is in effect from the deadline to submit the proposal, bid, or other response to a competitive solicitation...and shall remain in effect until such response is either rejected by the county...or withdrawn by the person or person's representative."

Section 2-355(f) of the Ordinance further states that the "cone of silence shall terminate the time the board [BCC]...or a county...department authorized to act on behalf of the board [BCC]...awards or approves a contract, rejects all bids or responses, or otherwise takes action which ends the solicitation process." The purpose of the cone of silence is to stop any improper influence of officials and authorized employees by persons seeking awards of competitive solicitations for local government contracts from the time the competitive solicitation is submitted until the contract is awarded.

¹ Sec. 2-355(a), Lobbyist Registration Ordinance

Based on the facts presented, there is no conflict between the language used in the Ordinance and the language used in the RFP. Under the Ordinance, the cone of silence is in effect from the deadline to submit the response to a competitive solicitation and does not end until the time the BCC (the county) awards or approves the contract, rejects all bids or responses, or takes some action to end the solicitation process.

Here, staff in the Purchasing Department has not been authorized to act on behalf of the BCC in awarding the RFP; and they do not have the final decision-making authority with regards to this RFP. Staff is only sending its recommendations to the BCC, and the BCC can overturn the Purchasing Department's recommendations at any time up to the time of the vote to award. Further, because Vector Media still has the ability to protest the determination of non-responsiveness, this clearly shows that the Purchasing Department staff does not have the ability to "reject" a proposal even if they have deemed it to be non-responsive.

Because the BCC can overturn Purchasing's recommendations at any time up to the time of the vote to award the contract, Vector Media's proposal is only considered rejected once the BCC awards the contract to another vendor, rejects all of the responses, or takes some action which ends the solicitation process. Therefore, because any potential vendor whose bid is deemed non-responsive by county staff has the ability to challenge this determination through an appeal process before a final award is made by the BCC, and because Vector Media's proposal has not been ultimately rejected by the county since the BCC has not yet voted to award the contract, Vector Media is prohibited from any communication with the BCC or their staff regarding this RFP, except for written correspondence, unless occurring at a public proceeding.

LEGAL BASIS:

The legal basis for this opinion is found in the §2-355 of the Lobbyist Registration Ordinance:

Sec. 2-355. Cone of silence.

- (a) ***Cone of silence*** means a prohibition on any communication, except for written correspondence, regarding a particular request for proposal, request for qualification, bid, or any other competitive solicitation between:
 - (1) Any person or person's representative seeking an award from such competitive solicitation; and
 - (2) Any county commissioner or commissioner's staff, any member of a local governing body or the member's staff, a mayor or chief executive officer that is not a member of a local governing body or the mayor or chief executive officer's staff, or any employee authorized to act on behalf of the commission or local governing body to award a particular contract.
- (b) For the purposes of this section, a person's representative shall include but not be limited to the person's employee, partner, officer, director, consultant, lobbyist, or any actual or potential subcontractor or consultant of the person.
- (c) The cone of silence shall be in effect as of the deadline to submit the proposal, bid, or other response to a competitive solicitation. The cone of silence applies to any person or person's representative who responds to a particular request for proposal, request for qualification, bid, or any other competitive solicitation, and shall remain in effect until such response is either rejected by the county or municipality as applicable or withdrawn by the person or person's representative. Each request for proposal, request for qualification, bid or any other competitive solicitation shall provide notice of cone of silence requirements and refer to this article.
- (d) The provisions of this article shall not apply to oral communications at any public proceeding, including pre-bid conferences, oral presentations before selection committees, contract negotiations during any public meeting, presentations made to the board or local municipal governing body as applicable, and protest hearings. Further, the cone of silence shall not apply to contract negotiations between any employee and the intended awardee, any dispute resolution process following the filing of a protest between the person filing the protest and any employee, or any written correspondence at any time with any employee, county commissioner, member of a local municipal governing body, mayor or chief executive officer that is not a member of the local municipal governing body, or advisory board member or selection committee member, unless specifically prohibited by the applicable competitive solicitation process.

- (f) The cone of silence shall terminate at the time the board, local municipal governing body, or a county or municipal department authorized to act on behalf of the board or local municipal governing body as applicable, awards or approves a contract, rejects all bids or responses, or otherwise takes action which ends the solicitation process.

This opinion construes the Palm Beach County Lobbyist Registration Ordinance and is based upon the facts and circumstances that you have submitted. The COE does not investigate the facts and circumstances submitted, but assume they are true for purposes of this advisory opinion. 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.

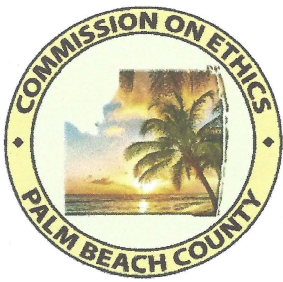
Please feel free to contact me at 561-355-1915 if I can be of any further assistance in this matter.

Sincerely,



Mark E. Bannon
Executive Director

CEK/gal



Honesty - Integrity - Character

Palm Beach County Commission on Ethics

July 9, 2020
Page 28 of 32

Commissioners

Peter L. Cruise, Chair
Michael S. Kridel, Vice Chair
Carol E.A. DeGraffenreidt
Michael H. Kugler
Rodney G. Romano

Executive Director
Mark E. Bannon

June 30, 2020

Ms. Allison Turner
City of Delray Beach Historic Preservation Board
100 NW First Ave.
Delray Beach, FL 33444

Re: RQO 20-005
Voting Conflict

Dear Ms. Turner,

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:

QUESTION:

As a member of the Historic Preservation Board (HPB) for the city of Delray Beach (city), are you prohibited by the Palm Beach County Code of Ethics (Code) from attending the presentation on your application before the HPB and answering questions that your representatives cannot answer, if you only answer directly to your representatives who then address the HPB on your behalf?

FACTS:

You currently serve on the HPB. The HPB is charged with reviewing all development, improvement, and redevelopment applications within a designated historic district of the city.

You also own an individually designated historic home in the city. You are in a unique position because this house has been your family's home for three generations, and you are the only one who knows the full history of the home and any renovations that have been done to the home. Your agent for your home recently presented to the HPB on March 4, 2020. Prior to the presentation, the city attorney advised you to excuse yourself from the dais due to the conflict of interest, and you were told that you could not be in the room during the presentation but had to wait in the lobby for the presentation to end. You were told that you could not address any questions that the HPB had about your property. Your agent was asked several questions that he could not answer because they were personal to the upkeep of the home and only the homeowner would know the answer.

You recently asked an attorney to help represent the matter when it returns before the board on July 1, 2020, regarding land development regulation and code questions. You stated that your agent and your attorney will present the matter to the HPB but you would like to be available to answer any questions the HPB may have. You stated that you would not address the HPB directly but would instead answer the questions to your representatives who would then address the HPB. You and your attorney believe the Code does not prohibit you from answering questions directly to your representatives who would then present the answers to the HPB. You believe that if you are not allowed to help your representative answer certain questions from the HPB, you would be at a distinct disadvantage compared to other applicants who are allowed to be present and answer any questions from the board.

ANSWER:

As an advisory board member, you are prohibited from using your official position as a member of the HPB in any way, including influencing others to take some action, to give a special financial benefit, not shared with similarly

situated members of the general public, to yourself.¹ Section 2-443(c) similarly prohibits you from voting on an issue or participating in a matter that would result in a special financial benefit being given to yourself. Voting on your application, participating in the discussions, or attempting to influence HPB members would constitute a misuse of office and a voting conflict. Based on the facts presented, you understand that when your application comes before the HPB, you must disclose the nature of your conflict, abstain from voting, and not participate in any discussion or presentation surrounding the vote. Subsequent to the abstention, you are also required to file a state conflict form (Form 8B) as required by statute.²

You are seeking further guidance as to whether your attendance at the presentation and your answering of questions directly to your representatives would be considered "participating" in the matter. The COE has previously held that "participate" means that an official may not take part in any presentation or discussion regarding the matter.³ Here, in this context, "participate" means that you may not present your application to the HPB or take part in any presentation or discussion regarding this matter with your fellow members of the HPB.

Based on the facts provided, your situation is unique given the history between the home and your family. Here, you stated that your only role will be to provide answers to your representatives on questions to which they do not know the answers. As long as you provide and direct your answers only to your representatives out of earshot of the board, and as long as only your representatives then address the board, you would not be "taking part" in the presentation but merely providing requested information to your representative. Please understand that you would be considered to be participating if you correct the board directly on any misstated facts presented to them or by them. Any of these "corrections" should be offered only to your representatives out of earshot of the board.

Although the code does not prohibit you from being in the room during the presentation, an appearance of impropriety may exist. Further, any facial cues or certain body or hand gestures may be interpreted as an attempt by you to influence the decision of the HPB in a prohibited manner. Therefore, we believe the best way for you to protect against allegations of improper participation in the discussions is to remain out of the room while the presentation is being made. Your representative could then come outside of the meeting room to obtain the answer for the HPB. While this is not mandated by the code, we offer this suggestion by way of protection for you as a public official, because it would virtually ensure that you could not have improperly participated in the decision making regarding this agenda item. However, if you chose to remain in the room, you must take great care to only speak directly to your representatives out of earshot of the HPB and not address the board in any way.

LEGAL BASIS:

The legal basis for this opinion is found in the §2-443(a) and §2-443(c)

Sec. 2-443. Prohibited conduct.

(a) **Misuse of public office or employment.** An official or employee shall not use his or her official position or office, or take or fail to take any action, or influence others to take or fail to take any action, in a manner which he or she knows or should know with the exercise of reasonable care will result in a special financial benefit, not shared with similarly situated members of the general public, for any of the following persons or entities:

(1) Himself or herself;

(c) **Disclosure of voting conflicts.** County and municipal officials as applicable shall abstain from voting and not participate in any matter that will result in a special financial benefit as set forth in subsections (a)(1) through (7) above. The official shall publicly disclose the nature of the conflict and when abstaining from the vote, shall complete and file a State of Florida Commission on Ethics Conflict Form 8B pursuant to the requirements of Florida Statutes, §112.3143. Simultaneously with filing Form 8B, the official shall submit a copy of the completed form to the county commission on ethics. Officials who abstain and disclose a voting conflict as set forth herein, shall not be in violation of subsection (a), provided the official does not otherwise use his or her office to take or

¹ §2-443(a)

² §2-443(c)

³ RQO 12-039; RQO 16-026

fail to take any action, or influence others to take or fail to take any action, in any other manner which he or she knows or should know with the exercise of reasonable care will result in a special financial benefit, not shared with similarly situated members of the general public, as set forth in subsections (a)(1) through (7).

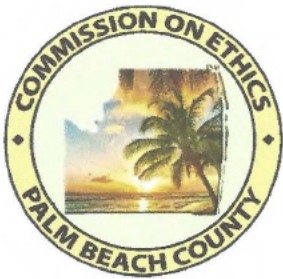
This opinion construes the Palm Beach County Code of Ethics Ordinance and is based upon the facts and circumstances that you have submitted. The COE does not investigate the facts and circumstances submitted, but assume they are true for purposes of this advisory opinion. It is not applicable to any 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 561-355-1915 if I can be of any further assistance in this matter.

Sincerely,

Mark E. Bannon
Executive Director

CEK/gal



Honesty - Integrity - Character

Palm Beach County Commission on Ethics

July 9, 2020
Page 31 of 32

Commissioners
Peter L. Cruise, Chair
Michael S. Kridel, Vice Chair
Carol E.A. DeGraffenreidt
Michael H. Kugler
Rodney G. Romano

Executive Director
Mark E. Bannon

July 2, 2020

Ms. Dawn Wynn, Esquire
City of Riviera Beach, City Attorney
600 West Blue Heron Blvd.
Riviera Beach, FL 33404

Re: RQO 20-006
Conflict of Interest

Dear Ms. Wynn,

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:

QUESTION:

Does the Palm Beach County Code of Ethics (Code) prohibit a councilperson, who in his private capacity works as a certified process server and has contracts with private investigations firms, from serving subpoenas when those subpoenas are related to a lawsuit in which the city is a party?

FACTS:

You are the City Attorney for the city of Riviera Beach and are requesting this advisory opinion on behalf of Councilman Tradrick McCoy. Councilman McCoy also works as a certified process server and enters into contracts with private investigation firms in Palm Beach County to provide his services.

The city of Riviera Beach has contracted with an outside law firm to defend the city in a lawsuit. One of the investigations firms that Councilman McCoy has a contract with recently sent him a packet of subpoenas to serve on behalf of the law firm representing the city. The packet contained subpoenas related to the lawsuit in which the city is the defendant. The investigations firm is not a city vendor.

ANSWER:

The Code prohibits the councilperson and his outside business from entering into any contract or other transaction to provide goods or services, either directly or indirectly, with the city.¹ He and his outside business are also prohibited from entering into any contractual relationships or other transaction with any entity where he would be providing services to the city or where the city would be paying for his services through his contract with that entity. The COE has previously held that these situations create indirect contracts which would violate Sec. 2-443(d), *Contractual relationships*.²

Based on the facts provided, the councilperson would be prohibited from serving any subpoenas related to the lawsuit with the city. Here, although the private investigations firm hires the process server, it is the city who would be paying for the process server's services through its contract with law firm who hires the investigations firm. If the councilperson were to serve the subpoena's related to the lawsuit involving the city, a prohibited indirect contract with the city would be created because the city would be ultimately paying for the councilperson's services.

¹ Sec. 2-443 (d)

² RQO 20-003; RQO 10-038; RQO 11-012

Therefore, the councilperson would be prohibited from serving the subpoenas on behalf of the law firm representing the city when the subpoenas are related to a lawsuit in which the city is a party.

LEGAL BASIS:

The legal basis for this opinion is found in §2-443(d):

Sec. 2-443. Prohibited conduct.

- (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 section 2-448(c) or by the local municipal governing body pursuant to local ordinance as applicable.

This opinion construes the Palm Beach County Code of Ethics Ordinance and is based upon the facts and circumstances that you have submitted. The COE does not investigate the facts and circumstances submitted, but assume they are true for purposes of this advisory opinion. 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 561-355-1915 if I can be of any further assistance in this matter.

Sincerely,



Mark E. Bannon
Executive Director

CEK/gal