



Agenda

October 4, 2012 – 1:30 pm
Governmental Center,
301 North Olive Avenue, 6th Floor
Commissioners Chambers

Executive Session from 1:45pm to 2:30pm Regular Agenda will begin at 2:45pm

Palm Beach County

Commission on Ethics

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West Palm Beach, FL 33411

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Commissioners

Manuel Farach, Chair

Robin N. Fiore, Vice Chair

Ronald E. Harbison

Daniel T. Galo

Patricia L. Archer

Executive Director

Alan S. Johnson

Executive Assistant

Gina A. Levesque

Staff Counsel

Megan C. Rogers

Senior Investigator

Mark E. Bannon

Investigator

James A. Poag

- I. Call to Order
- II. Roll Call
- III. Introductory Remarks
- IV. Executive Sessions
 - a. C12-008
 - b. C12-009
 - c. C12-010
- V. Proposed Advisory Opinions
 - a. RQO 12-061
 - b. RQO 12-064
 - c. RQO 12-065
 - d. RQO 12-067
 - e. RQO 12-068
- VI. Revisions to Rules of Procedure
 - a. Section 2.9 – Publication of Advisory Opinions
 - b. Section 4.2 – Dismissals: No Legal Sufficiency
 - c. Section 4.6.1 – Referral to Other Authorities
- VII. Executive Director Comments
- VIII. Commission Comments
- IX. Public Comments
- X. Adjournment

October 5, 2012

Ms. Valerie Cintron, Administrative Secretary
Water Utilities Department
Central Region Operations Center
8100 Forest Hill Blvd.
West Palm Beach, FL 33413-3336

Re: RQO 12-061
Misuse of Office/Non-Profit Organizations

Dear Ms. Cintron,

The Palm Beach County Commission on Ethics (COE) considered your request for an advisory opinion, and rendered its opinion at a public meeting held on October 4, 2012.

YOU ASKED in your submission dated August 12, 2012 whether county water utilities staff may take training from a non-profit organization, the Florida Water & Pollution Control Operators Association (FWPCOA), when two county water utilities superintendents serve on the FWPCOA's board of directors.

IN SUM, County employees are prohibited from using their position as water utilities superintendents to give a special financial benefit, not shared with similarly situated training providers, to a non-profit organization of which they are directors. Selecting, organizing and approving Water Utility Department (WUD) staff certification training by FWPCOA would constitute using one's official position to specially financially benefit that organization.

Therefore, in order for the FWPCOA to continue to provide training for county staff, the superintendent/board members must either resign their positions with the FWPCOA, or remove themselves entirely from any involvement in the selection, organization or approval process regarding all future FWPCOA training sessions.

THE FACTS as we understand them are as follows:

You are an administrative secretary for Bevin Beaudet and Brian Shields, Director and Deputy Director of the Palm Beach County Water Utilities Department (WUD). WUD provides, in part, water distribution, maintenance and wastewater management for Palm Beach County. The Florida Department of Environmental Protection (FDEP) requires Water Plant and Wastewater Plant Operators to be licensed. Plant Operators must maintain their licenses through a Continuing Education Unit (CEU) re-certification process biannually.

The Water Utilities Department (WUD) staff offers in-house training. These trainings are conducted pursuant to Florida Water & Pollution Control Operators Association (FWPCOA) standards and are approved for CEU credit by the FWPCOA. The FWPCOA is a statewide non-profit organization consisting of members who are engaged in the production, treatment and distribution of drinking water; the collection, treatment and disposal of wastewater; and/or the collection and treatment of storm water. According to their website, the purpose of the FWPCOA is to protect the health of the citizens & preserve natural resources. They accomplish this by advancing the professional status of water and wastewater operators, providing a licensing system and arranging training programs. The association works in cooperation with the Florida Section of the American Water Works Association (FS/AWWA), the Florida Water Environment Association (FWEA), the Florida Department of Environmental Protection (FDEP), the Florida Department of Health (FDH) and the Florida Educational System (FES). FWPCOA's testing certification is recognized by the State of Florida.

FWPCOA is the organization that WUD utilizes to sponsor CEU programs. FWPCOA determines the amount of credit hours each training program is worth, approves course curriculums and instructors, and submits test results

to the state. WUD pays FWPCOA for these services. Many WUD employees are current FWPCOA members and the Association's mission closely represents the skill sets needed by County Employees. Furthermore, several County Employees have been approved by the FWPCOA as educators. In-house training benefits the County by providing convenient, low cost training to staff, and providing experienced employees with the opportunity to develop their training skills as part of their regular duties. From time to time, WUD also uses non-employee FWPCOA certified trainers.

Prior to May 1, 2011, all water distribution certifications held by line and lift station crews and obtained through FWPCOA were voluntary. These certifications were separate from the FDEP plant operator license requirement. No CEU credits were required in order to maintain the voluntary certification. As of May 1, 2011, the FDEP now requires that employees who work on the water distribution lines be licensed in order to work alone or to lead a crew to maintain and repair drinking water lines. This process requires that line and lift station crews must also renew their licenses via CEU credits every two years.

After May 1, 2011, the deadline for all licensed line staff needing to re-certify is April 30, 2013. WUD has approximately 245 staff requiring re-certification credits, which includes plant operators and now, line employees. Since the mandatory license was instituted by FDEP, six "provider" entities throughout the state of Florida have been approved by FDEP to authorize CEU credits. According to the information you provided, none of the other training providers offer the convenience, nor do they offer a program as comprehensive as provided by the FWPCOA. That being said, WUD has hired non-FWPCOA trainers in the past in order to meet peak training demands and if the need arises, may do so in the future.

Two Superintendents of the WUD are unpaid, volunteer directors of the FWPCOA for Region 6, covering Palm Beach and Martin Counties. As Superintendents of the WUD, these County staff members currently are among the several WUD employees who arrange FWPCOA trainings and approve line and plant operator requests for CEU trainings.

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

Sec. 2-443(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:

- (7) A civic group, union, social, charitable, or religious organization, or other not for profit organization of which he or she (or his or her spouse or domestic partner) is an officer or director.

No employee may use their official position to obtain a special financial benefit, not shared with similarly situated entities, for a non-profit organization that they serve as an officer or director.¹ A financial benefit is defined as anything of value.² Here, two WUD superintendents serve on the board of a non-profit organization, the FWPCOA. As superintendents, they are also responsible for arranging and approving WUD employee training in their official capacity. The FWPCOA receives payment from the county for training provided to WUD employees, which constitutes a financial benefit. Moreover, there are 5 alternative organizations that provide similar, FDEP approved training.

¹ RQO 11-029 (an employee or elected official who serves as an officer or director of a charitable organization may not use their official title or elected office in soliciting donations; to do so would per se constitute using their employment or elected office to specially financially benefit that charity)

² §2-442 *Financial Benefit* includes any money, service, license, permit, contract, authorization, loan, travel, entertainment, hospitality, gratuity, or any promise of any of these, or anything else of value...

This is prohibited by the Code of Ethics. In their official capacity and in contemplation of providing training to over 200 staff members, WUD superintendents with discretion over trainer selection and training approval, may not select the FWPCOA over other similarly situated organizations while serving as directors of the FWPCOA.

However, this does not mean that the county and its employees may not utilize the training services offered by FWPCOA. In order to comply with the Code, the WUD superintendents who serve as FWPCOA board members must do one of two things. If they resign from the board of the FWPCOA, they may continue to arrange and approve training of WUD staff. In the alternative, should they elect to remain on the FWPCOA board, they may not participate in WUD training decisions and must delegate this function to other employees.

IN SUMMARY, based on the facts and circumstances provided, WUD employees who serve as officers or directors of the FWPCOA may not use their official position in any way to give a special financial benefit to the FWPCOA that is not available to similarly situated organizations. As an officer or director of the FWPCOA, using one's public position as a WUD superintendent to select, coordinate, approve training or otherwise financially benefit the FWPCOA in a manner not shared with similarly situated training organizations, would constitute a violation of the misuse of office section of the code.

In order to avoid a violation of the Code, WUD employees would need to either resign as FWPCOA directors or remove themselves entirely from all aspects of the WUD training certification process involving FWPCOA.

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 561-233-0724 if I can be of any further assistance in this matter.

Sincerely,

Alan S. Johnson,
Executive Director

ASJ/mcr/gal

October 5, 2012

Paulette Burdick, Commissioner
Palm Beach County Commissioner – District 2
301 North Olive Avenue
West Palm Beach, FL 33401

Re: RQO 12-064
Gift Law/Public Purpose

Dear Commissioner Burdick,

The Palm Beach County Commission on Ethics (COE) considered your request for an advisory opinion, and rendered its opinion at a public meeting held on October 4, 2012.

YOU ASKED in your email submission dated September 5, 2012, whether gifts that you do not accept personally as a matter of policy may be passed on to a charitable organization or government department without potentially violating the Palm Beach County Code of Ethics (the Code) gift law limitations and prohibitions.

IN SUM, transferring a gift to another entity does not alter the fact that you are the original recipient of that gift. Therefore, if the gift is from a vendor, lobbyist or principal of a lobbyist who lobbies, sells or leases to the county, and the value is in excess of \$100, annually in the aggregate, you are prohibited from accepting such a gift. However, you may accept a gift of any value, from whatever source, if done so on behalf of the county, in your capacity as County Commissioner, for use solely by the county for a public purpose. If you were to pass the gift on to a charitable organization, you must maintain and submit a log in accordance with the transparency provisions of the Code. Under these circumstances, accepting and passing a gift on to a county department or to a 501(c)3 non-profit organization would not be prohibited.

THE FACTS as we understand them are as follows:

As a Palm Beach County Commissioner you have a policy of not accepting gifts, regardless of value. When you do receive a gift, you reimburse the person or organization which gave the gift. While you have found this to be somewhat awkward for both parties, you have chosen to adhere to a zero gift policy so as not to inadvertently violate the gift law sections of the Palm Beach County Code of Ethics (the Code).

You have been contemplating passing these gifts on to 501(c)3 charities or county government departments. In such a scenario you would keep a log of the gifts, their source, and to whom they were given.

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

Section 2-444(a)(1) prohibits a County Commissioner from knowingly accepting, directly or indirectly, any gift with a value of greater than \$100, annually in the aggregate, from any person or business entity that the recipient knows, or should know with the exercise of reasonable care, is a vendor, lobbyist, principal or employer of a lobbyist who lobbies, sells or leases to the county. In order to violate the Code, knowledge of the status of the donor must be either actual or constructive.¹ Once you accept a gift, it is considered to be received by you, notwithstanding your passing the gift on to a third party. The code does not prohibit your accepting gifts under \$100, annually in the aggregate, from vendors or lobbyists, nor is there any limitation on accepting gifts from non-vendors or lobbyists, provided the gift is not a *quid pro quo* for official action, or otherwise given in exchange for the past, present or future performance of an official act or legal duty.²

The Code contains an exception to the §2-444(a) prohibition against soliciting otherwise prohibited gifts from vendors, lobbyists and their principals, where the donation is solicited for a non-profit charitable organization, as defined under the Internal Revenue Code, provided the donor has no pending application for approval or award of any nature before the county and provided a log is maintained and submitted to the COE including the following information; name of the charitable organization, name of the donor contacted, event for which the funds were solicited (if applicable) and the amount of the funds solicited or pledged if known.³ While this section applies to solicitations for charity, the COE is of the opinion that if you maintain and submit a log with the required information to the COE, that there is no functional difference with regard to accepting and donating such a gift to charity in a transparent manner and so long as there is no *quid pro quo or other special consideration* given the donor.

With regard to passing on these gifts to a county department, §2-444(g)e. exempts gifts solicited or accepted by county officials on behalf of the county in performance of their official duties for use solely by the county for a public purpose.⁴ Under these facts and circumstances, if you specifically accept gifts given to you in your capacity as County Commissioner, on behalf of the county, for use by a county department for a public purpose, the gifts would not be prohibited under the Code, even if the donor is a county vendor, lobbyist or principal or employer of a lobbyist.

Lastly, as a County Commissioner you are an official identified by state law as a reporting individual.⁵ Therefore, you are required to report gifts pursuant to state law.⁶ The Code requires only that you submit a copy of any such report to the COE. The COE cannot opine as to whether or not a pass through gift accepted on behalf of the County would be a reportable gift under state law, notwithstanding the fact that it may not be reportable for a non state reporting individual under the Palm Beach County Code of Ethics.

IN SUMMARY, the Code does not prohibit your accepting a gift and passing it along to a charitable organization unless the gift is from a vendor, lobbyist, principal or employer of a lobbyist who lobbies,

¹ There is no bright line regarding knowledge of the status of a donor as actual or constructive knowledge can only be determined by the facts and circumstances presented. The status of the donor by itself is not sufficient to establish knowledge. RQO 11-116, Commission on Ethics v. Barker, 677 So2d 254 (Fla. 1996)

² Art. XIII, §2-444(e), §2-443(a) and (b)

³ Art. XIII, §2-444(h)

⁴ RQO 10-027, RQO 11-083, RQO 11-019, RQO 12-044

⁵ §112.3148, Florida Statutes

⁶ Art. XIII, §2-444(f)(1)

sells or leases to the county and is valued in excess of \$100, annually in the aggregate. Notwithstanding, if a transparent log is maintained in accordance with the Code, donations to IRS recognized charitable organizations are exempted from this prohibition. If the gift is accepted by you as a County Commissioner, on behalf of the county, for use by a county department for a public purpose, you are not prohibited from accepting and passing on such a gift regardless of value.

No gift may be solicited or accepted as a *quid pro quo* for official action, special consideration or in exchange for the past, present or future performance of an official act or legal duty.

As a state reporting individual, you are required to comply with state law and submit a copy to the COE of any report submitted in this manner.

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 561-233-0724 if I can be of any further assistance in this matter.

Sincerely,

Alan S. Johnson
Executive Director

ASJ/gal

October 5, 2012

Jeffrey Kurtz, Attorney for The Village of Wellington
c/o The Law Offices of Glen J. Torcivia and Associates, P.A.
Northpoint Corporate Center
701 Northpoint Parkway, Suite 209
West Palm Beach, FL 33407-1950

Re: RQO 12-065
Misuse of Office/Voting Conflicts

Dear Mr. Kurtz,

The Palm Beach County Commission on Ethics (COE) considered your request for an advisory opinion, and rendered its opinion at a public meeting held on October 4, 2012.

YOU ASKED in your submission dated September 11, 2012 whether an ongoing conflict of interest exists based upon a friendship between Councilman John Greene and a village resident, Neal Hirsch. Councilman Greene previously requested an advisory opinion from the Commission on Ethics as to whether he was prohibited from accepting a gift of temporary residence from Mr. Hirsch, valued at \$2,948. Councilman Greene resided at a guest house on the Hirsch property between June 9, 2012 and August 15, 2012.

IN SUM, unless an official uses his or her office to corruptly secure a special benefit for another, there is no prohibition against voting or participating in matters involving a friend, where there is not a financial, fiduciary or familial relationship between the parties as provided in Art. XIII, §2-443(a)(1)-(7).

During his temporary residence at Mr. Hirsch's home, whether or not Councilman Greene and Mr. Hirsch may have been considered members of the same household, Councilman Greene did not vote or participate on any matter involving Mr. Hirsch. Temporary residence at the Hirsch property ended in mid-August. Based upon the facts and circumstances presented, there is no indication that Councilman Greene accepted a gift from Mr. Hirsch in exchange for a future vote, official action or legal duty to be performed.

THE FACTS as we understand them are as follows:

You are the village attorney for the Village of Wellington. In RQO 12-045, an elected official, Councilman John Greene, asked whether he was prohibited from accepting temporary housing from a personal friend, Mr. Neal Hirsch, who served as a director of a civic organization that employed a lobbyist compensated by a third party. The COE opined that Mr. Greene was prohibited from accepting temporary housing valued in excess of \$100 from his personal friend as long as Mr. Hirsch continued to serve on the board of directors of an organization that retained a lobbyist. As a result of the opinion, Mr. Hirsch resigned from the board thereby eliminating the conflict of interest and Councilman Greene accepted Mr. Hirsch's offer of temporary housing.

Councilman Greene stayed in Mr. Hirsch's guesthouse from June 9, 2012 through August 15, 2012. During this period, two matters came before the Village Council regarding property that Mr. Hirsch owns. The first issue was related to the master plan amendment contemplated by the proposed equestrian village project (EVP). As part of the application for the master plan amendment, the EVP developers proposed relocating an existing entrance to a property owned by Sperin, LLC, an entity controlled by Mr. Hirsch. The master plan amendment was approved by the council prior to Councilman Greene taking office. Councilman Greene voted to revoke that approval after taking office, but before he moved into Mr. Hirsch's guesthouse. The matter came before the council for discussion concerning pending litigation over the EVP on August 13 and 14. Mr. Greene did not participate in those discussions or vote on the matter.

The second issue involves Mr. Hirsch's home, Black Watch Farms. The property consists of several separate sections of land. The westernmost part of the property is owned by Chucker Holdings, Inc., an entity that Mr. Hirsch controls. This portion of Mr. Hirsch's property is subject to ongoing litigation over the potential reconsideration of a previously approved site plan and development permit. It is alleged that Mr. Hirsch and his companies did not consent to the application of the adjoining land owners for a change to the site plan. Mr. Hirsch contends that the change materially altered the amount of frontage on his land and the potential future development of his property into three independent lots. This matter was submitted by staff to the Council for discussion at the August 13th and 14th meetings. Mr. Greene did not participate in those discussions and no vote was taken on the matter. Mr. Hirsch has not publicly appeared before the Council or any other board on these issues. Chucker Holdings, Inc. has retained council to represent its interest in the pending litigation, settlement discussions and an October 3, 2012 quasi judicial 5.1.15 Hearing before the Wellington Planning, Zoning and Adjustment Board.¹

It is likely that these issues and perhaps others may come before the Village Council for discussion and possible action. As mentioned above, Councilman Greene moved out of Mr. Hirsch's guesthouse on August 15th. It should also be noted that the issue regarding Chucker Holdings, Inc. and subsequent potential litigation did not arise until after June 9, 2012, when Councilman Greene was already a temporary resident at the Hirsch property.

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

§2-443(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;
- (2) His or her spouse or domestic partner, household member or persons claimed as dependents on the official or employee's latest individual federal income tax return, or the employer or business of any of these people;
- (3) A sibling or step-sibling, child or step-child, parent or step-parent, niece or nephew, uncle or aunt, grandparent or grandchild of either himself or herself, or of his or her spouse or domestic partner, or the employer or business of any of these people;
- (4) An outside employer or business of his or hers, or of his or her spouse or domestic partner, or someone who is known to such official or employee to work for such outside employer or business;
- (5) A customer or client of the official or employee's outside employer or business;
- (6) A substantial debtor or creditor of his or hers, or of his or her spouse or domestic partner—"substantial for these purposes shall mean at least ten thousand dollars (\$10,000) and shall not include forms of indebtedness, such as a mortgage and note, or a loan between the official or employee and a financial institution;
- (7) A civic group, union, social, charitable, or religious organization, or other not for profit organization of which he or she (or his or her spouse or domestic partner) is an officer or director.

Section 2-443(a) prohibits elected officials from using their official position to take or fail to take any action if they know or should know with the exercise of reasonable care that the action would result in a special financial benefit not shared with similarly situated members of the general public, for certain entities or persons including themselves or a member of their household. Section 2-443(c) *Disclosure of voting conflicts*, similarly requires an advisory board member to abstain and not participate in any matter coming before his or her board which would result in a special financial benefit, not shared with similarly situated members of the general public, to themselves or a member of their household.

¹ Palm Beach County Lobbyist Registration Ordinance, §2-353 Registration and expenditures(c)(2) Registration exceptions.

A household member is defined in §2-442 as anyone whose primary residence is the same as the official or employee's, not including renters or live-in household staff.² Councilman Greene was a temporary guest of Mr. Hirsch. Councilman Greene lived in Mr. Hirsch's home for less than 90 days, did not receive mail at Mr. Hirsch's home, or change his driver's license or voting registration to Mr. Hirsch's address. Based upon these facts and circumstances, Councilman Greene and Mr. Hirsch were not members of the same household as defined by the Code. However, whether or not Councilman Greene could be categorized as a member of Mr. Hirsch's household at one point in time, he is no longer residing at the Hirsch property, having moved out on August 15, 2012. Accordingly, for the purpose of the misuse of office and voting conflict sections of the code, Councilman Greene is not prohibited from voting on matters involving Mr. Hirsch's property or businesses.

That being said, Councilman Greene must keep in mind that §2-443(b) *Corrupt misuse of official position* prohibits public officials from using their official position to corruptly secure or attempt to secure a special privilege, benefit or exemption for him or herself or anyone else. As defined by the Code, corruptly means done with a wrongful intent and for the purpose of obtaining a special benefit for any person, resulting from some act, such as voting, which is inconsistent with the proper performance of his or her public duties. Furthermore and in all instances, elected officials are strictly prohibited from accepting a gift of any value in exchange for the past, present or future performance of an official act or a legal duty.³

As an elected official who may in the future vote on matters resulting in a benefit to Mr. Hirsch, Councilman Greene must take great care not to use his official position to secure a special benefit for Mr. Hirsch, or any other person or entity, in a manner inconsistent with the proper performance of his public duty.⁴ Whether or not a corrupt misuse has occurred will be based upon the facts and circumstances presented. Because there is no prohibited conflict of interest under §2-443(a) under the facts you have presented, and providing there are no facts or circumstances to indicate a corrupt misuse of office or quid pro quo, Councilman Greene is not prohibited by the Code from voting on matters that may affect Mr. Hirsch, his businesses or other associated entities. Moreover, depending on the facts and circumstances presented by each future vote, Councilman Greene may be required by §286.012, Florida Statutes, to vote on matters where there is no evidence of a financial conflict or other misuse of office.⁵

IN SUMMARY, based upon the facts and circumstances submitted, the Code does not prohibit Councilman Greene from voting on matters that may result in a financial benefit to his personal friend Mr. Hirsch, so long as he does not use his official position corruptly to secure a special benefit for Mr. Hirsch, or otherwise use his official position to obtain for himself a financial benefit, not available to similarly situated members of the public. "*Corruptly*", means done with a wrongful intent and for the purpose of obtaining, compensating or receiving compensation for, any benefit resulting from some act or omission which is inconsistent with the proper performance of his public duties.

Additionally, a gift may not be solicited or accepted as a *quid pro quo* for official action, special consideration or in exchange for the past, present or future performance of an official act or legal duty.

² §2-442 Household Member includes anyone whose primary residence is in the official or employee's home, including non-relatives who are not rent payers or employees of the head of household.

³ §2-444 (e). Gift Law

⁴ RQO 10-013 (For the purpose of ordinance construction, the commission finds that a financial benefit includes either a private gain or loss).

⁵ 286.012 *Voting requirement at meetings of governmental bodies*. - No member of any state, county, or municipal governmental board, commission, or agency who is present at any meeting of any such body at which an official decision, ruling, or other official act is to be taken or adopted may abstain from voting in regard to any such decision, ruling, or act; and a vote shall be recorded or counted for each such member present, except when, with respect to any such member, there is, or appears to be, a possible conflict of interest under the provisions of s. 112.311, s. 112.313, or s. 112.3143. In such cases, said member shall comply with the disclosure requirements of s. 112.3143.

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 561-233-0724 if I can be of any further assistance in this matter.

Sincerely,

Alan S. Johnson,
Executive Director

ASJ/mcr/gal

PROPOSED

October 5, 2012

Kevin Ratterree
GL Homes
1600 Sawgrass Corporate Parkway, Suite 400
Sunrise, FL 33323

Re: RQO 12-067
Lobbyist Expenditures

Dear Mr. Ratterree,

The Palm Beach County Commission on Ethics (COE) considered your request for an advisory opinion, and rendered its opinion at a public meeting held on October 4, 2012.

YOU ASKED in your submission dated September 19, 2012 whether or not a lobbyist must calculate and disclose expenses related to personal travel to and from a meeting where lobbying occurs in their annual lobbyist expenditure report.

IN SUM, personal travel by a lobbyist to and from a meeting with county and municipal officials or employees is not a reportable expenditure required to be disclosed on the annual lobbyist expenditure report, so long as the lobbyist is not providing travel for the employee, official or others for the purpose of lobbying.

THE FACTS as we understand them are as follows:

You are a registered lobbyist. From time to time you meet with various elected officials and/or government staff for the purpose of lobbying. While completing your annual Palm Beach County lobbyist expenditure report you reviewed the expenditure form and the lobbyist registration ordinance. You requested an advisory opinion seeking clarification regarding reportable travel expenses.

THE LEGAL BASIS for this opinion is found in the following relevant sections of the revised Palm Beach County Lobbyist Registration Ordinance effective April 2, 2012:

An expenditure is defined as a payment, distribution, loan, advance, reimbursement made or controlled directly or indirectly, by a lobbyist or a principal for the purpose of lobbying.¹ Specifically excluded from the expenditure reporting requirement are a lobbyist or principal's salary, office overhead expenses, and personal expenses for lodging, means and travel. Personal travel expenses to and from a meeting with county and municipal officials or employees is not a reportable expenditure.² That being said, all travel provided by a lobbyist to an elected official, advisory board member or government employee or others for the purpose of lobbying, in excess of \$25, is a reportable expenditure and must be disclosed pursuant to the annual reporting requirement.³

¹ Palm Beach County Lobbyist Registry Expenditure Report Form

² §2-353 (d) *Reporting of expenditures.*

³ Lobbying is defined as seeking to influence a decision through oral or written communication or an attempt to obtain the goodwill of any county commissioner, any member of a local municipal governing body, any advisory board member, or any employee with respect to the

IN SUMMARY, a lobbyist is not required to calculate and disclose personal travel to and from meetings with county or municipal employees or officials as a lobbying expenditure.

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 561-233-0724 if I can be of any further assistance in this matter.

Sincerely,

Alan S. Johnson,
Executive Director

ASJ/mcr/gal

PROPOSED

passage, defeat or modification of any item which may foreseeably be presented for consideration to the advisory board, the board of county commissioners or the local municipal governing body lobbied as applicable.

October 5, 2012

Commissioner Addie Greene
1617 Boardman Avenue
Mangonia Park, FL 33407

Re: RQO 12-068
Misuse of Office

Dear Commissioner Greene,

The Palm Beach County Commission on Ethics (COE) considered your request for an advisory opinion, and rendered its opinion at a public meeting held on October 4, 2012.

YOU ASKED in your submission dated September 25, 2012, whether you were prohibited by the Palm Beach County Code of Ethics (the Code) from assisting members of your homeowners association in cleaning up a local lake.

IN SUM, as an elected official you are prohibited from using your official position directly or indirectly to give yourself a special financial benefit. Under the facts and circumstances you submitted, you may not participate or vote on this matter should it come before the Town Council or use your official position or title in any way to advance this project. However, you are not prohibited from assisting your homeowner's association in your personal capacity in an effort to clean up and improve Tiffany Lake.

THE FACTS as we understand them are as follows:

You are a commissioner for the Town of Mangonia Park and an owner of a lakeside property located within the Tiffany Lake Homeowners Association (the Association). There are 240 units represented by the Association; however, only approximately 36 units are on the Lake itself. You are not an officer or director of the Association; however, you have been approached by your neighbors and would like to assist them in the clean up and repair of Tiffany Lake. Based upon information you received from the Palm Beach County Property Appraiser's office, the lake is owned by the Central Park Business Association (CPBA) and you believe it is their responsibility to maintain the lake. The cleanup effort is in its infancy. However, among other remedies available to you, you have discussed reporting the CPBA failure to maintain the lake to Town Code Enforcement.

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

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: (Emphasis added)
- (1) *Himself or herself;* (Emphasis added)

(b) *Corrupt misuse of official position.* An official or employee shall not use 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.

An Official may not use his or her official position to obtain a special financial benefit for themselves. The COE has previously opined that financial benefit, in the context of the Palm Beach County Code of Ethics, constitutes economic gain or loss.¹ The question then becomes whether making improvements to the lake will result in a special financial benefit to you, not shared with similarly situated members of the general public. This will depend upon the facts and circumstances presented, including the number of homeowners affected by the requested repairs and whether such improvements will likely affect the value of your property in a manner not shared with similarly situated members of the general public.

Under the facts you have submitted, there are 240 homeowners in the Tiffany Lake Subdivision and approximately 36 of those units are on the lake. First, based on these circumstances, the economic benefit or loss to you is not remote or speculative in nature so as to remove any special financial benefit.² Second, while the general class of people directly affected is large (240), the number of owners who abut the lake itself is significantly smaller (36) and does not constitute a large enough class to eliminate the special financial benefit.³ In a prior opinion regarding property owners, the COE stated that “Where a class is large, a prohibited financial gain would result only if there are circumstances unique to the voting official which would enable him to gain more than the other members of the class.”⁴ Because lakeside owners directly affected by the condition of the lake may have a greater financial interest than the other 204 homeowners who reside within the Tiffany Lake community, the lakeside unit owners constitute a unique sub-class. As a member of this sub-class you may not use your official position to take action or otherwise influence the CPBA to clean up the lake. You are not prohibited from acting in your personal capacity as resident and homeowner. In working with your neighbors on this project in your personal capacity, you must keep in mind that using resources uniquely accessible to you as a Commissioner to benefit the lake project may violate this prohibition.⁵

Furthermore, as a Town Commissioner you are also prohibited from taking any official action to corruptly secure or attempt to secure a special privilege or benefit for yourself or for anyone else. As defined by the Code, corruptly means done with a wrongful intent and for the purpose of obtaining a special benefit for any person, inconsistent with the proper performance of your public duties. At all times, you must follow the channels or procedures that are available to any resident of the Town.

For example, reporting potential violations to Town Code Enforcement in a manner available to all members of the public would not violate the Code of Ethics. However, contacting Town Code Enforcement Officers in your official capacity as a Town Commissioner and sending them to the Lake to

¹ RQO 10-013 (For the purpose of ordinance construction, the commission finds that a financial benefit includes either a private gain or loss).

² State of Florida CEO Opinion 01-8, June 12, 2001

³ RQO 12-058

⁴ RQO 12-063

⁵ Letter of Instruction, C12-004

investigate potential violations or otherwise using your office to influence the CPBA to take action may constitute either a financial or corrupt misuse of office.

IN SUMMARY, while the Code does not prohibit you from taking action in your personal capacity, you may not use your status as an elected official to give yourself a special financial benefit not shared with similarly situated members of the community or corruptly secure a benefit for any person or entity. Under the facts and circumstances you submitted, using or attempting to use your official position, as opposed to using the public processes available to you as a resident of the Town, to obtain government action or influence CPBA to clean up Lake Tiffany, would constitute a violation of the Code.

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 561-233-0724 if I can be of any further assistance in this matter.

Sincerely,

Alan S. Johnson
Executive Director

ASJ/mcr/gal

ITEM VI(a) – REVISIONS TO RULES OF PROCEDURE, SECTION 2.9 – PUBLICATION OF ADVISORY OPINIONS

Issue: When promulgating the COE Rules of Procedure, several sources were reviewed. The Code of Ethics section 2-260.9 is a general statement establishing jurisdiction to interpret the code through advisory opinions and specific procedures were to be promulgated pursuant to section 2-257(b). One source of information used was Miami-Dade County Commission on Ethics and Public Trust. The Advisory Opinion section contains protocols similar to those in use by Miami-Dade County at the time. A review of Section 2.9 reveals a redaction protocol inconsistent with the current process in use in Palm Beach County. Staff is requesting a review of this protocol and to amend the Rules of Procedure accordingly.

Staff Analysis and Recommendation:

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

Section 2.9 currently provides that publication of opinions shall redact the name of the requesting party unless he or she authorizes publication. Notwithstanding this redaction, the name of the requestor is a public record and available for disclosure purposes.

Recommendation: Previous COE discussion regarding this section was tabled on November 30, 2011. Several Commissioners indicated that the current procedure, publishing the names of opinion requestors, continue and that Rule 2.9 be amended. However, no vote was taken and the issue was tabled. Staff recommends that the COE adopt the proposed changes to Rule 2.9:

CURRENT RULE OF PROCEDURE – PROPOSED CHANGES

2.9 Publication of Advisory Opinions

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

ITEM VI(b) – REVISIONS TO RULES OF PROCEDURE, SECTION 4.2 – DISMISSALS: NO LEGAL SUFFICIENCY

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 after a finding of legal sufficiency. Legally insufficient Complaints are not actionable as a matter of law.

Staff recommendation:

There is no provision within the Commission on Ethics ordinance that supports the current COE Rule requiring legally insufficient Complaints be brought before the Commission for dismissal by public order. Requiring a public order of dismissal of legally insufficient Complaints creates unnecessary paperwork, an inefficient use of staff and Commission time, and ultimately results in unwarranted financial expense and wasted resources. More importantly, it gives added emphasis to unfounded complaints (many political in nature) to the detriment of Respondents who have done nothing wrong.

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. 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. If a Complaint lacks legal sufficiency, the COE is prohibited from further action, other than to inquire further for purposes of a self-initiated Complaint. In fact, COE staff conducts limited inquiries on many such complaints. To require, by rule, that a legally insufficient matter be presented to the COE merely for purposes of dismissal where no such requirement is found in the COE ordinance is unnecessary and wasteful.

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. A limited inquiry may be conducted as permitted under Rule of Procedure 4.1.3 prior to a determination of legal sufficiency.
- 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.
- f) ~~(e)~~ 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 the complaint, 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 VI(c) – REVISIONS TO RULES OF PROCEDURE, SECTION 4.6.1 – REFERRAL TO OTHER AUTHORITIES

Article V, §2-260.2. Notification and referral to other authorities, states as follows:

As provided for by ordinance within its jurisdiction, the commission on ethics shall refer a matter to the state attorney or any other appropriate official or agency having authority to initiate prosecution when deemed appropriate. The state attorney or other appropriate agency may decline prosecution or enforcement of any matter referred under this division and refer the matter back to the commission on ethics. The commission on ethics shall notify the State of Florida Commission on Ethics, the state attorney, the U.S. Attorney for the Southern District of Florida, and other appropriate law enforcement agencies within ten (10) days of a finding of no probable cause or of a final order disposing of a complaint.

Currently, there is no corresponding Rule of Procedure describing the process of referral. A literal interpretation requiring referrals be made by the COE as a body may compromise a prospective investigation by Law Enforcement. A criminal investigation is exempt from public record precisely for that reason. A referral to Law Enforcement does not affect the COE complaint process unless and until a request is made by the State Attorney or U.S Attorney to stay the COE proceedings pursuant to Article V, §2-260 (h) and Rule of Procedure 4.6, at which time the COE case is stayed.

Recommendation of Staff.

Staff Recommends that referral to “the state attorney or any other appropriate official or agency having authority to initiate prosecution” be in the alternative, by the COE and/or Executive Director.

Proposed Rule 4.6.1 Referral to other authorities for prosecution

The Commission on Ethics, or the Executive Director on behalf of the Commission, shall refer a matter to the state attorney or any other appropriate official or agency having authority to initiate prosecution when deemed appropriate.