

Agenda

September 12, 2013
Governmental Center,
301 North Olive Avenue, 6th Floor
Commissioners Chambers

Meeting will begin at 1:30 pm Executive Session from 3:00 pm to 3:30 pm Regular Agenda will resume at 3:45 pm

Palm Beach County

Commission on Ethics

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Commissioners

Robin N. Fiore, Vice Chair

Daniel T. Galo

Patricia L. Archer

Salesia Smith-Gordon

Michael S. Kridel

Executive Director

Steven P. Cullen

Intake Manager

Gina A. Levesque

Staff Counsel

Megan C. Rogers

Senior Investigator

Mark E. Bannon

Investigator

Anthony C. Bennett

- I. Swearing in of New Commissioners
- II. Call to Order
- III. Roll Call
- IV. Introductory Remarks
- V. Chair Nomination/Vote
- VI. Vice Chair Nomination/Vote
- VII. Manuel Farach and Ronald Harbison Award Presentations
- VIII. Approval of Minutes from August 15, 2013
- IX. Discussion Re: OPPAGA Draft Report
- X. Discussion Re: Commissioner Training
- XI. Executive Session – C13-012
- XII. Executive Director Comments
- XIII. Commission Comments
- XIV. Public Comments
- XV. 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**

August 15, 2013

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

**COMMISSION CHAMBERS
GOVERNMENTAL CENTER**

I. CALL TO ORDER

II. ROLL CALL

MEMBERS:

Manuel Farach, Esq., Chair
Robin N. Fiore, Ph.D., Vice Chair
Patricia L. Archer
Daniel T. Galo, Esq.

STAFF:

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

ADMINISTRATIVE STAFF:

Amanda Canete, Deputy Clerk, Clerk & Comptroller's Office

III. INTRODUCTORY REMARKS

Chair Manuel Farach stated that electronic devices should be turned off or silenced. He added that anyone wishing to speak should submit a public comment card.

IV. APPROVAL OF MINUTES FROM JULY 11, 2013

MOTION to approve the July 11, 2013, minutes. Motion by Patricia Archer, seconded by Robin Fiore, and carried 4-0.

V. PROPOSED SETTLEMENT C12-013

Chair Farach said that the Commission on Ethics (COE) received a written proposed settlement regarding C12-013 signed by COE Advocate Kai Li Fouts, Esq., Marlene Ross, and respondent's attorney Scott Richardson, Esq.

Ms. Fouts said that:

- The COE had voted to find probable cause regarding Marlene Ross on December 6, 2012.
- Count 1 alleged that there was a violation of Article XIII, Section 2-443(b), corrupt misuse of official position, and Count 2, Article XIII, Section 2-443(b), corrupt misuse of official position, both in violation of the Palm Beach County Code of Ethics(Code).
- Ms. Ross responded to a subpoena from the State Attorney's Office. The facts and allegations of the case came to the COE's attention through Ms. Ross appropriately responding to the investigation.
- Counsel was requesting that the COE approve the agreement that was submitted. It was agreed that Ms. Ross would pay a \$500 fine regarding Count 1 with a request for the COE to consider dismissing Count 2.
- Ms. Ross would abide by the decision of the COE.

Mr. Richardson said that conversations occurred to resolve the matter without an evidentiary hearing. He said that Ms. Ross no longer held office.

Ms. Ross said that:

- She read and signed the negotiated settlement.
- She understood that by entering into the negotiated settlement she was agreeing to the allegations set forth in Count 1.

V. – CONTINUED

- She understood that the COE may impose a \$500 fine.
- As a result of the agreement, the COE may agree to dismiss Count 2.
- She has agreed to the terms with consultation from her attorney.

Vice Chair Fiore commented that the ethics violation did not result from a subpoena but from corrupt acts and misuse of office.

Ms. Fouts said that she agreed with the COE's willingness to dismiss Count 2 since the evidence was a function of the subpoena.

Commissioner Archer said that she supported the negotiated settlement and applauded Ms. Ross for coming forth and being honest.

Commissioner Daniel Galo said that he disagreed with the COE's ability to proceed with immunized testimony.

MOTION to approve the negotiated settlement for C12-013 as submitted. Motion by Patricia Archer, and seconded by Robin Fiore.

Vice Chair Fiore clarified that she seconded the motion since it had been stipulated that acts occurred.

UPON CALL FOR A VOTE, the motion carried 3-1. Daniel Galo opposed.

Chair Farach said that the advocate and respondent's counsel could offer suggestions regarding the public report and final order.

COE Intake Manager Gina Levesque said that:

- The public report and final order was similar to previously distributed copies.
- On page 1 under Count 2, the words, "certain," and "compromising" were removed.
- On page 2, the last paragraph, the words "compromising" or "inappropriate" were removed.

V. – CONTINUED

Mr. Richardson said that he agreed that the word, “to,” was unnecessary on page 3, the last paragraph which began, “According to.”

Vice Chair Fiore said that the comma and the fragment should be removed on page 3 of the last paragraph.

Mr. Richardson said that the language being removed by Vice Chair Fiore was also contained on page 1 under item 1 of the negotiated settlement.

Vice Chair Fiore said that Ms. Ross was being fined for a violation and not for a perception. Mr. Richardson responded that Ms. Ross was admitting that what had happened could lead to a perception of corrupt intent. He said that Vice Chair Fiore’s statement, “respondent admits to allegations contained in Count 1” was contrary to the negotiated settlement.

Vice Chair Fiore said that she needed to know if Count 1 was stipulated.

Ms. Fouts said that her understanding was that in resolving the matter, Ms. Ross would stipulate to Count 1.

Commissioner Galo suggested that the final paragraph should read, “According to the negotiated settlement and based upon the facts as set forth in the final order and the respondent’s acknowledgement that such facts could lead to a perception that there was a corrupt intent, the respondent admits that to the allegations contained in Count 1 of the complaint...”

Vice Chair Fiore suggested that the final paragraph should read, “According to the negotiated settlement and based on the facts as set forth in the final order, and that such facts could lead to a perception..., the respondent, therefore, admits to the allegation contained in Count 1 of the complaint...”

Chair Farach inquired if Mr. Richardson needed time to converse with his client.

RECESS

At 2:01 p.m., the chair declared a recess.

V. – CONTINUED

RECONVENE

At 2:22 p.m., the meeting reconvened with Commissioners Archer, Farach, Fiore, and Galo present.

Mr. Richardson said that:

- The discussed language did not adequately and accurately reflect the negotiated settlement's terms.
- Ms. Ross had misspoke during her statement to the State Attorney. She should have used the word, "advocate."
- In retrospect, Ms. Ross' response to the City of Boynton Beach's manager was true.
- Ms. Ross did not have corrupt intent to misuse her official position.
- It could be perceived that actions had occurred that violated the Code.

Chair Farach said that anyone who voted in favor of accepting the negotiated settlement could request that the motion be reheard.

Vice Chair Fiore said that the COE could not fine Ms. Ross since she had agreed that if something hypothetically happened, it would be wrong. She said that the fine could only be a "buyout" of further inquiry.

Ms. Fouts said that:

- To resolve the matter, both parties agreed to negotiate.
- There were evidentiary problems with the case.
- Everyone had reviewed the COE's proposed order.

Vice Chair Fiore requested that the vote be recalled.

V. – CONTINUED

Commissioner Galo stated that the qualifying language was unclear as written and Mr. Richardson said that the suggested language change did not reflect Ms. Ross' version of what happened.

Commissioner Galo suggested adding the word, "recognizes," to page 3 in the paragraph that began, "According to..."

MOTION to withdraw approval of the negotiated settlement. Motion by Robin Fiore, seconded by Manuel Farach.

Chair Farach said that the COE wanted the final order to be "up" or "down" on Count 1 without the qualifying language.

UPON CALL FOR A VOTE, the motion carried 3-1. Patricia Archer opposed.

Chair Farach said that:

- No settlement had been approved.
- The item was being tabled. If counsel reached an agreement, it would be revisited before today's meeting was adjourned.

(CLERK'S NOTE: See page 9 for continuation of item V.)

UNSCHEDULED ITEM

Disclosure on C13-010

Vice Chair Farach said that he would be formalizing his Memorandum of Voting Conflict form (8-B) to recuse himself regarding C13-010.

- The citizen's complaint regarding Mayor Susan Whelchel came before the COE on July 11, 2013.
- The complainant referenced Archstone Palmetto Park, LLC., which was a client of his law firm.
- Form 8-B was filed with the COE and the City of Tallahassee.

VI. EXPEDITED ADVISORY OPINION – REQUEST FOR OPINION (RQO) 13-014

Executive Director Steven Cullen, Esq., said that County Administrator Robert Weisman had asked the COE whether it would violate the Code's anti-nepotism provision if the County hired his son as an assistant director of traffic engineering. He said that staff had drafted an opinion with Chair Farach's guidance due to some potential urgency.

Staff Counsel Megan Rogers, Esq., said that:

- By charter and rule the Board of County Commissioners statutorily designated hiring to four individuals, including the County Administrator.
- The anti-nepotism provision prohibited the County Administrator from employing any relatives.
- As the ultimate hiring authority, the County Administrator cannot delegate that responsibility to someone else.
- The Code's anti-nepotism provision mirrored State law.
- Staff recommended that Mr. Weisman's son would be unable to accept a County position.
- Although four to five levels of supervision were between the County Administrator and the Traffic Department, it was still his division.

Commissioner Galo expressed concern that an applicant was being disqualified because his relative held a position five steps above the applicant's job.

Chair Farach said that case law and the ordinance lacked a qualifier or an exception to the anti-nepotism provision.

MOTION to approve expedited advisory opinion RQO 13-014. Motion by Daniel Galo, seconded by Patricia Archer, and carried 4-0.

VII. PROCESSED ADVISORY OPINIONS (CONSENT AGENDA) – None

VIII. ITEMS PULLED FROM CONSENT AGENDA – None

IX. PROPOSED ADVISORY OPINIONS

IX.a. RQO 13-006

Ms. Rogers said that:

- A municipal attorney asked whether an official who owned a property management company that provided services to a condominium association (COA) was prohibited from participating or voting on a matter that may financially benefit an investor of several properties within the COA.
- The COA was not the applicant.
- The investor owned approximately 80 percent of the COA's units.
- There was a separate unrelated project coming before the City of Boca Raton (Boca Raton) council (City Council) by a unrelated developer.
- The investor owned the land where the future development may be built. He was not the developer seeking the change before the City Council.
- There was no special financial benefit to the investor based upon the City Council's vote.
- There were several layers of corporate form and separation between the elected official and the investor.
 - The investor did not hold any officer's position, nor was he on the COA's Board of Directors.
 - The investor constituted many different corporations and some family members. No family members held an officer's position or were on the COA's Board of Directors.
 - The investor was not the original developer.
- Staff recommended that the elected official was not prohibited from voting on the matter.

IX.a. – CONTINUED

Vice Chair Fiore said that no nexus existed since the person who was going before the City Council was unrelated to the investor who contracted with the elected official.

MOTION to approve the proposed advisory opinion RQO 13-006. Motion by Daniel Galo, seconded by Robin Fiore.

Chair Farach said that the first three sentences in the paragraph that began “Unlike the...” on page 3 were unclear and should be removed.

AMENDED MOTION to include the change as discussed. The maker and the seconder agreed, and the motion carried 4-0.

V. – CONTINUED

(CLERK’S NOTE: See pages 2-6 for earlier discussion.)

Ms. Fouts asked for more time to discuss the specific language. She asked that the matter be tabled until the October 2013 meeting.

MOTION to table C12-013 until the October meeting. Motion by Robin Fiore, seconded by Patricia Archer, and carried 4-0.

(CLERK’S NOTE: The numerical order of the agenda was restored.)

IX.b. RQO 13-013

Ms. Rogers said that:

- A municipal police officer asked whether the City of Jupiter Police Department (JPD) was prohibited from assigning officers to live in government-owned residential properties within the JPD’s jurisdiction during their official duties.
- Where a municipal employee was assigned additional duties in his/her official capacity, additional compensation or value provided to the employee from his/her public employer was not a prohibited or reportable gift.

IX.b. – CONTINUED

- Due to a concern about potential crime, the JPD wanted to station two police officers to live on the Coast Guard's vacated properties.
- Assigning the officers involved a competitive process.

MOTION to approve proposal advisory opinion RQO 13-013. Motion by Robin Fiore, seconded by Patricia Archer, and carried 4-0.

IX.c. RQO 13-015

Ms. Rogers said that:

- A County employee asked whether the anti-nepotism provision prohibited his fiancée from continuing to work for the County. He also asked if her continued employment was not prohibited, did the anti-nepotism provision exclude her from receiving any promotion or advancement while he served as an Assistant County Administrator.
- The Code's anti-nepotism section prohibited a public official from employing, appointing, promoting, or advancing his/her relative.
- The anti-nepotism provision did not require discharging someone who became a relative or whose relative took a higher position after the person's employment.
- It appeared that the Assistant County Administrator did not exercise control over promotion or employment of his fiancée within her department. As long as he did not advocate her promotion in the future, she was not prohibited or precluded by the ordinance from accepting a superior County position.

Vice Chair Fiore said that page 2 in the paragraph that began "Section 2-445," should say, "does not address" instead of, "does not prohibit." She said that the wording implied that the COE was giving permission to something that it did not address.

IX.c. – CONTINUED

Ms. Rogers said that:

- The COE’s traditional language could be added in the footnote stating that the opinion was limited to the County’s Code of Ethics, and that it had no applicability to State law.
- The previously discussed sentence would be reworded to say, “The Code of Ethics’ anti-nepotism provision does not prohibit two officials from working together, or one relative from supervising another.”
- The terms, “advancement and promotion,” were specifically defined by case law.

Vice Chair Fiore said that in reading the Florida statute, an official could not advocate on behalf of his/her relative. She said that the “In summary” paragraph on the last page could say; “So long as you do not advocate on behalf of your fiancée, this anti-nepotism provision...”

Commissioner Archer suggested adding the language, “promotion, position, or other advancement.”

Ms. Rogers said that the “In summary” language needed to mirror the ordinance’s language to include advancement, promotion, and employment or appointment.

MOTION to approve the proposed advisory opinion RQO 13-015 as amended to include the changes as discussed. Motion by Patricia Archer, seconded by Daniel Galo, and carried 4-0.

X. EXECUTIVE SESSION – None

XI. EXECUTIVE DIRECTOR COMMENTS

XI.a.

DISCUSSED: Office of Program Policy Analysis and Government Accountability (OPPAGA) Update.

XI.a. – CONTINUED

Mr. Cullen said that OPPAGA staff still anticipated completion of its report in August 2013. He said that OPPAGA would contact the COE in advance and send a proposed draft for comments. He said that the draft would become a public record when OPPAGA submitted it.

XI.b.

DISCUSSED: Commissioner Vacancies.

Mr. Cullen said that he spoke to the president of the Palm Beach Chapter of Florida Institute of Certified Public Accountants (CPA), and he said that his group anticipated naming a commissioner within the next few weeks. He said that the Hispanic, the F. Malcolm Cunningham, Sr., and the County Bar associations sent an advertisement for the commissioner position with the closing date of August 19, 2013.

XI.c.

DISCUSSED: Commissioner Training.

Mr. Cullen said that staff completed most of the training materials and were scheduled to tape various segments next week. He said that staff had a tentative Circuit Court commitment to provide a judge for a question and answer session on best practices for a quasi-judicial hearing. He said that staff hoped to have the project completed by mid-September 2013.

Chair Farach said that the COE had previously discussed whether to apply rules similar to the Code of Judicial Conduct; however, the idea was rejected. Vice Chair Fiore responded that at the time the COE had lacked understanding regarding the degree to which quasi would be used. She suggested that the matter could be reviewed at a later date.

XI.d.

DISCUSSED: Web Site Revision.

Mr. Cullen said that the County was revising the entire COE Web site. He said that the Web site would have an e-book-type format and would be completed in less than one month.

XI.e.

DISCUSSED: Performance Metrics.

Mr. Cullen said that staff had met with County officials regarding performance data. He said that there was a tentative list of performance measures to add to those contained in the budget. He said that the County had placed some analytics on the Web site, and that a detailed printout would be provided to the commissioners.

XII. COMMISSIONER COMMENTS

XII.a.

DISCUSSED: Chair Farach's Resignation.

Vice Chair Fiore said that the commissioners regretted Chair Farach's resignation and would discuss the matter further at the next meeting.

XIII. PUBLIC COMMENTS – None.

XIV. ADJOURNMENT

MOTION to adjourn. Motion by Robin Fiore, seconded by Patricia Archer, and carried 4-0.

At 3:33 p.m., the chair declared the meeting adjourned.

APPROVED:

Chair/Vice Chair

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

at a glance

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

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

Scope

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

Background

From 2006 to 2010, citizens in Palm Beach County witnessed the public corruption prosecution of several elected officials. During this time, local business leaders established an ethics initiative and the state attorney convened a grand jury to address the ethical crisis facing the county. As a result of these and other efforts, the Palm Beach County Board of County Commissioners adopted ordinances in December 2009 to implement the grand jury's recommendations to establish a code of ethics, a county ethics commission, and an office of inspector general, and to strengthen lobbying regulations.^{1,2} In November 2010, county voters approved a referendum that made the county's 38 municipalities subject to the ethics code. In response, the county commission revised the ethics code effective June 2011.³

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

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

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

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

³ This revision was made pursuant to local referendum.

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

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

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

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

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

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

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

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

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

Findings

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

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

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

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

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

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

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

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

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

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

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

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

⁸ The commission also provides training to community groups upon request.

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

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

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

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

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

¹ The commission issued its first final order regarding a complaint in August 2010.

² The Palm Beach County Board of County Commissioners adopted changes to the ethics code to include the county's 38 municipalities effective June 2011.

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

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

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

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

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

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

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

Clarification of roles could improve the commission's complaint processes

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

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

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

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

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

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

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

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

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

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

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

¹⁵ Estimate is based on a rate of \$275 per hour.

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

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

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

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

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

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

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

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

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

¹⁶ Section 112.312(8), *F.S.*

¹⁷ Section 112.311, *F.S.*

¹⁸ Section 112.3143(3)(a), *F.S.*

¹⁹ Section 112.3143, *F.S.*

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

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

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

interest given the overlapping prosecutorial and quasi-judicial roles that commissioners fulfill.

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

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

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

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

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

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

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

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

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

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

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

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

The commission could benefit from enhanced commissioner training

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

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

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

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

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

The commission could improve its performance accountability system

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

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

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

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

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

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

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

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

Appendix A

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

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

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

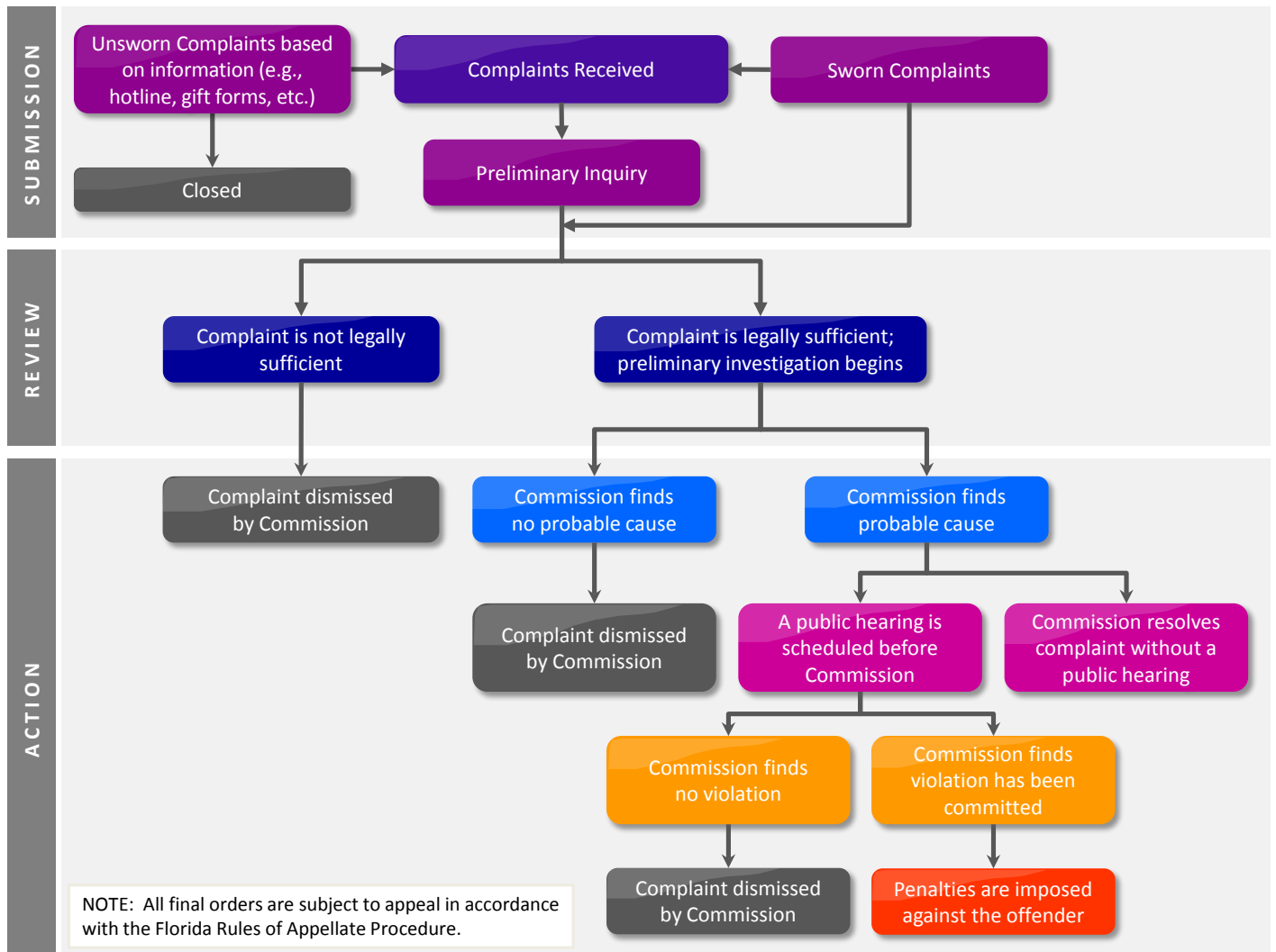
Following an initial inquiry, complaints must meet two important thresholds in order to move forward. First, the commission’s executive director must determine if the complaint is legally sufficient. Legal sufficiency requires that a complaint be in writing on a form prescribed by the commission, allege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

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

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

Exhibit A-1

The Commission’s Complaint Process Includes Many Steps from Submission to Final Action



Source: Palm Beach County Commission on Ethics.

The Florida Legislature

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OPPAGA website: www.oppaga.state.fl.us

Project supervised by Kara Collins-Gomez (850/717-0503)

Project conducted by Mary Alice Nye and Tom Roth

R. Philip Twogood, Coordinator

From: Robin Fiore [fiore.robin@gmail.com]
Sent: Friday, September 06, 2013 2:13 PM
To: Gina A. Levesque
Subject: Fwd: FW: OPPAGA Draft Report

----- Forwarded message -----

From: **Robin Fiore** <fiore.robin@gmail.com>
Date: Fri, Sep 6, 2013 at 2:10 PM
Subject: Re: FW: OPPAGA Draft Report
To: Steve Cullen <SCullen@palmbeachcountyethics.com>

Dear Mr. Cullen,

The OPPAGA report states: "To identify best practices for local ethics bodies, we examined relevant academic literature and research center publications, reviewed the governing laws and annual reports of other local, state, and federal ethics commissions and boards, and interviewed governmental ethics experts."

For transparency's sake, and in order to properly evaluate the report, one must also be able to validate the evidence for statements that such and such is a "Best Practice." Please formally request that OPPAGA provide specific citations for each such claim in the Draft report."

Please include my request and OPPAGA's response in the materials for this agenda item.

Sincerely,
Robin N. Fiore

On Fri, Sep 6, 2013 at 1:46 PM, Steve Cullen <SCullen@palmbeachcountyethics.com> wrote:
Commissioners,
Attached is the draft report from the OPPAGA review.
For the new commissioners, this process began in April.
You will note that a response is permitted by September 20.
We will place this on the agenda for the meeting on September 12.

Steve

Steven P. Cullen
Executive Director
Palm Beach County Commission on Ethics
The Historic 1916 Palm Beach County Courthouse #450
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From: COLLINS-GOMEZ.KARA [mailto:COLLINS-GOMEZ.KARA@OPPAGA.FL.GOV]
Sent: Friday, September 06, 2013 12:20 PM
To: Steve Cullen
Cc: TWOGOOD.PHILIP
Subject: OPPAGA Draft Report

Good afternoon, Mr. Cullen.

Attached please find a draft of OPPAGA's report: ***Palm Beach County Commission on Ethics Was Created Using Several Best Practices; Some Processes Could Be Enhanced***; also included is a transmittal letter. We request that if the commission wishes to provide an official response to the draft report, it do so by September 20, 2013. Prior to this date, please do not hesitate to contact me if you have questions, find errors, or desire further clarification of the presentation of any item included in the draft report.

Please reply to this message to verify receipt of this draft report.

Sincerely,

Kara Collins-Gomez, Staff Director
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*The Florida Legislature's Office of Program
Policy Analysis and Government Accountability*
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