



VIA EMAIL & US MAIL

March 29, 2022

Christie E. Kelley, Executive Director
Palm Beach County Commission on Ethics
2633 Vista Parkway
West Palm Beach, Florida 33411

Re: Request for Advisory Opinion

Dear Ms. Kelley:

As the City Attorney for the City of Boca Raton ("City"), and on behalf of Deputy Mayor Andrea O'Rourke and Council Members Monica Mayotte and Yvette Drucker, elected members of the City Council ("Officials"), I am requesting an advisory opinion from the Palm Beach County Commission on Ethics ("PBCCOE").

We also requested an informal opinion on this matter from the Florida Commission on Ethics ("FCOE"), a copy of that request is attached hereto.

I. Facts

On February 8, 2021, in anticipation of an upcoming election for two Council Member seats, Deputy Mayor O'Rourke endorsed candidates Mayotte and Drucker (and both were reelected). The Deputy Mayor communicated her endorsement through an email she sent to certain City residents (through her personal email account and identified herself as the Deputy Mayor). On March 1, 2021, a complaint was filed with the Florida Elections Commission ("Election Commission") against the Deputy Mayor related to the email/endorsements. The Deputy Mayor retained counsel to represent her with respect to the complaint and on January 27, 2022, the Election Commission found the complaint legally insufficient and closed the matter.

Based on the finding of legal insufficiency, the Deputy Mayor is seeking reimbursement from the City of the legal expenses she incurred, and a resolution authorizing the reimbursement will be before the City Council. Council Members Mayotte and Drucker seek to confirm they do not have a voting conflict with respect to the resolution (as the underlying complaint involved the Deputy Mayor's endorsement of their campaigns). Additionally, the Deputy Mayor seeks to confirm whether, in light of the opinions issued by the FCOE, she has a voting conflict with respect to the vote on the resolution.

II. Request for Opinion

a. Opinion for Council Members Mayotte and Drucker

Section 2-443(c) of the Palm Beach County Code of Ethics ("PBC Code") provides:

County and municipal officials as applicable shall abstain from voting and not participate in any matter that will result in a special financial benefit as set forth in subsections (a)(1) through (7). ...

Section 2-443(a) does not permit an official to take an action that will provide a special financial benefit to themselves (or to a list of other individuals/entities). Here, neither adoption nor rejection of the resolution to authorize reimbursement of legal expenses incurred by the Deputy Mayor would result in "special financial benefit" to Council Members Mayotte or Drucker (nor to any of the other people/entities listed in Section 2-443(a)), and even if it did (which it does not) any potential benefit from the endorsement ended with the election (which was in March 2021).

Please advise if the above analysis, which concludes that Council Members Mayotte and Drucker have no voting conflict with respect to the reimbursement resolution, is correct.

b. Opinion for Deputy Mayor O'Rourke

As noted in the City's contemporaneous request for opinion sent to the FCOE, Section 112.313(5), Florida Statutes, provides:

No public officer shall be prohibited from voting on a matter affecting his or her salary, expenses, or other compensation as a public officer, as provided by law. ...

The FCOE reached the conclusion, in CEO 88-46, that no voting conflict exists for a water and sewer district commissioner with respect to entitlement to reimbursement of attorneys' fees he incurred successfully defending against a complaint before the FCOE, as the reimbursement was provided by law.¹ (See also CEO 21-2). This decision

¹ The summary in CEO 88-46 included the following statement of the law as to a public official's entitlement to the payment of his/her attorney's fees:

A water and sewer district commissioner is not prohibited by Section 112.3143, Florida Statutes, from voting on issues concerning the reimbursement of legal fees and costs which he incurred in connection with a complaint filed against him with the Commission on Ethics. Section 112.313(5), Florida Statutes, allows a public officer to vote on matters affecting his expenses, as provided by law. The common law provides that a public officer is entitled to representation at the public expense in a lawsuit arising from performance of official duties while serving a public purpose.

The COE also included in CEO 88-46 the following explanations for their conclusions:

We previously advised that this provision clearly permitted a public officer to vote on a matter affecting his travel expenses, as provided by Section 112.061, Florida Statutes, regardless of the more general prohibition contained in Section 112.3143. See CEO 85-19. In our view, Section 112.313(5) also would permit a public officer to vote to reimburse himself for legal fees when such reimbursement is "provided by law."

The Florida courts previously have concluded that payment of attorney's fees by a governmental unit may be authorized under certain circumstances in view of the common law principle that public officers are entitled to a defense at the expense of the public in defending against unfounded allegations of official misconduct, arising from performance of official duties and while serving a public purpose, notwithstanding the absence of statutory authorization.

For these reasons, we conclude that a common law authorization for the payment of attorneys [sic] fees would be "as provided by law" for purposes of Section 112.313(5).

Moreover, in CEO 21-2 (relating to a vote correcting a pension issue that affected four members of a county commission and sixteen employees), the COE logically concluded:

The eligible class of resolution beneficiaries include four out of the five members of the County Commission—the *sole collegial body possessing the authority to address the inequity*. While the votes/measures involving the proposed retirement compensation resolution would be a part of a process causing gain or loss to the County Commission members who are a part of a class of eligible elected officers and SMS class County employees, we find that such a retirement compensation

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relies on Section 112.313(5), Florida Statutes, and concludes that, the general prohibition on voting on a matter that provides a public officer with a "special financial gain or loss" (in Section 112.4143(3)(a), Fla. Stat.), was superseded by Section 112.313(5), Fla. Stat, that authorizes a public officer to vote to reimburse himself/herself for incurred legal fees when such reimbursement is provided by law. This conclusion makes real sense in that, without it, city council members and other members of governing bodies in Palm Beach County would not be able to vote on matters, as here, that are "provided by law" and also benefit the members (such as a vote on a local government budget item that impacts member salaries or expenses, or on reimbursement of travel expenses for a governmental trip that may involve numerous members of the governing body). As such, when votes are necessary for governmental functions and are "provided by law," the FCOE opinion provides the rationale for the conclusion that no voting conflict should exist.

Please advise regarding the issue of whether Deputy Mayor may vote on the reimbursement resolution.

For convenience and informational purposes, we request that a copy of this letter be included in the record and provided to each member of the COE for their review in connection with this inquiry. Additionally, in the event you have any questions or require additional information regarding this request, please send such questions/requests to me at dgfrieser@myboca.us and we will provide a written response as soon as possible.

Thank you for your assistance in this matter.

Sincerely,



Diana Grub Frieser
City Attorney, City of Boca Raton

cc: Mayor and City Council Members (in accordance with Ord. No. 5431)
Leif J. Ahnell, C.P.A., C.G.F.O., City Manager
Mary Siddons, City Clerk (for posting on City website; Ord. No. 5431)

Attachment: Request for Informal Advisory Opinion to the Florida Commission on Ethics

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resolution would constitute "other compensation" under Section 112.313(5), Florida Statutes, derived by virtue of their public positions.



VIA EMAIL & US MAIL

March 29, 2022

Kerrie J. Stillman, Executive Director
The Florida Commission on Ethics
P. O. Drawer 15709
Tallahassee, FL 32317-5709

Re: Request for Informal Advisory Opinion

Dear Ms. Stillman:

As the City Attorney for the City of Boca Raton ("City"), and on behalf of Deputy Mayor Andrea O'Rourke and Council Members Monica Mayotte and Yvette Drucker, elected members of the City Council, I am requesting an informal advisory opinion from the Florida Commission on Ethics ("COE").

I. Facts

On February 8, 2021, in anticipation of an upcoming election for two Council Member seats, Deputy Mayor O'Rourke endorsed candidates Mayotte and Drucker (and both were reelected). The Deputy Mayor communicated her endorsement through an email she sent to certain City residents. On March 1, 2021, a complaint was filed with the Florida Elections Commission ("Election Commission") against the Deputy Mayor related to the email/endorsements. The Deputy Mayor retained counsel to represent her with respect to the complaint and on January 27, 2022, the Election Commission found the complaint legally insufficient and closed the matter.

Based on the finding of legal insufficiency, the Deputy Mayor is seeking reimbursement from the City of the legal expenses she incurred, and a resolution authorizing the reimbursement will be before the City Council. Council Members Mayotte and Drucker seek to confirm they do not have a voting conflict with respect to the resolution (as the underlying complaint involved the Deputy Mayor's endorsement of their campaigns). Additionally, the Deputy Mayor seeks to confirm she does not have a voting conflict with respect to the vote on the resolution.

II. Request for Opinion

a. Informal Opinion for Council Members Mayotte and Drucker

Section 112.4143(3)(a), Florida Statutes provides:

No county, municipal, or other local public officer shall vote in an official capacity upon any measure which would inure to his or her special private gain or loss. ...

Neither adoption nor rejection of the resolution to authorize reimbursement of legal expenses incurred by the Deputy Mayor would result in "special private gain or loss" to *Council Members Mayotte or Drucker* (nor to any relative, business associate or employer of either of them). The resolution addresses reimbursement of legal expenses, not the earlier endorsement, but, in any event, receipt of an endorsement in connection with candidacy for office does not qualify as a "special private gain or loss," and even if it did (which it does not), any potential benefit from the endorsement ended with the election (which was in March 2021).

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Please advise if the above analysis, which concludes that the Council Members have no voting conflict with respect to the reimbursement resolution, is correct.

b. Informal Opinion for Deputy Mayor O'Rourke

Section 112.313(5) provides:

No public officer shall be prohibited from voting on a matter affecting his or her salary, expenses, or other compensation as a public officer, as provided by law. ...

Applying the above statutory provision, in CEO 88-46, the COE concluded that Section 112.313(5) permits a public officer to vote to reimburse himself/herself for legal fees when such reimbursement is provided by law. In that opinion, the COE confirmed that a water and sewer district commissioner can vote (i.e., has no voting conflict) on the issue of reimbursement of legal expenses he incurred in successfully defending against a complaint filed with the COE. (See also, CEO 21-2).

As the reimbursement of the Deputy Mayor's legal expenses would be provided by law (See *Thornber v. City of Fort Walden Beach*, 568 So. 2d 914 (Fla. 1990)), the statute appears to be applicable to the reimbursement resolution. Please advise if this analysis, which concludes that the Deputy Mayor may vote on the resolution, is correct.

In the event you have any questions or require additional information regarding this request, please send such questions/requests to me at dgfrieser@myboca.us and we will provide a written response as soon as possible.

Thank you for your assistance in this matter.

Sincerely,



Diana Grub Frieser
City Attorney, City of Boca Raton

cc: Mayor and City Council Members (in accordance with Ord. No. 5431)
Leif J. Ahnell, C.P.A., C.G.F.O., City Manager
Mary Siddons, City Clerk (for posting on City website; Ord. No. 5431)

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