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MEMORANDUM

TO: Board of County Commissioners

FROM: Andrew J. Meyers, County Attorney 

DATE: May 3, 2019

RE: **Item 72 on the May 7 County Commission Agenda; Setting a Public Hearing to Consider an Amendment to Section 1-19(c)(5) of the Code of Ethics for Elected Officials**

On April 16, 2019, in connection with Item 53 on the Board's meeting agenda, the Board directed this Office to draft an amendment to clarify the scope of the "Charitable Contribution Fundraising" provision. It quickly became clear that we would be asked to produce various versions of the proposed amendment. To date, we have produced and distributed the primary version (which states that it was sponsored by the entire Board, but was coordinated with the Mayor, who was the sponsor of Item 53), a version sponsored by Commissioner Udine (distributed with the agenda item), and a version sponsored by Vice-Mayor Holness (distributed as additional material). We have been directed by a Commission Office to draft another version.

Although the item before the Board on May 7 seeks only that a public hearing be set for May 21, we are producing a side-by-side comparison of the key points in each version to facilitate the Board's May 7 discussion. The comparison document will be distributed by midday on Monday to allow time for the fourth version of the amendment to be completed and included.

As we had anticipated, a number of changes will be required prior to final Board action on this matter. Because of the different approaches (versions) that will be presented on May 7, we believe it is most efficient to draft all required revisions and amendments after having the benefit of the May 7 discussion.

You are shown as having received a memorandum from the Inspector General, who has commented on the versions included with the agenda item. That memorandum is attached hereto for your convenience and will be distributed with this memorandum as additional material.

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We agree with some but not all of the Inspector General's points. For example, his point about raising money for "nonprofits" is particularly valid. We do not, however, share his primary underlying concern, as any charitable solicitation must be for a public purpose and cannot otherwise run afoul of the law (e.g., public resources could not be used to raise money to aid certain activities by religious institutions), but we agree that the language should be revised to maximize clarity.

The Inspector General's letter seems to imply that, as he construes the current ethics provision, elected officials may not personally raise money except for, essentially, I.R.C. 501(c) entities. We respectfully disagree and believe such a ban would not survive judicial scrutiny. But his point is a fair one when staff or other public resources are used, and we have already developed language to better address this distinction.

We generally disagree with the Inspector General's comments about defined terms, including the definition of "in-kind." While the Inspector General might prefer if certain terms were defined differently, that decision is ultimately one for this Board. That said, we value the Inspector General's insight, share his desire to make the Code as clear as possible, and will seek to confer with him in furtherance thereof.

We have already received general comments from one municipal official, and we will seek input from leading municipal counsel as they too must construe the Code, which applies equally to municipal elected officials.

The proposed amendments would be considered, at the earliest, on May 21. If, based on the Board's discussion on May 7, it is believed that more time is needed, the public hearing could be set for one of the June meetings. Either way, there will be ample time and opportunity to address the Board's issues and concerns and those of other stakeholders.

In the interim, please feel free to contact Assistant County Attorney Rocio Blanco Garcia (ext. 8640) or me should you wish to discuss this agenda item.

AJM/RBG/gf
Attachment

c: Bertha Henry, County Administrator
Bob Melton, County Auditor



BROWARD OFFICE OF THE INSPECTOR GENERAL

May 2, 2019

Honorable Mark D. Bogen, Mayor, Broward County
and Members, Broward Board of County Commissioners
Broward County Governmental Center
115 S. Andrews Avenue
Fort Lauderdale, Florida 33301

By Email

RE: Motion to Amend the Broward County Code of Ordinances, *Code of Ethics for Elected Officials*

Dear Mayor and Commissioners:

The Broward Office of the Inspector General has completed its review of Agenda Item 72 for the May 7, 2019, Broward County Commission Regular Meeting, which proposes to amend Sec. 1-19(c)(5)(a) of the Broward County Code of Ordinances, Code of Ethics for Elected Officials (Code of Ethics), with regards to the Solicitation and Receipt of Contributions, Charitable Contribution Fundraising.

We have rarely commented on proposed legislation but have done so when we believe the changes would make enforcement more difficult. Our concerns are from the perspective of the sole authority to enforce the Code of Ethics and with the experience of doing so for the past eight years.

Due to concerns about enforceability, the OIG opposes the adoption of Agenda Item 72 as proposed by the BCC (Exhibit 2). Those changes do not, as a whole, clarify what is and is not permitted conduct. We do not oppose the adoption of Commissioner Udine's proposal (Exhibit 3).

While we agree that it would clarify the Code to add the solicitation of goods and services within its scope, the BCC proposal unnecessarily broadens and makes quite unclear the kinds of organizations or causes for which an Elected Official can acceptably solicit. To be enforceable and provide due notice to the affected officials, the proposal should include definitions for "charitable organization" and "individual in need." Each of us has a vastly different and personal understanding of these terms, and we would similarly differ on whether a specific solicitation served a "valid public purpose." In the absence of a local government attorney opinion that the solicitation would serve a valid public purpose, a subjective claim by an Elected Official that a cause or individual is charitable or needy is as problematic as the OIG creating its own standards for those terms. Without further clarification, these broad terms would render the rule unenforceable, unfair, or both.

John W. Scott, *Inspector General*

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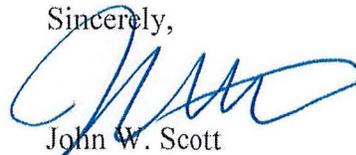
The expansion of all nonprofit entities to the classification of organizations for which Elected Officials could solicit donations is also problematic in consideration of the original intent of the Ethics Commission that drafted the Code. Nonprofit entities (IRS 501(c)-designated and defined) can be but are not always charitable institutions and some but not all qualify for tax-exempt status. To qualify as a nonprofit organization (the would-be standard under the BCC proposal), the entity need not be a charitable endeavor but need only be organized around a particular social cause or shared point of view, with a commitment not to distribute profits among shareholders or equity stakeholders. Nonprofits can be organized to advocate for political causes and candidates, to influence legislation, and to promote common business interests. To cite examples, the National Rifle Association (NRA) and the National Football League Players Association are nonprofit entities for which, under the proposed amendment, Elected Officials in Broward could solicit funds, goods, and services and deploy in-kind expenditures of the resources of their office, including direct staff and government-owned property, without the approval of their local governmental entity and without having to publicly disclose the activity, so long as they or their governmental attorney articulated what they deem a "valid public purpose" for any in-kind expenditures.

What has worked over the past eight years is the clear and unambiguous term "nonprofit charitable organization, as defined under the Internal Revenue Code," the current definition for a qualifying entity in Sec. 1-19(c)(5)(a) and the term preserved in Commissioner Udine's proposal (Exhibit 3). In conducting an investigation in the past, to determine whether the organization solicited for was the kind permitted under the Code of Ethics (in the absence of the governmental entity's formal approval of the solicitation), the OIG simply determined whether it was an IRS-qualified tax-exempt charity under 26 U.S.C. § 501(c)(3). This has served to eliminate the subjectivity of both the Elected Official and the OIG and remains, in our view, a workable definition that furthers the original intent of the Ethics Commission to minimize the dangers of misuse of position and damage to public trust while permitting officials' charitable work to continue.

Finally, we note that proposed Sec. 1-19(c)(5)(a)2. of Exhibit 2 would no longer proscribe the use of governmental staff and resources but would permit the use of direct staff and resources so long as there is no affirmative expenditure of public funds. This appears to leave the door open to allow Elected Officials to arrange for or instruct non-direct government staff to assist in these solicitations "on county time." We also question whether the use of any staff time should be considered in-kind and posit that the use of non-exempt or hourly staff can never be in-kind. To that end, if this proposal is adopted, we recommend a clarification that would establish that staff assistance during work hours is an affirmative expenditure of public funds.

Thank you for considering our concerns. We would be happy to discuss these comments further with you or the County Attorney.

Sincerely,



John W. Scott
Inspector General

cc: Andrew J. Meyers, County Attorney

John W. Scott, *Inspector General*

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