



Agenda Item Details

Meeting	Mar 09, 2022 - City Commission Meeting
Category	13. POLICY FORMATION AND DIRECTION
Subject	13.01 Analysis of Independent Ethics Board Ordinance Recommendations -- Cassandra K. Jackson, City Attorney
Type	Action, Discussion
Fiscal Impact	No
Recommended Action	Approve Options 1 thru 8.

For more information, please contact: Amy Toman, Deputy City Attorney (850) 891-8554

Statement of Issue

On September 1, 2021, the City's Independent Ethics Board (IEB) transmitted Draft Ordinance No. 21-ORD-01 to the Commission, recommending three amendments to the City of Tallahassee Ethics Code (Attachment 1). On September 21, 2021, the IEB transmitted a letter referencing Draft Ordinance Nos. 20-ORD-01, 20-ORD-02, and 20-ORD-03 to the Commission, recommending amendments to the City's lobbying provisions (Attachment 2).

On February 16, 2022, the City Commission met in workshop to discuss the IEB's draft ordinances, as well as several other issues related to ethics and the jurisdiction of the IEB. The Commission directed the City Attorney to bring back an agenda item analyzing the IEB's proposed ordinances.

Recommended Action

Approve Options 1 thru 8:

1. Misuse of position: Approve City Attorney's Office recommendation.
2. Penalties: Approve City Attorney's Office recommendation.
3. Disclosure or Use of Non-Public Information: Approve City Attorney's Office recommendation.
4. Definition of Lobbyist: Approve City Attorney's Office recommendation.
5. Lobbyist Registration: Approve City Attorney's Office recommendation.
6. Lobbyist Contingency Fees: Approve City Attorney's Office recommendation.
7. Public Website for Lobbyist Registration and Compensation Reports: Approve City Attorney's Office recommendation.
8. Expanded Jurisdiction of the IEB Over Lobbyists: Approve City Attorney's Office recommendation.

Fiscal Impact

None known at this time.

Supplemental Material/Issue Analysis

History/Facts & Issues

On September 1, 2021, the City's Independent Ethics Board (IEB) transmitted Draft Ordinance No. 21-ORD-01 to the Commission, recommending three amendments to the City of Tallahassee Ethics Code (Attachment 1). On September 21, 2021, the IEB transmitted a letter referencing Draft Ordinance Nos. 20-ORD-01, 20-ORD-02, and 20-ORD-03 to the Commission, recommending amendments to the City's lobbying provisions (Attachment 2).

On February 16, 2022, the City Commission met in workshop to discuss the IEB's draft ordinances, as well as several other issues related to ethics and the jurisdiction of the IEB. The Commission directed the City Attorney to bring back an agenda item analyzing the following ordinances proposed by the IEB: No. 21-ORD-01, No. 20-ORD-01, and No. 20-ORD-02. The City Attorney's Office (CAO) analysis of these proposed amendments to the Ethics Code and the City's lobbying provision follows:

IEB DRAFT ORDINANCE NO.: 21-ORD-01 (Amendments to the Ethics Code)

Misuse of Public Position

Section 2-8 of the current Ethics Code provides:

No public official or employee of the city shall use or attempt to use his or her official position or any city property or resource which may be within his or her trust, or perform or fail to perform, his or her official duties, in a manner which he or she knows or should know with the exercise of reasonable care will result in a special privilege, benefit, or exemption for himself or herself or others.

In 2019, the IEB recommended the current language, lowering the bar for prosecutions for misuse of position to a “knew or should have known” standard, as opposed to a “corruptly” standard. At the time, the CAO recommended retaining the “corruptly” standard, which is the standard prescribed by state law:

112.313(6), F.S.: No public officer, employee of an agency, or local government attorney shall *corruptly* use or attempt to use his or her official position or any property or resource which may be within his or her trust, or perform his or her official duties, to secure a special privilege, benefit, or exemption for himself, herself, or others.

112.312(9), F.S.: “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 a public servant which is *inconsistent with the proper performance of his or her public duties*.

The CAO referred specifically to **Blackburn v. State**, 589 So.2d 431 (Fla 1st DCA 1991), in which the court considered whether a county commissioner had misused her position when she asked a county employee to compile information and write an article in support of a county ordinance and then later used the article in her reelection campaign. The **Blackburn** court held:

We find nothing in the language of these sections that suggests the incidental benefit appellant may have received or enjoyed in respect to her campaign for reelection by having a county employee draft the subject article was intended to be covered by this code of ethics. . . There is no evidence in the record, apart from appellant's having freely admitted use of the article in her campaign, that disputes or contradicts her testimony regarding her intent to use the material for both purposes. The record does not contain competent substantial evidence to support a finding of fact that appellant's only purpose in obtaining the article was to corruptly use her office to obtain a prohibited benefit for use in her campaign.

The CAO also noted that retaining the “corruptly” standard would allow the IEB to rely on precedent established by the case law and opinions at the state level to conduct its own prosecutions of this provision. The Commission adopted the “knew or should have known” standard.

Apparently recognizing that strict application of the “knew or should have known” standard unfairly captures official action that benefits others (e.g., ribbon cutting), but really does not rise to the level of misuse, the IEB now recommends adding “in a manner inconsistent with the proper performance of his or her office” to the knew or should have known standard. **The CAO recommends that this provision be introduced for public hearing (Option 1).**

Penalties

The IEB seeks the authority to dismiss a complaint at any stage in the process if the IEB determines that the public interest would not be served by proceeding further or if it appears that the alleged violation is inadvertent or unintentional. The proposal contemplates a settlement agreement in which there is no finding or admission of wrongdoing, but which could nonetheless impose a “remedial action” including an oral or written reprimand, a letter of instruction, or the requirement of additional training. This proposal is confusing because it suggests that:

- (1) a violation *has* occurred; but
- (2) it was inadvertent, or the public interest will not be served by prosecuting it; so
- (3) there will be no admission of wrongdoing; but
- (4) the alleged violator will still be penalized.

While the IEB's interest in providing more efficient resolution of certain cases is commendable, perhaps the state law in this area offers a more logical approach, by recognizing that some violations are *de minimis* and do not warrant the use of substantial resources. Section 112.324, F.S., provides, in relevant part:

(11)(a) . . . the commission may dismiss any complaint or referral at any stage of disposition if it determines that the violation that is alleged or has occurred is a *de minimis* violation attributable to inadvertent or unintentional error. In determining whether a violation was *de minimis*, the commission shall consider whether the interests of the public were protected despite the violation. . .

(b) For the purposes of this subsection, a *de minimis* violation is any violation that is unintentional and not material in nature.

(12) . . . the commission may, at its discretion, dismiss any complaint or referral at any stage of disposition should it determine that the public interest would not be served by proceeding further, in which case the commission shall issue a public report stating with particularity its reasons for the dismissal.

Similarly, Palm Beach County authorizes its ethics commission to dismiss a complaint at any stage if the public interest would not be served by proceeding or the violation was inadvertent, as long as a public report stating the reason for dismissal is provided. Palm Beach County Municipal Code Sec. 2-260.3.

The statewide commission also contemplates settlement agreements but, like any settlement agreement, the terms are negotiated between the parties, and the parameters (i.e., the admission of wrongdoing, the imposition of a penalty, etc.) are not defined by law or rule:

F.A.C. 34-5.020 Stipulations, Settlements, and Consent Orders.

Informal disposition of the complaint may be made of any proceeding by stipulation, agreed settlement, or consent order between the Advocate and the Respondent, upon approval of the Commission in a public meeting, so long as a public report is made. . .

The CAO recommends the introduction of an ordinance containing language like that found in the Palm Beach County Code and in state law (Option 2), giving the IEB the authority to identify and dispose of *de minimis* violations and enter settlement agreements, in order to streamline the complaint process and ensure the efficient use of limited resources.

Disclosure or Use of Non-Public Information

The IEB suggests there is a scrivener's error in the Code section relating to the disclosure of non-public information. There is a "scrivener's error" in this provision, but it is not the one described by the IEB.

The provision is internally inconsistent, referencing "public official or employee" in the first line and "covered individual" later in the paragraph, but at the time the language was adopted in 2019, the Commission intended for it to apply only to covered individuals. The video of the meeting at which the provision was considered confirms this intent.

State law prohibits the misuse of non-public information by all public employees (s. 112.313(8), F.S.), so limiting the application to covered individuals doesn't mean that other employees can freely disclose non-public information, just that the IEB only has jurisdiction over covered individuals who might do so.

At the February 16, 2022, workshop, the Commission voted to make this provision applicable only to covered individuals. **The CAO recommends the introduction of an ordinance to correct the scrivener's error accordingly (Option 3).**

IEB DRAFT ORDINANCE NO.: 20-ORD-01 (Amendments to Lobbying Provisions)

On the whole, after review of the recommendations of the IEB, the CAO does not recommend at this time that any amendments to the lobbyist definition provisions be made. Since 2021, with the Blueprint Agency's adoption of its lobbyist provisions, the City, County, and Blueprint now have substantially similar provisions. Having similar provisions is a benefit to the public in the prevention of public confusion and uncertainty as to who is and is not a lobbyist and the requirements that are placed on such persons and entities. All three (3) entities require the registration of lobbyists and specify the same required information.

Definition of Lobbyist

The IEB maintains that the current definition of lobbying is “circular” because it references the definition of lobbyist. The IEB states that it is recommending an “expanded” definition of lobbyist to cure this “circular narrative” and more “explicitly [identify] conduct that would [constitute lobbying].”

The current definition of “lobbying” and the IEB’s proposed definition of “lobbyist” are very similar, making it unclear why a change is necessary. For example, the current definition of lobbying references communications whereby a lobbyist “seeks to encourage or influence the passage, defeat, modification or repeal of any item which may be presented for vote . . . or which may be presented for consideration by a city employee as a recommendation. . .” The IEB proposes changing the definition of “lobbyist” to mean anyone who seeks to encourage or influence “the passage, defeat, or modification of any ordinance, resolution, action, or decision of the city commission” or seeks to encourage or influence a city employee (which would include the city manager) or a decision-making body “pertaining to any action, inaction, decision, or recommendation.”

Like the current ordinance, the IEB’s proposal:

- Acknowledges that compensation is part of the definition of a lobbyist;
- Provides that influence over decision-making bodies and city employees, not just the city commission, is encompassed in the definition of lobbying; and
- Recognizes that the lobbying provisions are applicable to any item which has the potential to come before the city commission or other decision-making body.

The IEB proposal recommends expanding the definition of “lobbyist” to provide that a lobbyist can be not only a “person,” but also a firm or a business entity, but this distinction is unnecessary because “person” is defined for purposes of the City’s Code as follows:

The term "person" shall extend and be applied to associations, clubs, societies, firms, partnerships and bodies politic and corporate as well as to individuals. Tallahassee Municipal Code Sec. 1-2.

The IEB proposal *is* arguably different from the current ordinance in two respects:

1. Deletes the qualifier that a person is a lobbyist only if paid “for the purpose of lobbying . . .”
2. Includes language to clarify that lobbying can occur “during the time-period of the entire decision-making process . . .”

The IEB argues that the current definition of lobbyist creates a “loophole” that allows individuals who do not have the job title of “lobbyist” to avoid registration under the city’s code. Contrary to the IEB’s position, however, the current definition does not allow a person to avoid registration based on their job title; under the current ordinance, if a person seeks to encourage or influence a city employee or a city commissioner, they are a lobbyist, regardless of their job title.

If the Commission desires to “tighten up” or clarify the definition of lobbyist, it can do so much more simply than by re-writing the entire definition section of the lobbying ordinance:

Sec. 2-338. - Definitions.

(a) *Lobbying* shall mean communications, whether written or oral, made at any time during the entire decision-making process, by a lobbyist outside a duly noticed public meeting or hearing on the record with any member or members of the city commission, or any member or members of any decision-making body under the jurisdiction of the city commission, or any city employee, whereby the lobbyist seeks to encourage or influence the passage, defeat, modification or repeal of any item which may be presented for vote before the city commission, or any decision-making body under the jurisdiction of the city commission, or which may be presented for consideration by a city employee as a recommendation to the city commission or decision-making body.

(b) *Lobbyist* means a person who is employed and receives payment, or who contracts for economic consideration, to lobby, regardless of whether such person is formally designated as a lobbyist, for the purpose of lobbying, or a person who is principally employed for governmental affairs by another person or governmental entity to lobby on behalf of that other person or governmental entity.

Exceptions to the Definition of Lobbyist

The IEB proposal moves exceptions to the definition of “lobbyist” to the definition section, but also proposes significant changes to those exceptions. Many of the changes are unnecessary because they reference uncompensated or volunteer persons or entities (city residents; neighborhood association representatives, volunteers, and non-profit representatives) which are, by definition, already excluded, both under current code and the proposed amendments.

Similarly, the IEB proposes to exclude from the definition of lobbying “an expert witness who provides only . . . specialized information . . . in a public meeting. . .” This exception is superfluous because the current definition of lobbying specifically notes that lobbying only encompasses communications made outside of a public meeting. Additionally, the factual kind of testimony to be offered by an expert witness clearly is not a communication made to encourage or influence.

The IEB’s proposal also provides an exception to the definition of lobbyist for persons retained to represent others in publicly noticed, quasi-judicial proceedings. The quasi-judicial hearing process for local officials is set out in s. 286.0115, F.S., which prescribes the procedures for *ex parte* discussions as follows:

(c) Any person not otherwise prohibited by statute, charter provision, or ordinance may discuss with any local public official the merits of any matter on which action may be taken by any board or commission on which the local public official is a member. If adopted by county or municipal ordinance or resolution, adherence to the following procedures shall remove the presumption of prejudice arising from *ex parte* communications with local public officials.

...

4. Disclosure made pursuant to subparagraphs 1., 2., and 3. must be made before or during the public meeting at which a vote is taken on such matters, so that persons who have opinions contrary to those expressed in the *ex parte* communication are given a reasonable opportunity to refute or respond to the communication. This subsection does not subject local public officials to part III of chapter 112 for not complying with this paragraph.

The City, through Resolution No. 95-R-0054, has adopted a procedure to carry out the purpose of Florida Statutes, Section 286.0115.

An exception for representatives of clients in quasi-judicial hearings seems to be obviated by this statutory procedure.

The IEB proposes to “expand” the definition of city employee to include independent contractors of the City, both of whom would be excluded from the definition of lobbyist while acting in their capacities as such, and expands the definition of “decision-making body” to include bodies established by the charter, as well as the commission. (There are only two other bodies established by Charter than the City Commission: the Independent Ethics Board and the Sinking Fund Commission.)

Notably, the IEB proposal does *not* include several important categories of persons specifically exempted under the current code (e.g., law enforcement personnel, consultants under contract with the city, individuals contacted for information only). The CAO recommends retaining the current exemptions.

Other Definitions of Lobbyist

Leon County’s definitions of “lobbyist” and “lobbying” are essentially the same as the City’s. Blueprint’s definitions are more concise, but also substantively similar to the City’s and County’s definitions. Having consistent definitions across these entities makes it easier for lobbyists and the public to understand and follow the rules, and amending the City’s definitions, especially without any real, compelling need to do so, is likely to generate confusion and mistakes.

The CAO does not recommend any modifications to the definition of lobbyist but acknowledges if the Commission desires to further clarify the definition of lobbyists, the referenced changes to Section 2-338 would accomplish this objective (Option 4).

Registration and Contact Log

The IEB’s proposal recommends that all covered individuals be required to “ensure that lobbyists are properly registered . . . prior to any meeting pertaining to city business.”

The definition of “covered individual” is very broad:

Covered individual means:

- (1) Each public official;
- (2) Each employee and each member of a city board, commission, or council who is required by F.S. § 112.3145, to file an annual financial disclosure, including any employee with purchasing authority exceeding \$35,000.00; and
- (3) Each employee who is a procurement employee. "Procurement employee" means any city employee who has participated in the preceding 12 months through decision, approval, disapproval, recommendation, preparation of any part of a purchase request, influencing the content of any specification or procurement standard, rendering advice, investigation, or auditing or in any other advisory capacity in the procurement of contractual services or commodities, if the cost of such services or commodities exceeds or is expected to exceed \$10,000.00 in any fiscal year.

The IEB's proposal regarding registration:

- Does not include a definition of "ensure;"
- Is not limited to meetings at which a lobbyist "seeks to encourage or influence the passage, defeat, modification, or repeal of any item," but rather includes *any* meeting pertaining to *any* city business; and
- Applies broadly to any covered individual at any time, not just to individuals with decision-making authority relevant to the subject matter of the conversation.

As written, it is difficult to understand how this provision will be efficiently or effectively implemented and enforced. While some other Florida jurisdictions require lobbying contact logs (e.g., Palm Beach County, Tampa, Broward County), the requirement of "ensuring" that a speaker is a lobbyist does not appear to be a common provision. **As such, the CAO does not recommend this proposed provision (Option 5).**

The IEB proposal also requires lobbyists who lobby a covered individual to "contemporaneously," or within 3 business days, complete a "contact log" containing eight pieces of information about the interaction. This requirement will likely have a fiscal impact, as the city will be required to create and distribute an electronic form and make it available on multiple platforms (e.g., cell phone, laptop, desktop) to comply with the expansiveness and immediacy required by the provisions. Should the Commission's will be to require contact logs be kept by lobbyists, specific direction is needed.

The IEB's recommendation that lobbyists be required to include "the name or title and/or ordinance number" in their registration forms is already embedded in the Treasurer-Clerk's forms.

Contingency Fees

The IEB recommends adopting a ban on contingency fees for lobbying, mirroring the ban imposed by state law. The prohibition of contingency fees in the lobbying area is common. **The CAO recommends that this provision be introduced for public hearing (Option 6).**

Public Website

The IEB's proposal requires the Treasurer-Clerk's office to maintain an online system for registration and compensation reports. The Treasurer-Clerk's Office already maintains such a website and **an ordinance is not recommended or necessary (Option 7)**. Generally, the selection of the medium for notifying the public of ordinance requirements is administrative in nature and is not elevated to the stature of an ordinance.

IEB DRAFT ORDINANCE NO.: 20-ORD-02 (Expanded Jurisdiction by Charter Amendment)

In its September 21, 2021, letter to the Mayor and City Commissioners, the IEB indicated that it was transmitting three draft ordinances regarding lobbying. However, it appears that only one of the draft ordinances (20-ORD-01, discussed above) was attached to the letter, both when it was approved at the IEB's September 21 meeting and when it was included as Attachment 2 to the February 16 agenda item. As such, this discussion refers to the IEB's letter rather than to a draft ordinance.

Section 61 of the city's charter limits the jurisdiction of the IEB to "the officers and employees of the City of Tallahassee, whether elected or appointed, paid or unpaid, and over the members, officers and employees of any boards, commissions, or committees thereof." Acknowledging this limitation on its jurisdiction, the IEB proposes a charter amendment that would expand its

jurisdiction to include “lobbyists appearing before the city” and add to the IEB’s enumerated powers the power of judicial review over penalties assessed and disciplinary action imposed by the City Treasurer-Clerk.

The CAO recommends that the IEB’s jurisdiction remain as approved by the voters by referendum in 2014 (Option 8). The CAO has not been made aware of any need for the expansion of IEB jurisdiction such that an additional level of review prior to court review of any determination by the City Treasurer-Clerk would be necessary. If the commission votes in favor of this expanded jurisdiction, the CAO will bring forward the necessary language to effectuate a charter amendment.

Options

1. Misuse of position: Approve City Attorney’s Office recommendation.
2. Penalties: Approve City Attorney’s Office recommendation.
3. Disclosure or Use of Non-Public Information: Approve City Attorney’s Office recommendation.
4. Definition of Lobbyist: Approve City Attorney’s Office recommendation.
5. Lobbyist Registration: Approve City Attorney’s Office recommendation.
6. Lobbyist Contingency Fees: Approve City Attorney’s Office recommendation.
7. Public Website for Lobbyist Registration and Compensation Reports: Approve City Attorney’s Office recommendation.
8. Expanded Jurisdiction of the IEB Over Lobbyists: Approve City Attorney’s Office recommendation.
9. Provide staff direction.

Attachments/References

1. IEB Recommendations Regarding Ethics Ordinance
2. IEB Recommendations Regarding Lobbyist/Lobbying

Att 1- IEB Recommendations Ethics Ordinance.pdf (5,318 KB)

Att 2 - IEB Recommendations Lobbyists-Lobbying.pdf (5,788 KB)