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CLERK OF THE COUNTY COURTS
MIAMI-DADE COUNTY, FLA.MIAMI-DADE COUNTY
COMMISSION ON ETHICS & PUBLIC TRUST

In re: EDWARD TOBIN AND FRED KARLTON

C 08-32

PUBLIC REPORT AND FINAL DISMISSAL ORDER

A private citizen, Jared Dokovna, filed the above-referenced COMPLAINT against RESPONDENTS Edward Tobin and Fred Karlton. RESPONDENT Tobin serves as a City Commissioner in the City of Miami Beach. RESPONDENT Karlton serves as a City Advisory Board Member in the City of Miami Beach.

The COMPLAINT contained numerous allegations. Those within the jurisdiction of the Ethics Commission that related to Commissioner Tobin dealt with possible violations of the City of Miami Beach Code of Silence Ordinance at § 2-486; possible violations of the Miami-Dade County Code at § 2-11.1 (d) regarding voting conflicts; and possible violations of the financial disclosure requirements found in the Miami-Dade County Code at § 2-11.1 (i). The allegation against Advisory Board Member Karlton involved a possible *quid pro quo* arrangement with Mr. Karlton, which, if true, would violate the Miami Beach Code at § 2-446.

Pursuant to the Code of Miami-Dade County, Section 2-1068 and Section 2-11.1 (y), the Commission on Ethics & Public Trust has jurisdiction to enforce County and municipal ethics codes.

On January 29, 2009, the Ethics Commission found the COMPLAINT, as modified above, to be legally sufficient. On February 26, 2009, the Ethics Commission accepted the ADVOCATE's recommendation that the COMPLAINT be dismissed against RESPONDENT

Fred Karlton for lack of probable cause and that Count II through Count V against RESPONDENT Edward Tobin also be dismissed for lack of probable cause. At the same time, the Ethics Commission found that probable cause existed for the allegation found in Count I against RESPONDENT Edward Tobin, which related to Commissioner Tobin's leaving a voice message and engaging in a conversation with the City Manager while the Cone of Silence was in effect. At its discretion, the Ethics Commission dismissed Count I against RESPONDENT Edward Tobin, with a LETTER OF INSTRUCTION to the City Attorney for the City of Miami Beach recommending that language in the City Code be clarified regarding the Cone of Silence.

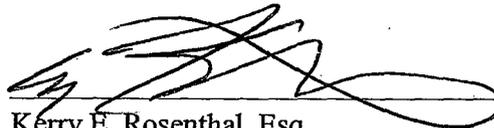
Therefore it is:

ORDERED AND ADJUDGED THAT the COMPLAINT against both RESPONDENTS is hereby DISMISSED, with a LETTER OF INSTRUCTION to the City Attorney for the City of Miami Beach.

DONE AND ORDERED by the Miami-Dade County Commission on Ethics & Public Trust in public session on February 26, 2009.

MIAMI-DADE COUNTY COMMISSION ON
ETHICS & PUBLIC TRUST

By:



Kerry E. Rosenthal, Esq.
Chairman

**MIAMI-DADE COUNTY COMMISSION ON ETHICS AND PUBLIC TRUST
LETTER OF INSTRUCTION**

To: Miami Beach Commissioner Edward Tobin
From: Miami-Dade County Commission on Ethics and Public Trust
Re: Jared Dokovna v. Edward L. Tobin et al (C08-32)
Date: March 2009

Jared Dakovna (Complainant) filed Complaint C08-32 against Miami Beach Commissioner Edward L. Tobin (Tobin). Complainant alleged that on or about October 10, 2008, Tobin violated the City of Miami Beach's (the City) Code of Silence (COS) by leaving a voicemail for and engaging in a conversation with City Manager Jorge Gonzalez, during the period of time that the COS was in effect. The call concerned Invitation to Bid (ITB) 43-07/08, known as the Lennox Avenue project.

On February 26, 2009, the Miami-Dade County Commission on Ethics and Public Trust (Ethics Commission) found that there was probable cause to believe that Tobin did, in fact, communicate with the City Manager during the time period when communication between a City Commissioner and the City Manager was prohibited by the COS. The Ethics Commission determined, however, that the charge against Tobin should be dismissed¹ and a Letter of Instruction should be issued.

The City's COS states, in pertinent part, as follows:

¹ Pursuant to Section 4.14 of the Ethics Commission's Rules of Procedure, the Ethics Commission has the authority to dismiss a complaint at any stage if it determines that the public interest would not be served by proceeding further. Moreover, there was no evidence that Tobin tried to unduly influence the Manger's decision as to whom to award the RFP to.

Sec. 2-486. Cone of silence.

(a) Contracts for the provision of goods, services, and construction projects.

(1) Definition. "Cone of silence" is hereby defined to mean a prohibition on:

a. Any communication regarding a particular request for proposal ("RFP"), request for qualifications ("RFQ"), or bid between a potential vendor, service provider, bidder, lobbyist, or consultant and the city's administrative staff including, but not limited to, the city manager and his or her staff;

b. Any communication regarding a particular RFP, RFQ or bid **between the mayor, city commissioners, or their respective staffs, and any member of the city's administrative staff including, but not limited to, the city manager and his or her staff;**

c. Any communication regarding a particular RFP, RFQ or bid between a potential vendor, service provider, bidder, lobbyist, or consultant and any member of a city evaluation and/or selection committee therefore; and

d. Any communication regarding a particular RFP, RFQ or bid between the mayor, city commissioners, or their respective staffs, and a member of a city evaluation and/or selection committee therefore...

(2) Procedure.

a. The cone of silence shall be imposed upon each RFP, RFQ or bid after the advertisement of said RFP, RFQ or bid. At the time of imposition of the cone of silence, the city manager or his or her designee shall provide for public notice of the cone of silence. The city manager shall include in any public solicitation for goods and services a statement disclosing the requirements of this division.

b. The cone of silence shall terminate:

1. At the time the city manager makes his or her written recommendation as to selection of a particular RFP, RFQ or

bid to the city commission, and said RFP, RFQ or bid is awarded; provided, however, that following the manager making his or her written recommendation, the cone of silence shall be lifted as relates to communications between the mayor and members of the commission and the city manager; providing further if the city commission refers the manager's recommendation back to the city manager for further review, the cone of silence shall continue until such time as the manager makes a subsequent written recommendation, and the particular RFP, RFQ or bid is awarded; or

2. In the event of contracts for less than \$25,000.00, when the city manager executes the contract.

(3) Exceptions. The cone of silence shall not apply to:

- a. Competitive processes for the award of CDBG, HOME, SHIP and Surtax Funds administered by the city office of community development; and
- b. Communications with the city attorney and his or her staff.
- c. Oral communications at pre-bid conferences;
- d. Oral presentations before evaluation and/or selection committees;
- e. Contract discussions during any duly noticed public meeting;
- f. Public presentations made to the city commissioners during any duly noticed public meeting...
- m. Communications regarding a particular RFP, RFQ or bid between any person, and the procurement director, or his/her administrative staff responsible for administering the procurement process for such RFP, RFQ or bid, provided the communication is limited strictly to matters of process or procedure already contained in the corresponding solicitation document. (emphasis added)**

The investigation revealed that Tobin left a voicemail message on the answering machine of City Manager Gonzalez on Friday October 10, 2008, at 11:53 a.m. The message was:

"Hey Jorge, its Ed Tobin, ah, I wanted to discuss this extension, for the ah bidders on the ah Lennox project, could call me on my cell, when you get this message? Thank you?"

Tobin does not deny making the phone call. The ITB was issued on September 11, 2008; thus, the COS was in effect on the date the call was made².

A Pre-Bid Conference was held on September 24, 2008 at 10:00 a.m. The deadline for receipt of questions from potential vendors was October 3, 2008 at 5:00 p.m. The deadline for receipt of bids was October 13, 2008 at 3:00 p.m. There was an issue concerning whether or not the City Manager was going to extend the deadline for prospective bidders to submit their bids by one (1) week. At around the same day and time, specifically October 10, 11 and 13, 2008, a series of phone calls were made and e-mails were sent to the City Manager by other individuals, concerning the same issue in the ITB. Tobin acknowledged that, at some point in time, the Manager returned his phone call and they, in fact, discussed the status of the ITB extension of time. The conversation between Tobin and the City Manager took place during the time the COS was in effect.

² COE Investigators obtained a copy of the City Manager's Memorandum to the City Commission dated October 22, 2008 recommending the bid be awarded to Central Florida Equipment Rentals Inc. Thus, the COS "lifted" on October 22, 2008 with regard "...to communications between the mayor and members of the commission and the city manager". Miami Beach City Code Section 2-486(a) (2) b.1.

Section 2-486(a) (1) (b) of the City's COS specifically prohibits:

“ Any communication regarding a particular RFP, RFQ or bid between the mayor, city commissioners, or their respective staffs, and any member of the city's administrative staff including, but not limited to, the city manager and his or her staff...”.

The Ethics Commission determined that the plain language of Section 2-486(3) (m) permits a City Commissioner to discuss issues of process and procedure already contained in the RFP, but only with the Procurement Director or the Procurement Director's staff. The Procurement Director for the City is Gus Lopez.

The Ethics Commission, in its decision to dismiss the complaint against Tobin, took into consideration the fact that the City Attorney's Office interprets Section 2-486(a)(1)(b) as not preventing a communication between a City Commissioner and the City Manager regarding procedural or ministerial matters. The City Attorney bases his interpretation on a recognition that the City Manager is effectively the City's Procurement Director, per powers granted the Manager in Section 4.02 of the City Charter. The Ethics Commission disagrees with the City Attorney's interpretation in that it is inconsistent with the clear and unambiguous language in the ordinance. The Ethics Commission strongly recommends that the City Commission consider their City Attorney's opinion and if accepted as policy, take actions to formalize such holding so that the citizens of Miami Beach can be aware of what the law is.

As it currently reads, the language of Section 2-486(a) (1) (b) clearly prohibits communication between City Commissioners and the City Manager while the COS is in effect. Citizens of Miami Beach ought to be able to rely on the plain language of an ordinance to know what is and what is not permissible conduct.

Similarly, elected officials in the City, like Commissioner Tobin, should not be subjected to ethics complaints being filed against them by citizens who are acting in good faith based on the plain language of the COS ordinance.³

The Ethics Commission reminds Commissioner Tobin, as well as all elected officials, that the Miami-Dade County Commission on Ethics and Public Trust is available and encourages individuals to seek opinions to guide their behavior before things escalate to the point where complaints are filed.

³ Tobin maintains, however, that this complaint was filed against him only as political retribution.