



MIAMI-DADE COMMISSION ON ETHICS AND PUBLIC TRUST

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MEMORANDUM

TO: Commission on Ethics and Public Trust

FROM: Martha D. Perez
Staff Attorney

SUBJECT: RQO 19-06, *See* Section 2-1529, Miami-Dade County Code of Ordinances;
Article IV, Section 2, The Children's Trust Bylaws; and, The Children's Trust
Conflict of Interest and Code of Ethics Policy

DATE: November 13, 2019

I. ISSUE

Whether The Children's Trust (hereinafter "TCT") is bound by the Miami-Dade County Conflict of Interest and Code of Ethics Ordinance (hereinafter "County Ethics Code").

II. BACKGROUND

This issue arose from an opinion issued to TCT board member Lourdes Gimenez, who inquired whether a conflict of interest existed for a board member to participate or vote on procurement matters relating to the County when the member's immediate family member holds an elected position in the County. An informal opinion was issued based on an analysis under Section 2-11.1(d) of the County Ethics Code and its applicability to TCT members. *See* INQ 19-19

After the issuance of this informal opinion, it was discovered that the Ethics Commission had issued a formal opinion limiting the applicability of the County Ethics Code provisions only to matters concerning gift and financial disclosure requirements. *See* RQO 03-179

Given the conflicting opinions throughout the years regarding the applicability of the County Ethics Code to TCT, it is fitting that this Commission act by either upholding or repealing RQO 03-179.

III. ANALYSIS

Legislative Background

Pursuant to the authority granted to the County in Section 125.901, Florida Statutes, Miami-Dade County passed an ordinance in 2002 creating The Children's Trust, an independent special district, established to fund improvements for the children of Miami-Dade County in the areas of health, development, safety, parental responsibility, community responsibility and other necessary and important children's services.¹

Section 2-1529 of the Miami-Dade County Code of Ordinances, The Children's Trust ordinance, "Applicability of State and County Laws," (hereinafter the Ordinance) defines which laws regulate the administration and management of TCT:

The Children's Trust shall be regulated by: Chapter 286 of Florida Statutes, ("Sunshine Law") including but not limited to the notice requirements; Chapter 119 of Florida Statutes ("Public Records Act"); Chapter 112, Part III of Florida Statutes ("Code of Ethics for Public Officers and Employees"); *Section 2-11.1 of the Miami-Dade County Code ("Conflict of Interest and Code of Ethics Ordinance")*, including but limited to the gift disclosure and financial disclosure requirements; and Article IB of the Miami-Dade County Code ("Standards for the Creation and Review of Boards Generally") to the extent that the requirements of this Article do not conflict with the requirements of Sec. 125.901 of Florida Statutes ("Children Services").²

It is the underlined phrase referenced above which presents an issue before this Commission and begs clarification on the extent in which the County Ethics Code applies to TCT. A brief history of the Ordinance merits review. On or about December 19, 2002, the Ordinance was presented to the Board of County Commissioners. The Ordinance, as adopted, included the phrase "included but not limited to" at Sections 5 and 9. The Ordinance also included the phrase "included but limited to" also in Section 9.

¹ See Ordinance 02-247 (Art. CIII, §§ 2-1521 through 2-1531, The Children's Trust)

² Per RQO 09-42, TCT is not required to file financial disclosure under the Conflict of Interest ordinance (County Ethics Code).

Pursuant to the Florida Statute and the Ordinance, TCT adopted Bylaws for the governance of its rules. Section 2 of Article IV of the Bylaws, Conflict of Interest, (Bylaws) provides that all TCT board members “shall comply with **all state and local laws regarding conflict of interest.**” Thereafter, TCT also implemented a Conflict of Interest and Code of Ethics Policy (Policy) with the purpose of enhancing the ethics mandate in Chapter 112, Florida Statutes, in order to maintain the highest level of integrity and transparency in all its endeavors.³ While the Policy is silent on the specific ethics regulations found in Section 2-11.1 of the County Ethics Code, it nevertheless addresses voting conflicts, cone of silence restrictions, lobbying requirements and appearance of impropriety prohibitions, and authorizes the County Ethics Commission (COE) to “review, interpret, render advisory opinions and letters of instruction and enforce The Children’s Trust Conflict Policy...” It also extends the Commission’s jurisdiction to all board members, employees, lobbyists, vendors and all persons acting on behalf of TCT.⁴

Ethics Opinions

Subsequent to the adoption of the Ordinance, Assistant County Attorney Karon Coleman requested a formal ethics opinion in 2003 regarding the applicability of the County Ethics Code to TCT.⁵ See RQO 03-179, issued to Coleman on November 24, 2003. The subject of this opinion revolved around the clause contained in Section 9 of the Ordinance, to wit: *Section 2-11.1 of the Miami-Dade County Code (Conflict of Interest and Code of Ethics Ordinance), including but limited to the gift disclosure and financial disclosure requirements.* Specifically, Coleman inquired whether the application of the County Ethics Code was limited to gift disclosure and financial disclosure requirements or whether it was broader, encompassing other provisions such as cone of silence and lobbying restrictions.⁶ Given the absence of any mention therein, it may be assumed

³ See Section I of the Policy, Purpose.

⁴ The Policy also empowers the Ethics Commission with enforcement of the Conflict Policy through the investigation and prosecution of complaints alleging violations of the Policy.

⁵ Pursuant to Section 2-1531 of the Ordinance, “Legal counsel shall be provided by the Miami-Dade County Attorney’s Office as required by the Ordinance. The Children’s Trust has the inherent authority to retain additional counsel as needed to supplement the representation provided by the County Attorney’s Office.”

⁶ See Memorandum from former COE Attorney Christina Prkic.

that TCT Bylaws and Policy had not been adopted or implemented at the time of this request.⁷ The Ethics Commission concluded that the aforementioned phrase, “undoubtedly suggest that the applicability of the Code of Ethics *does not extend beyond* the gift and financial disclosure provisions.” The Commission reasoned that “if the intent were to subject The Children’s Trust to the entire Code of Ethics Ordinance, such language would have been provided...”

Thereafter, COE issued several informal ethics opinions addressing conflict of interest inquiries from TCT under the authority granted to the COE in TCT’s conflict of interest Bylaws.⁸ Conversely, the COE issued a formal opinion affirming that, pursuant to TCT Bylaws and procurement policies, “all board members and contractors are governed by the Conflict of Interest Ordinance, i.e., the County Ethics Code. *See* RQO 07-11

Also, in RQO 11-14, the COE considered a request for an advisory opinion regarding the application of the County Ethics Code (and the Citizen’s Bill of Rights) to TCT’s procurement process. The Commission analyzed the facts under Sections 2-11.1(n) and (x) of the County Ethics Code (sections which are not specifically addressed in the Ordinance or the Policy) and concluded that TCT staff members could vote on grant proposals as long as they did not violate Subsections (n) and (x) of the County Ethics Code.

From 2015 through 2018, COE staff issued opinions limiting the applicability of the County Ethics Code on TCT matters by focusing on the language of the Policy and overlooking the Bylaws which require compliance with all *local* conflict of interest laws:

- In INQ 15-119, we opined that TCT is a State board not subject to our ethics ordinances, however, “pursuant to Section III.E of its adopted Conflict of Interest and Code of Ethics Policy, [TCT] has granted jurisdiction to the Miami-Dade County Commission on Ethics and Public Trust to review, interpret, render advisory opinions and letters of instruction and enforce The Children’s Trust Conflict Policy.”

⁷ TCT Bylaws were passed sometime after the enactment of the Ordinance around 2003. The Policy appears to have been implemented after the RQO was published.

⁸ INQ 06-01 stated that a TCT board member who is a consultant writing grants for a non-profit must declare his involvement in the grant before coming before TCT and recuse himself from participation and vote; INQ 06-78 concluded that a staff member should refrain from voting or participating on matters affecting the firm where her daughter is interning in the summer; INQ 06-170 declared that, although TCT was not covered by the County Ethics Code, the Commission could provide an ethics opinion based on its authority to interpret TCT’s Policy.

- In INQ 16-273, it was asserted that “The Trust Policy also designates the Miami-Dade County Commission on Ethics and Public Trust for the interpretation and enforcement of its Conflict Policy but does not appear to adopt the Miami-Dade County Conflict of Interest and Code of Ethics Ordinance. In addition, the Trust’s Conflict Policy... contains an appearance of impropriety standard... This heightened standard is included in the policies that are to be interpreted by this agency.”
- In INQ 18-199, COE staff opined that “As a non-County board, The Children’s Trust is not automatically covered by the Miami-Dade County Ordinance, Section 2-11.1 of the County Code. It is subject to the provisions of its By-laws as well as The Children’s Trust Conflict of Interest and Code of Ethics Policy it has adopted...The Miami-Dade County Commission on Ethics is empowered, pursuant to Section III.E of its Ethics Policy to ‘review, interpret, render advisory opinions and letters of instruction and enforce’ the Ethics Policy.”

Recently, COE staff issued three informal opinions to TCT board members, which recognize this Commission’s authority to render opinions to TCT board members and staff County Ethics Code and not limiting its jurisdiction to matters of gift and as implicitly provided in TCT Ordinance and Bylaws on the entire financial disclosures:

- In INQ 19-16, a TCT board member inquired whether she had a conflict of interest in her participation and vote on an RFQ where she appeared on the proposer’s list of consultants. In the analysis, particular attention was given to the first part of the sentence in the Ordinance, (TCT “shall be regulated by the Conflict of Interest and Code of Ethics Ordinance,”) while ignoring the effect, if any, on the second part (“including but limited to the gift disclosure and financial disclosure requirements.”) We reasoned that the meaning of the Ordinance, as reinforced by its Bylaws, placed TCT under the jurisdiction of the entire County Ethics Code and this agency may render opinions on whether a board member has a conflict of interest pursuant to the entire Ethics Code, not just a portion.
- In INQ 19-19 (the subject of this formal inquiry), we addressed the phrase at issue (“including but limited to”) and confirmed with the County’s Legal Department that the aforementioned clause “is a scrivener’s error and that the grant of regulatory authority providing that [TCT] shall be regulated by Section 2-11.1 of the County Ethics Code

applies.” Hence, we provided an opinion to a board member on the applicability of Section 2-11.1(v) of the County Ethics Code relating to whether she may participate and vote on procurement matters relating to Miami-Dade County when her spouse is an elected officer.

- Lastly, in INQ 19-94, TCT inquired on the applicability of Section 2-11.1(t), Code of Silence, to the procurement of goods and services by TCT. We opined that, pursuant to TCT policy, which explicitly provides that procurement matters comply with code of silence provisions, the County Ethics Code at Section 2-11.1(t) applied to TCT’s competitive procurement processes.

The COE derives its authority to interpret local ordinances from its enabling ordinance. Section 2-1072 of the Miami-Dade County Code of Ordinances grants power to the COE to interpret the County and municipal Code of Ethics Ordinances, Conflict of Interest Ordinances, Lobbyist Registration and Reporting Ordinances, Ethical Campaign Ordinances and the Citizen’s Bill of Rights. While this Commission is not empowered to interpret Section 2-1529, the TCT Ordinance specifies that TCT shall be regulated by specified laws, including Section 2-11.1 of the Miami-Dade County Code (“Conflict of Interest and Code of Ethics Ordinance”), *including but limited to the gift disclosure and financial disclosure requirements...*

Statutory Meaning Analysis

Precision in statutory drafting is aspiration rather than reality. While statutory construction can be complicated, one of its fundamental rules is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary or common meaning. It is noted that the initial meaning of an ordinance may not be the only possible interpretation or even the correct one.⁹ While one may assume that the words of an ordinance mean what a reasonable person would understand them to mean, it is important to look at other factors when giving meaning to what in this instance is undoubtedly an awkward and ambiguous phrase- “including but limited to.”

Applying a general canon of construction to this analysis, the ordinance must be given a “reasonable and practical interpretation, in accord with common sense.”¹⁰ The word “include” is

⁹ Christopher G. Wren, The Legal Research Manual: A Game Plan for Legal Research and Analysis (2d ed. 1986).

¹⁰ Stephen Adams, Listing the Canons of Construction, citing to Idaho Press Club, Inc. v. State Legislature of the State, 132 P.3d 397 (2006)

a term of enlargement, not of limitation.¹¹¹² The word “including” is also a word of illustration and has the same meaning as through the term were followed by “but not limited to.”¹² Notably and more compelling, the phrase “including but limited to” is not commonly used in statutory construction. In fact, the Ordinance uses the accepted phrase “including but not limited to” in two other instances, exposing the correct and common use of the phrase.

We cannot neglect the rules and policies of TCT regarding conflict of interest matters. Pointedly, the agency’s Bylaws specifically impose on its members compliance with all Florida state statutes and County ordinances relating to conflicts of interest, i.e., the County Ethics Code: “Members of the Board shall comply with all state and local laws relating to conflicts of interest.” Article IV, Bylaws¹³

Furthermore, TCT’s Policy has tasked the COE with interpreting, giving opinions and enforcing its conflict of interest policy, including provisions of voting conflict, cone of silence and lobbying, matters beyond the gift and financial disclosure requirements of the Ordinance. Deference must also be accorded to the drafters of the Ordinance. The County’s legal department considers the phrase “including but limited to” as simply a scrivener’s error.¹⁴ That opinion is underscored by the common usage of the phrase which has never been used in the context of limitation but rather, is used as a means of enlargement and illustration. Consequently, this Commission may consider whether it is limited by the language of the Ordinance, as is, in its application of the County Ethics Code to rendering opinions and enforcement or, whether such language is a scrivener’s error based on the regular and common use of the phrase, the use of the correct phrase in other parts of the Ordinance, TCT’s Bylaws and Policy.

¹¹ Sutherland Statutory Construction Section 47.07 (Seventh Edition); Arnold v. Colorado Dept. of Corrections, 978 P.2d 149 (Colo. App. 1999)

¹² V.S.A. Section 145

¹³ The Bylaws also address conflicts with the Ordinance: “Any conflict between these bylaws and the Ordinance or State Statutes shall be resolved in favor of the Ordinance or State Statutes,” Art. XII, Rules (8/29/2019)

¹⁴ In April 2019, COE staff reached out to the County Attorney’s Office Assistant County Attorney counsel for TCT who advised that the scrivener’s error “was identified a while ago but the item was deferred and never passed...”,

IV. RECOMMENDATION

It is recommended that this Commission repeal RQO 03-179 and accept the interpretation of the more recent ethics opinions regarding the applicability of the entire County Ethics Code to TCT, its members, employees, lobbyists, vendors and all persons acting on behalf of TCT, as supported by staff's position shared by the County's legal department, that the phrase "including but limited to" is a scrivener's error which may be corrected through the legislative process.¹⁵

reiterating that it was a scrivener's error. In June 2019, COE was advised that legislation was needed to correct the matter. As of October 2019, the correction amendment to the Ordinance is still pending.

¹⁵ In the future, if it is determined by the Board of County Commissioners that TCT ordinance should be amended to reflect COE jurisdiction over specific provisions of the County Ethics Code, to the exclusion of others, this formal opinion will be brought before the Ethics Commission for action.