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Keith Fitzgerald
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RE: Voting Conflicts

Dear Mr. Fitzgerald:

The purpose of this correspondence is to respond to your request for a review under the applicable ethical standards of the propriety of certain votes taken while you were a member of the Florida House of Representatives between 2006 and 2009.

Your request arises in the following context. Recent blog postings and email distributions have questioned the propriety of you voting on certain legislation in 2006, 2007, 2008, and 2009 relating to appropriations for New College of Florida while you were employed as a professor at New College.¹ The legislation to which the critics are referring was the general appropriations bill for each year, which funded all state entities, including all public universities. None of these bills made specific mention of the position that you hold nor did they even make specific reference to the department in which you work.

Applicable Standard of Conduct

1. The critics point to six different pieces of legislation for which you supposedly should have disclosed your interest. Of these six pieces of legislation, you only voted favorably on one of them. First, Chapter Law 2006-25 from the 2006 regular session; *The Journal of the House of Representatives* for April 6, 2007 indicates that you did not actually vote on this piece of legislation (HB 5001). Second, Chapter Law 2007-72 from the 2007 regular session; *The Journal of the House of Representatives* for April 12, 2007 indicates that you voted in favor of this piece of legislation (SB 2800). Third, Chapter Law 2007-326 from 2007 Special Session C; *The Journal of the House of Representatives* indicates that you voted "nay" on this piece of legislation (SB 2-C). Fourth, Chapter Law 2008-152 from the 2008 regular session; *The Journal of the House of Representatives* for April 10, 2008 indicates that you voted "nay" on this piece of legislation (HB 5001). Fifth, Chapter Law 2009-1 from 2009 Special Session A; *The Journal of the House of Representatives* from January 9, 2009 indicates that you voted "nay" on this piece of legislation (SB 2-A). Finally, Chapter Law 2009-81 from the 2009 regular session; *The Journal of the House of Representatives* from April 17, 2009 indicates that you voted "nay" on this piece of legislation (SB 2600).

Rule 3.1 of the 2006 Rules of the Florida House of Representatives provides as follows:

3.1—Disclosures of Interest and Disqualification from Voting

(a) No member may vote on any measure that the member knows or believes would inure to the member's special private gain. The member must disclose the nature of the interest for which the member is required to abstain from voting. Disclosure shall be done in a timely manner by filing a memorandum with the Clerk, which shall be printed in the *Journal* if a vote is taken on the measure on the floor. If a vote is taken on the measure in a council or committee, the memorandum shall be filed with the council or committee administrative assistant, who shall attach such memorandum to the council or committee report.

Rule 3.2 of the 2007 through 2009 House Rules provide as follows:

(a) **ABSTENTION ON MATTERS OF SPECIAL PRIVATE GAIN.** A member may not vote on any measure that the member knows or believes would inure to the member's special private gain. The member must disclose the nature of the member's interest in the matter from which the member is required to abstain.

Additionally, subsection (b) of both the 2006 and 2007-09 rules contains language which permits a member to vote on a matter which may inure "to the special private gain of any principal by whom the member . . . is retained or employed" but requires that member to disclose the nature of the interest.

Opinions of House counsel have set forth what constitutes a "special private gain" within the meaning of House Rule 3.1:

What constitutes "special private gain" depends on the size of the class of persons affected. House Opinions and the Commission on Ethics have followed the same line of reasoning for almost 30 years. In a 1980 Commission on Ethics opinion, the Commission stated:

We have advised that whether a particular measure inures to the special private gain of an officer or his principal will turn in part on the size of the class of persons which stands to benefit from the measure. When the class of persons is large, special gain will result only if there circumstances unique to the officer or principal under which he stands to gain more than other members of the class. On the other hand, when the class of persons is extremely small, the possibility of special gain is much more likely. Commission on Ethics Opinion (CEO) 80-61.

House Counsel Opinion 08-03. The House has followed this reasoning on numerous occasions. Even when a measure affects a limited class, it is appropriate to determine whether any gain is "remote and speculative." House Counsel Opinion 08-03; House Counsel Opinion 07-02; and House Counsel Opinion 05-01.

Additionally, a review of the opinions of the Commission on Ethics reveals that:

[T]he operative term is "special." It is not enough for a member or one of the member's conflict relations to receive a benefit or adverse impact from passage or non-passage of a measure; they must receive a *disproportionate impact* compared to the rest of those affected by the measure in a large class or be a part of a small impacted class.

House General Counsel Opinion 12-05. The Code of Ethics for Public Officers and Employees, in Section 112.3143(2), Florida Statutes, also addresses voting conflicts and the duties and obligations of state officers to disclose conflicts of interest, which includes members of the Legislature:

No state public officer is prohibited from voting in an official capacity on any matter. However, any state public officer voting in an official capacity upon any measure which would inure to the officer's special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom the officer is retained or to the parent organization or subsidiary of a corporate principal by which the officer is retained; or which the officer knows would inure to the special private gain or loss of a relative or business associate of the public officer shall, within 15 days after the vote occurs, disclose the nature of his or her interest as a public record in a memorandum filed with the person responsible for recording the minutes of the meeting, who shall incorporate the memorandum in the minutes.⁹

The "size of the class" test is a tool developed by the Commission on Ethics to aid in the analysis of voting conflicts, which are addressed on a case-by-case basis, based on all the known facts and circumstances. However, a "special private gain," typically inures to those public officials who receive a direct financial benefit from the vote. *See e.g. George v. City of Cocoa*, 78 F. 3d 494

2. The House Rule and the provisions of Section 112.3143(2), Florida Statutes, are not consistent in several respects:

- Section 112.3143(2), Florida Statutes, provides that a state public officer is not prohibited from voting on any matter, even one that would inure to the special private gain or loss of the state officer. House Rule 3.1(a)/3.2(a) prohibits a member from voting on any measure that the member knows or believes would inure to the member's special private "gain."
- House Rule 3.1(b)/3.2(b) and Section 112.3143(2), Florida Statutes, both permit voting and require the submission of a memorandum of voting when a vote inures to the special private "gain" of a principal by whom the member is retained, however, the House Rule does not address when a vote inures to the special private "loss" of the principal by whom the member is retained.

at 496-497 (11th Cir. 1996)(citations omitted). In *George*, the court stated that “[t]o constitute a prohibited voting conflict...the possibility of gain must be direct and immediate, not remote and speculative.” *Id.* at 498.

2006-2009 Appropriations Bills

Passage of the appropriations bills benefits all state agencies, including all public universities. Although passage of the appropriations bills did benefit New College, and New College is your employer, New College did not receive a benefit different to or disproportionate from those benefits received by the other public universities in the State.³ As such, New College received no “special private gain” and you not disclosing this relationship did not violate House Rules or Florida Statutes.

Additionally, there was also no special private gain to you as an individual.⁴ The appropriations to New College created a benefit to the entire student body, faculty, and staff of

3. In CEO 81-12, the Commission on Ethics stated:

In a previous advisory opinion, CEO 77-129, we advised that whether a measure inures to the “special” gain of an officer or his principal will turn in part on the number of persons who stand to benefit from the measure. Where the class of persons is large, a “special” gain will result only if there are circumstances unique to the officer or principal under which he or the principal would stand to gain more than the other members of the affected class. We are of the opinion that, if you vote upon general legislation which would affect all city and county housing authorities, there would be no “special” gain to a principal by whom you are retained, which would be the particular city housing authority which is represented by your law firm. However, if you vote upon special legislation, for example, a special legislative act relating only to the Tampa Housing Authority and inuring to the benefit of that Authority, that legislation would inure to the special gain of a principal by whom you are retained.

See also CEO 77-129 (The Commission found that a voting conflict of interest would not be created where a legislator voted on condominium legislation which affected his clients as it did all condominium owners, because such vote would not inure to the “special” private gain of the legislator or his clients. The Commission also advised that a voting conflict of interest would be created only if particular legislation would be of special benefit to the legislator’s clients due to their circumstances being unique as compared with all other condominium owners) and CEO 87-24 (The Commission found that no voting conflict of interest would exist were a legislator to vote on general legislation affecting all members of the members of the liquor industry. However, the Commission found that a voting conflict of interest would be created were the legislator to vote on liquor industry legislation which would inure to legislator’s “special” benefit).

4. It is important to note that the General Counsel for the House of Representatives has opined on a situation where a legislator was an employee of a university (Keiser College) and concluded that the legislator should disclose his interest with respect to certain legislation affecting that university. The situation in that opinion, however, is distinguishable from the present situation because in the Keiser College situation, the legislation singularly affected and benefitted Keiser College. The legislation involved funding for students attending institutions which had been converted from for-profit to not-for-profit within a certain time frame. Keiser was the only such institution which had made this conversion and was thus receiving a unique and special benefit. House General Counsel Opinion 11-05 (Mar. 29, 2011).

New College of Florida. Although you are, indeed, a member of that class which benefitted from the funding, you do not occupy a special position within that class and benefit does not inure to you in a unique or disproportionate manner when compared to others in the class.⁵ Any gain you received would not be considered "special" as the Commission on Ethics has interpreted that term. As such, it is our opinion that it was not improper for you to vote on these appropriations bills nor was it improper to not disclose your association with New College in a special filing with the Clerk of the House of Representatives pursuant to the Rules of the House of Representatives.

Likewise, it is our opinion that your votes on the four appropriations bills raise no issue under Section 112.3143(2), Florida Statutes. As noted above, there was no "special private gain or loss" that inured to New College or to you, personally. The benefit inured to all public universities generally and, more specifically, to the entire class of people who either attend or are employed by New College. Thus, in our view, all of the challenged votes were in compliance with relevant Florida Statutes and House Rules.

We trust that the foregoing is responsive to your request for a review and analysis of the applicable ethical standards of the propriety of certain votes taken while you were a member of the Florida House of Representatives between 2006 and 2009. Please let us know, if you have any additional questions or concerns.

Sincerely,

Mark Herron
Melanie Leitman

5. The 2008 appropriations bill (Chapter Law 2008-152) had line items for a few different infrastructure projects on New College's campus, including improvements to an academic facility and a classroom center. You neither work nor teach in either of these structures and as such, the improvements to these structures did not create a benefit unique to you.