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LEGAL MEMORANDUM

TO: The Jacksonville Ethics Commission
Carla Miller, Director of the Office of Ethics, Compliance and Oversight

FROM: Jason R. Gabriel, General Counsel *JRG*
Stephen M. Durden, Chief Assistant
Jason R. Teal, Deputy General Counsel

RE: General Counsel Binding Opinion 19-01; Application of Ethics Code to Sunshine
Laws and Public Records Laws

DATE: March 1, 2019

I. Introduction.

The City has had a board similar to the Ethics Commission off and on since the beginning of the Consolidated Government. The original Charter made the Civil Service Board the Board of Ethics. Section 20.09, Chapter 67-1320 Laws of Florida. Just a few years later, the Florida Legislature made the Charter's Code of Ethics an ordinance. Chapter 72-1578, Laws of Florida. The next year, the Council repealed Chapter 20, making it an ordinance. Pursuant to ordinance, the City Council created Chapter 2, Article 1 of the Charter. Ordinance 2010-616-E. This amendment to the Charter authorized the Council to do what it already had the power to do, create an Ethics Commission. Chapter 20 of the original Charter provided that the Board had jurisdiction over a variety of issues, e.g., conflicts of interest (Section 20.02), use of public property (Section 20.04), and restrictions on certain political activities (Section 20.06). The current Section 1.202 (e), Charter provides that the Commission shall "have jurisdiction to levy those civil fines or penalties authorized by the City Council for violations of the City's ethics code; . . ."

The current Ethics Code, Chapter 602, Ordinance Code, contains detailed restrictions similar to those in Chapter 20 of the original Charter. Chapter 602 also includes prohibitions unrelated to the original Code of Ethics. Three different Ordinance Code sections list laws and ordinances that regulate the conduct of officers and employees of the City.¹ In addition, Section 602.1208, Ordinance Code, creates what might be described as a Jacksonville Sunshine Law.²

The question now arises whether the Ethics Commission may “consider and adjudicate alleged violations” of Florida’s Sunshine Law or Public Records Law or the Jacksonville Sunshine Law.

II. Question Presented.

Whether the Ethics Commission may “consider and adjudicate alleged violations” of Florida’s Sunshine Law or Public Records Law or the Jacksonville Sunshine Law.

III. Short Answer.

The Ethics Commission may not “consider and adjudicate alleged violations” of Florida’s Sunshine Law or Public Records Law or the Jacksonville Sunshine Law.

IV. Discussion.

As for Sections 602.1202, 602.1203 and 602.1205, these ordinances provide a general reference to a variety of City ordinances, state statutes and constitutional provisions that govern municipal officers and employees. These statutes and provisions run the gamut from political

¹ Sec. 602.1202, Ordinance Code reads as follows: “All officers and employees of the City and independent agencies shall comply with all applicable provisions of the Constitution of the State of Florida, including, but not limited to the following: . . .” Sec. 602.1203, Ordinance Code, reads as follows: “In addition to the provisions of this Code, all of officers and employees of the City and independent agencies are expected to comply with the applicable provisions of state laws, including, but not limited to the following: . . .” Finally, Sec. 602.1205, Ordinance Code, reads as follows: “All officers and employee of the City and independent agencies are expected to comply with the applicable provisions of additional ordinances listed in other Chapters of the Ordinance Code, including, but not limited to the following: . . .”

² Sec. 602.1208, Ordinance Code, reads as follows:

- (a) All meetings of the Council and of its committees and subcommittees and meetings of the boards and commission of the City are declared to be public meetings open to the public at all times, unless otherwise exempted by Florida law, including section 112.324. No ordinance, resolution, rule, regulation or formal action shall be passed or considered binding except when made at a public meeting.
- (b) The public meetings required by this Section shall be held in premises owned or leased by federal, state, or local governments, or in premises which otherwise provide full and reasonable access to the public.
- (c) A person who is a member of a governmental body named in this Section who willfully violates the provisions of this Section by attending a meeting not held in accordance with its provisions shall be reprimanded or pay civil penalty as set forth in Part 11 of this Chapter.

activities and campaign financing rules, to Public Records and Sunshine Law. Part 12 provides a single location in the Ordinance Code for relevant and applicable law, but does not increase the Commission's jurisdiction. These sections either state that City officers and employees "shall comply" (Section 602.1202) or "are expected to comply" (Sections 602.1203 and 1205) with listed ordinances, statutes and constitutional provisions. In addition, each section includes the phrase "including but not limited to." If these sections created an enforceable command, officers and employees would have no notice as to what laws might be enforceable by the Ethics Commission.³ The foregoing leads to the conclusion that Sections 602.1202, 602.1203 and 602.1205 do not grant jurisdiction to the Jacksonville Ethics Commission to enforce any of the laws referenced in those sections, including the Sunshine Law and the Public Records Law.

The next question is whether the Ethics Commission has the inherent power to investigate the Sunshine Law or the Public Records Law. No agency has inherent power. *See, e.g., Fla. Virtual Sch. v. K12, Inc.*, 148 So.3d 97, 99-100 (Fla.2014) ("An agency created by statute does not possess any inherent powers. Rather, the agency is limited to the powers that have been granted, either expressly or by necessary implication, by the statute that created the agency."). Consequently, the Ethics Commission has no inherent power to investigate the Public Records Law or Sunshine Law.

The only question remains as to whether the Ethics Commission has the power under Section 602.1208 to investigate potential violations of the Sunshine Law.⁴ On its face that section purports to create what might be described as a Jacksonville Sunshine Law. Closer scrutiny demonstrates that the ordinance merely re-adopts the state statute. It declares that "all meetings of the Council and of its committees and subcommittees and meetings of the boards and commission[s] of the City" "to be public meetings open to the public at all times." It then adds, "unless otherwise exempted by Florida law, including section 112.324." The "Jacksonville Sunshine Law" does no more than redundantly require that the Florida Sunshine Law apply in Jacksonville, and grant to the Ethics Commission the power to enforce the "Jacksonville Sunshine Law." The real effect is to attempt to grant to the Ethics Commission the power to enforce a state law in a manner different from the method established in that state law. This the Council cannot do directly, nor can it do so indirectly by adopting an ordinance that requires compliance with a statute not otherwise enforceable by the Ethics Commission. Fla. Att'y Gen. Op. 2005-09 (2005) ("*See Green v. Galvin*, 114 So. 2d 187 (Fla. 1st DCA 1959), cert. denied, 116 So. 2d 775 (Fla. 1959), *appeal dismissed*, 117 So. 2d 844 (Fla. 1960) (public officials cannot do indirectly that which they are prohibited from doing directly); Ops. Att'y Gen. Fla. 81-98 (1981), 78-76 (1978) and 75-203 (1975).").

³ This leaves unanswered the question whether the City Council has unlimited authority to place within Chapter 602, and therefore under the jurisdiction of the Ethics Commission, any and all City ordinances and any and all state statutes.

⁴ No provision of the Ordinance Code even purports to grant jurisdiction to the Ethics Commission to investigate violations of the Public Records Law.

The Florida Legislature, with the enactment of Florida's Sunshine Law (Section 286.011, Fla. Stat), has preempted the field as to both the regulatory and penal (both civil and criminal) aspects of the law. The Florida Legislature has so pervasively legislated within these subject areas that a local government is precluded from legislating within them or creating additional enforcement mechanisms. "In AGO 75-50, [the Attorney General] stated that Ch. 119, F.S., . . . , constitutes a state preemption of the field of public records and, therefore, such field is not a proper or valid subject of attempted local regulation or legislation." 1985 Fla. Op. Att'y Gen. 45 (1985). See, e.g., *Tribune Company v. Cannella*, 438 So. 2d 516 (Fla. 2nd DCA 1983), *reversed on other grounds*, 458 So. 2d 1075 (Fla. 1984), *appeal dismissed sub nom., DePerte v. Tribune Company*, 105 S.Ct. 2315 (1985) (Legislature clearly preempts local regulation of the release of public records). This analysis is indistinguishable for purposes of Sunshine Law. The areas of Sunshine Law are not within the jurisdiction of the Ethics Commission to investigate or adjudicate.

Inasmuch as violations of these statutes carry criminal penalties, only the State Attorney's Office can pursue allegations alleging a violation of the Sunshine Law. Civil penalties, including injunctive relief must be sought in Circuit Court. As explained by the Department of Administrative Hearings:

Section 286.011, Florida Statutes, also provides for criminal and non-criminal penalties for a violation of Subsection 286.011(1), Florida Statutes. These penalties may only be imposed by courts. Subsection 286.011(2), Florida Statutes, provides: "The circuit courts of this state shall have jurisdiction to issue injunctions to enforce the purposes of this section upon application by a citizen of this state." The enforcement of a violation of the Sunshine Law is through the court system and not through the administrative process. DOAH does not have jurisdiction to impose any remedy or penalty provided for a violation of Subsection 286.011(1), Florida Statutes.

Florida Department of Agriculture and Consumer Services v. Cirrincione, 2006 WL 234902, at *4 (Fla.Div.Admin.Hrgs.) January 3, 2006.

In addition, and even more related to Jacksonville Ethics Commission jurisdiction, the Florida Ethics Commission recognized the validity of the DOAH holding when it found that it did not have jurisdiction over a Sunshine Law violation:

With regard to the allegations of a Sunshine Law violation, Section 286.011, Florida Statutes, is not within the jurisdiction of the Commission on Ethics to investigate or adjudicate. Inasmuch as violations of this statute carry criminal penalties, only the State Attorney's Office can pursue allegations alleging a violation of Section 286.011, Florida Statutes.

In re: Christine Coke, 2009 WL 3440352, at *3 (Fla.Div.Admin.Hrgs.) (September 18, 2009) quoting from *Public Report and Order Dismissing Complaint*, dated July 29, 2009 (Case No. 09-

087). If the Florida Ethics Commission does not have authority to investigate Sunshine complaints, then neither does a local ethics commission.

The enforcement of a violation of either the Sunshine Law or Public Records Law is through the court system and not through an administrative process, either state or local. The Jacksonville Ethics Commission does not have jurisdiction to impose any remedy or penalty provided for a violation of the referenced Florida Statutes.⁵

V. Conclusion.

I hope this provides the guidance you seek. Please do not hesitate to contact me if you have further questions.

GC-#1268449-Ethics Commission Sunshine Memo

⁵ This opinion leaves open the question of the authority of the Ethics Commission to impose fines or other penalties. See, Fla. Att'y Gen. Op. 2014-04 (2014) ("*Article V, section 1, and Article I, section 18, Florida Constitution, . . . provide that while commissions established by law or administrative officers or bodies may be granted quasi-judicial power in matters connected with the functions of their offices, no administrative agency shall impose a sentence of imprisonment, nor shall it impose any other penalty except as provided by law.*").