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OFFICE OF THE
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NINETEENTH JUDICIAL CIRCUIT OF FLORIDA
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September 20, 2017

Mr. James Messer
City Attorney
City of Fort Pierce
100 North U.S. 1
Fort Pierce, FL 34950

Re: Board of Examiners of Contractors

Dear Mr. Messer,

The State Attorney's Office has completed its review of a Sunshine Law complaint involving the Board of Examiners of Contractors (the "Board"). After interviewing witnesses, reviewing documents related to the complaint, and researching the operation of the Board pursuant to the Code of Ordinances and the Rules of Procedure For Disciplinary Matters before the Board, we have determined that the Board's current operational structure violates Florida Statute 286.011. We recommend that the city commission take immediate steps to remedy the continuing violation of the Sunshine Law by amending the Code of Ordinances.

A brief summary of how this issue came to light may be helpful in understanding how we reached this conclusion. Section 5-19 of the Code of Ordinances of the City of Fort Pierce (the "Code") creates the Board of Examiners of Contractors. The Board is responsible for adjudicating complaints of misconduct by contractors possessing a certificate of competency issued by the City of Fort Pierce or licensed by the State of Florida. The Board consists of ten members appointed by the city commission. One member of the Board is the City's Director of Building and Community Response. Three members of the Board are consumer representatives, and the remaining six members must be state licensed in various contracting disciplines enumerated in the ordinance. Section 5-20 of the Code provides that the Director of Building and Community Response (the "Director") shall serve as the Secretary of the Board. In addition to the secretary, the Board also elects a chairman and a vice-chairman.

The procedure for investigating complaints is contained in Section 5-51 of the Code and the Board's Rules of Procedure For Disciplinary Matters. When a person files a complaint

against a contractor with the Board, a copy of the complaint is forwarded to the Board's chairman and a building department official. The complaint is also sent to the contractor. The building department staff conducts an investigation and makes a recommendation to the chairman of the board and the Director about whether probable cause exists for the complaint. The chairman and the Director then meet to discuss the complaint and decide whether or not there is probable cause. This meeting is not publicly noticed or open to the public. The matter is referred to the entire Board for a hearing if they find probable cause. If they do not find probable cause, then the matter is closed.

On July 13, 2017, a business owner filed a complaint with the City against a contractor. The contractor at issue happened to be a member of the Board. After he received a copy of the complaint he contacted the board chairman and informed him of the nature of the complaint. Both the board member and the chairman confirmed to the State Attorney's Office that the contact occurred. The complaint was eventually reviewed by the vice-chairman and the Director, in a meeting that was not publicly noticed. They found probable cause to set the complaint for a hearing before the entire board.

Florida Statute 286.011(1) provides that all meetings of any board of any municipal corporation "at which official acts are to be taken" shall be open to the public. The statute also provides that such meetings must be reasonably noticed to the public. Florida courts have interpreted this section broadly to include any meeting between members of a board where two or more members of the same board or commission discuss some matter on which foreseeable action will be taken by that public board or commission. See, e.g., *Hough v. Stembbridge*, 278 So.2d 288 (Fla. 3rd Dist. 1973); *Board of Public Instruction of Broward County v. Doran*, 224 So.2d 693 (Fla. 1969); and *City of Miami Beach v. Berns*, 245 So.2d 38 (Fla. 1971). In *Times Publishing Company v. Williams*, 222 So.2d 470 (Fla. 2nd Dist. 1969), the court held that every step in the decision-making process, including the decision itself, is a necessary preliminary step to formal action, and therefore subject to the Sunshine Law.

When a board's decision making authority is delegated to one or more individual members of that board, their decision making process must also be made in public. In *News-Press Publishing Company, Inc. v. Carlson*, 410 So. 2d 546 (Fla. 2d DCA 1982), the court held that delegates or even a single member of a board who are authorized, directed, or designated by such board to act or exercise authority for the entire board stand in the place of the entire board and are subject to the provisions of the Sunshine Law. The enacting ordinances for the Board of Examiners of Contractors expressly provide that the decision to find probable cause is delegated to the chairman and the secretary of the Board. Ordinance section 5-51(b) provides that a finding of no probable cause is final, with no right of appeal to the entire board. There is no question that the Board's enacting ordinances confer decision making authority on two members of the board.¹ There is also no question that their meetings to determine probable cause are not open to the

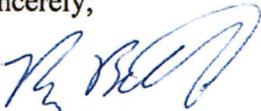
¹ The Director reported that as the secretary of the Board he participates in Board meetings, but is a non-voting member. The Attorney General's Office determined in AGO 2005-18 that non-voting members of a public body must still comply with the Sunshine Law.

public or advertised, as required by Florida Statute 286.011. This means that every time the chairman and Director meet to discuss complaints filed with the Board, the Sunshine Law is violated. The City Commission should take steps to remedy this structural flaw in the Board's enacting ordinances. The Commission should also undertake a review of other city boards that may suffer from the same structural flaws.

In our interviews with the board chairman and the member of the board who was the subject of a pending complaint, both stated that very little Sunshine Law training had been provided to them during their time on the board. Although the chairman recognized that a conversation with another member of the Board about a pending complaint was problematic, the other member was unaware that his actions violated the Sunshine Law. He told this office that he believed he could contact any member of the board about the complaint, just as a private citizen could. It appears that Board members would benefit from periodic training in the Sunshine Law. This office expresses no opinion on whether the member's contact with the chairman violated Florida's Code of Ethics for public officials, as codified in Florida Statutes 112.311 through 112.3261. Violations of the Code of Ethics are within the jurisdiction of the Florida Commission on Ethics.

Please don't hesitate to contact me if you have any questions about this matter. Thank you for asking us to review this issue.

Sincerely,



Ryan L. Butler
Assistant State Attorney
Attorney In Charge
Legal Affairs Division