



## **What to do if you receive a Complaint filed with the Commission on Ethics**

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### **What is the Commission on Ethics?**

The Florida Commission on Ethics is a nine member board with its primary responsibility being investigating and issuing public reports on complaints alleging breaches of the public trust by public officers and employees. The Commission does not (and can not) conduct investigations of public officials or employees on its own initiative. It requires a sworn complaint alleging a violation of the code of ethics or some other recognizable breach of the public trust before the Commission can initiate an investigation, report on its findings and recommend appropriate action including the imposition of penalties.

### **Many Complaints are Dismissed with Little or No Investigation**

Should the Commission receive a Complaint it will begin an investigation process. For all complaints the first step Commission Staff will take is to forward a copy of the complaint to the accused within five days of its receipt. The Commission investigates all sworn complaints that it receives, but it is required by its rules to make an initial determination concerning the sufficiency of a complaint. Staff will evaluate a complaint to determine if the Complaint meets its rule requirements and that the allegations are legally sufficient to form the basis for a possible violation of any law over which the Commission has jurisdiction. This is the first opportunity that an accused will have to get a Complaint dismissed. For example, if the Complaint is not signed before a notary indicating that the allegations in the Complaint are sworn to, then it is not a Complaint that can be investigated by the Commission, and should be dismissed. Further, if the Complaint does not contain allegations that can reasonably be interpreted as stating a violation of a specific ethics law or breach of public trust it must be dismissed. Regardless of whether the Complaint alleges violations of other laws, even laws specific to public officials or employees, such as the Sunshine Act or public records law, if those laws do not fall within the jurisdiction of the Commission to investigate, the Complaint should be dismissed. While the Commission Staff is sensitive to these issues and normally does a good job performing these evaluations, it is reasonable for the accused to submit a written response to the Commission identifying any deficiencies in the Complaint. The Commission Staff will notify the Complainant of problems with a Complaint and will allow an opportunity to amend or supplement a Complaint, but if a Complainant's

issues are simply not within the jurisdiction of the Commission then it is possible the process may end at this point.

### **Allegations of Failure to Properly Complete Financial Disclosure Forms Allow for Additional Grounds for Dismissal**

Pursuant to a 2013 change in Rule 34-5.002(4) Florida Administrative Code if a complaint alleges an error or omission in an annual CE Form 6 (a common allegation) the executive director **shall** determine whether the allegations are merely immaterial, inconsequential or de minimus errors or omissions. If the allegations are all immaterial, inconsequential or de minimus **no further action** is to be taken by staff. Further, if the Respondent files an amended disclosure correcting the error or omission with the Commission within 30 days of the date notice was sent by the Commission to the Respondent, **no further action** is to be taken. This is a new rule for the agency, responding to a recent statutory change and therefore not a process Commission Staff is used to performing; therefore, it is an opportunity that a Respondent needs to make sure has been exhausted.

### **Opportunities to Participate and Obtain Dismissal of the Complaint through the Probable Cause Hearing**

It is important to understand that the Commission and Commission Staff are inclined to give a member of the public a full opportunity to state a claim that can be investigated. The Ethics Commission's avowed purpose is to be the guardian of the standard of conduct of public officials and employees in Florida. Further Rule 34-5.002(1) states that a complaint "need not be as precise as... in a court of law". Complaints are generally construed and interpreted in a manner that will raise a justiciable issue, if possible. In addition, Commission Staff will communicate the deficiencies of a Complaint to a Complainant, explain what the Commission will investigate, and give opportunities to amend or supplement Complaints.

Should the Commission Staff determine that a Complaint is legally sufficient it will order a preliminary investigation performed by Commission staff. Normally any such investigation will include obtaining a statement from the accused public official or employee. The statement will be recorded and made a part of the investigatory file. Typically, allegations of violations of public ethics laws are not criminal in nature and an accused must answer the questions of the investigator, but accusations can cross into areas of criminal violations or penalties and an accused does retain the right to decline to answer questions based on a right against self-incrimination. Certainly these are matters that should not be left to an accused to consider on his own, and experienced legal counsel should absolutely be retained and present for any interview.

At the conclusion of the staff's investigation there will be issued an Investigator's Report. By the Rules of the Commission a Respondent will receive a copy of the Investigator's Report and has an opportunity to submit a written response prior to a hearing before the Commission. In addition, the Respondent is entitled to review the entire investigator's file at this time. It will be necessary to specifically request a copy of the file as the Commission is not obligated to provide the file to every Respondent and will not necessarily notify you of your right to see the file. By Rule, the Investigator's Report will include a

narrative account of all information obtained in the investigation and should discuss any conflicts in the evidence, but it will not include a determination as to whether there has been a breach of the public trust or any recommendation for a decision by the Commission. These limitations are not imposed on the Respondent, and the response to the Investigator's Report is an opportunity to again ask for dismissal of the Complaint. The response to the Investigator's Report can seek dismissal on several bases: the lack of any issue that the Commission has jurisdiction to address; in the case of a financial disclosure that the error was immaterial, inconsequential or de minimus; or that the alleged financial disclosure error was corrected within 30 days of notice being issued to the Respondent. The Investigator's Report and any Response will be provided to the Commission Advocate for his/her consideration. The Commission Advocate is an attorney, normally an assistant attorney general, who serves essentially as a prosecuting attorney for the Commission. The Advocate will present the case to the Commission and will submit an Advocate's Recommendation, in writing prior to the hearing before the Commission. The Respondent or his attorney will have the opportunity to influence the Advocate's recommendation to the commission both in the written response to the Investigator's Report, and in discussing the complaint prior to consideration by the Commission. Of course, this influence has the potential to be favorable or unfavorable depending upon the facts of each case and the approach taken by the Respondent.

The hearing before the Commission based on an ethics complaint that has been determined to state a case within the jurisdiction of the Commission and has been the subject of an investigation and for which a Commission Advocate has been appointed, is referred to as a Probable Cause Hearing. The scope of the probable cause hearing is the conclusion of the Commission's preliminary investigation. Prior to the hearing, the Commission will have received the complete investigation file, the Investigator's Report, the Advocate's Recommendation and anything received from the Complainant and Respondent. Therefore, it is important that the Respondent have submitted at least a written response to the Advocate's Recommendation (assuming the recommendation is not completely favorable.) While the Advocate's Recommendation is always given strong weight by the Commission, it is not conclusive on the result. At the probable cause hearing the Respondent and the Advocate will be permitted to make a brief oral argument. In my experience, the Commission will normally ask questions of both.

The Complainant may attend the probable cause hearing but is not given an opportunity to make a presentation. The Respondent may address the Commission or have counsel speak on his behalf. Since the statements of a Respondent can always be used as an admission in subsequent proceedings, it is always advisable to be represented by counsel. Counsel can advocate for dismissal of the Complaint at the probable cause hearing for all the reasons that can be raised in response to the Advocate's Recommendation. In addition, pursuant to Section 112.324, Florida Statutes, the Commission has the authority to dismiss any Complaint at any stage of disposition if it determines that the public interest would not be served by proceeding further.

### **Proceedings are Confidential**

An important tenant of the ethics complaint process before the Commission is that the proceedings are maintained confidential until a Complaint is fully resolved, unless confidentiality is waived by a

Respondent. The Complainant and all witnesses who may be interviewed as part of an investigation are informed of the requirement that they keep all knowledge of the accusations raised and proceedings of the Commission confidential until the Commission publishes its decision either in dismissing a case prior to a probable cause hearing or at the conclusion of such a hearing. Should the Commission Staff believe that a Complaint is insufficient or does not raise any issues within the jurisdiction of the Commission and determine that it should be dismissed, that recommendation is considered by the Commission in executive session, closed to the entire public, including the Complainant and Respondent.

At its meeting to determine probable cause, the Commission may continue its determination to allow further investigation; may order the issuance of a public report of its investigation if it finds no probable cause to believe that a violation of the Code of Ethics or other breach of public trust has occurred, concluding the matter before it; may order a final, public hearing of the Complaint if it finds probable cause to believe that a violation of the Code of Ethics or other breach of public trust has occurred; or may take such other action as it deems necessary to resolve the Complaint, consistent with due process of law.

In making its determination, the Commission may consider:

- (a) The sufficiency of the evidence against the Respondent, as contained in the Investigator's Report;
- (b) The admissions and other stipulations of the Respondent, if any;
- (c) The nature and circumstances of the Respondent's actions;
- (d) The expense of further proceedings; and
- (e) Such other factors as it deems material to its decision. If the Commission orders a public hearing of the Complaint, the Commission shall determine what charges shall be at issue for the hearing.

At the conclusion of a probable cause hearing, which again is closed to the public except the parties, the Commission will announce its determination to all of those present, but the decision will be subsequently put into a written decision. Nevertheless the confidentiality of the proceeding will continue until the issuance of a press release by the Commission on its decision the week following the hearing. The formal written decision will be subsequently issued.

### **Conclusion**

Although the financial penalties actually imposed by the Commission in the cases of many ethics violations may be minimal, the potential penalties, political impact or perceived harm to a person's reputation can be substantial. In the case of a public officer, penalties can range from restitution to civil penalties of up to \$10,000, and from a public reprimand to impeachment. In the case of a public employee, penalties can include demotion, suspension or dismissal in addition to fines of up to \$10,000. It is therefore well worth taking any ethics complaint seriously and retaining an experienced attorney to advise you of your rights. As discussed herein an experienced attorney may be able to obtain an early dismissal of a Complaint or a determination of no probable cause and avoid the time, expense and publicity of a public administrative hearing on the allegations.

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