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MEMORANDUM

TO: Dan Krassner and Ben Wilcox, Integrity Florida
FROM: Phil Claypool
DATE: January 17, 2014
RE: Analysis of Senate Bill 606 (2014 Session)

This is a section-by-section analysis of Senate Bill 606, by Senator Clemens. I have to say at the outset, the claim by the League of Cities that "the provisions of SB 606 in no way weaken the laws that are on the books" is simply absurd. It is preposterous to say that this bill would ensure "full transparency" or provide "the right tools to enforcement agencies to root out corruption," as the League proclaims.

Section 1. [Ethics training for elected municipal officials]

This would add elected municipal officials to the group of "constitutional officers" who are, as of 2013, required to complete 4 hours of ethics training annually. Also, It would clarify that the training should take place each calendar year, instead of just "annually," which leaves an ambiguity in current law as to when the annual period would start and end.

If training for State and county [elected] constitutional officers is good, then extending the requirement to elected municipal officers is even better. Specifying that the training must be done each calendar year may resolve an ambiguity, but it will work a hardship on those elected officials (principally legislators, county, school district) who take office in November right after they are elected and would have less than 2 months to get their first training completed. Perhaps a better approach would be to give everyone 12 months from the date their term of office began and every 12-month period thereafter?

Apparently a failure to complete the required 4 hours would be a violation of the Code of Ethics, punishable like any other ethics violation after a complaint is filed with the Commission. How anyone would ever know that the course wasn't completed, I don't know. Would the local press have to demand to see evidence of compliance?

Section 2. [Eliminate quarterly gift disclosure by State and local officials; validate

gift law opinions by agency attorneys]

This part of the bill would eliminate quarterly gift disclosure entirely, for State and local public officers and employees.

In addition, the bill would allow agency officials and employees to request an opinion from the agency's attorney about the application of what's left of the gift law to themselves, and provide that the official or employee could "reasonably rely" on that opinion, as the gift law has provided for members of the Legislature since 1990.

When the gift law was enacted in 1990, during a special session called because of mounting bad publicity and prosecutions involving legislators accepting gifts, the early bill drafts simply outlawed gifts from lobbyists, their associates, and their clients. Confronted with the fact that such an approach would leave a myriad of loopholes, the Legislature adopted the requirement that officials should report any gift worth over \$100, except those from relatives, promptly (on a quarterly basis).

If this bill is adopted, public officials would not have to disclose significant gifts – gifts which any objective citizen would think would impact official decisionmaking. For example, a gift from the president of a company that has a multi-million dollar contract with one's agency. Or a vacation home that was given to the official and his wife by the owner of a local development company (not by the company or its lobbyists).

In addition, municipal officials would not have to disclose the fact that they and their families have received free tickets to concerts, performances, and sporting events from the City. Nor would they have to report the fact that their city paid for their spouse's travel to Europe.

Apparently this is too much of an embarrassment to the city officials who receive such gifts, so they want to eliminate the likelihood that the public would learn about them. This bill does not "eliminate unintended consequences for gift reporting" as the League of Cities proclaims – it eliminates effective gift reporting altogether.

The question of what effect a city attorney's opinion should have on a case before the Ethics Commission has always been considered on a case-by-case basis, depending on the particular facts, with the Commission taking into account the fact that the official sought advice in advance and should be able to claim good faith reliance on the advice of counsel. If the bill's sponsor or the League of Cities has a different experience, it would be important to hear the facts of that particular situation.

Section 3. [Honorarium law opinions by agency attorneys]

This section of the bill would allow an agency official or employee to request an opinion from the agency's attorney about the application of the honorarium law to themselves, and provide that the official or employee could "reasonably rely" on that opinion.

This parallels the language proposed in the bill regarding agency attorney opinions about the application of the gift law, and should raise the same concerns.

Section 4. [Penalties against complainants]

This section would require the Ethics Commission to fine a complainant between \$1,000 and \$5,000 if the complainant has filed a complaint with malicious intent to injure the reputation of the public officer or employee and if the Commission finds that the complainant breached the confidentiality of the complaint. The fine would be collected by the Attorney General.

Currently, if a complaint is filed with malicious intent to injure the official's reputation, the Commission has the power to require the Complainant to pay the attorney's fees incurred by the public official defending against the complaint, even if the fees are paid by the official's public agency and the official incurred no out-of-pocket expenses. The amount owed includes fees incurred in proving entitlement to attorney's fees at hearings, so that the amount a complainant would be forced to pay would amount to tens of thousands of dollars more than the minor amount of fees that were originally occurred in defending against the complaint. In essence, current law penalizes the complainant for defending against the public official's attempt to make the complainant pay. That amount greatly exceeds the \$1,000 - \$5,000 additional penalty that would be added under the bill.

This is simply an unconstitutional attempt to get back at complainants in the ethics process. The Federal courts have already held that Florida cannot impose a penalty against a complainant for breaching the confidentiality of an ethics complaint, without violating the U.S. Constitution. In addition, this penalty would have the effect of reducing the number of valid ethics complaints filed. To the benefit of whom?

Section 5. [New limits on the Commission's authority to investigate complaints]

This section would require the Ethics Commission to dismiss a complaint if the officer or employee received an opinion from his or her agency's attorney, either in writing or orally at a public meeting, and the officer or employee reasonably relied upon the opinion and acted in accordance with it.

The question of what effect a city attorney's opinion should have on a case before the Ethics Commission has always been considered on a case-by-case basis, depending on the particular facts, with the Commission taking into account the fact that the official sought advice in advance and should be able to claim good faith reliance on the advice of counsel.

If the bill's sponsor or the League of Cities has a different experience, it would be important to hear the specifics of that particular situation.

Generally, the Ethics Commission has considered advice of counsel in deciding whether to recommend that a penalty be imposed. By requiring the Commission to dismiss the complaint because an attorney had given an opinion, the bill would mean that the people of Florida must defer to the opinion of that attorney, no matter how accurate her or his opinion was. The State agency that has the ultimate responsibility

for interpreting and enforcing Florida's ethics laws would no longer be the final arbiter of that law.

A citizen who gets bad tax advice still must pay his or her taxes.

Section 6. [Local ethics standards by charter amendment]

This section specifies that the electors of a political subdivision are not prohibited from amending its charter to create ethics standards that would supplement, but not conflict with, the State code of ethics. In addition, the law would specifically prohibit one political subdivision from imposing more stringent standards of conduct or disclosures upon the officers and employees of another political subdivision.

I am not aware of any situation where ethics provisions in a local government charter have been held invalid, so I don't know that it adds anything to the law.

On the other hand, the second part of this Section, about one subdivision imposing ethics on another, appears to be directed at charter counties who may have adopted ethics provisions they believe would extend to all municipalities within the county. That's not an ethics issue, it's a political fight on an issue of municipal law.

Section 7. [Abstention from voting when local standards are in effect]

Section 286.012, Florida Statutes, requires public officials who are present at a meeting cannot abstain from voting unless there is a conflict under the Code of Ethics, or the appearance of a conflict of interest. In effect, this law is intended to keep public officials from abstaining when they would prefer to, because the matter is too sensitive, or too controversial, or for other political reasons.

Section 7 of the bill would amend this statute to allow abstention when there is, or appears to be, a possible conflict of interest under a locally-adopted ethics standard.

Actually, this is a good idea. As a practical matter, I don't think it will have much impact, but it does take away one possible argument that State and local ethics laws are too complex or are so inconsistent that they should not be enforced.

Section 8. [Severability clause]

This section provides that if any part of the bill is held invalid, that will not affect any other unrelated part of the bill.

This is fairly typical, and probably is a good idea for any legislative act where there is a concern that part of it might be held unconstitutional.

Section 9. [Effective Date]

The bill is set to take effect July 1, 2014, except for the first Section (regarding training for elected municipal officers), which would begin on January 1, 2015.

Gifts received between April 1, 2014 and June 30, 2014 would not be reportable. Of course, nor would any other gifts in the future.