

LEGISLATIVE #

100003B

City of Gainesville Office of the City Attorney

Marion J. Radson ♦
City Attorney



Thomas B. Arden
Ronald D. Combs
Raymond O. Manasco, Jr.*
Stephanie M. Marchman
Daniel M. Nee ♦
Nicolle M. Shalley
Elizabeth A. Waratuke ♦

♦ Board Certified City, County
& Local Government Law

April 14, 2011

Committee for Civilian Review Board Coalition
c/o Ms. Andrea Costello, Attorney
Florida Institutional Legal Services, Inc.
12921 S.W. 1st Road, Suite 107-#346
Newberry, FL 32669

*Re: Your E-mail dated March 21, 2011, concerning proposed ordinance for a City
Community Police Review Board*

Dear Members of the Committee:

This letter is in response to your e-mail (with attachments) dated March 21, 2011, addressed to the Mayor, City Commissioners and the City Attorney of the City of Gainesville.

This Office previously orally expressed its opinion that a citizen review board with authority to review and investigate complaints against police officers, would likely run afoul of the Police Officer Bill of Rights, as codified in Chapter 112, Florida Statutes. At that time legal representatives of the Coalition offered to provide the legal authority supporting the creation of such a community review board under Florida law. As of this date, we have not received any such authority, and Ms. Costello informed Thomas Arden of this Office that she has opted not to provide such authority.

We have reviewed the proposed ordinance, included as attachment # 1 in your e-mail. The proposed ordinance appears to closely mirror the Key West, Miami, and Orange County ordinances which have been the subject of prior appellate review and an Attorney General Opinion, as discussed below.

The ACLU background materials, included as attachment # 2, provide a sample model of how such a board should be established and how such a board should function, and the reasons for the proposals. There is no discussion or analysis as to whether the sample model would be valid and legal under Florida law.

P.O. Box 1110 (32602)
200 E. University Ave.
Room 425
Gainesville, Florida 32601

PHONE (352) 334-5011
FAX (352) 334-2229
City Hall and the City Attorney's Office
are closed on Fridays
Hours: M-Th, 7-6

*Utilities Legal Services
P.O. Box 147117, Sta. A-138
Gainesville, Florida 32614
PHONE: (352) 393-1010
FAX: (352) 334-2277
Hours: M-F, 8-5

Attachment # 3, consists of the Key West Ordinance that created its Citizen Review Board and the pamphlet for that Citizen Review Board. The Ordinance was adopted in November 2002, that predates the Florida cases and opinion discussed below. (*see, Demings v. Orange County Citizens Review Board*, 15 So.3d 604 (Fla. 5th DCA 2009); *Timoney v. City of Miami Civilian Investigative Panel*, 990 So.2d 614 (Fla. 3d DCA 2008), and Informal Opinion of the Attorney General of Florida (March 22, 2004)).

Attachment #4 consists of the Miami ordinance that created its Citizens Investigative Panel, and the pamphlet for that Citizens Investigative Panel. This ordinance was adopted in February 2002, that also predated the Florida cases and opinion. (*see, Demings v. Orange County Citizens Review Board*, 15 So.3d 604 (Fla. 5th DCA 2009); *Timoney v. City of Miami Civilian Investigative Panel*, 990 So.2d 614 (Fla. 3d DCA 2008), and Informal Opinion Attorney General of Florida (March 22, 2004)).

The creation of a community police review board, as proposed in your ordinance, affects the rights of sworn police officers. Some of these rights are provided in the Florida Statutes, specifically the Police Officers Bill of Rights. Therefore, a discussion of controlling case law and any instructional legal opinions is necessary and warranted.

A year and a half after the Key West ordinance was enacted, the General Counsel for the Key West Citizen Review Board asked for an opinion from the Florida Attorney General as to whether the City of Key West could lawfully create such a citizen review board. The Key West Board is authorized to receive, investigate and make recommendations regarding complaints of police officer misconduct independently of the internal affairs procedures of the Key West Police Department. In an informal opinion dated March 22, 2004, the Office of the Attorney General noted that “[t]he plain language of [section 112.533(1)] makes the procedures set forth therein the exclusive means to investigate complaints against law enforcement officers and correctional officers and for determining whether to proceed with disciplinary action or to file disciplinary charges, regardless of other laws or ordinances to the contrary.” The Attorney General further opined that the confidentiality provisions of the statutes would not be available to such a citizens review board, and that the confidentiality requirements would prevent participation of the citizens review board in the resolution of a complaint against a law enforcement officer until the officer’s employing agency had made its initial findings. The Opinion concluded there is no statutory authorization for a citizens review board to operate as the receiving entity for complaints against officers, and then forward the complaints to the Department.

This informal opinion was, in turn, cited by the Fifth District Court of Appeal in the *Demings* case (*see* citation above), where an Orange County Ordinance and charter provisions creating a civilian review board nearly identical to that proposed here were held to be inconsistent with the Police Officers Bill of Rights. The Court found the ordinance to be unconstitutional as inconsistent with general law, and unlawful by transferring powers of the sheriff to another county office, department or board.

The City of Miami Ordinance was challenged in *Timoney* (cited above). Although this decision upheld the ability of the Miami Civilian Investigative Panel to conduct its investigation and issue the subpoena to the police chief, the Court noted that the police chief was, by statutory

definition, not a law enforcement officer entitled to the protections granted under the Police Officers Bill of Rights. In short, the Court sustained the powers of the board only as it pertained to an investigation of the police chief, and not other sworn police officers. This limitation on the ordinance presented in *Timoney* was reiterated in the *Demings* case.

Most recently, in *Fraternal Order of Police v. Rutherford*, 51 So.3d 485 (Fla. 1st DCA 2010), the First District Court of Appeal held that an open meeting format for an investigative body within the employing law enforcement agency (the Jacksonville Sheriff's Office), was inconsistent with the confidentiality provisions contained in Florida Statutes §§112.532(4)(b) and 112.533(2)(a). The Court summarized its finding as follows:

Because the plain language of section 112.532(4)(b) affords confidentiality to law enforcement officers who face potential discipline as a result of a Board investigation and the infringement on the public's general right to access is limited, we hold that the Board must keep information related to an investigation confidential until it is concluded by one of the means provided by statute.

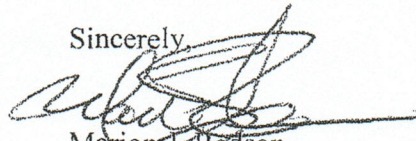
It follows that release of confidential information to the proposed community police review board in public meetings would likewise violate the confidentiality requirements of the Police Officers Bill of Rights.

At the meeting on March 21, 2011, held at the Gainesville Police Department with Chief Jones, it is my understanding that Jeff McAdams, F.O.P. President, and Michael Finesilver, attorney for the F.O.P., were in attendance. Mr. Finesilver expressed the opinion of the F.O.P. that the proposed ordinance is violative of the Police Officers Bill of Rights.

At a meeting held during the week of April 4, with representatives of the University of Florida, it is my understanding that the Coalition presented a similar request and proposed policy. It is my further understanding that the University also expressed its opinion at the meeting that the proposed policy is violative of the Police Officers Bill of Rights.

Based on the above and foregoing, unless otherwise judicially clarified, or an amendment to the Florida Statutes is enacted, the Office of the City Attorney must conclude that the creation of a civilian review board as proposed in your ordinance would be inconsistent with and violative of the Police Officers Bill of Rights under Florida law.

Sincerely,



Marion J. Radson
City Attorney

cc: Mayor and City Commissioners
Russ Blackburn, City Manager
Tony R. Jones, Chief of Police
Michael Finesilver, Staff Attorney, Fraternal Order of Police