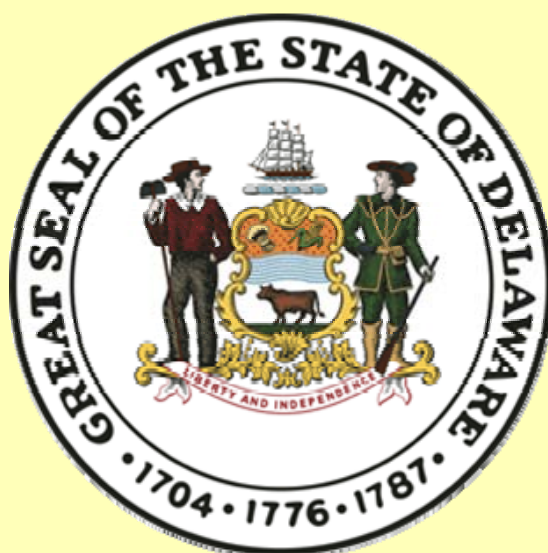


State of Delaware

State Public Integrity Commission



ANNUAL REPORT

March 1, 2007

Terry J. Massie, Chair

Barbara H. Green and Bernadette Winston, Vice Chairs

Commissioners

Barbara A. Remus

Dennis L. Schrader

William D. Dailey, Jr.

Wayne T. Stultz

STATE PUBLIC INTEGRITY COMMISSION

Annual Report - March 1, 2007

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STATE PUBLIC INTEGRITY COMMISSION

I. History and Mission

Created in 1991 as an independent agency, the State Public Integrity Commission administers and interprets four State laws: Code of Conduct (ethics); Financial Disclosure; Dual Compensation; and Lobbyists' Registration. *29 Del. C., Chapter 58.*

Originally named the State Ethics Commission, the Commission administered only the Executive Branch's Code of Conduct (Ethics law). Previously, the State Personnel Commission and the Attorney General administered that law (1984 until 1991). Under that arrangement, the Cabinet position of State Personnel Director was the administrative head; supervised administrative and technical activities; and developed policies and procedures. The Attorney General issued advisory opinions.

An independent Commission was created so State employees and officials were not self-governing. To avoid self-regulation, the Commission has only private citizens as appointees. They may not hold any other State or Federal elected office or appointment. Further, they may not hold positions of leadership in a political party. This is a means of increasing the public's confidence in its government. The Commission is the sole Administrative Agency with authority to interpret the law, and issue advisory opinions.

When the first private citizens were appointed as Commissioners in 1991, the Commission

had no dedicated staff, but had jurisdiction over more than 48,000 personnel. That total included not only full-time Executive Branch employees and officials, but part-time employees and State Board and Commission appointees.

Two years later, the Commission's jurisdiction grew. The State's 57 local municipalities, towns and counties, became subject to the Code of Conduct unless they adopted a Code approved by the Commission as being as stringent as the State law. *29 Del. C. § 5802(4)*. In 1993, it took on that jurisdiction still without dedicated staff.

That concern was addressed in 1994 by the "State Public Integrity Act." That law not only changed the Commission's name, but gave it power to hire its own attorney, rather than use the periodic services of a Deputy Attorney General. That provision insured additional independence of the Commission. The Act created a two-step process that would again increase the Commission's jurisdiction. The first step was to give it responsibility for the financial disclosure law beginning in January 1995. All Executive and Legislative Branch elected officials; Judges; Cabinet Secretaries and Division Directors and their equivalents; and other senior level Executive Branch officials, and Candidates for State office must file. *29 Del. C., Chapter 58, Subchapter II*. This increased the jurisdiction by more than 300 officers who hold public office and an undetermined number of Candidates for State office during each election season, who must file financial interests report.

Disclosure reports had been filed with three different agencies: (1) Secretary of State's office for Executive Branch filers; (2) Controller General for General Assembly members; and (3) the Clerk of the Supreme Court for Judges. These offices did not issue advisory opinions, so they were essentially filing repositories. The Attorney General, an elected official who must comply with the ethics and disclosure laws, also was the legal advisor on compliance with both laws. Under the 1994 law, the Commission was given the duty to render advice on the law; create forms; serve as

the filing repository; and refer suspected violations to the Attorney General for prosecution as a misdemeanor. The second step, beginning a year later, was to give the Commission jurisdiction over the Lobbying Law. *29 Del. C., Chapter 58, Subchapter IV*. This added almost 200 lobbyists, representing nearly 300 organizations for the Commission to advise. Lobbying registrations, authorizations, and quarterly expense reports had been filed with a Legislative Council administrative assistant. That office had no authority to issue advisory opinions. The 1994 Act made the Commission the filing repository, and gave express authority for it to issue advisory opinions on the entire chapter—ethics, financial disclosure, compensation policy, and lobbying laws. Ten years later, in 2006, 270 lobbyists had registered to represent 568 organizations.

Beyond the jurisdiction requirements, the 1994 Act mandated that the Commission provide training, publish an annual report, issue opinion synopses, etc. No agency previously had those statutory duties.

To achieve its duties, the Commission's seven citizens began interviewing Delaware attorneys and hired its legal counsel to begin work in January 1995. With that hiring, the Commission focused on its new duty of training. Counsel gave the first training class on financial disclosure to Governor Thomas Carper and his Cabinet one week after being hired. Education has remained the primary focus since 1995. Training sessions cover the law, the process for obtaining advice, filing complaints, responding to complaints, etc. Tools used in this educational endeavor include publishing synopses, brochures, ethics bulletins, and creating and maintaining a web site. Commission Counsel performs these duties along with providing day-to-day guidance.

The Commission is committed to exercising its duties to prevent or resolve conflicts; recommend rules of conduct to the General Assembly; issue advice; rule on complaints; prescribe forms and notices; assist State agencies, and if necessary seek assistance from State agencies in

discharging its duties. The Commission's commitment is promote ethics in government officials through education, compliance, and regulation, and through that promotion instill the public's confidence in its government.

II. Structure, Commissioners and Staff - 29 *Del. C. § 5808 and 5808A*

(A) Commission Appointments, Qualifications, and Compensation

As noted above, seven citizens are the "public eye" on the conduct of those subject to the laws. Each is nominated by the Governor and must be confirmed by the Senate. The Commissioners elect their own Chair.

By law, members cannot be an elected or appointed official or candidate for federal or State office. They may not hold a political party office or be an officer in a political campaign. No more than four Commissioners may be registered with the same political party. Although not required by statute, appointees are routinely appointed from all three counties.

The statute is designed to stagger Commissioner's terms. Vacancies occurring before a term expires are filled in the same way as original appointments for the remaining part of that term. No member can serve more than one full 7-year term, except a member may continue serving until a successor is appointed and qualified.

Commissioners are authorized \$100 for each day they perform official duties. They also may be reimbursed for reasonable and necessary expenses incurred in performing those duties.

(B) Commissioners Serving in 2006

After a substantial turnover in 2004 when the Commission lost 4 members within a 3-month period, the Commission stabilized with a full complement of seven members in 2005. One member resigned in 2006, and six members served until a replacement was confirmed in January 2007. The following six citizens were serving on the Commission at the end of 2006.

Foster (Terry) J. Massie, Chair

Foster J. (Terry) Massie was appointed for a seven-year term on July 23, 2002. The Commissioners twice elected him as Vice-Chair for Personnel, and in 2006 elected him as Chairman. His term expires on June 30, 2009.

Mr. Massie is employed by Wells Fargo's Auto Finance as a Regulatory and Operational Risk Consultant. He has worked in Risk Management for three years.

A graduate of Henry C. Conrad High School, he completed his Associate's Degree in Accounting at Goldey Beacom College, Wilmington, Delaware. He attended Neumann College, Aston, Pennsylvania, and Wilmington College.

His commitment to his community is evidence by his community service through such positions as current President, Mendenhall Village Homeowners Association; former Board Member and First Vice President, Greater Hockessin Area Development Association; and former Chair, Upper Limestone Road Focus Group. He resides in Hockessin, New Castle County.

Barbara H. Green, Vice Chair

Commissioner Green was appointed on June 25, 2004 to complete the term of Paul E. Ellis, with the term expiring July 8, 2005. By law, she was reappointed to serve her own 7-year term, which expires November 8, 2012. Her fellow members have elected her three times as the Commission's second Vice-Chair for the Procedures and Orientation Committee. In this role she is responsible for designing and implementing a procedures and orientation process for the Commission and its staff.

Ms. Green has a bachelor's degree in Medical Technology from the University of Delaware. She is presently retired, but previously worked for Dade Behring, a global diagnostic products company, the Dupont Company, and the Wilmington Medical Center.

In her early career she spent several years in hospital laboratory supervision before moving to the corporate world. While with Dupont, she worked in research and development and developed new medical diagnostic tests for Dupont chemistry analyzers. The bulk of her career has been spent in management, mostly in the diagnostic products manufacturing environment. Her most recent assignment was with Dade Behring as the Director of Manufacturing for a 500 person medical diagnostics manufacturing organization. She was also responsible for global implementation of corporate level quality and efficiency

Ms. Green is a Sussex County resident in Rehoboth.

Bernadette P. Winston, Vice Chair

Bernadette P. Winston was the fourth Commissioner appointed in 2004. Her seven-year term expires on May 12, 2011. In 2006, her fellow Commissioners elected her as the Vice Chair of Personnel.

Ms. Winston is the Executive Director of the Kingswood Community Center, Inc., in Wilmington, Delaware. In that position, she is responsible for the day-to-day operation of the Center's three sites.

She has had more than 30 years of experience in government and non-profit programs. Among her past activities, she was Board President, West Center City Early-Learning Center; Vice Chair, Interfaith House; Advisory Board Member for Girls Scouts and YMCA; and Second Vice President, NAACP; Treasurer of Monday Majors; and President of Thursday Women's Major League.

She is currently Chair-Woman of the Wilmington Housing Authority Board of Commissioners; is a member of Community and Schools Boards; is active with the Junior Board of Christiana Care; and is a member of the Order of the Eastern Star and the Daughters of Isis. She

also has served on the Board of the Food Bank of Delaware.

Ms. Winston resides in Wilmington, New Castle County, with her husband, George.

Barbara A. Remus

Barbara Remus was appointed to the Commission on July 23, 2002 for a 7-year term, which expires June 30, 2009.

She is a Senior Consultant for Brokerage Concepts, Inc. (BCI) of Delaware. BCI is part of the largest privately held group and individual insurance brokerage company in the United States. Her employment requires continuing education and ethics classes to maintain insurance licenses. Her professional associations are in the Delaware and National Association of Insurance and Financial Advisors, and the International Foundation of Certified Employee Benefit Specialists.

A graduate of Dover High School, she obtained her Bachelor of Science Degree in Business Administration from Wilmington College. Ms. Remus received a professional designation as a Certified Employee Benefits Specialist, DEBS, from the International Foundation of Employee Benefit Specialists and the Wharton School of Business. She is also a fellow with the foundation.

Her community service includes: Board member and Vice President, Camden Wyoming Sewer and Water Authority; former appointee to the State Small Employers' Reinsurance Board; and member, Delaware State and Central Delaware Chambers of Commerce. She served as Secretary, Dover Century Club; Vice President, Kent County Democrat Committee; and member, 34th District Democrat Committee. She is a member of the Dover Art League and the Dover Century Club.

She resides in Kent County in Camden.

Dennis L. Schrader, Esq.

Commissioner Schrader was appointed on June 24, 2004 to complete 6 years of Marla L.

Tocker's term after she relocated out of State. His term expires June 30, 2010.

Mr. Schrader earned a law degree from West Virginia University College of Law. He is admitted to practice in both West Virginia and Delaware State and Federal Courts, and is admitted to the U.S. Supreme Court. He presently practices with the firm of Wilson, Halbrook & Bayard, P.A., in Georgetown, Delaware. In his practice, he has served as the Town Attorney for towns in Southern Delaware, and was the County Attorney for Sussex County.

Mr. Schrader has been active in the legal community for many years serving as President of the Delaware State Bar Association, and an officer/representative of such organizations as the Sussex County Bar Association, Mid-Atlantic Conference of Bar Presidents, National Conference of Bar Presidents, American Bar Association, etc. He is currently serving on the Board of Bar Examiners.

He was selected by former Chief Justice Veasey to Chair the Delaware Supreme Court Committee that rewrote the Lawyer's Rules of Professional Conduct. He has been highly active in studies of the Delaware Court system, and received the Delaware State Bar Association President's Citation for service in the public interest for his work for the Professional Guidance Committee. He also was recognized for his work in furtherance of the administration of justice when he received the Andrew D. Christie *Pro Bono Publico* Award.

William W. Dailey, Jr.

In 2006, William W. Dailey, Jr., was appointed to the Commission to serve until November 8, 2012.

Mr. Dailey has an extensive engineering and surveying background, through his education and service in the United States Army=s Engineer Corps. After an honorable discharge, he continued his education and has been Certified in Reduction and Flood Hazards, Inshore and Coastal Hydrographic Surveying. He is a licensed Land Surveyor in Delaware, Maryland, New Jersey and Pennsylvania.

Prior to his retirement, he worked for VanDemark & Lynch, Inc., gaining experience in all phases of surveying and land development. He supervised field operations for the company, including property, topographic, construction, geodetic and hydrographic surveys; supervised field crews in those areas; compiled and reviewed field data; conducted legal research where necessary; and was recognized by Courts as a legal expert in the field, and has given expert testimony.

Projects he worked on ranged from small tracts to areas exceeding 5,000 acres, where he gained extensive experience in horizontal and vertical controls for aerial mapping and hydrographic surveys. His work in Delaware has covered projects such as supervising field surveys for the Delaware Army and Air National Guard at the Greater Wilmington Airport; Dover Air Force Base; and Georgetown Airport. His work for the military focused on runway and taxiway extensions and improvements. He also was responsible for field surveys on major shopping centers in Delaware: Christiana Mall, Concord Mall and Brandywine Town Center.

He has taught seminars and classes on various aspects of surveying, including Boundary Law, Surveying Basics, Surveying Issues, Title Insurance, Metes and Bounds Descriptions, etc. For 15 years, he was an instructor at Delaware Technical and Community College, Stanton Campus.

He has served on and been a member of numerous Surveyor Societies, including serving as Chair of the State of Delaware Board of Land Surveyors (1981-1990). In 1993, the Delaware Association of Surveyors selected him as its Surveyor of the Year.

In addition to serving on many boards and committees related to surveyors, he was Youth Chairman, President and Vice President of the Red Clay Kiwanis Club. Although retired, he remains involved with VanDemark & Lynch as a consultant. He also is active in the Gull Point Condominium Council in Millsboro, Delaware. He is a Sussex County resident with his spouse in Millsboro.

These six members will continue their service in 2007, along with a 2007 appointee who will bring the Commission back to its full complement of seven appointees.

Wayne T. Stultz

Mr. Stultz was appointed and confirmed in January 2007. He was appointed to complete the term of P. David Brumbaugh, who resigned in 2006. At press time for this report, Mr. Stultz was out of the country on a medical mission. Because he was out of the country, and because this annual report covers 2006, before he was appointed, an approved biography is not provided.

Commission Staff

The Commission has had a two person staff since 1995—its attorney and administrative specialist. They perform the day-to-day office operations. Its attorney is also the functional equivalent of a Director in preparing Strategic Plans, Budget Narratives, and other non-legal matters.

During 2006, a temporary employee, Jeannette Longshore, was hired through the State contract, in the absence of a full-time State employee. She has served the Commission on administrative functions since January 2006. This position is expected to be filled with a full-time State employee in 2007.

Commission Counsel - Janet A. Wright

As an independent agency, the Commission appoints its own attorney. 29 Del. C. § 5809(12).

Janet A. Wright was appointed in 1995. A Widener University School of Law graduate (cum laude), she was admitted to practice in Delaware in 1989. She also is admitted to the bar in the Delaware U.S. District Court, and the U.S. Third Circuit Court of Appeals. Ms. Wright was a Superior Court law clerk for the Honorable Richard S. Gebelein. She then was an Assistant Solicitor for the City of Wilmington. Initially prosecuting Building, Housing and Fire Codes, and animal protection laws, she periodically prosecuted criminal matters in Municipal Court. Later, as a civil litigator, she defended the City and its employees, primarily in federal court, against alleged civil rights violations. She holds an American Jurisprudence Award in Professional Responsibility, and completed the National Institute for Trial Advocacy's skills course. She is a member of the Northeastern Regional Conference on Lobbying (NORCOL) and the Council on Government Ethics Laws (COGEL). NORCOL members administer lobbying laws from Washington, D.C. to New England. COGEL members are government regulators of ethics, lobbying, financial disclosure, and campaign finance from all fifty (50) states, and the U.S. government. As a COGEL member, Ms. Wright served on its Site Selection Committee; moderated a Lobbying Session; conducted a Dual Government employment session; and is now on the Model Lobbying Law Committee. Her review of Alan Rosenthal's Drawing the Line: Legislative Ethics in the States was published in the "COGEL Guardian." She has given Government Ethics sessions at the Delaware Bar Association's Continuing Legal Education Classes. Her ethics presentation on "Land Use Planning and Eminent Domain in Delaware" was selected by the National Business Institute (NBI) for its on-line training program. More recently, she gave a CLE session on "Managing Ethical Issues in Your Day-to-Day Practice in Delaware."

III. Laws Administered by the Commission

While the Commission administers all four subchapters of Title 29, Chapter 58, the “Laws Regulating the Conduct of Officers and Employees of the State,” its largest work relates to the Code of Conduct -- the ethical standards for the Executive Branch and local governments. The Financial Disclosure subchapter requires Executive, Legislative and Judicial Branch public officers to annually disclose financial interests, such as assets, creditors, income, and gifts. The Compensation Policy subchapter creates procedures to monitor and prevent “double-dipping” when State or local employees or officials hold dual paid government jobs. The Lobbying subchapter mandates lobbying registration, authorization and expense reports by lobbyists who seek legislative or administrative action by the State.

In administering these laws, the Commission focuses on assisting government officials and lobbyists in understanding and complying with the law through advisory opinions, waivers, training sessions, and publications. Where necessary, it enforces compliance through the complaint process.

(A) Advisory Opinions - 29 Del. C. § 5807(c)

Advisory opinions serve several purposes: (1) give specific guidance to individuals on how to comply; (2) protect those who comply from disciplinary action; (3) serve as the basis for case examples in training classes; and (4) provide guidance through publication as opinion synopses.

Any employee, officer, honorary official, State agency, or lobbyist may seek advice.

(B) Waivers - 29 Del. C. § 5807(a)

In rare cases there may be a need to deviate from the laws. The Commission may grant waivers if: (1) the literal application of the law is not necessary to serve the public purpose; or (2) there is an undue hardship on the agency or the employee. Waivers become public records so the public knows why a deviation from the standards was permitted.

Any State employee, officer, honorary official, agency, or lobbyist may seek a waiver.

(C) Training and Publications - 29 Del. C. § 5808(A)(a)(1)

Other aids to complying with the law are training classes; publication of opinion synopses; Ethics Bulletins; brochures; and other materials. As the Commission normally meets once a month, the day-to-day work of providing instruction and facilitating compliance with the laws, conducting seminars and workshops, publishing materials, training etc., are the Commission Counsel's statutory duties. *Id.*

(D) Complaints - 29 Del. C. § 5810(a)

The Commission may act on sworn complaints, or its own initiative, on allegations of violations. A majority (4) must find "reasonable grounds to believe"¹ a violation occurred. 29 Del. C. § 5808(A)(a)(4). If probable cause is found, the Commission may conduct a disciplinary hearing. 29 Del. C. § 5810. The person charged has statutory rights of notice and due process. Violations must be proven by clear and convincing evidence. *Commission Rules, "Hearings and Decisions," ¶ 11.* If a violation is found, the Commission may impose administrative discipline. 29 Del. C. § 5810(d). It may also refer substantial evidence of criminal law violations to appropriate federal or State authorities. 29 Del. C. § 5810(h)(2). Frivolous complaints, or ones that do not state a violation or do not establish jurisdiction, may be dismissed. 29 Del. C. § 5809(3).

The purposes of the laws, the Commission's jurisdiction, and penalties are discussed below.

A. Code of Conduct - Subchapter I – Ethical Standards

Purpose and Jurisdiction: Subchapter I sets the ethical standards conduct for State employees, officers, and honorary officials in the Executive Branch and local governments, unless the

¹ "Reasonable grounds to believe" means "probable cause." *Coleman v. State*, 562 A.2d 1171, 1177

local government has a Code as stringent as the State law.² The purpose is to instill the public's respect and confidence that employees and officials will base their actions on fairness, rather than bias, prejudice, favoritism, etc., arising from a conflict of interest. 29 Del. C. § 5802(1).

The Code applies to all Executive Branch employees (rank and file), officers (elected and appointed Senior level Executive Branch officials), and honorary State officials (appointees to Boards and Commissions). Approximately 48,000 persons are in those three categories. The number of employees, officers and officials in the 51 local governments over which the Commission has Code of Conduct jurisdiction is unknown.

If the conduct exceeds the rules, disciplinary actions may be taken. 29 Del. C. § 5802(2).

Penalties:

(A) Conduct that may result in criminal prosecution: Four (4) rules of conduct carry criminal penalties of up to a year in prison and/or a \$10,000 fine. 29 Del. C. § 5805(f). Those rules are that employees, officers, and honorary officials may not: (1) participate in State matters if a personal or private interest would tend to impair judgment in performing official duties; (2) represent or assist a private enterprise before their own agency and/or other State agencies; (3) contract with the State absent public notice and bidding/arm's length negotiations; and (4) represent or assist a private enterprise before the State on certain matters for two years after leaving State employment. 29 Del. C. § 5805(d).

(B) Conduct That May Result In Administrative Discipline

Violating the above rules could also lead to administrative discipline. 29 Del. C. § 5810.

(Del., 1989).

²Seven local governments have had their Codes approved: Dover, Lewes, Millsboro, Newark, Smyrna, Wilmington, and New Castle County.

Rules where only administrative action may apply are: (1) improperly accepting gifts, other employment, compensation, or anything of monetary value; (2) misuse of public office for private gain or unwarranted privileges; and (3) improper use or disclosure of confidential information. 29 *Del. C. § 5806(b), §5806(e) and § 5806(f) and (g).*

Administrative discipline may be: (1) a letter of reprimand/censure; (2) removal, suspension, demotion, or other appropriate disciplinary action for persons other than elected officials; or (3) a recommendation of removal from office of an honorary official. 29 *Del. C. § 5810(h).*

B. Financial Disclosure - Subchapter II & Other Disclosure Requirements

Purpose: Subchapter II is meant to instill the public’s confidence that its officials will not act on matters if they have a direct or indirect personal financial interest that may impair objectivity or independent judgment. 29 *Del. C. § 5811.* Compliance is, in part, insured by the requirement to report financial interests shortly after becoming a public officer, and for each year they serve thereafter. Identifying the interests should assist the public officer in recognizing a potential conflict between official duties and those interests which may require recusal or ethical guidance. As the reports are public records, members of the public also may recognize a potential conflict.

Jurisdiction: More than 300 “public officers” in the Executive, Legislative, and Judicial branches must file reports within 14 days of becoming a public officer and on February 15 each year thereafter. Those who file include: State elected officials; cabinet secretaries, division directors, and their equivalents; all members of the judiciary; and candidates for State office. Because candidates must file, the number of filers varies depending on the number of State candidates in a given year.

Reported information consists of assets, debts, income, capital gains, reimbursements, honoraria and gifts. Aside from their own financial interests, officials must report: assets held with another if they receive a direct benefit, and assets held by or with spouses and minor children,

regardless of a direct benefit

Whether the financial interests raise ethical issues is decided under the ethics laws applicable to the particular officer.³

Penalties: Willful failure to file a report is a Class B misdemeanor. Knowingly filing false information is a Class A misdemeanor. *29 Del. C. § 5815*. The Commission may refer suspected violations to the Commission Counsel for investigation and to the Attorney General for investigation and prosecution. *Id.* The penalties are: up to six months incarceration and a fine of up to \$1,150 for a Class B misdemeanor, *11 Del. C. § 4206(b)*; and up to one year and a fine of up to \$2,300 for a Class A misdemeanor, *11 Del. C. § 4206(a)*. The Court may also require restitution or set other conditions as it deems appropriate. *11 Del. C. § 4206(a) and (b)*.

Other Disclosure Requirements:

(A) Code of Conduct Disclosure Requirements: In the Executive Branch, all State employees and officers must, as a condition of commencing and continuing State employment, file a “full disclosure” of any financial interest in a private enterprise that does business with, or is regulated by, the State. *29 Del. C. § 5805(d)*. “Honorary State officials,” appointees to certain Boards and Commissions, must file a “full disclosure” of any financial interest in a private enterprise that does business with, or is regulated by, the agency to which they are appointed. *29 Del. C. § 5805(d)*.

In these filings, “financial interest” includes: (1) ownership or investment interests; (2) receiving \$5,000 or more as an employee, officer, director, trustee or independent contractor; or (3)

³Executive Branch officers refer to the State Code of Conduct, *29 Del. C., Ch. 58*; Legislative Branch officers refer to the Legislative Conflicts of Interest, *29 Del. C. Ch. 10*; and Judicial officers refer to the Code of Judicial Conduct, Delaware Rules Annotated.

creditor of a private enterprise. 29 Del. C. § 5804(5). “Full disclosure” requires more details than the reports filed under the Financial Disclosure law by Senior Level officials. That is because there is a more immediate potential for a conflict when government employees and officials have a direct link between their financial interests and their government entity. . “Full disclosure” means sufficient information for the Commission to decide if any conflict exists. *Commission Op. No. 98-23*.

(B) Executive Order Disclosure Requirements: Executive Branch officers, who file under the Financial Disclosure Law as a public officer, also must notify the Governor’s office of receipt of gifts valued at more than \$250, so it can be posted on the Governor’s web site. *E. O. No. 8*.

C. Compensation Policy - Subchapter III

Purpose: Some elected and paid appointed officials hold a second job with State agencies or local governments. The General Assembly believed taxpayers should not pay an individual more than once for overlapping hours of the workday. 29 Del. C. § 5821(b). To ensure taxpayers that such employees and officials do not “double-dip” during those overlapping hours, those with dual government positions must have time records verifying the hours worked at the full-time job on any day they miss work due to the elected or paid appointed position. 29 Del. C. § 5821(c) and § 5822(a). Supervisor must verify the records and, if appropriate, the full-time salary will be prorated, unless the dual employee uses leave, compensatory time, or personal time. *Id.*

Jurisdiction: The number of people to whom this law applies varies based on how many State and local government employees hold elected office or a paid appointed position to boards or commissions.

For those who hold dual positions and are also subject to the Code of Conduct, the “double-dipping” restrictions are reinforced by the restriction on holding “other employment.” 29 Del. C. § 5806(b). Complying with that ethics provision is meant to insure that not only is there no “double-

dipping,” but that the “other employment” does not raise other ethical issues.

To insure compliance, the State Auditor audits the time records. 29 Del. C. § 5823. Discrepancies are reported to the Commission for investigation, and/or the Attorney General for possible prosecution under any appropriate criminal provision. 29 Del. C. § 5823.

D. Registration of Lobbyists – Subchapter IV

Purpose: Individuals authorized to act for another must register with the Commission if they will be promoting, advocating, influencing or opposing matters before the General Assembly or a State agency by direct communication. 29 Del. C. § 5831. The purpose of lobbying registration and reporting laws is to inform the public and government officials whom they are dealing with so that the voice of the people will not be “drowned out by the voice of special interest groups.” United States v. Harriss, 347 U.S. 612, 74 S. Ct. 808 (1954).

Jurisdiction: At the end of 2006, 270 lobbyists were registered to represent 568 organizations. That is 14 more lobbyists representing 97 more organizations than in 2005, when there were 256 lobbyists for 471 organizations.

Each lobbyist files a quarterly report disclosing all direct expenditures on General Assembly members and/or members of a State agency by their organization. 29 Del. C. § 5835. In 2006, 2,252 employer expense reports were filed. That was an increase of 1,228 over 2005 when 1,024 employer reports were filed—an increase of 219%.

Penalties: Any person who knowingly fails to register or knowingly furnishes false information may be found guilty of a misdemeanor. 29 Del. C. § 5837. Unclassified misdemeanors carry a penalty of up to 30 days incarceration and a fine up to \$575, restitution or other conditions as the Court deems appropriate. 11 Del. C. § 4206(c). Failure to file authorizations or reports serves as a cancellation of the lobbyist’s registration. *Id.* They may not re-register or act as a lobbyist until all

delinquent authorizations and/or reports are filed. *Id.* Several lobbyists were cancelled for failure to file after several notices. Their reason for not filing was that they were no longer lobbying. It was explained to them that lobbyists must notify the Commission within 10 days of any changes to their status. They also must file a close out expense report for any days they lobbied during the quarter before ceasing to lobby.

IV. Commission Accomplishments in 2006

The Commission's 2006 goals were to: (1) continue emphasizing training in all four areas of the law; (2) increase access to services to those subject to the laws, and the public through its web site; (3) continue meeting or exceeding performance measures used in its budget request, which was to increase training attendance and increase the number of requests for advisory opinions that were responded to in 45 days or less. Training attendance is the most difficult performance measure to meet for the reasons noted below.

The details of the accomplishments in those areas and others follow.

A. Training

STATUTORY MANDATE: The Commission's Counsel is to "assist the Commission in" [its] activities, such as seminars and workshops, educating individuals covered by the law about its requirements and purposes." 29 *Del. C.* § 5808A(a)(1).

While the Commission is statutorily mandated to give training, the law has no counterpart requiring attendance. Only one agency has mandatory training for some of its employees.⁴ Thus, the number of classes and attendees is dependent on voluntary attendance. In its budget request, the Commission projected 430 attendees for its training classes.

In 2006, the Commission's Counsel conducted twenty-two (22) training seminars; an increase of four (4) over last year. However, the number attending—252—was significantly lower than the

509 attending in 2005. However, the 2005 attendance was an anomaly arising from the transition of approximately 125 Fire School training contractors to casual/seasonal positions effective January 1, 2006. Thus, the December 2005 training for those individuals significantly raised the profile of attendees.

Eleven classes (11) were scheduled on the Ethics law, compared to fourteen (14) in 2005. Eleven (11) were on Financial Disclosure Reporting, compared to four (4) in 2005. As noted above, attendance depends on persons volunteering for training. For the first time since training began in 1995, one ethics class was cancelled because no one registered.

Classes focus on specific topics, e.g., ethics, but incorporate references to the: (1) dual compensation law when discussing other employment; (2) lobbying law in discussions on restrictions on representing private enterprises before the State; and (3) Code of Conduct, Financial Disclosure and Lobbying laws in discussing accepting and reporting gifts.

While fewer people attended ethics classes in 2006, financial disclosure classes and attendees increased significantly. The details of attendance and reasons affecting attendance are given below.

(1) Ethics Training

The Code of Conduct training classes continued for the Department of Health and Social Services. It is the only agency with mandatory Ethics training for some of its personnel. That requirement came from a 1998 legislative recommendation⁴ In past years, training was given every quarter. However, only 3 sessions were requested in 2006. These sessions usually have 25-30 attendees, so this decrease in the number of sessions requested was one reason for fewer attendees at ethics training 2006.

Another reason for the lower number of ethics attendees was that since 1998 the Division of

⁴The State Legislative & Citizens' Investigative Panel on Nursing Home Reform issued "The Marshall Report" with recommendations on nursing home care. *February 9, 1998*. It recommended the Departments of Justice and Health and Social Services have workshops for employees with nursing home oversight on obligations under State ethics guidelines. *Marshall Report, p. 18*.

Professional Regulation, Department of State (DOS), included ethics at its annual orientation course for new appointees to the more than 30 Boards and Commissions under the Division. This usually resulted in 60-100 attendees. In 2006, the agenda for the annual gathering underwent a redirection and the Commission's Counsel was not asked to make the usual presentation.

Aside from not having two classes that generally have a fair number of attendees, the 2005 attendance numbers were an anomaly. In December 2005, training was given to the contractual Fire School instructors who were being converted from contractors to casual/seasonal employees at the beginning of January 2006.

In 2005, two (2) local governments requested ethics training for its employees and officials. No local governments requested training in 2006.

In 2006, as in the past ten (10) years, ethics classes were scheduled through the Workforce and Organizational Development Office, Office of Management and Budget (OMB).⁵ The Workforce office coordinates training dates, schedules facilities, handles course registrations, creates and publishes fliers and pamphlets with notices of the courses, and handles other paperwork. This is a resource saver for the Commission as it frees Commission Counsel to focus solely on the training aspect for those classes, and perform other statutory duties. Any State employee, officer or official may register for these courses. In 2006, five (5) classes were scheduled through the Workforce Office on the Commission's behalf. One class was cancelled for lack of registrants.

We expect an increase in attendees in future years because ethics training is now required as part of the certification for the State's Management Development and Human Resource Certificate. These ethics courses also are publicized, scheduled and processed by the Workforce Office.

⁵ Previously, the State Personnel Office, State Training Unit.

(2) Financial Disclosure Training

While the number attending ethics classes dropped in 2006, the financial disclosure training classes drew an usually large number of attendees. The total number of public officers attending training was 111—approximately ½ of the total number of public officers who must file the report. This was an increase of 283% over 2005, when only 39 public officers attended.

As with the beginning of each year, financial disclosure classes were offered in January for public officers who must file an annual disclosure by mid-February. In 2006, there was a significant increase in the number of classes offered. This, we believe, was largely due to the interests of public officers in a new service offered beginning with the 2006 filings—on-line or other electronic means of filing.

A total of nine (9) classes were held in all three counties by Commission Counsel in the 19 work days between January 1 and February 3, 2006. Two (2) classes were open to any of the more than 300 public officers who must file. One was held in Dover and the other in Wilmington. Again, the Workforce Office played a vital role in processing registrations, creating a flier announcing the courses, etc. Twenty-one (21) public officers from various agencies attended these two classes.

Recognizing that not all public officers are available on the training dates that are open to any public officer, the Commission's e-mail announcing the classes offered agencies the option of scheduling a class convenient for its officials. The Judiciary branch was the primary responder. It requested classes in all three counties for its Judges, Magistrates, and Commissioners. The Administrative Office of the Courts coordinated these efforts with the Commission, identified facilities, and established dates convenient for the Judiciary. Four (4) classes were given to sixty-four (64) Judicial officers.

Other agencies scheduling separate training were the Department of Natural Resources and

Environmental Control, the Office of Management and Budget, and the General Assembly. A total of twenty-six (26) public officers attended these three courses.

Financial Disclosure Training has been part of the orientation for new General Assembly members from 1998 until the present--more than 9 years. Other General Assembly members and staffers who escort the new members also attend. The number attending varies based on the number of newly elected officers. In 2006, the abbreviated financial disclosure course was attended by all new General Assembly members and Legislative Hall staffers, for a total of twelve (12) attendees.

B. Advisory Opinions, Waivers, Complaints, and Referrals

(1) ADVISORY OPINIONS AND WAIVERS STATUTORY MANDATE: POWERS AND DUTIES OF THE COMMISSION: To issue written advisory opinions at the request of a State employee, officer, honorary official, or agency, as to the applicability of the law to any particular fact situation. *29 Del. C. § 5809(2)*. The Commission may grant a waiver to the specific prohibitions if it finds that the literal application of the law is not necessary to serve the public purposes of the chapter or finds an undue hardship on an employee, officer, official or State agency. *29 Del. C. § 5807(a)*. The Commission met twelve (12) times in 2006 to act on such matters.

(2) POWERS AND DUTIES OF COMMISSION COUNSEL: “To provide legal counsel to the Commission concerning any matter arising in connection with the exercise of its official powers or duties,” and “assist the Commission in drafting waiver decisions and advisory opinions.” *29 Del. C. § 5808A(a)(2)and (5)*.

In 2006, eighty-six (86) matters were submitted for action. This was an increase of 19 more than in 2005, when sixty-eight (68) matters were submitted. Of the 86 matters, two (2) were complaints: a reduction of two (2) from 2004. One complaint was against a banking establishment, not a State employee, officer or official. The other was a complaint against an attorney whose

professional conduct had already been raised and dealt with by the Court. The Commission found it lacked jurisdiction over both complaints.

The number of matters submitted, as referred to above, is based on each request or complaint filed by an individual. However, the number of legal issues in each request or complaint may be more than one.

(A) Advisory Opinions

Examples of situations where a single individual sought an opinion, and that request raised a number of ethical issues for the Commission to address occurred in at least twenty-two (22) cases, where State employees complied with the legal requirement to file a “full disclosure” if they seek to contract with a State agency, either as a vendor themselves or through a State vendor’s private company. *29 Del. C. § 5806(d)*. The disclosure is a condition of commencing and continuing employment or appointment with the State. *Id.*

The legal issue of whether there was “full disclosure” is determined by whether the Commission can decide from the information in the disclosure if the individual complied with all other Code sections. The individual must disclose information on whether they: (1) reviewed and disposed of the contract decision in their official capacity; (2) contracted with their own agency; and (3) bid on a contract that was publicly noticed and bid if the amount is for more than \$2,000. *29 Del. C. § 5805(a), (b) and (c)*.

The Commission must decide if accepting the outside employment may result in: (1) impaired judgment in performing State duties; (2) making official decisions outside official channels; (3) giving preferential treatment to any person or receiving preferential treatment themselves; (4) using public office for their own personal benefit or gain in obtaining the contract; (5) improper use of confidential information to obtain the contract; and (6) an appearance of impropriety--whether a

reasonable person, knowledgeable of all the relevant facts would still believe that the conduct would appear to violate any section of the Code. If the disclosure does not have sufficient information to answer those questions, then there has not been “full disclosure.” When there is “full disclosure,” but the conduct would violate the Code, the Commission may decide if a waiver is appropriate.

In most cases dealing with contracting with the State, State employees were contracting to be foster parents for the Department of Services for Children Youth and Their Families (DSCYF). Each contract was for more than \$2,000, but they had not been publicly noticed and bid by the State agency. Waivers were requested for that particular provision of the law so they could be contract as foster parents. While these requests were being processed, the State agency was in the process of preparing the public notice of the opportunity for any citizen to be a foster care provider. That process was completed so that State employees no longer need a waiver of that provision to contract with DSCYF as a foster parent. *See, e.g., [Appendix A](#), Advisory Op. No. 06-01, et. al., February 23, 2006.* The Department of Health and Social Services (DHSS) has not yet publicly noticed its foster care contracts, nor have State employees who are already giving foster care to DHSS’s clients file the required “full disclosure.” The Commission has worked with the agency for a number of years trying to resolve this issue.

Aside from those matters, the other requests for advisory opinions related to issues such as nepotism; payment of expenses by a private source; dual government employment; post-employment; serving as a Board member of a private organization, etc.

In one instance, a State vendor alleged that a State employee had a conflict of interest because he was a Board member of a private organization. While the vendor filed a complaint, both parties agreed to resolve the matter through the advisory opinion process rather than through the complaint

process to reduce the amount of time it would take for a decision if the complaint process were used. This required that the State employee waive some of the statutory rights he would be entitled to if it followed the complaint procedure. After waiver of those rights, the State employee responded to complainant's allegations in writing and appeared before the Commission. As there is a "strong legal presumption of honesty and integrity" by public officials, the Commission gave the State employee that presumption. However, it found that even by considering all the facts as the State employee expressed, that his Board member position with the private enterprise was a conflict. Where a conflict is found, the proceedings become a matter of public record. *29 Del. C. § 5807*. In addition to making the proceedings a public record, the Commission said the State employee resign as a Board member. He resigned immediately. *Commission Op. No. 06-57. [Appendix B](#)*.

(B) Waivers - Statutory Mandate: Waivers may only be given if the literal application of the law is not necessary to serve the public purpose, or there is an undue hardship on the State employee or State agency. *29 Del. C. § 5807(a)*. Because a waiver means the individual is being permitted to violate a provision which the General Assembly deemed "so vital to government" that violators are subject to criminal penalties, they are rarely granted. *See, 29 Del. C. § 5802(b)*.

However, as noted above, in 2006, the Commission was asked to grant a waiver for a multitude of State employees who sought to be foster parents. The basis for granting those waivers was because the only Code of Conduct provision with which the State employees had not complied was because the agency had not publicly noticed the availability of foster care contracts. As the State employees had no control over that decision, and as the State agency did start working on the public notice and subsequently achieved that compliance with the Code, the Commission granted waivers to those who had only a violation of that provision. It also granted a waiver to a State employee who would be dealing with his own agency on a foster care matter, but he and his spouse would only be

temporary foster care providers while the paperwork for adoption was going through the system.

C. Publications

Statutory Mandate: Commission Duties: The Commission is to publish synopses of its advisory opinions without disclosing the identity of the applicant if no violation is found, and is to prescribe forms, and publish manuals and guides explaining the duties of individuals covered by the laws the Commission administers. *See, 29 Del. C. § 5807(d)(4); § 5809(8) and (9).* **Commission Counsel Duties:** Assist the Commission in preparing and publishing manuals and guides explaining the duties of individuals covered by the law; give instructions and public information materials to facilitate compliance with, and enforcement of the law. *29 Del. C. § 5808(A)(1).*

In December 2006, the Commission published its Financial Disclosure synopses of opinions, updated through the end of 2006. Copies were mailed in January to each public officer who is subject to the financial disclosure law, to assist them in completing the annual form with the most recent interpretations. At the end of 2006, it also updated its Lobbying Synopses and its Dual Compensation Synopses. Both synopses were printed and ready for distribution by January 5, 2007. The newest versions are on the Commission's web site.

Throughout the year, the Commission continued to distribute its Ethics Brochure which includes references to the revised Merit Rules so that Merit employees will see that they have duties under both the Code of Conduct and the Merit rules regarding their conduct in such areas as outside employment, dual government employment, etc. With the advent of the passage of law to require that minutes be placed on a Statewide calendar beginning in January 2006, the Commission has its most recent decisions during that entire year on its web site.

D. Local Government Codes of Conduct

STATUTORY MANDATE: LOCAL GOVERNMENT DUTIES: Employees and officials of local governments are subject to the State Code of Conduct unless they adopt their own Code of Conduct.

68 Del. Laws, c. 433 § 1. **COMMISSION DUTIES:** Any local government Code and subsequent amendments must be approved by the Commission as being as stringent as the State Code. *Id.* In

In 2006, the Commission added the seventh local government to those which have been approved by the Commission. The Town of Smyrna is the most recent local government with an approved Code. The other six local governments are Dover, Lewes, Millsboro, New Castle County, Newark, and Wilmington.

In 2006, New Castle County submitted three proposed amendments to its local ordinances. One change was to its local financial disclosure ordinance. However, the Commission has no jurisdiction to compare their financial disclosure law to the State disclosure law because local government officials are specifically exempt from the State disclosure law. Thus, any local government can develop its own ordinances on the disclosure law without Commission approval. The other two amendments were to change some preliminary investigation procedures and gift laws in its Code of Conduct. The Commission found the proposed amendments were not as stringent as State law.

E. Legislative Matters

STATUTORY MANDATE: COMMISSION DUTIES: The Commission can recommend to the General Assembly from time to time such rules of conduct for public employees and officials as it shall deem appropriate. *29 Del. C. § 5809(1).*

The Commission tracked many pieces of legislation during the General Assembly's 143 first and second sessions which ended on June 30, 2006. [Appendix C](#). Legislation of particular interest to the Commission is discussed below.

(A) **Budget Bill** – The Commission received an operating budget of \$40, 100. That figure has not changed for eleven (11) fiscal years.

(B) **Senate Bill 131** – Beginning January 1, 2006, Executive Branch agencies must post their public meeting agendas at least 7 days before the meeting and post approved minutes within 5 work days on the Statewide central calendar. Throughout 2006, the Commission met the statutory deadlines in its posting its agendas and approved (non-confidential) minutes on the web. The information is on PIC’s home page, www.state.de.us/pic and is viewed by selecting “Calendar of Events.” As the majority of Commission items are confidential, two sets of agendas and minutes are now required: (1) a confidential set for the Commission’s files, and (2) a non-confidential set for the website. Writing two versions takes some additional administrative time, but the benefit far outweighs that time. Previously, the Commission published synopses of opinions generally on an annual basis. The new mandate means synopses are more immediately available in the form of the non-confidential minutes. As the Commission generally meets once a month that means the information is generally available monthly, rather than yearly.

(D) **House Bill 104** – Eliminated the notary requirement for public officers on their financial disclosure reports. In a House Committee meeting on this legislation, it was noted that public officials are entitled to a “strong presumption of honesty and integrity,” and that removing the notary requirement seemed more consistent with that presumption than having a notary verify the public officer’s signature, especially as the notary does not vouch for any of the reported information. Eliminating the notary requirement also made on-line filing more feasible. As a result, the legislation gave the Commission the option of accepting electronic filings for lobbyists and public officers. After PIC’s database was expanded for on-line filing of financial disclosure reports, the

Commission notified the more than 300 public officers of the option of on-line filing or hard-copy filing. Lobbyists also were given the on-line filing option. Previously, their data was entered into PIC's database, but an original signed copy of the same information was required. The legislation eliminated that requirement.

On-line filing from lobbyists and public officers serves several purposes:

- Customer Service** – convenience; optional; eliminates duplicate documents just to get an original signature; reduces customers paper and mailing costs; reduces customers administrative time as the database is preprogrammed with information that would normally be repetitive typing for each report filed; reduces time to complete the form, and time for copying and mailing; and provides immediate confirmation of filing. That service was not previously available because of the time it would take for the Commission's two person staff to individually notify more than 300 disclosure filers and 270 lobbyists that their reports were received.
- Staff Administrative Work** – reduces amount of paper previously handled by the two person staff; reduces filing space needed for paper documents; easier and faster to track who has filed; who is delinquent; etc., as the on-line data system is designed to track and create reports of that information; saves employee work time, paper and postage cost in mailing reminder notices of filing dates, training classes, notice of receipt of reports, by use of e-mail.
- Taxpayer Benefits** - Decreases taxpayer costs of paper, postage, and administrative work hours; aids in creating a "greener environment" because

less paper is used; easily and quickly generates reports to better serve members of the public seeking information; and reduces some costs associated with acquiring and maintaining floor space and filing cabinets needed for storing paper documents.

These benefits were achieved at the beginning of 2006 because the Commission targeted and planned the on-line filing as a goal in 2005. As a result of the planning, shortly after the legislation was passed PIC contracted with its vendor to expand the database. Also, as a result of planning, PIC did not have to request additional funds to expand the system technology. The database was programmed to add the expansion and testing started shortly before the deadline for notices to go to public officers reminding them of the mid-February filing deadline, and providing them with on-line filing instructions. The response to electronic filing by public officers was very good for the first time filing by mid-January 2006. Of the approximate 300 filers, 173 (57%) filed electronically for the first time.

F. Administrative Issues

(1) Financial Disclosure Reports - Public officers must file Financial Disclosure reports within 14 days of becoming a public officer and by February 15 of each year thereafter. *29 Del. C. § 5813 (c)*. The reports filed under this subchapter shall be made available at reasonable hours for public inspection and copying. *29 Del. C. § 5814 (b)*.

ATTORNEY GENERAL'S FOIA OPINION: In 2006, a *News Journal* reporter requested the Financial Disclosure and Lobbying reports filed by public officers and lobbyist. Original hard copies of the reports were offered for his review and inspection. Further, reports that can be

generated by the Commission's database were given to him. Some copies were made and some documents were scanned onto a disk. During the review, he requested the Commission's database rather than hard copies so that he would have a searchable system more convenient than looking through hard copies. The Commission's position was that the hard copies of the documents were the "best evidence" of what was filed and were the "public records", and were offered, and accepted at least in part. A more particular concern was attached to releasing the databases containing the financial disclosure reports of public officers. By offering hard copies to any person requesting the documents, the Commission had control over the format and knew who had requested the information if it were misused. If the database was issued, not only could the information be manipulated, but if posted to the Internet with such information as the public officer's banking and brokerage houses, and creditors names, etc., that any person in the world could use that information to try to scam, by phone or e-mail, account information from the public officer. Additionally, by linking the personal finance information with the name and position of the public official, there was a concern of identity theft. If the Commission had no control of how the database was used and distributed, it had no means of tracking back to find who had misused the information. The Commission continued to offer the hard copies, but the reporter filed a complaint with the Attorney General's office alleging the Commission would not release its public records, despite the fact that the hard copies had been offered. He further stated that the database should be a "public record" as defined by the Freedom of Information Act. The Commission believed that case law indicated that the government agency could determine the form in which the records were produced, and also expressed its concerns about spamming and identity theft. *Commission's Response to FOIA Complaint without attachments.* [Appendix D](#). The Attorney General's office ruled that the

database itself was a “public record” and must be provided. *Attorney General’s Op. , Unnumbered, August 21, 2006. [Appendix E](#)*. That means that it must be provided not only to the media, but to any person requesting the database. Ironically, two days after that opinion was issued, the *News Journal* ran an article on identity theft through the Internet, noting that it is a growing problem in Delaware and nationwide, and that Delaware had a higher than national average of 2.4 percent as compared to 1.9 percent. *News Journal, “Del. Aims to Protect Citizens’ Computers,” J. L. Miller, August 23, 2006*. In an editorial on that subject, the News Journal praised the efforts of the Governor and the Cabinet Secretary of the Department of Technology and Information for its actions regarding identity theft prevention.

CUSTOMER SERVICE: ANNUAL FILERS: For annual filers who are in office—more than 300-- the Commission sends an e-mail reminder of the filing date. Each officer’s e-mail lists any “gifts” reported by any lobbyist as an item of value to that specific officer. Lobbyists report the recipient’s name if the value exceeds \$50. While public officers only need to report items valued at more than \$250, some choose to over disclose and add this information in their report. The reason for sending the public officer a list of all items reported as spent by the lobbyist on that particular officer, regardless of value, allows the officer to question any reported gift. The Commission facilitates resolving any discrepancies between the officer and the lobbyist. Also, public officers do not always know the exact item value, such as the cost per person at a reception, etc. The listing of value of all items allows the officer to identify if that item must be reported on the financial disclosure report.

Beyond that information and assistance, each officer, through regular mail, gets a package with the Commission’s Financial Disclosure synopses containing all Commission decisions since it

began administering the law in 1995, through the end of the most recent year so any public officer will have a decision on matters that could affect what they must report. Included also are the disclosure form, instructions, and another notice of the filing date. Once the report is filed, it is reviewed by Commission Counsel. If discrepancies or other issues are noted in any part of the form, Commission Counsel calls or e-mails the public officer. Counsel's review includes a comparison of the "gifts" reported by lobbyists, and "gifts" reported by public officers.

CUSTOMER SERVICE: CANDIDATES FOR STATE OFFICE: In 2006, there were 57 candidates for State office. The Commission notifies the candidates of their requirement to file a financial disclosure report. In 2006, the Commission worked with the Board of Elections, as it has in the past, to identify candidates who must file. The Board provides the names, addresses, phone numbers, etc., as the candidates register. PIC's staff enters the information into its database and notifies the candidates. Some of the advantages for public officers who are already in office are available to candidates, depending on whether the candidate gives the information necessary to provide those services. For example, candidates can receive e-mail notices if they have an e-mail address. However, many candidates do not have e-mail or do not give the e-mail address to the Board of Elections. When that occurs, personal letters, rather than personal e-mails, are sent to each candidate. Also, to aid the candidate customers, the Commission worked with the Board of Elections to re-establish a link on the Board's web site so that candidates seeking information on forms to be completed for their candidacy would have "one-stop shopping" by also having the Financial Disclosure link on the Board's web site. That link was dropped when the Board's web site was redesigned and so was not available in 2005. The Commission's web site also has a link to the Election's web site.

In 2006, as in prior years, when information was available indicating that a candidate also held a government job at the State or local level, e.g., State employee who also had an elected job with a municipality, notice also was sent to the candidate regarding not only the financial disclosure law, but also information on the “anti-double dipping” dual compensation law, and information on the possibility that the Federal Hatch Act could have some implication for government employees if their State job had some federal funding. They also were provided with information on the State political activities law. While this Commission has no authority to interpret either, it believed that bringing the information to the candidate’s attention was an additional customer service that would benefit the candidates. This service is a bit difficult to achieve because staff must rely on newspapers to know which candidates are State or local government employees.

NON-COMPLIANCE PENALTIES AND ACTIONS TAKEN: If a public officer willfully fails to file a report, it is a class B misdemeanor. *29 Del. C. § 5815(a)*. If a public officer knowingly files a report that is false in any material respect, it is a Class A misdemeanor. *29 Del. C. § 5815(b)*. The Commission may refer suspected violations to Commission Counsel for “investigation.” *29 Del. C. § 5815(c)*. It may refer the matters to the Attorney General for “investigation and prosecution.”

To establish failure to file, if report is not received by the deadline, notices are sent, including a certified letter saying that failure to file is a misdemeanor. After several notices and no response, Counsel provides the dates and form of notices, and the lack of response, to the Commission. A majority (4) must approve referral to the Attorney General for discretionary prosecution. The notices sent by PIC are part of the record for the element of failure to file. In 2006, the Commission referred 10 matters to the AG after the deadline passed, notices were sent, with no response.

1996

The Commission reached a milestone in 1996 by completing its 10th year of administering the State lobbying law. During those years, it issued the first advisory opinions on the law; the number of registrants grew substantially, and electronic filing was implemented.

(3) Lobbying Activities

At the end of 2006, 270 lobbyists representing 568 organizations had registered-- an increase of 14 (more than 5%) registered lobbyists and 97 (more than 37%) organizations over the 2005 numbers of 256 lobbyists representing 471 organizations. This also increased the total expenditure reports filed with the Commission by the 270 lobbyists to 1,080 in calendar year 2006, as compared to 1,024 in 2005.

Of the 270 lobbyists, all but five (5) have an e-mail address that allows convenient, expedient, and costs saving labor, paper, postage, storage space, etc., as with the financial disclosure system. These figures are better than 2005 when 31 of the 256 lobbyists did not have e-mail addresses. That means more than 98%, as compared to 88% in 2005, can promptly receive reminders to file, delinquent notices, etc. The 2006 legislation, referred to above, allowing the Commission to accept electronic filings, resulted in additional and improved features for lobbyists, as it did for public officers. Previously, they submitted registrations, employers' authorizations, and expense reports to the database, but had to mail a signed original. Now, they merely submit the information to the database, and receive immediate confirmation that it is in the database. When lobbyists initially register, if they give their organization's e-mail address, the database system

automatically generates notice to the lobbyist confirming the information was successfully submitted and notifies the organization and the Commission that the lobbyist has registered on its behalf.

While there are still more than 200 organizations for which the Commission does not have an e-mail address, the system's technology still benefits the staff and those organizations without e-mail addresses. Because so many other organizations have given an e-mail address and receive automatic notice of the registration, the two person staff has more time to expedite services for those who do not. When a lobbyist registers and does not have an e-mail address, Commission staff is automatically notified that the organization has no e-mail address. This eliminates culling through the numerous registrations to identify the lack of an e-mail address. Because the system automatically does the culling and then notifies the staff, PIC's staff can immediately contact the organization and advise them the lobbyist has registered and can confirm the legitimacy of the registration immediately. That means organizations without e-mail can also get same day service, just like those with e-mail.

The benefit of this technical ability was well proven in 2006. In one instance, an organization without an e-mail address was contacted by staff to confirm authority for an individual who registered to represent that entity. The organization had never authorized him to represent it. Prior to the present technology, the lobbyist would register and the employer had 15 business days to file their authorization. After that date, the organization was notified of the failure to authorize the registrant to act. That meant that more than ½ month could pass before the organization was aware the individual had registered and could take action. With technology the entire matter was resolved in less than a day, with PIC acting as the go-between.

The change in the law permitting electronic filing reduced time and costs for the

lobbyists and organizations who had previously been required to mail in signed original reports. It also reduced the amount of paperwork handled, filed, and stored by the Commission's staff. As noted above, the increased number of lobbyists, their organizations, and their reports, would have required personal handling and storage of more than 1,000 pages of expense reports, 540 registration pages, and 1,136 organizational authorizations.

The technology associated with lobbyists benefits the public because it allows immediate updates on PIC's web site of the list of lobbyists and organizations, concurrent with when the registration is submitted. In 2006, beyond having an immediately updated list, the Commission put the lobbying expenditure reports on line. This means the public need not come to the Commission's office to review more than a 1,000 pages of expense reports. This information was already on the Commission's web site even prior to the Attorney General's ruling that the database itself was a public record. Because the database must now be given out, and the information in the database then be manipulated, the Commission's web site is the only official record of the filings.

Registered lobbyists must file quarterly expense reports, identifying the total amount of expenditures made on members of the General Assembly or State employees for such items as food, entertainment, travel, gifts, etc. *29 Del. C. § 5835*. As noted above, the on-line filing has greatly reduced the time and efforts involved by both the lobbyists and the staff.

Lobbying Badges & Homeland Security

Computer technology on lobbyists and their organizations aids the State in homeland security measures. The Division of Motor Vehicles issues lobbyists badges based on bona fide motor vehicle licenses. This is one means of screening who is accessing the General Assembly offices. Further, the Capitol Police checks the badges when the lobbyist goes to Legislative Hall. Finally,

with the Commission's web site continuously updated the Capitol Police and the Motor Vehicles Division can verify that the lobbyists are actually registered with PIC.

V. Funding

For Fiscal Year 2006, the General Assembly appropriated an operating budget of \$40, 100 for the Commission. In the eleven (11) calendar years, its operating budget has remained the same except for the years when all State agencies were asked to cut 2.5% from their operating budgets. The Commission can operate with the same budget by managing its funding not only for the existing year, but through its Fiscal Year Strategic Planning and its calendar year goal setting as reflect in its annual report. In 2006, just as in all prior years, the Commission had planned for an expanded capability of its database. It addressed the changes that would be needed in legislation; pre-programmed the cost to insure funds were available without requesting an increased budget, and calculated the costs savings in other areas to build the technological advancement reserve.

For FY 2007, the Commission requested the same appropriations as in FY 2006.

VI. Future Goals

Emphasis on education of the laws for State employees, officers, officials and local officials, and lobbyists, will continue as the Commission's focus.

As indicated in last year's annual report, future goals are to improve the media quality of the existing training programs, and investigate the possibility of an on-line training program to increase access to training for all who are subject to the laws. Steps toward the on-line training began in 2006, by contacting various vendors who offer on-line training development to review programs created for other government Ethics agencies. It also spoke with Federal Government Ethics

representatives about its own line training program, and will be obtaining from the City of Chicago's Ethics Commission a free copy of its on-line training for just the singular provision on post-employment. The on-line training will help reach more government employees and officials, and will be available on any day and at any time. As the Commission has only its attorney to present training the on-line capability will greatly aid in raising the profile of Ethics in government and extend the Commission's resources in terms of its funding and work by its two person office.

VII. Appendices

Appendix A – Advisory Op. No. 06-01, et. al. – Waivers



STATE OF DELAWARE

DELAWARE STATE PUBLIC INTEGRITY COMMISSION

MARGARET O'NEILL BUILDING
410 FEDERAL STREET, SUITE 3
DOVER, DELAWARE 19901

TELEPHONE: (302) 739-2399
FAX: (302) 739-2398

February 23, 2006

Mr. John Bates
DSCYF
1825 Faulkland Road
Wilmington, DE 19805

*Advisory Op. No. 06-01 thru 06-04; 06-06 thru 06-14; 06-16; 06-18; 06-20; and 06-21
Contracting with State - Foster Care*

*Hearing and Decision by: Chairman David Brumbaugh; Vice Chairs Barbara Green;
Commissioners William Dailey, Barbara Remus, Dennis Schrader and Bernadette Winston*

Dear Mr. Bates:

As you know, the Public Integrity Commission ruled that foster care contracts between State employees and the Division of Family Services (DFS), Department of Services for Children Youth and Their Families (DSCYF), violated several Code of Conduct provisions. Commission Op. No. 05-13. One provision was the mandatory requirement for State employees to file a full disclosure with this Commission. *29 Del. C. § 5806(d)*. Eighteen (18) people who are, or wish to be, foster care providers filed disclosures, curing any violation of that provision for those State employees.

The disclosures allow the Commission to decide if there are conflicts. We address the status of those 18 filers as their particular situation relates to the law and facts.

<u>File No.</u>	<u>Name</u>	<u>Agency</u>	<u>Remarks</u>	<u>Status</u>
05-67	Peter DeRepentigny	DSYCF	See separate opinion	Waiver Granted
06-01	Gayle King	DHSS/DDDS/Stokeley	Violation - § 5805(c)	Waiver Granted
06-02	Terry Hollis	Dept. of Corrections	Violation - § 5805(c)	Waiver Granted
06-03	Shirley Hooper	DHSS/Public Health	Violation - § 5805(c)	Waiver Granted
06-04	Rosalind Stancell	DFS	Violations - § 5805(b) & (c)	Waiver Denied
06-06	Beverly Atkins	DHSS/DDDS/Stockley	Violation - § 5805(c)	Waiver Granted
06-07	Leatha Foreman	DHSS	Violation - § 5805(c)	Waiver Granted
06-08	Joycelyn Brittingham	DHSS/DSS/Pyle	Violation - § 5805(c)	Waiver Granted
06-09	Ralph Smith, Sr.	Cesar Rodney School District	Violation - § 5805(c)	Waiver Granted
06-10	Brenda Barnes	Cape Henlopen School District	Violation - § 5805(c)	Waiver Granted
06-11	Joyce Hayes	Retired State employee	No Violation - § 5805(d) See separate letter	No conflict
06-12	Leonard Nelson	Cape Henlopen School District	Violation - § 5805(c)	Waiver Granted
06-13	Jasper Ray Thomas	Laurel School District	Violation - § 5805(c)	Waiver Granted
06-14	Sharon Y. Fisher	Cape Henlopen School District	Violation - § 5805(c)	Waiver Granted
06-16	Emma Tucker	Lake Forest School District	Violation - § 5805(c)	Waiver Granted

Mr. John Bates
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06-18	Deborah Ryder	Teacher Assistant (?)	Violation - § 5805(c)	Waiver Granted
06-20	Beverly Berry	Brandywine School District	Violation - § 5805(c)	Waiver Granted
06-21	Velvet Siegel	Capital School District	Violation - § 5805(c)	Waiver Granted

(1) State employees must file a disclosure if they have a financial interest in a private enterprise that is regulated by, or does business with the State. 29 Del. C. § 5806(d). Such filings are a condition of commencing and continuing employment with the State. *Id.*

The State regulates foster care providers. Seventeen (17) filers are current State employees, and must file a disclosure. One filer retired as a State employee less than two years ago. *No. 06-11*. As she is not “commencing and continuing employment with the State,” she is not required to file under *29 Del. C. § 5806(d)*. However, former State employees are subject to the post-employment law. *29 Del. C. § 5805(d)*. Her particular facts were previously addressed. *Commission Counsel, Ltr. to John Bates, 01/06/06*. The Commission ratified that letter, finding no post-employment violation. Thus, she may provide foster care without a conflict or the need for a waiver.

(2) State employees may not represent or otherwise assist a private enterprise before the agency by which they are employed. 29 Del. C. § 5805(b)(1). Fifteen (15) filers work for State agencies other than DSCYF. Thus, they are not violating this provision. Two filers, *No. 05-67* and *No. 06-04* are DSCYF employees. Thus, they would be representing or otherwise assisting a private enterprise before their own agency: violating the Code. Based on the particular facts, we grant a waiver to *No. 05-67*. *See, Commission Op. No. 05-67*. No waiver is granted for *No. 06-04* for the following reasons.

(A) Waivers may be granted if there is: (1) an undue hardship on the State employee or the State agency, or (2) the literal application of the law does not serve the public purpose. 29 Del. C. § 5807(a).

(1) “Undue hardship,” means “more than expected or required.” (Cite) We have held that if DFS wanted waivers in a particular case, it could submit information regarding the “undue hardship” on the agency. *Commission Op. No. 05-13*. No such facts were submitted. Regarding the State employee, the hardship placed on that individual is that she cannot enter private dealings with her own agency. That is the hardship placed on all State employees, officers, and even appointees to State Boards and Commissions. That is not an “undue hardship,”—it is not more than is expected or required of others.

(2) Here, the literal application of the law *does* serve the public purpose. The restriction on State employees dealing with their own agency is to insure they do not use their public office to unduly influence co-workers or colleagues; do not receive preferential treatment; etc. *Commission Op. No. 98-23*. It also helps insure that junior employees do not feel pressured by their superiors to accept responsibilities so they can “stay in good” with the “boss.” *Commission Op. No. 03-29*.

State employees have a “personal or private interest” in their full-time job. *Id.* Their superiors have oversight, such as the authority to “hire, fire, and write performance reports.” *Commission Op. No. 02-23, p.5.* When a State employee holds two positions where their superiors have oversight, we noted the dilemma this creates. *Id.* We said: Courts have noted that where the official has supervisory control in one government position over the employees in another position, it can raise concerns that there may be retaliation or conversely, there may be preferential treatment with respect to working conditions, hours of employment or otherwise relaxed enforcement of the rules. *Commission Op. No. 02-23 (citing Belleville v. Fornarotto, 549 A.2d 1267, 1274 (N.J. Super., 1988)).* Moreover, allegations may be made by other employees of misuse of government office or double-dipping by their co-worker, etc. See, *Mississippi Dep’t of Human Services v. Carolyn*, 869 So. 2d 1013 (Miss., 2004); *Commission Op. No. 03-37 (co-worker accused State employee of improper use of public office in foster care decisions when State employee’s home became foster care home to child who was client of State employee); Commission Op. No. 03-37(Delaware State employee accused of double-dipping because she was full-time employee and also contracted with her agency as a foster care provider).*

That is the problem here. DSCYF employees may feel pressured to become foster parents if their supervisor or a senior level official makes seeking foster care providers from in-house part of their agenda. An employee may not want to be a foster care provider, but feel pressured to do so-- afraid of a lower performance evaluation if they do not, or viewed as getting preferential treatment if they do. Those concerns were addressed at length in our prior opinion.

Further, we have noted concerns about the workload of DFS employees. *Commission Op. No. 05-13 (citing: In re: John Davis, Jr., State of Delaware Child Protection Accountability Commission, May 3, 2005.* Aside from that, DSCYF and the Foster Care Task Force noted that the primary need is for foster parents for children who are difficult to place because of emotional and other issues. If DSCYF employees already have more than a full plate, they do not appear to be the ideal resource for becoming foster care providers for children who need the most care.

Here, the literal application of the law is necessary to serve the public purpose—which is to insure that decisions made about foster care providers are not effected by the fact that a co-worker or colleague is a foster care provider for the reasons detailed herein—that it places both the foster care provider and the co-worker/colleague in difficult positions when their own work load already requires many demands, not only on their time, but their emotions.

(3) State employees may not review or dispose of matters if they have a personal or private interest that may tend to impair judgment in performing official duties. 29 Del. C. § 5805(a). Except for No. 05-67, no filers, in their official capacity, make decisions about foster care providers. For No. 05-67, a conflict can be avoided by recusal in areas identified in the separate opinion.

Mr. John Bates
February 23, 2006

(4) **State employees nor private enterprises in which they have a financial interest, may seek a State contract if the contract is for more than \$2,000 unless it is publicly noticed and bid. 29 Del. C. § 5805(c).** DSCYF submitted documents showing that it publicly noticed and bid an RFP for **private companies** to serve as vendors for foster care services. Several companies contracted with DFS. One filer, No. 06-04, works through one of those vendors: Children and Families First. Thus, No. 06-04 is not violating this provision. As 06-11 is a former employee, she is not violating this provision. That leaves 16 filers, who at the time of the filings and the Commission's consideration were violating this provision, as the public notice and bidding did not cover individual contracts. "Private enterprise" is "any activity by any person, whether conducted for profit or not for profit." 29 Del. C. § 5804(a)(*emphasis added*). "Person" includes "corporations, companies, associations, firms, partnerships, societies and joint-stock companies, as well as individuals." 1 Del. C. § 302(16)(*emphasis added*); *Commission Op. No. 94-10*.

DFS did not believe the "agreements" were "contracts." First, that argument is inconsistent with DFS's action. If DFS did not think an "agreement" to provide foster care services was a contract, then why publicly notice and bid it for private companies who find individuals to be foster care providers? Second, that argument is inconsistent with the common and ordinary meaning of the terms as "agreement" is usually synonymous with "contract." *Black's Law Dictionary*, p. 67 (6th ed., 1991); *Merriam Webster's Collegiate Dictionary*, p. 24, (10th ed., 1993).

DFS also said foster care providers are "volunteers." It believed "volunteers" were not "contracting" because they were not compensated. The plain and ordinary meaning of "volunteer" is "a person who gives his services without any express or implied promise of remuneration." *Black's Law Dictionary*, p. 1576 (5th ed., 1991). Payments are expressly given for foster care.

DFS asked if the public notice and bidding to private enterprises were sufficient to comply with the law. We find it insufficient. First, the plain language of the law requires public notice and bidding whether for a private company or an individual. Individuals were not included. Second, the obligations and duties of private companies are different from the terms for the actual foster care providers. Thus, public notice and bidding to obtain private companies to seek out foster care providers is insufficient to count as the required notice. In fact, public notice and bidding only to private enterprises companies may make the public think that individuals cannot go directly to DFS to become foster care providers.

DFS also believed meeting with various groups might suffice as public notice and bidding. However, interviews with most of these filers showed they were not aware of the opportunity as a result of DFS efforts. Rather, most were aware because of their own prior exposure to foster care as children; as providers in other States before coming to Delaware, etc. That is a microscopic survey. However, combined with DFS's own statements that it meets with


groups who are interested in foster care to talk about the need for providers, and combined with the Foster Care Task Force report that said it recognized “that satisfied foster parents are the best recruiters of new foster parents,” it appears that DFS is “preaching to the choir.” That approach limits the opportunity for individuals to become a foster parent because they do not hear about the opportunity. The whole purpose of public notice and bidding is to reach the most people possible. Thus, meetings with groups already interested in foster care is not sufficient.

While DFS is working on the public notice and bidding, a waiver must be considered for the 16 filers to whom this provision would apply. A waiver may be granted if there is an “undue hardship” on the agency or the employee. *29 Del. C. § 5807(a)*. As the agency is able to, and is rectifying the problem for the future, no waiver is needed for the agency, as it was already given time to get that problem resolved. The “undue hardship” for the filers is that they prepared to be foster parents by meeting the specifications, e.g., home-study, background investigations, etc. They took all the steps they could to comply, but had no authority or control of the public notice and bidding process. Accordingly, the Commission waives compliance with provision for these filers.

Conclusion:

The Commission finds no violation of the post-employment law (No 06-11). The Commission grants a waiver of the requirement for public notice and bidding for these individuals who filed before DFS had publicly noticed and bid the opportunity; the Commission grants a waiver for No. 05-67 with the limits imposed in a separate opinion; and denies a waiver for DFS and its employee (No. 06-04).

Sincerely,


P. David Brumbaugh, Chairman
Public Integrity Commission

PDB:JAW:ab

cc: All Disclosure Filers

Appendix B – Advisory Op. No. 06-57 – Violation Found



STATE OF DELAWARE

DELAWARE STATE PUBLIC INTEGRITY COMMISSION

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November 3, 2006

Alan Zaback, Director
DHSS
1901 N Dupont Highway
New Castle, DE 19720

Advisory Op. No. 06-57 – “Personal or Private Interest” Board Member
Hearing and Decision by: Chairman Terry Massie, Vice Chairs Barbara Green and Bernadette Winston; Commissioners William Dailey, Barbara Remus, and Dennis Schrader

Dear Mr. Zaback:

The Public Integrity Commission reviewed the correspondence of CHEER, Inc., a State contractor, and your three letters, on whether it is a conflict if, as the Division Director responsible for the home-delivered meals (HDM) program, you also are a Meals on Wheels Delaware (MOWD) Board member. Beyond the written materials, we heard your statements and Ms. Nirmala Abraham's, ¹ the Division's nutritionist for HDM.

First, we note that CHEER² did not file a formal complaint. It asked that you seek PIC's advice. You did so. Second, you and CHEER do not agree on most of the facts in CHEER's letter. As a State official, you are entitled to a presumption of honesty. *Beebe Medical Center v. Certificate of Need Appeals Board, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995)*. However, even with your facts and looking only at financial areas, your dual duties create conflicts which recusal cannot remedy.

I. Application of Law to Facts

The Code of Conduct provides that:

(1) State employees may not review or dispose of State matters if they have a personal or private interest that tends to impair judgment in performing official duties. 29 Del. C. § 5805(a).

²Mr. Zaback says CHEER Director, Arlene Littleton, is an MOWD Board member so she has a conflict. If he is alleging a conflict under the State Code, it applies to State employees and officials not private vendors. If he is alleging a conflict under MOWD rules or by-laws, we have no jurisdiction over MOWD's corporate by-laws and rules.

Your personal and private interest is as an MOWD Board member. Board members have a fiduciary duty to their organization. *Oberly v. Kirby*, 592 A.2d 445 (Del., 1991)(*Board Director owes fiduciary duty as corporate officer and member*). MOWD is directly linked to your review and disposal of HDM contracts. Your State duties include:

- (A) staying current on HDM State and Federal rules governing program aspects;
- (B) negotiating with, and selecting contractors to provide HDM;
- (C) managing HDM State and Federal funds and contractors' administrative and meal costs;
- (D) working with contractors to cut costs or find other funds if they exhaust State and Federal funds; and
- (E) monitoring contract compliance, including use of MOWD funds

In your State job, you negotiate the contracts, considering availability of State and Federal funds, etc. If a contractor is selected, you suggest how they may cut costs on administration or meals to stretch funds. If they deplete State and Federal funds, MOWD funds only for unfunded meals, not administrative costs. Your actions affect MOWD.

(A) *Your State decision to not award a State contract*: Your non-selection cuts off MOWD as a resource for those entities. Your State decision bars *any* decision by MOWD's Board on funding that entity. You, alone, make the Board's decision through your State decision. Interestingly, while depriving the Board of its power, your State decision helps MOWD. When you make a State decision that is also the Board's decision, you are "serving two masters"--the essence of a conflict. *In re: Ridgely*, 106 A.2d 527 (Del., 1954).

(B) *Your State decision in Negotiating Contracts*. In negotiating, you work to get contractors to reduce administrative and meal costs. Again, your decision affects MOWD. If you get the contractor to reduce meal costs, it stretches State and Federal funds, but also reduces MOWD's costs for unfunded meals.

(C) *Your State decision to Grant a Contract*. Once you award a contract, you monitor compliance, including use of Federal and State funds. Once those funds are gone, MOWD may fund unfunded meals. You discuss with contractors what MOWD will or will not fund. You and/or your staff attend MOWD meetings on funding a contractor. Those meetings are not always limited to just funding unfunded meals. At the MOWD meeting on whether to fund CHEER's unfunded meals, your nutritionist said that CHEER's administrative costs were too high. Administrative costs are not MOWD funded. Those costs are what you negotiate. In discussing that information, when it apparently was not necessary, you were in a position to have your official judgment questioned (if administrative costs are too high, why did you enter the contract?) Also, if you/your staff say administrative costs are too high, it calls into question on whose behalf you are acting. It reads like a non-funding recommendation, although MOWD does not pay those costs. Your fiduciary duty to MOWD includes trying to save costs. *Oberly, supra*. (*Board members have special duty to advance charitable goals and protect assets of non-profit*). . Also, as a Board member, you may influence its decision. Your duty to MOWD and ability to influence it, casts a shadow over whose interests you are serving.

(D) *Monitoring Use of MOWD's Funds*. When MOWD pays for unfunded meals, you monitor use of its funds. You said this is not your official duty. That means you are working for the State and a private company concurrently. As a Board member, you have a fiduciary interest

in the funds, which overlaps your State duties. Your dual duties could certainly clash, if your monitoring did not catch improper use of MOWD's funds.

(2) Division Directors may not represent or otherwise assist a private enterprise on matters before any State agency. 29 Del. C. § 5805(b)(1).

You said that as a Board member, you give MOWD information on contractors; State and Federal funds; State and Federal rules; monitoring of contract compliance, etc. In effect, at MOWD you perform your State job.

As a Board member, with a fiduciary duty, you are to know MOWD's finances. In fact, you raised funds for MOWD as a member of its "Kitchen Cabinet." *"Meals from the Masters," Cookbook, 2006, p. 17.*

The Board listens to and evaluates your State performance as part of its decisions on fund raising, expenditures of funds, etc. For example, it seeks some funds through State grants-in-aid. In other words, you assist the private enterprise in deciding if it will seek a State grant.

Further, your State program, in part, depends on MOWD. When you go through your State budget process and seek funds, you also, as a Board member, know about MOWD's finances. If the State is low on funds for your program, you know MOWD may have to pick up the costs of more unfunded meals. When you go to the State for funding, it is likely your Department head, the Budget office, and the General Assembly are (or should be aware of) MOWD funding assistance to your contractors. Questions about that funding would be directed to you in your official capacity. However, as you are a Board member, expected to know MOWD's finances, your response could be seen as an MOWD decision—which would be representing the private enterprise before the State.

In other words, your two roles come full circle. Your State job drives MOWD activities, and your MOWD role drives your State activities. It blurs the line of where you start and end your State and MOWD duties.

(3) State officials may not engage in conduct that may raise suspicion among the public that they are engaging in conduct that may violate the public trust. 29 Del. C. § 5805(a). This is basically an appearance of impropriety test. Commission Op. No. 92-11.

The Code does not require actual misconduct, only the appearance of misconduct. *Commission Op. No. 92-11; Refine Construction Company, Inc. v. United States, U.S. Cl. Ct. 12 Cl. Ct. 56, 62 (1987)*(interpreting federal restriction prohibiting any adverse effect on the public's confidence in its government. Court held that "an actual or apparent conflict of interest need not be found") Here, your dual roles raised a contractor's concern. Before that, MOWD discussed not having a Board member from your Division. *Refine, supra.* (where just one person suspected a conflict, the Court considered that fact as some evidence of at least the appearance of a conflict). Whatever their concerns, there is a clear and significant overlap in your State and MOWD duties. State duties "must command precedence" over personal and private interests. *In re Ridgley, supra.* When you simultaneously perform the same duties, the State duties are not commanding precedence. See, *Van EE v. EPA, 55 F. Supp. 2d 1 (D. C. District Court (1999))*(interpreting Federal restriction on representing or assisting a private enterprise before Federal agency or the appearance of such—

“there is a clear public interest in preventing government employees from allying themselves actively with private parties.”).

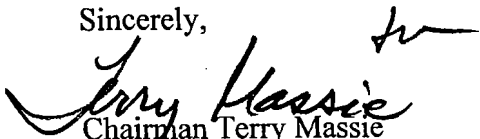
Also, in negotiating contracts you are privy to confidential information. In fact, the contract you signed with CHEER, as the approving State official, had a confidentiality provision. That contract was active when CHEER met with MOWD and was subject to renewal in September 2006. *See, Contract extract attached.* CHEER was concerned about confidentiality. You said no names or salaries of CHEER’s staff were given. The contract language does not identify what information is confidential, and we have no authority to interpret the State’s contract language.

However, this is another area where contractors or the public can call your dual roles into question. You gain confidential information in the contract process. Your dual roles make you closely identified with MOWD. When your State and private duties are so overlapping, the public may well suspect that your private interests may raise suspicion that even inadvertently, you would disclose such information to MOWD.

II. Conclusion

We explained how your State job impacts on MOWD, and how your MOWD decisions impact on your State job. As a result, contractors and the public could well suspect that in reviewing and disposing of the State contracts, your judgment may tend to be impaired. They also could well suspect that you are representing or otherwise assisting the private enterprise. Because of the significant overlap in your State and MOWD activities, recusal cannot cure your conflict. To insure your State duties command precedence, you are advised to resign from the MOWD Board.

Sincerely,


Chairman Terry Massie
Public Integrity Commission

cc: Arlene Littleton

Appendix C – Legislation Monitored by the Commission

143rd General Assembly - 1st & 2nd Sessions - January thru June 2005 & January thru June 2006

SENATE LEGISLATION			
BILL #	SYNOPSIS	REASON FOR MONITORING	STATUS
<u>S.B. 24</u>	Provides for interim management of certain State agencies pending enactment of legislation to provide for the efficient reorganization of State government. See final legislation, H.B. 229 below	Includes interim management of Public Integrity Commission.	Passed Senate 1/27/05 House Appropriations Committee 02/04/2005
<u>S.B. 33</u>	Permits members of public bodies to participate in regular meetings by electronic means under certain conditions: meetings in public place; communication among public body members seen or heard by public attendees. This alternative to physical presence of members is not available if a verbatim transcript of the proceeding may be necessary. EX: Members of professional regulatory boards could not attend disciplinary hearings by phone. Electronic participation permitted at routine meetings that require minutes, but not a verbatim transcript.	Would apply to routine PIC meetings.	Senate Sunset Committee 03/17/2005 Out of Committee - 6/29/05 Amended – Sent back to Sunset Committee 1/24/06.
<u>S.B. 41</u>	Establishes the Division of Human Relations to perform administrative, ministerial, fiscal and clerical functions of the State Human Relations Commission.	Creates new Division; will require updating the financial disclosure computer data base and mail labels when a Division Director is named.	Signed - 7/06/06.
<u>S.B. 42</u>	Code of Conduct to apply to Board of Pharmacy members. See, S.B. 346 below	Code has always applied to Board & Commission appointees. 29 <i>Del. C.</i> § 5804(6) and (12)(a)(2). Cross reference in the Board's enabling law should heighten awareness of the Code.	Senate Sunset Committee 03/15/2005 Substituted 6/29/05
<u>S.B. 116</u>	Presently, Thoroughbred Racing & Harness Racing Commissioners may not have a legal/beneficial interest in a firm, association or corporation that races horses in Delaware. Delaware residents involved in horse racing can serve on the Commissions if they agree not to race their horses in Delaware. Maryland's law is less restrictive: only a majority of Racing Commissioners cannot have a financial interest in racing in that State. This Bill would conform Delaware's law with Maryland's law.: prohibiting Commissioners from participating in proceedings if their interests may be affected. The Bill has a three-year sunset provision.	The enabling law for the Racing Commission is more stringent than the State Code of Conduct. The proposed legislation would be consistent with the Code of Conduct which prohibits honorary State Officials (appointees to Commissions) from reviewing or disposing of matters where the official or a close relative have a financial interest. See, 29 <i>Del C.</i> § 5805(a).	Defeated 06/08/2005

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<u>S.B. 131</u>	Amends FOIA to require posting of agendas and minutes of open meetings of Executive Branch public bodies online to a central calendar available to citizens through the State's web portal to improve citizen access to public information. Applies only to Executive Branch agencies that are subject to FOIA's open meeting requirements. Meetings of any State political subdivision, the Legislative and Judicial Branches are exempt.	Would apply to PIC.	Signed 7/12/05
<u>S.B. 196</u>	Provides that the Code of Conduct applies to Board of Plumbing, Heating, Ventilation, Air Conditioning and Refrigeration Examiners.	Code has always applied to Board & Commission appointees. 29 <i>Del. C.</i> § 5804(6) and (12)(a)(2). Cross reference in the Board's enabling law should heighten awareness of the Code.	Signed into law 6/27/06
<u>S.B. 250</u>	Fiscal year 2007 - Governor's proposed budget. See, Senate Bill 350	PIC's recommended budget is \$183,900. No increase in operating expenses; \$40, 1000 of total..	Senate Finance Committee 1/26/06
<u>S.B. 275</u>	DHSS Div. of Services for Aging & Adults with Physical Disabilities and Commission for the Blind may solicit/accept grants, gifts, etc. They are bound by the Code of Conduct.	Is consistent with PIC's ruling that agencies cannot solicit gifts w/o statutory authority and even with such authority, acceptance must comply with the Code of Conduct	Signed 7/6/06
<u>S.B. 346</u>	Provides that the Code of Conduct applies to Board of Pharmacy members. See, Senate Bill 42, above	Code has always applied to State Board & Commission appointees. 29 <i>Del. C.</i> § 5804(6) and (12)(a)(2). Cross reference in the Board's enabling law should heighten awareness of the Code.	Sunset Committee 6/10/06 Health & Social Services committee 6/8/06

143rd General Assembly - 1st & 2nd Sessions - January thru June 2005 & January thru June 2006

S.B. 350	Appropriations – FY2007	<p>PIC Appropriations: \$183,900 (recommended in Governor’s proposed budget). No increase in operating expenses. Increase in mileage rate for travel – 40 cents per mile effective July 1, 2006 – Staff and Commissioners receive mileage for travel as permitted by law Allows DHSS to spend funds designated as employee recognition funds on volunteers and non-State employees. Appears to overturn Commission’s prior ruling Notwithstanding the Code of Conduct, DHSS employees who served as contract foster care providers for the Div. of Developmental Disabilities Services, may continue to serve. Overturns Commission’s ruling.</p>	Signed – 7/1/06
S.B. 372	Mirrors Political Activities Restrictions in the Federal Hatch Act for State employees. Applies to Department of Justice employee.	<p>PIC administers the dual compensation law for State employees holding concurrent government positions. When it learns of dual positions, it notifies the employee of possible application of: (1) the dual compensation law; (2) Ethics restrictions on holding other employment, (3) Personnel Law restrictions on political activity; (4) Merit Employee rules on political activity and dual positions; and (5) if the State position is federally funded they may need to comply with the Federal Hatch Act. The letter also gives the Federal web site with opinions on applying the Hatch Act to State employees. The Commission has no jurisdiction over the Political Activity restrictions, Merit Rules, or Federal laws, but it identifies the contact source for information. If this legislation passes, the Commission will add a reference to this law.</p>	Signed – 7/10/06

143rd General Assembly - 1st & 2nd Sessions - January thru June 2005 & January thru June 2006

S.B. 400	Grant in Aid Appropriations: Section 6. (a) No funds in this Act shall be spent in a political campaign or for partisan political purposes. (b) No funds in this Act may be used to hire lobbyists.	Informational knowledge for State lobbyists.	Signed – 07/01/06
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143rd General Assembly - 1st & 2nd Sessions - January thru June 2005 & January thru June 2006

HOUSE LEGISLATION			
BILL #	SYNOPSIS	REASON FOR MONITORING	STATUS
<u>H.R. 3</u>	Permanent Procedures of the House of Representatives of the 143rd General Assembly of the State of Delaware for Ethics Violations.	To respond to inquiries from the public and from lobbyists on rules of procedure and ethics for General Assembly members. Jurisdiction of ethics for House members, like Senate members, is covered by their rules and the Legislative Conflict of Interest law. Title 29, c. 10.	Resolution Passed 1/11/05. Senate Finance Committee 6/7/05
<u>H.R. 4</u>	Rules of the House. Includes rules that House Members must comply with Financial Disclosure Law, Rule 16(d)(IV)(7); that Lobbyists register as required by the Lobbying Law, Rule 54; and provides rules on lobbyists taking the House floor to speak, Rule 57(a).	Assist House members and lobbyists in complying with the Rules. PIC sent letter to House last year noting that the citation in Rules 54 and 57 on lobbyists should be 29 Del. C., c. 58, subchapter 4, but Rule 57 uses the old citation, 29 Del. C., c. 16.	Resolution Passed - 1/11/05. Citations to Rules 54 & 57 corrected.
<u>H.B. 14</u>	An Act to Amend Chapter 171, Volume 58, Laws of Delaware. If amended, the Cheswold Charter would eliminate the one year waiting period for former council members to be employed by the Town of Cheswold.	The post-employment law, 29 <u>Del. C.</u> § 5805(d), has a two-year waiting period on certain matters. Applies if the individual is hired by a "private enterprise." This apparently is a contract with the Town for an entirely new position.	House Passed. Senate Passed. 1/27/05 Signed 02/09/2005
<u>H.B. 35</u>	Governor's Proposed Budget - See H.B. 300 - Final Budget Legislation	Proposes \$174,400 for the Public Integrity Commission. No increase in appropriation of operating costs. - Approved \$174, 200	See H.B. 300 House Appropriations Committee 1/4/05
<u>H.B. 61</u>	Changes the existing rate of 31 cents per mile to "the federal reimbursement rate as established in the IRS Code annually.@"	Would increase PIC operating costs for travel.	House Appropriations Committee 02/15/05
<u>H.B. 72</u>	Provides that the State Code of Conduct applies to all Nursing Home Administrators' Board of Examiners members.	Code has always applied to Board and Commission appointees 29 <u>Del. C.</u> § 5804(6) and (12)(a)(2). The cross reference in the Board's enabling law should heighten awareness of the Code.	House Policy Analysis & Gov't Accountability Committee 3/16/05 Out of Committee 06/01/2005 Senate Sunset Committee 6/22/05

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<u>H.B. 73</u>	Provides that the Code of Conduct applies to Council on Real Estate Appraisers members.	Code has always applied to appointees to State Boards and Commissions. 29 <i>Del. C. §5804(6) and (12)(a)(2)</i> . The cross reference in the Board's enabling law should heighten awareness of the Code.	Signed 7/07/05
<u>H.B. 74</u>	Provides that the Code of Conduct applies to Board of Pension Trustees members.	Code has always applied to appointees to State Boards and Commissions. 29 <i>Del. C. § 5804(6) and (12)(a)(2)</i> .The cross reference in the Board's enabling law should heighten awareness of the Code.	House Policy Analysis & Gov't Accountability Committee 03/16/05 Out of Committee 06/01/2005 Senate Sunset Committee - 6/28/05
<u>H.B. 104</u>	Permits PIC to accept electronic filings of lobbying & financial disclosure reports. Includes some technical amendments.	Legislation supported/recommended by PIC.	Signed 6/23/05 75 Del. Laws, c. 57
<u>H.B. 215</u>	Provides that the Code of Conduct applies to the Board of Professional Counselors of Mental Health, Chemical Dependency Professionals, & Marriage & Family Therapists members.	Code has always applied to appointees to State Boards and Commissions. 29 <i>Del. C. §5804(6) and (12)(a)(2)</i> .The cross reference in the Board's enabling law should heighten awareness of the Code.	Signed 6/30/05.
<u>H.B. 299</u>	Reorganizes State Government to eliminate the Department of Administrative Services and create the Office of Management and Budget.	Assigns PIC to Department of State for administrative and budgetary purposes. Creates new Division level equivalents in OMB. "Public officer" list will need to be updated with new positions and names of appointees.	Signed 6/30/05
<u>H.B. 300</u>	FY07 Appropriations Bill – Governor's Proposal	Proposes \$174,400 for PIC. No increase in operating costs. (H.B. 35) The General Assembly appropriated \$174, 200.	Signed 7/01/05
<u>H.B. 315</u>	Grant in Aid Appropriations: Section 6. (a) No funds appropriated in this Act shall be expended in a political campaign or for partisan political purposes; (b) No funds appropriated in this Act may be used to hire lobbyists.	Informational knowledge for State lobbyists.	Signed 7/01/05

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H.B. 396	Requires Annual Training in personnel management for all new division directors and all human relations employees.	PIC has statutes overlapping with Merit Rules. Presently, handouts are given to Human Relations Trainers, with information on the Ethics law and that HR course attendees may attend Ethics training. However, there is no insurance they will attend. PIC will continue to provide handouts. Question should language be added requiring Ethics Training? Also, Division Directors must file financial disclosure reports, within 14 days of becoming a Division Director, and each year thereafter so that information will be added to handouts for Division Directors who attend.	Passed House: 6/15/06 To Senate Industrial & Labor Committee – 6/20/06
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H.B. 411	Subject to funds in the Appropriations Act, the section of financial disclosure reports on gifts received by Public Officers, would be made available on PIC's website.	PIC administers the financial disclosure laws and maintains its own web site.	House Admin Comm. 5/3/06- Passed 6/13/06 Senate Judiciary Comm. 6/14/06
H.B. 427	This Bill will require that any gift received by a public officer with a value in excess of \$50 in a calendar year be disclosed by that public officer and the lobbyist shall report any expenditure and who the recipient is when the expenditure exceeds an aggregate of \$50 per reporting period.	PIC administers financial disclosure & lobbying laws.	House Administrative Committee: Tabled
H.B. 482	Establishes a Division Director of Capitol Police.	All Division Directors must file a financial disclosure report within 14 days of becoming a Division Director, and annually thereafter. If passed, the Commission will notify the individual selected of the requirement	Signed 06/28/2006
H.J.R. 24	Directs MERB to enhance distraction of information to State employees about their rights, rules and procedures for contesting discipline through a State web site.	Some laws administered by PIC overlap Merit Rules, e.g., the Code of Conduct and Merit rules restrict other employment in the public & private sector; restrict gift acceptance, etc. If passed, the Commission may consider asking MERB to add references to the Code of Conduct so State employees will know they need to comply with both restrictions.	Passed by House. Senate Labor & Industrial Relations Committee 06/20/2006
H.B. 461	Amends Freedom of Information Act to apply to non-citizens of the State of Delaware.	FOIA applies to PIC. Non-State citizens are registered with PIC as lobbyists, so it already provides public records to non-State citizens on request; most of that information is on PIC's web site & available to any person	Passed House Senate Judiciary Committee
H.B. 473	Requires contracts entered into by a State employee, official or agent with any vendor be approved as to form by the Department of Justice.	PIC has its own authority to enter contracts.	House Judiciary Committee – 6/7/06

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H.B. 505	Department of Technology to develop acceptable use policy for e-mail use for every State agency, addressing monitoring of e-mails; written warning; directions to cease activity.	PIC's staff has State e-mail system. Current DTI policy on acceptable use has been signed by staff.	House Telecommunications, Internet & Technology Committee – 6/14/06
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Appendix D – Commission’s Response to FOIA Complaint



STATE OF DELAWARE

DELAWARE STATE PUBLIC INTEGRITY COMMISSION

MARGARET O'NEILL BUILDING
410 FEDERAL STREET, SUITE 3
DOVER, DELAWARE 19901

TELEPHONE: (302) 739-2399
FAX: (302) 739-2398

July 24, 2006

Carl C. Danberg, Attorney General
Department of Justice
Carvel State Office Building
820 N French Street
Wilmington, DE 19801

Dear Attorney General Danberg:

This letter responds to Mr. Cris Barrish's allegation that the Public Integrity Commission (PIC) has not complied with the Freedom of Information Act (FOIA). PIC has continuously made its records available to him, complying with FOIA. It did not have its Information Technology vendor prepare a database, as requested by Mr. Barrish, and gave reasons, including the fact that it is already complying with FOIA. (*Atch-A, PIC ltr to Mr. Barrish*).

I. Public Records Maintained by PIC

PIC's statute, with reference to FOIA, says: "reports filed pursuant to this subchapter shall be made available at reasonable hours for public inspection and copying pursuant to Chapter 100 of this title." *29 Del. C., ch. 58, subchapter II, § 5814 (b) [financial disclosure] and subchapter IV §5836(b)[lobbying]*. The subchapters require the following information:

(1) financial disclosure: name, position; source of assets exceeding \$5,000 (e.g., real estate, banks, brokerages) of public officers, their spouses and children; creditors; other income sources; capital gains, reimbursements, honoraria and gifts exceeding \$250. *29 Del. C. § 5813*.

(2) lobbyists' registration; employers' authorization; and quarterly expense reports. Registrations and authorizations require: lobbyist's and employer's name, address, occupation; date lobbying began; employment length; subject of lobbying. *29 Del. C. § 5832 and 29 Del. C. § 5833*. Expense reports list employers' direct expenditures on State officials, in six categories; total of all expenditures; and recipients of gifts exceeding \$50. *29 Del. C. § 5835*.

II. Public Integrity Commission Complied with the Letter of the Law

PIC has repeatedly given, and continues to offer, Mr. Barrish access to “inspect and copy” the records, as required by its statute and FOIA.

Mr. Barrish’s initial request was on or about May 15, 2006. On May 16, 2006, he came to PIC’s office and was given lobbying and financial disclosure reports to inspect and copy. He returned on other occasions and again had access to the records. After selecting some records to copy, he asked to use PIC’s copier and not be charged. He was allowed to do so. PIC’s Administrative Assistant also printed some documents for him. (*Atch B, Longshore Affidavit*).

Many other documents were downloaded, converted to Adobe, and saved to a Compact Disc (CD) for his review outside of PIC’s office, and at times other than PIC’s office hours. (*Atch C*). More than 200 pages were provided: lobbyists’ expenditures on public officers (2005 -1st Quarter 2006),¹ list of lobbyists, their employers, public officers with addresses, etc. (*Index C-1*)(*copies of all documents w/original of this letter*). The information was complied from the reports, but in a more convenient format.

Mr. Barrish was offered other public records: Opinion Synopses of Financial Disclosure (140 pages) and Lobbying laws (52 pages): and an Ethics book of all 50 States’ laws to compare statutes. (# pages not counted, but book is approximately 1" thick) (*Atch C*).

He was advised that *News Journal* reporters, J. L. Miller and Pat Jackson, had copies of individual quarterly reports going back to the beginning of 2005, and financial disclosure reports filed in 2006, and earlier, to save costs and to review at his convenience. (*Atch D, J. Wright to C. Barrish, e-mail, May 15, 2006, 2:47 p.m.; and May 17, 2006, 2:48 a.m.*).

He was advised that PIC’s IT vendor was creating a program to have the lobbying expense reports on PIC’s web site.) He was promptly notified when they were available. (*Atch D, e-mail, J. Wright to C. Barrish, June 27, 2006, 2:27p.m.*) He, or any citizen, can access the reports (2002 - 1st Quarter of 2006), at no charge, to review at their convenience.

At the time of and after those actions, Mr. Barrish was offered access to the records on numerous occasions. (*Atch D, e-mail, throughout; Atch A*). They are still offered, along with the other materials.

PIC complied, and will continue to comply, with the law in its statute and FOIA.

III. Public Integrity Commission complied with the Spirit of the Law

FOIA’s purpose is to allow citizens to observe the performance of public officials and monitor decisions by such officials in formulating and executing public policy. *29 Del. C. § 10001*.

¹These lists also calculate lobbyists’ total expenditures during each quarter. This is not a statutory requirement. However, it serves the public by eliminating review of every individual lobbyist’s file, and the calculation of all entries to find a total.

The Commission's duties relating to these reports and laws include: prescribing forms to be used by filers; publishing synopses of opinions, determining if lobbyists and public officials filed reports, and providing public records to support performance of those duties. *29 Del. C. § 5809(8)(forms); 29 Del. C. § 5807(d)(4)(synopses); 29 Del. C. § 5815 and 29 Del. C. § 5837 (failure to file penalties).*

The records Mr. Barrish has accepted, been offered, and continues to be offered, provide the opportunity to observe PIC's performance of its duties.

Mr. Barrish seeks a database. The database has the same data as the records, and some additional fields. He already has or can have the actual records to determine if PIC is performing its duties. Having a database does not change that access or ability. Thus, the purpose of the law is served by PIC producing the actual reports.

IV. The Database is not Required by Law to be Produced

When a State agency gives access to inspect and copy records, it need not create a database or any record that does not exist. *Atch. E - Att'y Gen. Op. , Unnumbered, June 28, 2004; and Att'y Gen. Op. No. 99-IB12, September 21, 1999.* Other legal and factual reasons exist for not creating a database as requested by Mr. Barrish. *See, Atch A and cases cited therein; Atch F, Ltr to Rep. Lavelle and cases cited therein).*

The database constructed by a private vendor is not a record identified by PIC's statute as a public record, or any part of the statutory requirements of the reports, as identified by statute above. Delaware Courts have held that information not mandated by statute is not a "public record." *Atch G., Jacobs v. City of Wilmington, C. A. No. 18679, V.C. Strine, January 3, 2002.* The database is *optional* for lobbyists and public officers, and PIC's authorization to accept such filings is also *optional*. *29 Del. C. § 5809.* Not all lobbyists or public officers elect that option. That means the records, which were offered are the "best evidence" of reporting compliance for those not filing electronically.

Mr. Barrish says the data base and its tables are a "public record" as defined by FOIA. "Public Record" is "any information of any kind, owned, made, used, retained, received, produced, composed, drafted, other otherwise compiled or collected by any public body, relating in any way to public business, or in any way of public interest, regardless of the physical form or characteristic by which such information is stored, recorded or reproduced." *29 Del. C. § 10002.*

Mr. Barrish says Greg Hughes said it would not be a problem to get the database and download it for Mr. Barrish. Mr. Hughes is not employed by PIC or the private vendor which developed, wrote, and maintains the database. (*Atch. H., Cole Affidavit*). Mr. Alan Cole, Delmarva Digital Management Group (DDMG), did develop and write the programs. *Id.* The database is not on the State's server, but on DDMG's server. No State employee can access that server for the database and table. *Id.* The only access is to enter data into the fields by those who file reports. Not only are the tables or the database not required by law, but they are not held as such by PIC. The database and its tables are not retained, produced, composed, or drafted by PIC, but by the vendor.

To the extent any of the database and its tables are proprietary or trade secrets of the private vendor, they are not public records. *29 Del. C. §10002(g)(2)*.

Mr. Cole personally spoke with Mr. Barrish about the database and tables. *Id.* Mr. Cole estimates that performing the work discussed with Mr. Barrish would take approximately two days, *if* work for other DDMG clients is ceased for that time. *Id.* A State agency is not required to create documents that it does not have. Mr. Barrish wants the vendor to create a new document, developed under Mr. Barrish's specified needs. Such documents have never been created for any member of the public by PIC or its vendor.

V. State Agencies May Limit Dissemination of Even Public Records

The United States Supreme Court and Delaware Courts have noted the difference between information obtained by going to a Courthouse or office to review bits of information, as compared to gaining information that is in a database. *Bd. Of Managers of the Del. Justice Info. Sys. V. Gannett Co.*, 808 A.2d 453 (2002)(citing *Department of Justice v. Reporter Committee for Freedom of the Press*, 489 U.S. 749, 103 L. Ed. 2d 774, 109 S. Ct. 1468 (1989)). Both courts recognized that even information which is public can take on a more private nature depending on the degree of dissemination.

When PIC's database was expanded to permit optional electronic filing of financial disclosure reports, the Department of Technology and Information was concerned about the possible "spoofing" that could occur. (*Atch I, T. Jarrett e-mail to J. Wright, April 19, 2005*). More recently, when H.B. 411 was proposed, the concerns of "phishing" and "scamming" were raised by the Assistant Secretary of State, both as a filer and as a State official. (*Atch I, R. Geisenberger, e-mail to Joseph Fulgham*). Consistent with those concerns, tables and fields were created by DDMG that are *not* required by law to be on the public reports. Those fields include phone numbers, e-mail addresses, User Identification, passwords for private citizens who are lobbyists. That information is not required by law, but if the lobbyist chooses to file electronically, that information is gathered to as part of the database program to help insure security and some certainty in who is filing the report. It also serves as a means to notify those who file electronically of such things as changes in legislation governing lobbyists. The same data, again not required by law, is gathered on public officers. Some public officer provide their personal e-mail addresses rather than use their State e-mail address.

That information is not only not required by law; it is by law optional. Moreover, that information is not released to the public to avoid possible tampering with the on-line filing.

In addition to that personal information, the degree of dissemination of personal financial information of public officers is a concern consistent with DTI's concerns, and as expressed to Representative Greg LaVelle when he considered placing all of the financial disclosure reports on PIC's web site. (*Atch F, PIC Ltr to Rep. LaVelle*)

The Delaware Court in *DELJIS v. Gannet*, *supra*, said:

"the Supreme Court discusses the statutory meaning of privacy as it relates to the Federal Freedom of Information Act. The Supreme Court defines privacy as it relates to FOIA by using two

main sources--the common law, and the literal understanding of privacy. The Court begins its discussion of privacy for purposes of FOIA by looking at the common law concerning privacy. The common law of privacy relies to some extent on the degree of dissemination. "The common law recognized that one did not necessarily forfeit a privacy interest in matters made part of the public record, albeit the privacy interest was diminished and another who obtained the facts from the public record might be privileged to publish it." However, the Court specifically noted that there may be some privacy interest "inherent in the non-disclosure of certain information even when that information may have been at one time public."

After describing the common law definition, the Supreme Court describes the literal understanding of privacy which "encompasses the individual's control of information concerning his or her persons." Here, the Court uses the dictionary definition of privacy which states "information may be classified as 'private' if it is 'intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public.'" Another aspect of the literal definition of privacy the Court noted is that "The right of privacy is the right to control the flow of information concerning the details of one's individuality."

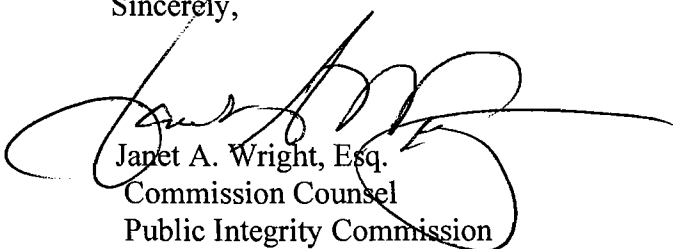
Here, the concerns are the dissemination that is personal and private to lobbyists and public officers, e.g., their individual User Identification and password; their individual e-mail addresses; and for public officers their personal financial information. While the latter information is in the public record, as noted herein, dissemination of such information could jeopardize the identity of public officers, their spouses' and children.

In *Gannett*, the Court did not have to decide *if* a database had to be produced because the State agency had agreed to produce certain tables to the *News Journal*. When it sought additional tables, the Court noted that was not part of the agreement, and identified certain tables that would not be given. No agreement exists here, and none is needed. PIC complies with FOIA by producing the records which contain none of the information in the fields which give some protection to the on-line filers and PIC in insuring the information is from the appropriate person, and also maintains control of dissemination of the personal financial information of public officers.

VI. Conclusion

Based on the above facts and law, the Public Integrity Commission has complied with FOIA and seeks dismissal of the complaint.

Sincerely,



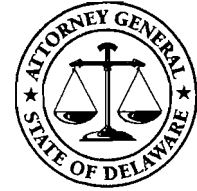
Janet A. Wright, Esq.
Commission Counsel
Public Integrity Commission

cc: Commission Members w/o attachments

Appendix E – Attorney General FOIA Opinion



STATE OF DELAWARE
DEPARTMENT OF JUSTICE



CARL C. DANBERG
Attorney General

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Fax: (302) 577-6630
TTY: (302) 577-5783

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Criminal Division (302) 739-4211
Fax: (302) 739-6727
Civil Division (302) 739-7641
Fax: (302) 739-7652
TTY: (302) 739-1545

SUSSEX COUNTY
114 E. Market Street
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Fax: (302) 856-5369
TTY: (302) 856-2500

August 21, 2006

PLEASE REPLY TO: Civil Division-Kent County (739-7641)

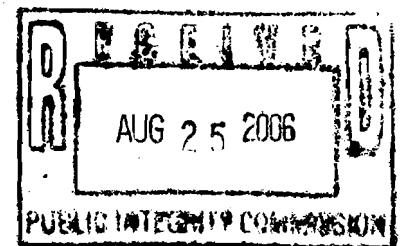
Mr. Chris Barrish
Senior Reporter
The News Journal
P.O. Box 15505
New Castle, DE 19850

Re: **Freedom of Information Act Complaint
Against State Public Integrity Commission**

Dear Mr. Barrish:

Our Office received your Freedom of Information Act ("FOIA") complaint on July 8, 2006 alleging that the State Public Integrity Commission ("the Commission") violated FOIA by denying you access to lobbying expense reports and financial disclosure reports of public officials in electronic form. ¹

¹ FOIA prohibits our Office from investigating "an alleged violation [of FOIA] by an administrative officer, agency, department, board, commission or instrumentality of state government which the Attorney General is obliged to represent pursuant to Section 2504 of [Title 29 of the *Delaware Code*]." 29 *Del. C.* §10005(f). The Attorney General's duty to provide legal advice, counsel and services to State agencies and officials "shall not apply to the State Public Integrity Commission." *Id.* § 2515(b).



Mr. Chris Barrish
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By letter dated July 12, 2006, we asked the Commission to respond to your complaint by July 24, 2006. We received the Commission's response on July 24, 2006. We made several requests to the Commission for additional information which we received over the course of July 27- August 7, 2006.

Pertinent Facts

The Commission is required by statute to receive and maintain lobbyist expense reports and financial disclosure reports of public officials. Until 2002, all reports were filed in hard copy and maintained by the Commission in its offices for inspection and copying pursuant to FOIA.

In 2002, the State contracted with a private company, Delaware Digital Management Group ("DDMG"), to create a database system for electronic filing of reports. The database contains the same information as in the hard copy reports with some additional fields (e-mail address, user ID number, and password) for secure electronic filing.

According to the Commission, lobbyists have the option since 2002 to file their expense reports electronically though a few continue to file in hard copy. For lobbyists who file in hard copy, the Commission's staff makes "the data entry for those few forms" into the electronic database. The database is programmed to post the lobbying expense reports on the Commission's website. The reports on the website are arranged by year (back to 2002), quarter, and name (in alphabetical order). By accessing the website, a citizen can use a personal computer to download and print out reports in hard copy.

According to the Commission, starting this year public officials have the option to file financial disclosure reports electronically with a user ID and password; 144 (out of 317) public

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officials filed their 2005 financial disclosure reports in hard copy rather than electronically. For public officials who continue to file reports in hard copy, the Commission scans the reports into PDF files. "Once that conversion is made, we can administratively attach the PDF file to the public officer's file in the [electronic] database. It remains a PDF file, and is identical to the hard copies on file." The Commission does not post any of the information in the financial disclosure reports on its website.

Commission's Legal Position

The Commission contends FOIA does not apply to its electronic database because: (1) FOIA only requires access to records a public body is required by law to maintain, and the Commission is only required by law to maintain reports in hard copy; (2) the Commission provided you with the reports in hard copy and FOIA does not require it to make the same information available to you in electronic form; (3) the Commission is not the custodian of the records you requested because DDMG maintains the electronic database; (4) to provide the electronic data in the form you requested requires computer programming to convert the information to a new format, thereby creating a new public record which FOIA does not require.

Alternatively, if the electronic database is a public record under FOIA, the Commission contends that FOIA exempts from disclosure: (1) DDMG's proprietary software; (2) personal identifiers; and (3) personal financial information in electronic form because of the risk of identity theft.

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RELEVANT STATUTES

FOIA provides: "All public records shall be open to inspection and copying by any citizen of the State during regular business hours by the custodian of the records for the appropriate public body." 29 *Del. C.* §10003(a).

FOIA defines a "public record" as "information of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected, by any public body, relating in any way to public business, or in any way of public interest, or in any way related to public purposes, regardless of the physical form or characteristic by which such information is stored, recorded or reproduced." *Id.* §10002(g).

FOIA exempts from disclosure "[t]rade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature." *Id.* §10002(g)(2). FOIA also exempts "[a]ny records specifically exempted from public disclosure by statute or common law." *Id.* §10002(g)(6).

Financial disclosure reports which public officers must file with the Commission "shall be made available at reasonable hours for public inspection and copying pursuant to [FOIA]." 29 *Del. C.* §5814(b).

"The lobbyist docket maintained by the Commission and any reports, authorizations or other documents filed with the Commission pursuant to this subchapter shall be made available at reasonable hours for public inspection and copying pursuant to [FOIA]." *Id.* § 5836(b).

LEGAL AUTHORITY

A. Commission Statute

By statute, the Commission must receive and maintain lobbying expense reports and financial disclosure reports of public officials. *See 29 Del. C. Ch. 58*. The Commission contends it is required to maintain the reports only in hard copy and not in an electronic format. The Commission contends its electronic database is not subject to FOIA because the "Delaware Courts have held that information not mandated by statute is not a 'public record'" (citing *Jacobs v. City of Wilmington*, C.A. No. 18679, 2002 WL 27817 (Del. Ch., Jan 3, 2002) (Strine, V.C.)).

In *Jacobs*, a chiropractor made a FOIA request for traffic accident reports prepared by the Wilmington Police Department. State law (21 *Del. C.* §4203(d)) requires police to submit traffic reports to the Department of Public Safety for accidents involving an impaired driver, personal injury or death, or apparent property damage of \$1,500 or more. Those reports "shall be for the information of the Department of Public Safety and shall not be open to public inspection." *Id.* § 313(b).

The Wilmington Police Department went beyond the statutory requirements and submitted a report to the Department of Public Safety for every traffic accident, even minor ones. Because the statute did not require the filing of minor accident reports, the chiropractor argued they were not exempt under Section 313(b) but rather public records under FOIA.

The Chancery Court rejected that argument as "inconsistent with the statutory promise of confidentiality for reports of traffic accidents made by drivers under the statutory reporting scheme. I hold that Non-Mandatory Reports are specifically exempted from public disclosure.

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As such, per 29 *Del. C.* §10002(d)(6), they are not public records subject to disclosure under FOIA." 2002 WL 27817, at p.1. ¹

Jacobs holds that minor traffic accident reports are not public records under FOIA because they are specifically exempted by another statute. *Jacobs* does not hold that such reports are public records because the police department did not have to prepare them.

The public records law in some states applies only if the records are "required by law" to be created, kept or maintained by the public body. ² The definition of a public record under Delaware's FOIA, in contrast, does not turn on whether the public body is required by law to maintain the record. FOIA defines a public record as "information of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected." 29 *Del. C.* §10002(g). Like the Maryland Public Information Act, Delaware's FOIA "is not limited to public records which are records required by law to be made, maintained, or kept." *Office of the Governor v. The Washington Post Co.*, 759 A.2d 249, 269 (Md. App. 2000). *See also City of Grand Forks v. Grand Forks Herald, Inc.*, 307 N.W.2d 572, 578 (N.D. 1981) ("Public records are not limited to those records which are required by law to be kept and maintained.").

¹ The section of FOIA cited by the Chancery Court is now recodified as §10002(g)(6), which provides that FOIA does not apply to "records specifically exempted from public disclosure by statute or common law."

² *See, e.g.*, N.J.Stat. Ann. § 47:1A-2 ("all records which are required by law to be made, maintained or kept on file"); Mo. Ann. Stat. § 575.010(5) ("required by law to keep"); Kan. Stat. Ann. § 45-201(a) ("by law are required to be kept and maintained"); Okla. Stat. 1970 s. 24 ("required by law to keep public records"). *But see* N.M. Stat. Ann. §14-2-6(E) ("whether or not the records are required by law to be created or maintained").

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The Commission may not be required by law to compile and maintain an electronic database, but once it does the database becomes a public record unless specifically exempted by FOIA.

B. Electronic Records

FOIA requires access to public records "regardless of the physical form or characteristic by which such information is stored, recorded or reproduced." 29 *Del. C.* §10002(g). FOIA does not make any "distinction between records maintained in manual and computer storage systems.'" *Att'y Gen. Op.* 97-IB06 (Mar. 17, 1997) (quoting *Yeager v. Drug Enforcement Administration*, 678 F.3d 315, 321 (D.C. Cir. 1982)). *Accord Seigle v. Barry*, 422 So.2d 63, 65 (Fla. App. 1982) ("There can be no doubt that information stored on a computer is as much a public record as a written page in a book or a tabulation in a file stored in a filing cabinet.").

"Although accessing information from computers may involve a somewhat different process than locating and retrieving manually-stored records, these differences may not be used to circumvent the full disclosure policies of the FOIA. The type of storage system in which the agency has chosen to maintain its records cannot diminish the duties imposed by the FOIA." *Yaeger*, 678 F.2d at 321.

According to the Commission, its electronic database "has the same data" as the hard copy reports filed by lobbyists and public officials with "some additional fields" (*e.g.*, user ID, password, e-mail address) created for secure electronic filing. Because you have access to hard copy reports, the Commission contends FOIA does not require it to provide you with the same information in electronic form.

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In *American Federation of State, County & Municipal Employees v. County of Cook*, 555 N.E.2d 361 (Ill. 1990), a union requested names of county employees by department, job title, rate of pay, and work location. The county provided a computer printout of the information. The union then asked for the same information on computer tape or diskette. The county denied the request because it had already provided the same information in hard copy.

Like Delaware's FOIA, Illinois law defines a "public record" to include recorded information "regardless of physical form or characteristics." Ill.Rev.Stat., ch.116, para.202(c). The Illinois Supreme Court held this definition includes "computer tapes within its scope." *AFSCME*, 555 N.E.2d at 364.

The court rejected the argument that the county "may choose the format in which it releases information so long as the requestor is provided reasonable access to the information, regardless of the format that was requested." *Id.* at 365. The public records law "does not state that a public body may reply to information requests by supplying different public records than those for which the requestor asked. Rather, the public body must make the public record available, including computer tapes, unless it can properly invoke an exception." *Id.* at 364. *Accord State ex rel. Margolius v. City of Cleveland*, 584 N.E.2d 665, 669 (Ohio 1992); *Farrell v. City of Detroit*, 530 N.W.2d 105, 109 (Mich. App. 1995); *Brownstone Publishers, Inc. v. New York City Department of Buildings*, 560 N.Y.S.2d 642 (App. Div. 1990).

In *Margolius*, the Ohio Supreme Court made clear "this holding only applies to public records already stored in a tangible medium at public expense. There is no requirement on the part of public agencies to create records that are not already in their possession, or to store records

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in a particular medium in order to provide greater public access to the records." 584 N.E.2d at 670. "Any increased financial burden caused by compliance with this decision can and should be passed on to the party making the request." *Id.* at 669 n.4.

We believe that under Delaware's FOIA an existing electronic database is a public record separate and distinct from the underlying records used to compile the database. Under FOIA, a public body cannot respond to a request for information in electronic form by supplying paper records that contain the same information.

C. Private Custodian

FOIA requires that public records "shall be open to inspection and copying by . . . the custodian of the records for the appropriate public body." 29 *Del. C.* §10003(a).

The Commission contends it is not the custodian of the electronic data you requested because the database was "constructed by a private vendor" (DDMG) and this "database is not on the State's server, but on DDMG's server."

In *State ex rel. Cincinnati Enquirer v. Krings*, 758 N.E.2d 1135 (Ohio 2001) (per curiam), the city contracted with two private companies to construct a new football stadium. The contracts required the companies to maintain cost-accounting records and afford the city access to those records. A newspaper asked the county administrator for construction records to investigate cost overruns on the stadium. The county provided all records physically located in the county administration building but argued that records maintained by the two contractors were not subject to the Ohio Public Records Act.

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The Ohio Supreme Court held the act affords "access to public records, even when a private entity is responsible for the records. . . [G]overnmental entities cannot conceal information concerning public duties by delegating these duties to a private entity." 758 N.E.2d at 1139, 1140. A private entity is subject to the public records law if: "(1) it must prepare the records in order to carry out a public office's responsibilities, (2) the public office must be able to monitor the private entity's performance, and (3) the public office must have access to the records for this purpose." *Id.* at 1140. The terms of the stadium contracts "are sufficiently broad to establish a right of access on the part of the county to the [contractors'] records concerning cost overruns on the public construction project." *Id.*³

The Commission provided us with a sworn affidavit of Alan D. Cole, Chief Technology Officer of Delaware Digital Management Group. According to Mr. Cole, "DDMG is a private company which contracted with the Public Integrity Commission (PIC) to create a database system for electronic filing of financial disclosure reports and lobbying reports." Under the contract, "the PIC Staff will have full administration access to all data within the system." According to DDMG, the "data itself belongs to PIC per the contract" and "the State of Delaware has the right to provide web hosting of this web site at a State facility." The Commission acknowledges it has access to the database to check to make sure that lobbyists and public officials have filed their

³ See also *Harold v. Orange County*, 668 So.2d 1010 (Fla. App. 1996) (the county "delegated to [the contractors] responsibility, *on behalf of the County*, to assure that the trade contractors comply with the Fairness in Procurement Ordinance and to maintain whatever records are necessary so that the County can verify such compliance."); *Prince George's County v. The Washington Post Co.*, 815 A.2d 859, 885-86 (Md. App. 2003) (a private company "set up the risk management database and fields for the County to be used for the transaction of public business. Therefore, we believe that both are public records and available, absent an applicable exemption, for public dissemination.").

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reports; to review the reports for completeness and accuracy; and to input information from hard copy reports into the electronic database.

We determine that the electronic database maintained by DDMG under contract with the Commission is subject to FOIA.⁴ DDMG maintains the database to help carry out the Commission's statutory responsibility to maintain lobbying expense reports and financial disclosure reports of public officials. The Commission owns the database and has complete right of access to the data even though it is maintained on DDMG's server. The Commission is the custodian of the database for purposes of FOIA because it contains information "owned," "used," or "otherwise compiled and collected" by the Commission. 29 *Del. C.* §10002(g).

D. Creation of a New Public Record

The Commission contends your FOIA request would require it "to create a new document, developed under Mr. Barrish's specified needs" and FOIA does not require a public body to create a record that does not already exist.

According to the Cole affidavit, you "requested a CVS (which is a comma separated text file) of the tables of the database and the information on lobbying and financial disclosure housed within those tables. The CVS could then be imported into such programs as Access or other relational database systems to make the data searchable." Mr. Cole states that your request would require: "(A) Identifying and blocking tables/columns that contain non-public information such

⁴ This does not mean that DDMG is a "public body" for purposes of FOIA. Because the Commission is the constructive custodian of the records you requested, you do "not have to deal with a private third party in order to gain access to the records.'" *Krings*, 758 N.E.2d at 1141 (quoting *State ex rel. Recodat Co. v. Buchanan*, 546 N.E.2d 203, 204 (Ohio 1989) (per curiam)).

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as User Ids and passwords; and (B) Converting the existing information from a relational database system into multiple CVS files." Mr. Cole estimates "it would take approximately two days if DDMG put aside the work for its other clients to perform the work requested."

To redact non-public information like user ID numbers and passwords does not amount to creating a new document under FOIA. "The argument that a document with some information deleted is a 'new document,' and therefore not subject to disclosure, has been flatly rejected." *Yeager*, 678 F.2d at 321. "This is true even if all but one or two items of information have been deleted." *Id.*⁵ FOIA, however, does not require "any manipulation or restructuring of the substantive content of a record." *Id.* at 323.

In *Att'y Gen. Op.* 04-IB14 (June 28, 2004), our Office determined that FOIA did not require a school district to "produce computerized data in a special format requested by a citizen" through "a search of the online database, accomplished by entering the requesting party's search criteria'" (quoting *Gabriels v. Curiale*, 628 N.Y.S.2d 882, 883 (App. Div. 1995)). "Nor does FOIA obligate an agency 'to develop a program to accomplish this task for the purpose of complying with [the FOIA] request.'" *Id.*⁶

In *Schulten, Ward & Turner, LLP v. Fulton-DeKalb Hospital Authority*, 535 S.E.2d 243 (Ga. 2000), a law firm requested Medicare information which would require "a computer

⁵ See also *Bowie v. Evanston Community Consolidated School District*, 538 N.E.2d 557, 561 (Ill. 1989) ("Deleting information from a record does not create a 'new' record"); *State ex rel. Stephan v. Harder*, 641 P.2d 366, 374 (Kan. 1982) (the public records law "implies a duty upon the agency to delete confidential and nondisclosable information from that which may be disclosed").

⁶ A public body, however, may have "to develop a special computer program which would delete exempt information." *Hamer v. Lentz*, 547 N.E.2d 191, 195 (Ill. 1989).

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technician [to] extract the requested information from files maintained in the Authority's database." 535 S.E.2d at 245. The Georgia Supreme Court held that FOIA "does not require a public agency or officer to create or compile new records by any method, including the development of a computer program or otherwise having a computer technician search the agency's or officer's database according to criteria conceived by the citizen making the request." *Id. Accord State ex rel. Kerner v. State Teachers Retirement Board*, 695 N.E.2d 256, 258 (Ohio 1998) (per curiam) ("In order to create the requested records, the board would have had to reprogram its computer system. Therefore, the Board had no duty to provide access to the requested records.").⁷

We determine that FOIA does not require the Commission to convert its electronic database from a relational database into CVS (comma separated) files. That would amount to the creation of a new public record which FOIA does not require.⁸

E. Exempt Information Under FOIA

The Commission contends that if FOIA requires access to its database, FOIA exempts from disclosure: (1) DDMG's proprietary software; (2) personal identifiers; and (3) personal financial

⁷ In *Kerner*, the Ohio Supreme Court noted that "if the clerk's computer were already programmed to produce the desired printout, the 'document' would already exist for the purpose of a [FOIA] request." 695 N.E.2d at 257.

⁸ We understand you also asked the Commission to scan hard copy reports onto a CD. FOIA does not require the Commission to do so. FOIA only requires a public body to make records "open to inspection and copying." 29 *Del. C.* §10003(a). FOIA does not require a public body to do the copying itself, though it may choose to for administrative convenience and charge the actual costs of copying. FOIA only requires the Commission to make the hard copy reports available to you to photocopy or scan at your own time and expense.

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information in electronic form.

1. Proprietary Software

The Commission contends the electronic database maintained by DDMG is exempt from disclosure under FOIA "to the extent that the database and its tables are proprietary or trade secrets of the private vendor" (citing 29 *Del. C.* §10002(g)(2)).

"When a public agency makes a diskette copy for someone, that person will have to have his own software to be able to read the information stored on the diskette. . . . By giving out a diskette, the city is not giving out any software. It is only giving out its database files and these files are a public record." *State ex rel. Athens County Property Owners Association*, 619 N.E.2d 437, 439 (Ohio App. 1992).

DDMG has confirmed that copying the electronic database in the format you requested would not infringe on its proprietary software. That software is separate and distinct from "the database itself which stores the data."

We determine that providing you with the reports in the Commission's electronic database maintained by DDMC would not require disclosure of any proprietary software which is exempt as a trade secret under FOIA.

2. Personal Identifiers

According to the Commission, before it decided to allow optional electronic filing of reports by public officials and lobbyists, there were concerns that hackers might try to manipulate the information. To prevent that, the Commission asked DDMG to create tables and fields such as "phone numbers, e-mail addresses, User Identification numbers, and passwords. That

information is gathered as part of the database program to help insure security and some certainty in who is filing the report. That information is not released to the public to avoid possible tampering with the on-line filing."

We agree that disclosure of personal identifiers like home address and telephone number, e-mail address, user ID number, or password would invade personal privacy and is not essential for government accountability. FOIA allows the Commission to redact direct personal identifiers from the electronic database before making it available to the public.⁹

3. Personal Financial Information

The Commission also wants to redact from the electronic database the names of banks, mutual funds, brokerage firms, creditors, and companies in which a public official owns stock or bonds. The Commission fears that information, in electronic form, might be used for identity theft.

According to the Commission, "we presently make the hard copy reports, even with the personal financial information available, pursuant to a FOIA request, but that is because it then gives us some control over who had access to the information in the event it should be misused." The Commission contends that under FOIA it can withhold that same information in electronic form because "State agencies may limit dissemination of even public records" if widespread dissemination would increase the risk to personal privacy.

⁹ FOIA also allows the Commission to redact bank or other account numbers (to the extent they are listed – the financial disclosure report form does not require them). "Disclosing personal bank account numbers would constitute a clearly unwarranted invasion of personal privacy because this information could be used for nefarious purposes. In addition, there is no public interest in this information." *Judicial Watch, Inc. v. Export-Import Bank*, 108 F. Supp.2d 19, 37 (D.D.C. 2000).

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The Commission contends that the "United States Supreme Court and Delaware Courts have noted the difference between information obtained by going to a Courthouse or office to review bits of information, as compared to gaining information that is in a database. *Board of Managers of the Delaware Criminal Justice Information System v. Gannett Co.*, 808 A.2d 453 (Del. Super. 2002) (citing *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989)). Both courts recognized that even information which is public can take on a more private nature depending on the degree of dissemination."

Computerized databases may enhance the concerns about individual privacy, but the courts in the *DELJIS* litigation did not hold that the entire criminal history database was exempt from disclosure under FOIA, only certain data fields. "[D]isclosure of databases, like any other information, must be looked at on a case-by-case basis, and should only be excluded from FOIA if it falls into one of the enumerated exceptions to FOIA." *DELJIS v. Gannett*, 808 A.2d at 460.

In *Price v. Corzine*, 2006 WL 1080491 (D.N. J., Apr. 20, 2006), the federal district court denied a request to enjoin the posting of financial disclosures on the Internet. The New Jersey Casino Control Act requires casino employees to file an annual financial disclosure statement (FDS) with the Casino Control Ethics Commission listing "all assets and liabilities, property and business interests, and sources of income of said employee or agent and his spouse." N.J. Stat. Ann. §5:12-58(e). By executive order, Governor Corzine required the Ethics Commission to post the financial disclosure statements on its Internet site beginning with statements for 2005.

"Plaintiffs challenge only the online publication of their FDS information. They do not challenge the State's requirement that [casino] employees provide that information, or the

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prevailing practice of making it available for inspection and copying" in hard copy. 2006 WL 1080491, at p.2. The district court noted, however, "that federal courts have upheld the constitutionality of numerous state statutes requiring the disclosure of personal financial information for the purpose of preventing conflicts of interest." *Id.* (and citations therein).

The Third Circuit has "suggested that the online publication of information that is already publicly available, by that fact alone, would not make otherwise permissible conduct unconstitutional." *Id.* at p.3 (citing *A.A. v. New Jersey*, 341 F.3d 206 (3rd Cir. 2003)). "The question was whether the information was entitled to protection and, if so, whether the government's interest in disclosing it outweighed that interest." *Corzine*, 2006 WL 1080491, at p.3.

"The State has a substantial interest in deterring corruption and conflicts of interest among its employees by requiring the disclosure of their financial information." *Id.* at p.4.

In posting the FDS information online, no additional data would be provided beyond what was already available to the public. Indeed, the website would provide *less* information than what was previously available. The Ethics Commission personnel review all FDS information prior to their posting to redact certain personal identifying information, including social security numbers, account numbers and home addresses.

Id. p.5. "The Court also notes that financial disclosure statements are currently available online for a number of other states, including Alabama, Georgia, Connecticut, Hawaii, Iowa, Indiana, Louisiana, Michigan, New Hampshire, New Mexico, Ohio, Pennsylvania, and South Dakota."
Id.

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income and a delineation of investments, is the very type of information that the public has a right to uncover when looking into conflicts of interest." *Archdeacon v. Town of Oyster Bay*, 813 N.Y.S.2d 289, 295 (Supr. 2006).

This information is already available in hard copy to the public for inspection and copying at the Commission's offices. We do not believe that making the same information available in electronic form would so increase the risk to personal privacy as to make the information exempt under FOIA.

We determine that FOIA does not exempt from disclosure in electronic form the information required to be disclosed by public officials in Sections 1 and 2 of the Commission's financial disclosure report forms.

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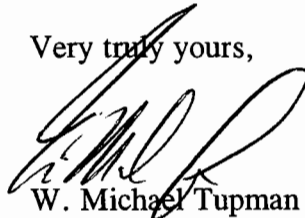
CONCLUSION

For the foregoing reasons, we determine that the Commission violated FOIA by denying you access to lobbying expense and financial disclosure reports in electronic form.

As remediation, we direct the Commission to provide the information contained in those reports to you in the electronic form in which they are currently maintained within twenty days of the date of this letter. The Commission may charge a reasonable cost for redacting direct personal identifiers like home address and telephone number, e-mail address, user ID, or password. The Commission may not redact from the database the information in Sections 1 or 2 of the financial disclosure reports, except for direct personal identifiers like account numbers. The Commission is not required by FOIA to convert the database into the specific format you requested to create a new public record.

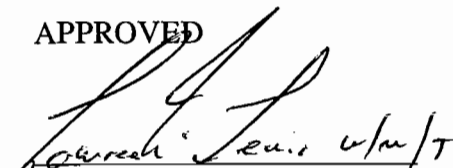
The Commission's attorney is directed to report back to our Office in writing within five business days after the Commission completes remediation.

Very truly yours,



W. Michael Tupman
Deputy Attorney General

APPROVED



Lawrence W. Lewis, Esquire
State Solicitor

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