

State of Delaware
Public Integrity Commission



ETHICS
TRANSPARENCY IN GOVERNMENT

ANNUAL REPORT
2014

William F. Tobin, Jr., Chair
Mark Dunkle, Esq. and Andrew Gonser, Esq., Vice Chairs

Commissioners

*Dr. Wilma Mishoe * Lisa Lessner*
*Jeremy Anderson, Esq. * Bonnie Smith*

**STATE PUBLIC INTEGRITY COMMISSION
Annual Report - 2014**

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I. *M*ission:

Administer, interpret and enforce the Code of Conduct (ethics); Financial Disclosure; Dual Compensation; and Lobbying Laws.

Jurisdictional History

- ✓ **1991 – State Ethics:** Executive Branch officers and employees, including casual/seasonal; (over 52,000); non-legislative elected officials; State Board and Commission appointees (In 2014, over 300 Boards and Commissions).
- ✓ **1993 – Local Ethics:** 57 local governments' employees, officers, elected officials, and Board and Commission appointees, unless they submit a Code for the Commission's approval. (As of 2014, only 8 have an approved Code, leaving PIC with 49 local jurisdictions).
- ✓ **1994 – Dual Compensation:** State and local employees and officials with a second elected or paid appointed job in government.
- ✓ **1995 – Financial Disclosure:** elected officials; State candidates; Judges, Cabinet Secretaries, Division Directors and equivalents. (2014: 388 officers filed).
- ✓ **1996 – Lobbying:** State lobbyists registration, authorization and expense reports (2014: 330 lobbyists; 963 organizations; over 3000 expense reports).
- ✓ **2000 – Ethics:** School Districts and Boards of Education
- ✓ **2001 – Ethics:** Charter School Boards of Education
- ✓ **2010 – Organizational Disclosures:** State elected officials & candidates must disclose private organizations if they are Board or Council members.
- ✓ **2010 – Newark Housing Authority:** Newark's Code of Conduct included the Authority, but the General Assembly changed the law to make it a State agency so that PIC would have jurisdiction.
- ✓ **2012 – Lobbyists:** Report within 5 business days legislative bill number or administrative action number or title on which they are lobbying. Report weekly on lobbyists' legislative/administrative action.
- ✓ **2014 – Lobbyists:** Passed legislation to charge lobbyists a fee for failure to file their expense reports in a timely manner.



PUBLIC INTEGRITY COMMISSION

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Commission Structure

Appointments, Qualifications and Compensation

- 7 Citizens are the “public eye” on Government Ethics
- Nominated by the Governor; confirmed by the Senate
- Elect their own Chair
- Cannot be:
 - ✓ Elected or appointed official – State, Federal or Local
 - ✓ Holder of political party office
 - ✓ An officer in a political campaign
- Generally appointed from all three counties
- Terms – one full 7 year term; may serve until successor is appointed and confirmed
- Vacancies filled just as original appointments
- Pay - \$100 each official duty day; reimbursement of reasonable and necessary expenses

II. Commission Structure and Biographies of Commissioners and Staff

A. Commission Appointee Status

During 2014 the Commission said goodbye to long-time Commissioner, William Dailey. Mr. Dailey served beyond his appointed term to allow time for appointment of a new member. In 2014, the Commission welcomed Commissioner Bonnie Smith. All three counties of the State are represented on with three members of the Commission from New Castle County, two from Kent County and two from Sussex County.

B. Commission Staff

The Commission has had a two person full-time staff since 1995—its attorney and administrative specialist—performing day-to-day operations. Its attorney, beyond legal duties, conducts training, prepares Strategic Plans, Budgets, and performs other non-legal duties. The Commission's Administrative Assistant performs the administrative functions, updates the website's calendar of events with the Commission agenda, minutes, etc.

C. Biographies of Commissioners



***William F. Tobin, Jr.
Chair***

William F. Tobin was appointed to complete a few months of the remaining term of former Chair, Barbara Green. Mr. Tobin was reappointed by the Governor in 2013 to serve his own 7-year term which expires in May 2020. He was elected Vice Chair, Policies & Procedures in 2012 and served in that role until he was elected Chair in September 2014.

Mr. Tobin has served many years in private sector positions, both for-profit and non-profit. His work has included managing budgets of more than \$500,000, and other fiscal aspects such as inventory control, asset management and audit reviews. He is presently a credit manager and safety director for George Sherman Corporation, Lewes, Delaware. He also has an extensive background in sales, and trained and mentored new and existing sales staff.

His public sector experience ranges from 7 years of active duty in the U.S.

Coast Guard, where he developed extensive emergency management skills, to training fire company members on Small Boat Handling in conjunction with the Delaware State Marine Police.

He has long been an active member and officer of organizations in the fire and rescue areas, serving as Treasurer and Co-Chair of the Fire and Rescue Boat Committee, Memorial Fire Company; Sussex County Technical Rescue Team as the Finance and Budget Executive, and member of the Delaware State Fire Police and Indian River Fire Company; and Executive Administrator, assistant treasurer, finance Board member of Georgetown American Legion Post #8, Ambulance State #93.

Aside from his interest in fire and safety, he is active in his community as Treasurer, Lower Delaware Shield and Square; American Legion Post #5 member; St. John's Masonic Lodge member; DE Consistory member, and Nur Temple member.

Commissioner Tobin resides in Harbeson, Sussex County, Delaware.



Andrew W. Gonser, Esq.
Vice Chair, Personnel

Mr. Gonser was confirmed to serve a seven-year term on the Commission in June 2011, with his term ending in June 2017. In 2012, he was elected to serve as Vice Chair, Personnel and re-elected in 2013 and 2014.

Mr. Gonser is a partner in the law firm of Gonser and Gonser in Wilmington. He is experienced in all aspects of Family Court matters from divorce, property division, custody and visitation, to paternity issues, guardianships and adoptions. He currently serves as Chair of the Family Law Section of the Bar Association and has won numerous awards including being Voted Top Family Law Attorney in Delaware Today multiple times.

After graduating *cum laude* from Widener University of School of Law in 2004, he clerked for the Honorable Jan R. Jurden, Delaware Superior Court. He is admitted to practice in all Delaware Courts, the U.S. District Court

(Delaware), and the U.S. Supreme Court.

His undergraduate degree is in English from the University of Delaware, where he received the Division I Men's Soccer Letterman's Award.

Mr. Gonser is actively engaged in legal and non-legal activities. He is a volunteer attorney for the Legal Self-Help Center and volunteers as a Guardian *ad Litem* for children in Delaware's foster care system. He also is a member of the Delaware State Bar Association and the Melson-Arsht Inns of Court.

Mr. Gonser resides in Wilmington with his wife and five children.



Mark F. Dunkle, Esq.
Vice Chair, Policies & Procedures

Mr. Dunkle was confirmed for a seven year appointment to the Commission on June 30, 2009. His term will expire on June 30, 2016. Mr. Dunkle was elected

as Vice Chair, Policies & Procedures in September 2014.

Mr. Dunkle is an Attorney/Director in the law firm of Parkowski, Guerke & Swayze, P.A., which has offices in all three counties. He has been a Director in this firm since July 1996.

Before receiving his law degree from Emory University School of Law in Georgia, he graduated with distinction from the University of Virginia with a degree in history. Upon completion of his law degree, he was admitted to the Georgia Bar, and three years later was admitted to the Delaware Bar. Aside from his admission to practice in all Delaware State Courts, he is admitted to practice in Pennsylvania, the U.S. District Court, District of Delaware, and the United States Supreme Court.

Mr. Dunkle is well-published in, and has made presentations on, land use law. Among his publications and presentations are: "Municipal Annexation Law in Delaware," "Delaware Land Use Law," "Delaware Condemnation Law," and "Eminent Domain Law in Delaware." His presentations have been through the auspices of the Delaware Urban Studies Institute, the National Business Institute, and the Delaware State Bar Association. Also, in the area of land use, he was a member of the Kent County Comprehensive Development Plan Update Committee, and a member of the Kent County Transfer of Development Rights Committee. In the area of publications, he also served as co-editor of *In Re*, the Journal of the Delaware State Bar Association. Mr. Dunkle also serves as Chair of the Delaware Chapter of the American College of Mortgage Attorneys.

He chaired the Governor's Magistrate Screening Committee for over ten

years. He is a past member of the Delaware Board of Bar Examiners Character and Fitness Committee and serves by appointment of the Delaware Supreme Court on the Preliminary Investigatory Committee of the Court on the Judiciary. He also has served on the Executive Committee of the Delaware State Bar Association and is a past-President of the Kent County Bar. Presently, he is a member of the Permanent Advisory Committee on Supreme Court Rules by appointment of the Chief Justice.

Mr. Dunkle has been active in the community of Dover and surrounding areas by serving as President of the Capital City Rotary Club and as a member of the Greater Kent Committee and the local Chamber of Commerce.

Mr. Dunkle resides in Wyoming, Kent County, Delaware.



Lisa Lessner

Mrs. Lisa Lessner was confirmed as a Commissioner on June 16, 2010 for a seven year term, expiring in 2017.

Mrs. Lessner is currently working as a fund raising consultant for Innovative Schools, a charter school management organization based in Wilmington.

For the past 16 years, Mrs. Lessner has actively worked as a community volunteer for various non-profits. She is currently a board member of the Boys and Girls Club of Delaware and also volunteers as a mentor for Creative Mentoring and in various capacities at Wilmington Friends School. Mrs. Lessner was a founder and board member of the Delaware Children's Museum for 14 years. Volunteering more than 1,000 hours a year, she chaired its Marketing and Exhibits Committees. In 1997, she was elected Vice President, until elected President in 2004. She served in that role until February 2010.

Mrs. Lessner's efforts for Delaware's first children's museum included extensive market research, writing an extensive business plan, attending conferences and networking with professionals in other States from children's museums, securing start-up funds, hosting fund raising events, hiring professional exhibit designers and architects, creating an exhibit master plan, hiring an executive director, and securing \$5 million in funds from the Riverfront Development Corporation for the museum's land and building. Her efforts were rewarded when the Museum opened in April 2010—on time and on budget.

While undertaking those efforts, she

also was a Board member of Albert

Einstein Academy (2001-2007), and a Delaware Theatre Company Board member (2009-2010).

Mrs. Lessner's business acumen began with a University of Delaware Bachelor of Science Degree in Accounting. That was followed by an MBA in Health Care Administration from Widener University, Chester, Pennsylvania. After interning for IBM and Morgan Bank, she worked for the Hospital of the University of Pennsylvania in a variety of positions, including Budget Specialist, Budget Manager, Senior Associate for Clinical Effectiveness and Senior Associate to the Executive Director. Later, she used her skills as an independent consultant for the Clinical Care Associates, University of Pennsylvania Health System. Her consultant work encompassed being the temporary Chief Financial Officer, and working on special projects, including establishing financial and human resources policies and procedures.

Mrs. Lessner and her family reside in Wilmington, DE.



Wilma Mishoe, Ed.D.

Dr. Mishoe was confirmed as a 7-year appointee to the Public Integrity Commission on March 15, 2011. Her term will expire in 2017. She was elected as the Vice Chair for Policies & Procedures during the first full year of her term, and in Oct. 2012 she was elected Commission Chair. Dr. Mishoe served as Commission Chair until September 2014.

Dr. Mishoe earned her doctorate at Temple University where her dissertation was on the preferred learning styles of learning disabled adults at post-secondary institutions. She earned both her Masters and Bachelor Degrees from Howard University, Washington, D.C.

Dr. Mishoe retired from Delaware Technical & Community College at the end of 2010, after serving as Dean of Student Services followed by Dean in Office of Instruction. She also had been Dean of Students and Director of Financial Aid at Wilmington College

(now University) from 1975-1980. Before that employment, she worked for The Brookings Institution in Washington, D.C.

She remains active in educational and community activities. She is presently a Board member of Wilberforce University in Ohio, where she serves as Board Secretary and also Chairs the Academic, Student Affairs and Compliance Committee. She is on the Board of Directors for Children and Family First, and is a member and Treasurer of the Dover Rotary Club. She presently is the immediate past Vice President of the Dover, DE Chapter of The Links, Incorporated. Founded in 1946, it is one of the oldest and largest volunteer service organizations of women who are committed to enriching, sustaining and ensuring the culture and economic survival of African Americans and other persons of African ancestry.

Dr. Mishoe has also held the position of President, Dover Alumnae Chapter, Delta Sigma Theta Sorority, and is the Board of Stewards Pro Tem for Mt. Zion A.M.E Church. She has received numerous honors and awards for her community leadership and work in education. Most recently, the Delmarva Black Chamber of Commerce awarded her its Leadership and Service Award in Education. In past years, she received the Citizen of the Year Award from Psi Iota Chapter, Omega Psi Phi Fraternity, Inc.; Employee of the Year Award from DelTech (Terry Campus); and Super Stars in Education Finalist from the Central Delaware Chamber of Commerce. She is a Certified Mediator by the Center for Community Justice, and received the First Line Leadership Certification from the State of Delaware.

She co-chaired the Mid-Eastern Association of Education Opportunity Program Personnel Student Leadership Conference; and through the National Council of Education Opportunity Association's Legislative Policy Seminar, she gave a presentation to Delaware's congressional assistants on the Title IV student services programs designed to identify and provide services for individuals from disadvantaged backgrounds.

Dr. Mishoe resides in Dover, Delaware, and in January 2013 was selected to be inducted into the Delaware Commission for Women's Hall of Fame of Delaware Women.



Jeremy D. Anderson, Esq.

Mr. Anderson was confirmed for a seven-year appointment to the Commission on June 30, 2011. His term will expire on June 30, 2017.

Mr. Anderson, a principal at the law firm of Fish & Richardson, PC, leads and

tries corporate and complex commercial cases in the Delaware Court of Chancery. Mr. Anderson handles technology-related cases that are brought to protect and defend the intellectual property of companies across several industry sectors such as Life Sciences, Computer Software, and Media and Entertainment. He has successfully represented clients in actions involving non-practicing entities (NPEs) regarding the fraudulent transfer of patents and breaches of covenants not to sue. He obtained a motion to dismiss a multi-forum shareholder derivative lawsuit that was based on his client's substantial monetary settlement with the federal government recently, and in another case defended a preliminary injunction seeking to stop a technology company from filing a patent infringement action in federal court.

As the head of Fish & Richardson's Corporate Governance and Chancery Litigation Practice, Mr. Anderson also represents corporations in high-profile cases involving mergers and acquisitions, stock appraisal, indemnification of officers and directors, demands for corporate records and misappropriation of trade secrets.

Mr. Anderson is the co-author of Technology Litigation in the Delaware Court of Chancery, a treatise that provides comprehensive analysis of technology-related claims such as breach of fiduciary duty, misappropriation of trade secrets, breach of contract, unfair competition, civil conspiracy, and aiding and abetting. He is a thought leader on stock appraisal actions, and has authored articles that have been quoted in the Wall Street Journal, New York Times,

Financial Times and Bloomberg. He frequently contributes to the “Chancery Daily” as a guest columnist and to Fish & Richardson’s commercial litigation blog.

Mr. Anderson is a member of the Delaware Bar Association, where he served as Assistant to the President and as member of the Executive Committee from 2010-2011. In October 2007, Mr. Anderson founded the Delaware Chapter of the J. Reuben Clark Law Society, a service organization that strives to promote fairness and virtue founded on the rule of law. He has been named a “Delaware Rising Star” by Super Lawyers in multiple years.

Mr. Anderson received his law degree from Georgetown University Law Center, in Washington, D.C., where he was the Senior Editor for Law and Policy in International Business. After graduation, he clerked for the Honorable Kent A. Jordan, United States District Court for the District of Delaware.

Mr. Anderson resides in Hockessin, Delaware.



Bonnie O'Day Smith

Ms. Smith was appointed to the Public Integrity Commission on March 26, 2014. Her term expires on March 26, 2021.

Ms. Smith retired from Sussex County government in November 2013, after 44 years of dedicated service. During her employment, Ms. Smith worked her way up the career ladder from an entry level position to become the Director of Data Processing. Ms. Smith developed the computer software used by all County employees.

Ms. Smith received her Associates Degree from Delaware Technical & Community College in Georgetown and was a member of the school’s first graduating class. During the course of her career, she also received several training certificates from IBM.

Ms. Smith has previously served on the Delaware Technical and Community College Advisory Computer Information Systems Board. She is involved in community activities including the Lions

Club, the Bridgeville Volunteer Fire Company, and is a life-long member of the Chaplin Chapel Church.

She currently resides with her husband Thomas and their dog Greedy in Bridgeville, Delaware.

D. Commission Staff

Deborah J. Moreau, Esq. Commission Counsel

As an independent agency, the Commission appoints its own attorney. 29 Del. C. § 5809(12). Ms. Moreau was appointed in June 2013, replacing the Commission's previous counsel of 18 years.

A Widener University School of Law graduate (*cum laude*), Ms. Moreau was a member of the Delaware Journal of Corporate Law. During law school she received two awards for her writing submissions. The Herman V. Belk Memorial Award was given in recognition of excellence in writing for an article written to gain admission to the law review in 2003. In 2004, she received the Donald E. Pease Best Student Article Award. Ms. Moreau's (*ne* Buswell) award-winning article was published in the law review. (Foreign Trade Antitrust Improvements Act: A Three Ring Circus – Three Circuits, Three Interpretations (Delaware Journal of Corporate Law, Vol. 28, No. 3, 2004)). The article has been cited in numerous professional materials. During her third year of law school, Ms. Moreau worked as an intern at the Delaware Department of Justice and was provisionally admitted to the Delaware Bar under Delaware Supreme

Court Rule 55. That early admission allowed Ms. Moreau to prosecute misdemeanor cases in Family Court before graduation from law school.

Ms. Moreau was formally admitted to practice law in Delaware in 2004. The following year she was admitted to the U.S. Third Circuit Court of Appeals. Ms. Moreau continued her career at the Delaware Department of Justice as a Deputy Attorney General for the Criminal Division. While she was a prosecutor, Ms. Moreau handled hundreds of cases, in a variety of courts. She has practiced in Family Court, the Court of Common Pleas and Superior Court. Her varied caseloads included domestic violence, juvenile crime, sexual assaults, guns, drugs, property, robbery, burglary, and murder. Ms. Moreau's work as a prosecutor allowed her to gain extensive trial experience.

Ms. Moreau resides in Smyrna, Delaware with her husband.

Administrative Assistant Jeannette Longshore

Jeannette Longshore was hired in 2006, as a temporary employee when the Commission's full-time administrative specialist was absent. She was hired full-time in June 2007.

Ms. Longshore worked at Delaware Technical Community College, Hewlett-Packard, and Agilent Technologies. She has experience in Microsoft Word, Excel, Access, and other computer skills. She performs the day-to-day administrative specialist functions, and updates the Commission's calendar of events on its web site with its agenda and minutes, and attends and takes

minutes at the meetings, etc. She has completed courses on the State Budget and Accounting; Program Management Office Training; and Grammar and Proofreading. Ms. Longshore has become proficient in the technical aspects of the Public Integrity Reporting System.

Ms. Longshore volunteers at The Emmanuel Dining Hall in Wilmington, Delaware, feeding the homeless.



III. Laws Administered by the Commission

❖ **Subchapter I, Code of Conduct**

Executive Branch and local government ethics;

❖ **Subchapter II, Financial and Organization Disclosures**

Executive, Legislative and Judicial Branch public officer's annual report of financial interests, such as assets, creditors, income, and gifts. All State elected officials and State candidates must also disclose private organizations of which they are a Board or Council member.

❖ **Subchapter III, Compensation Policy**

State or local employees or officials holding dual government jobs with procedures to monitor and prevent "double-dipping;"

❖ **Subchapter IV, Lobbying**

Lobbyists' registration, authorization, expense reports, and specific legislative or administrative actions on which they are lobbying State officials or employees.

A. Subchapter I, Code of Conduct – Ethical Standards

Purpose and Jurisdiction:

Twelve (12) rules of conduct set the ethical standards for “State employees,” “State officers,” and “Honorary State Officials,” in the Executive Branch. [29 Del. C. § 5804\(6\), \(12\) and \(13\)](#). It also applies to local governments, unless the local government has a PIC-approved Code that is as stringent as State law. [29 Del. C. § 5802\(4\)](#). 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, or creating the appearance thereof. [29 Del. C. § 5802](#).

Personal Jurisdiction – State Level:

The Code of Conduct applies to all Executive Branch employees (rank and file, including part-time), officers (elected and appointed senior level Executive Branch officials), and honorary State officials (appointees to more than 300 Boards and Commissions). Approximately 52,000 persons are in those State categories.

Personal Jurisdiction – Local Level:

At the local level, the number of employees, officers and officials in the local governments over which the Commission has jurisdiction is unknown.

In **2014**, local governments who had adopted their own Codes of Conduct included: New Castle County, Dover, Lewes, Millsboro, Newark, Smyrna, Delaware City, and Wilmington. As they have their own Code, the Commission no longer has jurisdiction over their employees, officers, and appointed officials. The remaining 49

local governments are under PIC's jurisdiction. In 2013, PIC approved a proposed Code of Conduct for the Town of Dewey Beach which has not yet been formally adopted by the town council.

Subject Matter Jurisdiction:

The Code of Conduct restricts participating in an official government capacity if there is a personal or private interest in a matter before them; bars all employees, officers and officials from representing or assisting a private enterprise before their own agency in their private capacity; bars officers (senior level officials) from representing or assisting a private enterprise before any agency; limits public servants in obtaining contracts with the government entity with which they serve; restricts their activities for 2 years after terminating State employment. [29 Del. C. § 5805](#). The law also restricts acceptance of gifts, outside employment or anything of monetary value; use of public office for personal gain or benefit; improper use or disclosure of government confidential information; and/or use the granting of sexual favors as a condition, either explicit or implicit, for an individual's favorable treatment by that person or a state agency. [29 Del. C. § 5806](#). The Code also bars conduct that creates a justifiable impression, or that may "raise public suspicion," of improper conduct, [29 Del. C. § 5802\(1\)](#) and [§ 5806\(a\)](#). Thus, the Commission considers if there is an appearance of impropriety.

The appearance of impropriety, under the Code of Conduct, is evaluated using the Judicial Branch standard, as interpretations of one statute may be used to interpret another when the subject (ethics) and the standard (appearance of an ethics violation) apply in both (public servant) cases. *Sutherland Stat. Constr. § 45-15, Vol. 2A (5th ed. 1992)*.

Penalties:

Both criminal and administrative penalties may be imposed.

(1) Criminal Prosecution: The General Assembly, in passing the law, found that some standards of conduct are so “vital” that the violator should be subject to criminal penalties. [29 Del. C. § 5802\(2\)](#). Four (4) rules 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 on certain State matters for 2 years after leaving State employment. [29 Del. C. § 5805\(a\)2\(2\)](#). Beyond referring suspected Code violations for prosecution, if a majority of Commissioners finds reasonable grounds to believe a violation of other State or Federal laws was violated, they may refer those matters to the appropriate agency. [29 Del. C. § 5807\(b\)\(3\) and\(d\)\(3\)](#); [§ 5808\(A\)\(a\)\(4\)](#); and [§ 5809\(4\)](#).

(2) Administrative Sanctions: Violating the above rules may, independent of criminal prosecution, lead to administrative discipline. [29 Del. C. § 5810\(h\)](#).

Under some rules both criminal and/or administrative sanctions may occur, but violating the following rules results only in administrative action: (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).

Disciplinary levels: (1) reprimand/censure of any person; (2) removing, suspending, demoting, or other appropriate disciplinary action for persons other than elected officials; or (3) recommending removal from office of an honorary official. 29

Del. C. § 5810(h).



B. Subchapter II, Financial and Organizational Disclosure Requirements

Both the financial disclosure report and the organizational disclosure are snapshots of any interest held by an official as of the date reported. The decision on whether those interests, or any acquired after that date, but not yet reported, create a conflict of interest, is based on the conflict laws for that particular officer. Executive Branch elected officers are subject to the [State Code of Conduct](#); Legislators are subject to the [Legislative Conflicts of Interest law](#); and Judicial officers are subject to the [Judicial Code of Conduct](#).

FINANCIAL DISCLOSURE:

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, in part, is insured when they report financial interests shortly after becoming a public officer, (14 days), and each year thereafter on March 15, while a public officer. [29 Del. C. § 5813\(c\)](#). Identifying the interests helps the public officer recognize a potential conflict between official duties and personal interests that may require recusal or ethical guidance.

Personal Jurisdiction:

More than 300 “public officers” in the Executive, Legislative, and Judicial branches must file financial disclosure reports within 14 days of becoming a public officer and on March 15 each year thereafter. [29 Del. C. § 5813\(c\)](#). Filers include: All Executive and Legislative Branch elected officials; all cabinet secretaries, division directors, and their equivalents; all members of the judiciary; and candidates for State office. [29 Del. C. § 5812\(n\)\(1\)](#). PIC received 360 annual Financial Disclosure filings in March 2014. As State candidates must also file, the number of filers per year varies depending on the number of candidates in a given year. Due to the election in 2014, PIC received an additional 73 Financial Disclosures from candidates for State-wide office. In total, PIC processed 433 Financial Disclosures.

Subject Matter Jurisdiction:

Assets, creditors, income, capital gains, reimbursements, honoraria, and gifts exceeding \$250 are reported. Aside from their own financial interests, officials must report: assets held with another if they receive a direct benefit, and assets held with or by their spouses and children, regardless of direct benefits. [29 Del. C. § 5813](#).

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 AG for investigation and prosecution. *Id.* The penalties are: (1) up to six months incarceration and/or a fine of up to \$1,150 for a Class B misdemeanor, [11 Del. C. § 4206\(b\)](#); and (2) up to one year incarceration 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 \(b\)](#).

ORGANIZATIONAL DISCLOSURES:

Purpose:

Potential conflicts can arise from associational interest, even without a financial interest, and if the organization seeks action by the General Assembly, the Governor, Lt. Governor, Treasurer, Auditor, Insurance Commissioner, or Attorney General, the annual reporting reminds them of that possibility. The reports are public records, and may be requested on the [FOIA form](#), on the Commission's website. That allows the public to also monitor the financial and associational interests of these officials.

Personal Jurisdiction:

State elected officials and Candidates for State office are required to disclose their memberships on councils or boards. [29 Del. C. § 5813A](#). Other public officers, e.g. cabinet secretaries, division directors, and their equivalents are not required to file this information.

Subject Matter Jurisdiction:

Elected officials and candidates must disclose the name and address of every nonprofit organization, (excluding religious organizations), civic association, community association, foundation, maintenance organization, or trade group incorporated in the State or having activities in the State, or both, of which the person is a council member or board member. [29 Del. C. § 5813A](#).

Penalties:

Same as for financial disclosure reporting violations.



C. Subchapter III - Compensation Policy – “Anti-Double Dipping Law”

Purpose:

Some elected and paid appointed officials hold a second job with State agencies or local governments. Taxpayers should not pay an individual more than once for overlapping hours of the workday. [29 Del. C. § 5821\(b\)](#). To build taxpayers' confidence that such employees and officials do not “double-dip,” those with dual positions must have their Supervisor verify time records of hours worked at the full-time job on any occasion that they miss work due to the elected or paid appointed position. [29 Del. C. § 5821\(c\)](#) and [§ 5822\(a\)](#). The full-time salary may be prorated, unless the dual employee uses leave, compensatory time, flex-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 dual employment.

For those holding dual positions, who also are subject to the Code of **Conduct**—Executive Branch and local governments--the “double-dipping” restrictions are reinforced by the ethical limits on holding “other employment.” [29 Del. C. § 5806\(b\)](#). Complying with the ethics provision is extra insurance against “double-dipping,” and also helps insure the “other employment” does not raise ethical issues. Further assurance against double-dipping is that the statute requires the Auditor to annually audit time records. [29 Del. C. § 5823](#). Generally, that audit is primarily of time records for General Assembly members who are also State employees.

In November 2013, the State Auditor’s Office informed PIC that the annual review of records would be changing from a fiscal year format to a calendar year format. The Auditor’s Office was reviewing records from July 1, 2011, through December 31, 2011, to close the gap caused by the shift in review periods. That review will be followed by a review of records from calendar year 2012. PIC is awaiting the final reports to determine if any action is required.

Penalties:

Aside from pro-rated pay where appropriate, discrepancies are reported to the Commission for investigation, and/or the AG for investigation and prosecution under any appropriate criminal provision. [29 Del. C. § 5823](#).



D. Subchapter IV – Lobbyists Registration and Reporting

Purpose:

Individuals authorized to act for another, whether paid or non-paid, 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](#). Lobbying registration and reporting informs 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. Harris*, 347 U.S. 612, 74 S. Ct. 808 (1954).

Jurisdiction:

When PIC began administering the lobbying registration law in 1996, there were about 200 organizations with lobbyists. At the end of 2014, 330 lobbyists,

representing 963 organizations, were registered.

Reporting Requirements:

Each lobbyist is to file quarterly reports revealing direct expenditures on General Assembly members and/or State agency members. [29 Del. C. § 5835\(c\)](#). That results in 3,852 expense reports. If the expense exceeds \$50, the lobbyist must identify the public officer who accepted the expenditure, and notify the official of the value. *Id.* In 2014, lobbyists reported expenditures totaling \$70,463.53. In addition to reporting expenditures, lobbyists are also required to report their lobbying activity. Lobbyists must report legislation by bill number or administrative action by number or title, within 5 business days of lobbying a State official. [29 Del. C. § 5836](#). “Lobbying” consists of direct communication with a State employee or official, including General Assembly members, for the purpose of advocating, promoting, opposing, or influencing legislation or administrative action. [29 Del. C. § 5831\(5\)](#). The law also required that all registration, expense reports, and the new “Lobbying Activity Report” be filed online. [29 Del. C. § 5832\(a\)](#).

Beyond the “Lobbying Activity Reports” that the lobbyists must file, the 2012 legislation required PIC to report all lobbying activity to the General Assembly on at least a weekly basis while the General Assembly is in session. [29 Del. C. § 5836\(d\)](#). Further, it required that a [searchable public database](#) be created so that the public could search for information on the names of lobbyists and their employers, expense reports, and the Lobbying Activity Report. [29 Del. C. § 5836\(d\)](#).

In 2013, the Public Integrity Reporting System (PIRS) was created in an effort to accommodate the new legislative reporting requirements. The new database was

announced as the Web 2.0 Award winner in the “Harnessing the Power of Civic Media” category by the Public Technology Institute (PTI). Users of PIRS can see which lobbyists are involved in specific legislation or administrative regulation, and view lobbyists’ employers and financial disclosures. The new system also made it easier for lobbyists and public officials to submit required lobbying and gift-related reports online. The PIRS online interface is also mobile-friendly, allowing lobbyists to report, and citizens to search using smartphones, tablets and other mobile devices.

Penalties:

Administrative: PIC may impose the administrative penalty of cancelling a lobbyist’s registration for failure to timely file their expense reports at the end of each calendar quarter. They may not re-register or act as a lobbyist until all delinquent authorizations and/or reports are filed. *Id.* Obviously, this personally affects their ability to represent an organization in which they are interested enough to volunteer, or affects their job performance if they cannot perform their paid duties. Recognizing the impact on lobbyists if their registrations are cancelled, the Commission sends several failure-to-file notices via e-mail, followed by certified letter. If the lobbyist does not respond, before their registration is cancelled, the organization which they represent is also notified. The names of delinquent filers are available on PIC’s website by searching lobbyist reports by quarter.

Over the past year, the administrative penalty has ceased to be an effective compliance tool. In the first quarter of 2014, there were 79 delinquent lobbyists. By the end of the third quarter there were over 100 delinquent lobbyists. Compare those numbers with a total of 15 delinquent lobbyists for the fourth quarter of 2013.

Financial: As a result of the increasing number of delinquent filers, in 2014 PIC successfully introduced legislation to impose a financial penalty on lobbyists for failure to file expense reports in a timely manner. Beginning in 2015, delinquent lobbyists will be required to pay a \$25 fine for the first day of their delinquency. Thereafter, an additional \$10 per day will accumulate until the maximum fee of \$100 has been reached. At that time, the lobbyist's registration will be cancelled and their account locked. They may not resume lobbying until all fees have been paid and all delinquent reports have been filed. PIC is hopeful that the imposition of a financial penalty will dramatically decrease the number of delinquent lobbyists.

Criminal: 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\(c\)](#).



IV. Methods for Achieving Compliance

(1) Training and Publications - [29 Del. C. § 5808\(A\)\(a\)\(1\)](#)

As the Commissioners normally meet monthly, the day-to-day work of providing guidance and facilitating compliance with the laws, conducting seminars and workshops, publishing materials, etc., are the Commission Counsel's statutory duties.

Id.

To best assist government officials and lobbyists in understanding and complying with the law, the Commission's primary focus is on training. Training is reinforced by handouts of publications which can be reviewed later. For quick reference, an Ethics Brochure with the 12 rules of conduct with some brief case examples is provided. It also has procedures for obtaining advice or waivers, and filing complaints. Opinion synopses are available on PIC's website. The synopses are sorted by topic and include a summary of all matters decided by the Commission from 1991 to 2014. As individuals encounter similar situations, they can refer to the cases. The web site also includes the

statutes, all Ethics Bulletins, a brochure on Delaware's gift laws, the Commission's rules and its annual reports. For Financial Disclosure filers and Lobbyists, it has instructions for on-line filing. Lobbyists can link to the Legislative Bill Drafting manual if drafting legislation for clients. It includes links to related laws such as the Legislative Conflicts of Interest Law and the Judicial Code of Conduct.

In **2014**, the Commission gave 13 training classes to a total of 271 attendees. That number was a dramatic increase over the 52 attendees in 2013. The training classes were presented to a wide variety of state, county, and legislative entities.



In an effort to reach more state employees, PIC is in the process of creating an online training module. Online ethics training will be mandatory for all new state employees. The module will be an introductory exposure to the ethics issues which commonly arise during government employment and it will not take the place of the more in-depth, in-

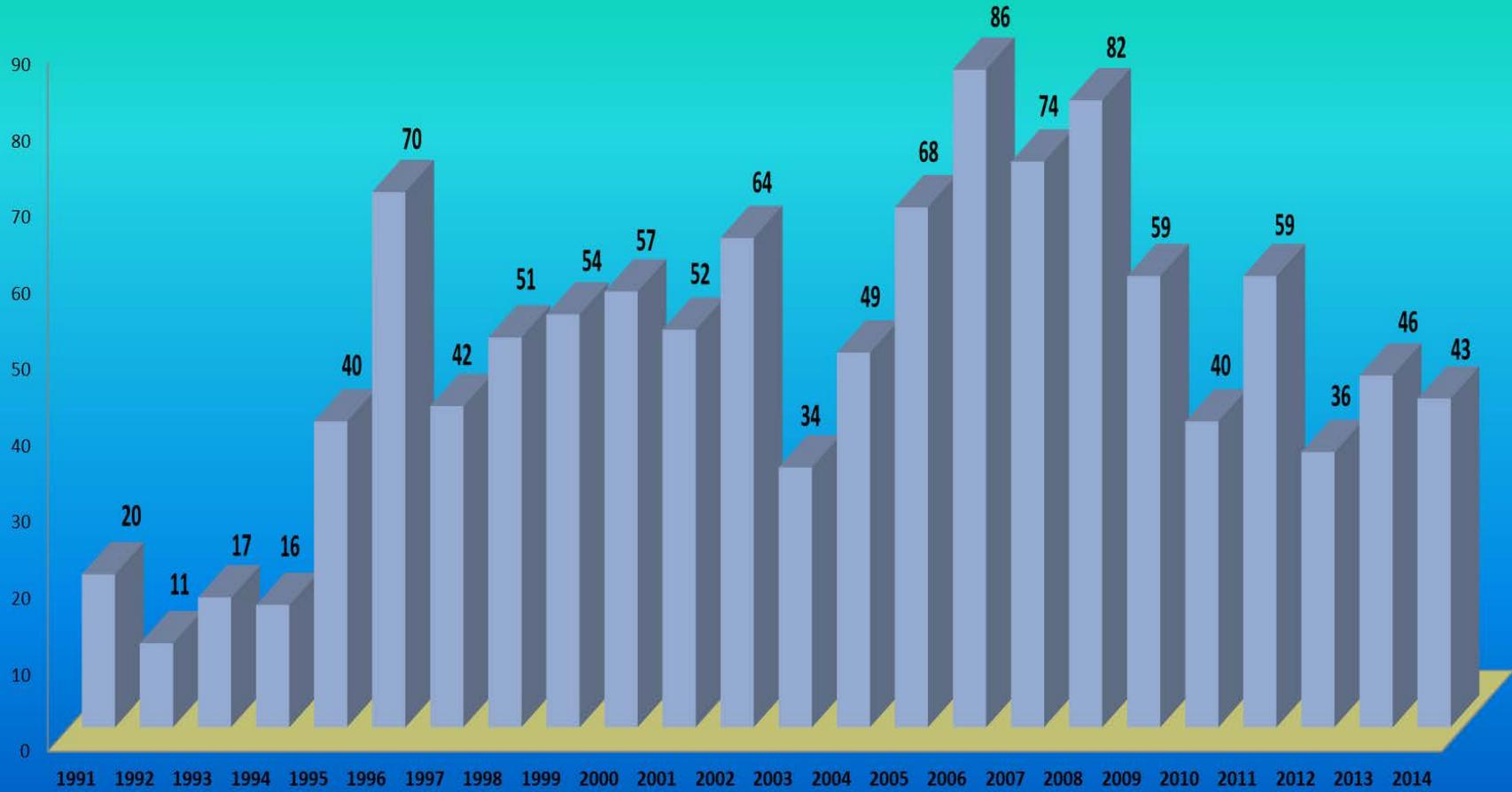
person training sessions. PIC hopes to have the training module complete by June 2015.

(2) Advisory Opinions - [29 Del. C. § 5807\(c\)](#).

Any employee, officer, honorary official, agency, or lobbyist may seek the Commission's advice on the provisions applying to them. While training and publications expose those subject to the law to a broad and general view, the Commission's advisory opinions and waiver service on particular fact situations gives the individual personal attention on a potential conflict, guiding them through the steps that would prevent crossing the ethics line. While advisory opinions are non-binding, if the individual follows the advice, the law protects them from complaints or disciplinary actions. [29 Del. C. § 5807\(c\)](#). Synopses of those opinions later become learning tools at training classes and are available on our website.

In **2014**, PIC acted on 43 requests for written advice. 34 formal advisory opinions were issued by the Commission and Commission Counsel responded to 9 requests for written informal advice. (See chart below).

No. of Opinions Issued 1991 - 2014



(A) Waivers - [29 Del. C. § 5807\(a\)](#)

Any employee, officer, honorary official, agency, or lobbyist may seek a waiver. In rare cases, an individual may need to deviate from the law. The Commission may grant waivers if: (1) the literal application of the law is not necessary to serve the public purpose; or (2) an undue hardship exists for the agency or employee. Waivers are open records so the public knows why a deviation from the law was allowed in a particular case. As some standards are so “vital” that they carry criminal penalties, making the information public further instills confidence that an independent body makes the decision. It also gives the public better exposure to the Commission’s deliberation process which may not be as clear when only a synopsis, that cannot identify the individual by name or through sufficient facts, is permitted.

In **2014**, two waivers were granted. Commission Op. Nos. 14-16 and 14-37. (See Appendices A and B). When a waiver is granted, the proceedings become a matter of public record. Those decisions are also available on the Commission’s website.

(B) Complaints - [29 Del. C. § 5810\(a\)](#).

Any person, public or private, can file a sworn complaint. The Commission may act on the sworn complaint, or its own initiative. A majority (4) must find “reasonable grounds to believe” a violation may have 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. If a violation is found, the

Commission may impose administrative discipline. [29 Del. C. § 5810\(d\)](#). It may refer substantial evidence of criminal law violations to appropriate federal or State authorities. [29 Del. C. § 5810\(h\)\(2\)](#). Frivolous or non-merit complaints, or those not in the Commission's jurisdiction, may be dismissed. [29 Del. C. § 5809\(3\)](#).

In **2014**, the Commission did not receive any properly submitted complaints. A complaint must be in writing, allege violations of specific portions of the Code of Conduct with supporting facts, and be properly notarized. In 2014, every submission was through an anonymous complainant. Without contact information, the Commission could not contact them to explain the procedural flaws. In those cases, the Commission published a synopsis of the dismissal on PIC's website, documenting the procedural deficiencies, with the hopes that the complainant would recognize their submission and contact PIC. The correct form of notarization is below:

29 Del. C. § 4328(3) For a verification upon oath or affirmation:	
State of.....	
County of.....	
Signed and sworn to (or affirmed) before me on (date) by (name(s) of person(s) making statement).	
(Seal)	(signature of notarial officer)
	(title and rank)
	(my commission expires:.....)



V. FOIA Requests

In **2014**, PIC responded to 20 requests for information under the Freedom of Information Act (FOIA), more than double the total of requests in 2013. The requests were submitted by a mix of news media, citizens, and private political organizations. Due to the efficiencies of the PIRS database, PIC was able to respond to 17 of those requests within 24 hours. For the remaining requests, the information requested was not related to data maintained in the database and required research to fulfill the request. PIC was able to gather the requested information and responded to those requests within 14 days.



VI. Funding

In **FY 2015**, which encompasses the last half of the 2014 calendar year, the General Assembly appropriated \$193,500 for PIC, with an operating budget of \$30,600. The Commission continues to spend less than 1¢ per person on the more than 52,000 people it regulates, while at the same time its duties have increased.



VII. Legislation

PIC Sponsored Legislation:

During the 2014 legislative session PIC submitted five pieces of legislation:

- [HB 303](#) Allowing Electronic Verification of Lobbyist's Employer Authorization Forms—signed into law July 22, 2014. This legislation updated the requirements for verification of a lobbyist's Employer Authorization Form which is submitted electronically but had previously been submitted in writing.
- [HB 304](#) Requiring Electronic Filing of Public Officer's Financial Disclosure Reports—signed into law on July 22, 2014. This bill required Public Officers to file their Financial Disclosure reports electronically so that PIC's database accurately captures all disclosure information. Previously, disclosures submitted via fax or PDF were not reflected in the PIRS database.
- [HB 305](#) Requiring Lobbyist Registration Fees—failed to be brought to the floor for a vote. 41 states charge lobbyist registration fees to cover the costs of administering the lobbying laws. PIC will re-submit this bill during the 2015 legislative session.
- [HB 306](#) Establishment of Late Filing Fees for Lobbyist Expense Reports—signed into law on July 22, 2014. Due to the high number of lobbyists failing to file their quarterly expense reports in a timely manner, PIC asked the General Assembly to impose a late fee to discourage the practice. Beginning January 1, 2015, lobbyists will have to pay a \$25 late fee for the first day of delinquency, with

additional fees accruing each day up to a total of \$100.

- [HB 307](#) Reporting of Candidate's Failure to File Financial Disclosure Reports—signed into law on July 22, 2014. This bill allows PIC to report to the Elections Commissioner the names of candidates running for public office who have failed to file their Financial Disclosure Report for publication on the elections website. 15 Del. C. § 8003(f) and 29 Del. C. § 5813. The goal is to make the public aware of those candidates who fail to comply with the statutory requirement.

Other Legislation

- [HB 13 w/HA 2 and SA 1](#) This bill prohibits a former member of the General Assembly from acting as a lobbyist for a period of one year after their term of office ends. Any person who knowingly violates this section is guilty of an unclassified misdemeanor. This bill takes effect January 1, 2015.
- [HB 381](#) Requiring members of the Cash Management Policy Board to file Financial Disclosure Reports—Not brought to the floor for a vote.



VIII. Future Goals

The Commission's focus will be to continue to emphasize education of employees, officers, officials, and lobbyists with the resources at our disposal.



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May 29, 2014

14-16 Post Employment (Waiver Granted)

Hearing and Decision By: *Dr. Wilma Mishoe (Chair); William Tobin, Vice Chair); Andrew Gonser, Esq., Vice Chair; Commissioners: Mark Dunkle, Esq., Bonnie Smith*

Dear Mr. Love,

Thank you for attending the Commission meeting on May 20, 2014. Based upon your written submissions, your comments at the hearing, as well as the comments of Mr. Robert Martine and Mr. Michael Price, the Commission decided to grant the Office of the Chief Medical Examiner a waiver of the post-employment restriction applicable to Mr. Robert Martine for 90 days effective June 1, 2014. Because a waiver was granted, this entire opinion will be published to assure the public that the appropriate interests were considered. 29 Del. C. § 5807(b)(4).

FACTS

You are Director of the Division of Services for Aging and Adults with Physical Disabilities (DSAAPD) within the Department of Health and Social Services. You are temporarily working with the Office of the Chief Medical Examiner (OCME) due to the absence of the OCME's Director. The OCME is comprised of multiple departments, some of which are currently the subject of a criminal investigation. You assured the Commission your request was not related to the Chemical Testing Laboratory which has been closed while the pending investigation is completed.

The OCME is faced with an urgent staffing situation in their Death Investigation Unit serving New Castle County. If fully staffed, the unit has one manager, Michael Price, and four forensic death investigators. Currently, three of the four forensic death investigators are not available: one investigator is on FMLA and expected to return to work in June; a second position is filled but the incumbent is suspended with pay due to an ongoing criminal investigation, return date is unknown; a third position is vacant and a candidate has been offered, but not yet accepted, the position and if accepted, his training will take several weeks; the fourth position is filled and the incumbent is working. The manager and the one staff member on duty are working excessive hours given the lack of normal staffing and the number of deaths requiring investigation. As an example, Mr. Price stated during a one week period earlier this month, there were eight automobile fatalities which required the services of a Forensic Investigator on the scene.

Appendix A

Forensic investigators assist in determining circumstances surrounding certain deaths listed in State statute which include accidents, suicides, suspicious deaths, and industrial and aircraft disasters. Investigations include conducting interviews, photographing the scene and body, gathering and preserving evidence, and transporting the body. Investigations must comply with forensic investigation laws, rules, regulations, standards, and policies. The responsibilities require competencies in medical terminology, anatomy, as well as investigative skills. Once an applicant is hired, a process that takes up to 60 days, the incumbent undergoes 300 hours of field training before being able to work independently. Typically, the agency has hired from a limited pool of retired law enforcement personnel. Mr. Price stated that was because of the investigative skills required for the position. The medical expertise needed for the position is gained through on-the-job training and self-study.

You and your staff are working on a short term solution to the vacancies which would help with some of the staffing issues through the end of May 2014. The OCME is planning to hire Robert Martine, currently a State employee with Capitol Police, who is scheduled to retire on June 1st. Mr. Martine is now on leave (vacation/compensatory time) through the end of May. The Capitol Police have authorized him to work with the OCME while on leave in May. He will be hired as a State seasonal/casual employee through the end of May. However, the OCME would like to contract with Mr. Martine beginning on June 1st for a period of six months. Mr. Martine previously worked for the OCME as a Forensic Death Investigator as a Casual/Seasonal employee from 2007 to 2013. He would be able to step into the job and provide the skilled services the agency needs without delay. You are asking the Commission, on behalf of the OCME, to consider a waiver of the two year post-employment restriction to allow Mr. Martine to contract with the OCME.

APPLICATION OF THE FACTS TO THE LAW

A. For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7th Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not “directly and materially responsible” for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff’d.*, No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official’s responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not “directly and materially responsible” for that particular matter.

The Federal Courts have stated that “matter” must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if Mr. Martine would be working on the same “matter,” Courts have held that it is the same “matter” if it involves the same basic facts, the same parties, related issues and the same

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confidential information. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials*, American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico at 842)*. See also *Beebe*.

There is no question that contracting with Mr. Martine would be a violation of the post-employment restriction. He last worked at the agency one year ago, performing the exact same job. Therefore, as a Forensic Investigator, he was directly and materially responsible for matters in the OCME, a position which is now being offered to him as a contractual worker. A waiver would be necessary to allow Mr. Martine to contract with the OCME within the two year time frame of the post-employment restriction.

B. Waivers may be granted if there is an “undue hardship” on the State Employee or the State agency. 29 Del. C. § 5807(a). They also may be granted if the literal application of the law is not necessary to serve the public purpose. *Id.*

(a) “Undue Hardship”

The common and ordinary meaning of “undue hardship” is “more than is required” or is “excessive.” *Commission Op. No. 97-18* (citing Merriam Webster’s Collegiate Dictionary, p. 1290 (10th ed. 1992)). The Forensic Investigators positions are only 25% staffed. The result is the remaining employees are required to work excessive hours. At this point, Mr. Price indicated that both he and the only other investigator are working 24 hour shifts. Complicating the staffing issue is the fact the job requires special skills and 300 hours of field training, a standard recommended by the American Board of Medicolegal Death Investigators (ABMDI) of which the OCME is a member. To cope with the staffing shortage, Mr. Price indicated he had checked with numerous past employees to see if anyone would be interested in returning on an interim basis but was not successful. He also stated that the position is not one which could be outsourced to a private contractor because the nature of the job requires an immediate ability to respond anywhere in the State 24 hours a day, seven days a week.

When determining the existence of a hardship, the Commission considers the cause and the agency’s role in creating the hardship. As stated earlier, the Forensic Investigator position requires a blend of investigative and medical skills. When the Commission asked about the recruitment process for the vacant positions, Mr. Price stated the OCME has almost exclusively hired retired law enforcement personnel because of their investigative skills. The retired officers obtain the necessary medical training by observing and assisting with autopsies and through independent study. By limiting the applicant pool to such a narrow segment of the population, the Commission believes that much of the agency’s hardship was created by the agency itself. When asked why the agency does not consider hiring trained medical professionals, Mr. Price dismissed them as unqualified because they typically don’t have the investigative skills required for the position. In contrasting the two pools of potential applicants it appears the OCME is willing to hire personnel with investigative experience and teach them the medical aspects of the job, but they are not willing to hire an applicant with medical experience and teach them the investigative side of the job. Interestingly, ABMDI’s website states there are no formal requirements for a position as a death investigator other than those set by each medical examiner’s offices. www.abmdi.org. The ABMDI goes on to say that degrees in “Forensic Science, Natural Science, *Nursing, or any other medically related field would be useful.*” *Id.* (*emphasis added*). The OCME’s short-sighted view of qualified applicants has contributed greatly to the current situation in which they now find themselves.

Appendix A

While it appears the OCME has an inherently flawed hiring process, there are other contributing factors to the staffing shortage which could not have been anticipated. One is the loss of an employee on medical leave and the other is the loss of the suspended employee. The combination of the hiring practices, the employee on medical leave, and the suspended employee have caused an emergency staffing situation in a critically important area. With his previous experience, Mr. Martine would be able to step into the position and begin work immediately. There would be no need for training or orientation. Therefore, the Commission decided to grant a 90 day waiver of the post-employment restriction as it applies to Mr. Martine effective June 1, 2014. During the next 90 day period, at least one employee should be returning from medical leave. Additionally, at the hearing Mr. Price indicated it may be possible to fill one of the other vacancies from a pool of applicants who have already been through the interview process. Therefore, the waiver will help the OCME through the worst part of the staffing shortage. However, the OCME is cautioned that the waiver is a short-term solution to a long-range problem. If the OCME continues its current hiring practices, the Commission expects they will face similar issues in the future. The Commission strongly urges the OCME to explore other hiring options, including partnerships with previously untapped resources such as nursing schools, colleges, and even law students. While we do not have oversight of personnel matters outside the realm of the Code of Conduct, failure to make significant progress in the remedial process will weigh heavily on the Commission's decision-making process if the OCME should again ask for a waiver of the Code of Conduct.

(b) Literal Application Is Not Necessary to Serve the Public Purpose

The overall purpose of the Code of Conduct is to instill the public's confidence in its government. 29 Del. C. § 5802(1) and (2). It is difficult to imagine anything that could be more detrimental to the public's confidence in their government than the OCME's inability to respond to crime scenes, car accidents, and suspicious deaths in order to conduct their investigations in a timely and professional manner, and to provide information on cause and circumstances of a suspicious death. To the contrary, it would appear that the OCME's inability to fulfill this important mission would be more detrimental to the public's confidence in their government than the perception created by contracting with an employee in violation of the two year post-employment restriction. However, the request for a six month waiver seems excessive. A 90 day waiver balances the hardship of the OCME with the public's interest in prohibiting former employees from contracting with their State agency after they leave State service.

CONCLUSION

The Commission grants a 90 waiver, effective June 1, 2014, to the OCME for the purpose of contracting with Robert Martine, a former employee. The purpose of the waiver is to allow the OCME to continue to perform critical services during the immediate staffing shortage.

Sincerely,

/s/ Wilma Mishoe

Dr. Wilma Mishoe
Chair

Appendix A



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November 19, 2014

Jeff Reed, Engineer
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Captain Darren Short
DSP Aviation South
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14-37 Contracting with the State—WAIVER GRANTED

*Hearing and Decision By: William F. Tobin, Jr., Chair, Mark Dunkle, Esq., Vice Chair;
Commissioners: Lisa Lessner, Jeremy Anderson, Esq., Wilma Mishoe and Bonnie Smith*

Dear Mr. Reed and Captain Short,

Thank you for attending the hearing on November 18, 2014. The Commission reviewed Cpt. Short's request for a waiver to allow the State Police Aviation Unit to contract with Mr. Reed, a DeIDOT employee, for the use of his private airplane. Based upon the comments at the hearing and the facts contained in the written submissions, the Commission decided to grant the waiver request.

I. Facts

Jeff Reed works as an engineer for DeIDOT. He owns a private business, Sussex Aero Maintenance, in Georgetown, Delaware. The Delaware State Police (DSP) Aviation Unit wants to contract with Mr. Reed for the use of his airplane. The FAA requires compensated pilots to be commercially certified and DSP's insurance carrier also requires pilots to be commercially certified. In order to be commercially certified, pilots must receive 10 hours of training on an airplane with retractable landing gear. While the Aviation Unit owns an airplane, it does not

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have the type of landing gear required by the FAA. As a result, the Aviation Unit must rent an aircraft with the proper equipment so new pilots may satisfy the commercial certification requirement.

Captain Short, head of the Aviation Unit, explored available rental options in the area. He anticipates the contract with Mr. Reed will be for \$3900 which represents 10 hours of training for three pilots at \$130 per hour. Mr. Reed's airplane is located in close proximity to DSP in Georgetown and as a result, DSP would not incur any travel expenses or lost man hours due to the travel time. A similar aircraft is available at Dover Air Force Base but the rental is higher at \$180 per hour and DSP would lose man hours and incur travel expenses. Delaware State University is another option at the same rental rate of \$130 per hour but would also add travel expenses and lost man hours.

II. Applicable Law

State employees, with a financial interest in a private enterprise that does business with a State agency, must file a full disclosure as a condition of commencing and continuing employment with the State. 29 Del. C. § 5806(d).

Mr. Reed works for DelDOT. He will be contracting with the Delaware State Police for the rental of his private aircraft. He filed a written disclosure of the proposed arrangement. His disclosure, along with his remarks at the hearing, constituted the required disclosure.

Under 29 Del. C. § 5806(d), State employees may not accept other employment if it may result in:

1. Impaired independence of judgment in performing official duties. The law precludes State employees from reviewing or disposing 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)(1). Mr. Reed does have a "personal or private interest" through the contract to rent his aircraft. However, the contract is with a different agency. In his State position, Mr. Reed does not make decisions about DSP's Aviation Unit, or the private contract. As he does not review or dispose of such matters, the contract would not violate this provision.

2. Preferential treatment to any person. The rule above is meant to preclude Mr. Reed, personally, from showing preferential treatment to his own private interest while performing his State duties. As discussed above, that will not occur. Other provisions also address this purpose.

(a) State employees may not represent or assist a private enterprise before their own State agency. 29 Del. C. § 5805(b)(1). This is to preclude Mr. Reed's agency colleagues or co-workers from making preferential decisions pertaining to his private business. That will not occur, as he has no private dealings with his own agency.

(b) State employees may not contract with the State if the contract is:

- (1) less than \$2,000 unless there is arms' length negotiations; or**
- (2) more than \$2,000 unless it is publicly noticed and bid. 29 Del. C. § 5805(b)(1).**

Appendix B

Captain Short estimated the amount of the contract to be approximately \$3900. Because the amount exceeds the \$2,000 threshold, the Code of Conduct requires the contract to be publicly noticed and bid.

Under the State Procurement law, the contract would not require public notice and bidding. That is because the Contracting and Purchasing Committee establishes the usual thresholds for public notice and bidding, 29 Del. C. § 6913(d)(4). Under its directive, the lowest threshold for public notice and bidding for Materiel and Non-Professional Services is for contracts of \$25,000 or over. For professional services, the amount is \$50,000 or more. <http://gss.omb.delaware.gov/contracting/spp.shtml>. Under either of those requirements this contract would not require public notice and bidding. Even if the contract met those thresholds, an agency head may waive the requirement when it is in the best interest of the agency. 29 Del. C. § 6907(a) and (b). Additionally, it may be waived if only 1 source meets the requirement. 29 Del. C. § 6925(a). When public notice and bidding does not occur based on those provisions, the agency must document the reasons, and the efforts put forth to determine the availability of another source. 29 Del. C. § 6907(b)(2) and 29 Del. C. § 6925(b). It is only because Mr. Reed is a State employee and the contract will exceed \$2,000, that public notice and bidding would be required. 29 Del. C. § 5805(c). It applies regardless of whether a conflict exists under any other Code provision; regardless of any additional costs associated with public notice and bidding, or delays in obtaining services; and regardless of whether sources are limited, absent a waiver from this Commission.

The low threshold for State employees, like the restrictions on no self-dealing and no dealing with their own agency, was enacted after Delaware Courts noted that: "The award of [State] contracts has been suspect, often, because of alleged favoritism, undue influence, conflicts and the like." *W. Paynter Sharp & Son, Inc. v. Heller*, 280 A.2d 748 (Del. Ch., 1971). In that case, a State official wanted to contract with his own agency, and the Cabinet Secretary rejected his bid because of his connection to the agency. The Court, upholding the Secretary's decision, noted that there was no State statute dealing with conflicts of interest. A few years later, in 1974, the Code of Conduct was enacted barring State employees from contracting with their own agency. It also included the \$2,000 threshold for public notice and bidding. However, like the Procurement law, which gives an agency head authority to grant waivers, this Commission also has given waiver authority. 29 Del. C. § 5807(a).

(c) Waivers may be granted if there is an "undue hardship" on the State employee or the State agency, or if the literal application of the law is not necessary to serve the public purpose. 29 Del. C. § 5807(a).

Mr. Reed is not requesting the waiver. He purchased his aircraft shop in 2008. No facts suggest he anticipated DSP would need that type of aircraft. The need for a waiver is driven by the fact that DSP does not own an aircraft which meets the FAA's and their insurance carrier's requirements for certification of commercial pilots. In deciding how to resolve the need, Captain Short followed the normal procurement law procedure of seeking available sources, and costs; documenting the reasons, and the efforts put forth to determine the availability of another source. 29 Del. C. § 6907(b)(2) and 29 Del. C. § 6925(b). The hardship on the agency is that after checking for alternative sources, the other available options would cost more in either actual rental fees or in travel expenses associated with travel to and from the airfield.

In considering the public purpose, the Commission considered both the purpose of the procurement law and the Code of Conduct provision, because the procurement law requires compliance with the Code of Conduct in contracts with State employees. 29 Del. C. § 6903(g). The procurement law's purpose is to obtain materials and services at the best possible price to

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maximize the purchasing value of public monies. 29 Del. C. § 6901(1). Captain Short's request is consistent with the public purpose of saving monies because the alternative would cost more. He also complied with the procurement rules which establish how the public purpose will be served—e.g., checking sources and costs, documenting those findings. He was not in any manner acting to circumvent the procurement law.

The purpose of the Code's contracting provision is to insure contracts are not awarded out of favoritism, undue influence, conflicts and the like. The full disclosure of the facts in this matter do not suggest favoritism and undue influence, as the decision to pursue a contract with Mr. Reed was made after seeking out other sources, and based on a calculation of the additional costs that would be incurred if the training were in Dover or Maryland. Moreover, when waivers are granted, the dealings become a matter of public record. 29 Del. C. § 5807(b)(4). This insures the public is aware that the possibility of favoritism, etc., was addressed by an independent agency, and that judgment was exercised in use of public monies. Accordingly, the Commission waives the requirement for public notice and bidding. This waiver is valid for one year, beginning on the date the contract is signed.

3. Official decisions outside official channels. No facts suggest this would occur because as noted above, the official channels were followed in terms of the procurement law and Code of Conduct compliance.

4. Any adverse effect on the public's confidence in the integrity of its government. This is basically an appearance of impropriety test. The test is whether a reasonable person, knowledgeable of all relevant facts, would still believe that a State employee could not perform their State duties with honesty, integrity, and impartiality. *In re Williams*, 701 A.2d 825 (Del., 1997).

Nothing in the above facts suggests Mr. Reed could not properly perform his State duties as a result of the private contract. Moreover, he will not use State time or resources to fulfill the State contract.

III. Conclusion

Based on the above facts and law, we grant a waiver of the public notice and bidding provision for a one-year period. Pursuant to statute, this opinion will be published in its entirety to provide public notice that all of the appropriate reviews have been undertaken and approved. 29 Del. C. § 5807(b)(4).

Sincerely,

/s/ William F. Tobin, Jr., Chair

Public Integrity Commission

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