

2017, Act No. 79 (Ethics Act); Issues for Gov Ops' Consideration

I. Overview

[2017, Act No. 79](#) (Ethics Act) established new standards of ethical conduct and created the State Ethics Commission as an independent commission within the Executive Branch. See the [Act Summary](#) and the [General and Section-by-Section Summary](#).

As described in the act and summaries, the State Ethics Commission:

- Does not have investigative or enforcement authority.
- Pursuant to [3 V.S.A. § 1223](#), accepts, reviews, makes referrals regarding, and tracks **complaints** regarding the three branches of State government alleging violations regarding:
 - 1) *Governmental conduct regulated by law* (defined in [3 V.S.A. § 1201\(5\)](#) to mean “conduct by an individual in regard to the operation of State government that is restricted or prohibited by law,” including laws regarding bribery, false claims, whistleblower retaliation, and post-public employment restrictions);
 - 2) *Dept. of Human Resources Code of Ethics*;
 - 3) *Campaign Finance*; and
 - 4) *Legislative and Judicial Branches and attorneys*.
- Makes those complaint referrals to the entities that currently handle them. Those entities are either required or requested to report back to the Commission on the disposition of the complaint. Any complaint not falling into one of those four categories is to be **closed** by the Commission. The Commission is to keep confidential the complaints and related documents in the custody of the Commission. [3 V.S.A. § 1223](#).
- In consultation with the Department of Human Resources, creates and maintains the **State Code of Ethics** “that sets forth general principles of governmental ethical conduct.” [3 V.S.A. § 1202](#).
- Creates the **disclosure forms** State and legislative candidates and Executive officers are to file. [3 V.S.A. § 1213](#).
- In collaboration with the Department of Human Resources, makes available to legislators, State officers, and State employees **training** on issues related to governmental ethics. [3 V.S.A. § 1224](#).

- Pursuant to [3 V.S.A. § 1225](#), through its Executive Director, issues:
 - a) **Guidance** regarding any issue relating to governmental ethics to an Executive officer or State employee upon his or her request, which shall be kept confidential unless the receiving entity has publicly disclosed it; and
 - b) **Advisory opinions** “that provide general advice or interpretation regarding [[3 V.S.A. ch. 31](#) (governmental ethics)] or any issue related to governmental ethics.” Advisory opinions are to be posted on the Commission’s website.
- **Annually reports** to the General Assembly pursuant to [3 V.S.A. § 1226](#) regarding:
 - *Complaints.* The number and summary of complaints, separated by topic and including their disposition, but not including any personal identifying information.
 - *Municipal complaints.* Pursuant to [2017, Act No. 79, Sec. 17](#) (pg. 31), as a temporary provision effective through the Commission’s Jan. 15, 2021 report, the Commission’s annual report is to include a summary of municipal complaints the Secretary of State is required to accept until Dec. 15, 2020 and report to the Commission.
 - *Guidance.* The number and summary of guidance documents issued, separated by topic, but not including any personal identifying information.
 - *Recommendations.* Any recommendations for legislative action to address State governmental ethics or campaign finance law.

II. Scope of State Ethics Commission Power; Statutory Construction

- *Scope of State Ethics Commission power.* As with other Executive Branch entities exercising statutory powers, the State Ethics Commission “has only such powers as are expressly conferred upon it by the Legislature, together with such incidental powers expressly granted or necessarily implied as are necessary to full exercise of those granted” and is “created by the State for carrying into effect the will of the State as expressed by its legislation.” Trybulski v. Bellows Falls Hydro-Electric Corp., 112 Vt. 1, 7 (1941).
- *Statutory construction.*
 - “Generally, this Court will defer to an agency’s interpretation of a statute it has been charged to execute.” Butson v. Dept. of Employment and Training, 179 Vt. 599, 600 (2006).

- However, when the Judicial Branch construes the meaning of statutory language, “[u]nderlying all other rules of [statutory] construction is the fundamental rule that we must ascertain and give effect to the true intent of the legislature . . . for it is that intent which constitutes the law.” Hill v. Conway, 143 Vt. 91, 93 (1983).
- “Our paramount goal, when interpreting a statute, is to effectuate the intent of the Legislature . . . we effectuate intent by looking ‘to the statute’s language and any legislative history, as well as the legislative policy the statute was designed to implement.’” Dept. of Corrections v. Human Rights Comm’n, 181 Vt. 225, 228 (2006) (other citations omitted).
- “[L]egislative history is helpful in construing a statute where it clearly shows the intent of the legislature[.]” In re Killington, 159 Vt. 206, 216 (1992) (citing Harris v. Town of Waltham, 158 Vt. 477, 481 (1992) (referencing the quote of a legislative sponsor in committee hearings on a bill in discerning legislative intent)).

III. State Ethics Commission; Advisory Opinion Authority

- **Enabling Law:** [3 V.S.A. § 1225\(b\)](#) allows the Executive Director of the Commission to “issue advisory opinions that provide general advice or interpretation regarding this chapter or any issue related to governmental ethics.” The Executive Director may consult with members of the Commission and the Department of Human Resources in preparing advisory opinions. Advisory opinions are to be posted on the Commission’s website.
 - *Compare* to [3 V.S.A. § 1225\(a\)](#), which allows the Executive Director to issue *guidance* regarding governmental ethics to Executive officers or State employees upon their request. Guidance is to be kept confidential, unless the receiving entity has publicly disclosed it. Guidance is to be summarized in the Commission’s annual report – without personally identifying information – pursuant to [3 V.S.A. § 1226\(2\)](#).
- **Legislative History:**
 - [2017, S.8, As Passed Senate](#) (pg. 22) would have allowed the Executive Director to issue “advisory opinions,” which were described as what is now “guidance” under [3 V.S.A. § 1225\(a\)](#). The bill did not provide for what is now “advisory opinions” under [3 V.S.A. § 1225\(b\)](#).
 - House Government Operations; committee testimony on 4/21/17, approx. 1:48 on VSARA’s Committee recording: Committee discusses that it wants the Commission to have advisory opinion authority not in response to specific requests of individuals; rather, without “going into the facts of any individual,” an advisory opinion would generally educate the public regarding

frequently asked questions regarding ethical conduct. (With “guidance” being issued in response to Executive officer or State employee request.)

- [2017, S.8, As Passed House](#) (pgs. 24-25) creates the distinction between guidance and advisory opinions that is now set forth in [3 V.S.A. § 1225](#).
- [Ethics Commission Advisory Opinion 18-01](#):
 - Was issued in response to a private individual/organization’s request;
 - Is in regard to the conduct of one public official; and
 - Provides the Commission’s opinion on the conduct of that one public official, based on the facts alleged by the requesting individual/organization.

IV. State Ethics Commission; State Code of Ethics

- Enabling Law: [3 V.S.A. § 1202](#) requires the Commission, in consultation with the Department of Human Resources, to “create and maintain the State Code of Ethics that sets forth general principles of governmental ethical conduct.”
 - [2017, Act No. 79](#), Sec. 9 (pgs. 25-26) required the Commission to submit a draft Code to the House and Senate Committees on Government Operations prior to creating its final version.
- [State Code of Ethics](#)
- Issues for Committee Consideration:
 - General Principles vs. Specific Prohibitions
 - Section 1 of the Code and Advisory Opinion 18-01 seem to indicate that public officials are required to comply with the Code, and that the Code sets forth prohibitions on governmental conduct.
 - Basis for Advisory Opinion 18-01.
 - Exclusive legislative chamber authority to judge members’ qualifications pursuant to [Vt. Const. Ch. II, §§ 14 and 19](#).