

VERMONT STATE ETHICS COMMISSION  
*Ethics Advisory Opinion Request 18-01*

<sup>1</sup>To: **Brian Leven, Executive Director, Vermont State Ethics Commission**  
Fr: **Paul Burns, Executive Director, Vermont Public Interest Research Group**  
Dt: **August 31, 2018**  
Re: **Request for an advisory opinion from the Ethics Commission**

In January of this year, VPIRG filed an inquiry with the Ethics Commission concerning Gov. Phil Scott's relationship with the Dubois construction company. In response, we were informed that because the complaint did not allege a violation of a code of conduct or law in effect at that time, there was essentially nothing the Commission could do.

By this letter, on behalf of the Vermont Public Interest Research Group, I am requesting an advisory opinion of the Ethics Commission concerning matters outlined below.

**First**, Gov. Scott maintains an ongoing financial interest in the Dubois Construction business. According to mandatory financial disclosures required by the passage of Act 79 in 2017, Gov. Scott reported that Dubois Construction paid him \$75,000 last year. This was the result of a financing deal that Gov. Scott entered into when he sold his share of the business before he took office. <https://www.burlingtonfreepress.com/story/news/politics/2018/06/07/would-governors-miss-vermonts-new-ethics-law/644302002/>

**Second**, Dubois Construction has entered into at least one substantial contract with the State of Vermont since Gov. Scott took office. This contract is through Buildings and General Services and is worth up to \$250,000. The duration of the contract is from June 15, 2017 to June 14, 2019. <http://bgs.vermont.gov/sites/bgs/files/files/purchasing-contracting/contracts/33703%20DUBOIS%20CONSTRUCTION.pdf>

**Third**, Attachment C of the current BGS contract with Dubois is the Standard State Provisions for Contracts and Grants. Section 20 of Attachment C states that:

**No Gifts or Gratuities:** Party shall not give title or possession of anything of substantial value (including property, currency, travel and/or education programs) to any officer or employee of the State during the term of this Agreement.

**Fourth**, since the time of VPIRG's initial inquiry, the Ethics Commission has adopted a "**State Code of Ethics: General Principles of Governmental Ethical Conduct.**" Under Section 1, General Principles, the Code states:

(1) A public official shall not have a conflict of interest or engage in any business, employment, transaction or professional activity, or incur any obligation that is in conflict with the performance of their duty as a public official.

Section 3 of the Code states in part:

(3) A public official shall not solicit or accept any gift or other item of monetary value, other than a campaign contribution, from any person or entity seeking official action from, doing business with, or conducting activities regulated by the public official's agency...

Section 7 of the Code states:

(7) A public official shall avoid any actions that create a potential or actual conflict of interest with their official duties or that they are violating the law, these General Principles of Governmental Ethical Conduct, or other governmental codes of conduct. A public official should avoid the appearance of a potential or actual conflict of interest.

Given the fact that the governor has an ongoing financial relationship with a business that has received one or more large contracts from the State since Gov. Scott took office, VPIRG now requests an advisory opinion from the Commission as to whether these facts present a conflict according to Vermont's new Code of Ethics.

If you require any additional information from me at this time, please feel free to contact me. Thank you very much for your consideration of this matter and I look forward to receiving the Commission's opinion.

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VERMONT STATE ETHICS COMMISSION  
*Ethics Advisory Opinion 18-01*

The Vermont State Ethics Commission has considered this request for an ethics advisory opinion from the Vermont Public Interest Research Group received August 31, 2018.

At present, the State Ethics Commission does not have the authority to compel an investigation to verify the alleged facts provided in this or any advisory opinion request. However, the Commission can render a general ethics advisory opinion based on the alleged facts presented in the request.

The fundamental issue presented in this ethics advisory opinion request is whether a public official can be a creditor to, and maintain a financial interest in, a company that contracts with the State.

In analyzing the issues presented, the Ethics Commission applied the State Code of Ethics: General Principles of Governmental Ethical Conduct,<sup>1</sup> Principles 1, 13, 3, 7, respectively.

***Principle 1***

Principle 1 of the Code states:

A public official shall not have a conflict of interest or engage in any business, employment, transaction or professional activity, or incur any obligation that is in conflict with the performance of their duty as a public official.

A “public official,” as defined in the Code, is “a statewide officer, whether elected or appointed, state legislator, or state employee.” Clearly, the position of governor, an elected official at the highest level in the executive branch of State government meets the definition of public official.

Principle 1 prohibits a “conflict of interest,” which is defined as: “a direct or indirect personal or financial interest of a public official, or the official’s family member, household member, business associate, employer, or employee, in the outcome of a cause, proceeding, application, or any other matter pending before the official or before the agency or public body in which the official holds office or is employed.” “Financial interest” is defined as “a pecuniary or equity interest, such as in stocks, assets, net profits, or losses of a business.”

Given the information provided, the Commission concludes that in the scenario presented in this advisory opinion request, the public official has a direct financial interest in his former company which paid the public official \$75,000 in 2017 as the “result of a financing deal that the public official entered into in 2016 when he sold his partnership share of the company.” The conflict of interest arises when a two-year contract for \$250,000 was awarded in 2017 under the authority of

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<sup>1</sup> The Commission adopted the State Code of Ethics: General Principles of Governmental Ethical Conduct on June 6, 2018.

the public official<sup>2</sup> to the public official's former company, which provides significant income to the company, and directly assists the company in meeting its financial obligation to the public official.

Applying Principle 1, the public official has a conflict of interest because he is financially intertwined as a creditor, who has an ongoing financial interest in a company that contract with the State, which the public official as governor is the chief executive officer.

### *Principle 13*

Principle 13 of the Code states:

A conflict of interest of any public official shall be imputed to any public official, who serves at the direction and control of that first public official, who has actual knowledge of the conflict.

Principle 13 sets out a fundamental tenet of governmental ethics codes known as a non-delegation clause.

Based upon the information set forth in the advisory request, the business contract with the State is clearly an "other matter pending" contemplated by the definition of "conflict of interest." This definition establishes that the matter pending be "before the agency or public body in which the public official holds office or is employed."

The contract in question was entered into by and between the State of Vermont, Department of Buildings and General Services and the company. The Commissioner of Buildings and General Services signed the contract on behalf of the State of Vermont. The Commissioner of Buildings and General Services is appointed by the Secretary of Administration with the approval of the governor and advice and consent of the Senate (3 V.S.A. § 2251). The Secretary of Administration is appointed by the governor with the advice and consent of the Senate (3 V.S.A. § 2221).

Applying Principle 13, the first public official's conflict of interest is imputed to any subordinate public official acting as the first public official's delegate, in this case the Commissioner of Buildings and General Services and the Secretary of Administration, who serve at the direction and control of the first public official, in this case the governor, who has actual knowledge of the conflict of interest.

### *Principle 3*

Principle 3 of the Code states:

A public official shall not solicit or accept any gift or other item of monetary value, other than a campaign contribution, from any person or entity seeking official action from, doing business with, or conducting activities regulated by the public official's agency, or whose interests may be substantially affected by the performance or nonperformance of the public official's duties, other than those permitted by law.

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<sup>2</sup> See analysis under Principle 13 on the issue of the authority of the Governor.

An additional issue presented in the advisory opinion request is whether or not the \$75,000 payment to the public official from his former company is a “gift” as defined in the Code. The definition of “gift” is “(ii) anything of value, tangible or intangible, that is bestowed for less than adequate consideration . . .”

Under the facts presented, the payment to the public official was part of a contractual obligation the Commission cannot conclude that payment to the public official was bestowed as a gift.

However, a relevant portion of Principle 3 states that a “public official shall not solicit or accept any “other item of monetary value” from an entity doing business with his agency.”

As stated in the alleged facts, the contract was entered into by and between the State of Vermont, Department of Buildings and General Services and the company. A governor as CEO of the State of Vermont has authority over or on behalf of the State Agency entering a contract. The governor or any public official is prohibited under Principle 3 from accepting “any other items of monetary value” from a company doing business with the State of Vermont.

Applying Principle 3, each time the public official as creditor receives an interest payment from the company, the State Ethics Code provisions against conflicts of interest are triggered.

The request for an advisory opinion also references the following provision in the contract (Paragraph 20 of Attachment C):

**20. No Gifts or Gratuities: Party [Business] shall not give title or possession of anything of substantial value (including property, currency, travel and/or education programs) to any officer or employee of the State during the term of this Agreement.**

Without the authority to investigate the alleged facts, whether or not this contract provision has been breached should more properly be reviewed as a contractual matter by the Vermont Attorney General, and is beyond the scope of this advisory opinion on governmental ethics issues.

### *Principle 7*

Principle 7 of the Code states:

A public official shall avoid any actions that create a potential or actual conflict of interest with their official duties or that they are violating the law, these General Principles of Governmental Ethical Conduct, or other governmental codes of conduct.

A public official should avoid the appearance of a potential or actual conflict of interest.

The last sentence of that Principle 7 states: “A public official should avoid the appearance of a potential or actual conflict of interest.” The appearance of the potential or actual conflict of interest is apparent by virtue of the filing of this ethics advisory request. Furthermore, given the governor’s authority over the Commissioner of Buildings and General Services, and the Secretary of Administration, this appearance is well founded.

All public officials are expected to comply with the State Code of Ethics: General Principles of Governmental Ethical Conduct. The State Ethics Commission strongly urges public officials to proactively seek ethics guidance from the State Ethics Commission on ways they can avoid and mitigate conflicts of interest.

The Ethics Commission advises all public officials to avoid conflict of interests by refraining from having any financial interest in or being a creditor to a company which contracts with the State of Vermont. Avoiding conflicts of interest or even the appearance of a conflict of interest is essential to building a rigorous organizational culture of ethical conduct at all levels of government.

Vermont State Ethics Commission  
*October 1, 2018*