



*Ethics is knowing the difference between
what you have a right to do and what is right to do.*

-Potter Stewart

Submitted: January 15, 2021



**Vermont State Ethics Commission
6 Baldwin Street
Montpelier, VT 05633-7950**

TABLE OF CONTENTS

Mission Statement.....	Page 3
Letter from the Chair.....	Page 4
Introduction: Looking Toward the Future.....	Page 5
Part I: Year in Review.....	Page 5
Part II: Guidance, Complaints, Advisory Opinions.....	Page 10
Part III: Ethics Commission Recommendations.....	Page 14

APPENDICES

Appendix A: Why a Statutory Code of Ethics is Necessary, Larry Novins
Appendix B: State-wide office holders support a statutory code of ethics. Feb 10, 2020 letter
Appendix C: Ethics Commission Press Release, July 2020
Appendix D: Ethics Enforcement Memorandum, Larry Novins
Appendix E: Administrative Duties
Appendix F: Secretary of State Report on Municipal Ethics

Pursuant to 3 V.S.A. § 1226 the Vermont State Ethics Commission submits its second annual report. This report covers the year 2020.

MISSION STATEMENT

The State Ethics Commission mission is to practice and promote the highest level of ethical standards and accountability in state government. The Ethics Commission offers governmental ethics training to all public servants, accepts, reviews, and makes referrals of complaints of alleged violations of governmental conduct regulated by law, provides information to the public, and issues ethical guidance and advisory opinions based on governmental codes of conduct and the General Principles set forth in its State Code of Ethics.

The Ethics Commission accepts complaints from any source regarding government ethics in all three branches of State government or violations of the State's campaign finance laws, 3 V.S.A. § 1223(a). The Ethics Commission refers and tracks complaints of violations of governmental conduct regulated by law. 3 V.S.A. § 1221. The Commission serves as a resource to public servants and the general public.

FROM THE CHAIR

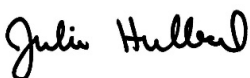
The 2020 Annual Report is the third in the Vermont State Ethics Commission's history. Despite being a remarkably chaotic year worldwide, for our Commission it was also remarkably productive. Still in our fledgling stages, the Ethics Commission faced all the challenges as other organizations, and we faced them head-on.

We pivoted our operations to a remote format in a matter of days. As a result, we continued to meet on schedule; not one meeting was canceled or postponed in 2020. We continued with the work of drafting a Code of Ethics to be considered for adoption by statute. We were successful at seeking public comment, making amendments, and submitting the final draft to the Legislature in advance of the new biennium.

As you will see in this Annual Report, creating the draft code was no small feat. Our ability to deliver this work to you is largely due to the dedication and tireless effort of our Executive Director, Larry Novins, supported by our small but committed volunteer board. During 2020 the Ethics Commission's Executive Director provided more educational opportunities than ever before, and through the public comment process, spoke with many Vermonters who desired to know more about government ethics.

Author Margaret J. Wheatley wrote, "Ethics are how we behave when we decide we belong together." Now is the most critical time to remember - we do belong together. We must continue to build trust in our government through the Ethics Commission's work.

Respectfully,



Julie Hulburd, SHRM-CP, PHR
Vermont State Ethics Commission, Chair

INTRODUCTION: LOOKING TOWARD THE FUTURE

2020 was, in so many ways, a year of great change. 2018 and 2019 revealed the inadequacies in Vermont government ethics standards and ethics oversight. 2020 saw the Ethics Commission redouble its efforts to build a foundation for ethics awareness in state government and eventual meaningful ethics oversight and enforcement. This third Ethics Commission Annual Report highlights the Ethics Commission's primary focus for 2020, its work toward a statutory code of ethics.

PART I: THE YEAR IN REVIEW

The State Ethics Commission: The Commission was created by Act 79 and codified in Chapter 31 of Title 3 of the Vermont Statutes Annotated. It has five members and an Executive Director.

MEMBERS

- *Julie Hulburd*, Chair, appointed by the Vermont Human Resource Association;
- *Christopher Davis*, Atty., appointed by the Vermont Bar Association;
- *Sarah Biolsi Vangel*, Atty., appointed by the Chief Justice of the Vermont Supreme Court;
- *Paul Erlbaum*, appointed by the League of Women Voters of Vermont; and
- *Michele Eid*, CPA, appointed by the Board of Directors of the Vermont Society of Certified Public Accountants.

EXECUTIVE DIRECTOR

- *Larry S. Novins*, Attorney.

Biographies: <https://ethicscommission.vermont.gov/about-us/biographies>

COVID-19 accommodations: The Ethics Commission had its first three 2020 monthly meetings in person at the Commission office in Montpelier. The Executive Director and Commission Chair made their last in-person legislative appearance at the House Government Operations Committee on March 11, 2020. All meetings after that, including the Ethics Commission’s public hearing on its draft code of ethics, were held remotely using Zoom.

Focus 2020, a statutory code of ethics: A decreasing number of complaints and ethics guidance requests (see, below) did not diminish the Ethics Commission’s 2020 work. The Commission analyzed the strengths and weaknesses of ethics awareness and oversight in state government. From the Ethics Commission’s creation in 2018, Act 79 was acknowledged as a starting point for “Governmental Ethics.” In late 2019, the Ethics Commission submitted proposed changes to 3 V.S.A. Chapter 31. The proposed changes became 2020’s H.634. One of the changes requested was a new provision: The Ethics Commission should submit to the Legislature a draft code of ethics for statutory enactment. The Ethics Commission sees a statutory code of ethics as essential to ethics in state government. A statutory code is needed to provide legally based advice and guidance. It is indispensable if there is ever to be ethics enforcement in Vermont. (See, Appendix A “Why a Statutory Code of Ethics is Necessary.”) S.198 also included the draft code of ethics mandate. S.198 added that the Ethics Commission should submit options for ethics enforcement. Preempted by COVID-19, neither bill became law. The Ethics Commission committed to the tasks anyway. The House and Senate Government Operations Committees asked the Ethics Commission to seek public input for the ethics code before submitting its draft code of ethics to the Legislature.

Other 2020 Goals: The Commission kept sight of its other 2020 goals. It maintained and updated its website. It re-submitted its 2019 proposals for legislation to make the H.634 changes and extend the Commission funding mechanism for an additional year. It has done so again for 2021. Ethics Commission members in 2020 filed executive officer financial disclosure statements, even though annual forms are not yet required by statute. The Commission updated the executive

officer financial disclosure statement form for use in 2021 to make it an easier to use fillable pdf and posted it on its website.

Ethics education outreach activities: The Executive Director participated in several ethics trainings for government employees with the Center for Achievement in Public Service (CAPS). He presented a government ethics overview to the Vermont Climate Council when it first met in November. The Ethics Commission had hoped to participate in an ethics training session for the House of Representatives planned for 2020. It did not occur because of the COVID-19 pandemic. In December, both the Executive Director and Commission Chair remotely attended the annual meeting of the Council on Government Ethics Laws (COGEL). The event provided education and perspective on all aspects of governmental ethics and ethics oversight. It reaffirmed how Vermont governmental ethics oversight trails other jurisdictions.

Legislative Activities: In late 2019 and early 2020 the Executive Director met with all six state-wide office holders to brief them on the Commission's efforts toward a statutory code of ethics. In February, Governor Phil Scott, Lieutenant Governor David Zuckerman, Treasurer Beth Pearce, Secretary of State Jim Condos, Auditor Doug Hoffer, and Attorney General TJ Donovan sent a joint letter to Senator Jeannette White and Representative Sarah Copeland Hanzas, Chairs of the Senate and House Government Operations Committees. The letter asked them as chairs of the committees responsible for oversight and conduct of state government to continue, "your good work this legislative session toward a Code of Ethics for public servants that *is backed by the force of law.*" (Emphasis in original.) (See, Appendix B.)

The Executive Director and Commission Chair appeared at numerous hearings at the House and Senate Government Operations Committees to advocate for significant amendments to Title 3, Chapter 31 (seen in H.634 and S.198) and in the House Appropriations Committee to discuss the Ethics Commission's budget. In addition to asking the Commission to submit a draft code of ethics, H.634 amendments called for closing executive officer financial disclosure loopholes created in the original statute, adding a certification that the information disclosed is true, changing

and clarifying Commission members' terms of office so that no more than one commissioner's term ends in any year. H.634 was reviewed by the House Government Operations Committee. It received no formal action before COVID-19 put it on the back burner. S.198 was voted out of the Senate Government Operations Committee and referred to the Senate Finance Committee. After COVID-19's arrival, it received no further Senate action. The Commission's work did not end.

Statutory Code of Ethics: Both the Senate and House Government Operations Committees asked the Ethics Commission to proceed with the draft ethics code project and seek public input before submitting the draft to them in November. The Executive Director reviewed ethics laws of the federal government and states. He also reviewed enforcement provisions of the forty-seven states which have authority to enforce those ethics laws. The Commission reviewed its early draft code of ethics and modified it.

In early July, the Ethics Commission approved a draft code of ethics to be released for public comment. The Executive Director issued a press release to scores of media outlets throughout Vermont. (See, Appendix C.) The press release explained the need for a statutory code of ethics and the need for public input before a draft is sent to the Legislature. The Executive Director had partial success getting emails with the press release sent to state employees. Emailed comments began arriving almost immediately. The public hearing, held on Zoom in early August, generated little additional comment. After the public comment period ended, the Commission reviewed all comments and amended the draft where appropriate. In response to the comments received, the Commission agreed to make substantial changes to the sections on conflicts of interest, gifts, and post-government employment. The Commission contracted with T.J. Jones, former Executive Director of the California Fair Practices Commission and former Ethics Enforcement Officer with the State of Connecticut, to consult on the draft code of ethics. The Ethics Commission submitted its proposed code of ethics to the House and Senate Government Operations Committees in November. Also submitted was the earlier version of the code sent out for public comment annotated with comments received to show the evolution to the November version. The

submissions may be seen on the Ethics Commission website:
<https://ethicscommission.vermont.gov/new-ethics-code-enacted-law> .

Ethics Code Enforcement: When Vermont adopts a statutory ethics code, the obvious questions are, “how will we achieve compliance?” then, “how will it be enforced?” Compliance is the goal. Better compliance means less enforcement is needed. Ethics codes with no enforcement for non-compliance have limited value. The quickest, most effective way to achieve ethics code compliance is through education and ethics awareness. Some manner of formal enforcement will, no doubt, be necessary in the future. It should not begin immediately. The Ethics Commission has made its belief clear: discussion of ethics code enforcement is best only after the Vermont has agreed on exactly what Vermont statutory ethics standards will be. Discussing enforcement and its cost now will distract from the fundamental task of adopting a code of ethics.

Once an ethics code is adopted, code compliance will require knowledge and understanding what conduct is expected. Ethics education and ethics awareness must come first. The Ethics Commission believes that public servants as a group wish to behave ethically. An initial period for ethics education and awareness will allow a thoughtful evaluation of how the code is working, the extent of compliance, and then enforcement needs. In the meantime, an adopted code will enhance ethics advice, guidance, and ethical behavior. Basic enforcement considerations are addressed in the Ethics Commission’s enforcement memorandum submitted to the Senate Government Operations Committee. (See, Appendix D.) Enforcement is best considered when enforcement needs become clear.

Executive Director, Substantive and Administrative Duties: The Executive Director is the Ethics Commission’s only employee. His position is half-time. He tries to be the eyes and ears of the Ethics Commission. He arranges agendas and responds to complaints. He drafts all Ethics Commission documents ranging from complaint-related correspondence to proposed statutes and annual reports. He responds to all inquiries and requests for advice. The

Executive Director researches and analyzes legal issues, formulates policy, provides ethics education and advice, testifies, and responds to media inquiries. In addition, the Executive Director is responsible for numerous Ethics Commission administrative duties. (See, Appendix E.) When Commission work is at its busiest, the administrative burdens are substantial.

PART II: GUIDANCE, COMPLAINTS, ADVISORY OPINIONS

As the Ethics Commission's limitations are more widely known, complaints to it and requests for ethics guidance and advisory opinions have decreased.

Guidance: Guidance requests decreased in 2020. Guidance based on the Ethics Commission's current non-binding code of ethics provides no protection to a public servant if the advice is followed and no consequence if it is not. Guidance requests in 2020 included:

- questions regarding the requirements and particulars of candidate financial disclosure forms.
- propriety of a state legislator's community service (no answer provided since the question was not from the individual involved).
- gifts received at meetings.
- contractors and whether they have authority to speak for the State of Vermont.

Potential Complaints: The Ethics Commission was contacted several times in 2020 with potential complaints. When advised how complaints are handled, potential complainants did not follow up with formal complaints. Rather, this frequent response: "Why bother, if you can't do anything?" The subject matter of the potential complaints involved:

- treatment of an individual held involuntarily in a state institution.
- suspected voter fraud, (no Ethics Commission authority over municipal actors).
- Other municipal government misconduct, 7 cases (no Ethics Commission authority). (See, note below.)

- a state funded health facility (no Ethics Commission authority).
- state actor conduct toward a criminal defendant (not an ethics-based complaint).

Note: *Municipal Complaints:* The Ethics Commission’s duties under current Vermont law do not include attending to municipal ethics complaints or providing guidance or advice to municipal officers. The Legislature recognized that municipal ethics are worthy of observation. Sec. 17 of Act 79 requires the Secretary of State to accept complaints in writing regarding municipal governmental ethical conduct and report those complaints to the Ethics Commission Executive Director in the form requested by the Executive Director. The Secretary of State’s office reported that in 2020 it received 98 inquiries related to municipal governmental ethics. For lack of any meaningful complaint procedure, only two formal complaints were filed. (See, Appendix F.) The Secretary of State’s 2020 report to the Ethics Commission contained, as it did in 2019, this caveat: “We would like to note that many individuals with complaints opted not to submit these complaints in writing, citing concerns about our office’s obligation to report to municipalities and the lack of any investigation or enforcement mechanism.” Email from Chris Winters, Deputy Secretary of State, to Larry Novins, Executive Director, December 15, 2020. The number of municipal ethics complaints to the Secretary of State and to the Ethics Commission far exceeds the number of complaints against state public servants. Municipal ethics in Vermont deserve closer scrutiny and attention.

Formal Complaints: By statute, complaints submitted to the Ethics Commission are confidential. Once received, the Executive Director performs a preliminary review of each complaint then decides whether the complaint should be referred for further action or closed. When a complaint is referred for further action, the receiving entity uses its own policies and standards to investigate and to decide what, if any, action to take.

Because of a potential conflict of interest, the Executive Director recused himself from participation in one complaint. It was then handled by the Ethics Commission Chair. The Executive Director spoke with all but one person who filed complaints in 2020. He ensured that the full nature of each complaint was understood, then kept in regular communication with complainants. When there was no avenue for complaints, he explained the extent and limitations of ethics oversight in Vermont. Complainants, even those whose complaints were not forwarded

for action, were grateful that there was a place for them to go. As in 2018 and 2019 frequently heard comments included: “At least I got to speak to a real person,” or “I am glad to have someone listen who cares.” However, many shared frustration that there was no available remedy for their complaints. Complaints screened and referred in 2020- alleged:

- misuse of government position, referred to DHR, pending.
- misconduct by several state legislators, regarding suspected illegal non-public meetings, referred to appropriate ethics panel, no misconduct found.
- misconduct by state-employed attorneys (two), regarding conduct in a criminal case, referred to Professional Responsibility Board, no disposition yet reported.*
- misconduct by a professional licensing board and staff, referred to DHR.** See, note below.
- misconduct by a state legislator, regarding suspected post-primary election activity, referred to appropriate ethics panel, no actionable misconduct found.

* These attorney complaint cases reveal a disconnect between a state code of ethics and the Vermont Rules of Professional Conduct. Complaints based on basic governmental ethics principles often find no equivalent rules in the Vermont Rules of Professional Conduct that govern attorneys. For example, a complaint can allege that an attorney in state government used her position to obtain a benefit not available to others. There is no equivalent provision in the attorney ethics rules. That complaint, even if it alleges a well-founded violation of *government ethics* would receive no action when referred to the Professional Responsibility Board. Government ethics violations do not always translate into sanctionable violations of legal standards that apply to attorneys. This is true also of conduct by other public servants whose conduct is referred elsewhere for further action.

** Complaints against State Boards and Commissions. Those referred to the Department of Human Resources may not be acted upon because DHR has authority over State employees only. Members of State Boards and Commissions who are not State employees are not under DHR purview. There are approximately 175 Vermont State Boards and Commissions. Governor’s Scott’s Executive Order 17-79 sets ethical expectations for gubernatorial appointees (boards and commissions) with enforcement reserved to the Governor. The Executive Order

does not have the force of law and can be revised at any time. No State Board or Commission is subject to an enforceable state-wide code of ethics or independent ethics oversight. State employees who work with or for boards and commissions may be subject to DHR oversight.

In 2020 the Ethics Commission received no complaints after September.

Campaign Finance Complaints: The Ethics Commission received no campaign finance violation complaints in 2020. The Office of the Attorney General reported that it had received 23 complaints. One resulted in a civil penalty agreed to by the respondent. The others were either complaints regarding federal campaigns or candidates not covered by Vermont law, or complaints where the violations complained of were inadvertent, remedied and de minimis in nature. They were seen as not justifying formal enforcement action. Inadvertent errors were made by new candidates unfamiliar with controlling campaign finance laws. They reportedly remedied the errors when attention was called to them.

Advisory Opinions: There were no requests for advisory opinions in 2020 and thus no need to invoke the new advisory opinion policy and process by which the Ethics Commission could ask for public input before issuing an advisory opinion. As the Ethics Commission noted in last year's report,

The Code of Ethics [adopted by the Ethics Commission] was not the product of formal rulemaking or legislative enactment. It lacks the force of law and is, therefore, unenforceable. To the extent an advisory opinion may be based on the Code of Ethics, it gives a sense of what ethical conduct should include, but not what is required. An advisory opinion based on an unenforceable code of ethics is illusory and cannot safely be used as precedent. It gives public servants no assurance that relying on the opinion will be safe or without consequence. A public servant requesting a formal advisory opinion receives little more than an ethical "weather report."

PART III: ETHICS COMMISSION RECOMMENDATIONS

In 2020, daily news stories about ethics in government appeared in virtually all national media. As we wrote in last year's report, the Ethics Commission's inability to meaningfully advise on ethics issues and respond to ethics complaints has become increasingly well-known. Effective government requires public trust. With no real assurance that government ethics and complaints are taken seriously, public confidence in the integrity of government can yield to simmering distrust and cynicism.

RECOMMENDATIONS:

- 1) The Ethics Commission recommends passage of a statutory code of ethics.
- 2) The Ethics Commission recommends passage of the amendments to Act 79 that were contained in last year's H.634, including:
 - making executive officer financial disclosure statements annual.
 - amending 3 V.S.A. § 1225(a and b) to clarify that guidance requests and advisory opinions may only be requested by State public servants regarding their own current or prospective conduct.
 - funding the Ethics Commission through June 30, 2022.
- 3) Staffing: The Ethics Commission asks that it be permitted to have an administrative staff position. The Executive Director frequently works more than the allotted 20 hours per week. No additional appropriation has yet been requested for FY2022. However, should Commission responsibilities be expanded in any way, the current staffing level will be unsustainable.
- 3) Municipal ethics: The Ethics Commission asks that the Legislature consider ways to provide ethics assistance to municipalities. The number and frequency of complaints received about municipal public servant misconduct is concerning. Some cities and towns lack independent resources to consult about basic ethical practices. As with state employees, the Commission believes that municipal public servants want to do the right thing and behave ethically. Ethics

awareness and education is the most effective means for avoiding ethics problems. Making general ethics education and assistance available to municipalities should be studied. The Ethics Commission can be a resource to provide general governmental ethics education and general ethics guidance to municipal officers whose rules and charters governing them vary widely. This can be done without imposing additional legal requirements on municipalities.

CONCLUSION:

The Ethics Commission firmly believes that the most productive roles it can play now are raising awareness of governmental ethics and working toward adoption of a statutory code of ethics. Ethics education and advice help public servants avoid ethical dilemmas. The mark of a successful ethics program is, quite simply, ethical conduct. Visible attention to government ethics helps public servants do their jobs. Ethics awareness in government should prevent ethics complaints. A culture of ethics in government will attract good people to all levels of government.

In the end, government integrity is recognized only when the public is confident that its servants are “doing the right thing.” The Ethics Commission is committed to its role in that effort.

Respectfully submitted:

Vermont State Ethics Commission

Larry S. Novins

Executive Director

APPENDIX A

WHY A STATUTORY CODE OF ETHICS IS NECESSARY, LARRY NOVINS

A core responsibility of the Vermont Ethics Commission is providing ethics advice and guidance when state public servants encounter ethics questions. Advice given is based on the State Code of Ethics created by the Commission. 3 V.S.A. § 1202. The Code represents the Ethics Commission's judgment of what ethics standards of public servants should be. The State Code of Ethics is not a law or even a statutorily authorized rule adopted through the Administrative Procedure Act. (See, e.g., 26 V.S.A. § 1574 granting rule-making authority to the Board of Nursing.) The Commission's State Code of Ethics adopts generally recognized standards for government ethics. The Code contains some provisions similar to those found in the Department of Human Resources Personnel and Policy Manual and the Governor's Executive Order 19-17, neither of which has the force of law. Neither applies to all public servants in Vermont. Even if the Ethics Commission is given enforcement authority, its current State Code of Ethics is legally unenforceable.

By statute, the Ethics Commission receives complaints regarding "governmental ethics in any of the three branches of government." Vermont law contains no general ethics standards for all of state government. The Ethics Commission is authorized to provide advisory opinions and confidential "guidance" regarding its statutes "or any issue related to governmental ethics." So far, no request for advisory opinion or guidance has been sought regarding any provision of "this chapter," meaning Chapter 31 of Title 3 - Government Ethics.

Ethics advice or guidance given now is based on the Commission's State Code of Ethics, not ethics standards set in law. Advice and guidance given is, therefore, of limited use. While ethics advice may be helpful, there is no protection for anyone who follows it. Nor is there any sanction against anyone who disregards it. A public servant who ignores an advisory opinion or guidance may do so with impunity. For those reasons, Ethics Commission advice and guidance is now rarely sought. As noted above, a binding statutory code of ethics is essential for the legitimacy of any advisory opinion or ethics guidance.

Under current law the Ethics Commission may accept and refer complaints of "government conduct regulated by law," the DHR "Code of Ethics" [sic], and of the State's finance laws set out in Chapter 61 or Title 17. With no statute setting ethics standards, there is no "governmental conduct regulated by law" regarding ethics violations to refer. And, with no legally applicable governmental ethics conduct regulated by law, there can be no ethics standards to enforce or use for advice or guidance. Forty-seven states have enforceable ethics provisions. A Vermont State Code of Ethics adopted by statute is essential.

APPENDIX B



STATE OF VERMONT

10 February 2020

Senator Jeanette White, Chair
Senate Committee on Government Operations

Representative Sarah Copeland Hanzas, Chair
House Committee on Government Operations

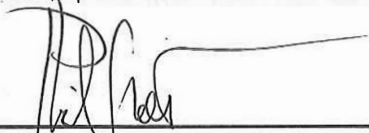
Dear Senator White and Representative Copeland Hanzas,

As Vermont's statewide elected officials, we ask you – the chairs of the legislative committees responsible for oversight and conduct of state government – to continue your good work this legislative session toward a Code of Ethics for public servants that is backed by the force of law.

Vermont's elected leaders must provide a check and balance because public servants' intents and the public good are sometimes at odds with each other.

As you know, in our public service, we must account for and address issues such as: conflicts of interest, preferential treatment, abuses of power, outside gifts, and protections for whistleblowers. A Code of Ethics embedded in Vermont law will provide public servants with direction and clarity on numerous issues they regularly face.

In 2017, the Legislature and Governor created the State Ethics Commission. We ask that you take the next legislative step and work with the Ethics Commission and others to establish a Code of Ethics for Vermont's public servants in all three branches of government.



Governor Phil Scott



Lieutenant Governor David Zuckerman



Treasurer Beth Pearce



Secretary of State Jim Condos



Auditor Doug Hoffer



Attorney General TJ Donovan

APPENDIX C

Vermont State Ethics Commission

Press Release Re: Statutory Code of Ethics July 8, 2020

Contact: Larry Novins, Executive Director, Vermont State Ethics Commission
Larry.novins@vermont.gov 802-828-7187.

Vermont takes a step toward a statutory code of ethics. Public Input Needed.

Does meaningful government ethics oversight in Vermont require an Ethics Code in statute? The Vermont State Ethics Commission concluded last year that the answer to that question is most definitely yes.

The Commission is not alone. All current state-wide office holders, Gov. Phil Scott, Lt. Gov. David Zuckerman, Secretary of State Jim Condos, Attorney General T.J. Donovan, Treasurer Beth Pearce, and Auditor of Accounts Doug Hoffer publicly expressed support for adoption of a statutory Code of Ethics. In a joint letter to the Chairs of the House and Senate Government Operations Committees on February 10, 2020 they wrote, "As you know, in our public service, we must account for and address issues such as: conflicts of interest, preferential treatment, abuses of power, outside gifts, and protections for whistleblowers. A Code of Ethics embedded in Vermont law will provide public servants with direction and clarity on numerous issues they regularly face."

Two bills introduced this last session (H.634 and S.198) asked the Ethics Commission to submit to the General Assembly a draft Code of Ethics which it will consider for adoption into law. While the arrival of COVID-19 preempted full consideration of those bills, the Ethics Commission has been asked and will send a draft Code of Ethics to the legislature this coming fall - but not before seeking public input.

Public Input Needed: Commission Chair Julie Hulburd explained, "It is essential that this draft code of ethics be thoroughly scrutinized. We want the legislature to be confident that issues the code raises have been fully addressed with the benefit of stakeholder and public input. We want to hear everyone's thoughts." Hulburd added, "Please send your comments and suggestions to the Commission." The Commission's website <https://ethicscommission.vermont.gov/> contains the current draft code and an explanation of why statutory adoption is necessary.

Enforcement: The Ethics Commission has been asked, "How will this code be enforced?" The Commission believes adopting a statutory code of ethics setting ethics standards for public servants should come first - before enforcement discussions. Once a code of ethics is adopted, the immediate and most effective way to ensure code compliance will be through ethics education and ethics awareness. The Ethics Commission is a willing partner and resource for public servants.

Comments: The Ethics Commission strongly urges written comments. It will, however, offer an opportunity for oral comments. At 10:00 a.m. on August 12, 2020, the Ethics Commission will hold a virtual public hearing regarding its draft proposal. Details will be posted on the Ethics Commission website soon. The Commission will continue to accept written comments through August 26, 2020. It will then consider all comments and suggestions, finalize the draft, and submit it to the House and Senate Government Operations Committees where its journey into statute can begin.

The Commission is grateful for all comments it receives.

End

APPENDIX D

November 12, 2020

To: Senate Government Operations Committee

Re: Ethics Code Enforcement Considerations

Statement of the Vermont State Ethics Commission Regarding Enforcement of the Vermont Code of Ethics

The Vermont Ethics Commission (“Commission”) continues its efforts to work with the legislature and other public officials to finalize the first statutory state Code of Ethics (“Code”). In addition to this process, the Senate Government Operations Committee has asked the Commission for thoughts on potential principles and procedures to ensure compliance with the Code. The Commission provides this preliminary response.

A Clear, Fair, and Impartial Enforcement Function Is the “Gold Standard” for an Effective Ethics Commission

The Commission believes that a clear, fair, and impartial enforcement mechanism is a necessary component of any meaningful ethics program. According to the National Conference of State Legislatures, the [majority of state ethics agencies](#) are granted authority to investigate and administratively prosecute ethics complaints. The Center for Public Integrity (“CPI”) has a full category for “Ethics Enforcement Agencies” in its State Integrity Investigations (in which category [Vermont finished last among the states in 2015](#), the year of the last report). In its 2018 report on Vermont’s governmental integrity, Columbia University’s Center for the Advancement of Public Integrity noted that, although the state did not “seem” to have much corruption, uncertainty still existed [“because of the weakness of its laws and enforcement system.”](#) To approach national models for state ethics, Vermont will at some level be judged by its ability to enforce its Code. The vast majority of public employees and officials will doubtless abide by the Code, and the Commission will support them with education and advice. Nevertheless, the Commission is mindful that a scant few individuals will nevertheless snub the Code for their own personal gain. Thus, without enforcement, the Code is merely aspirational, and would stand little chance of success in being able to establish and maintain an ethical culture in state government.

Enforcement of Ethics Code Compliance Should Not Begin until Public Servants Receive Adequate Ethics Training

Although enforcement is a necessary component of any meaningful state ethics program, the Ethics Commission believes, as a matter of fairness and practicality, that our public servants, state employees and officials should have adequate opportunity to be educated and trained on their specific ethical obligations prior to being subject to enforcement. The Commission believes that, following finalization of the Code, government-wide ethics training should be the first and main priority for the Commission (and the legislature). During this training period, all public servants subject to the Code should have an opportunity to identify any existing conflicts of interest. They should have the opportunity to seek individualized advice and guidance from the Commission regarding those possible conflicts of interest. And they should have the opportunity to “cure” any, all before an enforcement program begins.

A Meaningful Ethics Program Should Balance Ethics Code Enforcement and Vigorous Protection of the Due Process Rights of the Accused

The Commission believes that any public servant accused of violating the Code should have a clear understanding of enforcement procedures. Each is entitled to protections that will ensure fairness and impartiality. The Commission looks forward to continuing to work with the legislature and other stakeholders in crafting an enforcement process that remains focused on balancing compliance with fairness. Along the way, there are several enforcement principles that the Commission believes deserve particular focus and further discussion.

1. Statute of Limitations

The Commission believes that the enforcement process should have a statute of limitations to limit investigation of past allegations. As a threshold matter, any alleged misconduct that occurred prior to the enactment of the Code should not be the subject of a complaint. Following enactment of the Code (and training thereon), a reasonable statute of limitations should be imposed on the filing of a complaint. At this point, the Commission points the legislature to the state's general statute of limitations ([12 VSA § 511](#) and [12 VSA § 461](#)) and suggests six years from the date of the alleged misconduct.

2. Complaint Process

Any enforcement mechanism should provide for the Commission's independent ability to file a complaint when it has probable cause to believe that a violation of the Code has occurred. In addition, the Commission believes that members of the public should have the opportunity to file complaints of alleged misconduct, provided that the Commission has the opportunity to reject complaints that are not within the Commission's jurisdiction, or otherwise fail to state an alleged violation of the Code.

3. Notice

The Commission believes that the subject of a complaint – the “respondent” – should be provided notice of a complaint when it is received by the Commission, and that the respondent should have the opportunity (but not the obligation) to respond to the allegations. In addition, both the complainant and respondent should be entitled to know when a complaint has been dismissed, and the reasons for the dismissal.

4. Investigation Process

The Commission believes that, like all state agencies involved in contested cases, the agency should have the ability to compel the production of documents and testimony in its investigations, and the ability to enforce compliance with subpoenas. See, e.g., [3 VSA § 809a](#). The respondent should have the right to representation and participation in the investigative process. The respondent should also have the right to challenge subpoenas issued by the Commission.

5. Settlement Process

As with other state agencies (see, e.g., [3 VSA § 809a\(d\)](#)), the Commission should have the authority to accept a resolution of matters prior to a hearing through negotiated settlement of the claims.

6. Hearing Process

The Ethics Commission looks to the state's statutes for hearings in contested cases in Administrative Procedures Act ("APA," [3 VSA §§ 809 et seq.](#)) as a template for future hearings to enforce an adopted Code of Ethics. Usage of the APA model (which has been used by the state for over 50 years) would incorporate administrative due process rights and evidentiary standards. It would provide clarity and predictability for respondents in enforcement matters. At a minimum, public servants accused of ethics code violations should be entitled to appear; argue; testify; be represented by counsel; cross-examine witnesses; challenge evidence; and present evidence and witnesses in their defense. The Ethics Commission believes that any finding by the Commission should be in writing and be a matter of public record.

7. Penalties

The Commission believes that the model incorporated by a plurality of states – which includes civil monetary penalties and injunctive relief to prevent future misconduct – is the most effective deterrence model for those who have been found, after a hearing, to have violated the Code. In addition, the Commission believes that any illegal financial gain should be returned to the state.

8. Post-Hearing Process

As with the APA, the Commission believes that parties should have a right to appeal a ruling of the Ethics Commission following a hearing.

9. Confidentiality

The Ethics Commission believes that certain confidentiality rights may be appropriate for a respondent during the investigative and hearing process. See, e.g., [Kamasinski v. Judicial Review Council, 44 F.3d 106 \(2d Cir., 1994\)](#). During this period the Commission would not disclose the matter or the identity of a respondent, nor would the records be subject to public disclosure during this time. Many states follow a model in which a matter remains confidential until the agency finds there is probable cause to believe that an ethics code violation has occurred. Only then should a matter become public.

10. Safe Harbor

The Ethics Commission believes that state's ethical interests are best served by focusing on prevention over punishment. To this end, public employees and officials should be strongly encouraged to seek advice from the Commission in advance of engaging in any conduct that may be questioned. A public servant who does and then relies upon written Ethics Commission advice should be immune from later prosecution if a complaint regarding that conduct is filed.

Respectfully submitted,

Larry Novins,
Executive Director, Vermont Ethics Commission

APPENDIX F



State of Vermont
Office of the Secretary of State
128 State Street
Montpelier, VT 05633-1101

[phone] 802-828-2363
<https://sos.vermont.gov>

James C. Condos, Secretary of State
Christopher D. Winters, Deputy Secretary

SENT VIA EMAIL

December 15, 2020

Ms. Julie Hulburd, Chair
Mr. Larry Novins, Executive Director
State Ethics Commission
6 Baldwin Street, Room 315
Montpelier, VT 05633

RE: Act 79 municipal report

Dear Ms. Hulburd and Mr. Novins,

Under Act 79 of 2017, the Secretary of State's office is directed to accept written complaints regarding municipal governmental ethical conduct, forward these complaints to the applicable municipality, and report these complaints to the State Ethics Commission.

Between December 1, 2019 and December 1, 2020 we have received 98 inquiries relating to municipal governmental ethical conduct, about 9% of our total municipal calls and e-mails. The local officials and residents who called us typically posed questions about whether specified conduct is unethical, illegal, or otherwise inappropriate, and if so, what options are available. Two individuals subsequently submitted written complaints to our office over the past year. Those complaints were forwarded to the applicable municipality and are attached. One municipality opted to respond to the complaint it received; that response is attached as well.

We would like to note that many individuals with complaints opted not to submit these complaints in writing, citing concerns about our office's obligation to report to municipalities and the lack of any investigation or enforcement mechanism. Other individuals did not have "complaints" per se; they simply wished for prospective guidance or other education on ethics requirements for local officials.

After three years, we stand by our statement that the law as enacted was a start, but only a start. Without independence, authority and resources, the commission has been set up to fail.

We are convinced that the lack of any investigatory and enforcement mechanism dissuades the majority of complainants from putting their concerns in writing and the public still suffers from the same distrust and helplessness that led to this discussion in the first place. We sincerely hope that the conversation continues this year and that the commission is given the authority and resources it deserves.

We are happy to share more detail about the conversations we've had with Vermonters about ethics regulation at the municipal level, as it pleases the Commission.

Sincerely,

A handwritten signature in black ink, appearing to read 'CW', with a long horizontal flourish extending to the right.

Christopher D. Winters
Deputy Secretary of State
802-828-2124

APPENDIX E

Administrative Duties

Executive Director administrative responsibilities include (not a complete list):

- attending budget review meetings.
- placing orders for office equipment and supplies, (including designing stationery after address change).
- ordering Ethics Commission cards for members.
- preparing all meeting agendas, posting agendas on website, copying Sec. of Admin. to comply with 1 V.S.A. § 312(c)(2) and 3 V.S.A. § 2222(c)(c).
- setting up office Zoom account, Zoom invitations for each meeting, posting each meeting's Zoom information on website immediately before the meeting.
- arranging for bill payment: signing, scanning and submitting most bills for payment.
- IT work: fixing or getting help for computer or printer anomalies, website contents and modifications, including posting monthly agendas and minutes, public information.
- arranging office cell phone to permit off-site easy receipt of office calls during pandemic.
- managing periodic password changes: for office computers, website changes, and more.
- designing and drafting financial disclosure statements, formatting, and distributing them.
- posting each returned financial disclosure statement on the Ethics Commission website.
- requesting municipal conflict of interest policies, then putting each one received up on our website.
- setting up office accounts, changing office mailing address, arranging a mail slot in the office door.
- Obtaining public input: creating emails lists for press releases, for contacting state government department or agency heads, maintaining the lists.
- formatting annual report, arranging, and overseeing its printing and eventual distribution.