



November 25, 2019

Larry Novins, Executive Director
Vermont State Ethics Commission
6 Baldwin Street
Montpelier, VT 05633-7950

Re: Complaint to Vermont State Ethics Commission

Dear Larry:

This letter serves as a formal Complaint, filed on behalf of the Vermont Public Interest Research Group (VPIRG) under Chapter 31 of Title 3 of the Vermont Statutes Annotated.

By way of background, VPIRG filed an initial inquiry with the State Ethics Commission in January 2018, concerning Gov. Phil Scott's relationship as a creditor with a financial interest in the DuBois construction company, which contracts with the State. In response, we were informed by the Commission's Executive Director 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.

On August 31, 2018, shortly after the Ethics Commission's adoption of the State Code of Ethics, VPIRG requested an advisory opinion regarding this same apparent conflict of interest. Under 3 V.S.A. § 1225, there were then (and remain today) no restrictions on who may request an advisory opinion from the Ethics Commission. On October 1, 2018, the Ethics Commission released Advisory Opinion 18-01, which has since been removed from the Commission's website, but can be accessed via [VPIRG's website](#).

Advisory Opinion 18-01 made clear that the governor's ongoing financial interest in a firm that does business with the State amounts to a conflict of interest. Indeed, the Opinion found that the conduct in question violated at least four principles in the State's Code of Ethics.

The subsequent decision by the Commission to "withdraw" Advisory Opinion 18-01 was apparently not made due to any perceived error in the Opinion itself. According to the Commission's press release of September 4, 2019, the decision was made after a review of the "policy and process used for the Advisory Opinion," and was based in part on consultation with ethics officials from other jurisdictions and the "statutes and rules of other commissions."

Though we find the Commission's decision to remove the Advisory Opinion from public view to be unsupported by facts or law in Vermont, the merit of the Opinion itself remains intact. This Complaint outlines again the facts at issue and points out the apparent conflicts of interest.

The Facts

Gov. Phil Scott, who was once a co-owner of the DuBois Construction company, maintains an ongoing financial interest in the 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 in both 2018 and 2019.¹ These payments were made as part of a contractual arrangement that Gov. Scott entered into when he sold his share of the business before he took office as governor.² Regular payments to the governor are expected to continue for years to come, meaning the governor maintains a financial interest in the business.

DuBois Construction has entered into multiple substantial contracts with the State of Vermont since Gov. Scott took office. State contracts with DuBois have resulted in many payments totaling nearly a quarter of a million dollars in Fiscal Year 2018 alone. Additional payments were made in FY'19. Among the larger payments made to DuBois are the following:

- \$8,977.50 in the quarter ending 6/30/2019 from the Dept. of Buildings and General Services.
- \$4,993.96 in the quarter ending 9/30/2018 from the Dept. of Buildings and General Services.
- \$1,147.50 in the quarter ending 6/30/2018 from the Dept. of Buildings and General Services.
- \$1,938.00 in the quarter ending 6/30/2018 from the Dept. of Forests, Parks, and Recreation.
- \$25,590.00 in the quarter ending 3/31/2018 from the Dept. of Fish and Wildlife.
- \$82,110.00 in the quarter ending 12/31/2017 from the Dept. of Forests, Parks, and Recreation.
- \$12,931.95 in the quarter ending 12/31/2017 from the Dept. of Environmental Conservation.
- \$69,168.96 in the quarter ending 12/31/2017 from the Dept. of Environmental Conservation.
- \$37,201.00 in the quarter ending 9/30/2017 from the Dept. of Buildings and General Services.
- \$1,990.00 in the quarter ending 9/30/2017 from the Agency of Transportation.

The Code of Ethics

Vermont's Code of Ethics includes thirteen general principles.

Principle 1 of 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.

The governor is a public official and has a substantial ongoing financial interest in DuBois Construction. The construction company continues to seek and has been awarded contracts with the State since the governor took office.

¹ https://ethicscommission.vermont.gov/sites/ethics/files/2019_disclosure/Scott%20Philip%202019%20Disclosure.pdf;
<https://www.sec.state.vt.us/media/914637/2018-general-election-candidate-financial-disclosures.xlsx>

² <https://www.burlingtonfreepress.com/story/news/politics/2018/06/07/would-governors-miss-vermonts-new-ethics-law/644302002/>

As stated in Advisory Opinion 18-01: “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 [sic] with the State, which the public official as governor is the chief executive officer.”³

Principle 3 of the Code states:

(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, or whose interests may be substantially affected by the performance or nonperformance of the public official’s duties, other than those permitted by law.

The payments that the governor (a public official) accepts annually from DuBois Construction (\$75,000 per year in interest payments to date), are items of monetary value.

Advisory Opinion 18-01 found that “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.”⁴

Principle 7 of the Code states in part:

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

VPIRG disagrees with Advisory Opinion 18-01 in at least one respect: we do not believe that the filing of our request for an advisory opinion (or our filing of this complaint) is evidence of an apparent conflict of interest. The appearance of conflict or actual conflict in this case, is the result of the facts as they exist. The actions of the governor have triggered the conflict, not the actions on any person requesting action on the part of the Commission.

Principle 13 of the Code states in part:

(13) 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.

Applying the facts in this case, Advisory Opinion 18-01 stated that: “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.”⁵

³ Advisory Opinion 18-01 page 2.

⁴ Advisory Opinion 18-01 page 3.

⁵ Advisory Opinion 18-01 page 2.

The same rationale would obviously apply to the Secretary of the Agency of Transportation as well. Though the governor does not presumably dictate who receives each contract the State awards, the individuals that he appoints do make those decisions.

Department of Human Resources

3 V.S.A. § 1223 (a)(2)(A) states:

If the complaint alleges a violation of the Department of Human Resources, Code of Ethics, the Executive Director shall refer the complaint to the Commissioner of Human Resources.

It's worth pointing out that the Department of Human Resources has no Code of Ethics. VPIRG has urged legislators to address this deficiency, but we have been unsuccessful so far.

When VPIRG asked the Department of Human Resources to direct us to its Code of Ethics, we were told: *“There is no specific VT Department of Human Resources Code of Ethics. Rather, Department of Human Resources’ rules related to ethical conduct by state employees are embedded in existing Department of Human Resources Personnel Policies. These policies are available on the Department’s website.”*⁶

In lieu of a Human Resources Department Code of Ethics, VPIRG was referred to the Department’s Personnel Policies 5.2, 5.6, 11.5, and 11.6. Of those policies, 5.6 and 11.5 may be relevant to this particular issue.

DHR Policy **5.6**⁷ states in part:

Employees shall not engage in any employment, activity, or enterprise which has been or may be determined by the appointing authority to be inconsistent, incompatible, or in conflict with their duties as a State employee or with the duties, functions or responsibilities of the agency by which they are employed.

DHR Policy **11.5**⁸ states in part:

Employees may not accept any fee, compensation, gift, payment of expenses, or other thing of monetary value under circumstances which may result in a conflict with the employee's public duties. Employees in the classified service shall not have a personal interest in any business transaction within their area of influence in State government nor shall they have any private business relationship that may conflict with their public duties.

These DHR policies are substantially similar to the State Code of Ethics Principles 1, 3 and 7. Therefore, we believe that while the Ethics Commission did not review the DHR policies when it considered possible ethical violations in crafting advisory opinion 18-01, the same conclusions

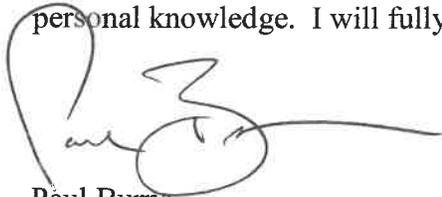
⁶ Attached file – email exchange between VPIRG advocate Dan Brown & DHR

⁷https://humanresources.vermont.gov/sites/humanresources/files/documents/Labor_Relations_Policy_EEO/Policy_Procedure_Manual/Number_5.6_EMPLOYEE_CONDUCT.pdf

⁸https://humanresources.vermont.gov/sites/humanresources/files/documents/Labor_Relations_Policy_EEO/Policy_Procedure_Manual/Number_11.5_INCOME_FROM_OUTSIDE_SOURCES_MOONLIGHTING.pdf

would be reached when applying the facts to the DHR policies. Gov. Scott's ongoing financial stake in a business that contracts with the State also violates these DHR policies.

If you require any additional information from me at this time, please feel free to contact me. I certify that the information provided in this complaint is true, correct, complete, and of my own personal knowledge. I will fully cooperate in the process regarding this complaint.

A handwritten signature in black ink, appearing to read "Paul Burns", with a long horizontal flourish extending to the right.

Paul Burns

Executive Director

VPIRG

141 Main Street, Suite 6

Montpelier, VT 05602

802-223-5221 ext. 12

From: DHR - General [<mailto:DHR.General@vermont.gov>]

Sent: Monday, January 28, 2019 12:53 PM

To: Dan Brown <dbrown@vpig.org>

Subject: RE: VT State Code of Ethics

Daniel:

There is no specific VT Department of Human Resources Code of Ethics. Rather, Department of Human Resources' rules related to ethical conduct by state employees are embedded in existing Department of Human Resources Personnel Policies. These policies are available on the Department's website. The following Personnel Policies include provisions mandating ethical conduct by State Employees:

Policy 5.2 – Conflicts of Interest Arising from Employment

Policy 5.6 – Employee Conduct;

Policy 11.5 – Income from Outside Sources; and

Policy 11.6. – No Solicitation Policy

In addition, you may wish to consult Governor Scott's Executive Order No. 19-17, the Executive Code of Ethics, which applies to gubernatorial appointees and the Ethics Commission

<https://ethicscommission.vermont.gov/sites/ethics/files/GENERAL%20PRINCIPLES.6.6.18.pdf>

Thank you for your inquiry,
DHR, Commissioner's Office