

Beth A. Wood, CPA
State Auditor

STATE OF NORTH CAROLINA
Office of the State Auditor

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July 14, 2009

Mr. Perry Newson, Executive Director
North Carolina State Ethics Commission
1324 Mail Service Center
Raleigh, North Carolina 27699

Dear Mr. Newson:

On September 18, 2008, the Office of the State Auditor issued an interim report on allegations involving noncompliance with internal operating, administrative, and personnel policies at the North Carolina State Ethics Commission (Ethics Commission). The interim report left unresolved the questions of (1) whether the Ethics Commission provided special treatment to a public official, (2) whether the Assistant Director intentionally deleted or altered entries in the Public Records Request Log during the investigation, and (3) whether an employee was terminated due to their cooperation with the investigation.

These issues were not fully investigated at the time because the Ethics Commission questioned the Office of the State Auditor's authority to have ready access to Ethics Commission records.¹ The Ethics Commission decided to withhold the requested records until the legal questions were resolved.

As a result of discussions between the Chairman of the Ethics Commission and the State Auditor, the Ethics Commission released to the Office of the State Auditor the records necessary to complete the investigation. The requested records were provided to the Office of the State Auditor in April 2009. Pursuant to North Carolina General Statute § 147-64.6, this final report presents the results of our completed investigation.

1. Potential special treatment

Our investigation confirmed that the Ethics Commission has not established formal written administrative or operating policies for general work processes. For example, when the investigation began, the Ethics Commission did not have formal policies for the public's review of Statements of Economic Interest (SEI). The only documented guidelines for public records requests were in the form of an e-mail dated May 20, 2007. During the investigation, management drafted formal records request policies and

¹ North Carolina General Statute § 147-64.7

procedures; however, Ethics Commission members had not formally adopted the revised policies and procedures as of July 2, 2009.

The Ethics Commission did not follow its existing policies and procedures (as defined in an e-mail to staff) regarding the viewing of the former Lieutenant Governor's² SEI by her General Counsel in October 2007. The existing policies prohibited individuals from reviewing SEI's without adequate supervision. However, Ethics Commission management overrode existing policy by permitting the General Counsel to view the former Lieutenant Governor's SEI in a closed office without supervision.

Ethics Commission management asserts that individuals (or their agents) reviewing their own SEI do not fall under the same purview as other public records requests. However, the policies in existence at the time did not reflect such a distinction. Further, there is no statutory basis for different treatment. Once an individual submits their SEI, it becomes a "public record" and the individual no longer has ownership of the document. As custodian³ of the public record, the Ethics Commission is required to provide "reasonable supervision" during inspection of the SEI by statute⁴ and Ethics Commission policy. By allowing a public official or their agent to view their SEI under a different standard, the Ethics Commission risks the appearance of providing special treatment.

Recommendation:

The Ethics Commission should immediately adopt formal administrative and operating policies and procedures. Further, management and staff should adhere to established policies in all situations to avoid the appearance of special treatment. Finally, the Ethics Commission should adequately document the reason for any departure from normal policy.

2. Integrity of documents and evidence

Our investigation determined that the Assistant Director did not delete or alter entries in the Public Records Request Log during the investigation. However, during our investigation, we noted deficiencies in the manner in which the Public Records Request Log was maintained.

The Ethic Commission maintains the Public Records Request Log in a computerized format with hard copies printed on a periodic or as-needed basis. At the time of the original investigation, entries to the Public Records Request Log could be made by multiple users. Because older back-ups of the Public Records Request Log file were routinely overwritten when new back-up files were created, changes to entries could be made with little to no detection by supervisors and without a method to determine who made the change.

² The former Lieutenant Governor is the current Governor.

³ North Carolina General Statute § 132-2

⁴ North Carolina General Statute § 132-6

Mr. Perry Newson, Executive Director

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Recommendation:

The Ethics Commission should revise procedures for entering information in the Public Records Request Log in a manner that ensures an accurate historical picture of requests with the appropriate level of accountability over entries and changes.

3. Termination of employee during course of investigation

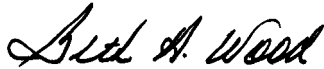
The interim report questioned whether the termination of an employee during the course of the initial investigation was related to the employee's cooperation with the investigation. The employee initiated legal action for wrongful termination under the "Whistleblower Act." Because of ongoing litigation related to the employee's termination, our investigation did not address this matter.

Recommendation:

No recommendation necessary.

Please provide your written response to these findings and recommendations including corrective actions taken or planned by July 31, 2009. In accordance with General Statute §147-64.6(c) (12), the Governor, the Attorney General and other appropriate officials will receive copies of this report. If you have any questions or wish to discuss this matter further, please contact us.

Sincerely,



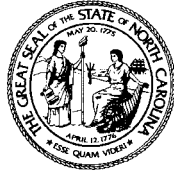
Beth A. Wood, CPA
State Auditor

cc: Robin P. Pendergraft, Director, State Bureau of Investigation
C. Colon Willoughby, Jr., Wake County District Attorney
Robert L. Farmer, Chairman, State Ethics Commission

Management letters and responses receive the same distribution as audit reports.

Auditor Comment

The Ethics Commission in the following response states that it has “incorporated herein by reference and attached” a response to an “interim report” because such response “has never been posted or published.” We have not included in this report the referenced response because it was issued by the Commission in response to a report released by the previous State Auditor. The interim report was issued September 18, 2008 and the referenced response was received November 4, 2008. Anyone seeking a copy of the Ethics Commission response to the interim report should contact the Ethics Commission directly.



STATE ETHICS COMMISSION

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WWW.DOA.STATE.NC.US/ETHICS/

ROBERT L. FARMER
CHAIRMAN

PERRY Y. NEWSON
EXECUTIVE DIRECTOR

July 31, 2009

The Honorable Beth A. Wood
State Auditor
20601 Mail Service Center
Raleigh, North Carolina 27699-0601

VIA HAND DELIVERY

Re: Final Management Letter (July 14, 2009) – Ethics Commission Response

Dear Ms. Wood:

We are in receipt of your final management letter dated July 14, 2009, regarding your office's review of the North Carolina State Ethics Commission. On September 18, 2008, State Auditor Les Merritt issued a "Special Review Interim Report" on allegations involving multiple issues. The Commission provided its detailed response on November 4, 2008. Because the Commission's detailed response to the Interim Report has never been posted or published, it is incorporated herein by reference and attached to this response. As you note, certain questions were unresolved due to serious legal and other concerns. At this time, those concerns have been resolved to everyone's satisfaction, and your final management letter is the culmination of those efforts.

Preliminarily, it bears emphasis that your final management letter absolves Commission staff, specifically including the Assistant Director, with regard to any alleged or possible wrongful or illegal deletion or alteration of relevant records, including the Commission's Statement of Economic Interest ("SEI") request log. This assertion should never have been made in the first place, as explained in the Commission's detailed response of November 4, 2008 (see attached).

However, your letter notes purported deficiencies in several areas, including a lack of formal written policies and procedures, the possible appearance of special treatment, the manner in which a public records request log was maintained, and the termination of a Commission employee. They will be discussed in the order presented in your final management letter. Many of these same issues have been addressed in the Commission's November 4, 2008, detailed response to the Interim Report; other issues have been resolved or rendered moot by your findings.

1. Potential special treatment

In this section, you find that the Commission has not established formal written administrative or operating policies for general work processes, including for the public review of SEIs. Because Commission staff allowed a public servant's duly authorized representative, a member of the State Bar, to review that public servant's SEI in relative privacy, thus appearing to contravene a draft policy for the *third-party review* of other people's SEIs (see explanation below), you believe this could create the appearance of special treatment. You recommend that the Commission adopt such formal policies and procedures and apply uniform SEI review standards to all reviewers to avoid any such appearance.

Your finding that the Commission has not established formal written administrative or operating policies for general work processes is correct. Due to the crushing demand of multiple critical functions during the Commission's start-up phase, combined with the lack of adequate staffing to meet those demands, we have had to make difficult choices regarding allocation of resources. Simply put, we could not do everything at once, and we chose to concentrate on those core missions and legal mandates which were critical to implementation of the new State Government Ethics Act and revised Lobbying Law. This included educating thousands of covered persons, investigating hundreds of complaints, creating a new financial and personal interest disclosure form (SEI), processing over 4,500 new SEIs, and providing advice to hundreds of persons impacted by the new laws. A two-year study by the Office of State Management and Budget ("OSBM") confirmed that the Commission's workload far surpassed the capacity of its existing staff.

However, Commission staff is in the process of preparing the necessary administrative policies and procedures, which will be finalized and presented to the Commission as soon as possible. Once established, we will continue to apply such policies and procedures in a fair and consistent manner.

As to the issue of potential special treatment regarding the review of a particular SEI, we must respectfully disagree. First, your finding is internally inconsistent in that on the one hand you say that the Commission has not established formal written administrative or operating policies but on the other you fault us for not following existing policies and procedures, referring to a draft policy clearly indicated as such.

Second, and more importantly, the draft internal guidance to which you refer (an e-mail of May 20, 2007) pertains to requests to review SEIs by *third parties*, not the actual filer him or herself. This "apples and oranges" situation was explained in detail in our November 4, 2008, response, so I can only conclude that you disagree with our substantive decision to differentiate between these two types of reviews. We certainly respect your opinion, but we could not have disregarded a policy that did not apply to the review in question. Moreover, our decision to distinguish between requests from third parties and those public officials who are obligated to

file SEIs was based upon our overarching goal of assisting those officials in complying with their obligations under the Ethics Act. At times that required that we provide filers with immediate access to those documents.

Third, even if you are correct that the public records law does not differentiate between such reviews, as custodian of the record in question, we believe that we provided “reasonable supervision” under the circumstances. Indeed, attorneys are routinely given access to court and other official records without direct supervision. This, too, was explained in detail in our November 4, 2008, response and need not be repeated here.

Perhaps the more important issue is the potential *appearance* of special treatment. We are extremely sensitive to this situation and have implemented SEI review practices to guard against it. All SEI reviews – whether third-party or principal – are now conducted under personal supervision of a Commission staff member, generally a senior staff attorney. Formal procedures will be presented to the Commission as soon as possible.

2. Integrity of documents and evidence

As more fully set forth in our November 4, 2008, response, the former Auditor accused the Assistant Director of altering SEI log entries during the investigation and speculated, in a broadcast campaign appearance, that the alteration may be a violation of criminal law. Your investigation found that our Assistant Director did *not* delete or alter entries in the SEI request log during the investigation. Again, because of the serious nature of the original implication if not accusation, it bears repeating that your final management letter absolves Commission staff, specifically including the Assistant Director, with regard to any alleged or possible wrongful or illegal deletion or alteration of relevant records, including the Commission’s SEI request log.

However, you did note alleged deficiencies in the manner in which the log was maintained. Specifically, you note that at the time of the original investigation, entries to the log could be made by multiple users. This is true. In fact, at the time in question, entries to the SEI request log could be made by any staff member. You recommend that this procedure be changed.

Commission staff recognized this situation and addressed it in mid-2008, several months before learning the specifics of your investigation. As of that time, entries to the SEI request log have been password protected and made by a single staff member. As of January 2009, entries on the SEI request log are both password protected and generally only made by one senior staff member who is an attorney. Again, formal procedures will be finalized and presented to the Commission as soon as possible.

You also note that because older back-up computer tapes of the SEI request logs were routinely overwritten when new back-up files were created (a standard Information Technology

Services practice totally outside of the Commission's control), internal changes to the SEI request log could be made with little or no detection by supervisors and without a method to determine who made the particular change. Again, this is true, but this is something the Commission has not heretofore felt the need to guard against. In the long history of the Commission's predecessor entity, the North Carolina Board of Ethics, there was never a need to protect against improper, false, or misleading entries on the SEI request log or to identify who had made particular log entries. To our knowledge, no improper editing had ever happened before. We therefore question the need to impose too burdensome a set of preventive measures to address what is hopefully an extremely rare occurrence.

However, we believe that the procedural changes noted above adequately address this situation and your recommendation. In addition, as a result of your review, we have begun making hard copies of each SEI log entry in order to have a record of all such changes. We have also revised the log itself to provide for identification of the staff member making the particular entry (again, under normal circumstances, this will be one single senior staff member) and the date that it was made.

3. Termination of employee during course of investigation

Because of ongoing litigation related to the termination of a Commission employee, you did not address any alleged "Whistleblower Act" issues and made no recommendations with regard thereto. The Commission's November 4, 2008, response to the Interim Report addresses this issue to the extent possible at this time.

Thank you for the opportunity to comment on your final management letter, and if you have any questions about any of the foregoing, please do not hesitate to contact us.

Respectfully,

Perry Y. Newson
Executive Director

Cc: Robert L. Farmer, Chair, State Ethics Commission
Robin P. Pendergraft, Director, State Bureau of Investigation
C. Colon Willoughby, Jr., Wake County District Attorney