



STATE OF NORTH CAROLINA
Office of the State Auditor

Leslie W. Merritt, Jr., CPA, CFP
State Auditor

May 9, 2008

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Ms. Kathleen Edwards
Assistant Director, Compliance Officer
North Carolina State Ethics Commission
116 W. Jones Street
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Dear Ms. Edwards,

Thank you for your "informal advisory opinion" dated May 7, 2008. While you raise many issues worthy of consideration, I want to take this opportunity to reply, at least in part, to some of those issues as well as to the tone and tenor of your letter.

We cannot help but note that in your "informal advisory opinion", coming from a staff member of the independent non-partisan Ethics Commission, you chose to use Mr. Merritt's name no less than twenty-five (25) times and to call him a "partisan elected official". In those twenty-five (25) references you often add commentary reflective of the State Auditor and it is not clear at times whether you are speaking as an advocate for an individual legislator, or from your role as a staff member of the Ethics Commission.

We agree entirely that compliance with the Ethics Act is the purview of the Ethics Commission. In fact in the draft report we stated, "The State Government Ethics Act vested responsibility for review and evaluation of the Statement of Economic Interest as well as issuance of both formal and informal advisory opinions with the State Ethics Commission." But, we followed that up with the following words, "However, conflicts of interest issues pre-date the Ethics Act and the Ethics Act does not preclude other agencies of government from investigating credible allegations related to conflicts of interest issues."

This was exactly the case with this investigation. Through our fraud waste and abuse hotline, which is statutorily mandated in N.C.G.S. § 147-64.6(c)(16), we received a credible allegation of a potential conflict of interest. The manager of that division (a 22 year veteran of the FBI) made the decision there were grounds to move forward. As part of our investigation we obtained a copy of the pertinent Statement of Economic Interest (SEI). This was done not to make a decision as the final arbiter as to the completeness of the SEI but as part of the audit trail which we are obligated to follow. It was just this type action that was envisioned by the Legislative Ethics Committee when they commented in a letter to Mr. Merritt dated January 22, 2008, "We do appreciate that there may be occasions when your staff will need to analyze an individual's Statement of Economic Interest when information or matters reflected in the statement are related to some other investigation or audit conducted by your office."

We are still in the process of and will continue reviewing all the argument and inferences in your "informal advisory opinion." Based on our discussions with you, and according to your informal advisory opinion, you seem to advocate a three tiered scheme related to ethics and conflict of

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interest jurisdiction in North Carolina. First, you seem to advocate that Legislators are under the exclusive jurisdiction of the Legislative Ethics Committee upon mandatory referral from the Ethics Commission; second, that public servants and other covered persons under the Ethics Act are under the jurisdiction of the Ethics Commission; and third, all other regular state employees are subject to the various agencies that may be concerned with ethics and conflict of interest matters, including that state employees' individual employer. Am I correct in my understanding of your position?

In your assertion that the State Auditor lacks any jurisdiction over conflicts of interest matters you cite no law. Rather, the Auditor's jurisdiction over matters of conflicts of interest is not only supported by law but is also well established in history and over the course of several different Auditors. The Office of the State Auditor is established by the North Carolina Constitution and N.C.G.S. § 147-64 lays out the scope and authority of the Auditor.

The duties of the Auditor include independently examining and making findings of fact on whether State Agencies are "conducting programs and activities ... in a faithful ... manner in compliance with and in furtherance of applicable laws and regulations of the State, and, if applicable federal law and regulation." N.C.G.S. § 147-64.6(b)(4). This includes "receiving reports of allegations of improper governmental activities set forth in G.S. 126-84" and conducting investigations into these allegations. N.C.G.S. § 147-64.6(c)(16). The Auditor fulfills this mandate through a confidential hotline established to receive calls from complainants. The Auditor must by law honor the complainant's anonymity.

In addition, where applicable the Auditor must conduct audits "in accordance with generally accepted auditing standards as prescribed by the American Institute of Certified Public Accountants, the United States General Accounting Office, or other professionally recognized accounting standards-setting bodies." N.C.G.S. § 147-64.6(c)(1). Those standards mandate that "Related-party transactions" (conflicts of interest) be disclosed in the notes to the financial statements prepared in conjunction with financial and performance audits. *GASB Codification Section 2300.107f*.

Twice in your letter you assert that the Ethics Commission has sole authority for interpreting the provisions of the Ethics Act. While the Act does give practical enforcement power to the Commission, it is a well understood legal principle that the power and responsibility for the interpretation of statutes lies with the Judiciary. This principal of respect for separation of powers is well established in case law. *Thomas v. N.C. Dept. of Human Resources*, 124 N.C.App. 698, 707, 478 S.E.2d 816, 822 (1996).

It is also important to point out that the State Constitution provides for an independent State Auditor. To try and curb the scope and the authority of the Office of the State Auditor by

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arguing that they have no right to review any matters of conflicts of interest is not only an argument that is contrary to the law but it is also contrary to good public policy.

In a meeting in our office on January 10, 2008 with you, the Chairman of the State Ethics Commission, and the Executive Director of the State Ethics Commission, we discussed several issues. You suggested we submit all issues related to ethics and conflict of interest to you. We respectfully declined. We articulated to you and you agreed that the Commission was limited in following up on anonymous complaints. We asked if you would assist in an investigation and provide us the content of an informal advisory opinion if such was offered as a mitigation factor. At the time you stated that you would not provide information based on N.C.G.S. § 138A-13(e). The State Auditor specifically agreed to honor your position but stated we would send a letter of request so that the record would be established. We met and discussed these matters in good faith and with respect. Your letter fails to acknowledge the mutual understanding we came to in reference to our request for information and our attempts to work together in good faith.

Now you have provided a written "informal advisory opinion" dated May 7, 2008. It appears likely we will end up with three opinions on this narrow issue, (1) your informal verbal advice sometime in 2007, (2) the informal written opinion dated May 7, 2008, and then (3) a written formal opinion by full Ethics Commission as a body, which may be reviewed, modified or overruled by the Legislative Ethics Committee.

The impact of the Office of the State Auditor submitting all anonymous "hotline" complaints involving covered persons to the Ethics Commission would likely have a chilling effect on the state hotline for fraud, waste, and abuse. We believe the State of North Carolina and her citizens are best served by transparency, disclosure and "sunshine".

We fully recognize that it is the Legislature that makes the laws. The Legislature could certainly mandate that all anonymous complaints under N.C.G.S. § 147-64.6(c) (16) involving legislators be transferred from the Office of the State Auditor to the Ethics Commission. Whether such action would promote transparency, disclosure, and "sunshine" is left to the wisdom of the Legislature.

We will continue to strive to work together with the Ethics Commission as well as any other State entity in good faith to carry out our statutory mandates.

Respectfully,



Timothy J. Hoegemeyer, J.D., MPA
General Counsel