

STATE PUBLIC INTEGRITY COMMISSION

Synopses of 1996 Opinions

Table of Contents

Personal or Private Interests

Interest in Non-Profit Organization	1
Restrictions on the Exercise of Official Authority	1
Restrictions on Representing Another's Interest before the State.	2
Regulating Activities Where Spouse Has Interest	2
Client Referral to Spouse's Private Enterprise	3
Agency Contracts with Brother-in-Law	4
Holding Stock Interest in Non-Profit Organization	5
Contract with Company Regulated by Agency	6
Decisions where a Daughter is Involved	7
Subcontracting with a Firm which has a State Contract	8
Stock in Private Enterprise	10
Stock Holdings in Publicly Traded Company	11

Accepting Anything of Monetary Value

Concurrent Employment	12
Local Government Employee Running for Elected Office	12
Running for Office While Serving as an Appointee to a State Board	13
Security Concerns	14
Employment with Companies Regulated by Agency	14
Employment With an Agency Contractor	15
Contracting with a State Agency	16
Consulting with facilities regulated by Employee's Agency	17
Teaching as Outside Employment for a Public School Teacher	20
Gifts, Payments, etc.	20
Scholarship	20
Tickets and Accommodations for an Athletic Event	21
Lunches from Vendors	21
Gift Certificate from Business Agent	23

Samples from Vendors	23
Payment to Honorary Officials	24
Payment of Expenses by Contractor	25
Reimbursement by a Non-Profit Foundation	26

***Appearance of Impropriety* 26**

***Confidential Information* 26**

Jurisdiction

Members of the General Assembly	27
Employees of Local Government	27
Judges, Prosecutors, and Local Government Police	27
State Regulatory Body	28
Criminal Law Complaint	30

Post-employment

Soliciting Former State Clients	31
Moot Issue	32
“Particular Facts” Required	32
Computer Consultant to State Agency	32
Computer Consulting with Former Agency	33
Computer Services Contract	33
Former Employee’s Participation in Selecting His Replacement	35
From Social Work to Computers	35
Limited Waiver Granted on Post-Employment Restrictions	35
Managing Computer Technicians	36
Limits on Post-Employment where Company Contracts with Former Agency	37
Insufficient Facts	37
(A) The Company With a State Contract	37
(B) The Company without A State Contract	38
(C) Restrictions on Using Confidential Information	38
Contract with Former Agency, But Not Same Agency Section	39
What’s a “Matter” under the Post-Employment Provision?	39
(A) Approach to Interpreting the “Matter”	40
(B) Interpreting “Confidential Information”	43

PERSONAL OR PRIVATE INTERESTS

Interest in Non-Profit Organization

A Division Director was also a volunteer member of a private non-profit organization. The organization asked the Director to consider chairing its Board of Directors. The organization did not compensate the individual as a volunteer member, and would not compensate her as a Board member. The Board engaged in such activities as deciding if the organization would pursue grants-in-aid, etc. Although most of its funding was from private companies, it would qualify for State grants. It rewrote its bylaws to say that if a State employee was on the Board, it would not ask for a grant from that agency. It would seek grants from other agencies.

(A) Restrictions on the Exercise of Official Authority

The Code of Conduct restricts State employees, officers and honorary officials from reviewing or disposing of matters where they have a personal or private interest that would tend to impair their judgment in performing official duties. 29 *Del. C.* § 5805(a)(1)(a). It also prohibits conduct that would raise public suspicion that the individual is engaging in acts violating the public trust and that would not reflect favorably on the State. 29 *Del. C.* § 5806(a).

This Commission has held that where a State employee was on the Board of a for-profit private enterprise, although the entity did not compensate her, it would be inappropriate for her to review or dispose of the company’s contract application as part of her official duties because, as a minimum, it might appear improper, which the Code prohibits. *See, Commission Op. No. 95-24.* “Private enterprise” includes “non-profit” entities. *See, 29 Del. C.* § 5804(8).

Here, the organization’s bylaws barred it from seeking funds from a State agency if an individual from that agency was on its Board. Thus, the Division Director would not review or dispose of any funding request from the organization because it would not seek funds from her agency, if she accepted a Board position.

However, if she did not become a Board member, but remained a volunteer, the bylaws did not bar the organization from seeking funds from her agency. The Commission concluded that she probably could not review or dispose of such request as part of her State duties. As a minimum, it might appear that because of her personal interest as a member, she might give preferential treatment to the organization if it requested funding. If such situations arose, she was directed to consider whether she should: (1) recuse herself; or (2) return to the Commission for an opinion on that specific situation; or (3) request a waiver from the Commission. The Commission may grant a waiver if it “determines that the literal application of such prohibition in a particular case is not necessary to achieve the public purposes of this chapter or would

result in an undue hardship on any employee, officer, official or state agency.” 29 Del. C. § 5807(a).

(B) Restrictions on representing another’s interest before the State.

The Code also restricts State employees, officers and honorary officials from representing or assisting a private enterprise with respect to any matter before the State agency with which the employee, officer or official is associated by employment or appointment. 29 Del. C. § 5805(b).

The organization’s bylaws made it clear that if the Division Director took a Board position, it would not seek funds from her Department. Thus, it appeared she would have no occasion to represent or assist the organization before the agency where she worked, if she served on the Board.

However, if she were not on the Board but just a member, then the organization’s bylaws would permit it to seek funds from her agency. The Commission concluded that it appeared that the Code restricted her from assisting the private enterprise before her own agency, meaning that she could not, e.g., help prepare the organization’s funding request. *See*, 29 Del. C. § 5805(b)(1).

“State officers” are further restricted. They may not represent or assist any private enterprise with respect to any matter before the State. 29 Del. C. § 5805(b)(2). “State officers” are persons who must file a financial disclosure form. 29 Del. C. § 5804 (12). Division directors are required to file. 29 Del. C. § 5812(a)(15). Thus, as a “State officer,” she would be restricted from assisting or representing the organization, not only before her agency, but before any State agency. For example, if the organization wanted funds from an agency other than hers, the Commission concluded that it appeared that the Code prohibited her from such things as preparing its grant request as that would be assisting the private enterprise in seeking funding from another agency. (*Commission Op. No. 96-64*).

Regulating Activities Where Spouse Has Interest

The Code of Conduct requires honorary State officials who have a financial interest in any private enterprise which is subject to the regulatory jurisdiction of, or does business with, the State agency on which he serves as an appointee, to file with the Commission a written statement fully disclosing the same. 29 Del. C. § 5806(d). An honorary State official notified the Commission that he served on a regulatory agency which regulated activities in which his spouse planned to engage. He said he would recuse himself from decisions concerning his spouse.

Honorary State officials are restricted from reviewing and disposing of matters before the State where they have a personal and private interest which would tend to impair independence of judgment. 29 Del. C. § 5805(a)(1). One interest which, as a matter of law, tends to impair independence of judgment is one where a close relative would receive a greater benefit or detriment than members of the same class or group. 29 Del. C. § 5805(a)(2). “Close relative” is defined to include a spouse. 29 Del. C. § 5804(1). The Code also prohibits such persons from engaging in conduct that would raise suspicion

among the public that he is engaging in acts violating the public trust and that would not reflect favorably upon the State. 29 Del. C. § 5806(a).

Without deciding if the spouse would receive a benefit or detriment greater than that received by others in the same class or group, the Commission held that if the honorary State official decided matters concerning his spouse, it could appear to the public that his judgment would be impaired, and therefore, it was appropriate that he recuse himself on such matters.

The Commission noted that a separate statute governing this particular regulatory body had specific provisions dealing with appointees having a direct or indirect pecuniary interest in the regulated activity. As the Commission had no jurisdiction to interpret that statute, it suggested the individual discuss compliance with that statute with the appropriate authority. The individual later notified the Commission that his spouse would not engage in the regulated activity as long as he served on the regulating agency. (*Commission Op. No. 96-16*).

Client Referral to Spouse's Private Enterprise

The Code permits State agencies to seek advisory opinions. 29 Del. C. § 5807(c). A State agency sought a decision on whether it could promote one of its employees, without creating a conflict. If promoted, a private enterprise owned by her husband was on the list of facilities to which clients from her office could be referred. Her agency identified certain internal procedures that were in place and asked if the promotion would result in a conflict, even with the procedures in place.

State employees cannot review or dispose of matters if there is a personal or private interest which tends to impair independence of judgment in performing official duties with respect to that matter. 29 Del. C. § 5805(a)(1). One interest, which as a matter of law, tends to impair judgment is where action or inaction by the employee would result in a benefit or detriment for a close relative to a greater extent than for others similarly situated. 29 Del. C. § 5805(a)(2). "Close relative" includes a spouse. 29 Del. C. § 5804(8).

Here, federal and State laws prohibited State employees from referring clients to a particular facility. The agency kept a list of all qualified facilities and the client or the client's family selected the facility from the list. Thus, the "matter" of selecting the facility was not a "matter" over which the employee had any review or disposition authority. Further, the agency had an individual who screened potential clients. After reviewing the applications, the screener assigned the clients to employees. It was agency procedure to assign employees to handle clients from a particular facility. Clients who resided in or selected the husband's facility would not be assigned to his spouse. Thus, the "matter" of deciding eligibility for applicants at her husband's facility was not a "matter" over which the employee had any review or disposition authority. As the agency would not assign the employee to clients who lived at her husband's facility, she would not evaluate the quality of care given at his facility. Thus, the "matter" of deciding quality of care was not a "matter" over which she had any review or decision making authority.

The Code also prohibits State employees from representing or assisting a private enterprise with respect to matters before the agency with which they are associated with by employment. 29 *Del. C.* § 5805(b)(1). Here, the “matters” which would be of interest to the private enterprise would be client eligibility, facility assignment, and client care. No input was required from the private enterprise regarding client eligibility as it was based on financial documents submitted by the potential client. No input was required from the private enterprise regarding facility selection as the client or the client’s family selected the facility. Thus, no occasion for the employee to represent or assist the private enterprise on “matters” before the agency on client eligibility and facility assignment would occur. The agency would not assign the employee to cases where the clients lived at her husband’s facility. Thus, she would have no information on the “matter” of client care on which she could represent or assist the private enterprise regarding the quality of care given those clients.

The agency said that one of its concerns was any appearance of impropriety as the Code prohibits conduct which would raise suspicion among the public that an employee is engaging in acts violating the public trust. 29 *Del. C.* § 5806(a). Here, the agency based client eligibility principally on mathematical calculations involving income and net assets contained in documents submitted by the applicant. A supervisor routinely reviews decisions on eligibility through the relatively simple process of reviewing mathematical calculations; not possible subjective statements by the employee. Additionally, the employee would not decide eligibility or have clients from her spouse’s facility. Therefore, it was unlikely she could approve or deny eligibility in a way to benefit her spouse’s facility. Additionally, the State employee has no control over the list or over which facility has space available.

The Code also prohibits disclosing confidential information gained by reason of public position or otherwise using such information for personal gain or benefit. 29 *Del. C.* § 5806(g). The employee, like all agency employees holding similar positions, had signed a confidentiality statement on disclosure or use information about applicants and clients. The employee said she was aware of and understood the prohibition, and never had, nor would she, violate the prohibition. (*Commission Op. No. 96-76*).

Agency Contracts with Brother-in-Law

A State employee was the lead point of contact for his agency’s procurement activities. On occasion, requests for locksmiths went through his office. As part of his duties, he obtained quotes from vendors, and where appropriate sought public bids. His brother-in-law was a managing partner for a locksmith company. As such, quotes from that firm could be solicited and/or that company would submit bids when public notice and bidding were required. The agency, believing a conflict might exist, had the individual’s supervisor solicit quotes or handle bids on locksmith needs. It asked if such action was sufficient to avoid a conflict.

The Code restricts State employees from:

- (1) reviewing or disposing of matters if a personal or private interest tends to impair independent

judgment in performing official duties; 29 *Del. C.* § 5805(a); and

(2) engaging in conduct that would raise suspicion among the public that an employee is acting in violation of the public trust. 29 *Del. C.* § 5806(a).

The Commission concluded that the agency had properly removed him from participating in this procurement activity because if he called and obtained quotes, his familial relationship might, as a minimum, tend to impair judgment. Even if it did not, the public could suspect that he would give his brother-in-law preferential treatment by: (1) calling him for a quote and not calling others; and/or (2) passing quotes of other contractors to his brother-in-law.

The Commission found that the procedures set up by the agency sufficiently removed any suspicion that he was engaged in activities violating the public trust because very few such requests came through his office; his supervisor decided if the bid complied with State procurement rules; and an individual from another section reviewed the contracts and judged the supervisor's recommendation on the bases of costs, competence, past track record, etc., of the contractor. (*Commission Op. No. 96-42*).

Holding Stock Interest in Non-Profit Organization

A State agency asked if it would raise any ethical issues if a non-profit 501(c)(3) private corporation were formed to promote the exchange and dissemination of certain client information between the State and private enterprises. According to the proposed bylaws, the private corporation would issue stock to certain State officers, such as an elected official, cabinet secretaries, and division directors. Representatives of private enterprises, which the State regulated, would hold the majority of the stock. The stock held would be voting stock and holders would, among other things, vote to elect the board of directors, which might include these State officers. Alternatively, it was asked if ethical issues could be eliminated if the State, instead of the individuals, held the stock.

The bylaws provided that the entities which would make up the private corporation would exchange certain client information. The State would be expected to contribute information to the network based on the data it collects on State clients. While other states have created such information networks, they were created by statute, not by incorporation of a private enterprise.

The Commission, by law, must base its advisory opinions on a particular fact situation. 29 *Del. C.* § 5807(c). Here, a particular fact situation did not yet exist as the legal entity of the private corporation had not been created and no State officer had participated in any aspect of the corporation's activities. However, to decide if such a private enterprise model would be used, guidance was needed on whether conflicts could arise from creating such a corporation. As the Commission may "provide assistance to state agencies, employees and officials in administering the provisions of this law," 29 *Del. C.* § 5809(10), this opinion is meant only to provide assistance to the State agencies and State officers involved to aid them in recognizing some areas where potential conflicts could arise. It is not meant to prejudice any activities

engaged in by such officers, should they elect to be parties to this private enterprise. Further, it is not within the Commission's authority to suggest how a network, such as proposed here, should be legally structured, as that is a matter for the Attorney General.

With those limits in mind, having reviewed the bylaws and the purpose of the corporate organization, the Commission had concerns that where State officials join forces with private enterprises under these circumstances, in a corporate activity, as a minimum, it raises issues about the appearance of impropriety. Without detailing all of those concerns, the Commission points out two issues. For example, the private corporation will be made up, in part, of companies that the State regulates. It could appear to the public that State officers might, in making regulatory decisions, give preferential treatment to those companies with whom they have joined forces in a private enterprise. *See, 29 Del. C. § 5805(a)(1) and § 5805(b)(2)*(State officers cannot review or dispose of matters in which they have a personal or private interest that tends to impair judgment and State officers cannot represent or assist a private enterprise in matters pending before the State). It also may appear to the public that the State officers are obtaining confidential information in their official capacity and passing that information to private companies. *See, 29 Del. C. § 5806(f) and (g)*(regarding improper disclosure or use of confidential information gained by reason of public position).

If the State held the stock, as opposed to the individual officers, some State official would still have to make voting decisions, and perform other functions and responsibilities as a stock holder. Such official may encounter the same appearance problems. Accordingly, the Commission does not see where giving the stock to the State would necessarily eliminate some of the ethical issues that might arise.

The Commission has some concerns about whether State officials may, within the scope of their employment, enter such arrangement, regardless of any ethical issues. However, that question is for the Attorney General's office, not this Commission. (*Commission Op. No. 96-56*).

Contract with Company Regulated by Agency

Before being appointed to a State agency, an individual had a private contract to provide maintenance for a private enterprise. For a number of years after his appointment, the company was not subject to the agency's regulations. Because of a change in business operations, the company became subject to the agency's regulatory authority. The individual notified the Commission that he would recuse himself from decisions regarding the company. He asked if he needed to take additional steps to avoid any conflicts of interest.

Because the individual's appointed position resulted in more than \$5,000 a year in compensation, he was considered a "State employee," under the Code of Conduct. *See, 29 Del. C. § 5804(11)(a)(2)*.

State employees are restricted from participating on behalf of the State in the review or disposition of any matter pending before the State in which they have a personal or private interest. A personal or

private interest in a matter is an interest which tends to impair a person's independence of judgment in performing duties with respect to that matter. 29 Del. C. § 5805(a)(1).

The Code also prohibits accepting outside employment if such acceptance would result in: (1) impairment of independence of judgment; (2) official decisions outside official channels; (3) preferential treatment to any person; or (4) any adverse effect on the public's confidence in the integrity of the government. 29 Del. C. § 5806(b).

The Code also prohibits employees from pursuing a course of conduct which will raise suspicion among the public that they are engaging in acts which violate the public trust and which will reflect unfavorably upon the State. 29 Del. C. § 5806(a).

As a minimum, it may appear that participation in regulatory decisions of a company with which he did business would raise suspicion among the public that his judgment may be impaired and that he might give preferential treatment to the company. Accordingly, his decision to recuse himself from matters affecting the company was appropriate.

The question of whether he should take further action was viewed in light of the other activities regulated by the agency. The agency had specific areas to regulate and decisions by it in areas of regulation outside the area which applied to this company, would not impact on the company. Accordingly, the Commission found no violation of the Code as long as he recused himself from decisions pertaining to the company. This would preclude him from reviewing or disposing of matters in which arguably he had a financial interest and would preclude any preferential treatment to the company in making official decisions.

As far as any appearance of impropriety, the Commission emphasized that he had a long standing contract with the company to perform the maintenance work before the company was ever regulated; he was performing the contract before his appointment; and his company was asked to continue to perform the work to give continuity to the plant maintenance. Thus, it is clear that any financial benefit received through the contract was not the result of his appointment.

The Commission concluded he need not recuse himself from other regulatory decisions, as those decisions would not impact on the regulatory decisions pertaining to the company. (*Commission Op. No. 96-53*).

Decisions where a Daughter is Involved

State employees may not review or dispose of State matters if they have a personal or private interest which tends to impair their independent judgment in performing duties with respect to those matters. 29 Del. C. § 5805(a)(1). A person's judgment tends to be impaired when any action or inaction on a matter would result in a financial benefit or detriment to a close relative to a greater extent than such benefit

or detriment would accrue to others members of the same class or group of persons. 29 *Del. C.* § 5805(a)(2)(a). “Close relative” includes children. 29 *Del. C.* § 5804(1).

A State employee was asked to review an existing agency contract for expansion. The contract dealt with scheduling and testing. The agency’s senior management decided to expand the contract because legislative changes dictated that the work be assumed by the existing contractor to free up agency staff. Persons at a higher level than the employee approved the negotiations. After the contract was renegotiated, the contractor announced plans to hire additional workers. The announcement reflected the specific hiring criteria and the particular background needed. The employee’s daughter, among other applicants, had the particular background and applied for a job.

The Commission found no violation of 29 *Del. C.* § 5805(a) as the State employee had no foreknowledge that her daughter would be considered for a position when the negotiations were occurring. Therefore, her judgment would not have been impaired because of her lack of knowledge. Also, no evidence suggested that her contract negotiations benefitted her daughter more than other members of the same class or group of persons. The contractor established the hiring criteria and hired other similarly qualified applicants. No facts suggested that the daughter received any greater benefit than that offered to other applicants.

The daughter would not work for the contractor in the same area as her mother and her mother had no responsibilities in the area of the subject matter (scheduling/testing) of the contract. (*Commission Op. No. 96-44 (I)*).

Subcontracting with a Firm which has a State Contract

A State agency solicited lease proposals for space to house several State agencies. Representatives from each agency which would use the space were on the Site Selection Committee. The committee narrowed the proposals to three candidate firms. One candidate firm intended to subcontract part of the work which would be required to prepare the site. An appointee to one of the State agencies which would be housed in the property owned the firm which would subcontract. Before the Site Selection Committee allowed the three candidates to present their proposals, the Commission was asked if it would violate the Code of Conduct if the appointee’s firm subcontracted.

Under the Code of Conduct, “State employee” includes any person “who serves as an appointed member, trustee, director of the like of any State agency and who receives or reasonably expects to receive more than \$5,000 in compensation for such service in a calendar year (not including reimbursement of expenses.” 29 *Del. C.* § 5804(11)(a). As the individual who owned the subcontracting firm was appointed by the Governor and received a salary of more than \$5,000 per year, for purposes of the Code of Conduct, he was a “State employee.”

State employees may not:

(1) Review or dispose of matters pending before the State where there is a personal or private interest that tends to impair independence of judgment. *29 Del. C. § 5805(a)(1)*. One interest which tends to impair judgment is when action or inaction on the matter would result in a financial benefit or detriment to accrue to the person or private enterprise to a lesser or greater extent than others in the same class or group. *29 Del. C. § 5805 (a)(2)*.

The matter to be reviewed and disposed of was a leasing contract. The appointee's official duties did not include any aspect of leasing contracts. His duties were to decide regulatory matters. His agency did not regulate either his firm or the candidate firm. Also, he was not on the Site Selection Committee so he would not review or dispose of the lease. While his company might experience a financial benefit if it subcontracted, the financial benefit would not result from any action or inaction by him in his official capacity. Also, he would recuse himself from any discussion with his agency regarding the leasing decision. Thus, the Commission found that if his firm subcontracted as part of the candidate's team, it would not violate *29 Del. C. § 5805(a)(1) and (2)*.

(2) Represent or otherwise assist any private enterprise with respect to any matter "before the state agency with which the employee . . . is associated by employment or appointment." *29 Del. C. § 5805(b)(1)*.

Assuming the Site Selection Committee was a "State agency," it was not the State agency to which he was appointed. As he was not on the Site Selection Committee; would not discuss the matter with his agency, and would not participate in any presentation to the committee by the candidate firm, it would not violate *29 Del. C. § 5805(b)*, if his firm were a subcontractor.

(3) Enter any State contract for more than \$2,000 (other than employment) unless the contract was made or let after public notice and competitive bidding. *29 Del. C. § 5805(c)*.

Although the law does not require solicitation for leasing proposals be subject to public notice and competitive bidding, the leasing contract was, in fact, advertised. Thus, there appeared to be no violation of *29 Del. C. § 5805(c)*.

(4) Engage in conduct that would raise public suspicion that the individual is engaging in acts violating the public trust. *29 Del. C. § 5806(a)*.

Regarding whether his participation as a subcontractor would raise suspicion among the public that he was engaging in activities violating the public trust, such concern was diminished because: (1) the proposals were subject to public notice and bidding; (2) the activities raised no technical violations of the statute; (3) he was not on the Site Selection Committee; (4) he would not personally appear or participate in the candidate firm's presentation to the selection committee; and (5) he would not discuss the leasing arrangement with his agency. Also, if his firm subcontracted, the work was only about 5% of the overall project costs. Other than the overall costs proposed, the primary criteria in selecting a candidate focused

on site location, not the type of work his firm would subcontract to perform. Thus, it did not appear that the work of the subcontractor would affect the selection, regardless of the contractor. This fact also diminished any appearance that having his firm subcontract as part of one contractor's team would influence the selection of the contractor.

If his firm participated in the contract, it was not anticipated that his State agency would have any special needs from the subcontractor which would require him to discuss those needs with his agency. However, the Site Selection Committee had not decided which candidate would receive the contract. Even assuming that the candidate firm which wished to use his firm as a subcontractor were selected, and assuming his firm was kept as its subcontractor, the need for discussions and decisions between the individual in his private capacity and his agency were remote and speculative. As the Commission must render advisory opinions based only on a "particular fact situation," 29 *Del. C.* § 5807(c), it concluded that it was premature to rule on whether such discussions and decisions, if they needed to occur, would violate the Code of Conduct. The Commission advised the parties that they could seek an opinion should such situation arise. (*Commission Op. No. 96-51*).

Stock in Private Enterprise

A State officer owned a single share of stock in a small Delaware corporation, valued at approximately \$600. The stock holding was not for investment purposes, but a "gesture of community support." The private corporation rented property it owned to a second corporation in which it held stock. The second corporation had a sublease agreement with the State. The private corporation did not receive any proceeds from the sublease agreement. The State officer was responsible for selecting someone to insure that the second corporation complied with its sublease agreement. As a State officer, he had no decision making authority over the corporation in which he held stock, and the amount of stock did not constitute a "financial interest" as defined by the Code of Conduct. However, he asked if holding stock in the first corporation would violate the Code of Conduct because he selected the person who would insure that the second corporation complied with the sublease.

The Code prohibits State officers from reviewing and disposing of matters in which they have a personal or private interest which tends to impair independent judgment in performing official duties with respect to that matter. 29 *Del. C.* § 5805(a)(1). As a matter of law, a person has an interest which tends to impair judgment if they have a "financial interest" in a private enterprise and any action or inaction would affect that interest to a lesser or greater extent than like enterprises or other interests in the same enterprise. 29 *Del. C.* § 5805(a)(2)(b). A person has a "financial interest" if he: (a) has a legal or equitable ownership interest of more than 10%; (b) expects to receive more than \$5,000 in income during the year as an employee, officer, director, trustee or independent contractor; or (c) is a creditor in an amount equal to 10% or more of the debt of that enterprise. 29 *Del. C.* § 5804(4). Here, the individual's ownership interest was less than 10%; he received no income from the corporation; and he was not a creditor of the corporation.

While his stock holding did not meet the statutory definition of “financial interest,” the Commission pointed to a Delaware Superior Court decision in which the Court relied only on the general prohibition against having an interest which tends to impair judgment, 29 *Del. C.* § 5805(a)(1) without any reference to the “financial interest” provision, 29 *Del. C.* § 5805(a)(2)(b), for an assumption that an individual had a conflict of interest. *Beebe Medical Center v. Certificate of Need Appeals Board*, *Del. Super., C.A. No. 94A-01-004*, Terry, J. (June 30, 1995), *aff’d*, *Del. Supr., No. 304*, Veasey, J. (January 29, 1996). The Code also prohibits engaging in conduct which could raise suspicion that they are violating the public trust. 29 *Del. C.* § 5806(a).

The Commission said that although the \$600 stock did not constitute a “financial interest,” the question was whether the holdings might create a perception of impropriety. The Commission held that under these facts, it found no justifiable imperception because: (1) the holding was small; (2) it was fully disclosed; (3) the basis of the holding was a “gesture of public support,” as opposed to an investment opportunity; (4) he would recuse himself from reviewing decisions on whether the second corporation was complying with the sublease; and (5) the first corporation received no proceeds from the sublease agreement with the State. (*Commission Op. No. 96-61*).

Stock Holdings in Publicly Traded Company

As part of his State duties, a State officer was to find a company to fulfill a service contract. The service needed was highly technical and the State officer “did a lot of research,” and “acquired a lot of knowledge,” about companies which provided the highly technical service. Specifically, only three companies were the primary providers, and they had a substantial portion of the world market. He recommended that one of the companies provide equipment and phase-in services at more than \$1 million. After the contract was issued, he learned that the company was making a public offering of its stock. He concluded that he could use his knowledge about the company without any conflict because his investment was less than the amount defined by the Code of Conduct as a “financial interest.” He and his wife bought 340 of the 2 million shares offered.

He was to routinely monitor the contract for compliance and could decide if his agency needed additional services. If more services were needed, his recommendation “would carry a lot of weight.” He also said other Delaware agencies and other jurisdictions might seek his recommendation on the company’s ability to fulfill the contract. He said that although any sale would make the company look better, he did not think his decisions would affect the stock price. However, he recognized that his opinion could have an impact. He said that if the Commission found a violation he could delegate his decision making authority or liquidate the investment.

His investment was not enough to be a “financial interest” as defined by the Code. *See*, 29 *Del. C.* § 5804(5). However, the Commission noted other provisions which affected its decision.

First, the code prohibits reviewing or disposing of matters pending before the State where the individual has a personal or private interest which tends to impair judgment with respect to that matter. 29

Del. C. § 5805(a)(1). The Commission pointed out that the Delaware Superior Court interpreted the provision as requiring recusal of a decision maker on matters pending before the State where a private company employed the individual and the company was seeking a decision from his agency. The Court did not discuss the amount of any “financial interest.” *See, Beebe Medical Center v. Certificate of Need Appeals Board, Del. Super., C.A. No. 94A-01-004, Terry J. (June 30, 1995), aff’d, Del. Supr., No. 304, Veasey, J. (January 29, 1996).*

Second, the Code restricts State employees from having “any interest in any private enterprise . . . which is in substantial conflict with the proper performance his duties.” *29 Del. C. § 5806(b)(emphasis added)*.

Third, the Code prohibits conduct which could raise suspicion that the individual is violating the public trust. *29 Del. C. § 5806(a)*. The Commission noted that in a prior decision it said: “The significant import of Section 5806(a) is that employees are to pursue a course of conduct which will not ‘raise suspicion’ that their acts will ‘reflect unfavorably upon the State and its government.’ Actual misconduct is not required; only a showing that a course of conduct could ‘raise suspicion’ that the conduct reflects unfavorably.” *Commission Op. No. 92-11*.

The Commission concluded that his investment created perception and possible conflict of interest problems because: (1) only three major companies provided the service; (2) the service was in a fast developing field; (2) this limited competitiveness was to be weighed against his decision making authority; (3) he would be routinely deciding if the equipment worked properly; (4) he would be the one to recommend additional services for his agency; (5) his decision making authority carried “a lot of weight” not only with his own agency but other Delaware agencies, and even other jurisdictions; and (6) no statute or rule prevented him from delegating his decision making authority. (*Commission Op. No. 96-85*).

ACCEPTING ANYTHING OF MONETARY VALUE

Concurrent Employment

Local Government Employee Running for Elected Office

An individual who worked for a city government was subject to the State Code of Conduct because it applies to local governments that have not adopted their own Code. *68 Del. Laws, c. 433 § 1*. Besides holding his government position, he wished to run for office in a different city. The Commission referred the individual to its prior holding that no specific Code of Conduct provision prohibits running for elective office while employed by the government. *Commission Op. No. 92-2*.

As this individual was a law enforcement officer, he also was referred to the Police Officers’ Bill of Rights regarding participating in political activities. *See, 11 Del. C. § 9200(a)*. The restriction against

police officers engaging in political activity while on duty or when acting in an official capacity or while in uniform was similar to the statute governing political activities by State Merit employees, which prevents them from engaging in political activity or soliciting political contributions, assessment or subscriptions during hours of employment or while engaged in State business. *See, 29 Del. C. § 5954.* Although the Commission has no jurisdiction over those laws, it noted that those restrictions were consistent with the Commission's interpretation of Code of Conduct provisions which preclude acts appearing to be improper and acts in substantial conflict with properly performing public duties under the concurrent employment provision. *See, 29 Del. C. § 5806(a) and (b).*

As the individual had not been elected to office, the Commission found that the issue of whether being an elected official would create an actual conflict with his government employment was not ripe for decision. It advised the individual that if elected, he should be aware of the restrictions on holding concurrent employment. *See, 29 Del. C. § 5806(b).*

He was advised that if elected, he would be subject to the State Code of Conduct not only in his employed position, but also in his elected position. It said if a particular fact situation arose after being elected, he could return to the Commission for an opinion on a particular fact situation. (*Commission Op. No. 96-02*). (*Merit Employees, See, 29 Del. C. § 5954 & AG Op. No. 78-016*).

NOTE: The Delaware Supreme Court, in a 1998 advisory opinion interpreting the State Constitution, held that a State trooper must resign as a State trooper if elected to the General Assembly as he would be exercising both legislative powers (enacting State laws) and executive powers (enforcing State laws) and the combination would be "antithetical to Separate of powers between the three branches of government." *In Re: Request of the Governor for an Advisory Opinion, Del. Supr., 722 A.2d 307 (1998).*

Running for Elected Office While Serving as an Appointee to a State Board

An individual who was an appointee to a State Board wanted to run for either a city or county elected position. He had not decided which one.

The Commission referred the individual to its earlier rulings which held the Code of Conduct does not specifically prohibit running for elective office. (*Commission Op. Nos. 92-2 and 96-02*). However, in those opinions, the Commission noted that the Code of Conduct does preclude acts appearing to be improper and acts in substantial conflict with properly performing public duties. *29 Del. C. § 5806(a) and (b)*. Viewing those provisions in the context of running for elective office, the Commission held that individuals seeking political office should not engage in political activities or solicit any political contribution, assessment or subscriptions during hours of State employment or while engaged in State business. *See, Commission Op. No. 96-02.*

It noted that apart from the Code of Conduct, other statutes prohibit certain persons from being a candidate or holding elective office. For example, Public Integrity Commission members cannot be

elected or appointed to U.S. or State office or be a candidate for those offices, 29 *Del. C.* § 5808(b); the State Election Commissioner may not hold or be a candidate for office, 15 *Del. C.* § 301, etc. The Commission pointed to those provisions to alert the individual to check beyond the Code of Conduct for other statutes that might affect his decision to run for office.

The Commission held that it could not rule on whether any conflict would be raised if the individual were actually elected because it can render decisions based only on particular facts. 29 *Del. C.* § 5807(c). Here, the individual had not even decided which elected office he intended to seek. Assuming he was elected, it would still need a particular fact situation to decide if the concurrent employment would violate the prohibition against holding other employment where it may result in: (1) impairment of independence of judgment in exercising official duties; (2) undertaking to give preferential treatment to any person; (3) making a governmental decision outside official channels; or (4) any adverse effect on the confidence of the public in the integrity of the State government. 29 *Del. C.* § 5806(b). Without specific facts, the Commission would not speculate on whether holding the concurrent positions would violate the Code.

If the individual were elected, as an elected official he would be subject to the State Code of Conduct, unless the particular local government had adopted its own code of Conduct. *See, 68 Del. Laws, c. 433 § 1.* Only four local governments have adopted their own codes of conduct--Lewes, Newark, Wilmington and New Castle County. Also, as a State official, he would remain subject to the State Code of Conduct as a result of that position.

The Commission advised the individual that if elected and a specific situation arose, he should feel free to seek a decision from the Commission based on that specific situation. (*Commission Op. No. 96-22*). (*Merit Employees, See, 29 Del. C. § 5954 & AG Op. No. 78-016*).

Security Concerns

An agency asked if it would violate the Code of Conduct for one of its employees to accept part-time employment which would result in the employee having access to the agency's offices after duty hours. The agency was concerned that a security problem could occur, although no such incident had occurred. Further, the agency said its concern was not specifically about this individual. Rather, it resulted from a risk analysis determination that there could be a problem in granting agency employees access to areas where confidential information was retained as it could set precedent and create a problem.

The Code prohibits concurrent employment if it would result in: (1) impaired independence of judgment; (2) preferential treatment to any person; (3) government decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of the government. 29 *Del. C.* § 5806(b).

The Commission issues advisory opinions on a particular fact situation. 29 *Del. C.* § 5807(c). As the agency concerns were not related to this individual and no security incident had occurred, the Commission held that the matter was not ripe for decision.

Further, the agency was charged by the federal government with risk analysis for security problems based on federal statutes and/or regulations. The Commission's jurisdiction is limited to implementing and administering the Code of Conduct. *See*, 29 Del. C. § 5808(a). Thus, it has no jurisdiction over federal provisions relating to security matters. (*Commission Op. No. 96-09*).

Employment with Companies Regulated by Agency

Employees of a State agency were offered temporary jobs by a company regulated by their agency. Their State position required them to enforce regulations against the company, when necessary. While performing the temporary job, they could observe whether the company was violating the regulations.

The Code prohibits outside employment if it may result in: (1) impaired independence of judgment in performing official duties; (2) preferential treatment of any person; (3) official decisions outside official channels; or (4) any adverse impact on the public's confidence in the integrity of the government of the State. 29 Del. C. § 5806(b).

Because they would be paid by a company for which they enforced State regulations and their off-duty work for the company could result in observations that State regulations were being violated, the Commission concluded that accepting the outside employment could adversely effect the public's confidence in the integrity of government because the public might assume the employees would give preferential treatment to the outside employer or assume that the employees' judgment could be impaired because of the conflict between performing duties for an employer against whom they must enforce State regulations. (*Commission Op. No. 96-41*).

Employment With an Agency Contractor

A company which contracted with a State agency was unable to fulfill the contract in three areas because it did not have the necessary expertise. The agency asked another agency if the contractor could hire some of its employees to provide the expertise. They would provide these services to the contractor during their off-duty hours. If the contractor could not hire these State employees, the contract restrictions would result in a funding reversion if the deadline were not met. The State employees who would fulfill the contract were well qualified to provide the services and would perform the functions during non-regular business hours so that it would not interfere with their full-time employment. One was a Merit employee and the other was a non-Merit employee. The agency asked if the contractor could hire the employees, and if so, whether they should be paid or receive compensatory time.

The Code restricts employees from accepting other employment if it would result in: (1) impaired judgment; (2) preferential treatment to any person; (3) government decisions outside official channels; or (4) appear improper. 29 Del. C. § 5806(b).

The Commission found no violation of the Code under these facts. Even assuming a violation, the

Commission may grant waivers if there is an undue hardship for the State agency. 29 *Del. C.* § 5807(a). Here, the need of the agency to fulfill the contract obligation, with consideration of both the expertise required for the program and the need to meet the contract deadline, would constitute a hardship for the agency.

Regarding whether the employees should be paid or receive compensatory time, the Commission did not find that decision to be within its jurisdiction. Rather, the agencies should determine how compensation will be made based on the contract provisions and any other relevant law or rule. For example, as to the Merit employee, the agency might review such things as the Merit Rules regarding dual employment with another State agency (Rule 5.0500) and the Merit Rule on partial compensation received from another agency (Rule 5.0500). *See, Merit Rules (Revised August 12, 1994). (Commission Op. No. 96-17).*

Contracting with a State Agency

A State employee started his own computer company as an outside business. He asked if he could bid on a State contract that was to be publicly noticed and bid. The contract was not with his own agency, nor did he have any dealings with the agency in his official capacity. He asked if his outside employment violated the Code of Conduct.

The Code prohibits State employees or any private enterprise in which they hold a legal or equitable ownership of more than 10% (more than 1% if the corporate stock is regularly traded on the securities market) from bidding on State contracts of more than \$2,000 if there is no public notice and bidding. 29 *Del. C.* § 5805(c). As there was notice and public bidding for this contract, the amount of the contract and the amount of the ownership interests were immaterial, and as a State employee, he could bid on the contract.

The Code also prohibits State employees from representing private enterprises before the agency by which they are employed. 29 *Del. C.* § 5805(b)(1). As he would not be representing the private enterprise before his own agency, there was no violation of this section.

Regarding whether his outside employment created a conflict, the statute provides:

No State employee shall have any interest in any private enterprise nor shall he incur any obligation of any nature which is in substantial conflict with the proper performance of his duties in the public interest. No State employee shall accept other employment . . . under circumstances in which such acceptance may result in any of the following:

- (1) impairment of judgment in exercising official duties;
- (2) an undertaking to give preferential treatment to any person;
- (3) the making of a government decision outside official channels; or

(4) any adverse effect on the public's confidence in the integrity of the government.
29 *Del. C.* § 5806(b).

The Commission has previously held that to insure there is no substantial conflict with performing official duties, the individual should not perform any functions related to the outside employment during the hours when the individual is supposed to be performing State duties. *See, e.g., Commission Op. Nos. 95-13, 95-30, 95-39.* Here, the State employee would perform the contract obligations in the evenings and on weekends, when he was not working.

The facts do not appear to create a situation which would tend to impair judgment, or result in preferential treatment or decisions outside official channels because the agency with which he sought to contract was not the same agency where he was employed, and the official decisions made for the agency where he worked did not impact on the contracting agency or vice versa.

As the law permits State employees to contract with State agencies if there is notice and public bidding, and as he was not representing the private enterprise before the agency which employed him, it did not appear that such action would have any adverse effect on the public's confidence in its government.

However, the Commission bases its opinions on a particular fact situation. 29 *Del. C.* § 5807(c). If he were selected as the contractor and learned additional facts which raised issues under the above provisions, or any other Code of Conduct provision, he was to re-evaluate his situation and return to the Commission for additional advice if necessary. (*Commission Op. No. 96-48*).

Consulting with facilities regulated by Employee's Agency

A State employee who inspected certain private facilities for compliance with Federal and State regulations had duties which included going to the facilities, interviewing clients and residents, making observations, etc., and writing a report on whether the facility complied with regulations. When a facility had not complied with the regulations, it had to write a plan of correction, and submit the plan to his office for approval.

He was contemplating becoming a consultant during off duty hours and anticipated two consulting possibilities.

First, he asked if he could be a consultant to the same type of facilities in another state. He wanted to provide quality assurance to improve facility compliance with the State and Federal regulations. He said the Delaware facility owners, which his office licensed and certified, might also own the same kind of facility in other states and that he would seek clients from those Delaware owners.

Second, he asked if he could consult with the regulated facilities in Delaware if he transferred to another division in his own agency or to another State agency.

He would call the Delaware providers to see if they wanted to hire him. For out-of-state clients, which Delaware providers did not own, he would go door-to-door. He intended to tell prospective clients that he regulated such facilities in Delaware.

The Code prohibits outside employment under circumstances where it may result in any of the following:

- (1) impairment of independence of judgment in exercising official duties;
- (2) undertaking to give preferential treatment to any person;
- (3) making government decisions outside official channels; or
- (4) any adverse effect on the confidence of the public in the integrity of the State government.
29 Del. C. § 5806(b).

State employees, officers and officials also must not engage in conduct that would raise suspicion among the public that they are violating the public trust and that would not reflect favorably upon the State.
29 Del. C. § 5806(a).

State employees also may not use public office to secure unwarranted privileges, private advancement or gain. *29 Del. C. § 5806(e).*

(A) Consulting Work Outside the State

The Commission concluded it might appear to the public that he would give preferential treatment to companies with facilities regulated in Delaware if he consulted for those same companies in other States. Thus, the public's confidence in the integrity of its government could be adversely affected, which would violate *29 Del. C. § 5806(b)(4)*.

Additionally, there could be an appearance of impropriety, even if the Delaware companies he regulated did not own the out-of-state facilities. When he inspected for compliance with federal regulations, federal monitors followed-up on his inspections. If he advised an out-of-state client how to comply with the same federal regulations he enforced in Delaware, and the federal agency that monitors his Delaware work challenged his advice, he could find himself in an adversarial role with the federal agency he must work with as part of his State position.

This Commission previously recognized that if an individual worked as a private consultant to companies outside of Delaware on the same matters his agency was responsible for in Delaware, his advice as a consultant could be later challenged, and his State position would certainly be brought out. *Commission Op. 91-19*. The Commission believed this adversarial position would reflect unfavorably on the employee's position of holding the public trust, and therefore would violate the Code. Similarly, if this employee advised clients outside of Delaware on federal regulations he enforced in Delaware, and had his advice challenged, his State position would certainly be brought out in an adversarial proceeding. This Commission must issue advisory opinions with a view toward consistency. *29 Del. C. § 5809(5)*. To

insure consistency in its opinions, the Commission found that the activities he wished to engage in with out-of-state clients would violate 29 *Del. C.* §5806(a).

In soliciting out-of-state clients, he planned to inform prospective clients of his position as a specialist with Delaware and tell them he inspected the same type of facility in Delaware. Even if the out-of-state facilities were not owned or operated by a Delaware company regulated by his agency, he could persuade out-of-State clients to hire him because such facilities in all States have to comply with the federal regulations he enforces as part of his State job. Prospective clients may believe he has an inside track on applicable federal regulations. Also, if clients followed his advice, and later had a compliance problem, they might argue that because he inspects Delaware facilities for compliance with the same federal regulations, his advice carries an inspector's seal of approval.

The Code prohibits State employees from using public office to secure unwarranted privileges, private advancement or gain. 29 *Del. C.* § 5805(e). It also prohibits conduct that would raise the suspicion among the public that an employee is engaging in acts violating the public trust. 29 *Del. C.* § 5806(a). As a minimum, because he would be soliciting clients and telling them of his State position, it might appear to the public that he was using his State position to secure private clients for his own financial gain.

(B) Consulting with Delaware facilities

(1) While working in another position in the same agency

This employee had applied for another position in the same division where he presently worked. This would mean that he would still be an inspector in the same field, but would be inspecting different facilities.

Assuming he was selected for the position, the outside employment provision would still apply. *See* , 29 *Del. C.* § 5806(b)(4). If clients hired him to consult on issues regulated by his same division, it might appear that his clients would receive preferential treatment from the persons within that division.

This Commission previously ruled that accepting outside employment with businesses regulated by their agency would be improper for State employees. *Commission Op. No. 96-41* (where State employees enforced regulations against a specific industry, accepting outside employment with those same companies would be improper because, as a minimum, it could adversely affect the public's confidence in government because the public might assume that the employees would give preferential treatment to the outside employer when enforcing the regulations. Also, the public may believe that the employees' judgement would be impaired because of the conflict between performing duties for the outside employer and the need to enforce State laws against that same employer).

Beyond the outside employment restrictions, the Code prohibits State employees from representing or otherwise assisting private enterprises with respect to any matter before the State agency with which they

are associated by employment. 29 Del. C. § 5805(b)(1).

Thus, if selected for the job, if he consulted with private facilities regulated by the same agency that employed him, he would be at least “assisting” them with respect to matters before his agency because he would be advising them on how to comply with the regulations enforced by his agency. Thus, the Commission concluded that serving as a consultant to a private enterprise regulated by his agency under such circumstances would violate 29 Del. C. § 5805(b)(1).

(2) If transferred to another agency

He also asked if he went to another State agency, whether consulting with the facilities in Delaware would be permissible. This Commission must issue advisory opinions based on “particular facts.” 29 Del. C. § 5807(c). Without the particulars of what the job would entail, what regulatory authority would be exercised in the position, etc., the Commission did not have particular facts to render a decision. (*Commission Op. No. 96-66*).

Teaching as Outside Employment for a Public School Teacher

A State employee asked if it were a conflict of interest for him to hold outside employment teaching a private course similar to a course he taught in the public schools for students. He and his spouse owned a company that offered the course.

The Code of Conduct prohibits State employees from having any interest in a private enterprise or incurring any obligation of any nature in substantial conflict with the proper performance of official duties. It also prohibits outside employment if it may result in: (1) impaired independence of judgment in exercising official duties; (2) an undertaking to give preferential treatment to any person; (3) a government decision outside official channels; or (4) any adverse effect on the public’s confidence in the integrity of the government. 29 Del. C. § 5806(b).

The employee did not conduct business related to his private enterprise during hours when he was working for the State. He also did not use supplies, vehicles, books, etc., from his State employment to teach the outside course. If he used State facilities to teach the course, his private enterprise would pay a rental fee set by the State. The course was advertised by either notice in newspapers or to insurance companies to their clients, and did not specifically target students at the school where he taught. Students or their parents from the public school might respond to the ads, but not many had done so. When teaching the outside course, he did not mention the specific school where he taught, but did say he was teaching a similar subject in public schools.

Under these facts, the Commission found no violation of the outside employment provision. (*Commission Op. No. 96-20*).

Gifts, Payments, etc.

Scholarship

A national professional association of government employees in a certain career field offered scholarship opportunities to public employees to attend a university course to enhance public administrative skills. The scholarship paid for tuition, room, board, etc. Some private companies contributed the tuition funds to the national association. The association and the university reviewed applications to decide who would receive a scholarship.

The Code of Conduct restricts acceptance of gifts, payment of expenses, or anything of monetary value if it may result in: (1) impaired judgment in exercising official duties; (2) preferential treatment to any person; (3) making government decisions outside official channels; or (4) any adverse impact on the public's confidence in the integrity of the government. *29 Del. C. § 5806(b)*.

The association offering the scholarship opportunity did not do business with and was not regulated by the individual's agency. The agency did not regulate the companies contributing to the tuition, but several were vendors. The individual had no personal role in selecting those companies as vendors for the agency; and was not aware that any contributor had any dealings with the agency, until after attending the course when the individual conducted a search to learn if the State agency had such dealings. The Commission concluded that the individual could not have given preferential treatment nor had impaired judgment when that individual did not choose the vendors. (*Commission Op. No. 96-52*).

Tickets and Accommodations for an Athletic Event

A State officer received passes to an athletic event and the cost of lodging while attending the event from a friend who was a State employee in another State. The friend received the passes from a corporation.

The standard for accepting gifts is whether such acceptance would result in: (1) impairment of judgment in exercising official duties; (2) preferential treatment to any person; (3) government decisions outside official channels; or (4) any adverse impact on the public's confidence in the integrity of its government. *29 Del. C. § 5806(b)*.

The friend worked for a State agency in another State and had no affiliations or business with the State officer's Department or with any Delaware State agency. Additionally, the corporate sponsor had no dealings with either the officer's Department or any State agency. The Commission found that accepting the gift did not raise an ethical issue. (*Commission Op. No. 96-28*).

Lunches from Vendors

Vendors for a State agency were selected to give product presentations during the employees'

lunch hour. Although the purpose of the presentations was to educate the employees on the products, the selected vendors also provided lunches, such as sandwiches, pizza, etc. Employees were not required to attend and rarely could they receive educational credit for doing so. Although the employees who attended did not make direct decisions on whether such vendors would be used, they were trained professionals who provided opinions to those who decided if the product would be used. A representative from the agency and a vendor stated that no pressure was put on vendors to provide the lunches. They noted that without the lunches, the staff was not as inclined to attend. They asked if such lunches fell within the meaning of “gift” and whether acceptance violated the Code of Conduct.

The Code of Conduct restricts employees from accepting:

“other employment, any compensation, gift, payment of expenses or any other thing of monetary value under circumstances in which such acceptance may result in any of the following: (1) impairment of independence of judgment in the exercise of official duties; (2) an undertaking to give preferential treatment to any person; (3) the making of a governmental decision outside official channels; or (4) any adverse effect on the confidence of the public in the integrity of the government of the State.” 29 Del. C. § 5806(b).

The Code of Conduct does not define “gift.” The rules of statutory construction require terms to be read in their context and given their common and ordinary meaning consistent with the manifest intent of the General Assembly. 1 Del. C. §§ 301 and 303. The dictionary definition of “gift” is “something voluntarily transferred by one person to another without compensation.” *Merriam Webster’s Collegiate Dictionary*, p. 491 (10th ed. 1993). This definition seems consistent with the General Assembly’s intent because the same provision separately refers to “any compensation” and “payment of expenses.” Under the statutory terms, the lunches could be considered: (1) gifts; (2) payment of expenses; or (3) any other thing of monetary value.

No matter which term applies, the test is whether acceptance violates any of the four statutory criteria. The Commission presumed that acceptance would not actually result in impaired judgment, preferential treatment, or government decisions outside official channels. However, to decide if acceptance would adversely effect the public’s confidence in the integrity of the government, the Commission looked at the totality of the circumstances. Although attendees had no direct decision making authority, their indirect authority was significant because they were trained professionals who could speak with authority on the product’s value to those who decide which vendor to use. Further, the public could view the training as not so vital because no one was required to attend and educational credit was rarely given. Also, the unique timing of the sessions, only during lunch hours, could be viewed by vendors and the public as subtle pressure to provide lunch, especially as no one was required to attend and they generally were not given credit for doing so.

The Commission weighed this public view against the facts which diminished the question of an improper appearance: (1) the individuals did not directly decide matters about the product; (2) the meals

were apparently not elaborate and apparently did not cost much; (3) vendors were not required to provide meals and the vendor who appeared before the Commission said he did not feel pressured; (4) the individuals who did attend might enhance their knowledge and skill; and (5) while educational credit was not generally provided, the Commission noted that the agency representative, who was a trained professional, believed the sessions were valuable.

The Commission found balancing these views difficult under these particular facts, but held that it must place the views within the purpose of the statute which is to insure the public's confidence in its employees and officials. 29 *Del. C.* § 5802. Statutes enacted for a public purpose are broadly construed to achieve that public purpose. *See generally, 3A Sands, Sutherland Stat. Constr. Chapter 71, (5th ed. 1992)*. In balancing the views in favor of the public purpose, and under the particular facts of this case, the Commission concluded that accepting the lunches from vendors created a perception problem. The elements creating the perception problem were: (1) the indirect, but significant potential of influence on decisions; and (2) the people paying for the lunches were **sales representatives**, not professional instructors, so by the very nature of their job, a perception could exist that they could use the sessions as an indirect avenue to a sale (emphasis by the Commission).

Aside from the lunches, vendors also periodically provided pens, notepads, mugs or clipboards to the staff. The Commission held that because the recipients had no direct decision making authority, the issue was whether acceptance may raise an appearance of impropriety. The Commission assumed that the items were promotional in nature, e.g., carried the company's logo and not very costly. Aside from the minimal costs, the Commission noted the FDA regulated these particular vendors regarding what kind of items may be given. There were no facts presented to suggest that acceptance created a perception of impropriety. (*Commission Op. No. 96-78*).

Gift Certificate from Business Agent

A state employee was responsible for constituent relations in her division. As such, she responded to inquiries from certain business agents, such as the appropriate time for filing certain documents, status of a claim, etc. During the holiday season, she received a seasonal card from a business agent. Enclosed in the card was a \$100 gift certificate. The card expressed appreciation for her assistance in matters related to her State job. She believed acceptance would create an appearance of impropriety and sought an opinion from the Commission.

Her statement to the Commission was that she gave the same type of information and assistance to this business agent as she gave to anyone else who made inquiries. The Commission found that acceptance would, as a minimum, create an appearance of impropriety resulting in an adverse effect on the public's confidence in the integrity of State government because it might appear that acceptance would result in preferential treatment to the business agent. Accordingly, the Commission directed that the gift be returned. (*Commission Op. No. 96-04*).

Samples from Vendors

Various vendors gave a State agency equipment samples to evaluate whether the equipment would be selected for official use by students/schools. A committee evaluated the equipment, and selected the vendor's equipment that would be for official use. The agency director asked if accepting the samples were proper. He also asked if he could use the samples as door prizes at a conference.

The Code of Conduct prohibits accepting anything of monetary value if acceptance may result in: (1) impaired judgment in exercising official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) an adverse effect on the public's confidence in State government. *29 Del. C. § 5806(b)*.

As the official status selection was not within the director's sole discretion, and as sales representatives commonly provided evaluation samples, the Commission found no violation of the above provision, regarding accepting the samples.

Regarding using the samples as door prizes, the Commission found no specific applicable provision in the Code of Conduct. A general provision precludes State employees from engaging in conduct violating the public trust. *29 Del. C. § 5806(a)*. Because the equipment was only a sample to aid the decision making process, and the students/schools would have official regulation equipment for use, the Commission found no violation in using the samples as door prizes. (*Commission Op. No. 96-59*).

Payment to Honorary Officials

A State regulatory commission examined, licensed and renewed licences of applicants for certain licenses. A different agency selected a contractor to prepare examination questions. However, it might seek input from the commission members on the contractor.

To insure test questions prepared by the contractor reflected changes in the law and in industry practices, a panel of experts in that field reviewed the questions to decide which ones would be retained, updated or discarded to maintain the test validity. Two commission members and others, including some State employees, spent two (2) days reviewing 500 questions. The contractor offered each participant, not just the commissioners, \$100 per day for their work. The State employees did not accept the payment as they received their regular State compensation for attending, unlike the commissioners.

By law, the appointed commission members were paid \$50 per meeting and could not be paid more than \$500 per year, nor be paid for more than 10 meetings per calendar year.¹ Attending the test-development sessions was not considered a meeting and therefore, the State could not pay the

¹Appointees who receive or reasonably expect to receive less than \$5,000 in a calendar year are "honorary State officials." *29 Del. C. § 5804(13)*.

commissioners.

Honorary State officials cannot accept any compensation, gift, payment of expenses or any other thing of monetary value if such acceptance may result in: (1) impaired judgment in exercising official duties; (2) undertaking to give preferential treatment to any persons; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of the State government. 29 Del. C. § 5806(d).

Under these facts, the Commission found no violation of 29 Del. C. § 5806(b). (*Commission Op. No. 96-19*).

Payment of Expenses by Contractor

The State Code of Conduct prohibits State employees from accepting any compensation, gift, payment of expenses or any other thing of monetary value under circumstances in which such acceptance may result in:

- (1) impairment of independence of judgment in exercising official duties;
 - (2) undertaking to give preferential treatment to any person;
 - (3) making a government decision outside official channels; or
 - (4) any adverse effect on the confidence of the public in the integrity of the State government.
- 29 Del. C. § 5806(b).

A State employee was asked to participate in a national study conducted by a federal agency. The federal agency had contracted with a private consulting firm to develop a strategy for collecting data on health issues through an intergovernmental partnership. The consulting firm invited health officers, including a Delaware officer, to work with a focus group in Washington, D.C. for two days. The Delaware officer believed his participation in the group would benefit the State because Delaware would have an opportunity to help develop national policies, plus it would increase his own knowledge and development. The focus group worked throughout the first day, and reported back to the full group at the end of the day. Additional focus group sessions and policy discussions occurred on the second day. No entertainment was provided by the contractor or the federal government. He attended the conference on his vacation time. The consulting firm notified him that it would reimburse his expenses for travel and accommodations.

Previously, the consulting firm had contracted with his agency, but he did not participate in the decisions. More recently, he served on a committee which selected a contractor and the consulting firm had submitted a bid. It was not selected. It was possible that the firm might seek future contracts with his agency.

The Commission found that his independence of judgment in exercising official duties would not be influenced by having the expenses paid because he was not aware of any anticipated or pending contract

requiring decisions by him that involved the consulting firm. Similarly, because he would not be making such decisions, it did not appear that he could give preferential treatment to the firm. As no government decision was to be made by him regarding the firm, it seemed unlikely that he could make a decision affecting the firm outside official channels.

However, because the firm may pursue a contract with his agency and/or Division in the future, the Commission alerted him that if it happened a question of whether it would appear to the public he might give it preferential treatment in contract decisions might arise. This would depend on the specific facts. As the Commission must base its advisory opinions on a “particular fact situation,” 29 *Del. C.* § 5807(c), he was advised that if a specific situation arose, the Commission could then address the question. (*Commission Op. No. 96-57*).

Reimbursement by a Non-Profit Foundation

Two State employees attended a criminal justice conference which consisted of daily meetings and discussion groups, including breakout group sessions on the weekends, where groups were assigned topics to discuss and report back all conference attendees. Additionally, evening meetings were held and presentations were made during dinner. The two State employees were active participants in the discussions and presentations. Their trip was paid for by a non-profit foundation which funds grants to States to develop and implement criminal justice programs. The non-profit organization did not receive any State funds from Delaware; it had no contracts with Delaware; and neither employee engaged in any activity to solicit grants for Delaware from the non-profit foundation.

The Code prohibits acceptance of payment of expenses where acceptance may result in: (1) impaired judgment in performing official duties; (2) an undertaking to give preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse impact on the confidence of the public in the integrity of its government. 29 *Del. C.* § 5806(b). As the two individuals had no decision making authority over the foundation; the foundation had no dealings with the State such as seeking contracts, etc.; and the seminar was intensive and educational in nature, the Commission found no violations. (*Commission Op. Nos. 49 & 50*).

APPEARANCE OF IMPROPRIETY

A private retirement home asked a State officer to sign a letter soliciting funds. The letter mentioned that he had family members who were cared for at the facility. Although his agency did not regulate the facility, the State did. He would sign the letter as the son of a resident, not as a State official. However, he believed they asked him to sign the letter because of his name recognition that resulted from being in public office. No other persons with family members at the facility were asked to sign a solicitation letter. While he was very satisfied with the care given to his parent, he asked if signing the letter was appropriate.

The Code prohibits State employees, officers and honorary officials from using public office to secure unwarranted privileges, private advancement or gain. 29 *Del. C.* § 5806(e). It also prohibits conduct which may raise public suspicion that the individual is engaging in acts violating the public trust and acts which will not reflect favorably upon the State. 29 *Del. C.* § 5806(a).

The Commission found that signing the letter would be inappropriate for him as it might appear that because of his name recognition, which was based on being in public office, he (through his parent) would secure some private gain or privilege from soliciting funds and/or it might be seen by the public as an official endorsement of this private enterprise. (*Commission Op. No. 96-62*).

CONFIDENTIAL INFORMATION

A State employee was the lead point of contact for his agency's procurement activities. His brother-in-law's private firm periodically bid on locksmith contracts with the agency. The procurement law prohibited disclosure, during negotiations, of the contents of proposals to prohibit availability to competing offerors. 29 *Del. C.* § 6922. The agency delegated responsibilities concerning the locksmith contracts to the individual's supervisor. The Code of Conduct prohibits engaging in activities that might reasonably be expected to require or induce one to disclose confidential information acquired by public position. 29 *Del. C.* § 5806(f). It also prohibits disclosing or otherwise using confidential information for personal gain or benefit. 29 *Del. C.* § 5806 (g). As the agency had delegated the review and disposal of the contracts to the individual's supervisor, he did not participate in negotiations or otherwise have access to information, such as quotes from competitors, etc. Therefore, the Commission found no violation of the confidentiality provisions. (*Commission Op. No. 96-42*).

See also, *Commission Op. No. 96-74, p. 38 and Commission Op. No. 75, p. 43, Interpreting "Confidential Information" in Post-Employment Context.*

JURISDICTION

Members of the General Assembly

A complaint was filed against a General Assembly member. The Commission previously held that the Code of Conduct does not apply to such persons. *Commission Op. No. 94-14*. It applies to State employees, officers and honorary officials. General Assembly members are specifically excluded from the definitions of State employees and officers. *See, 29 Del. C.* § 5804 (11)(b)(1) and (12)(a). They do not fall within the definition of honorary officials as those persons are appointed and General Assembly members are elected. *See, 29 Del. C.* § 5804(13). Further, conflicts of interest for General Assembly members are governed by 29 *Del. C.* § 1001, *et. seq.* That law is enforced by the House Ethics Committee for Representatives and the Senate Ethics Committee for Senators. 29 *Del. C.* § 1003. As the Commission had no jurisdiction, it referred complainant to the appropriate Ethics Committee.

(Commission Op. No. 96-11).

Employees of Local Government

Complaints were filed against individuals who were employed by local governments. The State Code of Conduct applies to local governments who have not adopted their own Codes of Conduct. 68 *Del. Laws c. 433 § 1*. Four local governments have adopted their own codes--Lewes, New Castle County, Newark and Wilmington. As the individuals were employed by local governments which had adopted their own code, the Commission had no jurisdiction and referred complainants to the local governments. *(Commission Op. Nos. 96-11 and No. 96-45).*

Judges, Prosecutors, and Local Government Police

After being charged with murder, complainant filed a complaint against a judge, prosecutors, local police officers and detectives, and an expert witness hired by the local government. He alleged that witnesses perjured themselves; the prosecutors filed a motion to exclude evidence; an expert hired by the prosecution altered evidence; complainant's home was searched without a warrant; and the judge refused to hold a suppression hearing. To the extent complainant was alleging the State Code of Conduct was violated, the Commission held:

The Code of Conduct applies to State employees, officers and honorary officials. The Commission has no jurisdiction over the judiciary as they are specifically excluded from the definitions of State employee and officer. *See, 29 Del. C. § 5804(11)(b) and (12)(a)*. They are not honorary officials because although appointed, they receive more than \$5,000 per year. *See, 29 Del. C. § 5804(13)*. Further, their conduct is governed by the Judicial Code of Conduct.

The Commission also had no jurisdiction over the local police and detectives because their conduct was governed by a Code of Conduct adopted by their local government. *See, 68 Del. Laws c. 433 § 1*.

No facts suggested that the hired expert was a State employee, officer or official, or that he was a local government employee or official who was subject to the State Code of Conduct. Accordingly, the Commission concluded it had no jurisdiction over him.

Regarding the prosecutors, the Commission held that while they are State employees, this Commission has limited jurisdiction only over the subject matter addressed by its statute. There is no provision governing the types of procedural and evidentiary matters of which the individual complained. Rather, the appropriate criminal laws and rules of procedure govern such matters and those laws and rules are not within the Commission's jurisdiction. *(Commission Op. No. 96-38).*

State Regulatory Body

An Association was created by statute to regulate a profession. The Governor appointed some members of its “governing board” and the professional membership elected others. It asked if the Association was a “State agency” and if the Board members were subject to the State Code of Conduct.

The Code applies to State employees, officers and honorary officials. *See, e.g., 29 Del. C. §§ 5805 and 5806.* Appointees to a “State agency” are either “State employees” or “Honorary State officials.” “State employee” means “any person (1) who receives compensation as an employee of a State agency; or (2) who serves as an appointed member, trustee, director or the like of any State agency and who receives or reasonably expects to receive more than \$5,000 in compensation for such service in a calendar year” (excluding, among others, Honorary State officials). *29 Del. C. § 5804(11)(a).* “Honorary State official” means “a person who serves as an appointed member, trustee, director or the like of any State agency and who receives or reasonably expects to receive not more than \$5,000 in compensation for such service in a calendar year.” *29 Del. C. § 5805(13).*

“State agency” means “any office, department, board, commission, committee, court, school district, board of education and all public bodies existing by virtue of an act of the General Assembly . . . ” *29 Del. C. § 5804(10).*

The regulatory body existed by an act of the General Assembly. It was deemed a “public body” under the Freedom of Information Act (FOIA). It was called a State agency in the Administrative Procedures Act (APA). By statute, the appointees constituted a “board.” Although self-regulating, it performed the same regulatory functions performed by State boards and commissions that regulate other professions under Title 24. Like other State regulated professions, it was subject to “regulation in the public interest.”

The Code of Conduct was created to insure conduct that does not violate the public trust or create a justifiable impression among the public that the public trust is being violated. *29 Del. C. § 5802.*

Because the regulatory body was statutorily created by the General Assembly; was deemed a “public body”; was referred to as a State agency; functions as similar State boards and commissions; and was charged with a public trust; the Commission found that it was a “State agency” for purposes of the Code of Conduct.

By statute, the appointees were part of the “governing board.” As such, they were “directors or the like,” under the Code of Conduct, because the statute gave them authority for the overall direction of the organization through the establishment of bylaws related to the administrative and domestic duties of the organization.

The appointees of the board had a statutory right to accept remuneration, but they had elected not to do so. This Commission previously held that where appointed members of a Council established by

statute were not entitled to compensation that they were still covered by the Code of Conduct because the “important consideration in the determination of whether an Honorary State Official is covered is the authority and responsibility of that office, not just the compensation.” (*Commission Op. No. 92-1,A-1*). Thus, the fact that the appointed members were not accepting compensation was not a determinative factor. The Commission found that they were: (1) appointed; (2) “directors or the like” of a State agency; and (3) could reasonably expect to receive less than \$5,000 per calendar year. Accordingly, they were “Honorary State Officials” and subject to the Code of Conduct.

The membership elected the remaining board members. Under a literal reading of the statute, they would not be considered: (1) “Honorary State Officials,” as they are not appointed; (2) “State officers” because they are not required to file a financial disclosure statement; and (3) “State employees” because they were not accepting compensation from the State as they had elected not to establish bylaws concerning remuneration.

The rules of statutory construction require that statutes be construed consistent with the manifest intent of the General Assembly. *See, 1 Del. C. §§ 301 and 303*. The General Assembly found that the conduct of State government officials must hold the respect and confidence of the people and that to ensure propriety and to preserve public confidence, such persons “must have the benefit of specific standards to guide their conduct.” *29 Del. C. § 5802*. It stated that the code “shall be construed to promote high standards of ethical conduct in state government.” *29 Del. C. § 5803*. Generally, statutes enacted for a public purpose are broadly construed to serve that public purpose. *See generally, 3A Sands, Sutherland Stat. Constr. Chapter 71, (5th ed. 1992)*.

The elected members, with the appointed members, are the “governing board” of a State agency. The agency was subject to public scrutiny under FOIA. The purpose of FOIA is to let citizens observe the performance of public officials and to monitor their decisions and is broadly construed to serve that purpose. *29 Del. C. § 10001*. Such legislation has the effect of instilling the respect and confidence in its public officials, just like the Code of Conduct. *See, e.g., Levy v. Board of Cape Henlopen School District, Del. Ch. C.A. No. 1447, V.C. Chandler (October 1, 1990 at 20)* (FOIA is designed to insure government accountability and is the method by which government officials earn the public trust). The regulatory agency was charged with regulating the practice of a licensed profession in Delaware “in the public interest.” Under the rules of statutory construction, interpretation of one statute may be influenced by the language of other statutes where they apply to similar persons, things or relationships to aid in a more harmonious and uniform system of law and may supply evidence that legislative action is standardized. *2B Sands, Sutherland Stat. Constr. § 53.02 (5th ed. 1992); Id. at § 53.05* (the general course of legislative policy in other statutes may be used to show intent or convey meaning of another statute).

This regulatory agency was unique from other governing bodies of professional regulatory agencies established by Title 24 in that some members were appointed and some were elected, while the governing bodies of all other Title 24 professional regulatory agencies are comprised only of appointees. *See, e.g., Title 24, “Professionals and Occupations.”* However, it was charged with essentially the same duties

as other professional regulatory agencies, except the regulated profession was different. As the appointed members and the members of the governing bodies of all other professional regulatory agencies appeared to be subject to the State Code of Conduct, the Commission did not believe the legislature intended to exclude the elected members of this governing board merely because of uniqueness in structure when the functions are essentially the same and there is a public purpose to be served. Accordingly, the Commission found that the elected members of the governing board also were subject to the Code of Conduct. (*Commission Op. No. 96-39*).

Criminal Law Complaint

Complainant alleged that the Attorney General's office had improperly concluded, after an investigation, that the acts of a State employee did not constitute violations of criminal laws such as: issuing a false certificate; tampering with public records; and official misconduct. Because the AG's office did not find a violation of those laws, complainant alleged that something "illegal and unethical" was "going on" in the AG's office. As complainant did not identify the criminal laws he believed the AG's office had violated, the Commission assumed that his allegation was all encompassing.

First, the Commission held that to the extent he was alleging violations of any crime outside the scope of the State Code of Conduct, it had no jurisdiction over such laws. It also had no authority to interpret Title 11 criminal code provisions to decide if, in fact, the State employee had engaged in criminal acts, as the Attorney General is charged with the power and duty to investigate, upon information received, possible violations of the criminal code. *See, 29 Del. C. § 2504(4) and In re Eastburn & Son, Del. Super., 147 A.2d 921(1959).*

Second, while the State Code of Conduct has certain provisions that rise to the level of a criminal violation, [*See, 29 Del. C. § 5805*], he had not identified which provisions he believed were violated. *See, Commission Rules and Regulations, IV (C)(complainant must file a sworn statement; include the known facts; and identify Code sections he believes were violated)*. Thus, the Commission reviewed each provision within Section 5805 and determined that the facts failed to state a claim under any provision which carried a criminal penalty. The complaint was dismissed. *See, 29 Del. C. § 5809(3)(Commission may dismiss any complaint that fails to state a violation)*. (*Commission Op. No. 96-10*).

POST-EMPLOYMENT

Soliciting Former State Clients

Just before leaving her State job, an employee wrote to the clients assigned to her by the State and told them she was going to work for a private enterprise. She also told them that the private enterprise could be selected as a service provider by the client. Federal law required that clients be offered a choice of providers. It was the agency's intention to notify clients of their right of choice, and it planned to identify

private enterprises which had contracted with the State as providers, such as the one where the employee was going to work. No facts indicated that a substantial number of her clients selected the provider for which she was going to work, as a result of her letter. Additionally, she did not participate in any decision to select the private enterprise as a service provider for the State. Further, she had sought an advisory opinion from the Commission for a determination of whether she could accept employment with the contractor. *Commission Op. No. 95-17*. At that time, she said she was not using the list of her State clients to encourage them to switch to the private contractor. Rather, she sought to inform them of their rights. Agency representatives and the former employee met with the Commission to discuss this situation, and review the letter. There apparently was some confusion between the agency and the employee regarding whether who should notify clients of her change in status and of their ability to select her new employer, who had contracted with the State, as a service provider.

The agency did not seek a decision on whether, in this particular instance, the former state employee violated the Code. Rather, it sought guidance on avoiding possible confusion in the future. The Commission may “provide assistance to state agencies, employees and officials in administering the provisions of this law.” 29 *Del. C.* § 5809(10). The Commission noted that the Code prohibits disclosure of confidential information beyond the scope of the employee’s position or the use of such information for personal gain or benefit. 29 *Del. C.* § 5806(g).

While the Commission believed it was of service to notify clients when a person handling their case leaves State service, it noted that the clients are clients of the State, not of the individual. To the extent that client names could be considered proprietary or confidential, the Commission suggested that the agency could avoid future questions regarding such use of the information, by establishing the type of notice to clients that would best suit the agency, its clients, and employees. For example, the agency may wish to develop a policy on notifying clients of an employee’s departure, rather than having the employee send such notice. (*Commission Op. No. 96-01*).

Moot Issue

A former State employee asked if he could accept a consultant position with his former agency. However, as the agency had selected another individual, the Commission found that the issue was moot. (*Commission Op. No. 96-79*).

“Particular Facts” Required

An individual who intended to leave State employment asked if his proposed post-employment activities would violate the Code of Conduct. He had not accepted any offer with any employer nor had he decided if he would pursue a consulting contract with the State. He said it was possible that he might work for a company that could have State contracts. The Commission must base its decisions on a “particular fact situation.” 29 *Del. C.* § 5807(c). As he had no particular company in mind, nor was he aware of any particular State contract on which he might work, the Commission held that the facts were

insufficient for a decision. It referred him to the Commission's synopses of post-employment opinions and advised that once he identified a specific post employment position, he could return for a decision. (*Commission Op. No. 96-69*).

Computer Consultant to State Agency

A State agency notified 30 vendors of a computer consulting opportunity. A State employee learned of the opportunity and applied. The employee asked if it would violate the post-employment provision if she left State employment and accepted the position.

The post-employment provision imposes a 2-year restriction against former State employees representing or assisting a private enterprise on matters involving the State if the employee: (1) gave an opinion; (2) conducted an investigation; or (3) was otherwise directly and materially responsible for the matter while employed by the State. 29 *Del. C.* § 5805(d). It also prohibits disclosing or otherwise using confidential information gained as a State employee for personal gain or benefit. *Id.*

While a State employee, the individual had worked on computer programs, which she would be doing if she selected as the consultant. However, she had not worked for the same agency while employed by the State; had not been in anyway involved with the agency while employed by the State; and the computer work was not on the same subject matter for which she was responsible while employed by the State. Thus, she would not be representing or assisting the private enterprise on matters on which she gave an opinion, conducted an investigation, or was otherwise responsible for while employed by the State. Further, the type of information she had access to while employed by the State was not information that would aid her in the agency contract. She said she would not disclose or use any confidential information gained as a State employee. The Commission found no violation under these facts. (*Commission Op. No. 96-81*).

Computer Consulting with Former Agency

A State agency contracted with a firm to provide computer services for a multi-year project. Later, the contractor defaulted and the agency needed to hire another contractor. The agency wanted to use a firm owned and operated by a former State employee. Also the firms' systems designer who would be assigned to the project was a former State employee. The agency wanted them to complete part of the multi-year project and then would publicly notice and bid the remainder of the project.

As neither the owner of the firm or the program designer had been terminated for more than 2 years, the commission considered whether the agency contract was a matter on which either of them had: (1) given an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible for while employed by the State, as provided the post employment provision. 29 *Del. C.* § 5805(d).

Both former employees had worked for the same agency. However, neither had worked for the section that was seeking to contract; neither had participated in anyway in putting together the contract that the defaulting contractor had been awarded; and neither had been involved with the project which was the subject of the contract while employed by the State.

The post-employment provision also prohibits disclosing or otherwise using confidential information gained while a State employee. 29 *Del. C.* § 5805(d). In designing the contract program, the type of information the employees worked with as State employees would not be used, nor would they disclose any confidential information. (*Commission Op. No. 96-73*).

Computer Services Contract

A former State employee asked if it would create a conflict for him to form his own company and seek State contracts. He would not seek contracts with his former agency, but wanted to seek contracts with other State agencies, including a Board on which he had served.

The post-employment provision restricts State employees from representing a private enterprise on matters involving the State, for 2 years after leaving State employment, if they: (1) gave an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 *Del. C.* § 5805(d).

Here, he intended to represent a private enterprise (his company) on a contract to provide computer services to various agencies. While employed by the State, he was not involved in any decision concerning the contracts. Thus, while employed by the State, he did not give an opinion, conduct an investigation, and was not otherwise directly and materially responsible for the particular contracts he wanted to seek.

On a broader level, his primary State duties included various administrative and operational decisions for his agency, which included implementing operational aspects in areas of personnel, finance, payroll, etc., that resulted in computer programs to facilitate and expedite access to the data for his agency. Computer systems were not a technical requirement of his employment, but an area of interest to him and he used that interest to develop and improve operations in his agency. However, as he was not seeking to contract with his former agency, his activities did not violate the Code of Conduct.

As a secondary aspect of his State employment, he served on the Board of Managers of an agency. At its periodic meetings, the Board had discussions, over a course of twenty years, about computer systems as a means of enhancing the flow of information. However, the Board never took formal action and he never voted on any proposal to develop such a system. He subsequently learned, by reading the Budget bill, that the agency was seeking proposed funding for a computer system. He was not involved in the budget proposal and, in fact, was not even aware until he read the proposed budget that funding was being sought. If the funding became available, the contract would fall within the range of contracts which must

be publicly noticed and bid under the State procurement law. As he did not have any involvement, or even knowledge of the proposed funding, it was determined that he had not given an opinion, conducted an investigation, and was not directly and materially responsible for the funding for the contract. Thus, it would not violate the Code for him to seek the contract if it were funded.

The former employee also stated that one of his business partners had a contract with his former agency as an independent contractor. The former employee's firm would not be working on any aspect of his partner's contract, nor would he seek to recruit programmers to fulfill the contractual obligations.

As the former employee would not contract with his former agency, and would not be involved in the agency's contract work with his business partner, the Commission found no violation. (*Commission Op. No. 96-32*).

Former Employee's Participation in Selecting His Replacement

When a State employee decided to leave State service, his agency announced an opening for the position. No replacement was found before he left State service, and his job was re-announced. The agency wanted to contract with him to be part of a three-person panel which would review and rank the applications of persons applying for his prior position. State employees who applied for the job had not been under the supervision of the former employee. The agency expected the task to take two days, and wanted him as part of the panel because of his expertise in both computer and finance systems. He and the panel would review and rank the applications, but would not interview candidates, as a separate panel would conduct the interviews.

The Commission found that he had not: (1) given an opinion; (2) conducted an investigation; or (3) been directly and materially responsible for the "matter" [reviewing job applications] while employed by the State, except the single occasion when he had decided to leave State service and reviewed the applications after the first announcement of the job opening. He had not reviewed and ranked job applicants while employed by the State; had not evaluated the State applicants who applied for the job while employed by the State; would not interview candidates; and would use his expertise to evaluate applications. (*Commission Op. No. 96-43*).

From Social Work to Computers

A computer company offered a former State social worker a job. The company had a contract with her former State agency.

The Commission held that her employment by the computer company would not violate the post-employment provision as she had not given an opinion; conducted an investigation; and was not directly and materially responsible for selecting the contractor or developing the contract requirements, while employed by the State. *See, 29 Del. C. § 5805(d)*. She used the computer system provided under the

contract for the ministerial work of tracking clients. However, the type of activity for which she was directly and materially responsible was not the ministerial tracking of cases, but fulfilling the job requirements of a social worker. Those responsibilities were dissimilar to the employment with the private enterprise, as she would work in the systems end of the computer program. While her general knowledge of the agency's needs might help to develop computer requirements, the Commission found that such general background differed from the particular duties for which she was directly and materially responsible--evaluating the needs of a particular client and making decisions such as whether intervention was necessary. The Commission held that moving from the operational area of direct services to families into a computer systems position, with no contact with her former clients, would not violate the post employment provision. (*Commission Op. No. 96-46*).

Limited Waiver Granted on Post-Employment Restrictions

A State employee was a Training Administrator in the Division of Mental Retardation (DMR). In addition to other duties, she served in the lead capacity for the "Essential Lifestyle Planning" (ELP) project, which had a goal of restructuring the way DMR provides support and services to clients.

She wanted to leave full-time employment because of injuries suffered in an accident. It was possible that the agency might need her expertise on the ELP project. An agency representative said he supported her waiver request due to the unusual circumstances of her accident, and because it would give the Division the option of contracting with her if it needed her expertise on the ELP program. He said the Division would follow all State guidelines on competitive bidding.

A former employee may not represent or assist a private enterprise on matters involving the State, for two years after leaving State employment, if the individual: (1) gave an opinion; (2) conducted an investigation; or (3) was otherwise directly and materially responsible for the matter while employed by the State. 29 *Del. C.* § 5805(d). As her employment by the State included work on the ELP program and she wanted to seek a contract on that same matter, if the Division sought a contractor for the work, her participation in such contract would violate the post-employment provision.

The Commission may waive Code of Conduct restrictions if the literal application of the law is not necessary to serve the public purpose or if there is an undue hardship on the employee or the agency. 29 *Del. C.* § 5807(a). If a waiver is granted, the proceedings become a matter of public record. 29 *Del. C.* § 5807(a). The Commission granted a waiver for the limited purpose of allowing the agency to have the option of contracting with her, if it decided it needed her expertise in the limited area of the ELP process. (*Commission Op. No. 96-60*).

Managing Computer Technicians

The Director of a State agency left his employment and accepted a fellowship position with a federal agency. At the end of the fellowship, he was offered a job by a computer firm which had won a

competitive contract with Delaware to provide a tracking program for a case management system. The company also had a contract with another State. It wanted him to manage the technicians who would be putting together the programs for Delaware and the other State. The contract was not with his former agency.

While employed by the State, he served on a Committee which developed guidelines for the State agency which later contracted with the company. He said it was possible that the Committee discussed a computer tracking system, but he had no specific recollection of such discussion and was not aware of any specific Committee action regarding such systems. The former employee was not involved in any facet of the contract or in selecting the company, as he had left State employment and therefore was not serving on the Committee at the time of the contract.

As he was not in any manner involved in the specific contract while employed by the State and as the private employment would consist of managing computer technicians, which was not part of his responsibilities while employed by the State, the Commission found that he had not given an opinion, conducted an investigation and was not directly and materially responsible for the matter while employed by the State. 29 *Del. C.* § 5805(d). (*Commission Op. No. 96-65*).

Limits on Post-Employment where Company Contracts with Former Agency

A former State employee went to work for a company which had projects regulated by his former agency. While employed by the State, he had reviewed and approved some projects. If he worked on those projects for the private employer, he would be representing or assisting a private enterprise on matters in which he gave an opinion while employed by the State. Such activity would violate the post-employment restriction.

However, the private company said it had other projects he could work on which the State did not regulate. Participation in those projects would not violate the post-employment provision. Additionally, the company had projects which he did not review and approve while employed by the State. On those projects, he was expected to have contact with his former agency. The Commission held that as he was not representing his employer on matters which he reviewed while in his official capacity, his participation would not be prohibited. In reaching that decision, the Commission relied on *Beebe v. Certification of Need Appeals Board*, *Del. Super.*, C.A. No. 94A-012-004, *Terry, J.* (June 30, 1995), *aff'd*, No. 304, *Del Supr.*, *Veasey, J.* (January 29, 1996) (former member of Health Resources Management Council did not violate the post-employment restrictions when he represented a private company on an application before the Council as he had not reviewed the application while serving on the Council). (*Commission Op. No. 96-71(B)*).

Insufficient Facts

A State employee's duties entailed not only working on computer systems, but planning, designing, etc. He also wrote bid specifications, evaluated bids, gave opinions on the abilities of contractors to perform the contracts, participated in selecting vendors, etc. He was actively engaged in those activities until 1994. Later, his participation in contractual aspects was reduced. In 1996, two computer companies offered him employment. One company did not have a contract with his State agency, but it was expected to bid if the agency re-bid the contract. The other company had a State contract with his agency. However, he had not participated in that contract decision.

(A) The Company With a State Contract

The Commission found that there were insufficient facts to decide if his participation in the contract would violate the post-employment provision. Clearly, in the past, he had participated in decisions on contracts on which this company bid. However, in later years he did not participate in contract decisions. If the subsequent contracts were mirror images of the ones in which he participated, then it was possible the contract could be one on which he gave an opinion or was otherwise directly and materially responsible. But if the contract on which the company wished him to work was substantially different, it may not be one on which he gave an opinion or was otherwise directly and materially responsible. Without such specific facts, the Commission could not issue a final decision.

(B) The Company without A State Contract

While the other company did not have a State contract with his former agency, he anticipated that if the agency re-bid the contract the company might respond to the request for bidders. If it responded, it was possible that it might be selected. Conversely, it was possible that the agency might not re-bid the contract; the company might not respond if the contract were re-bid; and it might not be selected if it did respond to a re-bid. If the latter occurred, it was possible that he might go to work for the company but have no occasion to represent or assist it before the State within the two-year period.

If the contract were re-bid, the contract terms were not known at this time. Those terms could effect whether the contract would be a "matter" on which he gave an opinion, conducted an investigation or was otherwise directly and materially responsible. 29 *Del. C.* § 5805(d). The Commission pointed to a federal case where a former federal employee was working for a private enterprise on a contract which was a mirror image of a contract he drafted, negotiated, etc., while employed by the government. *See, United States v. Medico*, 7th Cir., 784 F.2d 840 (1986)(a mirror image contract was the same "matter" on which a federal employee worked on during his federal employment and therefore participation on behalf of a private enterprise violated the federal post-employment law). Participating in a mirror image contract might violate the Delaware post-employment provision. However, if the contract sufficiently differed from contracts worked on while employed by the State, it might be possible that the activity would not violate the Code. *See, CACI, Inc. v. United States*, Fed. Cir., 719 F.2d 1567(1983)(federal employee was chief of computer section and contracted with private vendors; as part of his post-employment activities, he represented a company which bid on a

contract with his former agency; federal court held that the contract was not the same “matter” because the contract was broader in scope, different in concept and incorporated different features than contracts he worked on during his government employment).

(C) Restrictions on Using Confidential Information

The post-employment restrictions also prohibit improper disclosure or use of confidential information gained while employed by the government. *29 Del. C. § 5805(d)*. The Commission noted that the State employee said proprietary systems were “out there,” and that he had been involved in contract negotiations for the State with various computer companies. It pointed out that even where a contract is subject to public notice and bidding, some information may be confined to closed hearings. *See, 29 Del. C. § 6919*. Also, trade secrets, and commercial or financial information obtained which is of a privileged or confidential nature, is not to be disclosed. *See, 29 Del. C. § 10002(d)(2)*. The Commission cautioned the employee that if he accepted either job, he was not to improperly disclose or use confidential information that he may have gained from his public position. (*Commission Op. No. 96-74*).

Contract with Former Agency, But Not Same Agency Section

A private company hired a former State employee 22 months after she left State employment. The private employer had a contract with the agency for which she had worked. She was not involved in the contract negotiations; did not work in the same section that entered the contract; and her State duties did not involve testing, which was the subject matter of the contract. Her private employment would require her to coordinate scheduling/testing with the same department for which she had worked. However, those activities were not done by the same section where she had worked and she would be at a different site location. Based on those facts, it did not appear that she gave an opinion, conducted an investigation, nor was she directly and materially responsible for either the contract with the company or the subject matter thereof, while employed by the State. *See, 29 Del. C. § 5805(d)*.

She advised the Commission that her private employment would not be such that any confidential information she may have obtained while working for the State would be improperly disclosed or used for personal gain or benefit. (*Commission Op. No. 96-44 (II)*).

What’s a “Matter” under the Post-Employment Provision?

A State employee obtained an advisory opinion from the Commission regarding his post-employment activities. *See, Commission Op. No. 96-32, “Computer Services Contract,” pp. 33-34, supra*. He had asked if it would violate the post-employment provision if he sought contracts with State agencies. He was not attempting to contract with his former agency. The Commission held that his proposed activities did not violate the Code.

Once he submitted bids on contracts, the agencies asked to the Commission to review the situation.

It asked the Commission to focus on the meaning of “matter” and the meaning of “confidential information,” in the post-employment provision.

That provision restricts State employees from representing or assisting a private enterprise on any matter involving the State, for 2 years after terminating employment, if he: (1) gave an opinion; (2) conducted an investigation; or (3) was otherwise directly and materially responsible for such matter in the course of his official duties. 29 Del. C. § 5805(d)(*emphasis added*). The provision also provides: “Nor shall any former State employee, State officer or Honorary State official disclose confidential information gained by reason of his public position nor shall he otherwise use such information for personal gain or benefit.” *Id.* (*emphasis added*).

“Matter” means “any application, petition, request, business dealing or transaction of any sort.” 29 Del. C. § 5804(6). “Confidential information” is not defined by the Code.

At the hearing, an agency representative noted that “matter” is “fairly broad,” and wanted to know: “Is it the same matter even though it’s not the same contract, but it’s a similar process?” Putting that question in the context of this case: Is the “matter” (providing computer services to other agencies) the same “matter” for which he was responsible while employed by a different agency since the “process” of developing computer programs is similar? And does understanding the “process” constitute “confidential information”?

(A) Approach to Interpreting the “Matter”

Under the Delaware rules of statutory construction, words and phrases are to be read within their context and the construction should be consistent with the manifest intent of the General Assembly. 1 Del. C. § 303 and § 301.

In the Code of Conduct, the broad intent of the General Assembly is expressed in its “Legislative findings and statement of policy.” *See*, 29 Del. C. § 5801. The General Assembly said that the conduct of State employees and officers must hold the respect and confidence of the public, which is achieved by following “specific standards” of conduct. 29 Del. C. § 5802. It went on to say that: “all citizens should be encouraged to assume public office and employment, and that therefore, the activities of officers and employees of the State should not be unduly circumscribed.” 29 Del. C. § 5802(3).

To assure that these findings and policy considerations are applied with a fair understanding of such legislative intent, the General Assembly was careful to provide specific standards to determine whether proposed post-employment activities are permitted. Thus, the “matter” in the post-employment provision must be one in which the former employee: (1) gave an opinion; (2) conducted an investigation; or (3) was otherwise directly and materially responsible. *See*, 29 Del. C. § 5805(d).

The Commission then considered cases analyzing the term “matter” in the federal post-employment

provision, which is similar to Delaware’s provision. *See, United States v. Medico, 7th Cir., 784 F.2d 840, 842 (1986); CACI, Inc. v. United States, Fed. Cir., 719 F.2d 1567 (1983).* In those cases, the federal statute restricted former employees from acting “as agent or attorney for anyone other than the United States in connection with any . . . contract, claim, . . . or other particular matter . . . in which he participated personally and substantially as an officer or employee.” *Medico at 842.*²

The *Medico* Court spoke at length about the purpose of the post-employment provision and how that affects the definition of “matter.” *Id. at 842-843.* It said that moving between government and private employment creates a risk of a conflict of interest--that people who hope to move to the private sector will favor firms they think may offer rewards later and after they switch to the private side may exercise undue influence on those they leave behind. *Id. at 843.* On the other hand, the chance to move from private to public employment and back again may enable the government to secure skilled people who are unwilling to make public service a career at current pay rates. *Id.*

The Court stated:

“The government can hire people for less, and attract specially skilled agents, if it allows them to put their skills to use later for private employers. It is therefore important to define ‘particular matter’ broadly enough to prevent disloyalty without defining it so broadly that the government loses the services of those who contemplate private careers following public service.” *Id.*

The Court said those concerns were addressed by the manner in which the statute was drafted. *Id.* The court noted the “discrete and isolated transactions” which trigger the prohibition. *Id.* It said the limits of the statute must be put together. *Id.* The court pointed out the triggering factors are whether the “matter” is the same “matter” and whether the former employee participated “personally and substantially.” *Id.* It said that even where the subject is the same, the facts must overlap substantially. *Id.* Similarly, Delaware’s law has triggering factors--the “matter” must be the same “matter” in which the former employee: (1) gave an opinion; (2) conducted an investigation; or (3) was otherwise directly and materially

²The Delaware post-employment restriction uses the term “matter,” and it separately defines it as “any application, petition, request, business dealing or transaction of any sort.” The federal statute does not separately define “matter,” but lists examples in the statutory text such as contracts, claims, etc., “or other particular matter.” Regardless of approach, both restrictions identify types of “matters.” Placed within the framework of the statute, the “matter” must be related to the former employee’s activities and subsequent representation. In Delaware, it must be “directly and materially” related and in the federal statute, it must be “personally and substantially” related. These standards are similar. *See, WordPerfect Thesaurus* (“directly” is listed as synonymous with “personally”; “material” is synonymous with “substance”; *See also, Black’s Law Dictionary, p. 880 (5th ed. 1979)* (“material” encompasses representation which is “so substantial and important” (emphasis added); *Id. at 1281* (“substantially” includes “materially”).

responsible. 29 *Del. C.* § 5805(d). The decision on whether the Delaware code factors are triggered is based on comparing the factual “matter” on which the employee worked, and the factual “matter” of the proposed post-employment and whether the two overlap. *See, Commission Opinions on Post-Employment.*

In *Medico*, the facts overlapped substantially because the former employee represented a company before his former agency on a contract that was a mirror image of a previous agency contract that he negotiated. *Id.* at 842 and 844. The Court held the “matter” was the same and “nothing more was required.” *Id.* at 844.

By way of contrast, the *Medico* court pointed to another federal case where the subject was the same but the facts did not substantially overlap. *Id.* at 843 (citing *CACI, Inc. v. United States, Fed. Cir.*, 719 F.2d 1567 (1983)). In *CACI*, a federal Department of Justice (DOJ) employee was Chief of the computer section that provided services to a DOJ division. *Id.* at 1570. When the computer staff could not supply services, private contractors did so through noncompetitive contracts. *Id.* While employed by the DOJ, the Chief “contemplated” obtaining the services through competitive contracts. *Id.* at 1576. After he left government service, the DOJ issued a Request for Proposals (RFP) for the computer services. *Id.* at 1570. The Chief, now a former employee, helped prepare a company’s response to the RFP and represented the company before his former agency. *Id.* An unsuccessful bidder challenged the contract award on the basis that, among other things, the post-employment provision had been violated. The lower court held that the prior data processing contracts and the current procurement contract were part of the same particular “matter.” *Id.* at 1576. However, the Appellate Court reversed that decision, holding that they were not the same “matter” because the former employee had not developed the concept or formulated the RFP, and the contract was broader in scope, different in concept and incorporated different features than the prior contracts. *Id.* It noted that the new contract was to consolidate services, eliminate redundant services, improve management control, provide new services, include some services under the old contract and exclude some services provided under the old contract. *Id.* Thus, the *CACI* court, like the *Medico* court, looked at a specific, identifiable “matter.”

Like the federal courts, the Delaware Superior Court looked to the particular matter on which a former State official was representing a private enterprise, rather than a process, to decide if the post-employment provision applied. *Beebe v. Certificate of Need Appeals Board, Del. Super.*, C.A. No. 94A-01-004, Terry, J. (June 30, 1995). In *Beebe*, a former member of the Health Resources Management Council represented a company before the Council on a certificate of need (CON) request. *Id.* at 17. In his introductory remarks, he said that he had served on the Council for five years. *Id.* It was argued that his representation of the company violated the post-employment statute. *Id.* The Court found that while he was a Council member, he participated in reviewing CONs; however, the record showed that he did not take part in reviewing the two applications being considered by the Council. The Court held that “since he appeared before the Council in a matter for which he had no direct and material responsibility while on the Council, he did not violate the statute.” *Id.* (*emphasis added*).

Here, the “matter[s]” on which the Delaware former employee wants to represent a private enterprise are contracts to provide computer services to two agencies. Those contracts, like the ones in CACI, were not concepts or proposals he developed. The contracts require developing programs based on the specific agency needs to eliminate redundancy, improve control, provide new services, and integrate or exclude existing computer services as needed.

Unlike the Medico contracts, they are not mirror images of each other, and no facts indicated that they mirror any of his former agency’s computer system. That system was developed for his former agency’s specific needs and the other two agencies have identified their own specific needs.

While the former employee was involved with his agency’s computer system, it was not a technical requirement of his job. Moreover, the contracts are with other State agencies, not with his former agency. Thus, he is not even representing a private enterprise before his own agency as was done in Medico and CACI.³

The first contract he seeks is with a Board on which he served as his agency’s representative. The Board met periodically and was charged with developing policies. His position with the Board was as a policy maker. He was not its computer specialist, nor was he responsible for the day-to-day operations of the agency over which the Board developed policy. While the Board discussed the need for a better information system, like the individual in Beebe, the former employee did not review, vote on or develop the concept or proposal.

As for the second contract, he did not work for the agency with which he wants to contract; nor was he involved in developing its proposals.

Thus, the contracts were not “matters” on which he gave an opinion, conducted an investigation

³ The post-employment provision does not prohibit representation before an individual’s former agency or agencies with which he has worked, unless the representation is on matters where he gave an opinion, conducted an investigation or was otherwise directly and materially responsible. Had the General Assembly wished to make the post-employment provision more restrictive, it could have done so, as it has done for those who are current employees of the State and are concurrently representing a private enterprise. *See, 29 Del. C. § 5805(b)*(employees, officers and honorary officials are restricted from representing a private enterprise on any matter before the agency with which they are associated by employment or appointment); *29 Del. C. § 5805(c)*(officers are restricted from representing a private enterprise on any matter before the State). Where the legislative body chooses the rule to achieve its goal, that is the rule to be followed. *See, Medico, 784 F.2d at 844; See also, Goldstein v. Municipal Court, Del. Super., C.A. No. 89A-AP-13, J. Gebelein (January 7, 1991)(citing State v. Rose, Del. Super., 132 A. 866, 877 (1926)(where the legislature is silent, additional language will not be grafted onto the statute because such action would, in effect, be creating law).*

or was otherwise directly and materially responsible for while employed by his State agency.

(B) Interpreting “Confidential Information”

The post-employment provision provides: “Nor shall any former state employee, state officer or honorary state official disclose confidential information gained by reason of his public position nor shall he otherwise use such information for personal gain or benefit.” 29 *Del. C.* § 5805(d).

Both agencies said: “The question presented by this set of circumstances is whether the former employee had access to confidential information through his employment with his agency and as a member of the Board which could conceivably give his company an unfair advantage over other contractors in developing these issues [developing computer programs].”

The Commission noted at the outset that:

- (1) the Code does not define the term “confidential information”;
- (2) it was to decide if the former employee gained “confidential information,” through his State employment;
- (3) if so, he may not disclose such information following employment with the State nor may he otherwise use such information for personal gain or benefit.

The Commission noted in another decision that the Code does not define “confidential information.” Thus, it followed the rules of statutory construction which require that words and phrases be read within their context and be construed according to the common and approved usage of the English language. *Commission Op. No. 95-05*(citing 1 *Del. C.* § 303). The ordinary usage of “confidential” means “containing information whose unauthorized disclosure could be prejudicial.” *Id.* (citing *Merriam-Webster’s Collegiate Dictionary*, p. 242 (10th ed. 1993)). The concern expressed was not that the government would be prejudiced if he got the contracts, but that a competitor for the contracts might be prejudiced.

In the prior decision, the Commission also looked at case law and statutes dealing with release of government information as relevant precedent in deciding if a specific matter was confidential under the Code of Conduct. *Id.* (citing 2A *Sutherland Stat. Constr.* § 45.15 (5th ed. 1992)(decision on a point of statutory construction has relevance as precedent if the language of one statute has been incorporated in another or both statutes are such closely related subjects that consideration of one would naturally bring the other to mind). To insure consistency in its opinions, as required by 29 *Del. C.* § 5809(b), the Commission uses the same approach in this instance, but deals with the particular facts of this case. *See*, 29 *Del. C.* § 5807(c)(advisory opinions are to be based on particular facts). Therefore, the Commission noted that, in this case, provisions in Title 11 and in Title 29 might restrict disclosure of certain information which might be in the existing data systems.

First, to the extent the information in the existing data systems is protected from release as a matter of law, its disclosure would be unauthorized. The former employee stated that in developing the computer programs he would have no need to use any of the information contained in the existing programs. Thus, he would not be using non-disclosable contents of the systems for his personal gain or benefit. An agency representative said that any computer analyst could technically perform the job. As non-disclosable information in the data systems was not needed to write the programs, even assuming the former employee had that particular information, his competitors would not be prejudiced as they also would not need it to develop a program.

As to the activities of the Board, its Executive Director said the meetings were subject to the Freedom of Information Act (FOIA). FOIA provides that meetings are to be public unless they are closed based on specific statutory provisions. 29 *Del. C.* § 10004(b). Thus, open sessions would not be considered confidential proceedings. The statements at the Commission meeting were that all the meetings were open and that any member of the public could have attended the meetings and listened to the discourse. Thus, information at those meetings was information any citizen could have obtained. Again, it was admitted that any computer analyst could technically perform the job. Thus, the Board's discussions were available to competitors causing no prejudice. Furthermore, the job could be performed without that information, giving the former employee no edge over competitors. The Commission noted that information on developing computer systems is readily available to any person through, for example, classes offered at schools and universities. *See, e.g., Delaware Tech Spring 1997 Course Schedule, p. 15.* Public information also is available on how to create computer systems in a specialized environment. *See, e.g., Kinney, Litigation Support Systems (1985)* which includes sample government RFPs, etc. Also, information on how to contract with the State of Delaware is publicly available. *See, e.g., 29 Del. C. § 6901, et. seq.*

The Commission also gave weight to the statement of an agency representative that no privacy statute or freedom of information type of privilege or proprietary information was involved, especially as no facts to the contrary were revealed.

Rather, the expressed concern was that while the Board's contract was subject to notice and public bidding, the contract with the other agency was not. No evidence was offered to show that such a non-public bid contract involved any use of "confidential information." However, if this concern was based on awarding a contract under circumstances where the public is less likely to know about it because it was not subject to public bidding such concern has more to do with openness of government than with use of confidential information. There is no provision in the Code prohibiting former employees from bidding on contracts that are not subject to notice and public bidding. If the General Assembly believed it was a distinction that made a difference, it could have imposed a restriction on former employees as it has on current employees and officers. *See, 29 Del. C. § 5805(c)*(current employees and officers may not contract with the State on contracts of less than \$2,000 unless there is notice and public bidding). Further, the State can award certain contracts without notice and public bidding. *See, e.g., 29 Del. C., Chapter 69.* Thus, this Commission will not graft such a distinction onto the statute. *See, Goldstein,*

supra, n. 3.

Another concern was that a data systems analysis program applicable to other State agencies was developed while the former employee was with his agency. Again, it is unclear how this connects to “confidential information,” especially when any computer analyst could perform the contract. If it was being suggested that the former employee gained some special advantage because of his employment with his agency, contacts he may have made with other agencies, and through membership on the Board, the Commission failed to see how such activities could be classified as part of the “confidential information” rubric. The relationship or lack thereof does not impact on the ability to perform the service. Any computer analyst could perform the contract. Also, no evidence was submitted to suggest that the former employee used any relationship with such persons to obtain the contracts. In fact, the former employee’s undisputed testimony was that he first learned that funding might be available for a computer contract with the Board when he read about it in the State’s proposed budget, a public document. The Board’s contract was subject to public notice and bidding and was open to anyone regardless of prior associations or friendships. Thus, the relationship or lack thereof does not impact on the ability to perform the service.

As to the other contract, the former employee did not know, nor did he have any involvement with persons within the agency.

No evidence was submitted to suggest that the former employee used his relationship to obtain any of the contracts. *See, CACI, 719 F.2d at 1582* (to ascribe “evil motives” to State employees who make contractor selection or to the former employee for whom they had worked without factual basis is “clearly erroneous”); *See also, Brown v. District of Columbia Board of Zoning Adjustment, D.C. App., 486 A.2d 37, 44, n. 7 (1984)* (there must be, among other things, a showing of access substantially related to the subsequent representation before a Court infers that an individual actually gained confidential information); *See also, Medico, 784 F.2d at 844* (fact that former employee did not use “inside information” was “irrelevant” to a determination of whether the post employment provision was violated because the statute restricts representation on matters where the individual is personally and substantially responsible and “avoids any reference to such difficult-to-prove events”).

The Commission concluded that there was no evidence that confidential information relative to these contracts was gained through the former employee’s employment or his position on the Board. Therefore, he could not have used such information in connection with the contracts.

(C) Can the former employee use computer analysts from his partner’s firm?

When he first requested an opinion from the Commission, the former employee said that one of the partners in his firm is also head of another firm which contracts with his former agency. He said he would not: work on those contracts; seek to recruit programmers to fulfill the other firm’s obligations; or seek a contract with his former agency. *Commission Op. No. 96-32, “Computer Services Contract,” pp. 33-34, supra.*

One agency said that it understood that the two computer consultants who might be used by the former employee for this work had previously performed work for his partner's firm. It asked if the use of those consultants violated the prohibition against the disclosure or use of confidential information for personal gain or benefit. No facts suggest that the two consultants worked on the contracts with his former agency. However, assuming they did, no facts indicate that any confidential information they may have learned would be used on these contracts. The Commission noted again that fulfillment of these contracts requires technical skills that are within the public domain, and any computer analyst could technically perform the task. Assuming the computer analysts are familiar with his former agency's needs, they must use their skills to develop a specific program based on the specific needs of the contracting agencies. Even though the "process" of fulfilling the contracts may be the same "process" used for his former agency, this Commission has already addressed the "process" issue at length. The fact that two of the analysts have worked for another firm does not change the conclusion that the former employee is not disclosing or using confidential information for personal gain or benefit or that he is using it to the prejudice of competitors. (*Commission Op. No. 96-75*).