2015 Report of the Conflict of Interest Commissioner

Prince Edward Island
Legislative Assembly

Office of the Conflict of Interest Commissioner
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Assemblée législative

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February 8, 2016

Hon. Buck Watts, MLA
Speaker of the Legislative Assembly
P.O. Box 2000
Charlottetown, PE
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Dear Mr. Speaker:

It is my honour and duty to submit to you the 2015 Annual Report of the Office of the Conflict of Interest Commissioner for the period January 1 to December 31, 2015.

This report is submitted pursuant to section 3(1) of the *Conflict of Interest Act*, R.S.P.E.I. 1988, Cap. C. 17-1.

Yours very truly,

Hon. John A. McQuaid
Conflict of Interest Commissioner

2015 Annual Report of the Conflict of Interest Commissioner- February 8, 2016

Introduction

I am pleased to present the Legislative Assembly with my first report regarding the affairs of the Office of the Conflict of Interest Commissioner.

The primary role of the Commissioner is to work with Members as they fulfill their obligations under the *Conflict of Interest Act* R.S.P.E.I. 1988 Cap. 17.1. In my report I will refer to this legislation as the "*Act*".

The role of the Commissioner includes providing opinions and advice with respect to the nature and extent of these obligations.

In addressing the affairs of the Office I believe the Commissioner has a role in advising the Legislative Assembly with respect to the operation and the administration of the *Act,* including suggested amendments to the *Act.*

Disclosure Statements

The *Act* requires all Members, their spouses and dependent children, to file Private Disclosure Statements disclosing all their income, assets and liabilities. They must also disclose any interests they hold in private corporations. Disclosure must be completed 60 days following the official election of the Member to the Legislative Assembly.

Also within this 60 day period the Commissioner is required to meet privately with each Member to review their Private Disclosure Statement for compliance with the *Act.* The Member's spouse is also entitled to attend this meeting. During the meeting the Commissioner advises each Member on other obligations they have under the *Act.*

Therefore, following the general election on May 4, 2015, the deadline for the completion of the Private Disclosure Statements was July 20, 2015 – 60 days following Declaration Day May 21, 2015. All Members complied with this deadline. Following the meeting with each of the 27 Members I prepared their Public Disclosure Statement.

As required by the *Act* the Public Disclosure Statements of all Members were also filed with the Clerk of the Legislative Assembly on or before July 20, 2015. They are available for review by the public.

For the first time the Clerk published the Public Disclosure Statements on the web site of Legislative Assembly. See: http://assembly.pe.ca and follow the links from "Independent Offices" to the "Conflict of Interest Commissioner" to the disclosure statements. Paper copies are also available from the Clerk's Office at 197 Richmond Street, Charlottetown, Prince Edward Island.

Once in each following calendar year, Members are required to file current Private Disclosure Statements and meet with the Commissioner to review them. Members have been advised that in 2016 Private Disclosure Statements and meetings with the Commissioner must be completed on or before June 1st. Updated Public Disclosure Statements will be prepared and filed with the Clerk on or before this date.

Forms have been developed for the assistance of the Members in the preparation of their Private Disclosure Statements and for the disclosure of additional information required by the *Act*. The Commissioner has the jurisdiction to determine the content of these forms to ensure they capture all the required information.

I am reviewing the forms presently utilized with a view to streamlining them where possible. When the review is complete I intend to post the blank forms on the internet. I believe it is beneficial to have the blank forms in the public domain so that everyone can see the extent of the information a Member is required to privately disclose.

Each year Members are also required to report to the Commissioner any material change in their income, assets or liabilities. Where a statement of material change is filed, the Public Disclosure Statement of the Member is amended accordingly.

Since July 20, 2015 some Members have filed statements of material change. The Public Disclosure Statements of these Members have been amended.

Trusts

The *Act* provides that if the Premier or a member of Cabinet holds securities, stocks in a public company or carries on a business, he or she may only carry on the business or continue ownership of those assets during their term of office, if they are entrusted to a trustee approved by the Commissioner and according to the terms of an trust agreement also approved by the Commissioner.

All those required to establish such trusts have done so.

Opinions to Members

With the change in the leadership of the governing Liberal Party on February 21st and the Provincial General Election on May 4th, the membership of Executive Council changed.

Those individuals who did not return to Executive Council were advised in writing of their obligations under s. 24 of the *Act* with respect to accepting contracts from the Government of P.E.I., making representations to that Government and accepting a contract from any person who had received a contract or benefit from the department of which a former member of Executive Council was the Minister.

Some Members also requested an opinion on various issues regarding the interpretation and application of the *Act*. I have responded to these requests and provided the relevant advice.

According to section 7 of the *Act* the above opinions are given on a confidential basis.

I am pleased to report that I have not received any requests from Members to provide an opinion with respect to an alleged contravention of the *Act* by a Member.

Canadian Conflict of Interest Network

In September 2015, I attended the annual meeting of the Canadian Conflict of Interest Network in Quebec City. This is an organization made up of the Conflict of Interest/Integrity Commissioners from across Canada, including the House of Commons, the Senate and the Territories. The individual holding the office in these jurisdictions is responsible for the legislation and/or codes of conduct applicable to elected representatives and Senators.

The conference provided me with insight into some of the ethical issues confronted by elected officials in other jurisdictions. I also gained some insight into the manner in which the legislation and/or code of conduct in other jurisdictions addresses these issues.

These meetings are held annually. The 2016 conference will be held in September in Edmonton, Alberta.

The Conflict of Interest Act

The *Act* has been in place since 1999. It is modeled on the legislation in Ontario. While the legislation in Ontario, as well as that in other Provinces and in the House of Commons, has evolved since 1999, the *Act* has never been amended.

With this in mind I undertook a review of legislation in other Canadian jurisdictions. In my opinion the operation and administration of *Act* could be improved with the inclusion of some specific provisions that have been adopted in other jurisdictions.

Suggestions for Change

1. **Requesting an Opinion from the Commissioner as to an Alleged Contravention of the Act**

The opinion of the Commissioner regarding an alleged violation of the *Act* may be sought in one of the following ways:

(i) A Member may, on his or her own initiative, request an opinion as to whether a decision by a Member or, the Member's participation in a decision has placed or will place that Member in a conflict of interest.

(ii) A Member who has reasonable and probable grounds to believe another Member may have contravened the *Act* may request the Commissioner to give an opinion. The request must be in writing, it must set out the grounds for the Member's belief there has been a contravention and it must be supported by an affidavit. The Speaker receives a copy of the request and it is tabled before the Legislative Assembly.

(iii) The Legislative Assembly, by resolution, may request an opinion from the Commissioner as to whether a Member has contravened the *Act*.

(iv) The Premier may request an opinion as to whether a Minister has contravened the *Act*.

Therefore, at the present time a request for an opinion of the Commissioner as to whether a Member has contravened the *Act* may come from another Member, Members of the Assembly by way of a resolution or in the case of a Minister, from the Premier.

Many Canadian jurisdictions permit members of the public to request the Commissioner to provide an opinion respecting an alleged contravention of the *Act* by a Member. I refer to the Provinces of Nova Scotia, New Brunswick, Manitoba, Alberta and British Columbia as well as the Northwest Territories and Nunavut.

In my opinion the Legislative Assembly should consider an amendment to the *Act* to provide that any person may request that the Commissioner deliver an opinion as to whether a Member has contravened the *Act*.

The person making the request would be required to set out in an affidavit the grounds upon which the person believes a Member has contravened the *Act* and include details as to the circumstances that give rise to the alleged contravention.

The amendment should also incorporate a provision that would prohibit the member of the public from making any public comment until the Commissioner has confirmed that the Member affected by the allegation has received a copy of the affidavit. The Commissioner would have 14 days to provide the subject Member with a copy of the affidavit.

Upon receipt of a request for an opinion from a member of the public the Commissioner would be required to assess the request to determine if it is frivolous, vexatious or without merit. If determined so, the Commissioner would have authority to dismiss the request and provide reasons for the dismissal to the Legislative Assembly, and the individual requesting the opinion.

If the Commissioner found the request for an opinion as to an alleged contravention was not frivolous, vexatious or unmeritorious, an inquiry would be commenced following the procedure presently set forth in the *Act*.

There should be some protection in the *Act* for those persons who, in good faith, provide information to the Commissioner either by way of a request for the Commissioner's opinion or, in the course of the Commissioner's inquiry into any request for an opinion. The *Act* should include a provision that no employer shall take or threaten any action with respect to employment of a person because the person has in good faith provided information to the Commissioner.

In my opinion the objective of an amendment permitting members of the public to request an opinion from the Commissioner is greater accountability by Members to the public.

2. "Private Interest"

According to s. 9 of the *Act* no Member shall make a decision or participate in the making of a decision in the course of performing his or her duties if the Member knows or ought reasonably to know that in making that decision there is an opportunity to further the Member's private interest or the private interest of another person.

At present the definition of "private interest" is phrased in the negative. The *Act* states what is not in a member's private interest. See: Section 1(g).

Consideration should be given to an amendment to the *Act* citing situations where the actions of a Member constitute furtherance of his or her private interest. The Parliament of Canada in the Code of Conduct for Members utilizes this wording.

Adopting this approach the *Act* could be amended to provide that a Member's private interest is furthered if one or more of the following results flow from a decision of the Member or a decision in which the Member participates.

1. An increase in or the preservation of the value of assets

2. The extinguishment or reduction in the amount of liabilities

3. The acquisition of a financial interest

4. An increase in income from a source referred to in the member's disclosure statement provided for pursuant to s.25 of the *Act*

The existing s.1(g) of the *Act* would continue by way of an exception providing that even if one of the above results flows from a Member's decision, the Member's private interest is not furthered if the decision in issue is one:

1. that is of general application
2. that affects the member or the other person as one of a broad class of the public

3. that consists of being a party to a legal action relating to actions of a member as a member of the Assembly
4. that concerns remuneration or benefits of a member's family for the purposes of the Act
5. where the interest is so remote or insignificant in its nature that a decision affecting the interest cannot reasonably be regarded as likely to influence the Member

3. Gifts

Section 13 of the *Act* provides that Members are prohibited from accepting gifts or personal benefits, of any value, that might be connected directly or indirectly with the performance of the Member's duties.

However, a Member may accept a gift or personal benefit if it is received as an incident to protocol, custom or social obligation or, the nature of the gift is such that it could not reasonably be regarded as likely to influence the Member in the performance of his or her duties. If the value of such a gift exceeds $500 or the value of all such gifts received in a twelve-month period exceeds that amount, the Member shall disclose the gift or gifts to the Commissioner and they shall be reported in the Member's Public Disclosure Statement.

Most other jurisdictions in Canada have set the limit for these "acceptable" gifts at a value between $200 and $250. I suggest a reduction from $500 to $200 would be appropriate.

4. Responsibilities of Ministers upon Ceasing to Hold Office

Section 24 of the *Act* provides that for a period of 6 months after ceasing to hold office a former Minister may not: (i) accept a contract or benefit from the Government of P.E.I.; (ii) make representations to the Government on his or her behalf or on behalf of another person; (iii) accept a contract or benefit from another person who received a contract or benefit from a department of which the former Minister was the Minister or; (iv) make representation to the Government on any transaction or negotiation in which the former Minister was involved as a Minister where the representation could confer a benefit on the former Minister that is not general application to the members of the public.

The restrictions do not apply to contracts or benefits in respect of further duties in the service of the Crown.

When the *Act* came into existence the 6-month "transition period" may have been the accepted norm. From a review of the legislation across the country I note that, except for the Yukon and Nunavut, Prince Edward Island is the only jurisdiction with a transition period of 6-months duration. The legislation in most other Canadian jurisdictions imposes

a 12-month transition period while in British Columbia and the Parliament of Canada the period is 2 years.

I suggest that the Legislative Assembly consider amending the *Act* to expand the transition period beyond 6 months. The adoption of a 12-month transition period would be more consistent with the transition period that prevails in other Canadian jurisdictions.

In some of those jurisdictions where the transition period is 12 months the legislation gives the Commissioner the jurisdiction to grant a former minister an exemption from or a reduction in the term of the transition period. I refer to Alberta, Newfoundland and Labrador, Nova Scotia, Saskatchewan, Northwest Territories, Yukon and Nunavut.

If the *Act* is amended to give the Commissioner this jurisdiction the grounds upon which an exemption or a reduction is granted could be set forth in the *Act*.

For example s. 25.41(1) of the Alberta *Conflict of Interest Act* sets out the grounds upon which the Commissioner may grant an exemption or a reduction in the length of the transition period. These are: (i) if the conditions on which the employment, appointment, contract or benefit is awarded, approved or given are the same for all persons similarly entitled; (ii) the award, approval, grant or benefit results from an impartially administered process open to a significant class of persons or (iii) the activity, contract or benefit will not create a conflict between a private interest of the former minister and the public interest.

Furthermore, the Alberta Act confers jurisdiction on the Commissioner to attach any additional conditions to the exemption or reduction that is determined necessary in the circumstances.

5. Mandatory Review of the *Conflict of Interest Act*

A periodic mandatory review of the *Act* will provide Members with an opportunity to consider changes to the *Act* in a tempered and reflective environment as opposed to a hasty consideration of amendments initiated in the tempest of a controversy that exposes the legislation as being deficient.

The legislation and/or codes of conduct in the Parliament of Canada, the Provinces of Alberta and New Brunswick as well as Nunavut all provide for a mandatory review at a fixed time.

I suggest the *Act* include a provision making it mandatory that a review of the provisions and the administration of the *Act* be undertaken by a committee of the Legislative Assembly after every Provincial General Election. The review should include an opportunity for the public to make either oral or written submissions. The delegated Committee would be required to report to the Assembly, with recommendations, no later than one year after the date of the General Election.

The additional objective of a mandatory review is to improve the legislation on an ongoing basis. Furthermore, such a review creates a process whereby Members regularly recommit to core ethical values and professionalism within the institution.

II. Clarification of Certain Provisions in the Act

There are some provisions of the *Act* that require clarity. I will explain.

(i) Blind Trusts – Reimbursement for the Costs of Establishment and Administration

As I stated in the first part of this report the *Act* provides for the establishment of trusts by Ministers if they: (i) should own a business and; (ii) have an interest in a business through a partnership or sole proprietorship. The Minister may retain his or her business interest if it is entrusted to a trustee according to the terms of a trust agreement approved by the Commissioner. See section 19 of the *Act.*

Furthermore if a Minister owns securities, stocks, futures or commodities and wishes to continue ownership of these assets they must be placed in the hands of a trustee pursuant to the terms of a trust agreement approved by the Commissioner. See section 18 of the *Act.*

Section 19(3) states the Minister may be reimbursed from the Operating Fund of the Province for reasonable fees and disbursements paid for the establishment and administration of the trust established to hold the Minister's interest in a business.

It has been the practice to reimburse a Minister from the Operating Fund for reasonable costs associated with the establishment and administration of a trust established to hold the securities and stocks. The Commissioner reviews each invoice submitted for such services to ensure it is reasonable. I agree with this practice; however, because the *Act* does not specifically provide for reimbursement of reasonable costs associated with the establishment and administration of the trusts required to be established for the continued ownership of stocks and securities, I suggest an amendment to make this clear.

(ii) Disclosure of Corporate Interests

In their Private Disclosure Statements Members who own shares in a private corporation disclose the names and addresses of all individuals or corporations holding shares of any class, value or voting power in that private corporation. The names of all the officers and directors of the private corporation are also disclosed.

It appears the information is presently provided and has been provided in the past pursuant to s. 25(2) (f) of the *Act.* This provision gives the Commissioner jurisdiction to request a Member to include in the Private Disclosure Statement "... any other information that the Commissioner requires."

I suggest an amendment to the *Act* specifically stating this information is required to be included in the Private Disclosure Statement.

With respect to the Public Disclosure Statement of similar information, the past and present practice is for the Commissioner to publicly disclose the names of all officers, directors and shareholders of the private corporation regardless of the class, value or voting power of their shares.

In my opinion there is a question as to whether the Commissioner is obligated to publicly disclose the names of all officers, directors and shareholders of a private corporation other than Members, their spouse and family members. The broad authority given to the Commissioner in s. 25(2) (f) applies only to Private Disclosure Statements.

Therefore, I suggest an amendment to the *Act* which will give the Commissioner specific authority to include in the Public Disclosure Statement the names and addresses of the officers, directors and shareholders of a private corporation. Excepting Members, their spouse and family members, consideration might be given to limiting public disclosure of the names of minority shareholders to those holding more than a 5% to 10% voting interest in the private corporation.

With respect to shareholders owning non-voting preferred shares in a private corporation I suggest an amendment to provide for the public disclosure of only those non-voting preferred shareholders owning shares with a value in excess of $5,000. This is consistent with s, 26(4) of the *Act* which does not require the public disclosure of assets less than $5,000.

(iii) <u>The Publication of Disclosure Statements</u>

According to s. 27(8) of the *Act* the Clerk of the Legislative Assembly must make the public disclosure statements available for examination by the public. As I noted above, the Clerk has now caused these statements to be posted on the website of the Legislative Assembly.

While the wording of s. 27(8) may be sufficiently broad to permit this, I recommend the section be amended to make it clear the Clerk has the authority to publish the public disclosure statements on the website of the Legislative Assembly.

(iv) <u>The *Act* and the Members' Pension Plan</u>

The Indemnities and Allowances Commission (the "Commission") recently raised an issue in its 2015 Report respecting the *Act* and the Members' Pension Plan. The Commission noted there is an inconsistency between s. 14(6) of the *Act* and the pension plan applicable to Members of the Legislative Assembly. The Commission recommended that the Conflict of Interest Commissioner and the Legislative Assembly consider an amendment to the *Act* that would resolve the inconsistency. The Commission states at page 5 of the Report:

There is an inconsistency between Subsection 14(6) of the *Conflict of Interest Act* RSPEI 1998, Cap. 17.1 And articles 6.03 and 13.03 of the *Pension Plan for Members of the Legislative Assembly of Prince Edward Island* (the *Plan*) respecting commencement of retirement benefits.

The Commission has reviewed this matter and, to ensure the *Plan's* continued registration and compliance with the *Federal Income Tax Act*, has determined that there will be no change to the articles of the *Plan*. As a result, the Commission respectfully suggests that the Conflict of Interest Commissioner and the Legislative Assembly address the inconsistency through amendment to Subsection 14(6) of the *Conflict of Interest Act*. The Commission notes that this same recommendation was made to the Legislative Assembly by the Conflict of Interest Commissioner dated March 10, 2003.

Pursuant to s. 14(1) of the *Act* a Member shall not knowingly be party to a contract with the Government of Prince Edward Island under which the Member receives a benefit. However, pursuant to s. 14(6) of the *Act* the provisions of s. 14(1) do not prohibit a Member from receiving retirement benefits from any pension plan funded wholly or partially by the Government of P.E.I. **"... except a pension resulting from prior service in the Legislative Assembly."**

Therefore a Member who reaches pensionable age while holding office is not, according to the *Act*, entitled to receive a pension for past service, as long as that Member continues to hold office.

On the other hand articles 6.03 and 13.06 of the *Pension Plan for Members of the Legislative Assembly of Prince Edward Island (the "Plan")* provide that a person who has served in the Assembly shall commence receipt of pension benefits at age 71 even though the person continues to hold office as a Member.

Article 6.03 – Part II of the *Plan* - reads as follows:

> A Participant, who continues to be a Legislative Member beyond the Normal Retirement Date, shall continue to contribute to the Plan until the Postponed Retirement Date. In this event the Participant's pension will be calculated and payable as outlined in Article 6.01 with that Article being read as if the words Normal Retirement Date were replaced by the words Postponed Retirement Date.
>
> **Notwithstanding anything to the contrary contained herein, if a Participant remains a Legislative Member beyond December 31st of the year in which the Participant attains age 71, the Participant's pension contributions shall cease and pension payments under Part II shall commence no later than the last day of the calendar year in which the Participant attains that age.**

Article 13.06 – Part III of the *Plan* - reads as follows:

> Subject to 13.05 a Participant, who continues to be a Legislative Member beyond the Normal Retirement Date, shall continue to participate in the Plan until the Postponed Retirement Date. In this event the Participant's pension will be calculated and payable as outlined in Article 13.09 or 13.10 as applicable.

Notwithstanding anything to the contrary contained herein, if a Participant remains a Legislative Member beyond December 31st of the year in which the Participant attains age 71, pension payments under Part III shall commence no later than the last day of the calendar year in which the Participant attains that age.

The payment of benefits under Part III are blended with those payable under Part II and according to the Plan both must be paid concurrently.

By the operation of s. 46(8) of the *Legislative Assembly Act* the *Plan*, like any benefit recommended by the Commission, becomes part of that *Act* as if it had been enacted by the Legislature.

There is a conflict between two existing pieces of legislation – the *Act* and the *Legislative Assembly Act*. The Commission has made it clear in their report they will not recommend amending the *Plan* with respect to the entitlement of a sitting Member to receive a pension for past service in the Legislative Assembly. The Commission states the reason for this recommendation is the preservation of the registered status of the *Plan* under the provisions of the *Income Tax Act (Canada)*. The Commission has the final word on benefits, including pensions. Therefore the provisions of the *Plan* will not be amended.

To resolve the inconsistency between the *Act* and the *Legislative Assembly Act* the Commission suggests that the Legislative Assembly amend s. 14(6) to make it clear a Member, while continuing to hold office, is entitled to receive a pension for past service in the Assembly.

As the Commission points out, there was a recommendation by the Conflict of Interest Commissioner to the Legislative Assembly in 2003 that this amendment be made. It was never done.

At that time two members who held office and who qualified for a pension sought the Commissioner's opinion as to whether they would contravene the *Act* by receiving their pension. Former Commissioner Robinson rendered an opinion that they would not contravene the *Act* because they were a part of a larger class of Canadians who were participants in a registered pension plan and they were obligated by the operation of the *Income Tax Act (Canada)* to receive benefits upon attaining the mandated age. The two Members who requested the opinion authorized its publication. It may be found on the website of the Legislative Assembly. Follow the link to "Independent Offices" to the "Conflict of Interest Commissioner" and to "Opinions". Alternatively, click on this link; http://www.assembly.pe.ca/conflict/decisions/conflict_hammac.pdf

The *Plan* provides for a pension in two parts: Part II the "Basic Portion" and Part III "Supplemental Retirement Benefits".

The basic portion is registered under the *Income Tax Act (Canada)*. This part of the total pension is partially funded by contributions from Members. On the other hand, the Government of Prince Edward Island funds supplemental retirement benefits and

Members do not contribute. This part of the *Plan* is not registered under the *Income Tax Act (Canada)*.

The *Income Tax Act (Canada)* provides that when a person participating in a registered pension plan reaches age 71 that person shall commence receipt of pension benefits. As the Commission points out, if participants in the *Plan* do not commence receipt of benefits at age 71 the *Plan* will lose its registration status.

Therefore, all Canadians participating in registered pension plans, including private registered retirement savings plans, are required to receive pension benefits at the age set by the *Income Tax Act (Canada)*. Members are in this broad class of persons and pursuant to s.1 (g) of the *Act* a Member's "private interest" is not furthered by receipt of pension benefits.

Furthermore given the very specific wording of Articles 6.03 and 13.06 of the *Plan* any Member who becomes entitled to the basic portion of the pension and the supplemental pension benefits must accept those benefits concurrently when he or she attains the age of 70 years, even though the Member is at the time holding office.

It is noteworthy that the legislation in Ontario, upon which the *Act* was modeled, permits a Member who holds office to receive a pension for past service in the legislature while continuing to serve.

I join with the Commission in recommending that the *Act* be amended to be consistent with Articles 6.03 and 13.06 of the *Plan*. I suggest that in considering the amendment the Legislative Assembly seek the further advice of the *Plan* administrator and the Commission.

Conclusion

I thank all Members for the cooperation they accorded me in the preparation of their Disclosure Statements as well as for their commitment to the obligations they have under the *Act*.

I acknowledge the support and guidance of Mr. Charles MacKay, Clerk of the Legislative Assembly and that of all the staff working within the Legislative Assembly. Special thanks to Ms. Barbara O'Donnell and Ms. Emily Doiron for the excellent administrative assistance they provide.

I also thank former Commissioner Neil Robinson for his assistance when I initially assumed this position. It was greatly appreciated.

I look forward to a discussion with the Members of the Legislative Assembly on the suggested amendments to the *Act*. I am available to work with Members to improve upon these suggestions, to implement them and to explore other amendments that may be

viewed as necessary to preserve the integrity of the institution that is at the foundation of our democracy.

Respectfully submitted,

February 8, 2016

Honourable John A. McQuaid

Conflict of Interest Commissioner