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June 4, 2021

Via Email and Certified Mail: atamagni@alaska.net

Tracking No.

Alfred L. Tamagni, Sr., Chair
Alaska Personnel Board
7110 Oakwood Drive
Anchorage, Alaska 99507

Re: Executive Branch Ethics Act –AKPIRG/Alexandra Verite di Suvero complaint
Our File: 2684-12

Dear Mr. Tamagni:

The State of Alaska Personnel Board retained the undersigned to serve as Independent Counsel to investigate a complaint made by Alexandra Verite di Suvero on behalf of the Alaska Public Interest Research Group (AKPIRG) under the Executive Branch Ethics Act, AS 39.52 *et. seq.* (“Ethics Act”). The subjects of the complaint were former Chief of Staff Ben Stevens and Governor Dunleavy. There were two complaints filed, one dated March 8th and an edited complaint dated March 29th that corrected multiple typographical errors.¹ The substance of the complaint is the same in both letters.

The complaint requests “the commencement of an ethics investigation into the actions and chain of events that surround the absence of a written waiver submission by Gov. Dunleavy to the attorney general with regards to the departure of Mr. Stevens from the Office of the Governor into his new role at ConocoPhillips Alaska.”² The complaint alleges that Governor Dunleavy and Mr. Stevens violated the Executive Branch Ethics Act by failing to submit a request for written waiver to the attorney general pursuant to AS 39.52.180(c).³ The complaint further states that Mr. Stevens and Governor Dunleavy circumvented statutory restrictions which otherwise would restrict Mr. Stevens’ employment after leaving state service.⁴

¹Exhibit A (Alaska Public Interest Research Group Complaint dated March 8, 2021); Exhibit B (Alaska Public Interest Research Group Complaint dated March 29, 2021).

² Exhibit A at 2.

³ *Id.*

⁴ *Id.*

Based on Independent Counsel’s review of the complaint, two interviews with Mr. Stevens, information provided by Barbara Fullmer, and review of documents obtained during the investigation, as well as the statutory language of the Ethics Act, it is Counsel’s opinion that the neither Ben Stevens nor Governor Dunleavy violated Alaska’s Executive Branch Ethics Act. Counsel finds that Mr. Stevens had no duty to seek an advance ethics waiver or a blanket waiver before leaving State service in order to comply with AS 39.52.180. Rather, Mr. Stevens’ obligation under AS 39.52.180 is to seek a waiver if, within the course of his employment, he encounters a matter in which he participated *personally and substantially* while he served as a public officer.⁵ Indeed, Mr. Stevens has already sought and obtained a waiver for work on the Willow Project,⁶ demonstrating that he is knowledgeable about the waiver process and will seek waivers in the future if they are required under the Act. Additionally, although Mr. Stevens interacts with various government entities as part of his job at ConocoPhillips Alaska, Independent Counsel finds that Mr. Stevens is not engaged in prohibited lobbying activity as that term is defined in Alaska Statutes. We therefore find no breach of the Executive Ethics Act by either Ben Stevens or Governor Dunleavy.

I. FACTUAL BACKGROUND

A. Complaint

On March 9, 2021, the Alaska Public Interest Research Group (AKPIRG) delivered a sworn complaint to the Alaska Attorney General’s office alleging both Governor Michael Dunleavy and former Chief of Staff Ben Stevens violated the Alaska Executive Branch Ethics Act.

1. Ben Stevens

AKPIRG alleges that Mr. Stevens “was involved in numerous cases, proceedings, applications, contracts, determinations, proposals, and countless considerations of legislative bills, resolutions, constitutional amendments, and other legislative measures, proposals, considerations, [and] adoptions of administrative regulations.”⁷ AKPIRG further claims that in his employment with ConocoPhillips, Mr. Stevens is responsible for “government relations” which AKPIRG equates to “lobbying,” and suggests that Mr. Stevens is, or will inevitably, be working on behalf of ConocoPhillips on matters in which he participated personally and substantially as a public officer.⁸ AKPIRG erroneously concludes that, pursuant to AS 39.52.180, Mr. Stevens was required to seek what would amount to a blanket waiver from Governor Dunleavy before Mr. Stevens left employment with the State of Alaska. It also asserts that, had Mr. Stevens sought a waiver, it would be necessary to impose “restrictions on Mr. Stevens’ employment activities after his tenure in the Office of the Governor in a policy-making position”⁹ and that failure to do so is “market tampering.”¹⁰

The complaint against Mr. Stevens is, to be generous, factually thin. The complaint contains little reliable information about Mr. Stevens’ responsibilities as Chief of Staff, particularly on Oil and Gas matters, and

⁵ AS 39.52.180(a).

⁶ Exhibit C (Letter from Ben Stevens to Attorney General Treg R. Taylor dated March 12, 2021); Exhibit D

⁷ Exhibit A at 5.

⁸ *Id.* at 4.

⁹ *Id.* at 2.

¹⁰ *Id.* at 6.

even less information about Mr. Stevens' responsibilities at his new position other than second-hand information from the Attorney General and news articles that stated his responsibilities would include "government relations." The complaint also contains speculation about what Mr. Stevens might be doing at ConocoPhillips, including possible lobbying. However thin, there was a wisp of a hint of a scintilla of facts that if true, could constitute a violation of the Ethics Act. Additionally, although not expressly requested by Mr. Stevens, the Ethics Act does have a provision in AS 39.52.250 for ethics advice to former public officers. Accordingly, the bulk of this investigative report focuses on the allegations against Mr. Stevens.

2. Governor Dunleavy

AKPIRG alleges that Governor Dunleavy was obligated to seek a written ethics waiver for his departing Chief of Staff, Ben Stevens.¹¹ It further claims that Governor Dunleavy was required to consider a host of factors about Mr. Stevens employment and then decide, in the abstract, whether Mr. Stevens' employment with ConocoPhillips would be adverse to the public interest.¹² AKPIRG's complaint seeks information about the Governor's decision making process through a series of proposed questions posed in their complaint.¹³ These questions are not answered in this report, nor would it be proper to do so. AKPIRG's questions demonstrate a fundamental lack of understanding of the Executive Branch Ethics Act investigative process. Independent counsel makes the inquiry he sees fit based on the Executive Branch Ethics Act. Allowing a complainant to frame the scope or direction of Independent Counsel's investigation would destroy the independent nature of the inquiry. The investigative process would devolve into a political exercise, rather than a fact-finding, truth-seeking process. Ultimately, assuming these questions are not wholly rhetorical, they are better directed to the Governor's press office at gov.pressoffice@alaska.gov.

B. Investigation

Independent Counsel reviewed AKPIRG's complaint, all materials provided with the complaint, information about Mr. Stevens' former position as Chief of Staff for Governor Dunleavy, and information about his current employment as Vice President of External Affairs and Transportation for ConocoPhillips Alaska. Counsel also interviewed Mr. Stevens on two occasions. Finally, counsel examined the AS 39.52.180 public interest determination waiver that Mr. Stevens obtained in April of 2021 for work on the Willow project as well as Mr. Stevens' letter requesting that waiver.¹⁴

AKPIRG assumes that since the Governor is the chief executive, the Office of the Governor and the Chief of staff are intimately involved in all minutiae of state government. Based on the undersigned's interview with Mr. Stevens, this is not the case. Much of the day-to-day operation of the government of the State of Alaska is handled by state employees, managers, directors, and commissioners. Only at the cabinet level is there significant interaction with the Office of the Governor.

¹¹Exhibit A at 2.

¹² *Id.* at 5-6.

¹³ *Id.*

¹⁴ Exhibits C and D.

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Chief of Staff is a malleable position. Different Governors utilize their Chief of Staff in different ways. Mr. Stevens described his role as that of a senior manager. He saw himself as less of a policy/decision maker than the person who made sure that decisions got made by those charged with that role. He also had additional duties of ensuring that the Governor’s office ran efficiently, and that necessary work got completed correctly and on time.

When asked directly about Oil and Gas matters in which he may have “participated personally and substantially” while working in the office of the Governor, there were few that came to Mr. Stevens’ mind. He is certainly aware of matters affecting oil and gas development but not many specific matters that he participated in personally and substantially. Not surprisingly, budgetary matters, COVID-related matters, and the PFD occupied much of the energy of the Office of the Governor during Mr. Stevens’ tenure as Chief of Staff (July 31, 2019 – February 28, 2021). Oil and gas matters, particularly matters that involve producers like ConocoPhillips or the Trans-Alaska Pipeline System (TAPS) were not a substantial part of Mr. Stevens’ job as Chief of Staff.

When pressed, Mr. Stevens could recall knowledge of an attempted resolution of unpaid oil and gas tax credit issue. As a producer, ConocoPhillips Alaska is not involved in these credits. Mr. Stevens also had knowledge of the potential effect the BP sale to Hillcorp could have on oil and gas corporate tax revenue and methods. Again, this knowledge would not have involved ConocoPhillips Alaska. Mr. Stevens also recalled that there were a handful of calls between his predecessor and the Governor, mostly arranging meetings related to Covid-related slowdown and shutdown of operations.

Mr. Stevens has disclosed that his responsibilities with ConocoPhillips Alaska “include government relations, village outreach, community investment, media and advertising, including its interests in the Trans-Alaska Pipeline System (TAPS) and the other common carrier pipelines that connect to TAPS. He also serves “on the management team for ConocoPhillips Polar Tanker Fleet.”

Independent Counsel’s office communicated with Barbara Fullmer, Vice President and Chief of Counsel for ConocoPhillips Alaska, Inc. regarding Mr. Stevens’ participation in ConocoPhillips governance. Ms. Fullmer indicated that Mr. Stevens is an employee of ConocoPhillips Company assigned to the ConocoPhillips Alaska Unit. Ms. Fullmer informed Independent Counsel’s office that, effective March 26, 2021, Mr. Stevens is named as a director of Alpine Pipeline Company, ConocoPhillips Alaska Pipelines, Inc., ConocoPhillips Transportation Alaska, Inc., Kuparuk Pipeline Company, Oliktok Pipeline Company, and Willow Pipeline Company. All of these ConocoPhillips entities are involved with oil and gas transportation.

After review of this evidence, Counsel has determined that the complaint alleged facts that, even if true, could not possibly constitute a violation of the Executive Branch Ethics Act by Governor Dunleavy. The Ethics Act places the sole burden on the former employee, not the Governor to seek a waiver when necessary. The Governor’s only responsibility would be to consider a waiver once one was requested. Mr. Stevens has only had one occasion thus far to request a waiver (for the Willow project), which was considered and granted by Governor Dunleavy as required by AS 39.52.180.¹⁵ Therefore, Independent Counsel sought no further information from Governor Dunleavy and performed no additional follow up

¹⁵ Exhibit D.

on this portion of the complaint, other than responding to a phone call from the Governor's counsel informing him of the finding of no probable cause.

II. LAW & ANALYSIS

A complaint filed under the Executive Branch Ethics Act requires Independent Counsel retained by the Personnel Board to determine whether the conduct alleged, if true, would violate the Ethics Act.¹⁶ If Independent Counsel concludes that the allegations in the complaint, if true, would not constitute a violation of the Ethics Act, Counsel must dismiss the complaint with notice to the complainant and to the subject of the complaint.¹⁷ If Counsel determines that the conduct alleged would constitute a violation of the Ethics Act, Counsel will accept the complaint for investigation and determine whether there is probable cause to believe that a knowing violation of the Ethics Act occurred and cannot be corrected.¹⁸ If Counsel finds that there is probable cause to believe that a knowing violation occurred, Counsel will initiate formal proceedings.¹⁹

The primary questions before Independent Counsel are: 1) was Mr. Stevens under a duty to request a blanket waiver or waiver of certain matters when he left State employment; 2) Was Governor Dunleavy under a duty to request a waiver from his outgoing Chief of Staff under the circumstances; 3) is Mr. Stevens engaged in prohibited lobbying under AS 39.52.180(d) by indirectly supervising lobbyists; and 4) are there any restrictions on Mr. Stevens' serving as a director on six Conoco Phillips Alaska Boards?

A. *Statutory Law*

The Ethics Act provides, in relevant part:

39.52.010. Declaration of policy.

(a) It is declared that

(1) high moral and ethical standards among public officers in the executive branch are essential to assure the trust, respect, and confidence of the people of this state;

(2) a code of ethics for the guidance of public officers will

(A) discourage those officers from acting upon personal or financial interests in the performance of their public responsibilities;

(B) improve standards of public service; and

(C) promote and strengthen the faith and confidence of the people of this state in their public officers;

¹⁶ AS 39.52.310(d).

¹⁷ *Id.*

¹⁸ AS 39.52.350(a).

¹⁹ *Id.*

(3) holding public office or employment is a public trust and that as one safeguard of that trust, the people require public officers to adhere to a code of ethics;

(4) a fair and open government requires that executive branch public officers conduct the public's business in a manner that preserves the integrity of the governmental process and avoids conflicts of interest;

(5) in order for the rules governing conduct to be respected both during and after leaving public service, the code of ethics must be administered fairly without bias or favoritism;

(6) no code of conduct, however comprehensive, can anticipate all situations in which violations may occur nor can it prescribe behaviors that are appropriate to every situation; in addition, laws and regulations regarding ethical responsibilities cannot legislate morality, eradicate corruption, or eliminate bad judgment; and

(7) compliance with a code of ethics is an individual responsibility; thus all who serve the state have a solemn responsibility to avoid improper conduct and prevent improper behavior by colleagues and subordinates.

39.52.110. Scope of Code.

(a) The legislature reaffirms that each public officer holds office as a public trust, and any effort to benefit a personal or financial interest through official action is a violation of that trust. In addition, the legislature finds that, so long as it does not interfere with the full and faithful discharge of an officer's public duties and responsibilities, this chapter does not prevent an officer from following other independent pursuits. The legislature further recognizes that

(1) in a representative democracy, the representatives are drawn from society and, therefore, cannot and should not be without personal and financial interests in the decisions and policies of government;

(2) people who serve as public officers retain their rights to interests of a personal or financial nature; and

(3) standards of ethical conduct for members of the executive branch need to distinguish between those minor and inconsequential conflicts that are unavoidable in a free society, and those conflicts of interest that are substantial and material.

(b) Unethical conduct is prohibited, but there is no substantial impropriety if, as to a specific matter, a public officer's

(1) personal or financial interest in the matter is insignificant . . . ; or

(2) action or influence would have insignificant or conjectural effect on the matter.

(c) The Attorney General, designated supervisors, hearing officers, and the personnel board must be guided by this section when issuing opinions and reaching decisions.

Sec. 39.52.140. Improper use or disclosure of information.

(a) A current or former public officer may not disclose or use information gained in the course of, or by reason of, the officer's official duties that could in any way result in the receipt of any benefit for the officer or an immediate family member, if the information has not also been disseminated to the public.

(b) A current or former public officer may not disclose or use, without appropriate authorization, information acquired in the course of official duties that is confidential by law.

39.52.180. Restrictions On Employment After Leaving State Service.

(a) A public officer who leaves state service may not, for two years after leaving state service, represent, advise, or assist a person for compensation regarding a matter that was under consideration by the administrative unit served by that public officer, and in which the officer participated personally and substantially through the exercise of official action. For the purposes of this subsection, "matter" includes a case, proceeding, application, contract, determination, proposal or consideration of a legislative bill, a resolution, a constitutional amendment, or other legislative measures, or proposal, consideration, or adoption of an administrative regulations.

(b) This section does not prohibit an agency from contracting with a former public officer to act on a matter on behalf of the state.

(c) The head of an agency may waive application of (a) of this section after determining that representation by a former public officer is not adverse to the public interest. The waiver must be in writing and a copy of the waiver must be provided to the attorney general for approval or disapproval.

(d) An individual who formerly held a position listed in this subsection may not engage in activity as a lobbyist under AS 24.45 for a period of one year after leaving that position. This subsection does not prohibit service as a volunteer lobbyist described in AS 24.45.161 (a)(1) or a representational lobbyist as defined under regulations of the Alaska Public Offices Commission. This subsection applied to the position of

(1) governor;

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- (2) lieutenant governor;
- (3) head or deputy head of a principal department in the executive branch;
- (4) director of a division or legislative liaison within a principal department in the executive branch;
- (5) legislative liaison, administrative assistant, or other employee of the Office of the Governor or Office of the Lieutenant Governor in a policy-making position;
- (6) member of a state board or commission that has the authority to adopt regulations, other than a board or commission named in AS 08.01.010;
- (7) member of the governing board and executive officer of a state public corporation.

(e) A former head of a principal department in the executive branch may not, for a period of one year after leaving service as the head of that department, serve on the governing board of a company, organization, or other entity that was regulated by that department or with which the former department head worked as part of an official duty as the department head. A former employee of the Office of the Governor in a policy-making position may not, for a period of one year after leaving employment in that office, serve on the governing board of a company, organization, or other entity with which the former employee worked as part of an official duty for the Office of the Governor.

(f) In this section, "employee of the Office of the Governor in a policy-making position" means a person who is an employee required, because of the person's position in the Office of the Governor, to file a statement under AS 39.50.020 .

AS 24.45.171. Definitions.

In this chapter

...

(11) "lobbyist" means a person who

(A) is employed and receives payments, or who contracts for economic consideration, including reimbursement for reasonable travel and living expenses, to communicate directly or through the person's agents with any public official for the purpose of influencing legislation or administrative action for more than 10 hours in any 30-day period in one calendar year; or

(B) represents oneself as engaging in the influencing of legislative or administrative action as a business, occupation, or profession;

III. ANALYSIS

A. *AS 39.52.180 Restrictions on Employment*

AS 39.52.180(a) states that, for a period of two years after leaving state employment, a former public officer is precluded from: (1) representing a person (2) for compensation (3) with regard to any matter that (4) was under consideration by the administrative unit of state government in which the officer served and (5) in which the officer participated personally and substantially, (6) through the exercise of official action.”²⁰ AS 39.52.180(a) only prohibits a former officer from engaging in an activity if it meets every one of the statute’s enumerated elements.²¹

The Alaska Department of Law has interpreted and applied the language of AS 39.52.180(a) over fifty times since its enactment in 1986. In that time, the Department has “consistently read this prohibition in accord with the legislature’s intent that AS 39.52.180 be narrowly applied.”²²

The sectional analysis that accompanied the passage of AS 39.52.180(a) (as quoted by the Department of Law) provides valuable insight into the legislature’s intent:

The most difficult area to address in this legislation is the post-employment situation. The public interest requires that some restrictions be placed on the range of activities that former public officers may perform in the private sector. Of course, regardless of whether employment is in the public or private sector, the expertise and knowledge one gains in a job are transferable skills that employees rightfully take with them and that enable the employees to seek more responsible positions. We must also consider that while Alaska has a relatively small workforce, government is the state’s largest employer.

The development of a post-employment provision that places legitimate restrictions on the use of one’s employment experience is, for the reasons, a difficult task. . . . [T]he post-employment section of this bill reflects a compromise between competing interests. That compromise protects the state’s significant interests but does not unfairly restrict an officer’s ability to work in the private sector after leaving state service.²³

Because AS 39.52.180(a) is narrowly drawn, its prohibitions only extend to “matters” that were (1) under consideration by the administrative unit directly served and (2) in which the officer participated personally

²⁰ 2005 Inf. Op. Att’y Gen. (May 25), Alas. AG LEXIS 20 (May 25, 2005), *10.

²¹ 2013 Op. Att’y Gen. (April 29), 2013 Alas. AG LEXIS 3 (April 29, 2013), *2.

²² *Id.*

²³ 1986 Op. Alaska Att’y Gen No. 2 (Sept. 24), Alas. AG LEXIS 189 (September 24, 1986), *7-8.

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and substantially through the exercise of official action.²⁴ The term "matter" includes: "a case, proceeding application, contract or determination, but does not include the proposal or consideration of legislative bills, resolutions and constitutional amendments, or other legislative measures; or the proposal, consideration, or adoption of administrative regulations."²⁵ An early Attorney General opinion interpreting the scope of AS 39.52.180(a) found that, based on the legislative history, the term "matter" should be "narrowly circumscribed around the examples specifically listed." Alaska regulation 9 AAC 52.100 further clarifies that, "for purposes of AS 39.52.180(a), 'matter' does not include the general formulation of policy by a public official."²⁶ The Department of law reasoned:

so long as policy discussions and decisions concerning the state's interest in the subject "did not coalesce into a particular and specific contract, case, application, determination, proceeding, or other similar action which involved determining the rights of third parties or the disposition of state property (including money), this person is not barred from dealing with future subjects or matters, even though they may be the outgrowth of those policy decisions."²⁷

For the prohibition in AS 39.52.180(a) to apply, an official must have participated "personally and substantially" in a matter through the exercise of "official action." AS 39.52.960(14) defines 'official action' to mean: "advice, participation, or assistance, including, for example, a recommendation, decision, approval, disapproval, vote, or other similar action, including inaction, by a public officer."²⁸ The Alaska Department of Law also takes a very restrictive view on what constitutes personal and substantial involvement.

Contrary to AKPIRG's assertions in its complaint, there is no blanket restriction on private employment in AS 39.52.180(a). Instead, the statute is narrowly drawn to maintain the integrity of the executive branch while still allowing talented, experienced state employees to use their expertise in the private sector after their tenure of state service concludes. According to the Department of Law,

Skills, knowledge, experiences, and contacts gained while serving in government cannot be totally ignored or made unusable when seeking employment after leaving government. The representatives drawn from society will often return, and to place an unreasonable restriction on the ability to return would hurt the public interest by discouraging potential state officials from accepting public employment. State employment can be a valuable educational experience, and the potential personal growth while serving the state is a prime recruitment factor for luring qualified private citizens to state employment. To totally eliminate the value of that

²⁴ *Id.* at *11.

²⁵ AS 39.52.180(a).

²⁶ 9 AAC 52.100.

²⁷ 2013 Op. Att'y Gen. (April 29), 2013 Alas. AG LEXIS 3, *5.

²⁸ AS 39.52.960.

experience for two years after state service would significantly deter those contemplating state service.²⁹

Finally, AS 39.52.180(a) prohibits a former public officer from engaging in certain narrowly defined conduct but does not require any other individual to inquire as to the former public officer's private employment or whether that former public officer is complying with AS 39.52.180(a). The statute exclusively places the onus of compliance on the former public officer. This is consistent with the purpose of the Executive Act stated in AS 39.52.010(a)(7) which notes that: "compliance with a code of ethics is an individual responsibility."³⁰

1. *AS 39.52.180(c) Waiver*

In addition to being narrowly tailored to limit the impact on post-government employment, AS 39.52.180 also creates a method by which a former state employee may obtain a waiver of the application of AS 39.52.180(a). AS 39.52.180(c) states that the head of an agency may waive application of the restriction in 39.52.180(a) after determining "that representation by a former public officer is not adverse to the public interest."³¹ The waiver must be in writing and a copy of the waiver must be provided to the attorney general for approval or disapproval.³²

AS 39.52.180(c) therefore requires that Mr. Stevens or his employer to request a waiver if Mr. Stevens finds that he is going to represent, advise, or assist ConocoPhillips as to a matter that was under consideration by the Office of the Governor during Mr. Stevens' tenure as Chief of Staff and in which Mr. Stevens participated personally and substantially through the exercise of official action. Governor Dunleavy as "head of the administrative unit" would then, upon receipt of this request, determine if Mr. Steven's representation of ConocoPhillips as to that particular 'matter' would be adverse to the public interest. Governor Dunleavy would forward his determination to the Attorney General for approval or disapproval.³³ Notably, Governor Dunleavy, as the head of an agency under AS 39.52.180(c), has no obligation to consider whether section (a) applies Mr. Stevens nor any obligation to determine whether a waiver of section (a) would be appropriate absent a request for such a waiver.

2. **Mr. Stevens was not obligated to seek a blanket waiver**

AKPIRG believes that Mr. Stevens was obligated to seek a blanket waiver under AS 39.52.180(c) before he left public service.³⁴ Further, AKPIRG believes that the waiver request should have encompassed the entirety of Mr. Stevens future employment (AKPIRG further implies that such a waiver should not be granted).³⁵

²⁹ 1986 Op. Alaska Att'y Gen No. 2 (Sept. 24), Alas. AG LEXIS 189 (September 24, 1986), *7-8 (quoting the sectional analysis of the bill).

³⁰ AS 39.52.010(a)(7).

³¹ AS 39.52.180(c).

³² *Id.*

³³ AS 39.52.180(c).

³⁴ Exhibit A at 2.

³⁵ *Id.*

As noted above, a former public officer is the only individual who has a duty to seek a waiver if their new employment directly involves a matter that was under consideration by their administrative unit. Even then, the Ethics Act only requires a waiver request if the “officer participated personally and substantially through the exercise of official action.”³⁶

The language of AS 39.52.180(a) specifically refers to “a matter”. Because of this statutory language, waivers are almost universally matter-specific. Mr. Stevens has no obligation to seek a blanket waiver before departing his employment with the State. Such a request would not further the purpose of AS 39.52.180(a) and would be insufficient to inform the Governor and the Attorney General of the specific “matter(s)” requiring consideration for waiver. Without knowing what “matter” to consider when weighing Mr. Stevens’ waiver request, the Governor and the Attorney General would have no way to determine whether permitting a waiver would be for or against the public interest. Accordingly, failure to seek a blanket waiver before Mr. Stevens knew what specific matters he would be working on and whether they fell within the scope of AS 39.52.180(a) was not a violation of the Ethics Act.

3. Mr. Stevens has already requested and received a waiver regarding the “Willow Project.”

AKPIRG alleges that Mr. Stevens attempted to “circumvent the statutory process, set by Alaska laws, to impose necessary restrictions on Mr. Stevens employment activities.”³⁷ It also alleges that “the Governor and Ben Stevens failed to go through the process as laid out in AS 39.52.180.”³⁸ Investigation by Independent Counsel reveals that this is not the case. In fact, it appears that the exact opposite has occurred. Mr. Stevens is aware of his ethical obligations as a former state employee and has complied (perhaps “over-complied”³⁹) with AS 39.52.180(a) by requesting and receiving a waiver for anticipated work related to the Willow Project.⁴⁰

Counsel notes that Mr. Stevens’ waiver request was made after AKPIRG’s initial complaint but before its amended complaint. It is unknown whether AKPIRG was aware of Mr. Stevens’ waiver request at the time it amended its complaint. Regardless, the waiver is strong evidence that Mr. Stevens and his employer are aware of Mr. Stevens’ obligations under AS 39.52.180(a) and the process to follow if a waiver is necessary.

The fact that Mr. Stevens took a conservative approach by seeking a waiver for work on the Willow Project and the fact that the Governor consulted ethics counsel before issuing the waiver demonstrates

³⁶ AS 39.52.180(a).

³⁷ Exhibit A at 2.

³⁸ *Id.*

³⁹ Given Mr. Stevens’ disclosure of his knowledge of Willow gained during his tenure in State service, it is unlikely that it meets the threshold of “personal and substantial” participation. However, as Mr. Stevens noted, he asked for the waiver “out of an abundance of caution.” The waiver also notes that it is “questionable” whether the waiver is necessary. *See* Exhibit D.

⁴⁰ Exhibit D. This waiver was requested on March 12 and was approved by the Governor on April 5 and the Attorney General on April 8, 2021. Parenthetically, it should be noted that this waiver does not apply to the prohibition against service on a board of directors under 180(e). That issue is addressed further below.

that both Mr. Stevens and Governor Dunleavy are committed to following AS 39.52.180. There is no reason to believe they will not continue to do so in the future.

B. AS 39.52.180(d) Lobbying Prohibition

Since there are allegations that Mr. Stevens is engaged in lobbying, a brief analysis of the applicable law on restriction of lobbying is appropriate. An individual who formerly held a position listed in AS 39.52.180(d) may not engage in activity as a lobbyist under AS 24.45 for a period of one year after leaving that position.⁴¹ While the Chief of Staff is not listed on the list of enumerated positions, the list does include “legislative liaison, administrative assistant, or other employee of the Office of the Governor or Office of the Lieutenant Governor in a policy-making position[.]”⁴² It is likely that the position of Chief of Staff would meet this description.

1. Mr. Stevens is not lobbying

As noted above, the role of Chief of Staff changes with each administration. For the purposes of this opinion, Undersigned Counsel assumes that Mr. Stevens’ role as Chief of Staff falls within the list of positions in AS 39.52.180(f). Further, AS 39.52.180(f) applies to Mr. Stevens because in his role as Chief of Staff he filled out a POFD under AS 39.50.020. Undersigned Counsel makes no other specific findings about matters Mr. Stevens was involved in as Chief of Staff other than what are stated in this report.

Despite the applicability of the AS 39.58.180(f), Independent Counsel finds no violation on this statute because Mr. Stevens is not a lobbyist as defined by AS 24.45.171 (11) and his job duties do not currently include activities that meet the definition of lobbying. AS 24.45.171(11) defines a lobbyist as follows:

“lobbyist” means a person who,

- (A) is employed and receives payments, or who contracts for economic consideration, including reimbursement for reasonable travel and living expenses, to communicate directly or through the person's agents with any public official for the purpose of influencing legislation or administrative action for more than 10 hours in any 30-day period in one calendar year; or
- (B) represents oneself as engaging in the influencing of legislative or administrative action as a business, occupation, or profession;

Based on statements made during his interview, Mr. Stevens is not presently working (or registered) as a lobbyist. While he does communicate with state, local, and tribal governments, he does not influence legislation or administrative action or engage in such activities for nearly enough time to meet the statutory definition of lobbyist. Mr. Stevens does not represent that he is in the occupation of lobbying. His description of his anticipated work on the Willow project is illustrative. He states that he is “currently working on behalf of ConocoPhillips to secure the legal and political support of the North Slope Borough

⁴¹ AS 39.52.180(d).

⁴² *Id.*

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for that Project.”⁴³ This does not qualify Mr. Stevens as a “lobbyist” as defined in AS 24.45.171(11) and Mr. Stevens indicated in his interview that he spends very little time directly doing this type of work.

Mr. Stevens did indicate in his interview that ConocoPhillips Alaska’s lobbying efforts are conducted by employees within his department. He stated, however, that ConocoPhillips lobbyists are removed from his direct supervision by both a manager and a director. He also indicated that these lobbying efforts are conducted through ConocoPhillips’ agents, not Mr. Stevens. AS 39.52.180(d) prohibits an individual from “engaging in activity as a lobbyist under AS 24.45,” it does not prohibit indirect supervision or management of employees who may engage in lobbying activities on behalf of a corporate employer.

2. Mr. Stevens should seek guidance under AS 39.52.250 if he wishes to engage as a lobbyist under AS 24.45

As noted above, if Mr. Stevens intends to directly engage in any activities that meet the statutory definition of lobbying under AS 24.45.171(11) within a year of leaving public employment with the Office of the Governor, he should seek guidance from the Attorney General pursuant to AS 39.52.250. Lobbying activities are not subject to waiver under AS 39.52.180(c).

C. AS 39.52.180(e) Prohibition on Serving on a Governing Board

AKPIRG also cites (without citation to supporting evidence) AS 39.52.180(e) in support of its complaint.⁴⁴ AS 39.52.180(e) states that “[a] former employee of the Office of the Governor in a policy-making position may not, for a period of one year after leaving employment in that office, serve on the governing board of a company, organization, or other entity with which the former employee worked as part of an official duty for the Office of the Governor.”⁴⁵ The statute defines “policy making position in the office of the Governor” as an individual who is required, because of that person’s position, to file a financial disclosure statements under AS 39.50.020.⁴⁶ Mr. Stevens fell within the scope of subsection (f) while he was an assistant to the governor. Mr. Stevens filed POFD disclosures for 2018-2021. Therefore, Mr. Stevens is prohibited from serving on the governing board of a company or organization with which he worked as part of his official duties.⁴⁷

Since March 26, 2021, Mr. Stevens has been a director of Alpine Pipeline Company, ConocoPhillips Alaska Pipelines, Inc., ConocoPhillips Transportation Alaska, Inc., Kuparuk Pipeline Company, Oliktok Pipeline Company, and Willow Pipeline Company.⁴⁸

⁴³Exhibit C. It should be noted that the waiver he has only applies to actions governed by AS 39.52.180(a) and not to lobbying activities governed by AS 39.52.180(d). AS 39.52.180(d) is not waivable.

⁴⁴ Exhibit A at 2.

⁴⁵ AS 39.52.180(e).

⁴⁶ AS 39.52.180(f).

⁴⁷ AS 39.52.180(e).

⁴⁸ It appears from Corporate filings that Mr. Stevens was named a director of ConocoPhillips Alaska LNG Company on March 26, 2021 but removed from that position on May 17, 2021. He is also a Vice President, but not a director, of ConocoPhillips Alaska II, Inc. and ConocoPhillips Alaska, Inc.

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While Mr. Stevens has already sought and obtained a waiver for his work on the Willow project, that waiver only applies to activities covered by AS 39.52.180(a). No waiver is available for the prohibition against serving on a governing Board set forth in AS 39.52.180(e).⁴⁹ In his March 12, 2021 waiver request, Mr. Stevens states “as a high-level State employee in the Governor’s office, I was aware of many matters affecting the State’s oil and gas resource development, including for example, ConocoPhillips’s proposed development of the Willow Project in the NPR-A.”⁵⁰ While he notes that “I never participated personally and substantially in any official decision related to the project while with the Governor’s office,” this is not the standard that applies to AS 39.52.180(e).⁵¹ The Public Interest Determination and Waiver issued by the State explains further that “Mr. Stevens was aware of discussions related to possible intervention by the State of Alaska in litigation against the Willow Project.”⁵² The opinion goes on to note that the question of whether to participate in the Willow Project litigation was a matter under consideration by the Department of Law, the Attorney General, and the Governor which strongly suggests the involvement, to at least some degree, of the Governor’s chief of staff.⁵³ As to the timing of the matter, the Bureau of Land Management released its decision on the Willow Master Development Plan in October of 2020 and a federal lawsuit was filed challenging that decision on December 21, 2020.⁵⁴ According to the court filings, ConocoPhillips Alaska, Inc. intervened in the lawsuit on December 28, 2020 and the State of Alaska intervened on January 15, 2021.

According to information published by ConocoPhillips, as part of the Willow project, a new pipeline will be required from Kuparuk to Willow. The Willow Pipeline Company was incorporated on July 29, 2020. ConocoPhillips Company is 100% shareholder. Mr. Stevens is a director and President of the Willow Pipeline Company among other ConocoPhillips entities focusing on oil and gas transportation.

As Chief of Staff, (July 31, 2019 through February 28, 2021) it appears that Mr. Stevens was aware of the Willow Project but did not work directly with one or more ConocoPhillips entities on matters related to the Willow project. When asked about this specifically, Mr. Stevens stated that he was unaware of how these companies were organized until he started working at ConocoPhillips. Mr. Stevens denied that he worked directly with Alpine Pipeline Company, ConocoPhillips Alaska Pipelines, Inc., ConocoPhillips Transportation Alaska, Inc., Kuparuk Pipeline Company, Oliktok Pipeline Company, and Willow Pipeline Company while he was employed as Chief of Staff with the Office of the Governor.⁵⁵ It may be relevant to note that the entity that is currently participating in the federal lawsuit regarding the Willow Project is ConocoPhillips Alaska, Inc., not Willow Pipeline company (Mr. Stevens is a Vice President of that ConocoPhillips Alaska, Inc., but not a director). Thus there is a strong inference if Mr. Stevens worked with anyone on this litigation while Chief of Staff, it was ConocoPhillips Alaska, not Willow Pipeline.

⁴⁹ AS 39.52.180.

⁵⁰ Exhibit C at 1.

⁵¹ *Id.*

⁵² Exhibit D at 1.

⁵³ *Id.*

⁵⁴ 3:20-cv-00308-SLG.

⁵⁵ It appears from Corporate filings that Mr. Stevens was named a director of ConocoPhillips Alaska LNG Company on March 26, 2021 but removed from that position on May 17, 2021. He is also a Vice President, but not a director, of ConocoPhillips Alaska II, Inc. and ConocoPhillips Alaska, Inc.

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A strict reading of AS 39.52.180(e) would only prohibit Mr. Stevens from serving on the governing board of one of these entities if he “worked [with them] as part of an official duty for the Office of the Governor.”⁵⁶ However, it will likely be difficult to determine which specific ConocoPhillips entity was “working with” the Office of the Governor on the Willow Project issue. There is no evidence that Mr. Stevens had any contact with, let alone worked with these entities while chief of staff and Mr. Stevens denies having any such contact. A review of corporate filings shows a significant overlap between the officers and directors of the ConocoPhillips entities operating in Alaska. However, there is no reason to believe that corporate formalities and separation have not been maintained.

There is no evidence that Alpine Pipeline Company, ConocoPhillips Alaska Pipelines, Inc., ConocoPhillips Transportation Alaska, Inc., Kuparuk Pipeline Company, Oliktok Pipeline Company, or Willow Pipeline Company worked with Mr. Stevens while he was Chief of Staff. Mr. Stevens does recall working with Trans Alaska Pipeline System on occasion but has no recollection of working with or even knowing the existence of the corporations/common carrier lines organized to feed the TAPS system. Therefore, it does not appear that Mr. Stevens is in violation of AS 39.52.180(e).

However, if any evidence comes to light that Mr. Stevens worked directly with any of these specific corporations as a state officer, then he would have to decline service on the board of directors for one year after leaving state service.

1. AS 39.52.180 does not require the State of Alaska impose “restrictions” on Mr. Stevens’ employment.

AKPIRG next alleges a violation of AS 39.52.180 occurred because the State of Alaska did not impose “restrictions” (presumably on Mr. Stevens’ future employment).⁵⁷ The complaint again demonstrates a fundamental misunderstanding of how AS 39.52.180 operates. Just as AS 39.52.180 does not create a system for obtaining blanket waivers, it similarly does not place blanket restrictions on future employment. As discussed above, when an employee leaves state service, they are free to seek employment on the open market. A private employer must consider the benefit of the former state official’s experience against the potential restriction placed on the scope of work they can perform.

Only when an employer wants a former State officer to work on a matter that could violate AS 39.52.180(a) would the employee be under an obligation to either decline to work on the matter (for two years after termination of State service) or to seek a waiver.⁵⁸ Every employee subject to the Executive Ethics Act has training on the scope of the Act. The State of Alaska has no obligation to remind a departing officer of their statutory obligations on their way out the door.

Further, AKPIRG does not specify which specific individual violated this alleged duty to restrict Mr. Stevens’ employment. Without naming an individual who allegedly violated AS 39.52.180, Undersigned Counsel is unable to determine if that person is subject to the Ethics Act, let alone if they violated it.

⁵⁶ AS 39.52.180(e).

⁵⁷ Exhibit A at 2.

⁵⁸ AS 39.52.180(a) & (c).

2. The departing State officer (and only the departing State officer) is responsible for complying with employment restrictions contained in the Executive Branch Ethics Act

Mr. Stevens alone is responsible for complying with the restrictions on his employment that are created by the Executive Branch Ethics Act. From the record, it is clear that Mr. Stevens and his current employer are aware of the restrictions that AS 39.52.180 places on Mr. Stevens' employment. As Mr. Stevens noted:

Given the infancy of my new role with ConocoPhillips it is yet unclear whether I would ever be asked to take on any responsibilities that might in fact require me to work on matters in which I participated personally and substantially throughout the exercise of official action while with the Governor's office. ConocoPhillips has said it has no intent to ask me to do so.

Thus, both Mr. Stevens and ConocoPhillips appear to be taking appropriate steps to comply with Mr. Stevens' ongoing ethical responsibilities.

Mr. Stevens is also responsible for complying with AS 39.52.140. AS 39.52.140(a) and (b) prohibits both current and former public officers from using or disclosing information gained in the course of official duties if the information has not also been disseminated to the public and may not disclose information acquired in the course of official duties that is confidential by law.⁵⁹ There is no evidence and no allegation that Mr. Stevens has violated AS 39.52.140.

D. There was no allegation of wrongdoing against Governor Dunleavy for violation of AS 39.52.180 for not seeking a waiver request from Mr. Stevens

Given the above analysis of AS 39.52.180 as it applies to Mr. Stevens' employment, the allegations against Governor Dunleavy do not state any fact that, if true, would constitute probable cause to believe that a violation of the Executive Branch Ethics Act occurred.⁶⁰ AS 39.52.320 provides that if, after investigation, it appears that there is no probable cause to believe that a violation of this chapter has occurred, the attorney general [or independent counsel] shall dismiss the complaint. Pursuant to AS 39.52.335(c), the disposition of the matter should be communicated promptly to the complainant and the subject of the complaint.

Independent Counsel acts in place of the Attorney General when investigating complaints under AS 39.52.310. The finding of no probable cause has already been communicated to the Governor's counsel orally. This report communicates it formally.

AKPIRG alleges that Governor Dunleavy attempted to circumvent "the statutory process, set by Alaska laws, to impose necessary restrictions on Mr. Stevens' employment activities after his tenure in the office

⁵⁹ AS 39.52.140(a)&(b).

⁶⁰ AS 39.52.320.

of the Governor.”⁶¹ It further alleges that it filed an ethics complaint because the Governor had not submitted a written waiver request the Attorney General by March 5, 2021. The implication is that Governor Dunleavy was under a statutory duty to either generate a waiver himself or demand a waiver from Mr. Stevens as soon as he learned of his departure from state service to work for ConocoPhillips Alaska. AKPIRG further assumes that the Governor violated AS 39.52.180 by failing to initiate the waiver process on his own. Alternatively, AKPIRG’s allegation is that the Governor had a duty to inform Mr. Stevens or his employer of the limitations on his employment. The premise for these allegations is fundamentally flawed; the Governor has no such statutory duty.

Under AS 39.52.180, only the “public officer who leaves state service” (in this case Mr. Stevens) has a duty to seek a waiver.⁶² Even then, a waiver request is only necessary when a former public official seeks to “represent, advise, or assist a person for compensation regarding a matter that was under consideration by the administrative unit served by that public officer, and in which the officer participated personally and substantially through the exercise of official action.”⁶³ Sometimes a future conflict is obvious and an employee is able to request a waiver as the employee is leaving State employment. More often, however, a waiver request is not necessary until after an employee has left state office, started their new position, and their new employer tasks them with a matter that the employee realizes was under consideration by their state administrative unit. The process outlined in AS 39.52.180 places the burden of compliance squarely on the former state officer. Under no circumstances does the head of a state agency (in this case, Governor Dunleavy) have a duty to initiate the process or investigate whether it is necessary. The undersigned was unable to find a past case where a waiver process was initiated by an agency head.

Similarly, an agency head has no duty to inform the departing employee or his prospective employer of any limitations on employment based on the employee’s state service. The duty to comply with AS 39.52.180 lies solely with the former public officer.

Accordingly, after investigation, Independent Counsel has determined that because Governor Dunleavy has no statutory duty to enforce AS 39.52.180 or to initiate the waiver process under AS 39.52.180(c), there is no probable cause to believe that Governor Dunleavy violated the Executive Branch Ethics Act. The complaint against him is dismissed.

E. Violation of Confidentiality by AKPIRG

This investigation is confidential under AS 39.52.340. However, as it has in the past, AKPIRG released and publicized its complaint via press and at least one online blogger. Although this complaint resulted no findings of misconduct, reputational damage to the subjects of this complaint, whether intended or not, has already occurred. There is a common expression, often attributed to Winston Churchill but more accurately to Cordell Hull (and historically likely to Johnathan Swift) “A lie will gallop halfway around the world before the truth has time to pull its breeches on.” AS 39.52.340 is designed specifically to prevent this problem. There appears to be a strategy for political opponents to file an ethics complaint,

⁶¹ Exhibit A.

⁶² AS 39.52.180(c).

⁶³ AS 39.52.180(a).

weaponize it by releasing it to the press, and then enjoy a series of press cycles in sympathetic press outlets based solely on the publication of the complaint.

As noted above, the complaint against Governor Dunleavy did not even meet the threshold for a finding of probable cause. The complaint against Mr. Stevens was right on the probable cause bubble. The entire complaint was based almost exclusively on hearsay statements and supposition of wrongdoing, with only minimal first-hand evidence. The ‘facts’ were then filtered through a misinterpretation of the Ethics Act, specifically who has the duty to request a waiver under AS 39.52.180(c), and to what extent employment constitutes a “matter” under AS 39.52.180(a).

Unfortunately, the ethics investigation process takes time to “pull its breeches on.” After the complaint is assigned to counsel, research must be completed to make a probable cause determination. If probable cause is found, the subject of the complaint gets a copy of the complaint and has an opportunity to respond. In addition to that response, counsel must conduct detailed legal research and factual investigation which can include, as in the present case, interviews and the gathering of documentary evidence. Because the Executive Branch Ethics Act has little-to-no judicial interpretation, more challenging research into areas such as legislative history must often occur. Depending on the complexity of the matter being investigated, the process can take many months. Unfortunately, due to the time required to properly investigate, research, analyze and resolve a complaint, the reputational damage caused by the initial illegal release of the complaint, even if it ultimately proven to be unsupported by facts or law, can be permanent.

The Legislative Ethics Act mirrors much of the Executive Branch Ethics Act with one notable exception; the Legislative Ethics Act has penalties, including criminal penalties, for violating confidentiality. If the legislative confidentiality provisions are violated, the complaint is dismissed. Until the legislature modifies the Executive Branch Ethics Act to include similar penalties, the weaponization of Executive Branch Ethics Act complaints will likely continue unabated.

IV. CONCLUSION

Accordingly, for the reasons stated in this report, the undersigned makes the following findings:

The complaint states no fact that, if true, would constitute probable cause to believe that Governor Dunleavy violated the Executive Branch Ethics Act. Accordingly, the complaint against him is dismissed.⁶⁴

The allegations against former Chief of Staff Ben Stevens are not factually supported and are inconsistent with the plain meaning of AS 39.52.180. Mr. Stevens was not required to request a blanket waiver under AS 39.52.180(c) before leaving State service. Upon identifying a possible conflict, Mr. Stevens promptly requested and received a matter-specific waiver.⁶⁵

Further, Mr. Stevens is not a member of the Board of Directors of Conoco Phillips. He does serve on the Board of six common carrier line corporations, but there is no evidence that he worked with any of these

⁶⁴ AS 39.52.320.

⁶⁵ Exhibits C & D.

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corporations (or knew of their existence) while Chief of Staff. Therefore, Counsel finds no violation of AS 39.52.180(e). Mr. Stevens is also not engaged in lobbying as that term is defined by 24.45.171(11). If Mr. Stevens wishes to engage in activities that meet the statutory definition of lobbyist within a year after leaving state service, he is advised to seek guidance as a former employee from the Attorney General's office pursuant to AS 39.52.250.

Because the initial complaint was publicized in violation of AS 39.52.340, Undersigned Counsel advises both subjects of the complaint of their right to waive confidentiality pursuant to AS 39.52.340(c).

Please do not hesitate to call with questions or concerns.

Sincerely yours,

//John J. Tiemessen//

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