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ATTORNEY GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

April 11, 1984

Honorable Laurence E. Connolly, Jr.
Maine House of Representatives
State House
Augusta, Maine 04333

Dear Representative Connolly:

You have inquired whether any of certain recent activities of Mr. David T. Flanagan, former Counsel to the Governor of Maine, violated the Maine Conflict of Interest Law, 5 M.R.S.A. § 18. The activities about which you have inquired, both in your letter and in conversation with my staff, consisted generally of appearances by Mr. Flanagan as an attorney on behalf of private clients in two rulemaking proceedings before two State agencies and the actions by Mr. Flanagan, also on behalf of private clients, relating to legislation currently before the Maine Legislature. In that the rulemaking proceedings in question were not pending before the concerned agencies at the time of Mr. Flanagan's departure from State government, and because the Maine Conflict of Interest Law does not in any respect regulate the activities of former State employees with regard to the Legislature, it is the opinion of this Department that these activities by Mr. Flanagan did not violate the Conflict of Interest Law.

In responding to your inquiry, my staff has spoken with you; with Mr. Bruce Reeves, a former State Senator and the sponsor of the original Conflict of Interest Law in 1975; and with Mr. Flanagan. From these conversations, there appears to be no dispute as to the relevant facts. From the beginning of the administration of Governor Joseph E. Brennan in 1979, Mr. Flanagan was employed as Counsel to the Governor, in which capacity he dealt with a broad range of governmental issues affecting virtually every Executive Branch agency. He served

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until the end of August, 1983. At that time, he resigned his position and assumed employment, on September 6, 1983, as a partner in the law firm of Pierce, Atwood, Scribner, Allen, Smith & Lancaster in Portland, Maine.

Since that time, Mr. Flanagan has appeared on behalf of his firm's clients in rulemaking proceedings before two State agencies. On January 4 and 18, 1984, he appeared on behalf of a coalition of thirty industrial companies in hearings held before the Maine Board of Environmental Protection on proposed rules concerning hazardous air pollutants. The Board was authorized to adopt these rules by P.L. 1983, ch. 535, enacted at the first regular session of the 111th Maine Legislature, and initiated the rulemaking proceeding by the publication of notice pursuant to the provisions of the Maine Administrative Procedure Act, 5 M.R.S.A. § 8001 et seq. on December 14, 1983. Next, Mr. Flanagan appeared on behalf of the Central Maine Power Company at public hearings before the Land Use Regulation Commission held on February 8 and 9, 1984 on proposed rules concerning the so-called Maine Rivers Law, P.L. 1983, ch. 458, also passed at the last session of the Legislature. This proceeding, which was initiated as a result of petition from the Natural Resources Council of Maine filed pursuant to § 8055 of the APA on November 30, 1983, was commenced by the agency by the giving of public notice on January 9, 1984. Finally, since the convening of the second regular session of the 111th Legislature, Mr. Flanagan has discussed with Governor Brennan and others legislation pending before the Legislature of interest to the Central Maine Power Company, on the company's behalf. Your question is whether any of these activities violated the Maine Conflict of Interest Law.

The law, originally enacted in 1975, P.L. 1975, ch. 539, currently provides in pertinent part:

> 3. Former executive employee. A former executive employee commits a civil violation if he, within one year after his employment has ceased, either knowingly acts as an agent or attorney for, or appears personally before, a state or quasi-state agency for anyone other than the State in connection with a proceeding in which:
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> > A. The State is a party or has a direct and substantial interest; and
> > B. The particular matter at issue was pending before his agency and was

> directly within his official responsibilities as an executive employee at any time within one year prior to the termination of his employment.

The law has been amended twice since its first enactment. In 1976, it was the subject of an amendment of significant importance to your inquiry as part of an Errors and Inconsistencies Bill, P.L. 1975, ch. 770, §§ 16-18. Then, in 1980, the law was substantially revised, largely to eliminate a provision relating to former partners of current State employees, P.L. 1979, ch. 734, but this revision has little relevance to your present inquiry.

I. Appearance in Rulemaking Proceedings.

The first question is whether Mr. Flanagan violated the Conflict of Interest Law in representing private entities in the two rulemaking proceedings just described before the Board of Environmental Protection and the Land Use Regulation Commission. The answer to this question is that these actions of Mr. Flanagan cannot be found to have violated that law since, as its legislative history clearly shows, it was not intended to apply to participation by a former State employee in formal proceedings that were initiated after the departure of the person in question from State service.

As originally enacted in 1975, the scope of the Conflict of Interest Law to the activities of former State employees on behalf of others before State agencies was quite broad. The law provided, among other things, that any person acting as agent or attorney or appearing personally before a State or quasi-State agency was prohibited from doing so if "[t]he subject matter at issue was directly within his official responsibilities." 5 M.R.S.A. § 15(1)(A)(2) and (B)(2), enacted by P.L. 1975, ch. 539 (emphasis added). The purpose of this language was explained in the Statement of Fact accompanying Committee Amendment "A" to Legislative Document 1608, which Amendment consisted of a total revision of the original bill and became law:

> "The purpose of this amendment is to provide criminal penalties[1/] for former members of the classified or unclassified service

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1/ The violation was subsequently decriminalized in the 1980 revision of the Conflict of Interest Law. P.L. 1979, ch. 734, § 2.

> employed by an executive agency who continue to participate in a substantial way in certain of governmental areas they were responsible for while State employees." (emphasis added).

Comm. Amend. A to L.D. 1608, No. S-297, Statement of Fact (107th Legis. 1975). Thus, in its original form, the Maine Conflict of Interest Law was designed to prohibit former State employees from having anything to do with State agencies by whom they were employed, for one year following the termination of their employment, on any "subject", or "area" which was within their responsibilities.

The breadth of this prohibition, however, was substantially narrowed the next year. At that time, Senator David L. Graham, who had originally presented the Committee Amendment which became law in 1975, successfully attached an amendment to an Errors and Inconsistencies Bill rendering the participation by a former employee in public proceedings illegal for one year after the termination of employment only if "the particular matter at issue was pending before his agency" at any time within one year prior to the termination of his employment. P.L. 1975, ch. 770, §§ 16, 17. The purpose of this amendment was clearly set forth in its Statement of Fact:

> "Present law disqualifies a former state employee from acting or appearing for another in any proceeding the subject matter of which was directly within his official responsibilities as a state employee. This Amendment limits the applicability of the law to proceedings which were pending before the agency at the time of the employee's departure. The purpose of the amendment is to permit departing state employees to utilize the professional expertise which they may have brought to or developed in state service, but still prohibit them from using their influence to affect pending proceedings in which they may have been involved. As the law now stands, it creates a significant impediment to the ability of state employees to obtain alternative employment." (emphasis added).

Sen. Amend. C to L.D. 2345, No. S-552, Statement of Fact, 107th Legis. (1976). Senator Graham read this explanation into the Legislative Record at the time of the introduction of the amendment in the Senate. 3 Legis. Rec. 1066-67 (1976). It is

clear, then, that in adopting this amendment, the Legislature intended to limit the Conflict of Interest Law's prohibition to "particular matters" which were "pending" before an agency at the time of an employee's departure. The significance of this substantial narrowing of the law's scope was not lost on other members of the Legislature. When Senator Graham's amendment was presented to the House of Representatives, Representative Lawrence P. Greenlaw, Jr. urged that it be defeated, arguing:

> "It seems to me, Mr. Speaker, Men and Women of the House, that perhaps this procedure that is presently in law is a good procedure. I am not sure that we necessarily want to have state employees immediately go out into the private sector and then be able to represent clients before an agency of state government in which they have had previous knowledge or workings." (emphasis added).

3 Legis. Rec. 1074 (1976). However, after first agreeing with Representative Greenlaw to indefinitely postpone the amendment in nonconcurrence, id. at 1075, the House, later the same day, adopted Senator Graham's amendment. Id. at 1088. The Legislature was thus well aware of the import of the amendment, and chose to adopt it in order not to place undue restrictions on the subsequent activities of State employees following the termination of their employment.

The limitation of the prohibition on post-employment activities of a State employee to any "particular matter at issue" which was "pending" before a State agency at the time of termination of his employment was not altered by the 1980 amendments to the law. Thus, the legislative history of its enactment remains controlling as to its interpretation. Consequently, in order for a former State employee to have violated the law by participating in a formal proceeding before a State agency, that proceeding must have been pending at the time of his departure.

As indicated above, neither of the two rulemaking proceedings in which Mr. Flanagan participated were pending at the time of his departure from State service. Mr. Flanagan left the Governor's Office in late August of 1983. The Board of Environmental Protection proceeding in question was commenced by public notice in December of that year, and the Land Use Regulation Commission proceeding was commenced after the receipt of a petition dated the same month. Thus, Mr. Flanagan did not violate the Conflict of Interest Law by

participating in either of these proceedings.2/

II. Legislative Activities.

The Conflict of Interest Law applies by its terms to any person who "acts as an agent or attorney for, or appears personally before a State or quasi-State agency." 5 M.R.S.A. § 18(3). While the term "agency" is not defined in the statute, given its normal import and usage to describe subordinate bodies of government, the term would not include the Maine Legislature. See, for example, the definition of the term "agency" which appears in the Maine Administrative Procedure Act, 5 M.R.S.A. § 8002(2), which expressly excludes the Legislature. Thus, since the Legislature would not be considered an "agency" for purposes of the Conflict of Interest Law, any activities undertaken by a former State employee concerning pending legislation, are not prohibited even if the

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2/ In view of this conclusion, it is unnecessary for this Office to consider another ground on which Mr. Flanagan's participation in the two rulemaking proceedings might be found to be outside of the scope of the Conflict of Interest Law. In order for a former employee to be found to have violated the law, it is also required that the particular matter in question be pending before "his agency" and be "directly within his official responsibilities as an executive employee." 5 M.R.S.A. § 18(3)(B). As this Office has had occasion to observe before, the phrase "directly within his official responsibilities" appears to have been designed to apply to State employees who had "some direct decision-making authority over a particular matter." Op. Me. Att'y. Gen. 79-42, at 13-15 (copy attached). Clearly, as a member of the Governor's Office, while Mr. Flanagan may have had influence, he had no direct statutory decision-making authority concerning matters before the Board of Environmental Protection or the Land Use Regulation Commission. Thus, it might well be argued that Mr. Flanagan is not restricted by the statute in any way whatever with regard to his post-employment activities with those agencies, or indeed with any agency of State government, since he was not an employee of any such agency. Such an interpretation would find substantial support in the Opinion of the Attorney General just referred to, as well as in the provisions of analogous federal statutes and their legislative history cited therein. This Department will offer no further comment on the issue here, except to suggest that the Legislature may wish to clarify the statute, particularly if it does not agree with its apparent plain meaning, in which regard this Department would be happy to provide assistance.

legislation concerned the employee's former agency. Consequently, Mr. Flanagan's conversations concerning pending legislative matters with Governor Brennan or others with legislative responsibilities, did not violate the law.

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I hope the foregoing answers your questions. Please feel free to reinquire if clarification is necessary.

Sincerely,

JAMES E. TIERNEY
Attorney General

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cc: Governor Joseph E. Brennan
David T. Flanagan, Esq.
Mr. Bruce Reeves
Legislative Leadership