

State of New York
Office of the Inspector General



Investigation of the Dissemination of New York
State Board of Election Enforcement Division
Documents

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Inspector General

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EXECUTIVE SUMMARY

On April 22, 2016, the *New York Daily News* published an article titled, “De Blasio team skirted campaign donation limits; investigators found ‘willful and flagrant’ violations ‘warranting prosecution.’” The article was based on a letter written by New York State Board of Elections Chief Enforcement Counsel Risa S. Sugarman dated January 4, 2016, and an accompanying memorandum dated December 31, 2015. Both documents were published on the *New York Daily News* website. The documents discussed complaints received by the Board of Elections’ Enforcement Division against the Putnam County Democratic Committee and the Ulster County Democratic Committee in October 2014 alleging that political contributions were improperly made through the two committees to circumvent limits to campaigns of individual candidates. The documents that the *New York Daily News* discussed in the article and posted on its website describe the Enforcement Division’s investigation of the complaints and ultimately recommend that the Board of Elections refer the matter to the New York County District Attorney’s Office.

The *New York Daily News* article does not reveal how the newspaper obtained the Enforcement Division’s documents, which are labeled “privileged and confidential.”

The Inspector General received a complaint alleging that confidential Board of Elections documents were disseminated to the press and immediately commenced an investigation. In the course of the investigation, the Inspector General conducted sworn interviews of more than 25 Board of Elections employees, including all four commissioners, the board’s two co-executive directors, the director and deputy director of public information, counsel, and Sugarman, among others. John W. Conklin, director of public information for the Board of Elections, admitted he disseminated the documents to the *New York Daily News*.

The Inspector General’s investigation substantiated the allegation that there was a dissemination of confidential documents to the press. The Inspector General also obtained disparate testimony from Board of Elections employees regarding the definition of “privileged and confidential” and whether the Enforcement Division materials, including those at issue here, must be treated as such. For the reasons discussed below, the Inspector General finds that claims of uncertainty regarding the confidentiality of the materials in question defy credibility and are undermined by a number of factors. Moreover, the Inspector General concludes that the disclosure of Enforcement Division materials while investigations are pending not only has the potential to impede or obstruct investigations, but potentially undermines principles of fundamental fairness in investigations and prosecutions.

The Inspector General recommends that the Board of Elections develop clear rules, regulations, policies, and/or procedures regarding the proper treatment of Enforcement Division materials to ensure fair investigations and prosecutions and to protect the integrity of the Board of Elections’ processes. Board of Elections staff must also undergo training on any new rules, regulations, policies, or procedures. The Inspector General is forwarding this matter to the Joint

Commission on Public Ethics for whatever action the Commission deems appropriate, as well as to the New York County District Attorney for whatever action he deems appropriate.

INTRODUCTION AND BACKGROUND

The New York State Board of Elections

On June 1, 1974, the Board of Elections (“BOE”) was established as a bipartisan state agency responsible for administering and enforcing all laws related to elections in New York State. The BOE also regulates disclosures and limitations under the Fair Campaign Code that governs campaign practices. The BOE assists local election boards, investigates complaints of possible statutory violations, and promotes voter participation in elections.¹

By statute, the BOE is comprised of four commissioners. The chairmen of the Republican and Democratic state parties and the legislative leaders of these state parties each recommend one commissioner, and all four commissioners are appointed by the Governor. The commissioners recommended by the legislature serve as co-chairs of the BOE. Commissioners are appointed for two-year terms, receive an annual salary of \$25,000, and are not permitted to have any other public employment.

The current commissioners of the BOE are Douglas A. Kellner, co-chair and commissioner (Democrat); Peter S. Kosinski, co-chair and commissioner (Republican); Gregory P. Peterson, commissioner (Republican); and Andrew J. Spano, commissioner (Democrat).²

For purposes of board meetings, three commissioners constitute a quorum, and the affirmative vote of three commissioners is required for any official action by the BOE.

The commissioners of each political party also appoint a co-executive director for a term of four years. The current co-executive directors are Robert A. Brehm (Democrat); and Todd D. Valentine (Republican).³ In keeping with the bipartisan composition of the BOE, Counsel’s Office is headed by two co-counsel, one Democrat and one Republican, each of whom are assisted by a deputy counsel from their respective political party. The Public Information Unit is currently run by a director of public information appointed by the Republican Party, and a deputy director of public information appointed by the Democratic Party. The Election Operations Unit is currently run by a director of election operations, a Democrat, and a deputy director, a Republican. The director of data processing for the Information Technology Unit and administrative officer for the Administrative Unit are non-partisan positions.

¹ N.Y. Elec. Law §§ 3-100, 3-102 (Consol. 2016).

² Commissioner Kosinski was appointed on April 15, 2015, and his term will expire on April 15, 2017. The other three commissioners’ terms have expired and they continue to fulfill their duties on holdover status.

³ Co-Executive Director Brehm was appointed effective October 1, 2009, for the unexpired portion of a four-year term that ended on August 7, 2013. He was reappointed to a four-year term beginning August 8, 2013, which will end on August 7, 2018. Co-Executive Director Valentine was appointed effective January 24, 2008. He was reappointed to a term beginning August 8, 2009, which expired on August 7, 2013. He has not been reappointed.

Division of Election Law Enforcement

In June 2014, the Election Law was amended to establish an independent unit in the BOE known as the Division of Election Law Enforcement (“Enforcement Division”).⁴ The Enforcement Division investigates election law violations and enforces campaign finance disclosure requirements. The Enforcement Division is headed by Chief Enforcement Counsel Risa S. Sugarman, who was appointed to a five-year term that commenced on September 1, 2014. The chief enforcement counsel has sole authority over personnel decisions in the Enforcement Division, and must hire without regard to political affiliation. She is chosen by the Governor and confirmed by each house of the Legislature by separate majority vote.

The chief enforcement counsel has sole authority within the BOE to investigate and conduct investigations on her own initiative or upon receipt of a complaint alleging violations of the Election Law. All complaints alleging violations must be forwarded to the Enforcement Division.

The Enforcement Division is located in Albany, New York, in the same building, and on the same floor, as the BOE, but the Enforcement Division is physically separated from the rest of the BOE. Only Enforcement Division employees and a small number of non-partisan information technology employees have key cards that allow access to the Enforcement Division’s section of the floor. Although the BOE and the Enforcement Division share a computer server, the BOE and the Enforcement Division have separate network drives, and BOE employees cannot access Enforcement Division documents or data.

The Enforcement Division staff investigates allegations and gathers evidence to determine the proper disposition of complaints alleging violations of the Election Law. The process for Enforcement Division investigations is delineated in section 3-104 of the Election Law. At any time, the chief enforcement counsel may request authorization from the board to administer oaths and affirmations, subpoena witnesses, compel attendance, conduct examinations under oath or affirmation, and require the production of documents and evidence relevant and material to an Enforcement Division investigation. The board must vote on whether to grant or refuse to grant such authorization within 20 days of the request. Chief enforcement counsel may participate in the board’s deliberations and, in the event of a tie, must vote on the board’s approval or refusal of her request. If the board fails to vote on a request within 20 days of its submission, the chief enforcement counsel may, on her own initiative, administer oaths and affirmations, subpoena witnesses and compel their attendance for examination under oath or affirmation, or require the production of books, records, and other evidence.

Based upon the evidence obtained in an investigation, the chief enforcement counsel determines whether to close the matter, proceed with a civil enforcement action, or refer the matter to the Office of the Attorney General or a district attorney for criminal prosecution. If the chief enforcement counsel determines that the complaint’s allegations, if true, would not violate

⁴ N.Y. Elec. Law §3-100(3-a).

the Election Law or are not supported by credible evidence, she must issue a letter to the complainant dismissing the complaint and provide notice to the board.

If the chief enforcement counsel determines that there is reasonable cause to believe a violation warranting criminal prosecution has occurred, she is required under section 3-104(5)(b) of the Election Law to present such findings to the board. Such findings are generally presented to the board through letters and memoranda such as the documents at issue in this investigation.

Within 30 days of findings being submitted, the board must vote to accept or reject the Enforcement Division's findings. The chief enforcement counsel is entitled to participate in all matters related to the review of her report, and, in the event of a tie, shall vote on its acceptance or rejection. If the board fails to vote on her findings within 30 days of submission, or if the board accepts her findings that reasonable cause to believe that a violation warranting criminal prosecution has occurred, the chief enforcement counsel has seven days to refer the matter to the Office of the Attorney General or a district attorney with jurisdiction over the matter to commence a criminal action.

Board Meetings and Executive Sessions

The BOE is a public body whose meetings are subject to the requirements of the New York State Open Meetings Law.⁵ Board meetings of the commissioners are therefore open to the press and public and are simultaneously broadcast over the internet.

Pursuant to the Open Meetings Law, the board may also convene an executive session that is not open to the general public; attendance is limited to commissioners and any other persons authorized by the commissioners. Generally, the BOE's executive sessions include the four commissioners; two co-executive directors; chief enforcement counsel; director and deputy director of public information; and other BOE senior staff. The Open Meetings Law limits executive sessions to certain enumerated purposes, including the discussion of information relating to current or future investigations or prosecution of criminal matters that would imperil effective law enforcement if disclosed; proposed, pending, or current litigation; and personnel matters.

Multiple witnesses testified that the BOE convenes executive sessions to discuss enforcement cases, litigation, and personnel matters. The Public Information Unit maintains board minutes for both the public and executive sessions. Enforcement Division cases are referred to by case number in executive session minutes.

⁵ N.Y. Pub. Off. Law §§ 100-111 (Consol. 2016).

Confidentiality

New York Public Officers Law: Code of Ethics

New York Public Officers Law section 74 includes New York State's Code of Ethics, which is applicable to state employees including the employees of state agencies, boards, and commissions. The Board of Elections is a state agency for the purposes of Public Officers Law section 74. As relevant to this investigation, the Code of Ethics states that "no officer or employee of a state agency . . . should disclose confidential information acquired by him in the course of his official duties nor use such information to further his personal interests."⁶

BOE Confidentiality Policies

The BOE also maintains an Employee Handbook that includes the following confidentiality policy: "All information which you read, see or hear is confidential and should not be disclosed to others, except as part of your work assignment. Employees should not disclose confidential information acquired in the course of their duties nor use such information to further their personal interest."

The Enforcement Division has its own Code of Conduct that applies to all Division employees. The Code of Conduct includes Secrecy Provisions and Confidentiality policies, which state as follows:

IV. Secrecy Provisions and Confidentiality

A. General Policy

The Division maintains specific protocols covering the release of secret and confidential information. Employees are expected to be familiar with and follow all established protocols.

B. Additional Requirements

The Division policy regarding confidentiality places additional responsibilities on employees:

1. Employees are prohibited from divulging any Election or Division-related information they might obtain during their employment even after separation from the Division.
2. Unauthorized use of data obtained through the internal computer system is prohibited. Personal use of such data constitutes improper handling of Division information. Similarly, unauthorized disclosure of confidential information regarding the systems of the State Board of Elections and/or the Division or the audit and investigative methodologies developed or used by the Division is strictly prohibited.
3. Unauthorized changes or destruction of computer or other files constitutes tampering with public records and is, therefore, prohibited.

⁶ N.Y. Pub. Off. Law § 74(3)(c) (Consol. 2016).

Publicly Available Records

Director of Public Information John W. Conklin (Republican) is the BOE spokesperson. Conklin is responsible for handling all press inquiries and producing press releases and public advisories. Deputy Director of Public Information Thomas E. Connolly (Democrat) assists Conklin with these duties. The director of public information is also the BOE's records access officer, and is responsible for processing all requests for information pursuant to the New York State Freedom of Information Law.

The Freedom of Information Law (FOIL) governs the release of information by BOE and other state agencies. The law applies to written requests for the production of agency records or documents. FOIL requires state agencies to make all records available to the public for inspection unless the release of such records, or portions thereof, is specifically exempted from disclosure by law.

There are several exemptions to FOIL's disclosure requirements. Most relevant here, state agencies may deny access to records, or portions thereof, that are compiled for law enforcement purposes and which, if disclosed, would interfere with law enforcement investigations or judicial proceedings; deprive a person of their right to a fair trial or an impartial adjudication; or would disclose confidential information relating to a criminal investigation.

The BOE records access officer is required to maintain a current list of all BOE records available for public inspection and copying. Notably, BOE's Freedom of Information Subject Matter List for 2016 includes pleadings, briefs, legal memoranda, decisions, and orders in litigated cases in which the BOE has been a party, but does not include Enforcement Division materials.

Voter registration records are public except for certain personal identifying information, namely, driver license numbers; department of motor vehicle non-driver photo ID numbers; and social security numbers.⁷ Likewise, records of county boards of elections, as well as the New York City Board of Elections, are public records.⁸ However, there is no language contained in the Election Law suggesting that BOE Enforcement Division documents cannot be deemed privileged and confidential for the same reasons set forth in the law enforcement exemption to FOIL.

THE INSPECTOR GENERAL FOUND THAT THE BOARD OF ELECTIONS DIRECTOR OF PUBLIC INFORMATION DISSEMINATED THE ENFORCEMENT DIVISION'S DOCUMENTS

In the course of the Inspector General's investigation, the Inspector General conducted sworn interviews of more than 25 BOE employees, including four commissioners, the BOE's two co-executive directors, the Chief Enforcement Counsel, BOE co-counsel, and Public

⁷ N.Y. Election Law § 3-220 (Consol. 2016).

⁸ N.Y. Election Law § 3-212 (Consol. 2016).

Information Office staff. The Inspector General inquired of every witness, all of whom testified under oath, whether they had disseminated the Enforcement Division documents that were discussed in and reprinted by the *New York Daily News*. John W. Conklin, the Director of Public Information for the BOE, cooperated with the Inspector General's investigation and admitted under oath that he emailed the letter and the attached memorandum to both Kenneth Lovett of the *New York Daily News* on April 20, 2016, and, later, to Scott Reif, deputy director of communications for the New York Senate Republicans.

When questioned about his dissemination of the documents to Lovett, Conklin testified that on April 20, 2016, Lovett called him and requested, in sum and substance, documents relating to allegations of efforts to evade campaign contribution limits on behalf of Democratic candidates for the New York State Senate in 2014. In response, Conklin emailed Lovett the Enforcement Division documents later that same day. At the time of Conklin's dissemination, it was public knowledge due to a front-page story in the *New York Times* that the matters discussed in these documents were subject to active criminal investigations by federal and local prosecutors and that grand jury subpoenas had been issued.

Conklin, who has been the BOE's Director of Public Information since 2009, testified that he did not seek approval or advice from anyone else at the BOE before sending the Enforcement Division documents to Lovett.

When testifying before the Inspector General, Conklin acknowledged that the documents he disseminated were marked "privileged and confidential". At the same time, he professed some purported uncertainty as to whether his dissemination was prohibited, noting that there is no rule or regulation at BOE that defines confidentiality, and asserting that the commissioners do not necessarily treat documents labeled as privileged and confidential as such. Conklin also testified that during his time at the BOE, other matters discussed during executive session had been disseminated to the public by BOE employees.

Notwithstanding these statements, Conklin admitted that prior to April 20, 2016, he had never provided anyone in the news media with copies of documents labeled privileged and confidential. He also acknowledged that the BOE's Employee Handbook does in fact contain instructions regarding the treatment of confidential information. He attempted to undermine this confidentiality policy by opining that the handbook conflicts with provisions of the New York Election Law requiring that all records be public except for certain types of personal identifying information of voters. As noted above, however, those provisions do not apply to Enforcement Division records, including records regarding confidential law enforcement investigations relevant to this matter.

DISPARATE TESTIMONY REFLECTING UNCERTAINTY REGARDING THE DISSEMINATION OF CONFIDENTIAL ENFORCEMENT DIVISION MATERIALS LACKS CREDIBILITY

As discussed above, the BOE Employee Handbook states that “all information” that BOE employees “read, see or hear is confidential.” The plain language of the Open Meetings Law and FOIL also suggest that Enforcement Division documents should be considered confidential until the matter is completed in all respects. In addition, the section of the BOE’s 2014 Annual Report discussing the creation of the Enforcement Division states that, “[a]ll complaints received by the [Enforcement] Division are confidential. The identities of complainants and the existence of particular investigations is [*sic*] held in the strictest confidence.”

Enforcement Division employees generally testified that they adhere to the Enforcement Division’s Code of Conduct, which is underscored by the Enforcement Division’s practice of emailing the code to employees and having them confirm receipt of the code by email. In addition, Enforcement Division materials are not included on the BOE’s FOIL subject matter list, and Sugarman testified that she does not provide information about open investigations in response to FOIL requests. Moreover, enforcement matters are discussed in executive session outside the public purview, and Enforcement Division documents sent to the board for executive session are labeled privileged and confidential.

Nevertheless, testimony to the Inspector General reflected purported confusion at the BOE regarding the confidentiality of Enforcement Division materials and whether the board’s executive sessions are confidential. Several witnesses recognized that the Enforcement Division documents disseminated in this matter were, in fact, privileged and confidential. Others, including multiple senior staff members, testified that just because a document was labeled privileged and confidential did not make it so, and that the BOE’s chief enforcement counsel may not have the authority to deem material privileged and confidential. All four commissioners testified that the BOE has no confidentiality policy.

Co-Executive Director Robert A. Brehm testified that the purpose of executive session meetings is to discuss confidential matters and that executive session activities are considered privileged and confidential. Regarding Enforcement Division documents labeled privileged and confidential, Brehm testified that he would need to consult with counsel to determine whether documents designated as privileged and confidential by the chief enforcement counsel were, actually, privileged and confidential. Brehm also testified that commissioners might have the authority to disclose confidential material outside the BOE. Similarly, Co-Executive Director Todd D. Valentine testified that while he treats executive session matters as privileged and confidential, the privilege belongs to the commissioners. Valentine did not provide any specific rule or regulation in support of this position.

Brian Quail, co-counsel to the BOE, testified that while he considered Enforcement Division documents to be confidential, there was a “potentially open question” regarding whether one of the commissioners could provide privileged and confidential Enforcement

Division documents outside of the BOE. Quail also testified that it would be “inconceivable” that anyone, including a commissioner, would give Enforcement Division documents to the press. By contrast, Kimberly A. Galvin, co-counsel to the BOE, testified that the words privileged and confidential on the Enforcement Division documents were simply a “marking that [Sugarman] provided to the document.” According to Galvin, the Enforcement Division documents were not, in fact, confidential, and the BOE works under the assumption that everything at the BOE is public. However, Galvin acknowledged that the BOE discusses certain matters in executive session to shield them from the public.

Testimony by commissioners also reflected some disagreement about confidentiality. Co-Chair and Commissioner Peter S. Kosinski testified that when he reads the words privileged and confidential on Enforcement Division documents, he understands that to mean that he should not share the documents outside the BOE. He testified that it would be inappropriate to discuss executive session matters outside of the BOE without approval of all the commissioners. Similarly, Commissioner Gregory P. Peterson testified that when he reads the words privileged and confidential on an Enforcement Division document, he understands that to mean that the document should remain with the board, and that to disseminate it would be inappropriate. Commissioner Andrew J. Spano testified that when he receives a document marked privileged and confidential, the document is privileged and confidential. Peterson and Spano both testified they treat matters discussed in executive session as confidential. Co-Chair and Commissioner Douglas A. Kellner testified that there is no established procedure at the BOE for handling documents marked privileged and confidential, but that it is the BOE’s longstanding practice to keep such documents confidential. He also testified that commissioners have a certain level of discretion. Kellner testified that it was not clear to him whether a commissioner would be forbidden from providing the Enforcement Division documents to the press. Like Valentine, Kellner pointed to no authority supporting this position.

Finally, Sugarman testified that every investigation in the Enforcement Division is confidential. Sugarman further testified that the privileged and confidential label on her communications to the board meant that the documents should not be dispersed to anyone outside of the BOE. According to Sugarman, all conversations held in executive session are confidential.

In light of the BOE Employee Handbook, the Enforcement Division’s Code of Conduct, and the BOE’s use of executive session to discuss Enforcement Division matters, any purported uncertainty as to whether Enforcement Division documents are privileged and confidential defies logic and credulity. The Enforcement Division cannot take major investigative steps, such as subpoenaing witnesses or referring a matter for criminal prosecution, without providing information and materials to the commissioners for board meetings and seeking approval from the board. Public dissemination of the materials required for the board to approve the Enforcement Division’s actions could compromise the division’s investigations and undermine outside prosecutors’ ability to build successful cases.

Despite the disparate testimony and opinion at the BOE regarding confidentiality, all witnesses who testified other than Conklin denied disseminating the Enforcement Division documents outside the BOE.

Commissioner Peterson testified that if a BOE employee provided Lovett with the Enforcement Division documents, the employee should be fired. Commissioner Kellner testified that if a BOE employee disseminated the documents to cause someone political embarrassment, the employee should be disciplined. Notably, on prior occasions, Commissioner Kellner himself disclosed information to the press and third parties regarding ongoing Enforcement Division investigations.

In fact, the Inspector General's investigation revealed multiple prior occasions when BOE matters that could be considered confidential were disseminated to the press. On those occasions, there was disagreement within the BOE regarding the propriety of those disseminations. Yet the BOE never developed additional rules, policies, or regulations outlining what BOE materials are confidential and when such materials may be shared outside the agency. Likewise, the BOE did not institute any additional training for its staff to address this apparent ambiguity. The Inspector General's investigation determined that the BOE's lack of consensus around confidentiality is a bipartisan problem, which speaks to the need for clear rules and guidance to ensure the integrity of BOE's operations and enforcement matters. In fact, both Kellner and Spano testified that it would be appropriate for the BOE to have a defined confidentiality policy.

FINDINGS AND RECOMMENDATIONS

On or about April 26, 2016, the Inspector General received a complaint alleging that confidential Board of Elections Enforcement Division information had been disseminated to the press.

The Inspector General's investigation substantiated the allegation that there was a dissemination of confidential documents to the press insofar as the Inspector General discovered that Director of Public Information John W. Conklin provided a letter labeled "privileged and confidential," as well as a memorandum prepared by the Enforcement Division and disseminated with the letter, to Kenneth Lovett of the *New York Daily News*. The investigation further revealed disparate opinions at the Board of Elections regarding the definition of "privileged and confidential" and whether the Enforcement Division materials, including those at issue here, must be treated as such. While the Inspector General finds that this purported ambiguity lacks credibility, it is imperative that the Board of Elections develop clear policies and procedures so that the lack of a policy cannot be used as an excuse for future misconduct.

The Inspector General determined that since the Enforcement Division was established as a separate unit within the Board of Elections in 2014, the Board of Elections has not created sufficient rules, regulations, policies, and/or procedures regarding the treatment of Enforcement Division materials to provide clear guidance to the Board's employees. Accordingly, the

Inspector General recommends that the Board of Elections adopt appropriate rules, regulations, policies, and procedures establishing which Enforcement Division materials are privileged and confidential, and how such materials should be handled to ensure the integrity of the Board of Elections' operations and enforcement matters. Board of Elections staff must also undergo training on any new rules, regulations, policies, or procedures.

The Inspector General is forwarding this matter to the Joint Commission on Public Ethics for whatever action the Commission deems appropriate, as well as to the New York County District Attorney for whatever action he deems appropriate.