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l'éthique

Referral from the Public Sector Integrity Commissioner: The Fonberg Report

made under the
CONFLICT OF INTEREST ACT



April 30, 2013

Mary Dawson
Conflict of Interest and
Ethics Commissioner

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PREFACE

The *Conflict of Interest Act*, S.C. 2006, c.9, s. 2 (Act) came into force on July 9, 2007.

Pursuant to section 68 of the Act, if a matter is referred to the Conflict of Interest and Ethics Commissioner by the Public Sector Integrity Commissioner pursuant to subsection 24(2.1) of the *Public Servants Disclosure Protection Act*, the Conflict of Interest and Ethics Commissioner must provide a report to the Prime Minister setting out the facts in question as well as the Commissioner's analysis and conclusions in relation to the referral. A copy is provided to the public office holder or former public office holder who is the subject of the report and to the Public Sector Integrity Commissioner. The report is also made public.

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EXECUTIVE SUMMARY

This report presents the findings of my examination under the *Conflict of Interest Act* (Act) of the conduct of Mr. Robert Fonberg, while he was Senior Associate Secretary of the Treasury Board. The matter was raised in a disclosure referred to me in September 2011 by the then interim Public Sector Integrity Commissioner.

In 2007 the Treasury Board Secretariat was involved in discussions with the Department of Foreign Affairs and International Trade (Foreign Affairs) regarding \$800,000 in proposed funding for a non-profit international organization, the Forum of Federations, for a project in Sudan. At issue was whether a Treasury Board submission was required before the funds could be awarded.

It was alleged that Mr. Fonberg became involved in this matter after he was approached by the Forum of Federations' President and CEO at the time, Mr. George Anderson. According to the disclosure, Mr. Fonberg had identified himself as a former colleague, former subordinate and friend of Mr. Anderson's.

In this examination, I sought to determine whether Mr. Fonberg made a decision or participated in making a decision that placed him in a conflict of interest in contravention of subsection 6(1) of the Act, and in particular whether his involvement with this file provided an opportunity to further the private interests of a friend or improperly further the private interests of another person. I also sought to determine whether he extended preferential treatment to the Forum of Federations based on his relationship with Mr. Anderson contrary to section 7. I also examined whether Mr. Fonberg should have recused himself from involvement in this file in accordance with section 21.

I found that despite sharing a personal and professional relationship as former colleagues and senior public servants, Mr. Fonberg and Mr. Anderson were not "friends" within the meaning of the Act.

The Treasury Board Secretariat was already considering whether a Treasury Board submission would be required for the proposed funding before Mr. Fonberg became involved. The evidence gathered during this examination demonstrates that Mr. Fonberg did not seek a particular outcome on behalf of Mr. Anderson and the Forum of Federations.

There are no specific rules prohibiting Treasury Board Secretariat officials from communicating with beneficiaries or potential beneficiaries of contracts, grants or contributions. There is no evidence to indicate that Mr. Fonberg had treated Mr. Anderson differently than he would any senior stakeholder.



With respect to subsection 6(1), I found that Mr. Fonberg was not in a conflict of interest in respect of his involvement with this file and, in particular, that he did not act to further the private interests of a friend or improperly further the private interests of another person. I therefore found that he did not contravene subsection 6(1).

With respect to section 7, I found that Mr. Fonberg did not extend preferential treatment to Mr. Anderson or the Forum of Federations and that, therefore, he did not contravene this provision.

As Mr. Fonberg was not in a conflict of interest in respect of his involvement with this file, he would not have been required to recuse himself from this matter and, therefore, he did not contravene section 21.

In conclusion, I found that, in relation to his involvement in the issue of whether a Treasury Board submission was required in order for the Forum of Federations to receive \$800,000 for a project in Sudan, Mr. Fonberg did not contravene the *Conflict of Interest Act*.

REFERRAL

On September 20, 2011 the then-interim Public Sector Integrity Commissioner referred to me, under subsection 24(2.1) of the *Public Servants Disclosure Protection Act*, a protected disclosure that his office had received on May 20, 2008. The disclosure raised conflict of interest concerns, alleging that in 2007 Mr. Robert Fonberg had, while he was Senior Associate Secretary of the Treasury Board, made a decision “that resulted in a financial award to an external party as a result of preferential treatment or assistance to a friend.”

In 2007 the Treasury Board Secretariat was involved in discussions with the Department of Foreign Affairs and International Trade (Foreign Affairs) about \$800,000 in proposed funding for a non-profit international organization, the Forum of Federations, for a project in Sudan. The Forum of Federations had already undertaken work in Sudan using core funding provided by Foreign Affairs and approved by the Treasury Board. At issue was whether a new Treasury Board submission would be required before the additional funding could be approved. Information included with the disclosure indicated that Mr. Fonberg participated in these discussions shortly before he left the Treasury Board Secretariat to assume his duties with the Department of National Defence.

The individual who made the disclosure to the Public Sector Integrity Commissioner said that it was very unusual for Mr. Fonberg to be involved in an issue such as this one, and that his involvement appeared to arise from a personal relationship between himself and the President and CEO of the Forum of Federations at the time, Mr. George Anderson. Documents accompanying the disclosure indicated that Mr. Anderson had been in contact with Mr. Fonberg about this issue and that, as a result, Mr. Fonberg had become engaged in this file. According to the disclosure Mr. Fonberg had identified himself as a former colleague, former subordinate and friend of Mr. Anderson.

Based on the information before me at that time, I had reason to believe that Mr. Fonberg might have contravened subsection 6(1), and sections 7 and 21, of the *Conflict of Interest Act* (Act).

Subsection 6(1) prohibits public office holders from making, or participating in making, a decision that would place them in a conflict of interest. I was concerned that Mr. Fonberg might have placed himself in a conflict of interest by furthering the private interests of Mr. Anderson as a friend or else by improperly furthering the private interests of Mr. Anderson or the Forum of Federations.

Section 7 prohibits public office holders, in exercising an official power, duty or function, from giving preferential treatment to a person or organization based on the identity of someone



representing that person or organization. I was concerned that Mr. Fonberg might have given preferential treatment to the Forum of Federations because of his relationship with Mr. Anderson.

Section 21 requires that public office holders recuse themselves from any discussion, decision, debate or vote on any matter in respect of which they would be in a conflict of interest. I was concerned that, by not recusing himself from the decisions around whether a Treasury Board submission was required for the proposed \$800,000 funding, Mr. Fonberg might have contravened this section.

PROCESS

In January 2012, before making a final decision on whether to launch an examination, my Office spoke to the individual who made the disclosure to the Office of the Public Sector Integrity Commissioner. During that meeting my Office was asked not to identify that individual and undertook not to do so.

Section 68 of the *Conflict of Interest Act* (Act) states that when a matter is referred to me by the Public Sector Integrity Commissioner pursuant to subsection 24(2.1) of the *Public Servants Disclosure Protection Act*, I must produce a report setting out the facts in question as well as my analysis and conclusions in relation to the referral.

On January 19, 2012, I decided to commence an examination in accordance with subsection 45(1) of the Act, and I wrote to Mr. Fonberg to inform him accordingly. I indicated that the relevant sections of the Act would appear to be subsection 6(1) and sections 7 and 21. I asked Mr. Fonberg to provide me, in writing, with any relevant factual information and any views he might have on whether he had breached any of his obligations under the Act in connection with the activities described above.

I received a response from Mr. Fonberg on February 17, 2012 and interviewed him on April 3, 2012. My Office interviewed five other witnesses. Some of the witnesses also provided documentary evidence. The Schedule to this Report includes a list of all witnesses interviewed in connection with this examination.

In keeping with the practice I have established, Mr. Fonberg was given an opportunity to comment and make further representations on the factual sections of this report (Referral, Process, Findings of Fact and Mr. Fonberg's Position) before it was finalized.



FINDINGS OF FACT

The disclosure I received from the Public Sector Integrity Commissioner indicated that Mr. Fonberg participated in making a decision in respect of which he might have been in a conflict of interest, and in respect of which he might have given preferential treatment to the Forum of Federations based on his relationship with Mr. Anderson.

In order to determine whether Mr. Fonberg contravened the *Conflict of Interest Act* (Act), it was necessary to understand the relationship between Mr. Fonberg and Mr. Anderson, Mr. Fonberg's involvement in discussions relating to the decision as to whether a Treasury Board submission was required for the proposed \$800,000 funding and any steps taken by Mr. Fonberg to assist Mr. Anderson and the Forum of Federations. It was also necessary to determine whether Mr. Fonberg's involvement in this matter was unusual.

Background

Relationship between Mr. Fonberg and Mr. Anderson

Mr. Anderson and Mr. Fonberg have known each other since 1988. Mr. Fonberg told me that they had met when Mr. Anderson was Assistant Deputy Minister at the then-Department of Energy, Mines and Resources and Mr. Fonberg was an executive at the Department of Finance in the area of economic development. Mr. Fonberg said that he and Mr. Anderson worked together primarily in connection with the energy mega-projects of the day. As senior federal public servants, they continued to work together in a variety of capacities. They worked in the same department at times, including the Privy Council Office in the 1990s. Mr. Anderson retired from the federal public service in 2005.

Mr. Fonberg said that his relationship with Mr. Anderson was professional and collegial but that they were not friends as such. Mr. Anderson told my Office that he and Mr. Fonberg had had a good working relationship, but that they had never had a social relationship.

The proposed \$800,000 contribution to the Forum of Federations

The Forum of Federations is an Ottawa-based international organization that supports the development of, and promotes cooperation among, federations around the world. In 2005 Foreign Affairs agreed to provide the Forum of Federations with \$20 million over six years to support its work, including a project in Sudan. The 2005 agreement between Foreign Affairs and the Forum of Federations, which was approved by the Treasury Board Secretariat, included a condition requiring the Forum of Federations to make a new Treasury Board submission if it wished to solicit additional government funds.



In May 2007, the Forum of Federations had completed the project in Sudan using core funds it had received as a result of the 2005 agreement with Foreign Affairs. The Forum of Federations was subsequently asked by Foreign Affairs to undertake a second phase of the project. The \$800,000 at issue was meant to support that work. Email exchanges indicate that the Treasury Board Secretariat had been involved with this file at least since mid-June 2007.

There were discussions within the Treasury Board Secretariat as to whether a new Treasury Board submission would be required in order for the Forum of Federations to receive the additional funds. Some Treasury Board officials argued that the terms of the 2005 agreement required it. Other Treasury Board officials, some officials at Foreign Affairs as well as Mr. Anderson questioned this position, given that the Forum of Federations had been asked by Foreign Affairs to do the work.

Initial involvement of Mr. Fonberg

Mr. Fonberg did not specifically recall when he first heard of the discussions about the possibility of Foreign Affairs providing \$800,000 to the Forum of Federations, but he believed it was in early July 2007 during a lunch with Mr. Anderson. Mr. Fonberg said that, to the best of his recollection, the lunch had been set up by Mr. Anderson. He believed that Mr. Anderson mentioned to him an issue involving a difference in interpretation between Mr. Anderson and some officials at the Treasury Board Secretariat. Mr. Fonberg said that he would probably have told Mr. Anderson that he would look into it.

Mr. Anderson recalled speaking to Mr. Fonberg about the issue of the \$800,000 funding, but did not remember whether it was over the phone or at lunch. Mr. Anderson noted that it was not unusual, given his former position, for him to speak to people at the Deputy Minister level. He told my Office that he did not recall asking Mr. Fonberg to do anything specific, but was seeking information from Mr. Fonberg as to where the file stood. Mr. Anderson said that he had been trying to sort out the issues around the file with Foreign Affairs, and that Foreign Affairs had told him that the problems were with the Treasury Board Secretariat. Mr. Anderson then asked Mr. Fonberg if he could look into the issue.

Mr. Fonberg said that he had raised the issue with Mr. Daniel Jean, an Assistant Secretary at the Treasury Board Secretariat, but did not have a clear recollection as to when or to whom else he would have spoken at the time. Mr. Jean told my Office that, to the best of his recollection, the first time Mr. Fonberg raised the file with him was during a meeting on August 1, 2007.



August 1, 2007 meeting

Documents from the Treasury Board Secretariat indicate that, on August 1, 2007, Mr. Fonberg did call a meeting with staff from the Treasury Board Secretariat who had been involved with this file. They discussed the 2005 agreement between the Forum of Federations and Foreign Affairs and the issue of whether a new Treasury Board submission was required in order for the Forum of Federations to receive the additional \$800,000 funding. At the meeting, Mr. Fonberg asked for a legal opinion in order to clarify the terminology of the 2005 agreement. He also asked that the history of the file be documented.

According to the individual who made the disclosure, during the meeting Mr. Fonberg said that he would be speaking with Mr. Anderson later that day. That individual also stated that Mr. Fonberg had identified himself as a friend and former colleague of Mr. Anderson. Mr. Jean, who had attended the meeting, said that Mr. Fonberg had mentioned having worked with Mr. Anderson, but did not recall that Mr. Fonberg had described Mr. Anderson as a friend. Mr. Jean added that there was no suggestion that Mr. Fonberg wanted any eventual decision taken by Treasury Board Secretariat to favour Mr. Anderson.

Mr. Fonberg told me that he had no recollection of the August 1, 2007 meeting, or of telling his staff that he would be speaking to Mr. Anderson later that day. He told me that, if he had said that he would be speaking to Mr. Anderson, it would likely have been to explain to Mr. Anderson that there continued to be a difference of interpretation. Mr. Fonberg told me that he did not remember saying that Mr. Anderson was a friend and that he would be surprised if he had.

Mr. Fonberg said he did not recall speaking with Mr. Anderson around August 1, 2007. Mr. Anderson also told my Office that he did not specifically recall speaking to Mr. Fonberg on August 1, 2007, but added he had spoken to numerous government officials regarding this file.

Other than the information provided by the individual who made the disclosure, I have found no evidence during this examination indicating that Mr. Fonberg and Mr. Anderson are friends or that Mr. Fonberg identified Mr. Anderson as such during this meeting.

Communications following the August 1, 2007 meeting

According to the individual who made the disclosure, during a telephone conversation on August 2, 2007 an official at Foreign Affairs told an official from the Treasury Board Secretariat that Mr. Anderson had called to inform Foreign Affairs that Mr. Fonberg had agreed to a liberal interpretation of the original Treasury Board decision and that the Sudan project funding could go ahead.



During his interview with my Office, Mr. Anderson said that he could not recall having done this. He said that it is possible that, after he had presented his position to Mr. Fonberg, Mr. Fonberg said something like ‘that sounds reasonable to me’ and Mr. Anderson had shared that with Foreign Affairs. However, Mr. Anderson said that he did not think that Mr. Fonberg had made any commitment at that time and that he doubted that he had suggested to Foreign Affairs that Mr. Fonberg had done so.

Mr. Fonberg told me that he did not recall telling Mr. Anderson that he had agreed to a liberal interpretation and that he would be surprised if he had. He said that there were still legitimate differences of views at that point.

Email exchanges between Mr. Anderson and Mr. Fonberg

The documents gathered provided evidence of two email exchanges that occurred after August 1, 2007 between Mr. Anderson and Mr. Fonberg.

In an email exchange on September 10, 2007, Mr. Anderson asked Mr. Fonberg for an update on the file. Mr. Anderson wrote that he understood from Foreign Affairs that the Sudan program was a centre piece of Canada’s presence in that country and that they wanted the project to go ahead, but that they were unable to complete a contract because of uncertainties at the Treasury Board Secretariat. Mr. Fonberg responded that he had the same understanding as to the importance of the Sudan project, and that Mr. Jean was trying to sort out the issue with Foreign Affairs and would be in touch with Mr. Anderson shortly. Mr. Fonberg also wrote that he wished to sort out the specific issues around the Sudan file before achieving a more generic solution for future files.

On September 26, 2007, Mr. Anderson sent Mr. Fonberg an email with the subject line “three days to sort out our problem”. Both Mr. Anderson and Mr. Fonberg told my Office that the subject line of the email likely reflected the fact that Mr. Fonberg was scheduled to leave the Treasury Board Secretariat to assume his duties at the Department of National Defence three days later.

In that second email, Mr. Anderson wrote that a meeting was to take place the following day between Foreign Affairs and an official from the Treasury Board Secretariat. Mr. Anderson expressed concern that the Treasury Board Secretariat might be adopting an overly rigid position on the question of whether a new Treasury Board submission would be required in order for the Forum of Federations to receive the proposed funding from Foreign Affairs.

In this same email, Mr. Anderson noted that he had originally suggested a meeting between himself and senior officials from Foreign Affairs, the Treasury Board Secretariat and



perhaps the Canadian International Development Agency. He added that it appeared that the Treasury Board Secretariat did not want to do this. He wrote, “I am worried that this risks becoming a dragged-out bureaucratic saga.” In the email, Mr. Anderson asked Mr. Fonberg if he could ask Mr. Jean to attend the meeting and to report back to Mr. Fonberg.

Mr. Fonberg forwarded the email to Mr. Jean, asking him to attend the meeting or, if he could not, whether he thought Mr. Fonberg should go. Mr. Jean responded that Mr. Allan Culham, an executive director from Treasury Board Secretariat, would attend the meeting. In an email of September 27, 2007, which continued this exchange, Mr. Jean added that, from discussions so far it would appear that the Forum of Federations should be doing the work in Sudan using existing funding from their 2005 agreement with Foreign Affairs.

Mr. Fonberg replied: “On FoF, at this point, the outcome will be the outcome; all I think is required is some due process to the Forum a fair hearing with the right people in the room. With clarity, everyone can get on with what they should be doing.”

The meeting referred to in this email exchange took place on September 27, 2007. It was attended by officials from the Treasury Board Secretariat and Foreign Affairs. Although Mr. Anderson had asked to attend, he was not invited and was not present at the meeting. The purpose of the meeting was to discuss the funding of the proposed project in Sudan, including the terms of the 2005 agreement between Foreign Affairs and the Forum of Federations.

Mr. Fonberg said that he did not recall having any further involvement in this file after the September 26 and 27, 2007 email exchanges.

On October 1, 2007 Mr. Fonberg moved to his new position at the Department of National Defence. He said that he left no direction in respect of this matter, and was not involved in any debriefing with staff at the Treasury Board Secretariat. He added that, until hearing from my Office, he was unaware of the final decision on whether to grant an additional \$800,000 in funding to the Forum of Federations. None of the documents gathered or the witnesses interviewed during this examination provided any evidence to the contrary.

Recommendation made following Mr. Fonberg’s departure

Officials within the Treasury Board Secretariat continued to discuss the file in the weeks following Mr. Fonberg’s departure and, on October 23, 2007, Mr. Culham sent an email to Mr. Jean recommending that the Forum of Federations could proceed with the second phase of the Sudan project without a new Treasury Board submission.

Mr. Culham’s recommendation was accepted by Mr. Jean and, on November 1, 2007, Mr. Culham emailed Foreign Affairs to communicate this decision. In the email, Mr. Culham



wrote that this decision could be communicated to the Forum of Federations. Mr. Culham also noted in his email that the Treasury Board Secretariat was discussing the establishment of future parameters for government funding of projects involving the Forum of Federations. The wider parameters were ultimately agreed upon in April 2008, more than six months after Mr. Fonberg's departure from the Treasury Board Secretariat.

Mr. Culham told my Office that, while he was aware of the communication between Mr. Anderson and Mr. Fonberg, and of the fact that Mr. Anderson was pressing the Treasury Board Secretariat to come up with a decision on the file, at no point was pressure put upon him by Mr. Jean or Mr. Fonberg to come to a specific decision on the file.

Communications between top Treasury Board executives and individuals seeking funding

As part of this examination, I considered whether there were any applicable policies, guidelines or norms governing the interactions between the top executives at the Treasury Board Secretariat and an individual seeking government funding from another department.

All witnesses who were at the Treasury Board Secretariat at the time that additional funding for the Sudan project was being discussed agreed that there were no rules or policies prohibiting Treasury Board officials from communicating with beneficiaries or potential beneficiaries of contracts, grants or contributions.

These witnesses did, however, have different views about the frequency and appropriateness of communications between Treasury Board officials and third party beneficiaries.

According to the disclosure, it was highly unusual for the Treasury Board Secretariat to be involved with someone seeking funding, as this relationship would be for Foreign Affairs to manage.

Mr. Culham said it was inappropriate for the Treasury Board Secretariat to be engaged in conversations with the Forum of Federations or Mr. Anderson. He said that the Treasury Board Secretariat's involvement in this file should have been limited to discussions with Foreign Affairs, without any representation or input from outside parties.

Mr. Jean indicated that, had he been in Mr. Fonberg's position, he would have listened to Mr. Anderson's concerns. However, he said that, in doing so, he would respect the fact that any decision to be made regarding this issue would be made between Treasury Board and Foreign Affairs. Mr. Jean said that he had no recollection of another instance where a third party stakeholder had been in direct contact with the Treasury Board Secretariat at a level as senior as that of Mr. Fonberg.



Michelle d'Auray, who was Secretary of the Treasury Board at the time that I was conducting my fact-finding in this examination, but who had had no involvement in the subject matter of this examination, told me that there are no strict rules governing direct contact between the Treasury Board Secretariat and a third party relating to a funding agreement between the third party and a line department, except those rules that normally apply with regard to conflict of interest or lobbying. She stated that instances of such communications are rare, largely because most third parties work through the line department or agency responsible for the program under which they have applied for funding or because they do not understand the government operations well enough to know where and how to direct their concerns.

In this connection, I note that, unlike many third party beneficiaries, Mr. Anderson, as a former senior public servant, was well placed to know how and to whom to direct his concerns.

Ms. d'Auray said that a third party would contact her two or three times a year. She would listen but would never commit to anything. Usually, she would not call them back but would ask one of the Treasury Board Secretariat Program Assistant Secretaries to call and redirect them to the responsible department or to call the department to ask them to contact the third party. If she did call them back (i.e. because the third party was making a request to the Treasury Board Secretariat directly), it would usually be after the decision had been taken to tell them that they would not get the funding, if this was the Treasury Board Secretariat decision, or else to note a few things that they may wish to raise in their discussions with the line department they were dealing with. She would then let the matter take its own course.

For his part, Mr. Fonberg said that there was nothing unusual or inappropriate about his involvement in this kind of file and that there is no policy prohibiting direct contact between the Treasury Board Secretariat and a recipient of funds. He was, however, unable to describe another specific instance. He also expressed the view that restricting such communications would not be a best practice.

While there are no rules or policies prohibiting Treasury Board officials from communicating directly with beneficiaries or potential beneficiaries of contracts, grants or contributions, it appears that such communications, though rare, do occasionally take place.

Summary

While Mr. Fonberg and Mr. Anderson had a personal and professional relationship as former colleagues, I have found no evidence that Mr. Fonberg and Mr. Anderson are friends within the meaning of the Act.

Mr. Fonberg became involved in this file in his official capacity as Senior Associate Secretary of the Treasury Board. Officials at the Treasury Board Secretariat were already seized



with the issue of whether a Treasury Board submission was required in connection with the additional \$800,000 funding for the Forum of Federations when Mr. Anderson contacted Mr. Fonberg about the file.

There was a difference of opinion and debate over whether or not a new Treasury Board submission was required in light of the condition attached to the previous grant to the Forum of Federations. A decision was made after different views were considered.

There are no rules against Treasury Board Secretariat officials communicating with beneficiaries or potential beneficiaries of contracts, grants or contributions. Such communications, though rare, do occasionally take place.

Mr. Fonberg's role in determining whether a Treasury Board submission was required was limited. He listened to Mr. Anderson's concerns but did not make a commitment to a specific outcome. Following his initial discussion with Mr. Anderson, Mr. Fonberg raised the issues around the file with officials at the Treasury Board Secretariat. He convened a meeting to discuss the file during which he asked for a legal opinion in order to clarify the terminology of the original 2005 agreement and asked that the history of the file be documented.

I note that Mr. Fonberg set out his position clearly in his email of September 27, 2007 to Mr. Jean. He wrote, "On FoF, at this point, the outcome will be the outcome; all I think is required is some due process to the Forum a fair hearing with the right people in the room. With clarity, everyone can get on with what they should be doing." In my view, this email from Mr. Fonberg is indicative of the nature of his involvement in this issue.

The decision as to whether the \$800,000 of funding required a Treasury Board submission was made after Mr. Fonberg left the Secretariat. There is no evidence that Mr. Fonberg committed to or pushed for a particular outcome, nor is there evidence that he left instructions with Treasury Board Secretariat officials regarding this file when he departed for his current post at the Department of National Defence.



MR. FONBERG'S POSITION

Mr. Fonberg's position is that he has not contravened any of his obligations under the *Conflict of Interest Act* (Act).

He said that, although he had worked with Mr. Anderson on various files in the past, Mr. Anderson was not a friend as such. They had had a professional relationship as colleagues but had never had a social relationship.

Mr. Fonberg said that there appeared to be a legitimate difference of opinion on the question of whether a new Treasury Board submission was required before the Forum of Federations could receive the additional \$800,000. He said he had several communications with Mr. Anderson, as a result of which he would have encouraged staff at Treasury Board to engage in dialogue to clarify different interpretations and ultimately to reach a decision.

Mr. Fonberg said no preferential treatment was afforded by him to the Forum of Federations or Mr. Anderson. He said that, to the best of his recollection, he did what he would do under similar circumstances when confronted with what he considered to be a legitimate concern or difference of views. He asked the Treasury Board Secretariat to look into the matter. He said that ambiguous language in the original agreement had resulted in different interpretations and, as Senior Associate Secretary, he exercised the traditional 'challenge function' on this file that is part of his responsibilities.

Mr. Fonberg said that, if there had not been a legitimate issue or difference of interpretations, he would have said that to Mr. Anderson and would not have taken any further action. He added that the concerns of the Forum of Federations appeared to have proven to be legitimate, given the decision made by others after his departure from the Treasury Board Secretariat. He said that the decision was made after the issues were examined following a rigorous process.

Mr. Fonberg told me that, had Mr. Anderson not contacted him, he would likely still have become involved in the file at a later stage because Mr. Anderson was copying senior members of government on his letters relating to the file.

Mr. Fonberg said that, in his opinion, he was never in a conflict of interest as he did not have a personal interest in the matter and there was never an improper furtherance of the private interests of another person. He said that he did not provide preferential treatment and that Mr. Anderson was afforded the same treatment as Mr. Fonberg would afford any senior stakeholder who had a legitimate concern that Mr. Fonberg viewed as appropriate for consideration by himself or senior management in his organization.



ANALYSIS AND CONCLUSIONS

Analysis

In this examination, I had to determine whether Mr. Fonberg contravened subsection 6(1), section 7 or section 21 of the *Conflict of Interest Act* (Act) in connection with his involvement, when he was Senior Associate Secretary of the Treasury Board, in the process that led to the decision to approve a grant of \$800,000 to the Forum of Federations without requiring that a new funding proposal be submitted.

Decision-making: Subsection 6(1)

Subsection 6(1) prohibits public office holders from making a decision that would place them in a conflict of interest:

6. (1) *No public office holder shall make a decision or participate in making a decision related to the exercise of an official power, duty or function if the public office holder knows or reasonably should know that, in the making of the decision, he or she would be in a conflict of interest.*

Section 4 defines the circumstances in which a public office holder may be understood to be in a “conflict of interest” within the meaning of the Act. It reads as follows:

4. *For the purposes of this Act, a public office holder is in a conflict of interest when he or she exercises an official power, duty or function that provides an opportunity to further his or her private interests or those of his or her relatives or friends or to improperly further another person’s private interests.*

The evidence gathered in this examination clearly demonstrates that Mr. Fonberg was involved, in his capacity as Senior Associate Secretary of the Treasury Board, in discussions about whether to grant the Forum of Federations additional public funds without requiring a new Treasury Board submission. He was exercising an official power, duty or function in doing so.

There is no evidence to suggest that Mr. Fonberg acted to further his own private interests or those of his relatives in connection with his involvement in this decision-making process.

The focus of the analysis under subsection 6(1) is, therefore, on whether Mr. Fonberg’s involvement in this file placed him in a conflict of interest within the meaning of section 4 of the Act and, in particular, whether his involvement provided an opportunity either to further the private interests of a “friend” or to “improperly” further the private interests of another person.



In the *Watson Report*, I interpreted the term “friends” as including those who have a close bond of friendship, a feeling of affection or a special kinship with the public office holder concerned and determined that the fact that two individuals are members of a broad social circle or business associates does not necessarily mean that they are also friends. In this case I found that, despite sharing a personal and professional relationship as former colleagues and senior public servants, Mr. Fonberg and Mr. Anderson are not “friends” within the meaning of the Act.

The determination of whether Mr. Fonberg contravened subsection 6(1) turns, therefore, on whether his involvement in this file can be understood to have provided an opportunity to “improperly” further Mr. Anderson’s private interests or those of the Forum of Federations.

As set out in the Findings of Facts, I have found that there are no rules or policies prohibiting Treasury Board officials from communicating with beneficiaries or potential beneficiaries of contracts, grants or contributions. I have also found that such communications, though rare, do occasionally take place between Treasury Board officials and third parties seeking funding.

There is no evidence that Mr. Fonberg acted in any way to influence or modify the process that led to the decision to grant additional funds to the Forum of Federations. In particular, his email exchange with Mr. Jean on September 27, 2007 indicates that he did not seek any particular outcome on behalf of Mr. Anderson and the Forum of Federations.

In this connection, Mr. Jean and Mr. Culham each testified that at no time did they feel any pressure from Mr. Fonberg to reach any particular result in determining whether the Forum of Federations ought to be required to make a new Treasury Board submission.

Mr. Fonberg’s involvement in these discussions was limited, consisting primarily of raising a question with his staff about the appropriate interpretation to be applied to the terms of the conditional grant governing the Forum of Federations’ existing funding.

The decision to grant the Forum of Federations additional funds without requiring a new Treasury Board submission was taken on the basis of recommendations made by Mr. Culham in late October 2007. It was conveyed by email to the Department of Foreign Affairs in November 2007 after Mr. Fonberg left his position at Treasury Board Secretariat. Mr. Fonberg did not leave any instructions with respect to this particular file on leaving for the Department of National Defence in early October 2007.

In my view, Mr. Fonberg cannot be understood to have acted improperly in relation to the decision to award the Forum of Federations a grant without requiring a new Treasury Board submission. He was not, therefore, in a conflict of interest within the meaning of the Act and, consequently, did not contravene his obligations under subsection 6(1).



Preferential Treatment: Section 7

Section 7 prohibits preferential treatment to a person or organization based on the identity of a representative in the following terms:

7. No public office holder shall, in the exercise of an official power, duty or function, give preferential treatment to any person or organization based on the identity of the person or organization that represents the first-mentioned person or organization.

In the *Paradis Report*, I interpreted “preferential treatment” to mean “treatment more favourable than might be accorded to anyone else in similar circumstances.”

As set out above in relation to my analysis of subsection 6(1), Mr. Fonberg was exercising an official power, duty or function in connection with his involvement in the decision to grant the Forum of Federations \$800,000 without requiring a new Treasury Board submission.

The analysis of section 7 turns, therefore, on whether Mr. Fonberg extended “preferential treatment” to Mr. Anderson or the Forum of Federations within the meaning of the Act.

As I have already determined, there are no specific rules prohibiting officials from the Treasury Board Secretariat from communicating with beneficiaries or potential beneficiaries of contracts, grants or contributions and that such communications, though rare, do occasionally take place between Treasury Board officials and third parties seeking funding.

As set out in the Findings of Facts, I have found that departmental officials were already considering the question of whether the Forum of Federations would be required to make a new Treasury Board submission when Mr. Anderson raised his concerns with Mr. Fonberg.

As I have noted in my analysis under subsection 6(1), the evidence gathered in this examination does not demonstrate that Mr. Fonberg’s involvement in this file served to influence or modify the process that led to the decision to grant the Forum of Federations additional funding or that he sought any particular outcome on behalf of Mr. Anderson.

Mr. Fonberg’s involvement in this decision-making process was limited and mostly consisted of asking for information about how his staff was interpreting a condition attached to the Forum of Federations’ existing grant, a provision that was not given a definitive interpretation until after Mr. Fonberg had left his position with the Treasury Board Secretariat.



In light of the evidence collected during the course of this examination I accept Mr. Fonberg's testimony that, in respect of his interactions with Mr. Anderson, he treated Mr. Anderson as he would have treated any senior stakeholder.

For these reasons, I conclude that Mr. Fonberg did not extend preferential treatment to Mr. Anderson or the Forum of Federations in connection with his involvement in the decision grant the Forum of Federations additional funding without requiring a new Treasury Board submission and, therefore, that he did not contravene section 7 of the Act.

Duty to Recuse: Section 21

Section 21 requires public office holders to recuse themselves from any discussion, decision, debate or vote on any matter in respect of which they would be in a conflict of interest within the meaning of the Act. This provision reads as follows:

21. A public office holder shall recuse himself or herself from any discussion, decision, debate or vote on any matter in respect of which he or she would be in a conflict of interest.

As I have already determined, Mr. Fonberg was involved in the decision to grant additional funding to the Forum of Federations in his official capacity as Senior Associate Secretary of the Treasury Board. However, for the same reasons set out above in relation to my analysis of subsection 6(1), Mr. Fonberg was not in a conflict of interest within the meaning of the Act in respect of his involvement in this decision-making process and, therefore, was not required to recuse himself. He did not contravene section 21 of the Act.

Conclusions

With respect to subsection 6(1), I have found that Mr. Fonberg cannot be understood to have acted improperly in relation to the decision to grant the Forum of Federations an additional \$800,000 in funding without requiring a new Treasury Board submission. He was not in a conflict of interest within the meaning of the Act and, consequently, did not contravene his obligations under subsection 6(1).

With respect to section 7, I have found that Mr. Fonberg did not extend preferential treatment to Mr. Anderson or the Forum of Federations in connection with that decision and, therefore, that he did not contravene section 7.

With respect to section 21, I have found that Mr. Fonberg was not in a conflict of interest within the meaning of the Act in respect of this decision and so was not required to recuse himself. He, therefore, did not contravene section 21 of the Act.



SCHEDULE: LIST OF WITNESSES

Except where noted, the names of all witnesses are listed below according to the organizations to which they belonged at the time the events that are the subject of this examination occurred.

Interviews

Treasury Board Secretariat

- Ms. Michelle d'Auray, Secretary of the Treasury Board (July 2009 to November 2012)
- Mr. Allan Culham, Executive Director
- Mr. Robert Fonberg, Senior Associate Secretary
- Mr. Daniel Jean, Assistant Secretary
- The individual who made the disclosure to the Office of the Public Sector Integrity Commissioner

Forum of Federations

- Mr. George Anderson, President and CEO

