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June 1, 2021

Joanne Giuffrida, Chair
Monroe County Board of Ethics
County Office Building—Room 210
39 W. Main Street
Rochester, NY 14614

Re: Legislator Ernest Flagler-Mitchell

Dear Ms. Giuffrida:

I am writing you in your capacity as Chair of the Monroe County Board of Ethics. As you know, our firm was retained by the County of Monroe “to provide independent legal and investigative services to the Monroe County Board of Ethics” in connection with a complaint against County Legislator Ernest Flagler-Mitchell. This letter constitutes our report concerning our investigative conclusions and recommendations.

To assist our office in conducting this investigation, we retained the services of Empire Risk Resolutions, Inc.—George and Wanda Markert—both of whom formerly worked as law enforcement officers and are experienced investigators.

In addition, our office was provided with file materials from the Monroe County District Attorney’s office, which office had investigated Mr. Flagler-Mitchell’s conduct prior to our retention. As detailed below, whenever we were unable to interview potential witnesses, whether because we could not locate the witness or because the witness declined to respond to inquiries from our office or from Empire Risk Resolutions, Inc., we relied on summaries of interviews which were conducted by representatives of the District Attorney’s office.

COMPLAINT

In simplest terms, the complaint against Mr. Flagler-Mitchell was made by a young female (then 19 years old) who received a photo, via Facebook messaging, of an erect penis, sent to her by Mr. Flagler-Mitchell late one evening in November of 2020.

The complainant, Lakaya Sinclair, is a young woman who met Mr. Flagler-Mitchell at a community event that followed a mass shooting on Pennsylvania Avenue in the City of Rochester in September of 2020. The event was attended not only by neighborhood residents, as well as friends and family of the shooting victims, but also by community leaders and public officials. Ms. Sinclair reports that Mr.



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Flagler-Mitchell introduced himself to her as a Monroe County Legislator. In turn, she told Mr. Flagler-Mitchell that she was an aspiring photographer. During that conversation, Mr. Flagler-Mitchell gave his business card (which identified him as a County Legislator) to Ms. Sinclair. Although Ms. Sinclair then told Mr. Flagler-Mitchell that she had a Facebook page, she didn't give him either a telephone number or an email address.

The following month, in October of 2020, Mr. Flagler-Mitchell reached out to Ms. Sinclair via Facebook. Initially, he sent Ms. Sinclair a friend request, which she accepted. Then, having friended Ms. Sinclair, Mr. Flagler-Mitchell began communicating with her using Facebook's instant messaging feature.

During these Facebook messages, Ms. Sinclair advised Mr. Flagler-Mitchell that she was having difficulty obtaining financial aid at Monroe Community College ("MCC") and asked if he could help her in that respect. Eventually, Ms. Sinclair was put in touch with an individual who supposedly could help out with her financial aid difficulties, although she reports that nothing of substance came of that contact. Ms. Sinclair further reports that there were messaging exchanges during October, most of which concerned her need for financial aid at MCC. However, at one point in October, Mr. Flagler-Mitchell's messages turned more personal. For example, he made reference to the fact that both of them were Capricorns.

Ms. Sinclair next reports that she began receiving instant messages from Mr. Flagler-Mitchell at inappropriate times—namely, late at night. This troubled Ms. Sinclair, who was then in a relationship. Furthermore, at one point Mr. Flagler-Mitchell sent her a message that consisted only of three heart emojis, with no text. Ms. Sinclair explained that the Facebook platform identifies which Facebook friends are actively using the platform at any given time. Thus, if Ms. Sinclair was up late and on her Facebook page, Mr. Flagler-Mitchell was able to tell from his own device that she was then using Facebook.

On November 24, Ms. Sinclair messaged Mr. Flagler-Mitchell advising that she would like the opportunity to do photography at any of his public speaking events. He replied with a message that he may have a project for her. However, when she asked him about the supposed project, Mr. Flagler-Mitchell replied as follows:

I will let you know when I get out of bed. I am up, but doing self love you know how us Capricorns do.¹

He closed the message with a smiley face emoji and a heart emoji.

¹ The District Attorney's office obtained copies of the Facebook messages between Ms. Sinclair and Mr. Flagler-Mitchell; quoted passages are taken from screen shots of those messages.



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Shortly thereafter, on November 24, 2020, Ms. Sinclair received a Facebook message from Mr. Flagler-Mitchell which consisted of a photograph of an erect penis in the grip of a man's hand. When Ms. Sinclair replied that "this is weird," Mr. Flagler-Mitchell deleted a number of his previous Facebook messages. All in all, it appears from the screenshots that Mr. Flagler-Mitchell deleted at least a dozen of his messages to Ms. Sinclair. We are advised that, when a Facebook user deletes his or her own messages, they disappear not only from the user's Facebook page, but from the recipient's Facebook page as well.

Ms. Sinclair also reports that after the Democrat & Chronicle reported about her complaint against Mr. Flagler-Mitchell, she received telephone calls from three women who had reached out to Ms. Sinclair via a mutual friend. These three women told Ms. Sinclair that they had received similarly inappropriate messages from Mr. Flagler-Mitchell in the past.

While this investigation was under way, Ms. Sinclair inadvertently encountered Mr. Flagler-Mitchell one weekend morning at a diner in Rochester. She was having breakfast with a family member when four men entered the diner. At first, Ms. Sinclair didn't recognize any of the men, even though she reports that the four men were staring at her, because they were all wearing masks. When the men removed their masks, she recognized one as being Mr. Flagler-Mitchell. She became distraught and began to cry. Ms. Sinclair states that she felt so uncomfortable that she left the diner. As she walked out of the diner, Mr. Flagler-Mitchell didn't speak with her, but instead held up his phone in her direction, as though he were photographing or video-recording the encounter.

MONROE COUNTY CODE OF ETHICS

Section 45-13 of the Monroe County Code of Ethics reads as follows:

Every officer or employee should endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust. He should not use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others. He should not by his conduct give reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties or that he is affected by the kinship, position or influence of any party of person.

This investigation focused on that portion of Section 45-13 that prohibits an officer or employee from attempting "to use his official position to secure unwarranted privileges or exemptions for himself or others." This report recognizes that interpretation of the Code of Ethics is the province of the Board of Ethics and not this investigator. However, it is our belief that an attempt to utilize a legislator's



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office as an opportunity to secure personal favors from county residents—regardless of whether the resident was a direct constituent of the legislator—constitutes a violation of Section 45-13. Ms. Sinclair’s complaint can be understood as alleging an attempt by a County Legislator to take advantage of his position for the purpose of obtaining sexual favors from a resident. Accordingly, with deference to any contrary opinion by the Board of Ethics, it is our belief that Ms. Sinclair presents the Board with a cognizable claim that Mr. Flagler-Mitchell violated Section 45-13.

MR. FLAGLER-MITCHELL’S EXPLANATION

Several attempts were made to interview Mr. Flagler-Mitchell concerning Ms. Sinclair’s complaint. Three letters were sent to Mr. Flagler-Mitchell—on April 27, May 11 and 19, 2021. In addition, the undersigned spoke with Mr. Flagler-Mitchell by telephone on May 7 and May 11. Our letter of May 11 (which was sent by email and first class mail) advised Mr. Flagler-Mitchell that the Board of Ethics was unwilling to delay its investigation, particularly in light of the fact that the District Attorney’s office had announced that it did not intend to pursue criminal charges against him. In addition, as he had requested, we advised Mr. Flagler-Mitchell that his conduct was being evaluated in light of Section 45-13 of the County’s Code of Ethics.

When we failed to hear further from Mr. Flagler-Mitchell, our May 19 letter advised him that unless we heard from him or his attorney by the close of business on May 27, we would conclude our investigation without his interview, and would instead rely on a summary of his interview by representatives of the District Attorney. We heard nothing further from Mr. Flagler-Mitchell after his phone call of May 11. He never contacted us directly or through an attorney to schedule an interview. Accordingly, the following is taken from interview summaries and other materials found in the District Attorney’s file.

A telephone call between Ms. Sinclair and Mr. Flagler-Mitchell, occurring on December 23, 2020, was recorded by investigators of the District Attorney’s office, with the consent of Ms. Sinclair. During that call, Mr. Flagler-Mitchell apologized to Ms. Sinclair and claimed that he had not meant to send the photo to her. She asked if she had done anything that made Mr. Flagler-Mitchell think it was okay to have sent the photo? He replied, “no”, and claimed that the photo was intended, not for Ms. Sinclair, but for his wife.

Subsequently, on January 5, 2021, Mr. Flagler-Mitchell was interviewed by two of the District Attorney’s investigators. Mr. Flagler-Mitchell repeated his claim that the photo was intended for his wife, with whom he claimed to have been texting at the same time he was messaging with Ms. Sinclair. He also made the same claim about the “self love” comment he had made earlier that night – namely, that it had been intended for his wife.



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During his January 5 interview, Mr. Flagler-Mitchell admitted that he and another individual had spoken with Ms. Sinclair about assisting her with MCC.

It is our conclusion that Mr. Flagler-Mitchell's explanation for his conduct lacks credibility. First of all, the Facebook platform clearly identifies the person with whom the Facebook user is messaging, making it very hard to understand how Mr. Flagler-Mitchell could have mistaken the recipient of his message. Moreover, the screen shots of the November 24, 2020 messages between Mr. Flagler-Mitchell and Ms. Sinclair belie this explanation. There is a record of a series of messages from Mr. Flagler-Mitchell to Ms. Sinclair that are today deleted, but that suggest an uninterrupted series of communications between the two of them. It is most unlikely that this series of messages could have occurred without Mr. Flagler-Mitchell having recognized the identity of the person with whom he was messaging. Furthermore, in the November 24 messages, he did not offer the same explanation to Ms. Sinclair; nor does she recall any of the deleted messages having offered this explanation.

Secondly, and of perhaps greater significance, is that others have reported similar conduct on the part of Mr. Flagler-Mitchell. The District Attorney's investigative file revealed that approximately 11 other women have reported receiving inappropriate or explicit messages and photos from Mr. Flagler-Mitchell. The majority of these third-parties requested anonymity, and although some women identified themselves to the investigators, none will be identified by name in this report. It is unnecessary to name any of these third-parties, as such public disclosure would cause more harm to innocent individuals.

Some of the third-party witnesses advised that Mr. Flagler-Mitchell's messages were unwarranted, and that either they ceased all communications with him thereafter, or that they remained in contact with him but that he sent no more inappropriate messages. In some instances, however, the inappropriate or explicit communications were consensual. In some other cases, third-parties received a similar photograph of an erect penis or a photo that was described more generally as "graphic". In at least one instance, the recipient of explicit messages and photos responded in kind.

Lastly, according to materials in the District Attorney's investigative file, on November 24, 2020, the same day on which he sent the photo to Ms. Sinclair, Mr. Flagler-Mitchell was exchanging explicit photographs with a third-party.

Thus, in view of the fact that numerous third parties reported similar inappropriate messaging by Mr. Flagler-Mitchell, including on November 24, 2020, we believe that the explanation about intending to send the photo to his wife strains credulity. Rather, the conduct reported by Ms. Sinclair appears consistent with a pattern of similar behavior by Mr. Flagler-Mitchell with other women.



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CONCLUSIONS

Initially, it is the conclusion of our investigation that Ms. Sinclair was entirely credible. Her recollection of the events of November 24, 2020, is consistent with the Facebook screen shots obtained by the District Attorney. More importantly, her description of these events is consistent with the reports of several others who came forward once Ms. Sinclair's complaint was reported publicly.

Conversely, it is the opinion of this investigation that Mr. Flagler-Mitchell's explanation for the events of November 24 is lacking in credibility, for the reasons stated above.

It is the further conclusion of this investigation that Mr. Flagler-Mitchell violated Section 45-13 of the Monroe County Code of Ethics. He introduced himself to Ms. Sinclair as a County Legislator; he offered to assist her with obtaining financial aid at MCC; and he initially communicated with her, not on a social level, but ostensibly in the context of assisting her, whether with MCC or with her photography aspirations. Secondly, it is a fair inference from the facts that Mr. Flagler-Mitchell sent the photo "to secure unwarranted privileges" – namely, sexual favors. Although Section 45-13 of the Code of Ethics speaks in very general terms, and does not explicitly prohibit unwanted sexual overtures, it is our conclusion that sending an explicit photo to a community resident that he had offered to help, in his capacity as a public official, constitutes a violation of Section 45-13.

RECOMMENDATIONS

Lastly, it is our opinion that the Monroe County Code of Ethics should be revised to address two issues which were presented by this investigation.

First, the Code of Ethics should expressly prohibit sexual harassment and unwanted sexual overtures. Recent events have revealed numerous instances of inappropriate sexual behavior committed by public officials, including elected public officials; by prominent executives; by celebrities and executives in the entertainment field; in the military; and in fact, throughout the public and private sectors. Because this problem seems almost pervasive in today's world, we believe that the Code of Ethics should explicitly prohibit any such conduct. We are not suggesting that the Code should govern the private lives of Monroe County employees or officials. However, this incident demonstrates that there is a need for the Code of Ethics to address the problems of harassment and unwanted sexual behavior.

Secondly, the Code of Ethics should mandate truthfulness in connection with all legitimate investigations conducted by or on behalf of the County of Monroe. False statements made during the course of legitimate investigations should be prohibited by the Code of Ethics.



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Thank you for allowing our firm to be of service to the Board of Ethics. I am forwarding the original of this letter/report to you in hardcopy, but am also emailing a PDF. I understand that you will forward copies to the other members of the Board of Ethics—namely, Hilda Rosario Escher and Clayton Osbourne.

Respectfully,

David Rothenberg

DR/be