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Office of the Conflict of Interest and Ethics Commissioner
ATTN: Mary Dawson, Commissioner
Parliament of Canada
Centre Block, P.O. Box 16
Ottawa, Ontario
K1A 0A6

Email: ciec-ccie@parl.gc.ca

January 31, 2017

RE:

- (a) Request again for disclosure of whether you have applied to be reappointed for another term;**
- (b) Request that you recuse yourself from ruling on the matters addressed in this letter because you received 6-month contract worth approximately \$100,000 from the Trudeau Cabinet in mid-December (and also may have applied for reappointment);**
- (c) Request for ruling again that Trudeau Cabinet violated the *Conflict of Interest Act* by giving you that contract;**
- (d) Request for a ruling again that Trudeau Cabinet violated the *Conflict of Interest Act* by giving Commissioner of Lobbying a similar 6-month contract;**
- (e) Request for ruling that Prime Minister Trudeau violated the *Conflict of Interest Act* and *MP Code* by receiving gifts from the Aga Khan, and;**
- (f) Request for ruling that MP Seamus O'Regan violated the *MPs Code* by receiving gifts from the Aga Khan**

Dear Commissioner Dawson:

I am writing concerning enforcement of the *Conflict of Interest Act* (“COIA”) generally, concerning the gifts the Aga Khan has given to Prime Minister Trudeau and MP Seamus O’Regan, and also again requesting a ruling that Prime Minister Trudeau and his Cabinet were in a conflict of interest under section 4 of the COIA and, as a result, under subsection 6(1) were and are prohibited from either reappointing you or extending your term as Conflict of Interest and Ethics Commissioner or from choosing another person as Commissioner.

(a) Request for disclosure of whether you have applied to be reappointed

I am writing to request first, as a few journalists have in the past few months, that you disclose whether you have applied to the federal Cabinet to be reappointed to another term as Conflict of Interest and Ethics Commissioner (as is allowed under subsection 81(3) of the *Parliament of Canada Act*).

Your term ended in early January (although it was renewed for six months by the Trudeau Cabinet). The deadline for applying to the position was November 21, 2016. It was extended to January 9, 2017 but that extension was made after November 21st. As a result, you must know whether you have applied to be reappointed.

You must disclose whether you have applied to be reappointed because if you have you are in a financial conflict of interest currently concerning making rulings that affect Prime Minister Trudeau and members of his Cabinet or Liberal Party caucus.

You have this financial conflict of interest because your reappointment would mean you would receive up to \$1.4 million (approximately \$200,000 annually for the 7-year term).

Whether you receive either of those amounts of money will be decided by the Cabinet (“Governor-in-Council”) which under subsection 81(1) of the *Parliament of Canada Act* decides whether to nominate you for reappointment, with approval by the House of Commons (where Liberal MPs hold a clear majority of the seats).

It is unclear in the *Parliament of Canada Act* whether the Cabinet even has to consult with the leaders of every recognized party in the House of Commons on your reappointment. Subsection 81(1) requires that consultation on first appointment, but subsection 81(3) states simply:

“Reappointment

81.(3) The Commissioner is eligible to be reappointed for one or more terms of up to seven years each.”

Democracy Watch’s position is that really you are in a conflict of interest when ruling on any matters that affect any MP, as the Liberals also have an interest in having opposition party MPs found guilty of violating of the *COIA* or the *Conflict of Interest Code for Members of the House of Commons* (“*MP Code*”) as those rulings would hurt the opposition parties’ profile and standing with the public.

Section 10 of the *COIA* states:

“Offers of outside employment

10. No public office holder shall allow himself or herself to be influenced in the exercise of an official power, duty or function by plans for, or offers of, outside employment.”

I believe you face an analogous situation – only it is your plans for continuing as Commissioner that create conflict of interest.

Clause 3(b) of the *COIA* states:

“Purpose

...

3.(b) minimize the possibility of conflicts arising between the private interests and public duties of public office holders and provide for the resolution of those conflicts in the public interest should they arise;

To fulfill this main purpose of the *COIA*, you must disclose whether you have applied to be reappointed. Given that you are an employee of the public, clearly the public also has a right to know whether you have applied to be reappointed.

(b) Recusal because you received six-month contract from Trudeau Cabinet (and may have applied to be reappointed)

For all the reasons set out above in section (a) you must recuse yourself from ruling on the matters addressed in this letter, and any other matters concerning the *COIA* and the *MP Code*, especially concerning the Trudeau Cabinet. You must do this because you received a contract in mid-December from the Trudeau Cabinet worth approximately \$100,000 as you were reappointed under subsection 82(2) of the *Parliament of Canada Act* in an interim position for six months (as you have been in since last July).

Your conflict of interest is only compounded if you have applied to the Trudeau Cabinet to be reappointed for another seven-year term worth approximately \$1.4 million to you.

(c) Request again for ruling that Prime Minister Trudeau and his Cabinet violated the *Conflict of Interest Act* by reappointing you, and will violate it by reappointing you or another person to a seven-year term as Ethics Commissioner

As noted above in section (b), the primary purpose of the *Conflict of Interest Act* (“*COIA*”) in section 3 is to “minimize the possibility of conflicts arising between the private interests and public duties of public office holders and provide for the resolution of those conflicts in the public interest should they arise.” That means the *COIA* should be interpreted by the Conflict of Interest and Ethics Commissioner (and any substitute decision-maker, given that you should recuse yourself from ruling on such matters) with this goal in mind.

The Supreme Court of Canada ruled in two cases in 1996 that “If democracies are to survive, they must insist upon the integrity of those who seek and hold public office” (*Harvey v. New Brunswick*), and; “given the heavy trust and responsibility taken on by the holding of a public office or employ, it is appropriate that government officials are correspondingly held to codes of conduct which, for an ordinary person, would be quite severe” and; “[t]he magnitude and importance of government business requires not only the complete integrity of government employees and officers conducting government business but also that this integrity and trustworthiness be readily apparent to society as a whole” (*R. v. Hinchey*).

In many cases since 2007, most recently concerning fundraising events involving Cabinet ministers and/or their staff, you have not been interpreting or enforcing the *COIA* with its main purpose in mind, nor have you been upholding the Supreme Court's standard.

When your term ended in early January, your appointment for another six-month interim term was decided by the Cabinet ("Governor-in-Council") under subsection 81(2) of the *Parliament of Canada Act*, and your reappointment for a seven-year term or another person's appointment as Ethics Commissioner for a seven-year term is decided by Cabinet under subsection 81(1) of the *Parliament of Canada Act*, with approval by the House of Commons (where Liberal MPs hold a clear majority of the seats).

I know that, technically, the Governor General will make the appointment. I am challenging with this complaint the action of Prime Minister Trudeau and his Cabinet of nominating you to serve your current six-month term under subsection 81(2), and after this six-month term the Cabinet's action of nominating you or anyone else for a seven-year term under subsection 81(1) of the *Parliament of Canada Act*.

Democracy Watch and the opposition parties, specifically MP Rona Ambrose and MP Alexandre Boulerice, have filed complaints with you alleging that Prime Minister Trudeau and/or his Cabinet ministers have, by hosting or attending high-priced, exclusive, invite-only fundraising events, violated the *COIA*. The opposition parties, and with this letter also Democracy Watch, have also filed complaints alleging that the Prime Minister violated the *COIA* by accepting the gifts of a vacation and helicopter ride from the Aga Khan. Under subsection 44(3) of the *COIA*, you are required to examine the complaints and under subsection 44(8) of that *COIA* you are required to make your report on the complaint public.

You have pre-judged the results of these complaints before examining the new facts set out in the complaints (and before you have investigated the facts concerning any of the fundraising events) by issuing a public statement on November 30, 2016 stating that the fundraising events do not, and cannot, violate any section of the *COIA*.

Prime Minister Trudeau and his Cabinet therefore knew, as of that date, your position on the fundraising events – they knew that you will not find them guilty of violating any section of the *COIA*.

Therefore, they knew when they reappointed you for a six-month interim term in December and/or will reappoint you for a full seven-year term in July that they will be able to continue to raise funds at these exclusive fundraising events for themselves and Liberal Party of Canada, a private organization to which they belong, and will be protected from being found guilty of violating the *COIA*.

If you have not applied to be reappointed for a full seven-year term, Prime Minister Trudeau and his Cabinet will determine who will be nominated to fill the position of Ethics Commissioner. In making that determination, they have an opportunity also to determine what stance the people who have applied for the position will take on the issue of the Cabinet fundraising events.

The situation is analogous to someone filing a lawsuit against Prime Minister Trudeau and he then choosing the judge to rule on the lawsuit and handing the judge a six-month contract worth \$100,000, with Prime Minister Trudeau also deciding whether the judge will continue to have his/her job as judge after the contract ends. This would clearly be a situation of Prime Minister Trudeau taking part in a decision in which he has the opportunity to further his private interest – namely interest in not being found guilty of violating the *COIA*, and his interest also in not having the Cabinet ministers he appointed found guilty.

As well, as the funds can go to themselves (via transfers from the Liberal Party to their campaign account for the next election or to cover the expenses for activities they undertake for the Party), and to their riding associations (where they usually serve as a member of the board), and to their private organization (the Liberal Party), the fundraising by Prime Minister Trudeau and his Cabinet and continuing the fundraising are, by definition, a private interest for them.

You have also received a complaint in December filed about Defence Minister Harjit Sajjan's refusal to call an inquiry into the treatment of prisoners by Canada's armed forces in Afghanistan. As Minister Sajjan served in Afghanistan with the armed forces, he potentially has a private interest in ensuring an inquiry does not occur.

As a result of the above, Prime Minister Trudeau and his Cabinet had an opportunity to further their private interest when they exercised their official power to be Ethics Commissioner when your term ended in early January.

Sections 4 and 6 together prohibit any public office holder, including Prime Minister Trudeau and his Cabinet ministers, from making a decision or participating in making a decision that relates to an exercise of official power when they have an opportunity to further their private interest.

The decision concerning who will be the next Ethics Commissioner was not a decision of general application or a decision that affects Prime Minister Trudeau and his Cabinet ministers as a few people in a broad class of persons – it affects only them directly as the complaints only concern their fundraising activities – and it does not concern the remuneration or benefits they receive as public office holders. Therefore the decision was not, and is not exempted from being covered by the *COIA* under the huge loophole created by the definition of “private interest” in section 2 of the *COIA*.

Therefore, it is very clear that the legally correct ruling under the *COIA* is that Prime Minister Trudeau and his Cabinet ministers were required to recuse themselves from making the decision or participating in making the decision concerning who will be Ethics Commissioner after your term ended in early January, and that they violated sections 4 and 6 of the *COIA* by reappointing you for the six-month term.

In addition, the legally correct ruling is that they are required to recuse themselves from making the decision or participating in making the decision concerning who will be Ethics Commissioner after your current six-month term ends in early July.

As the famous precedent-setting British court ruling by Lord Chief Justice Hewart in *R v. Sussex Justices, Ex parte McCarthy* ([1923] All ER Rep 233) put it, justice must “not only be done, but should manifestly and undoubtedly be seen to be done.” This standard is clearly violated when the Prime Minister and his Cabinet choose their own judge at the same time the judge is investigating alleged violations of the law by them.

Given you received the six-month contract from the Prime Minister and have a conflict of interest as a result, I request that you refer this matter to another decision-maker (such as a provincial ethics commissioner) for consideration and a ruling that Prime Minister Trudeau and his Cabinet ministers violated sections 4 and 6 of the *Act* when they took part in the decision of reappointing you as Ethics Commissioner.

(d) Request for a ruling again that Trudeau Cabinet violated the *Conflict of Interest Act* by giving Commissioner of Lobbying a similar 6-month contract

The argument set out above in section (c) that Prime Minister Trudeau and his Cabinet were in a conflict of interest and so violated the *Conflict of Interest Act* (“*COIA*”) by participating in the decision to re-appoint you for six months applies equally to their participation in the re-appointment of the Commissioner of Lobbying for a six-month term. The only differences are that the current Commissioner of Lobbying has, unlike you, made it clear with a public statement that she has not applied to be reappointed to another seven-year term.

Another difference is that Prime Minister Trudeau and his Cabinet have the power to nominate the next Commissioner of Lobbying under subsection 4.1(1) of the *Lobbying Act* (not, as with your position, under the *Parliament of Canada Act*).

The other difference in the situation is that the complaints the Commissioner of Lobbying is investigating are two complaints filed by Democracy Watch concerning two fundraising events that a registered lobbyist participated in organizing, one for Finance Minister Morneau on November 7, 2016 and one for Justin Trudeau in August 2015.

The opposition parties, again specifically MP Rona Ambrose and MP Alexandre Boulerice, have also filed complaints with the Commissioner of Lobbying about various Liberal Party fundraising events involving Prime Minister Trudeau and/or his Cabinet ministers and people who are seeking decisions from the Cabinet.

As a result, again Prime Minister Trudeau and his Cabinet had an opportunity to further their private interest when they exercised their official power to make the specific decision to nominate the current Commissioner to be Commissioner of Lobbying after the current Commissioner’s term ended in early January.

Therefore, it is very clear that the legally correct ruling under the *COIA* is that Prime Minister Trudeau and his Cabinet ministers violated sections 4 and 6 of the *COIA* by participating in making the decision concerning who will be Commissioner of Lobbying after the current Commissioner’s term ended in early January.

Again, given you received the six-month contract from the Prime Minister and have a conflict of interest as a result, I request that you refer this matter to another decision-maker (such as a provincial ethics commissioner) for consideration and a ruling that Prime Minister Trudeau and his Cabinet ministers violated sections 4 and 6 of the *COIA* when they took part in the decision of reappointing Karen Shepherd as Commissioner of Lobbying after her term ended in early January.

(e) Request for ruling that Prime Minister Trudeau violated the *Conflict of Interest Act* and *MP Code* by receiving gifts from the Aga Khan

The media has reported most of the details concerning Prime Minister Trudeau's acceptance of the gift of a holiday at the Aga Khan's island home, and flight to and from the island on the Aga Khan's helicopter, both in December 2014 and December 2016.

According to the federal Registry of Lobbyists, the Aga Khan Foundation Canada (AKFC) was registered to lobby the Prime Minister's Office and the House of Commons at both of these times.

According to the AKFC website, the Aga Khan is a member of the Board of Directors of the AKFC and "The Board has overall statutory governance responsibility for AKFC and maintains an active role in setting AKFC's long-term strategy." Indeed, board members of any incorporated entity like the AKFC are legally required to further its interests.

The *Conflict of Interest Code for Members of the House of Commons (MP Code)*, which applied to Mr. Trudeau at the time of the December 2014 trip, clearly prohibits most gifts and benefits, as subsection 14(1) states:

Prohibition: gifts and other benefits.

14. (1) Neither a Member nor any member of a Member's family shall accept, directly or indirectly, any gift or other benefit, except compensation authorized by law, that might reasonably be seen to have been given to influence the Member in the exercise of a duty or function of his or her office.

Subsection 14(2) only allows a Member or their family to accept courtesy, protocol, or hospitality gifts that are normal for MPs to receive. Subsection 3(1) of the *MP Code* defines "benefit" as including money if there is no obligation to repay it and "a service or property, or the use of property or money that is provided without charge or at less than its commercial value."

The only significant exception to the subsection 14(1) rule is section 15(0.1) which states that MPs may accept the gift of "sponsored travel" from anyone, and take any guest(s) they want with them on the trip, as long as the trip "arises from or relates to his or her position" as MP. For general gifts/benefits as defined under the *MP Code*, MPs are required under subsection 14(3) and (4) – and under subsections 15(1) and (2) for sponsored travel – to disclose to the Ethics Commissioner within 60 days of receipt if gifts/benefits/travel received within a 12-month period from one source have a total value of more than \$200 (before October 20, 2015, the threshold was \$500). Under 14(3), the

disclosure statement for general gifts/benefits must detail their source, nature and circumstances, and the statement for sponsored travel must include several details.

Mr. Trudeau's trip in December 2014, including the gift of the helicopter ride, does not fit within any of the exceptions. The gift of the trip was not a normal courtesy that MPs receive; it was a holiday and so did not arise from or relate to his position as MP, which he admitted by not declaring the trip as sponsored travel. And, given that the Aga Khan was on Board of the AKFC which was registered to lobby the House of Commons (i.e. MPs) at the time of the trip, the trip can reasonably be seen to have been given to influence Mr. Trudeau.

Given that the AKFC is named after the gift-giver in this case, and that the Aga Khan is on the Board, and that the Aga Khan in part funds the AKFC, it would be clearly legally incorrect to allow the Aga Khan to give a gift that a staff member of the AKFC would be prohibited from giving. In fact, it would be a legal fiction to do so. Doing so would also open a huge loophole that would allow any organization that is registered to lobby the federal government to have its board members give gifts to MPs and Cabinet ministers – gifts that its staff members are prohibited to give.

With regard to the gift by the Aga Khan to Prime Minister Trudeau of the December 2016 trip, subsection 11(1) of the *Conflict of Interest Act* (“COIA”) matches the blanket prohibition in subsection 14(1) of the *MP Code* on gifts that “might reasonably be seen to be given to influence” the Prime Minister, and the definition of family members is essentially the same (in subsection 2(1) of the COIA), and the exemption for courtesy and hospitality gifts is the same (in clause 11(2)(c) of the COIA – although under 11(3) if that type of gift is worth more than \$1,000, “the gift or other advantage is, unless otherwise determined by the [Ethics] Commissioner, forfeited to Her Majesty in right of Canada”).

In contrast to the *MP Code*, the rules in the COIA also say that Cabinet ministers (and other senior government officials covered by the COIA) and their family members are allowed to accept a gift or other advantage that is from a relative or friend (clause 11(2)(b)). With regard to travel, the COIA rule is stronger than the *MP Code* – Cabinet and Parliamentary Secretary MPs and family members are not permitted to accept travel on private aircraft unless required to do so by their position or “exceptional circumstances” or approved in advance by the Ethics Commissioner (section 12).

As with the December 2014 trip, Prime Minister Trudeau's December 2016 trip, including the helicopter ride, does not fit within these exceptions. The gift was not a normal courtesy, and the AKFC was registered to lobby the Prime Minister's Office at the time of the trip – which means the very high standard in subsection 11(1) that accepting a gift is prohibited if the gift can possibly be reasonably seen to have been given to influence the Prime Minister.

You issued a guideline in July 2011 entitled *Gifts (including Invitations, Fundraisers and Business Lunches (“Guideline”))* on the acceptance of gifts by Cabinet MPs under the COIA, and since 2013 you have issued several advisory opinions on the acceptance of gifts by MPs. The *Guideline* upholds fully the spirit of section 11 of the COIA that any gift that a reasonable person might view as being given to influence a Cabinet MP must

be refused. It even says in section 2 with regard to trinkets such as pens, notepads, keychains etc. that, depending on the situation, “it may still be inadvisable [for a Cabinet Minister] to possess an article that clearly advertises a particular donor.”

The *Guideline* also lists in section 2 several situations in which a gift cannot be accepted, including whenever the “donor” is dealing with or may in the future deal with the government or “the donor or the donor’s firm is a registered lobbyist” or the donor’s organization “has or may, in the future, have a contract” with the government or “could submit a bid” for a government contract.

The Aga Khan fits under all of these definitions of a “donor” – and therefore a federal Cabinet minister, especially the Prime Minister who has decision-making authority over all other Cabinet ministers, cannot accept a gift from the Aga Khan.

With regard to whether the gift from the Aga Khan fits under the subsection 11(2) exception allowing for gifts from friends, section 3 of your 2011 *Guideline* states first that:

“The Office has interpreted “friend” to mean a person with whom one has some history of mutual personal regard beyond simple association. While acquaintances can become friends, they do not do so simply because of frequent interactions.”

Democracy Watch’s position is that based on this interpretation, the Aga Khan could not even be regarded as a friend of the Prime Minister – they seem to be more acquaintances.

As well, even if you decide that the Aga Khan is a friend of the Prime Minister, your 2011 *Guideline* goes on to state in section 3:

“When a gift is given by a relative or friend, one does not usually expect it to have been given with a view to influencing public decision-making. In that sense, the rule reinforces this reasonable expectation. However, sometimes there can be both friendship or family connections, and a business relationship between a public office holder and a person offering a gift. *If a friend is offering a gift in a context not normally associated with gift-giving and the friend is also doing or likely to do business directly or indirectly with the public service entity of the public office holder, then the gift should not be accepted.* Similarly, the Office takes the view that the nature or substance of a gift may suggest that a gift is being given in a business context rather than between friends.” [emphasis added]

In Democracy Watch’s opinion, the December 2016 trip cannot be exempted under subsection 11(2) without opening a huge loophole in the subsection 11(1) prohibition on gifts. As the above part of your *Guideline* suggests, this exception should only be used to allow normal, non-extravagant birthday or anniversary gifts from true friends.

The Aga Khan’s gift to Prime Minister Trudeau of the trip, including three members of his family and two friends (not including MP Seamus O’Regan and his spouse (see section (f) below for details), likely has a market value of \$5,000-\$10,000 per person, for a total value of \$30,000 to \$60,000. The AKFC lobbies the Prime Minister’s Office, and the federal government has provided hundreds of millions of dollars to the AKFC.

Given the above, if you do not rule that the Aga Khan's gift is a violation of subsection 11(1) of the *COIA* – if you allow it under subsection 11(2) – you will make a mockery of the *COIA* and greatly undermine subsection 11(1). If you exempt the gift from the Aga Khan, you will also likely cause organizations that lobby the government to hire friends of the Prime Minister and other Cabinet ministers who will then, based on your ruling, be free to wine and dine the ministers and lavish gifts on them with impunity.

You have greatly undermined other sections of the *COIA* in past rulings by creating loopholes in the *COIA* that do not exist – such as your 2009 ruling claiming that political parties are not “persons” under the *COIA* and therefore it was fine for Conservative MPs and Cabinet ministers to hand out government cheques with the Conservative Party logo on them, and; your 2010 ruling that it was fine for two lobbyists who were lobbying Minister Lisa Raitt to help raise thousands of dollars for her riding association because, you claimed, that only helped the association not her, and; your baseless decision that the *COIA* only applies to financial interests (even though the *COIA* does not in any way even suggest that the definition of “private interest” is restricted to only financial interests).

Democracy Watch implores you not to undermine yet another section of the *COIA* – because of your past rulings summarized above it is one of the only remaining meaningful sections of the *COIA*.

Finally, concerning specifically Prime Minister Trudeau's flight on the Aga Khan's helicopter, section 12 of the *COIA* only allows acceptance of such a gift if “required in his or her capacity as a public office holder or in exceptional circumstances or with the prior approval of the Commissioner.” None of these exemptions apply to Prime Minister Trudeau's helicopter ride. The ride was not required as part of his position, and as has been reported in the media, Prime Minister Trudeau did not seek prior approval from you.

Prime Minister Trudeau has claimed that the Aga Khan's helicopter is the only way to get to the island, and therefore “exceptional circumstances” existed. Your 2011 Guideline states that exceptional circumstances means “an emergency or commercial aircraft breakdown and no other commercial flight is reasonable in the circumstances.” A simple Internet search reveals that O'Brien Helicopters and Paramount Business Jets (and likely other companies) provide helicopter charter rentals for flying to islands in the Bahamas. As a result, clearly the exceptional circumstances exemption does not apply to Prime Minister Trudeau's ride.

(f) Request for ruling that MP Seamus O'Regan violated the *MP Code* by receiving gifts from the Aga Khan

For all of the reasons set out in the first part of section (e) above concerning the Aga Khan's December 2014 trip gift to Mr. Trudeau, Democracy Watch requests that you issue a ruling finding that MP Seamus O'Regan violated subsection 14(1) of the *MP Code* when he accepted the December 2016 trip gift, including the helicopter ride, from the Aga Khan.

In case you are even contemplating ruling that the gift to Mr. O'Regan was given to him by Prime Minister Trudeau (who invited him along on the trip), suffice to say that would be an absurd conclusion for you to reach given that Prime Minister Trudeau could not have extended the invitation unless the Aga Khan had given the gift to him.

Please contact Democracy Watch at the address above if you need any more information to initiate the inquiries. We look forward to hearing back from you very soon concerning whether you will recuse yourself from ruling on these situations.

In any case, given that the facts have been made public and are clear in all of these situations, we hopefully look forward to seeing rulings very soon on all of these matters.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Duff Conacher', is positioned above the typed name.

Duff Conacher, Board member of Democracy Watch
On behalf of the Board of Directors of Democracy Watch