

Agenda

Item #1



STATE OF MAINE  
COMMISSION ON GOVERNMENTAL ETHICS  
AND ELECTION PRACTICES  
135 STATE HOUSE STATION  
AUGUSTA, MAINE  
04333-0135

Minutes of the January 25, 2008, Meeting of the  
Commission on Governmental Ethics and Election Practices  
Held in the Commission's Meeting Room,  
PUC Building, 242 State Street, Augusta, Maine

Present: Michael Friedman, Esq., Chair; Hon. David Shiah; Hon. Francis C. Marsano; Hon. Edward M. Youngblood, Hon. Mavourneen Thompson by telephone. Staff: Executive Director Jonathan Wayne; Phyllis Gardiner, Counsel.

At 9:03 A.M., Chair Michael Friedman convened the meeting.

The Commission considered the following items:

**Agenda Item #1 Ratification of Minutes: December 7, 2007 Meeting**

Phyllis Gardiner, counsel, reviewed a few word changes to Item #2. On motion by Mr. Marsano and seconded by Mr. Youngblood, the minutes as amended were adopted unanimously.

**Agenda Item #2 Request for Waiver of Late-Filing Penalty/Gary C. Wood**

Gary C. Wood withdrew his request for waiver.

*The following agenda item was taken out of order, as Mr. Hughes had not yet arrived:*

**Agenda Item #4 Results of Staff Investigation/Lobbying for Maine Community Cultural Alliance**

Mr. Wayne explained that in October the State Controller completed an audit of four state agencies that deal with arts and cultural matters. The controller was concerned that the Maine Community Cultural Alliance (MCCA) had hired a lobbyist and used public funds to do so and that a non-profit organization was formed to pay for the lobbyist fees. Mr. Wayne reminded the Commission that at the last meeting they had supported the staff looking into the matter, since there may have been lobbying performed which would require them to register with the Ethics Commission. Mr. Wayne further explained that the staff sent a letter to the lobbyists, Michael Saxl and James Cohen of Verrill Dana, LLP, outlining the staff's concerns

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and questions. They replied very thoroughly and willingly to the letter and provided exhibits of time summaries showing both lobbying services and non-lobbying services for MCCA. Mr. Wayne said they did provide some lobbying services, but a small portion. Mr. Wayne said the law only requires a lobbyist to register if the lobbyist has engaged in lobbying for more than 8 hours in a calendar month and has been compensated for that work. He also said lobbying means direct communication with a governmental official to influence legislation. Mr. Saxl and Mr. Cohen maintained that the amount of lobbying did not go over the eight hour threshold within a month. Mr. Wayne said that he and Mr. Lavin, Assistant Director, did go over to Verrill Dana and were given permission to look over the time records for Verrill Dana's work for MCCA. The records were kept in great detail and evidenced that Mr. Saxl and Mr. Cohen had a good understanding of what kinds of activities constitute lobbying. After reviewing the records for the busiest eight-month period, the staff felt confident that their records were accurate and that they were not required to register as lobbyists. Mr. Wayne said the staff believes that no further action is necessary. He also stated that the lobbyists were very cooperative and provided all information voluntarily.

Mr. Friedman restated the staff's recommendation that no further action by the Commission is required.

Ms. Thompson stated appreciation for staff's work and also the willing cooperation of Verrill Dana. She said that she thought the Commission should adopt the staff's recommendation. She questioned the current definition of lobbying, saying perhaps this area needs to be addressed. She expressed concern over an individual registering as a lobbyist, under the definition for eight hours; however, over a six month period that individual could lobby for seven hours and 59 minutes each month and not be considered 'lobbying' under our definition. She said her concern is there is nothing in the rules that says 'up to a number of minutes per legislative session.'

Mr. Wayne said the Legislature's intent was to have a threshold for when an individual has to register as a lobbyist. He said the intent was if lobbying did not reach eight hours in a month, then no disclosure or registration is necessary and that is how the law reads.

Ms. Thompson said this eight hour statute is concerning and needs to be looked at closer in her opinion.

Mr. Wayne said different points of view exist on the eight-hour threshold. Some lobbyists feel this is a loop hole and others are very diligent about not going over the threshold so clients do not have to pay the

\$200 registration fee. Mr. Wayne further stated that if the Commission thinks changes need to be looked at, it would be appropriate to solicit comments from lobbyists.

Mr. Youngblood said the same argument would take place no matter where the threshold was set. He said unless a particular individual is really abusing the statute, emergency legislation would not be possible.

Ms. Thompson would like to have further discussion at a future meeting. Mr. Wayne stated he could invite the lobbyists to comment and be present at that meeting.

Mr. Marsano said realistically, any legislation would not be submitted until 2010. He stated he agrees with Mr. Youngblood's statement regarding changing the threshold.

Mr. Friedman questioned whether a vote was necessary regarding the MCCA issue. It was decided that since no further action was necessary, no vote was needed.

### **Agenda Item #3 Failure to File Report and Return Unspent Campaign Funds/David Hughes**

Mr. Wayne explained that Mr. Hughes was a special election candidate for House District 72 last November. He received \$4,287 in MCEA funds. He was required to file his campaign report 42 days after the election in November and he was required to return his MCEA funds not spent for his campaign. He did not file nor return the funds within the time required. Mr. Wayne said several calls were made and letters were sent with no response from Mr. Hughes. The lack of response to repeated attempts by the Commission staff was a concern. Mr. Wayne told the Commission members that Mr. Hughes came in to the Commission office yesterday and filed his report along with a check for unspent funds to the Maine Clean Election Act. Mr. Hughes also provided his bank statements showing payments made from his campaign account, invoices for services and examples of services that he had paid for. Mr. Wayne said his documentation helped to assure his public money was spent for campaign services. Mr. Wayne further stated that the staff will conduct a full audit of Mr. Hughes' campaign in order to be assured that everything is in order. He said the penalty for late filing (37 days late) and failure to return Clean Election Act funds could be as high as \$1,500; however, Mr. Hughes could request a waiver of all or part of the \$1,500 penalty amount. Mr. Wayne also explained that Mr. Hughes did have a personal tragic situation happen during the reporting period, which could have been a factor in why Mr. Hughes was late in filing and not returning the funds.

Mr. Hughes said that he first wanted to apologize to the people of Maine. He said the clean election process is for candidates like himself who cannot afford to run without this public money. When candidates participate in the program, they should do everything they can to reinforce the public trust and he did not do that. He apologized for his actions and wanted to be held accountable. He said he had not dealt with a personal situation like this before. It was a reporter knocking at his door that made him realize what was happening. He said he did not want to discuss the personal matter in a public forum.

Mr. Friedman asked Mr. Hughes if he understood the audit procedures and what was needed from him.

Mr. Hughes confirmed that he understood the process and that there would be penalties assessed.

#### **Agenda Item #5 Adoption of Rule Amendments**

Mr. Friedman reminded the Commission that at the October meeting, the public was invited to comment on rule changes. At the December meeting, comments were received and the comment period was extended for another ten days after the December meeting. Mr. Friedman acknowledged additional comments from Carl Lindemann. He said that Mr. Lindemann requested today's meeting be set at a later date so that he could be present to comment further. Mr. Friedman said that after discussion with Mr. Wayne, he denied the request to extend the date again. The procedure for rulemaking states that the time for public comment be set and this was done. Mr. Lindemann has submitted several written documents in the past. Mr. Friedman stated that the time for public comment has ended; therefore, it would not be appropriate to allow Mr. Lindemann to comment further by phone.

Ms. Gardiner said everyone has the same opportunity to submit comments by a deadline and the deadline has come and gone. In order to be fair to everyone, the time has ended for everyone.

Ms. Thompson agreed that the process has been followed and in fairness to all, the comment period is over. She expressed concern regarding Mr. Lindemann's continued questions over the jurisdictional issue. She would like to have this matter cleared up once and for all. She said she believes passing judgment on another Commission member is not within the members' jurisdiction.

Mr. Friedman said rehashing the same issue is not productive. He feels getting guidance from the Legislature is the next step and that should be forthcoming in the future.

Ms. Gardiner said there needs to be a formal adoption for the final rule changes as they have been presented in the packet of material today.

Mr. Shiah moved to adopt the proposed rule changes as drafted by staff; seconded by Mr. Marsano. Motion passed unanimously. (5-0)

### **Agenda Item #6 Proposed Advice to Section 1056-B Filers**

This agenda item was withdrawn in light of pending legislative action which may provide guidance.

Mr. Marsano asked for clarification on the withdrawal of Item #2. Mr. Wayne said that Mr. Wood contacted the Commission by phone and said he wished to withdraw his request for a waiver.

### **Other Business**

#### **Kate Smith, MCEA Special Election Candidate**

Mr. Wayne explained that Ms. Smith was in the special election in November and ran as an MCEA candidate. He reported that the staff was having difficulty getting her to return her Clean Election Act funds. When she finally sent her repayment in, the check was returned for insufficient funds. Mr. Wayne said the staff has requested Ms. Smith provide her bank statements, since her check was returned. Mr. Wayne said that if she does not willingly provide the bank statements as requested, the staff would like the Commission's authorization to perform an investigation which would include a subpoena of her bank statements for inspection.

Mr. Marsano asked why a complete audit would not be done first.

Mr. Wayne said a full audit can be done; however, if everything checks out on the bank statement, then a full audit would not be necessary. Mr. Wayne said this effort would be a 'middle-ground' approach instead of conducting a full audit.

Mr. Marsano stated that he felt a full audit under these circumstances is necessary. He said a bounced check would seem like a reason to conduct an audit, especially since she has not contacted the Commission after a letter was sent to her notifying her of the returned check.

Discussion took place regarding subpoena power and audit procedures and whether to look at the bank statement only or all documentation including invoices, etc.

Ms. Thompson said audits, either random or targeted, are very informative in helping to improve the process of the Clean Elections Act and audits tell the public that the Commission is seriously working to protect public money. She also said that a returned check from a campaign account should just not happen, if everything is done appropriately. She strongly urged an audit be done.

Mr. Youngblood said that Ms. Smith's lack of explanation the very next day is suspicious.

Mr. Friedman said the consensus is for the staff to conduct a full audit on Kate Smith's campaign.

Ms. Thompson further stated that an audit procedure is not only to discover something wrong, but to be sure the money has been appropriately used and to be sure candidates are taking the public money very seriously and being careful with it.

Mr. Friedman stated that the audits also have shown that the majority of candidates do spend the public money appropriately.

### **LaMarche Appeal of Commission's Penalty Determination**

Ms. Gardiner informed the Commission that Pat LaMarche has brought a Rule 80(C) action challenging the penalty determination that the Commission decided upon at its October 30<sup>th</sup> meeting after considering the campaign's audit report.

The meeting adjourned at 9:50 a.m.

Respectfully submitted,

Jonathan Wayne, Executive Director



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Minutes of the February 11, 2008, Meeting of the  
Commission on Governmental Ethics and Election Practices  
Held in the Commission's Meeting Room,  
PUC Building, 242 State Street, Augusta, Maine

Present: Hon. David Shiah, Acting Chair and Hon. Edward M. Youngblood. Hon. Mavourneen Thompson, Michael Friedman, Esq. and Hon. Francis C. Marsano attended by teleconference.  
Staff: Executive Director Jonathan Wayne.

Due to weather conditions, Chair Friedman could not attend the meeting in person. Mr. Shiah was nominated by Mr. Youngblood to chair today's meeting. On motion by Mr. Youngblood, seconded by Ms. Thompson, it was unanimously decided to have Mr. Shiah chair the meeting.

At 9:07 A.M., Acting Chair David Shiah convened the meeting.

The Commission considered the following items:

**Agenda Item #1 Request for Waiver of Late-Filing Penalty/Katherine D. Pelletreau**

Mr. Wayne explained that Katherine D. Pelletreau was registered as a lobbyist for the Maine Association of Health Plans in 2007. She was two days late in filing the annual report due on December 31, 2007. Ms. Pelletreau requests a waiver of the penalty because her husband had suffered a heart attack in the late fall and she was on leave from her work through December 31, 2007. The statutory penalty is \$200; however, the staff recommends a penalty of \$50 due to the health circumstances in Ms. Pelletreau's family.

Mr. Marsano stated that "late fall" seems ambiguous. He wondered whether any one on staff had asked her for more detailed information regarding how long she was away from work.

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WEBSITE: WWW.MAINE.GOV/ETHICS

PHONE: (207) 287-4179

FAX: (207) 287-6775

Mr. Wayne said a staff member had spoken to her, but he had not personally talked to her. He said when a treasurer or candidate has a health issue, the past practice has been for staff to be slightly more lenient. Ms. Pelletreau was notified of today's meeting, but she did not respond to the invitation.

Mr. Youngblood stated that he is not in favor of giving lobbyists a break, since this is their business and they know the filing deadlines for which they are responsible. He said this particular case may be reason to be more lenient and go with the staff recommendation to reduce the penalty to \$50.

Ms. Thompson stated she agreed with Mr. Youngblood. Ms. Thompson thought it might be a good idea to wait until we hear from the lobbyist as to when the medical emergency occurred and how long she was out of the office. Ms. Thompson further stated it is always in the Commission's best interest to get as much information as possible from the candidate or lobbyist in order to make a fair decision and to assess the fairest penalty.

Mr. Wayne said the staff would be willing to go back to Ms. Pelletreau and get more information and put this item back on the agenda for the March meeting.

Ms. Thompson made a motion to table this item until March 31. Mr. Marsano seconded. The motion passed unanimously.

## **Agenda Item #2 Proposed Rule Amendment**

Mr. Wayne stated that the Joint Standing Committee on Legal and Veterans Affairs has requested that the Commission adopt a rule which would allow candidates to re-use signs from a previous election without updating the disclosure statement printed on the signs regarding who paid for the signs. This was a result of a bill put forward last year by Senator Elizabeth Schneider. He said if the treasurer's or committee's name changed, then the sign could be reused as long as the correct address was on the sign. Mr. Wayne said this would apply to any type of communication to voters. Mr. Wayne said that the LVA Committee will be sending a letter outlining instructions for the rule changes.

Mr. Marsano pointed out that section 1014 of Title 21-A, did not use the words 'campaign signs' in the description. He would like to see this phrase introduced into the statute. Mr. Marsano also outlined other changes he would recommend for this section. Mr. Marsano restated that the phrase 'campaign signs'

definitely needs to be in the statute, at the very least, for more detailed clarification on communications. He felt the signs could be reused as long as the rules are followed as to what is acceptable.

Ms. Thompson requested that Mr. Marsano's changes be done in writing to the Commission members in order to see these changes on paper. She also stated that any changes made must not allow confusion on the part of the voters. She said the voter needs to read communications and understand clearly what is being said.

Mr. Friedman stated that the signs need to be 100% correct and not 85% correct.

Mr. Youngblood said that care needs to be taken when dealing with specific communications. Does this mean mailers or any other communication needs to be addressed individually. He said this is probably why the statute was written in this general manner.

Mr. Marsano stated he feels that the words "campaign signs" should definitely be included because there would be no doubt as to whether they may be reused and these are one of the more expensive items in a campaign.

Mr. Shiah suggested this item be tabled until next month in order to see these suggested changes in writing.

Mr. Friedman stated that he agrees with Mr. Marsano regarding keeping the cost of campaign expenses down to a minimum where possible; however, he stressed the importance of having the correct information in all communications of the campaigns. He would not be in favor of the Commission sanctioning a practice that would allow misinformation on a campaign sign.

Ms. Thompson stated that she would support changes, but would like to see them in writing. She also stated the importance of accurate, up to date information on the signs.

Mr. Marsano said he agreed with Ms. Thompson but believes the statute should state specifically what is acceptable for candidates to make changes to the signs in a cost effective manner.

Mr. Youngblood moved to table this item until the March meeting; Ms. Thompson seconded. The motion passed unanimously.

**Agenda Item #3 Proposed Investigation of 2006 Candidate Debra J. Reagan**

Mr. Wayne explained that Debra J. Reagan was a 2006 candidate for the House of Representatives who was the only candidate remaining who has not returned unspent Maine Clean Election Act funds to the Commission. He said Ms. Reagan promised to make monthly payments but has not reliably paid the promised amounts. The last payment was returned for insufficient funds. Mr. Wayne said Ms. Reagan owes the State of Maine \$3,390. Mr. Wayne said the matter was referred to the Attorney General last year; however, it was decided to put her on a monthly payment schedule after warning her of the penalty she could incur if she does not return the funds. Since she has not fulfilled her obligation, the Commission staff recommends a full investigation of this candidate and requests authorization for a subpoena of her bank accounts. Mr. Wayne stated that there could be civil penalties involved.

Ms. Thompson said in the past, the Commission has been very strict about the use of public funds and how the candidates use those funds in order to maintain the public's trust. She asked if this investigation would include an audit.

Mr. Wayne said that the investigation could include an audit. He further stated that since the candidate had been so uncooperative, the staff felt that a subpoena would be in order.

Mr. Youngblood agreed that an audit should be done and the staff should be given the authority to subpoena the necessary records.

Mr. Marsano asked why this referral to the Attorney General's office has taken so long.

Mr. Wayne stated that due to work load, the staff counsel has been spread very thin. Mr. Wayne said that the priority changed to getting the money back through monthly payments by the candidate.

Mr. Marsano stated that the clean election funds need to be protected and this matter needs to be addressed more aggressively. He also agreed that an audit should be done; however, the subpoena needs to happen immediately.

Mr. Youngblood moved to follow the staff recommendation to investigate Ms. Reagan's misuse of Maine Clean Election funds by simultaneously conducting an audit, and taking all steps necessary, including the subpoenaing of records to get the investigation completed.

Ms. Thompson offered an amendment to the motion that would replace the word "misuse" with "use."

Mr. Marsano stated that clean election money is supposed to be returned and failure to return the money under any circumstances would be misuse.

Ms. Thompson withdrew her amendment.

The original motion passed unanimously.

#### OTHER BUSINESS

##### **Carl Lindemann's February 7, 2008, Memo**

Mr. Wayne stated that Phyllis Gardiner wrote a memorandum regarding Mr. Lindemann's request and it was e-mailed to all the Commission members. He was not sure if everyone had an opportunity to review it. All the Commission members had not had a chance to review Phyllis Gardiner's memo. It was decided to have Mr. Shiah read Ms. Gardiner's memo out loud. (Copy attached hereto.)

Ms. Thompson asked for clarification on complaint procedures.

Mr. Wayne said that the staff had proposed a rule which was meant to clarify that if the staff received a complaint that was outside the Commission's jurisdiction, it can return it to the complainant or refer it to the appropriate agency. This proposed rule was unrelated to Mr. Lindemann's request. Mr. Lindemann commented to that rulemaking saying that he thought that there should be a procedure for complaints against Commission members to be automatically referred to an outside agency. Mr. Wayne said his memo to the Commission stated that he thought that complaints against Commission members were so rare that they could be handled on a case-by-case basis. In that memo, Mr. Wayne also recommended against an automatic referral to an outside agency.

Ms. Thompson wondered if the Legislature would be the proper body to establish a procedure for dealing with complaints regarding a Commission member since the Commission members cannot judge themselves. She expressed her belief that there should be an appropriate avenue for a complainant to take a complaint against a Commission member.

Mr. Wayne said if the complainant felt aggrieved by a decision by the Commission because the Commission or a member of the Commission was biased, that person could file an action in the court. In other contexts, someone could, as Mr. Lindemann has already, bring the matter to the attention of the Legislature.

Mr. Friedman stated that the Commission is, like all others, authorized by statute. It does not have the power to hear issues that are not within its jurisdiction. He said not every matter brought forth by any citizen in Maine should be brought before this Commission. If other commissions have complaints brought against a commission member, the aggrieved individual may go to court to seek a judicial determination. Mr. Friedman stated that Mr. Lindemann has taken it upon himself to send individual Commissioners e-mails, letters, etc. He said that he thinks it is extremely inappropriate for an individual who has an interest pending before the Commission to deal directly with the members of the Commission to the exclusion of the staff. Mr. Friedman said excluding the staff from communications is very inappropriate.

Mr. Friedman also reviewed the duties of the Chair of the Commission. Mr. Friedman said part of those duties includes using the meeting time effectively by reviewing agenda items for jurisdiction and keeping meetings efficient. He also referred to the history of the MHPC and former Commissioner Jean Ginn Marvin and reminded the members that this Commission does not have jurisdiction to investigate or make recommendations with regard to fellow Commissioners. Mr. Friedman said individuals who do feel aggrieved, may go to the legislative leadership, the Governor or go to court, which Mr. Lindemann has done. Mr. Friedman further stated that since the Commissioner in question is no longer on the Commission, the issue is a moot point.

Mr. Lindemann addressed the Commission. He said the staff was included on his communications with the Commissioners. He said this issue has nothing to do with former Commissioner Ginn Marvin's qualifications and conduct. He said it deals with the dilemma of inappropriateness of having an officer of a regulated entity serve on the Ethics Commission. He said the treasurer of a political committee should not

be allowed to be a Commissioner. He said that the Commission should recognize the dilemma in this matter: on one hand, the Commission does have jurisdiction over this matter because it involves a regulated entity; on the other, the matter involves a former Commissioner which creates the problem of having her former fellow Commissioners sitting in judgment over her actions. The Commission should cede jurisdiction because of these extraordinary circumstances and allow this matter to go forward. He said that to do otherwise would mean that a conflicted agency would sit on a matter against a fellow Commissioner, and that it would be close to obstruction for this Commission to decide this matter.

Ms. Thompson asked for clarification as to what exactly Mr. Lindemann's major concern is. She summarized that this Commission voted unanimously that passing judgment on a fellow Commissioner is not within the Commission's jurisdiction. She asked if Mr. Lindemann would like to see the Commission have the ability to formally refer the complaint to another agency.

Mr. Lindemann stated that the decision the Commission made regarding its ability to make a determination on the qualifications of a fellow Commissioner was separate from the matter he was bringing before the Commission now. This matter involves a question of whether the Commission has a conflict of interest in that former Commissioner Jean Ginn Marvin is the treasurer of an entity that filed a report with the Commission, a report which is the subject of his complaint. He stated that he did not see how it would be appropriate for the Commissioners who sat on the Commission with Ms. Ginn Marvin or the Executive Director, Mr. Wayne, to participate in a hearing on the complaint.

Ms. Thompson said since the Commission has several new members, perhaps the issue should be heard again in order for the Commission to find out what should be done in these situations. She did not think it should rest until it is decided how to deal with conflict of interest issues.

Mr. Friedman asked Ms. Thompson to clarify which issue she was speaking about: the issue regarding the adequacy of the 1056-B filing or the issue of conflict of interest of the Commission.

Ms. Thompson said she believes the more important issue is how to deal with a complaint by a citizen of conflict of interest of a member of the Commission. She said the Superior Court would deal with the 1056(B) issue. She recognized that the members of the Commission cannot deal with a complaint of conflict of interest, but perhaps a referral to another agency would be appropriate.

Mr. Friedman said that he did not necessarily disagree with Ms. Thompson, but he said the Commission does not have jurisdiction to even discuss the issue of conflict of interest. He did not think it was necessary for the Commission to provide advice on issues that are outside of the Commission's jurisdiction. He said if an aggrieved citizen has a complaint, the remedy is to go to court or to seek a political solution. He said that the fact that there are new Commissioners does not mean that the Commission has jurisdiction or that the issue should be discussed again. He would strongly discourage the Commission take any more time to discuss this issue during a regular Commission meeting.

Mr. Marsano said he has not seen or heard what the exact parameters of the complaint in Superior Court are. He said that he thought there probably was a way in which the two issues are involved. For instance, Mr. Lindemann's suggestion that, as he was speaking on a matter, a person who has recused sat directly behind him – is that a problem? Is that in the complaint? Does that relate to the conflict? What does it do with respect to the recusal? Another facet of the issue is the statements by Mr. Lindemann and Mr. Wayne that no disclosure of the Commissioner's position in the organization was made to the Governor or the legislative leadership. He said that since he did not know what the case was all about, he did not want to speak with respect to the otherwise philosophical issue until the case was finally resolved. Mr. Lindemann's analogy to jury selection was interesting but the difference was that the breadth of the screening that the Governor and Legislature does in examining potential Commission members is exceedingly greater than the jury screening process. Ultimately, once the case is resolved and is even farther in the past than it is now, the philosophical issue can come back to the Commission, if it wants to take it up again, but in the end, the ultimate decision will lie with the Commissioner who must make that final decision of recusal. He stated that he did not want to do anything regarding these issues until the case was over.

Mr. Friedman said that he did not think that it was necessary for the Commission to do anything regarding this matter at this time. Mr. Marsano agreed. Mr. Shiah asked whether it was the pleasure of the Commission to close this matter. It was the consensus of the Commission to close the matter.

Ms. Thompson brought up the issue regarding whether to insert a public comment item on the monthly agendas. It was decided to put a discussion of this suggestion on the next agenda for the March meeting.

Ms. Thompson also inquired as to how audits were being handled with the resignation of the staff auditor in December. Mr. Wayne said that Mr. Dinan waited until the end of the audit of the 2006 candidates before he retired. The hiring process will be initiated soon to find a replacement for him.

There being no further business, the meeting adjourned at 10:35 a.m.

Respectfully submitted,

Jonathan Wayne, Executive Director

OFFICE OF ATTORNEY  
GENERAL

State House Station 6  
Augusta, Maine 04333-0006  
Phone: 626-8830

FAX: 287-3145  
email:  
[phyllis.gardiner@maine.gov](mailto:phyllis.gardiner@maine.gov)

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## *Memorandum*

**TO:** Commission on Governmental Ethics and Election Practices

**CC:** Carl Lindemann

**FROM:** Phyllis Gardiner, Assistant Attorney General

**DATE:** February 10, 2008

**SUBJECT:** Carl Lindemann's Request for Commission Action

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Since I will not be able to attend the Commission meeting on Monday, February 11, 2008, I am writing to provide some procedural advice regarding the most recent request filed by Mr. Carl Lindemann, dated February 7, 2008.

As you are aware, Mr. Lindemann has a Rule 80C action pending in Superior Court, challenging the Commission's decision of December 22, 2006 that the Maine Heritage Policy Center ("MHPC") is not a political action committee ("PAC"). Among the arguments raised by Mr. Lindemann in his petition for judicial review of that decision are claims that the Commission was biased as a result of former Commissioner Ginn Marvin's role as a board member and treasurer of the MHPC while she served on the Commission, notwithstanding that she recused herself from all proceedings regarding the complaint about MHPC's status. This issue has been fully addressed in briefs filed by both parties with the court. We are now awaiting oral argument before the Superior Court decides the matter.

Although the Commission ruled in December 2006 that MHPC did not meet the definition of a PAC, it simultaneously determined that the organization was legally obligated to file a report of any contributions or expenditures on the TABOR initiative campaign, pursuant to 21-A M.R.S.A. §1056-B. MHPC complied with that directive by filing such a report in January, 2007. On March 5, 2007, Mr. Lindemann filed a request for a new investigation into the accuracy and completeness of this report. That request was initially considered by the Commission at a meeting on May 14, 2007, and after some discussion the members voted 2 to 1 to postpone (or "reschedule") any further consideration of the request until after the Superior Court had ruled on Mr. Lindemann's petition in the case described above. Mr. Cassidy made the motion; Mr. Friedman seconded it; and both of them voted in the affirmative. Ms. Thompson voted in the negative. Ms. Ginn Marvin recused herself from the discussion of this matter. The

minutes of the meeting reflect the majority's view that it would make sense to defer investigation into the adequacy or accuracy of the section 1056-B report since, if the Superior Court were to rule that MHPC is a PAC, MHPC would be required to file a PAC report. Since a PAC report, by definition, is broader in scope than a section 1056-B report, its filing would thereby moot the second request for investigation.

Separate from his section 1056-B request, Mr. Lindemann raised issues last summer concerning Ms. Ginn Marvin's qualifications to serve as a Commission member based on his allegations that she was serving simultaneously as an officer of a "political committee" and had engaged in fundraising for that committee, in violation of Title 1 M.R.S.A. §§ 1002(2) & (6). He raised these concerns in correspondence addressed to the Governor and Legislative leadership first, and then brought the matter to the Commission. The Chair initially determined, based on advice from staff and counsel, that the Commission did not have jurisdiction to rule on the qualifications of a fellow Commission member, or to enforce the provisions of section 1002(2) & (6). He thus declined to put the matter on the agenda. At the meeting on August 13, 2007, after some discussion about whether the full Commission should decide the jurisdictional issue, a motion was made to accept the staff's view that the Commission has no jurisdiction over a complaint to disqualify a Commission member. This motion was adopted on a 4-0 vote, with Ms. Ginn Marvin abstaining.

More recently, Mr. Lindemann has argued to the Commission that it should adopt rules governing the handling of complaints against Commission members. The Commission declined that request, as a matter of policy, and adopted revisions to the Chapter 1 procedural rules at the meeting on January 15, 2008, without including any such provision. Mr. Lindemann now cites to a statement made by Jonathan Wayne in the cover memorandum to those rule changes, which was addressed to Commission members and included in the packet for the January 15 meeting. Mr. Wayne suggested in that memorandum that any complaints that may arise concerning Commission members could simply be dealt with on a case-by-case basis, without the need for procedural rules. In his February 7 letter Mr. Lindemann suggests that, in renewing his complaint about Ms. Ginn Marvin's conduct, he is attempting to invoke this case-by-case procedure.

Mr. Lindemann, however, has already been afforded an opportunity to try to persuade the Commission to act on his complaint regarding Ms. Ginn Marvin's conduct and qualifications, or to refer the matter to another agency or authority. Having already concluded that the Commission lacks jurisdiction to act on this complaint, you are not now under any legal obligation to reconsider that decision, or to treat this as a new complaint.

To the extent that Mr. Lindemann wishes to raise issues of bias or improper procedure based on Ms. Ginn Marvin's role on the Commission, as those issues relate to the Commission's handling of the section 1056-B investigation request, he is free to do so when the Commission takes up that request again following the Superior Court's ruling on his Rule 80C appeal. To take up that request now would require reconsideration of the motion to reschedule his request for an investigation of the 1056-B report. Such a motion would have to be made by one of the Commission members who voted in the majority on May 14, 2007. The same process would be required to reconsider the vote of August 13, 2007 on jurisdiction.

Mr. Friedman noted at the conclusion of the May 14, 2007 meeting, as recorded in the minutes, with respect to the vote to reschedule the request for an investigation into the MHPC's section 1056-B filing:

the vote to delay does not cast any doubt on the validity of the complaint. The complaint is worthy of hearing, but the Commission needs to be concerned with administrative economy. The Commission will look at every aspect of the complaint when the time is right.

Notwithstanding the Chair's expressed willingness to give full and fair consideration to Mr. Lindemann's request when the time is ripe, if Mr. Lindemann no longer wishes to have the Commission investigate the section 1056-B filing by MHPC due to his allegations of bias, then he is free to withdraw the request for the investigation. If he wishes to file a complaint about Ms. Ginn Marvin's conduct with another agency or office, then, as pointed out in Mr. Wayne's February 4 email to him, Mr. Lindemann is at liberty to do so.

Short of a motion to reconsider one of the matters that has already been decided by the Commission, there is no procedural mechanism to deal with Mr. Lindemann's February 7 request, nor is there any legal obligation for the Commission to do so at this juncture. The Commission has jurisdiction to deal with only one pending request by Mr. Lindemann, and that request has been scheduled for consideration after the Superior Court rules on the PAC question.

I hope this outline is useful to you. If you need clarification of any of the above, please let me know. Thank you, and I'll look forward to seeing you at the next Commission meeting.

cc: Jonathan Wayne, Executive Director  
Paul Lavin, Assistant Director