

Minutes of the November 9, 2005 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: Chair Jean Ginn Marvin; Hon. Michael T. Bigos; Hon. Andrew Ketterer. Staff:
Executive Director Jonathan Wayne; Counsel Phyllis Gardiner.

Absent: Hon. Vinton E. Cassidy

At 9:13 A.M., Chair Ginn Marvin convened the meeting. The Commission considered the following items:

Agenda Item #1 – Ratification of Minutes of the October 12, 2005 meeting

Mr. Ketterer moved to accept the minutes of the October 12, 2005 meeting, Mr. Bigos seconded, and the Commission voted unanimously (3-0) to ratify the minutes of October 12, 2005 meeting.

Agenda Item #2 – Request for Waiver of Penalty by No Slots for ME!

The director explained that Mr. Kilfoil was requesting a waiver of the late fee because he had thought the report was due on a different day. The director explained that the staff had recommended a late fee of \$514.52 based on how many days late the report was filed.

Mr. Ketterer moved to adopt the staff recommendation, Mr. Bigos seconded, and the Commission voted unanimously (3-0) to assess the penalty of \$514.52.

Agenda Item #3 – Definition of Lobbying for Disclosure Purposes

Martha Currier-Demeritt explained that the staff had requested the Commission's approval to publish a one-page memo offering advice to lobbyists on what activities constitute "lobbying" for reporting purposes. After considering comments submitted by several lobbyists, the Commission staff had recommended a more narrow view of lobbying than was initially proposed and presented to the Commission in September. Ms. Currier-Demeritt went on to explain that the Commission staff received more comments on the morning of the meeting from Bernstein Shur. Ms. Currier-Demeritt explained that the Commission members needed to approve the lobbying FAQ or determine if there were some changes that needed to be made. She stressed that time was critical because the lobbying year started in December and she normally sent out the booklet by the end of November.

Chair Ginn Marvin stated that the Commission members would accept the written comments from Bernstein Shur but stated that in the future any material submitted to the Commission on the day of the meeting would not be allowed. She further explained that it did not give the Commission member enough time to go over such materials.

Dan Riley of Bernstein Shur explained that they were unable to attend the last meeting when the Commission members had gone over the FAQ. He said that he reviewed the minutes from the last meeting and wanted to provide a few additional comments. He continued to say that one of the issues was the form that was used, which reflected the statute for the most part, but caused a vast majority of the problems. He explained that Bernstein Shur had a compliance procedure in-house which they worked very hard on. He explained that a law firm with a number of legislative clients such as his made it difficult to accurately reflect what was being done at the state house in a fashion that accurately reflected the statute. He stated that what the form asked for in its reporting was both confusing and in some respect overly broad.

Mr. Riley highlighted a few of the main points he wanted the Commission to look at. He believed that some points in the FAQ were not entirely supported by the statute. He went on to say that the changes that were made between the first and second draft were great. In particular the changes made with respect to monitoring were more reflective of the statute.

Mr. Riley thought that the areas that needed a little work were in the bottom of the FAQ. He stated the report that needed to be filed with the Commission was intended to include activity that occurred in the previous month. The statute required that a person register within fifteen days of meeting the eight-hour threshold which was acquired through direct communication with the legislator. Mr. Riley continued by saying that this was not always the way it worked; for example a client could request some information in July or August, and then decide in September that they want to pursue a legislative option. Bernstein Shur would then draft legislation, contact the potential sponsor, and get the bill filed before the closure deadline in October. He explained that the work done in July or August was outside of the window of the reporting form that needed to be filed. He stated that this was one example for the Commission where the form and the current statute do not provide for the type of reporting that the FAQ covered and guided the regulated community to follow.

The second issue, he stated, was that the current statute did not include the executive department staff, the Governor's staff, but did include legislative staff, specifically in the definition of official of the legislative branch. He was unsure if that was what the Commission had intended, but felt that this change should be done through the legislature rather than through an informal guidance document like the booklet.

He concluded that Bernstein Shur's recommendation to the Commission was that, if they decided to make some changes to address some of the confusion that was apparent, they do so in the form of a bill to the Legislature. He stated the reason for doing so was due to the fact that the Commission staff, in attempting to help people figure out how to comply

with Maine law, was dealing with a constitutionally protected right; the right to petition government. He went on to say the Supreme Court had decided that while lobbying could be regulated, it needed to be done in a narrowly constructed way which captured the amount of money spent in trying to influence government, but did not suppress the peoples right to petition government. He continued by saying that on thing that was properly addressed in the second draft was the narrowing of the number of people who might have to register and to lobby. Mr. Riley still had issues with those portions of the FAQ that involved what lobbying was, direct lobbying, and what was not lobbying. He stated that there were constitutional issues involved under the US Constitution and the Maine Constitution. He stated there were tax implications involved which were cited in his memo. He explained that some business expenses involved with legal fees are deductible, however, some lobbying expenses are not. Therefore, it was an important issue for the business community. He continued by stating that if Bernstein Shur was providing legal advice to their clients, then the client could deduct it as a business expense; lobbying was not considered deductible.

He went on to explain the report that was done by Paul Carrier on what lobbyists had made in the year was not even close to being accurate because of the variety of ways that lobbyists report how much they were being paid and who they were working for. He stated that some of the bigger firms, like Bernstein Shur, were not even on the list due to the fact that they were very careful to report just what the statute called for and not more, which would be a disservice to their clients with respect to the tax implications. Based on his reading of the Supreme Court decision in U.S. vs. Harris on this issue, Mr. Riley felt that it was very simply to capture for the public. So there was disclosure of the fact that interests who were paying others to lobby on their behalf were available to the public and that the narrow constraint on the right to petition government would be allowed in the Supreme Court's opinion, but they did not want to suppress peoples' right to petition. He stated that there was a situation under Maine Law where the current form did not give people the accurate information which was who was being paid what to lobby on which bills.

Chair Ginn Marvin asked if the members had any questions.

Mr. Ketterer took the floor and asked Mr. Riley if there was a difference in regards to a lobbyist talking to the governor or the governor's staff about vetoing legislation as opposed to talking to him about a judicial appointment for one of their partners. Mr. Riley stated that if it involved legislation, then conversations with the governor were captured by current law. In addition, if a lobbyist was talking to anyone in the legislature, then the conversations would be covered by the current law. However, if a lobbyist were to go see the governor's council or one of his policy analysts on a piece of legislation, then it would not be covered by the current statute. He stated that it appeared to him that there should not be any difference between the two if a piece of legislation were involved, but there was currently a discrepancy in the law between legislative staff and the governor's staff. He went on to say that the governor's staff was not currently covered under the definition section and that was just one of the areas he thought should be updated.

Mr. Riley stated that the last point he wanted to make was that the statute had been re-worked in 1993 and since then there had been a lot of changes in the way that lobbying was conducted. He continued by saying there were a lot of changes in how the reporting was done now; instead of paper most of it is filed electronically.

Mr. Bigos took the floor and asked Mr. Riley, in regards to the timing of research he had mentioned earlier, if he could propose any language that would help the Commission say that this type of research will not be counted. Mr. Riley stated that he did but that it would probably require a statutory change, he referred to an example of a lobbyist in the past that was called before the Commission, and required to show what he had done, what legal research was involved, when he had done it, and why he had registered when he had to do it. Mr. Riley stated that his firm always kept track of everything, making sure they had captured all of the lobbying time for the report, but they did not report research that did not end up involving drafting of bills that went before the legislature. He felt that was critical to find the right language, and it would also require a change to the form and to the statute. He continued by saying that the current statute and forms stated that a person who had done eight hours worth of lobbying in a calendar month had to register and had to begin to report. He explained that if a person had registered in September and had done legal work that ended up being researched in July in preparation for a bill that was not thought to make it to the legislature then they would have to backtrack all the way to July to report the time spent researching when it may not have been eight hours worth. Mr. Riley felt this raised many compliance issues. Mr. Riley thought the form and possibly the statute would need to be redrafted to make it very clear what was and was not research and preparation for lobbying and how a person captured that from a reporting standpoint.

The director proposed that the staff meet with Mr. Riley to go over some of his issues, and the staff would fine-tune the advice that was given out to lobbyist if it not require a statutory change. The director stated there was one bill that had been cleared by the legislative council for next session. It proposed to require disclosure of lobbying of executive branch agencies. The director went on to say that the staff would propose any statutory changes to the Commission members at the December meeting. If the members approved the changes the proposed legislation could be used as a vehicle to get those changes in as well.

Chair Ginn Marvin questioned the director as why time was of the essence for the lobbying booklet. The director responded that the lobbying year began on December 1, and once a person had done lobbying for eight hours in a month they were required to file a report with the Commission. He went on to say that waiting until mid-December would prolong the process of getting the booklet out to help people determine if they are required to file as a lobbyist.

Ms. Currier-Demeritt stated that she felt the Commission had always had a very broad interpretation of the statute and if they were going to be tightening up that interpretation then it needed to be done before the start of the lobbying year. She said that the staff

normally sent out a packet sometime in the month of November to remind lobbyists to send their annual report in by December 30 and that by December 1 they can begin to register. Getting the booklet out ensured that people would have the correct information heading into the on-coming year.

Chair Ginn Marvin stated that all the new information made it difficult for the Commission members to do anything without having first gone over what that information was. She felt that it was very compelling towards the lobbying booklet. Ms. Currier-Demeritt stated that the staff could continue to give out the broad information and not send out a narrow interpretation until it had really been mulled over.

Ms. Gardiner wondered what the date of the December meeting was and if it would be early enough in the month to meet everyone's needs.

Mr. Bigos stated that he was not comfortable being in a reactive position all the time. He went on to say that there was more work that could be done but that the current draft was good and that at some point there needed to be a conclusion. Mr. Ketterer agreed with Mr. Bigos, and said that if anything needed to be changed in the future, then they could do that. Mr. Bigos stated that if something arose in the next few weeks before the next meeting then he would appreciate an email informing him of what was going on.

Ms. Gardiner stated that the FAQ as drafted at that time referred to communications with staff of the legislature or the governor. She agreed that Mr. Riley had accurately pointed out there was a difference in what the statute said and what the FAQ said. She stated that the issue of research on subjects months before any proposed bills actually went before the legislature was an important issue and would require some redrafting.

Ms. Gardiner also mentioned the grassroots letter and the lobbying point raised in comments. The statute did speak to direct communication but she thought the reason the staff put that in the guidance was because the lobbyist was essentially engaged in direct communication through another agent. It was that close involvement in running a grassroots lobbying campaign that the staff consider that to be lobbying. She stated there was room for debate about that. The Commission could decide whether they wanted to address that in the guidance or defer the issue. She stated that she didn't think the Commission would want to have guidance go out that would be changing, but could add to it later as they had a chance to contemplate the issues.

The director responded that the staff would be very comfortable clarifying the issue on the governor's staff and withdrawing the advice on grassroots lobbying. He agreed that Mr. Riley had a reasonable point on that this certainly did not involve the direct communications with the legislative staff but indirectly through a third party. The staff would not provide any guidance regarding that issue at that time.

Chair Ginn Marvin asked if a motion was needed or if the members needed to accept the FAQ as currently drafted and look at any changes there might be in the future. Ms.

Gardiner stated that they could do that so Ms. Currier-Demeritt could get something out there while the staff looked more into the Grassroots question and claw-back issue.

Mr. Riley concurred that they were not trying to slow down the process. He just wanted to make sure the Commission was aware of some of the issues they had raised, and he would be more than happy to go over it with the staff.

Mr. Bigos moved to accept the FAQ as proposed as revised notwithstanding any urgent changes that the director made them aware of within days of or a few weeks after the meeting, only if necessary. Mr. Ketterer asked if that was with the modifications they had discussed. Mr. Bigos replied that it was. Mr. Ketterer seconded and the Commission voted unanimously (3-0) to accept the FAQ as revised.

Chair Ginn Marvin ended the discussion by saying that the Commission would not accept any more testimonies on the day of the hearings anymore. It did not give the Commission members enough time to go over the new information given out.

Agenda Item #4 – Funding for the Maine Clean Election Act

The director explained that this was a perennial issue for the Commission. He went on to say that the staff had prepared a draft report about the sufficiency of the Maine Clean Election Act fund for the upcoming elections. The conclusion of the Commission staff in the draft report was that they were still hopeful that the current level of funding would be sufficient, but the Commission had some doubts that were expressed in that report. He went on to say that the major source of doubts was the uncertainty about the number of gubernatorial candidates, who had declared an intention to be publicly financed, who would really succeed in qualifying. He went over the requirements for candidates regarding how many signatures and qualifying contribution requirements they had to collect. He explained that the staff had received expressions of interest from six candidates in the gubernatorial race and went over each one. He stated that the Commission staff was anticipating that some Green Party candidate would come forward and run for governor in 2006. He concluded that the current level of funding would be sufficient if there were three candidates in the general election who were publicly financed. However, if there were more than three, the Commission would have to ask for some additional revenues towards the Maine Clean Election fund.

He stated that it was difficult to know at that time if the Commission would need to ask for additional revenues. There had been a deadline for the Commission to request additional funding from the governor to be included in the governor's supplemental budget. At that time, the director thought it was too speculative to make that request given the financial constraints that the administration and the legislature were under. He went on to say that the MCEA did permit the Commission to put in their own bill following the issuance of a report if they believed they needed additional funding. The director stated that the staff recommendation was to issue the report and to put in a bill as a placeholder for next session because the Commission was not sure they would need to ask for more money until late in the session.

Chair Ginn Marvin asked if there were any questions. Mr. Bigos asked the director if he could review some of the operative deadlines during the next legislative session and when the staff would know more about how many clean election candidates there would be in the primaries to help the Commission make a decision. The director replied that for candidates who were in a party included Peters Mills, Chandler Woodcock, Stephen Stimpson and a Green Party candidate. The deadline for them to collect the \$5 checks was April 18, nearing the very end of the session. The director said that he thought it would be appropriate for him to interview these candidates and check in with them around February or January to see how they are doing with their campaign. The unenrolled candidates, Nancy Oden, Bobbie Mills, and Alex Hammer, had until June 2. The director proposed that he check in with them in the months before that date to see how their campaign was going. He reiterated that with the unenrolled candidates they would not know for sure until after the session concluded in May.

The director continued to say that there was a fall-back provision in the law which stated that the Commission was allowed to ask the State Controller to transfer 2 million dollars from the General Fund to the Maine Clean Election Fund. This was established in 2002 when the legislature removed 6.7 million dollars, and realized there may be a shortage in the 2006 election. He went on to say that the provision provided for the Commission to receive two 2 million dollar advances for the 2006 election instead of waiting until 2007 and 2008. The director stated that the proposal given out at the meeting already was requesting the first of the two 2 million dollar advances.

Mr. Ketterer asked if the director could briefly review for the Commission members the history of advances that the Commission had gotten earlier than they otherwise would have. The director explained that in late 2003, when he was still fairly new to the Commission, the projections were that the Commission would not have enough money for the 2004 elections because of the 6.7 million dollars that had been transferred out. The legislature allowed the Commission to have in 2004 a large chunk of money that otherwise would have been given out on January 1, 2005. Mr. Ketterer asked whether the money the Commission had received had indeed helped out with the 2004 elections. The director affirmed that it had. The director said that the Commission would need to request the first of those two advances, and it was provided for in the current budget bill. In addition, the Commission might need to ask for the second 2 million dollar advance if more than three candidates for running for governor in the general election were publicly financed.

Mr. Ketterer asked if the director was proposing to put in a bill and just let it sit there as a placeholder; the director replied only if the Commission members were comfortable doing that just so they had a platform for asking for additional funds.

Chair Ginn Marvin questioned what the downside would be of putting that placeholder bill in. Mr. Bigos stated that he supported doing the bill because the Commission owed it to the legislature if they might need more money and a surprise would not be good. He stated that he was interested in having the report changed slightly just to explain a little

bit more about the 6.7 million transferred out of the MCEA fund. Mr. Bigos said that he did not think the Commission should have the governor put it in his budget because the Commission was unsure if it was really going to be needed. Mr. Bigos felt that the bill and the report were a wise decision to make because it gave everyone full disclosure and showed that the Commission was acting responsibly.

Mr. Ketterer stated that he agreed with Mr. Bigos and that these issues were out of the Commission's control. The Commission is required by law to distribute funds according to a formula, and it was never known how many people would decide to enter an election race.

The director stated he had one last point to bring to the Commission's attention, and whether the Commission felt it needed to be addressed more prominently in the report. In regards to how the matching funds are given out, the Commission pays the person the maximum amount that they might ever be entitled to spend. The director gave an example of what could happen to a candidate and explained that they would have the money in their bank account. If there were additional authorizations, which there frequently were in the last week of the election, the candidate would have the money already. He said that this was very convenient for the candidates, but that it was understood that the Commission may not be so generous in the future. The budget in the report was premised on the Commission paying out half of the maximum amount of matching funds. The director stated that the reason for this was that of the amounts of matching funds that had been paid out in 2004, the legislative candidates were only authorized to spend 24% of that amount. He continued by saying that in order to make this work the Commission staff were proposing to only give the candidate half of the maximum amount of the full amount, which could cause alarm at the legislature because those candidates are accustomed to receiving the full eight thousand and now they would only be receiving four thousand. The director stated the message in the report was that the Commission was constrained by the current fiscal realities, and this way a way to reduce the cost of the program by 1.3 million dollars.

He questioned if the Commission members were in support of the proposal. They all agreed that it sounded like a good idea. Mr. Ketterer stated that it would be great to be able to give out all the money and just authorize certain amounts to be spent by the candidates. However, that would only work if funds were unlimited and that was not the case.

Chair Ginn Marvin asked the director if he needed a motion for the proposal. The director responded that if the Commission was comfortable with it, a motion would be helpful for them to adopt the report with the revisions selected by Mr. Bigos and the submission of proposed legislation to request additional revenues.

Mr. Bigos moved to adopt the report with the revisions and the submission of proposed legislation to request for additional revenues, Mr. Ketterer seconded, and the Commission voted unanimously (3-0) to adopt the report as said above.

Chair Ginn Marvin called a fifteen minute recess before the beginning of Agenda Item 5, an Investigative Hearing on the 2004 campaigns of and use of public funds by Julia St. James and Sarah Trundy, and in the publication of certain campaign literature in a special election in Biddeford in 2004.

Note: An official transcript of the hearing is attached to these minutes, entitled “Investigatory Hearing Regarding Campaigns of Julia St. James, Sarah Trundy, and literature in Biddeford Special Election.”

Respectfully submitted,

Jonathan Wayne
Executive Director