STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
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Minutes of the June 14, 2016, Special Meeting of the
Commission on Governmental Ethics and Election Practices
45 Memorial Circle, Augusta, Maine

Present: Margaret E. Matheson, Esq., Chair; Michael T. Healy, Esq.; William A. Lee III, Esq.; Meri N. Lowry, Esq.; Hon. Richard A. Nass

Staff: Jonathan Wayne, Executive Director; Phyllis Gardiner, Counsel

Commissioner Matheson convened the meeting at 2:10 p.m.

The Commission considered the following items:

1. Use of Email List for Fundraising – State Senate Campaign of Diane Russell

Mr. Wayne stated Michael Hiltz, a Portland resident, had filed a request for an investigation regarding the campaign of Representative Diane Russell, who is a candidate for Senate District 27. Mr. Hiltz alleges her use of an email list maintained by her PAC is an over-the-limit contribution to her campaign and that her campaign did not report the employment information for many of her contributors as required under campaign finance law. Mr. Hiltz is a supporter of Rep. Chipman.

Ms. Matheson asked if Rep. Russell was present. Ms. Knox stated she was not. Mr. Lee asked why Mr. Hiltz was not present. Mr. Wayne explained that Mr. Hiltz sent an email stating he would not be present because he had nothing further to add to his complaint.

Katherine Knox, Esq., appeared before the Commission on behalf of Rep. Russell. Ms. Knox expressed concern about Mr. Hiltz's absence and stated this is his second complaint against Rep. Russell. She said that, given the timing of their filing, these complaints appeared to be politically motivated. (On June 3, 2016, Mr. Hiltz submitted a request for an investigation regarding the activities of the Working Families PAC, a political action committee established by Rep. Russell for which she is the principal officer (hereinafter, the "first complaint"). The first complaint was scheduled to be considered by the Commission meeting at its meeting on June 29, 2016 and had not been provided to the Commissioners as of the date of this meeting.)

Addressing the issue of Rep. Russell's reporting of contributors' employment information, Ms. Knox stated most of the contributions received by Rep. Russell are received via ActBlue, which is a

digital fundraising platform. Candidates can sign up for an account, design their contribution page and then receive weekly updates on their account activity. Ms. Knox stated the form has fields for all of the required information that needs to be reported in campaign finance reports. She stated that the campaign does follow-up on missing information but the "not currently employed" or "unemployed" is what the contributor listed when they completed the form to make their contribution.

Ms. Matheson asked what percentage of Rep. Russell's contributions came through ActBlue. Ms. Knox stated the majority of Rep. Russell's contributions are received via ActBlue. In response to a question from Mr. Lee, Ms. Knox stated the employment information listed is what the contributor entered when they made their contribution.

Mr. Healy asked if ActBlue adds contributors' names to the email list. Ms. Knox stated that ActBlue only processes the contribution; it does not compile email lists. Mr. Healy asked if the ActBlue contributions were related to the email list complaint. Ms. Knox stated she does not currently have that information.

Mr. Nass asked about the link between MoveOn.org and ActBlue. Ms. Knox stated that MoveOn.org is an issue-based platform. Individuals can post petitions for people to respond to by signing the petition. Ms. Knox stated MoveOn.org does not provide individual information to the petition sponsors but they can send messages to individuals who have signed their petitions.

Ms. Matheson stated that Commission Rules require that a reasonable effort be made to obtain the employment information of contributors and it appears that this has been done.

Mr. Lee moved to terminate the investigation with a finding that there has been no violation of the requirement to use reasonable efforts to obtain the occupational information of contributors.

Following a suggestion by Ms. Gardiner regarding the wording of the motion, Mr. Lee amended his motion and moved to find that there are insufficient grounds to proceed with an investigation regarding the issue of reporting contributors' employment information based on the undisputed facts that the form provided to the contributor contains a field to fill in employment information and in all

instances something was filled in, i.e., unemployed or not currently working, which meets the requirement that the candidate make a reasonable effort to obtain the information. Ms. Lowry seconded the amended motion. Motion passed (5-0).

Ms. Knox stated it was her impression that today's proceedings were to determine whether further investigation was necessary, not to make a determination of whether a violation had occurred. Ms. Matheson stated they were tracking the statutory language on reviewing applications for an investigation: "The commission shall review the application and shall make the investigation if the reasons stated for the request show sufficient grounds to believe a violation may have occurred." Ms. Lowry agreed and stated she believed that was the standard they would apply to each issue. Mr. Healy stated he thought a formal evidentiary hearing would be held before they made final decision. Ms. Gardiner stated that once the Commission receives a complaint, it is up to the Commissioners to decide how they want to proceed: schedule a formal evidentiary hearing or decide they have sufficient information to find a violation or there are reasonable grounds to continue to another day for more thorough review.

Ms. Knox stated Rep. Russell had filed a series of petitions on MoveOn.org, all of which are associated with her name. Ms. Lowry suggested Ms. Knox provide an explanation of how MoveOn.org functions. Ms. Knox stated individuals click a link to sign the petition, which triggers a form that asks for information such as their name, address, email address and maybe their telephone number. She stated that MoveOn.org maintains this information but it is not disseminated to the petition sponsor. Mr. Healy asked how MoveOn.org allows the petition sponsor to access the individuals' information. Ms. Knox stated that MoveOn.org has a feature that allows the petition sponsor to send an invitation to individuals who responded to his or her petition to sign up, via a link, to receive information about the petition sponsor's other projects. If the individual responds to the invitation, they are forwarded to NationBuilder which compiles the contact information for the petition sponsor to access.

Ms. Knox pointed out that the email list size fluctuates depending on interest, personal information changes, etc. which makes it hard to assign a value to the list. She stated there are a lot of platforms that perform this service and ultimately Rep. Russell found NationBuilder too expensive and changed platforms. Mr. Healy asked what the maintenance fees were. Ms. Knox stated that

NationBuilder cost approximately $1,000 a month. In response to a question from Mr. Healy, Ms. Knox stated that sometimes the PAC paid the fees and other times Rep. Russell paid for it directly but was later reimbursed by the PAC.

Ms. Matheson asked when the PAC was established. Mr. Wayne stated the PAC was established in 2013.

Mr. Healy asked if Rep. Russell got paid or reimbursed for her time spent maintaining this list while it was on NationBuilder. Ms. Knox requested to delay this response until they respond to Mr. Hiltz's first complaint (referring to the complaint regarding Working Families PAC). She stated they were only prepared to respond to the three questions posed by Commission staff regarding this complaint filed by Mr. Hiltz. Mr. Healy stated that if Rep. Russell was paid by the PAC for her time in putting this list together, then it is relevant to the question of to whom the list belongs to – the PAC or Rep. Russell. Ms. Knox stated the PAC is an unincorporated entity that is completely controlled by Rep. Russell, and always has been, so this is a distinction without difference for purposes of distinguishing ownership of the email list.

Mr. Lee said that if the PAC made a cash contribution to the Rep. Russell's campaign, it would have to be reported. Ms. Knox agreed it would. Mr. Lee stated that if that is the case then, there is a distinction between the PAC and Rep. Russell. Ms. Knox acknowledged that there was a distinction with respect to a cash contribution. However, she believed it was unfair that a list Rep. Russell personally compiled is considered PAC property just because the PAC paid maintenance fees, thus denying Rep. Russell access to a list she personally compiled. She stated this issue has never been reviewed by the Commission and there is no guidance about ownership or value of these email lists.

Mr. Healy asked if Rep. Russell was working on the list as herself or as the manager of the PAC. Ms. Knox stated the PAC did not exist when Rep. Russell created this email list. Mr. Healy stated that he could reasonably conclude that if the PAC had been paying to maintain the list, including reimbursing Rep. Russell for work on it, then the PAC has ownership of the list. Ms. Knox disagreed that simply having the PAC pay maintenance fees is evidence of exclusive ownership of the list. One could also conclude that there was a hybrid ownership of the list. She said the

Commission should have a rule regarding the ownership of these kinds of lists but there is no rule now on how to determine who owns a list or what the list's value is. Mr. Healy stated this was a factual determination. Ms. Knox asked how Rep. Russell could have known how to proceed with the maintenance of the list when there are no rules or statutes that apply to this situation.

Mr. Lee said the PAC received $7,441 last October for sale of the list. Ms. Knox stated that was correct but it is part of the first complaint and they are not prepared to respond to this issue. Mr. Lee stated that if the PAC sold the list, then that is evidence that the PAC owns the list. Ms. Knox stated that, on its face, it appeared that way, but the full response is more complicated and will be presented at the time the first complaint is heard by the Commission. Mr. Lee pointed out the confusion in trying to figure out the roles of the PAC and the candidate with respect to this list, especially since the PAC is an unincorporated entity with no legal separate existence of its own. Ms. Knox agreed and stated that it is hard to explain what a PAC is to individuals interested in starting a PAC because PACs do not exist outside of election law.

Mr. Healy stated that if the PAC is indistinguishable from Rep. Russell, then anything it does is actually being done by Rep. Russell. Ms. Knox stated that a PAC does not function as d/b/a entity for an individual. Mr. Healy stated that if Rep. Russell makes a solicitation thru the PAC, she also makes the decision about how that contribution is used. Ms. Knox stated she does and the only exception to how she could use those funds is making a contribution to her campaign. She stated the Legislature had sustained a veto on a proposed change to narrow how PAC funds could be used.

Ms. Lowry stated she is not as interested in the nature of the entity or its relationship to Rep. Russell as she is in knowing how the PAC received payment for sale of the list and if Rep. Russell received payment for maintenance of the list. Ms. Lowry stated she was interested in whether Rep. Russell was paid and by whom because it is relevant to the need for further investigation.

Mr. Nass stated MoveOn.org collects information that somehow gets transferred to NationBuilder and asked how that happens. Ms. Knox stated Rep. Russell can send updates, through MoveOn.org, on the status of her petitions and can add a link for the individual to sign up to receive future information. This link redirects them to NationBuilder where they will have to fill out another form with their contact information which Rep. Russell will have access to. Mr. Nass stated this is a very

sophisticated way to establish a rapport with potential contributors and the end result is monetary contributions. Ms. Knox stated this is a very common process, there is nothing illegal to it and the individuals sign up voluntarily. In addition, there have been no allegations or complaints that Rep. Russell is scamming or misleading the contributors. She expressed concern about the language being used that implies that contributors are being scammed and the potential impact on Rep. Russell who has not done anything illegal or nefarious.

Mr. Healy stated he would like to know how many names on the list were contacted to make solicitations for her campaign, what is the value of the list as of the time Rep. Russell used it to make solicitations and who owns the list. Ms. Knox stated the list was used for more than fundraising. It was used to send alerts regarding issues of importance to Rep. Russell, especially issues in the state that were before the Legislature. It is not a straight-forward fundraising list; it is a hybrid list used for multiple purposes.

Mr. Healy made a motion that, pursuant to statute, sufficient grounds have been demonstrated that a violation may have occurred and there is reason to have an investigation in this matter. Mr. Nass seconded the motion. Mr. Lee asked for clarification if this type of motion required them to make any type of finding or decision. Ms. Gardiner stated this motion simply started the process. Motion passed 5-0.

Ms. Knox asked if it would be possible to combine the two complaints and asked for an extension of time in order to provide one comprehensive response to the issues. Mr. Wayne suggested holding this issue over to the July meeting and adding the first complaint to that agenda. Mr. Healy stated it made sense to combine the two complaints and consider them at the same time.

Mr. Lee asked if there was an agreement that the list has value; all the Commissioners agreed there is a value. However, he said that is a matter for a factual determination by the Commission.

Mr. Nass asked if the Commission finds a violation, would the result be the imposition of a penalty. Mr. Wayne stated they could do this but they could also recognize that Rep. Russell would have no way of knowing this could be viewed as a contribution to the PAC or if they view this as a contribution from the PAC, they could direct Rep. Russell to pay the PAC for the list.

Ms. Matheson stated she believed there is a line between the candidate and his or her PAC and it should be respected and maintained for the purpose it exists in election law. Mr. Nass agreed and expressed concern that other candidates could be doing the same thing. He suggested this may be an issue for the Legislature to review and correct. Ms. Lowry stated she thought the two entities – the candidate and the PAC – are distinct enough entities so that they could determine who owned the list and at what time, or whether there is a shared ownership. Mr. Healy stated that another question the Commission may want to address is whether it is within the purpose or the mission of a leadership PAC to use the proceeds or assets of a PAC to benefit the election of the PAC manager. Ms. Knox stated that information would be included in their response to the first complaint.

Other Business

Mr. Healy stated at the last meeting there was a preliminary hearing on a complaint filed against Rep. Chipman by Steven Biel of Portland. There were two motions voted on and two motions that failed for lack a second – a motion to find a violation and a motion to find no violation. The Commission did not authorize the staff to conduct further investigation. Mr. Healy stated he made a motion to adjourn the matter, which passed.

Mr. Healy stated that subsequent to the meeting, he reviewed the statute on the house party exception and the Clean Election laws. He stated that this is an issue of first impression for the Commission and one of the most important issues to come before the Commission during his tenure. Mr. Healy stated he believed the Commission owed it to the public and Clean Election Act candidates to make a finding on whether what Rep. Chipman did with the house party invitation was permissible or not. He stated that for those reasons he would like to make a motion to reopen the matter and, if it is seconded, to table the motion until the next meeting. Mr. Healy stated he had drafted his own findings of fact and conclusions of law, which if his motion is adopted, he would distribute to the parties before the next meeting. If his motion is not seconded, the matter would remain as it was left at the last meeting.

Mr. Healy made a motion to reopen the case regarding Rep. Chipman which was heard at the Commission's last meeting.

Mr. Lee asked for clarification about whether this is a motion for reconsideration because he thought they had voted not to do further investigation. Ms. Gardiner stated they did vote to do no further investigation but that was separate from finding that there may have been a violation or not. She stated her understanding of the motion was that the Commission had decided they had sufficient information and did not need any additional facts to determine whether there was probable cause to believe that a violation may have occurred.

Ms. Matheson asked if Mr. Healy's motion was to reopen. Mr. Healy stated that it was and that when he voted for no further investigation it was because he did not think it was necessary for staff to do any further investigation. He thought there were sufficient facts to make a finding of violation.

Mr. Lee seconded the motion. He asked if Mr. Healy's motion would rewind the case to the point where they could make a determination whether to investigate. Ms. Gardiner stated it did and they were reopening it to consider whether the information was sufficient to determine whether a violation had occurred. Mr. Lee asked if it made a difference if the motion was to reopen or to reconsider. Ms. Gardiner stated it did not.

Mr. Lee asked if the motion passed, would Mr. Healy be making a motion to postpone consideration of it until the regularly scheduled meeting in June. Mr. Healy clarified that if his motion to reopen was seconded, he would make a motion to table his motion to reopen until the next meeting so the parties could be present. If the Commission voted to reopen the matter, it would then consider the merits of the complaint and decide whether, based on the evidence, a violation did or did not occur.

Ms. Lowry asked if the motion to reopen or reconsideration was timely. Ms. Gardiner stated there was nothing in the statute or rules regarding reopening or reconsidering a complaint and there was nothing done at the last meeting that would give the parties any appeal rights.

Mr. Lee stated they were troubled by the language of the statute and had asked staff to research and report back on the history of the statute. He asked if staff would have that research available for the next meeting. Mr. Wayne stated they would. Mr. Lee stated he had made a motion to table this matter at the last meeting so they could have this information to make a determination.

Mr. Healy stated he wished he had voted for the motion to table at the last meeting but he did not because the parties wanted to resolve the matter due to the upcoming election. He stated he believed Clean Election candidates should know whether this use of the house party exception is okay or not.

Ms. Matheson stated she probably would not vote in favor of the motion because she felt their decision to not go any further with the investigation was sufficient given the facts.

Mr. Healy made a motion to table the motion to reopen until the next meeting. Mr. Lee seconded the motion.

Motion passed (4-0; Mr. Nass abstained.)

Mr. Wayne stated he would provide notice to the parties and asked whether Mr. Healy's draft Findings of Fact and Conclusions of Law should be distributed as well. Ms. Gardiner stated that because they had not voted to reopen the matter, it would not be appropriate to distribute the draft at this time.

Ms. Matheson asked if there was any other business to be discussed.

Mr. Wayne stated the draft determination on the Theodor Short hearing was ready for their review and distributed it to the Commissioners. Mr. Wayne stated that he had received notice from Mr. Short's attorney that Mr. Short would not appeal the Commission's decision to deny Clean Election funding. Mr. Lee asked how these decisions are normally handled. Ms. Gardiner stated that the Chair signs the decision if it is acceptable to the Commission as written, but if Commissioners want to discuss possible changes, that discussion would have to be put off until the next meeting.

Mr. Nass made a motion, seconded by Mr. Healy, to adjourn. The motion passed. The meeting adjourned at 3:45 p.m.

Respectfully submitted,
/s/ Jonathan Wayne
Jonathan Wayne, Executive Director