



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
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Minutes of the May 22, 2020, Meeting of the
Commission on Governmental Ethics and Election Practices
45 Memorial Circle, Augusta, Maine

Present: William A. Lee III, Esq., Chair; Meri N. Lowry; and Hon. Richard A. Nass.

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

Commissioner Lee convened the meeting at 9:05 a.m. He noted that this was the first meeting that was being conducted by Zoom videoconferencing. He said the Commission currently has three Commissioners. There are two pending nominations, but due to restrictions on meetings due to COVID-19, those nominations are on hold and it is likely to take some time before that changes.

Mr. Lee said a second ethics complaint had been filed against the Speaker of the House, Sara Gideon. Ms. Lowry had recused herself from consideration of the first complaint against Speaker Gideon, but she has reconsidered the necessity of her recusal based on new information. Ms. Lowry said both she and her husband made a one-time contribution to the Sara Gideon campaign. She said, out an abundance of caution, she had recused herself from participating in the first matter involving Speaker Gideon to avoid the appearance of a conflict. She said she had again reviewed the conflict of interest language in statute, which states that a close political relationship is not created by the making of a contribution to a political committee, organization or candidate. In light of the express language of the statute, she believed her recusal was not required. Ms. Lowry again disclosed that she and her husband had contributed to Sara Gideon's campaign, but the statutory language does not require her to recuse herself and does not characterize her contribution to the Gideon campaign as a conflict of interest. She was confident in her ability to keep an open mind when Speaker Gideon appears before the Commission. Mr. Lee said he was satisfied with Ms. Lowry's statements. Mr. Nass said he had recused himself from matters in the past and was also satisfied with Ms. Lowry's statement. Mr. Wayne said he would schedule the matter for the June Commission meeting.

Mr. Lee said that, due to COVID-19, the Commission meetings were being conducted via Zoom and live streamed to YouTube for the foreseeable future. He said he was willing to make a motion

that these meetings be kept private on the Ethics Commission's private YouTube channel, but made available to the public upon request. Ms. Lowry said it was her understanding the meeting link would be posted on the Commission's website. Mr. Nass said he agreed with Mr. Lee's motion but said he wanted to hear from Mr. Wayne whether he had an opinion about the motion. Mr. Wayne said this was very achievable for the Commission staff to handle meetings in this manner.

Mr. Lee made a motion that the Maine Ethics Commission meetings conducted via Zoom, or similar process, be live streamed to the public with a recording of that live stream to be saved to the Ethics Commission YouTube account library and made private but be made available to the public upon request. Mr. Nass seconded the motion. Motion passed 3-0.

The Commission considered the following item:

1. Investigation of Stop the Corridor

Mr. Lee said the purpose of this meeting was to give direction to the Commission staff on the scope of the investigation to be conducted involving the complaint against Stop the Corridor (STC). He said there were a couple of preliminary matters to be addressed. The first issue was a request by STC to designate their document submissions to the Commission as confidential based on guidance from the Commission staff. Mr. Lee said some of the information provided by STC was confidential and some was not. Clean Energy Matters has objected, stating it could not prepare an adequate response without seeing STC's opposing arguments. Mr. Lee said he believed people are entitled to rely on the guidance provided by the Ethics Commission, which was what STC did. He said he believed there was greater harm in the Ethics Commission not standing by its word than a harm created by another party receiving that information. He said to be fair to Clean Energy Matters, he hoped the arguments presented today by STC would be sufficient for Clean Energy Matters to craft a response. Mr. Augur had no objection to proceeding in this manner. Mr. Monteleone and Ms. Knox had no objection. Mr. Nass and Ms. Lowry agreed with Mr. Lee's decision.

Mr. Lee said the second preliminary issue was whether the Commission would need to go into Executive Session. He said the authority to go into Executive Session is under Title 1, section 405(6)(f), which pertains to the discussion of information that is not disclosable to the public. In this matter, that would be financial and campaign documents and information related to STC. If a

document is not disclosable to the public, then discussion of the document cannot take place in a public meeting. He said he hoped to conduct the meeting without having to go into Executive Session because he preferred to keep the process transparent. He said it was critical that the Commissioners not make any comments or ask questions in such a way that would inadvertently reveal confidential information. He said if it became necessary for the Commission to go into Executive Session, that session would be conducted via conference call in order to ensure privacy. He asked Ms. Gardner if he had left anything out. Ms. Gardner said Mr. Lee's explanation was clear and sufficient.

Mr. Wayne said at the March 10th Commission meeting, the Commission authorized an investigation into whether STC qualified as a political action committee (PAC) because of its involvement in the petitioning process for a citizen initiative. He said the Commission staff had a teleconference with the representatives for STC in late March and received some documents from STC in April. However, it became apparent there was a difference of opinion between the Commission staff and the attorneys for STC on the scope of the investigation. He said Commission staff believed the scope of the investigation should be expanded to include whether STC was a ballot question committee (BQC) based on the information received from STC. He said the documents from STC were helpful. STC's intent in providing those documents was to show a steady inflow of money from funding sources and a steady outflow of expenditures in 2019 to support their argument that its participation in the ballot petitioning process had not changed the overall purpose of the organization. He said STC redacted the names of the payees in the accounting documents provided and replaced them with general categories. This redaction diminished the value of the information for the investigation. He said, in order to conduct a thorough and professional investigation, the Commission staff needed to understand what STC was doing beginning in August 2019 and then compare that to its financial activities prior to that time. He said the staff did not believe the scope of the investigation was limited just to the expenditures related to the petitioning process. The scope should include the broad range of STC's activities since the ballot question became a possibility.

Mr. Wayne said Commission staff believed the investigation should also include an examination of how STC received funds and whether it received funds for the purpose of influencing an election. He said, based on the information received, it was important to understand the communications to

the funding sources. He said one of the questions that should be asked is whether the funding sources knew the funds were going to be used to influence an election, which is one of the triggers for whether an organization should register as a BQC.

Mr. Wayne said the representatives for STC have said they intended to keep the funding sources anonymous during the course of this investigation. He said the Commission staff needs that information in order to understand what the funding sources thought they were funding when they provided funds in late 2019, what their purpose was in providing the funds, and the overall purpose of STC.

Ms. Lowry asked if the Commission staff was also seeking the names of STC's vendors. Mr. Wayne said it was critical for staff to have that information. There was sufficient information in the documents already provided by STC to reasonably ask what the funding sources knew. Mr. Nass said he wanted to remind everyone that the Commission has a very good track record of maintaining confidentiality. Mr. Lee said it appeared the investigation would not be any broader if it were to include examining whether STC was a BQC. Mr. Wayne said that was his opinion and that the lines of questioning regarding both reporting statuses would be the same. He said STC was arguing that the investigation's scope was limited to the question of STC's major purpose, which is a much more limited investigation.

Ms. Lowry asked whether it would be necessary to pursue an examination of STC's major purpose if the staff were to focus on whether STC qualified as BQC. Mr. Wayne said that would be entirely appropriate and the investigation would still be thorough if it were limited to that question.

James Monteleone, Esq., and Katherine Knox, Esq., appeared before the Commission, on behalf of Stop the Corridor. Mr. Monteleone said in early March there were extensive memoranda outlining the issues. At the March meeting, the Commission moved and approved, by a vote of 2-1, of an investigation to determine whether STC qualified as a PAC based on evidence which suggested that its major purpose became to initiate or influence an election. Mr. Monteleone said, despite discussions in the record about the possibility of STC being an BQC, that is not what the Commission approved. In order to place the question of STC's major purpose into context, STC independently provided the Commission staff with the records necessary to quantify STC's spending and fundraising from mid-October forward and to put it in context with periods before

mid-October. He said the documents voluntarily provided to the Commission staff clearly established that the funding, spending, and field operation work did not change over time. He said STC provided unredacted information about its field staff operations, which constituted the in-kind contributions reported by No CMP Corridor, and volunteered to make key staff available to answer the questions the Commission staff indicated needed follow up. Mr. Monteleone said STC has been cooperative, made itself available, and voluntarily provided documents in order to demonstrate that its major purpose had not changed. He said if the Commission expanded the investigation to include whether STC met the definition of a BQC, it would fundamentally change the investigation and turn this into a comprehensive audit of all of STC's financial activity. That level of detail was not necessary in order to determine STC's major purpose. When STC's activity regarding the ballot question was viewed in a broader perspective of all of its activity from the organization's inception to the present, it was clear that its major purpose has not changed over time.

Ms. Knox expressed concern that scope of the investigation was becoming a constantly moving target or a fishing expedition. She said she met with the Commission staff prior to the March meeting and understood, as was expressed in the staff memo, that STC did not meet the criteria to register as a PAC or BQC, but at the March meeting, that changed into a recommendation for investigation. She said STC provided the requested documents as proof of that its major purpose has not changed, but those documents are now being used to justify an increased level of investigation. Ms. Knox said she did not understand what had changed and why there was a rush for further investigation.

Newel Augur, Esq., appeared before the Commission on behalf of Clean Energy Matters. Mr. Augur said he wanted to clarify that the staff memo for the March 10th meeting had a recommendation for the Commission to consider whether STC qualified as a BQC. Nevertheless, Clean Energy Matters believed STC was acting as a PAC and that was the focus of the complaint. He said he had utmost faith in the Commission staff and the Commission that the investigation would be done properly, carefully, and confidentially. He said if the Commission concluded that the organization did not violate Maine ethics laws, that would close the matter.

Mr. Wayne said the information received from STC strengthened the factual basis for questioning whether STC violated the BQC statute. He said if the Commission wanted to change the scope of the investigation based on new information, it was within its authority and it would be appropriate

to do so. He said if STC's major purpose was to influence municipal resolutions and moratorium votes and permitting processes, it was questionable whether the documents provided by STC support that argument. Ms. Knox objected to any discussion about the financial information contained in the confidential documents provided to the Commission.

Mr. Monteleone agreed the BQC issue was raised at the March meeting, but it was not included in the final motion. He said there was no basis or explanation for the Commission staff to expand the investigation to include whether STC qualified as a BQC.

Mr. Nass said the Maine Legislature has made it clear that Maine voters have a right to know who is spending money to influence significant public issues such as this. The Commission's job is to see that this information was disclosed to the public. He said all the necessary factors have been presented to justify this investigation in an expanded scope.

Ms. Lowry asked if there was a difference in the amount of information that would be disclosed to the public if the Commission were to decide that STC was a BQC rather than a PAC. Mr. Wayne said campaign finance law does require some PACs to provide more information regarding its expenditures.

Regarding how far back the request for documents should go, Mr. Wayne said it was important to be aware of the limits of campaign finance law and that, for the first part of its history, STC was not trying to influence an election. He said he would be hesitant to see campaign finance law require STC to report all money in and out that was not related to influencing an election, which is why the BQC status may be more appropriate.

Mr. Lee said he believed the Commission staff needed to see what STC spent money on or the staff would be stymied in its efforts to determine if STC's major purpose changed. Mr. Monteleone said STC agreed that it was necessary to view STC's spending in context and it has agreed to make key staff available to answer questions about how money was spent as well as how it was raised and the discussions about those contributions. Mr. Lee asked if the documents were a better source of information. Mr. Monteleone said the interviews would be better because the staff person could provide more detail and answer any follow-up questions Commission staff may ask. Mr. Lee said he has always found it better to review documents prior to conducting an interview because it

provided direction for the interview. Mr. Monteleone said the documents provided a high level of detail sufficient to discern STC's activities during the relevant period.

Mr. Monteleone said part of their concern was that STC is an LLC that engages in a variety of business, some of which is outside the political spectrum. He said STC was being asked to disclose the financial activity of its entire operation, not just that which is potentially related to the citizen initiative. The documents provided represented the entirety of STC's involvement with the citizen initiative. Any questions the staff continued to have could be answered in an interview with key STC staff.

Mr. Nass said he did not think the documents represented the complete record despite STC's assurances. Ms. Knox said STC was not simply asking the Commission to take it at its word. The information in the documents was comprehensive and came directly from STC's accounting ledger. She said STC has been cooperative while trying to protect its belief that the majority of its activity did not fall under the Commission's purview. She said she did not understand what the staff saw in the documents STC provided that changed its analysis.

Mr. Lee said he saw 50-60 redactions in the documents, which raised more questions for him. He said it would be useful for the investigation to be able to compare STC's spending patterns before and after the citizen initiative became a possibility. Mr. Lee was not suggesting the information provided by STC was in any way evasive or incorrect. His point was the information provided did not get the Commission to a point where it can make a determination. Mr. Lee said there was some discussion at the March 10th meeting about STC being a BQC, but that status was not the primary focus at that time. Mr. Lee asked if STC was making the argument that the Commission was restricted from broadening the investigation if it received new information that may indicate a different violation may have occurred. Mr. Monteleone said STC is not questioning the Commission's authority to broaden its investigation. He said their argument was that the questions raised by Commission staff as the next steps in the investigation could be answered within the current scope of the investigation. Ms. Knox agreed and said any expansion of the investigation should be based on a solid foundation of changed circumstances necessitating the expansion. She said she has not heard an articulation of the additional evidence that made the staff believe there was now a need to expand the investigation. Ms. Knox acknowledged that it would be difficult to

have that discussion in a public meeting given that much of the information would be confidential under the Commission's statute.

Mr. Wayne said the publicly reported amount spent by STC to help with the petitioning was not \$50,000 but \$80,000, which does not change the legal analysis but does raise questions about the organization's reporting. He said the Commission now has new information about STC's structure, management, and funding sources. As a result of this new information, the staff believed that the likelihood increased that at least one of the funders would reasonably know STC would use some of the funds for petitioning purposes. It was reasonable for the Commission to investigate whether the funding sources received communications from STC indicating that a portion of the funds would be used for petitioning purposes. If so, that would be one of the factors that could qualify STC as a BQC. It was also reasonable to investigate whether the citizen initiative played any role in the level of STC's spending in December and January.

Mr. Monteleone said many of the questions posed by the staff could be dealt with in an interview with STC's staff without the need to expand the scope of the investigation. He said questions about intent and communications were valid and could be answered in an interview, but the Commission staff has not scheduled an interview and was instead seeking to change the scope of the investigation.

Mr. Augur said that he did not have anything to add to Mr. Wayne's explanation of the rationale to expand the scope of the investigation.

Mr. Lee asked if the Commission authorized the investigation to proceed as the Commission staff requested, would the staff go back to January 2019 to look at STC's expenditures or would they start with the period covered in the redacted documents and then have a discussion with STC about obtaining earlier records as needed. Mr. Wayne said in terms of a detailed examination of spending, the staff would start in August 2019, but for comparison purposes, they would want to receive financial information about STC's activities prior to the initiation of the ballot question. That would be necessary to verify STC's claim that most of the spending activity was unrelated to the initiative.

Mr. Nass did not disagree with starting with information from August 2019, but he did not want that start date to hinder the staff's investigation regarding the funding sources.

Mr. Augur said he believed the review start date should be flexible to allow for the request of additional information.

Mr. Lee called for a business session for the Commissioners to consider the four questions submitted by the staff in its memo and recommended they consider each question individually. Mr. Nass and Ms. Lowry agreed with Mr. Lee's recommendation to consider each question individually.

1. Should the Commission gain an understanding of the broad range of STC's financial activities and the purposes of those activities (i.e., not just STC's petitioning costs, but also its spending on television and other paid communications, polling, and payments to allies)?

Mr. Lee said his inclination was to say yes to this question because he did not believe the staff had the information they need. Mr. Nass said he agreed and said they should not set any parameters but allow the staff to determine the timeframe to investigate. Ms. Lowry agreed.

Mr. Lee moved that the Commission staff should engage in an investigation to gain an understanding of the broad range of STC's financial activities and the purposes of those activities, that is, not just STC's petitioning costs but also its spending on television and other paid communications, polling, and payments to allies. Mr. Nass seconded the motion. Motion passed 3-0.

2. Should the Commission staff investigate STC's receipt of funds and why its funding sources provided cash to STC?

Mr. Lee suggested changing the word "cash" to "financial assistance." Ms. Lowry and Mr. Nass agreed to the modification.

Mr. Nass made a motion that the Commission staff investigate STC's receipt of funds and why its funding sources provided funds to STC. Mr. Lee seconded the motion. Motion passed 3-0.

3. Should the Commission accept redactions and the withholding of names in the documents and interview responses (e.g., the funder, vendors, and allied organizations)?

Mr. Nass and Ms. Lowry said the Commission should not accept the redactions.

Mr. Lee made a motion that the Commission require unredacted documents and the disclosure of names in documents and interview responses (e.g., the funder, vendors, and allied organizations).

Mr. Nass seconded the motion. Motion passed 3-0.

4. Should the Commission staff consider whether STC qualifies as a BQC?

Mr. Lee made a motion that they authorize the Commission staff to include as part of its investigation, whether or not Stop the Corridor qualifies as a BQC. Mr. Nass seconded the motion.

Ms. Lowry said if they pass this motion, it would give the Commission staff the discretion to investigate whether STC qualifies as either a BQC or a PAC. Mr. Wayne said the Commission staff supported that motion. Mr. Lee said the information received from STC provided sufficient grounds to warrant an investigation into whether STC qualifies as a BAC.

Motion passed 3-0.

Adjournment

Ms. Lowry made a motion, seconded by Mr. Nass, to adjourn. The motion passed. The meeting adjourned at 11:58 a.m.

Respectfully submitted,

/s/ Jonathan Wayne

Jonathan Wayne, Executive Director