STATE OF MICHIGAN
TERRI LYNN LAND, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

October 31, 2005

Mr. David E. Murley
Michigan House of Representatives
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Dear Mr. Murley:

This is in response to your request for an interpretive statement under the Michigan Campaign Finance Act (MCFA), 1976 P.A. 388, as amended. Specifically, you have asked a series of questions regarding the application of section 57 of the statute. Your questions and the Department of State's responses are set out below.

1. *Does the MCFA require a public body that makes expenditures of more than $500 in a calendar year to file as a committee and submit regular campaign finance reports?*

Section 57 prohibits a public body from making contributions and expenditures as those terms are defined in the MCFA, with certain narrowly defined exceptions. This prohibition is in addition to the Attorney General's longstanding position that a public body has no constitutional or statutory authority to spend public funds to support or oppose a candidate or ballot question. Similarly, in a 1982 letter opinion issued to then Representative Bob Emerson, the Attorney General indicated that a public body (in this case, a downtown development authority) does not have the authority or power to form a campaign committee.

A public body that violates the MCFA by making expenditures may be prosecuted for violating the law. Additionally, a public body that misuses public funds could be investigated by the Attorney General pursuant to MCL 14.141 *et seq* or by the Department of Treasury pursuant to MCL 21.46 and 21.47. However, the public body is not required to file as a committee.

It should be noted that corporations are also prohibited from making contributions and expenditures. A corporation that makes illegal contributions is not required to legitimize that activity by filing as a committee and submitting reports of its illegal activity.

2. *Are election-related communications, financed by public bodies, subject to the express advocacy test?*

Section 6 of the MCFA defines "expenditure" to include anything of ascertainable monetary value "in assistance of, or in opposition to, the nomination or election of a candidate, or the qualification, passage or defeat of a ballot question." With respect to communications, section 6(2)(b) excludes from the definition of expenditures those communications that do not support or oppose a candidate or ballot question "by name or clear inference."

In 2004, the department was asked whether "ads that discuss issues without expressly advocating the election or defeat of the candidate who is featured in that 'issue ad'" were expenditures subject to the MCFA. The question arose after the United States Supreme Court ruled in *McConnell* v *FEC*, 539 U.S. 981 (2003) that "electioneering communications" as defined in the Bi-Partisan Campaign Reform Act of 2002 could be regulated despite the fact that those communications did not expressly advocate the election or defeat of a candidate. In response to that request, the department stated in an April 20, 2004 interpretive statement issued to Robert S. LaBrant that it "will continue to apply the express advocacy standard in determining which communications are regulated by the MCFA."

As stated in LaBrant:

> *McConnell* indicates that the 'express advocacy' standard is not a constitutional requirement. Presumably, the Michigan legislature could enact FECA's "electioneering communication" standards. Yet, *McConnell* unambiguously requires the express advocacy test for any statutory definition that employs vague, broad language. The vagueness and over-breadth discussed in *Buckley* and clarified in *McConnell* still lurk in the MCFA's definitions of contribution and expenditure. For that reason, we are compelled to apply the express advocacy test to all communications.

The express advocacy test is a clear, objective standard that gives meaning to the ambiguous phrase "by clear inference." (Clear to whom or how many? Concluded from internal or external facts?) While we recognize that express advocacy is rooted in constitutional analysis and that public bodies may not be afforded First Amendment rights, the department declines to apply two separate standards to communications that are excluded from the MCFA's reach by identical language. Therefore, for purposes of the MCFA the department will apply the express advocacy test to communications financed by public bodies.

3. *Does the Department still interpret Section 57 to allow public bodies to adopt resolutions supporting or opposing ballot questions? If so, could a public body pass a resolution supporting or opposing a candidate?*

As previously noted, section 57 prohibits a public body from making contributions or expenditures, with certain narrowly defined exceptions. "Contribution" and "expenditure" are defined in sections 4 and 6 of the MCFA to include payments, loans, dues, assessments or other

items of ascertainable monetary value. In an interpretive statement issued to Steven Daunt on August 17, 2000, the department concluded that a city council did not make an expenditure as defined in sections 4 and 6 when its members voted on a resolution to support or oppose a ballot question. However, the department emphasized that the use of public resources to distribute or publicize that resolution beyond the regular provision of factual information regarding actions taken by the city council would result in a violation of section 57. The department will continue to abide by this interpretation.

The Daunt interpretive statement acknowledged that this rationale would apply equally to a resolution that supports or opposes a candidate. However, the MCFA is not the end of this analysis. A public body still must be empowered by law to adopt a resolution of this nature. (The constitutional grant of authority to cities and villages, for example, is limited to adopting resolutions "relating to municipal concerns, property and government." Const 1963, Art 7, sec 22.) The opinions issued by the Attorney General to date indicate that public funds may not be used to support or oppose a candidate [OAG, 1979-1980, No 5597, p 482 (November 28, 1979)] but have not specifically addressed whether public bodies have authority to pass resolutions supporting or opposing candidates. Therefore, you may wish to consult with the Attorney General for a definitive position on this issue.

4. *MCFA Section 57(1)(a) exempts "The expression of views by an elected or appointed public official who has policy-making responsibilities" from Section 57's prohibition. How will the Department interpret this subsection? Does it allow a public official to use public resources such as telephones or e-mail to communicate with a constituent or the media regarding his or her position on a ballot question? Does it allow a public official to send mass e-mail or mailings to constituents explaining why the official is supporting a particular ballot question or candidate? Does it allow a public official to use public resources to send mail to constituents urging them to elect or defeat a candidate, or to qualify, pass, or defeat a ballot question?*

Consistent with the First Amendment, section 57(1)(a) makes it clear that public officials are entitled to express their views on policy issues. Indeed, public officials have an obligation to take positions on controversial political questions so that constituents are fully informed and better able to assess their qualifications for office. [See OAG, 1969-1970, No 4647, p 87 (September 29, 1969)]. The occasional, incidental use of public resources to communicate with a constituent or the media on a ballot question falls within this exemption, as there are no resources devoted to an effort to assist or oppose the qualification, passage or defeat of that question.

However, sending a mass e-mail or mailing that expressly advocates support for a ballot question or candidate or urges constituents to vote for or against a candidate or ballot question would result in the use of public resources to make an expenditure. The use of public resources in this manner falls squarely within the section 57 prohibition against using anything of ascertainable monetary value in assistance of, or opposition to, the nomination or election of a candidate, or the qualification, passage or defeat of a ballot question

5. *MCFA Section 57(1)(b) exempts "The production or dissemination of factual information concerning issues relevant to the function of the public body" from Section 57's prohibitions. How does the Department interpret this subsection? May a public body produce and disseminate any information, as long as it is factual? For example, could a public body disseminate a newsletter that says "Senator Smith endorses Senator Jones" if that is a factually accurate statement? Is the public body required to present balanced information, as long as it is arguably grounded in fact? May a public body use public resources to provide links to websites, organizations, commentary or editorials that support or oppose a ballot questions or candidate?*

Section 57(1)(b) provides that the prohibition against using public resources to make campaign contributions and expenditures does not apply to spending that occurs to produce and disseminate factual information concerning issues relevant to the function of the public body. Although the MCFA does not address what issues are relevant to the function of a public body, we fail to see how "Senator Smith endorses Senator Jones" meets this test. As such, this fact would not fall within the section 57(1)(b) exemption.

While "issues relevant to the function of a public body" is not defined in the MCFA, this concept is consistent with the Attorney General's position that a public body must be authorized or empowered to use public resources in a particular manner. A cogent explanation of this position is found in OAG, No 6531, 1987-1988 (August 8, 1988). The question posed there was whether a school district "could expend public funds to objectively inform the public concerning upcoming ballot proposals." After noting that school districts and community colleges' powers are limited to those granted by the legislature or state constitution, the Attorney General stated:

> OAG, 1987-1988, No 6423, supra, concluded that school districts and other public boards and commissions are not authorized to expend public funds to influence the electorate in support of or in opposition to a particular ballot proposal. OAG, 1965-1966, No 4291, p 1 (January 4, 1965); Phillips v Maurer, 67 NY2d 672; 490 NE2d 542; 499 NYS2d 675 (1986); Elsenau v Chicago, 334 Ill 78; 165 NE 129 (1929); Mines v Del Valle, 201 Cal 273; 257 P 530 (1927).
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> This prohibition evolves from the concern that such an expenditure of public "funds might be contrary to the desire and even subject to the disapproval of a large portion of" taxpayers and, further, "that it was never contemplated under the Constitution and statutes of this State that our boards ... should function as propaganda bureaus." Mosier v. Wayne County Bd of Auditors, 295 Mich 27, 31; 294 NW 85 (1940); OAG, 1965-1966, No 4421, p 36 (March 15, 1965); OAG, 1965-1966, No 4291, supra.
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> A public body, however, "may expend public funds to objectively inform the people on issues related to the function of the public body." OAG, 1987-1988, No 6423, supra; OAG, 1965-1966, No 4421, supra; OAG, 1979-1980, No 5597, p 482 (November 28, 1979).

> It has been held that a board of education of a school district has implied power to make reasonable expenditures to provide a fair presentation of facts relating to a school bond election so as to aid school electors in reaching an informed judgment on proposed issues to be voted at the school election. Citizens to Protect Public Funds v Bd of Education of Parsippany-Troy Hills Twp, 13 NJ 172, 179; 98 A2d 673, 677 (1953). The expenditure of public funds for such purposes will be held invalid if the presentation of facts, including good and bad features, is not fairly presented. Hankin v Bd of Education of Hamilton Twp, 47 NJ Super 70; 135 A2d 329, 334 (1957).
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> It is my opinion, in answer to your first question, that school districts or community college districts may expend public funds to inform their electors in a fair and objective manner of the facts surrounding an upcoming ballot proposal or proposals to be voted upon by the school district or the community college district electors.

Thus, regardless of whether the use of resources constitutes an expenditure, a public body must have separate authority to use the public resource in that manner. If this authority exists, then factual information that is relevant to the public body - as defined by its grant of authority - may be produced and disseminated using public resources, as long as the information is limited to facts and does not include express advocacy.

With respect to links, in a June 15, 2001 interpretive statement issued to Kathleen Corkin Boyle, the department indicated that a link to a candidate's web site was an expenditure. This interpretation relied upon a Federal Election Commission's enforcement action against a corporation owned by a candidate that included a link from the corporation's web site to a web site that raised money for the candidate/owner. The term "expenditure" is defined in section 6 of the MCFA as the transfer of anything of ascertainable monetary value in assistance of a candidate or ballot question, including transfers made for the purpose of influencing the nomination or election of a candidate or the qualification or defeat of a ballot question. Clearly, a link to a single candidate's fundraising site could only be for the purpose of assisting the candidate's fundraising effort and is therefore not permitted under the MCFA.

A public body is also precluded from using public resources to create and maintain links to web sites, organizations, commentary or editorials that expressly support or oppose candidates or ballot questions if the public body does so for the purpose of influencing the outcome of an election. The department will apply an objective standard to assist in making this determination. If a public body creates and maintains one or more links that are used in a restrictive manner for the advocacy of one side of a ballot question, or if the links are to sites that are exclusively for, or exclusively against, a candidate, a slate of candidates or a ballot question, the department will presume that the public body is providing those links for the purpose of supporting or opposing that candidate or ballot question.

6. *MCFA Section 57(1)(c) exempts "The production or dissemination of debates, interviews, commentary, or information by a broadcasting station, newspaper, magazine, or other periodical or publication in the regular course of broadcasting or publication" from Section 57's prohibitions. How does the Department interpret this subsection? Could a publicly-funded publication—say, a school newsletter—carry a commentary that calls for the election or defeat of a candidate? May a publicly-funded newsletter contain any "interview, commentary, or information," as long as the newsletter was published "in the regular course of publication? May a publicly-funded newsletter contain a commentary that calls for the election or defeat of a candidate if that newsletter is not produced in the regular course of publication? Finally, how does the Department interpret "regular course of broadcasting or publication"?*

The department interprets the "regular course of broadcasting or publication" as the normal, routine publication schedule of the broadcast or publication. Any broadcast or publication, including a newsletter, that is not produced in the regular course of publication falls outside the section 57(1)(c) exemption. However, the plain language of section 57(1)(c) allows interviews, commentary and information to be included in a newsletter that is published in accordance with the normal, routine publication for that newsletter.

To the extent that your questions concern the hypothetical use of a publicly funded publication that includes interviews, commentary and information that supports or opposes a candidate, we again suggest that you consult with the Attorney General concerning a public body's authority or power to use public resources in this manner.

Interpretive Statement

This response is informational only and constitutes an interpretive statement with respect to your inquiries.

Sincerely,

Brian DeBano
Chief of Staff / Chief Operating Officer