STATE OF NEW MEXICO
DIANNA J. DURAN
SECRETARY OF STATE

August 14, 2014

The Honorable Gary K. King
Attorney General
State of New Mexico
Candidate for Governor
P. O. Box 40
Moriarty, NM 87035

Certified Mail -Return Receipt Requested

Subject: Secretary of State Letter to Gary K. King, July 14, 2014

Notice of Final Action

Dear Mr. Attorney General:

I am writing this letter to notify you of the final determination reached by my office regarding the following contributions you received in your capacity as a candidate for Governor:

6/25/2014 Trudy Healy	$5,200
6/25/2014 Trudy Healy	$5,200
6/25/2014 Ed Healy	$5,200
6/25/2014 Ed Healy	$5,200
6/28/2014 Amelia Carson	$ 500
6/28/2014 Amelia Carson	$5,200

On July 14, our office notified you that, absent additional information, the contributions shown above that were received after the primary election appeared to violate the Campaign Reporting Act (CRA), §1-19-34.7 NMSA 1978. This assessment was based on consistent guidance from this office since October, 2011. Significantly, as discussed below, it was guidance you had helped develop. On July 18, you responded with comments about how you planned to pay for debts from the primary election, indicating that you were going to begin invoking guidelines from the Federal Election Commission (FEC) as a guide to be used for your own campaign reporting. You also included abstract comments labeling it "reasonable to conclude that a contribution received after an election can be applied to a prior election period" and that it is possible "to attribute such contributions for the reduction of debt."

Background

The current campaign contribution limits became effective in November, 2010. The first practical interpretations of the new law began in 2011. Our initial view was that contributions were limited to $5,000 per election cycle as stated in the law. However, in October, 2011, on your second biannual report, you reported a single $15,000 campaign contribution from one contributor. My office wrote to you and questioned the apparently excessive contribution. You responded and asserted that the excess contributions were to be used for campaign debt. However, you subsequently reversed yourself, and voluntarily refunded $5,000 to that donor, thus abandoning the claim that you could keep the money for "debt reduction." You also allocated the remaining $10,000.

Your actions led to three conclusions: (1) that you, both as a candidate and in your capacity as Attorney General, agreed that an amount over $10,000 violated the contribution limits; (2) that excess contributions after a cycle had concluded could not be retroactively applied to the previous cycle for "debt reduction" and (3) of the remaining $10,000, you had determined that $5,000 could be designated for the 2014 primary election cycle and the remaining $5,000 could be designated for the 2014 general election cycle.

Based on those conclusions, beginning in October, 2011, my office began to advise candidates along those same lines, and that they could accept contributions up to the limits for both the Primary and General Election cycles during the primary cycle, so long as they were so designated, accounted for and that general election designations were not expended during the Primary cycle. (We had previously opined that we believed your office would consider prospective designations a violation, but it became clear that you did not consider prospective designations to be a violation since you were using them.)

It must be noted however, that while we accept your guidance and close this particular review, your invocation of federal law on the question in discussion cannot be considered in isolation. It is part of a larger question of whether the federal guidelines can be followed in their entirety throughout the CRA. As detailed below, our requests for Attorney General opinions and Attorney General comments on proposed rules that might address many of the questions that have arisen, have gone unanswered.

In May, 2012, a federal court determined that the Campaign Reporting Act cannot be applied to individuals or committees making independent expenditures. I requested advice and guidance from your office regarding the application of the Act to independent expenditure committees and coordinated expenditures. You did not provide an attorney general opinion or an advisory opinion.

In 2013, in the absence of formal attorney general's opinions with regard to the Campaign Reporting Act, my office began to draft proposed guidelines, for statewide discussion, on four areas of the Act: (1) candidates and campaign committees; (2) political committees; (3) lobbyists and (4) independent expenditures. We requested the input of a distinguished, multi-partisan advisory committee and hoped the public comments and ensuing dialog would help us generate a final, usable set of guidelines that would clarify the Act for all candidates and

campaign committees. Again, we did not receive any input from the Attorney General's office in that effort either.

As you have noted, the draft proposed guidelines attempted to follow the FEC guidelines with regard to the reduction of campaign debt. But we did not include all of the provisions of the FEC guidelines because, as you have noted, the Campaign Reporting Act is silent on a number of those provisions.

For instance, the draft proposed guides copied the following language from the FEC guidelines:

> "A contribution made after a particular candidate's election may only be applied to that election if it does not exceed the campaign committee's net debts outstanding for the election. A post-election contribution that does exceed net debts would be considered a contribution for a future campaign and must be handled as such."

But neither the proposed guidelines in discussion nor the Campaign Reporting Act defined "net debts". This presented an immediate problem because, under the FEC guidelines, a candidate may not claim more than $250,000 in net debt for loans from the candidate to the campaign, after the conclusion of the election cycle. As you know, the federal contribution limits are not the same as New Mexico limits.

As we considered and discussed the draft guideline proposals, the issue of how to "mirror" the federal guidelines in New Mexico and remain true to the New Mexico statutes became increasingly murky. The draft proposed language in discussion raised additional questions, such as: Would a candidate in New Mexico be limited to $250,000 in net campaign debt as the result of personal loans? Would the debt limit be the same for statewide candidates and non-statewide candidates? Would some other amount apply? Would our statute allow candidates to collect unlimited amounts after the election and apply them to personal loans from the candidate? Would there be any limit at all on personal loans to a candidate's own campaign that could be paid back in cycle after cycle?

As we reviewed all these questions, and much more, we realized, among other considerations, that your own statements as attorney general in May, 2012 had significant bearing. You had stated that:

> "unlimited cash contributions to political campaigns puts out the welcome mat for 'Pay to Play' scandals."

There was concern that the adoption of guidelines that allowed a candidate to take unlimited amounts of contributions after an election and apply them to personal loans from the candidate would be seen not only as ignoring your position, but as a direct challenge to the concern you had expressed above. Additionally, just imposing the $250,000 FEC limit on campaign debt from personal loans, or establishing some other arbitrary figure, seemed to reach far outside the language of the state statute itself.

Unable to resolve these issues, and any number of other questions that arose regarding independent expenditures and coordinated expenditures, and again without any guidance from

the Attorney General's office, we did not proceed with adoption of the draft proposed guidelines in discussion.

Therefore, recognizing the disparity between federal law and the New Mexico Campaign Reporting Act, our determinations not only in your case, but in all cases referred to this office this year, have been based on guidance provided continually since October, 2011, as discussed above, and not on draft proposed guidelines that had been in discussion.

The Contributions at issue

Our initial review began as a result of inquiries from the media that strongly questioned your receipt of excess primary contributions "AFTER the primary is over" [Emphasis from a media inquiry]. Reviewing information provided by your campaign, which did not include any indication that the donations were to be used to address primary debt, this office initially determined that the contributions in question exceeded limits agreed to in October, 2011. In the view of this office (and yours as well as far as we knew from as far back as October, 2011) the above contributions were in excess of the personal contribution limit, and the contributions were all made entirely during the general election period.

Despite our request, your letter, dated July 18, 2014, failed to explain a rationale for the apparent violation, nor did your campaign contradict any of the facts outlined above that would have clarified the matter. On July 25, 2014, our office extended the timeframe for your response from July 24, 2014 to August 4, 2014, asking you to either correct the report or explain why it did not constitute a violation. Your campaign did not respond to this request. We do not know whether this lack of information was an oversight, or a deliberate attempt to create a controversy, since you instead chose to file for a premature "emergency" writ of mandamus with the Supreme Court. The writ application was disappointing and surprising in that your office has taken the view previously that the administrative procedures set out in the statute, including mediation, are mandatory, after written notice of final action.

The New Mexico Campaign Reporting Act does not provide for the procedure you have used, but rather expressly provides a detailed process to be followed in all investigations. Even in the event of an adverse finding (which is not the case in this instance) or imposition of a penalty, the law would require binding arbitration after "written notice of final action." (NMSA 1978, §1-19-34.4) As this matter has been under review, this office had not provided such notice. **However, this letter, as contemplated by the statute, constitutes the written notice of final action.**

Although you did not provide any documentation demonstrating that you had applied the contributions in question to debt reduction, your filing in the Supreme Court provided a "bank activity statement" that appears to show your intent to retire unspecified campaign debt. Whether that is the $335,000 in primary campaign loans from yourself to your campaign, or whether it is the $200,000 in general election loans from yourself to your campaign is not stated. Even though you elected to provide this information to the Supreme Court instead of our office, the documents provided to the Court satisfy our request for supplemental information concerning the retirement of campaign debt.

It is only from your filing with the Supreme Court that this office has independently been able to ascertain that the contributions in question appear to be intended for re-designation, after the fact, to retire primary election debt. Despite the previous claim of debt retirement, no other payment on debt had been indicated before, and no designation for debt retirement had ever been made by any contributor, let alone for the contributions in question.

As noted above, the New Mexico Campaign Reporting Act is silent on the questions of: 1) re-designation of campaign contributions to retire debt from previous elections; 2) the definition of "net debts" and 3) the limits on debts arising from loans from the candidate that can be reimbursed.

As stated earlier, your acceptance of the $10,000 contribution in 2011 in one lump sum for both the primary and general elections, as well as your returning the $5,000 you had claimed for "debt reduction" indicated you agreed with our guidance that began in October, 2011 and continued until July, 2014.

Final Action

You are both the Attorney General of New Mexico and you are a candidate for statewide office. Presumably your reasoning and your legal position as to your own contributions is intended as an interpretation that would apply to all candidates, and not intended as some sort of singular exception that is not available to all other current and future candidates. We do not believe you, as a candidate, would urge the Secretary of State to adopt a legal position that you as attorney general did not also believe to be correct. With that good faith belief, together with the fact that you are the signatory for your campaign's verified Writ, I accept your assertions in the Writ as your opinion in your capacity as Attorney General, of the way in which New Mexico law must be interpreted regarding the provisions of the CRA in question.

Based upon the records provided to the New Mexico Supreme Court and your opinion, we now apply federal guidelines for the provision you have cited. Federal election law provides a process for accepting a contribution during the general election cycle, but retroactively applying it to the primary election contribution limits:

> The candidate and his or her authorized political committee(s) may accept contributions made after the date of the election if:
>
> > (A) Such contributions are designated in writing by the contributor for that election;
> > (B) Such contributions do not exceed the adjusted amount of net debts outstanding on the date the contribution is received; and
> > (C) Such contributions do not exceed the contribution limitations in effect on the date of such election.

Based on your advice and the application of the federal guideline, we find:

1) The contributions in question to be permissible.
2) The contributor needs to designate in writing that his or her contribution is to retire Primary election debt.

3) There is sufficient primary election debt.
4) The re-designation will not be in excess of the limits upon that contributor for that contribution.

The document we have reviewed shows that on July 2, 2014 you appear to have repaid yourself for loans you personally made to your campaign. At this time, this office has not been provided with statements or other information from the Healy's or Ms. Carson showing their intent for the contributions to be re-designated. Please provide (1) the required documentation of re-designation from the donors and (2) documentation demonstrating that the contributions at issue have been applied to primary election debt reduction. We assume that your office can readily provide or obtain this documentation and our office considers this matter substantively closed.

Based on the forgoing discussion, **this constitutes written notice of final action on this matter**. There remains no issue to be resolved on this matter between your campaign and the administration of the Election Code.

In conclusion

My office works daily to administer the Election Code, including the provisions of the Campaign Reporting Act. In your capacity as Attorney General you offered no advice, assistance, service, counsel or even comment on the draft proposed administrative rules—at any time over the past eight months. Yet in your capacity as a candidate you have cited those draft proposals as if they had been adopted—arguing to the Supreme Court of New Mexico the novel and legally dubious proposition that proposed rules, never adopted, hold the force of law. In the future, it is my hope that we can work together to provide clear and consistent guidance to the public regarding New Mexico election law.

This letter constitutes the written notice of final action by the Secretary of State.

Best regards,

Dianna J. Duran
Secretary of State