



STATE OF MICHIGAN
JOCELYN BENSON, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

May 26, 2022

Robert LaBrant
12411 Pine Ridge Drive
Perry, MI 48872

Dear Mr. LaBrant:

The Department of State (Department) acknowledges receipt of your letter dated March 1, 2022, in which you sought a declaratory ruling or interpretive statement under the Michigan Campaign Finance Act (Act or MCFA).

The MCFA and Administrative Procedures Act (APA), 1969 PA 306, MCL 24.201 *et seq.*, require the Department to issue a declaratory ruling if an interested person submits a written request that presents a question of law and a reasonably complete statement of facts. MCL 24.263, 169.215(2). If the Department declines to issue a declaratory ruling, it must instead offer an interpretive statement “providing an informational response to the question presented[.]” MCL 169.215(2). In compliance with the MCFA and the APA’s publication and public comment period requirements, the Department posted to its website and informed e-mail subscribers of the receipt of your request on March 1, 2022 and informed them of the deadline to file public comments on the request.

In accordance with publication and public comment period requirements, the Department posted your request on its website and informed e-mail subscribers of the deadline to file written comments. MCL 169.215(2). The Department did not receive any public comments during the initial public comment period.

The Department issued its preliminary response on May 5, 2022 and posted it for public comment in accordance with the MCFA and APA requirements. You submitted public comments on May 11, 2022 largely echoing and restating the arguments in your original request, including continued requests for information relative to the status of the campaign finance complaint filed by you against Unlock Michigan, Michigan Citizens for Fiscal Responsibility, and Michigan! My Michigan! That complaint is pending before the Department. The Department does not comment on pending campaign finance complaints, and the status of that complaint will not be addressed in this interpretive statement.

Additionally, your public comment questions why the preliminary draft was issued as an interpretative statement, not as a declaratory ruling. As indicated in the preliminary draft, and as required by section 15(2) of the MCFA, the Department reviewed your request and determined that it does not contain a sufficient statement of facts to warrant issuance of a declaratory ruling. Accordingly, the Department offers the following interpretive statement as an informational response to your questions, which are set forth below.

Your request contains four questions, all of which concern the process by which the Department investigates and discloses the disposition of campaign finance complaints. Specifically, you ask:

1. Does the Secretary of State have a duty to follow the statutory deadline imposed by MCL 169.215 (10) to make a determination after receiving a complaint, response, and rebuttal no later than 45 business days after receiving the rebuttal and post that determination to the Secretary of State's website as to whether or not there may be reason to believe a violation of the act occurred?
2. Once that determination is made, is the Secretary of State under a similar duty to post within 30 business days on the secretary of state's website any complaint, response, rebuttal, and any correspondence that is dispositive of that violation or alleged violation between the secretary of state and the complainant or the person against whom the complaint was filed?
3. May the Secretary of State delay posting a determination that finds that there may be reason to believe a violation of the act occurred while conciliation negotiations are ongoing?
4. Is there any statutory basis to engage in conciliation and at the same time not post a determination that there may be reason to believe a violation of the act occurred?

Your first and second questions concern the timing requirements on making certain documents publicly available imposed on the Department by the Act. Your third and fourth questions concern the obligations imposed on the Department by the Act when conciliation negotiations are ongoing. Because of the similarities of the topics, and the interrelation of the subjects as it relates to the Department's efforts to enforce the MCFA, the Department addresses these questions together.

The Department of State is required to investigate allegations of violations of the MCFA whenever a valid complaint is filed. MCL 169.215(9). At the conclusion of the investigation, the Department must reach a disposition of the complaint and is required to disclose that finding, along with the complaint, responses, and rebuttals concerning the complaint. MCL 169.215(10).

When the Department determines, following its investigation, there is no reason to believe a violation of the MCFA occurred, the Department's obligations are straightforward. The Department must post the documents described above within 45 business days of the rebuttal statement submitted for that complaint; and within 30 days of its determination.

When the Department determines there may be reason to believe a violation occurred, however, the Department's obligations are considerably more complex. If there may be reason to believe a violation occurred, the MCFA imposes on the Department an affirmative obligation to "endeavor to correct the violation or prevent a further violation by using informal methods such as a conference, conciliation, or persuasion, and may enter into a conciliation agreement with the person involved." *Id.* In other words, even if the Department reaches the conclusion that a violation occurred, the Department is prohibited from reaching a disposition until it has endeavored to resolve the matter through conciliation, and the Department has 90-business days to engage in this resolution process.

The MCFA does not define "conciliation agreement" but the Act treats the process as akin in many respects to a settlement of a civil or criminal judicial action. Specifically, the MCFA

provides that “[u]nless violated, a conciliation agreement is a complete bar to any further civil or criminal action with respect to matters covered in the conciliation agreement.” *Id.* (emphasis added). Accordingly, the Department’s typical procedure for conciliation agreements closely tracks the parameters of civil settlement negotiations. The Department does not disclose its initial findings to the public, through a FOIA request or otherwise, until the conciliation agreement is completed. Consistent with the MCFA requirement that the Department pursue conciliation agreements, and the fact that the MCFA treats the conciliation agreement process as similar to civil settlement, the Department makes every attempt to resolve potential violations through a process that is confidential until resolution. This confidentiality allows the Department to engage in frank discussions with the alleged violator in order to fulfill its statutory obligation to resolve complaints. See MCL 169.215(10).

At the same time, the MCFA provides that the Department must “post on the secretary of state’s Internet website whether or not there may be reason to believe that a violation of this act has occurred.” *Id.* This language requires the Department to post the disposition of its investigation with 45 business days, even if that disposition is that a violation may have occurred.

Such an obligation, however, would complicate the Department’s ability to meet its simultaneous obligation to attempt to resolve potential violations through the conciliation agreement process. As numerous past MCFA investigations and innumerable civil settlements in the judicial context demonstrate, in many cases it is not possible for the Department to complete its review of a complaint, response, and rebuttal; then make an initial determination; then negotiate and complete the conciliation process all within a 45-business day period. This is particularly so where a conciliation agreement — which necessarily requires the consent of multiple parties — is the required next course of action.

In theory, the Department could post an initial disposition of a complaint stating that there may be reason to believe a violation occurred prior to conclusion of conciliation agreement negotiations. Such a practice, however, is antithetical to the settlement process. This is especially so when MCFA complaint subjects may agree to a conciliation agreement only if the subject is not required to admit wrongdoing, a common practice in both conciliation agreements and judicial settlements. See, e.g., [Michigan Republican Party: Self Report](#), Conciliation Agreement, pg. 24. While meeting the deadlines established by the Act is important, the most important part of the process is ensuring that each complaint is investigated fairly, using consistent standards, and being thorough to reach the correct conclusion commanded by the Act.

Additionally, strict adherence to a 45-day requirement could jeopardize the thoroughness of the Department’s findings. Instances have arisen during the investigation where the Department makes an initial finding of a violation, but during the course of negotiations, new evidence is presented that causes the Department to reverse its initial finding. Were the Department to have already posted the documents to its website in the middle of the negotiations, this would hinder the Department’s ability to engage in good-faith settlement discussions.

Although the Department does not take missing statutory deadlines lightly, courts have recognized that deadlines may not always be met given an agency’s resources and obligations. See *Hughes v. Dep’t of Env’tl. Quality*, 2014 Mich. App. LEXIS 250 (Mich. Ct. App 2014), *People v. Smith*, 200 Mich. App. 237 (1993). Unfortunately, the same is true for the Department when investigating complaints. Like other departments and agencies, the Department recognizes that while investigating complaints, there are times where it is unable to meet the statutory deadlines proscribed by the Act as a result of staffing resources and other elections-related

obligations that command the Department's attention. As the demands on the Department's elections obligations have increased in recent years, the Department has made great efforts to respond to those demands by hiring additional staff and acquiring additional resources.¹

But despite these efforts, the practical reality is that sometimes the Department must still make decisions as to how it prioritizes workloads based on its staffing capacity and resources. Consistent with this, the Department makes a good-faith effort to meet all statutory deadlines when it can, but when following the deadline would prevent the Department from fairly and properly conducting investigations, the Department may take action outside of the statutory periods.

Notably, whereas the above precedents indicate that Departments may at times be unable to meet statutory deadlines, the Department is aware of no case that allows it to set aside its obligation to endeavor to resolve possible MCFA violations through the conciliation process. To be clear, the passage of a statutory deadline does not prevent the Department from continuing to investigate a MCFA complaint, does not negate a pending complaint, and does not force the Department to dismiss a pending complaint. *See Hughes*, 2014 Mich. App. LEXIS 250.

Ultimately, the Department's binding statutory obligation is to complete all investigations by reaching the correct disposition under the MCFA. Where this disposition involves a potential violation, the Department is obligated to pursue the conciliation process to reach an agreement on behalf of Michigan's citizens that best prevents further violations of the MCFA. The Department must make a good faith effort to accomplish this while also following all statutory deadlines. However, the Department may not always be able to meet statutory deadlines especially when doing so would prevent correct disposition of an MCFA violation under the procedures which the Department is bound by the MCFA to pursue.

Sincerely,

Melissa J. Smiley, PhD
Chief of Staff

¹ In 2019, the Bureau of Elections was audited by the Auditor General for the period 2016-2019. The Auditor General reviewed 12 campaign finance complaints that were submitted and noted that the Department did not meet the statutory deadline in 3 of the complaints. Auditor General Report, available: <https://audgen.michigan.gov/wp-content/uploads/2019/12/r231023519.pdf>. The report specifically noted the Bureau of Election's response indicating that job duties have increased, yet staffing level has remained unchanged. Specifically, the Bureau of Elections noted that "it will work to seek staffing increases that would allow for full review within the timeframes required."