

STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE  
13<sup>TH</sup> JUDICIAL CIRCUIT

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In Re Investigative Subpoenas/  
Michigan Campaign Finance Act Violation

DECISION AND ORDER DISMISSING THE CASE

On February 14, 2008, this Court entered an order, pursuant to MCL §767A.1, *et seq.*, authorizing Alan R. Schneider, Prosecuting Attorney for Grand Traverse County (“Prosecuting Attorney”), to issue investigative subpoenas to employees and principals of a public relations firm, a major corporation and the Corporation’s “outside” law firm. The Prosecuting Attorney is investigating whether the Corporation, through its attorneys, paid the public relations firm to influence the outcome of an election in Grand Traverse County, in violation of the Michigan Campaign Finance Act (“MCFA”), MCL §169.201, *et seq.*

In response to the subpoenas, the law firm produced some documents, but did not produce certain other documents because “[the client] has asserted the attorney-client privilege.” In response to the subpoenas, the Corporation produced some documents, several of which were redacted “to eliminate attorney-client and/or work-product privileged information.”

The Prosecuting Attorney filed a Motion to Compel Compliance with Investigative Subpoenas, along with a Brief in Support of the Motion. The Corporation filed a Motion under Seal for a Protective Order Requiring Filings under Seal; Closed Hearing; Dismissal of this Matter for Want of Jurisdiction; and Other Protections afforded by MCL §767.6(5), including an Order to Quash, and to Deny Motion to Compel Compliance with Investigative Subpoenas. With the parties’ agreement, the Court heard the public oral arguments of counsel on April 4, 2008 and took the matter under advisement. The Court now issues this written decision and order and, for the reasons stated herein, dismisses the case.

The Prosecuting Attorney contends that he has the authority to investigate and prosecute violations of the MCFA by virtue of the statutory duties of prosecuting attorneys contained in MCL §14.28. He relies on *Forster v Delton School District*, 176 Mich App 582, 585 (1989)

and 1999 OAG 7040. The Prosecuting Attorney further contends that the attorney-client privilege does not preclude disclosure of communications, work-product and financial records of an attorney who acted in concert with a client to commit a crime or who counseled a client while a crime was ongoing. The Corporation contends that neither the Prosecuting Attorney nor this Court has jurisdiction to investigate alleged violations of the MCFA because exclusive jurisdiction lies with the Michigan Secretary of State to investigate and resolve violations through informal methods or to refer violations to the Attorney General for criminal prosecution, citing MCL §169.215(10) and (13) and relying on the principles of statutory construction. The Corporation alternatively maintains that the subpoenas should be quashed and the motion to compel production of any attorney-client privileged communications denied because the Investigative Subpoenas Act, MCL §§767A.6.(5), expressly prohibits the Court from compelling production of privileged communications and the judicially-created crime-fraud exception does not apply.

The first question that must be answered is whether this Court has subject matter jurisdiction to authorize and enforce investigative subpoenas issued by a prosecuting attorney who is investigating a possible violation of the MCFA. Since the Court is without jurisdiction, it will not address the privilege issue.

#### Analysis

The MCFA vests authority for implementation and enforcement expressly in the Secretary of State. The Secretary of State is under an express duty to promulgate rules and issue declaratory rulings in order to implement the MCFA, in accordance with the Administrative Procedures Act, MCL § 24.201, *et seq.* *Michigan State Chamber of Commerce v Secretary of State*, 122 Mich App 611; 332 NW2d 547 (1983). The MCFA provides, in pertinent part, the following:

(5) A person may file with the secretary of state *a complaint* that alleges a violation of this act . . .

(9) The secretary of state shall investigate the allegations under the rules promulgated under this act . . .

\* \* \*

(10) If the secretary of state determines that there may be reason to believe that a violation of this act has occurred, the secretary of state shall 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. Unless violated, a conciliation agreement is a complete bar to any further action with respect to matters covered in the conciliation agreement. If the secretary of state is unable to correct or prevent further violation by these informal methods, the secretary of state may refer the matter to the attorney general for the enforcement of a criminal penalty provided by this act or commence a hearing as provided in subsection (11).

(11) The secretary of state may commence a hearing to determine whether a civil violation of this act has occurred. A hearing shall not be commenced during the period beginning 30 days before an election in which the committee has received or expended money and ending the day after that election except with the consent of the person suspected of committing a civil violation. The hearing shall be conducted in accordance with the procedures set forth in chapter 4 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.271 to 24.287. If after a hearing the secretary of state determines that a violation of this act has occurred, the secretary of state may issue an order requiring the person to pay a civil fine equal to the amount of the improper contribution or expenditure plus not more than \$1,000.00 for each violation.

(12) A final decision and order issued by the secretary of state is subject to judicial review as provided by chapter 6 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.301 to 24.306. The secretary of state shall deposit a civil fine imposed under this section in the general fund. The secretary of state may bring an action in circuit court to recover the amount of a civil fine.

(13) *When a report or statement is filed under this act*, the secretary of state shall review the report or statement and may investigate an apparent violation of this act under the rules promulgated under this act. If the secretary of state determines that there may be reason to believe a violation of this act has occurred and the procedures prescribed in subsection (10) have been complied with, the secretary of state may refer the matter to the attorney general for the enforcement of a criminal penalty provided by this act, or commence a hearing under subsection (11) to determine whether a civil violation of this act has occurred. [Emphasis added.]

\* \* \*

(16) There is no private right of action, either in law or in equity, under this act. *The remedies provided in this act are the exclusive means by which this act may be enforced and by which any harm resulting from a violation of this act may be redressed.* [Emphasis added.]

Subsection (5) permits *a person* to file a complaint alleging a violation of the MCFA. Subsection (9) authorizes the Secretary of State to investigate such a complaint and subsection (10) mandates that, if the Secretary of State has reason to believe there has been a violation of the act, the Secretary of State “shall endeavor to correct the violation or prevent a further violation by using informal methods.” If the Secretary of State is “unable to correct the violation or prevent a further violation,” the secretary of state “may refer the matter to the attorney general for the enforcement of a criminal penalty provided by this act or commence a hearing as provided in subsection (11).” The purpose of a hearing under subsection (11) is “to determine whether *a civil violation* of this act has occurred.” If the Secretary of State determines that a violation has occurred, the Secretary of State “may issue an order requiring the person to pay *a civil fine*.” The final decision and order of the Secretary of State is subject to judicial review under subsection (12).

Subsection (13) is triggered “[w]hen a report or statement is filed under this act.” The language of subsection (13) echoes that of subsection (10), which mandates that the Secretary of State use informal conflict resolution procedures for correcting MCFA violations, but, if these fail, the Secretary of State “may refer the matter to the attorney general for the enforcement of *a criminal penalty* provided by this act . . .” Subsection (13) was added by Public Act 250 in 2001. Subsection (16) makes clear that the remedies provided for in the act are the exclusive remedies for violations of the act.

The Prosecuting Attorney’s reliance on the authorities he cites is misplaced. First, the MCFA makes no reference to “prosecuting attorneys” other than the Attorney General with one exception. Section 33, which requires the filing of campaign statements with the Secretary of State provides, in pertinent part, as follows:

(9) If a candidate is found guilty of a violation of this section, the circuit court for that county, on application by the attorney general or the prosecuting attorney of that county, may prohibit that candidate from assuming the duties of a public office or from receiving compensation from public funds, or both.

In all other respects there is no role for a county prosecuting attorney under the act.

Second, in *Forster v Delton School District*, 176 Mich App 582, 585; 440 NW2d 421 (1989), an action was brought against a school district alleging violations of the MCFA. The

Court of Appeals held that there was no private action under the MCFA for the alleged violations, saying:

The campaign financing act does not allow for enforcement by private individuals. MCL § 169.215; MSA § 4.1703(15) provides an express remedy to enforce the duties imposed under the campaign financing act. The campaign financing act also provides for criminal penalties for knowing violation of the act, and enforcement for such knowing violation may be prosecuted by the Attorney General *or local prosecuting attorneys*. [Emphasis added.]

The Prosecuting Attorney relies upon the “or local prosecuting attorneys” in this statement by the Court and the Attorney General’s reliance on *Forster* when he opined that “the Attorney General does not have the exclusive authority to enforce the criminal provisions of the [MCFA]. Enforcement of such provisions may be prosecuted by the Attorney General or by county prosecuting attorneys.” 1999 OAG 7040.

However, *Forster* was decided in 1989 and the Attorney General issued opinion 7040 in 1999. Since then, the MCFA has been amended. 2001 PA 250. Subsections (13) and (16) were added. The MCFA now expressly provides that there is no private right of action for a violation of the act and that the remedies provided for in the act are exclusive. And, again, the provisions providing for enforcement of a criminal penalty refer only to the Attorney General.

Admittedly, these provisions now limit the Prosecuting Attorney’s general statutory duties as set out in MCL § 49.153 which states:

The prosecuting attorneys shall, in their respective counties, appear for the state or county, and prosecute or defend in all the courts of the county, all prosecutions, suits, applications and motions whether civil or criminal, in which the state or county may be a party or interested.

But, the Attorney General, as the chief law enforcement officer of this State, has the same statutory duties as a prosecuting attorney. In addition, MCL §14.29 provides:

It shall be the duty of the attorney general, at the request of the governor, the secretary of state, the treasurer or the auditor general, to prosecute and defend all suits relating to matters connected with their departments.

In determining what constitutes a “state interest” for the purpose of deciding whether to initiate litigation, the Attorney General has broad statutory discretion. “[T]he courts should accord substantial deference to the Attorney General’s decision that a matter constitutes a state interest.” *Fieger v Cox*, 274 Mich App 449, fn 9; 734 NW2d 602 (2007).

The MCFA is designed to ensure openness and honesty in our elections by mandating certain reporting requirements and by prohibiting corporations (including law firms operating as limited liability companies) or their lawyers or agents from making monetary contributions to influence elections. *Fieger, supra*, at p 451.<sup>1</sup> Thus, enforcement of the MCFA is unquestionably a state interest. The Legislature clearly intended to vest exclusive jurisdiction for enforcement of the MCFA in the Secretary of State and, upon her request, in the Attorney General.<sup>2</sup>

In *Citizens for Common Sense in Government v Attorney General*, 243 Mich App 43; 620 NW2d 546 (2000), the Court of Appeals held that the circuit court lacked subject matter jurisdiction over the ballot committee's action for a declaratory ruling because the "MCFA provided the exclusive procedure for its enforcement through the Secretary of State" and the ballot committee had not exhausted its administrative remedies.

In *Fieger, supra*, the Court viewed a contest between the Attorney General's investigation of possible felony violations of the MCFA and the authority of the court being asked to issue writs of superintending control or mandamus or grant injunctive relief to those who were the subjects of the investigation as a separation of powers issue. The Court found that the plaintiffs were forum shopping and the court's exercise of jurisdiction was a restraint on the Attorney General's authority to investigate in violation of the constitutional separation of powers. The Court wrote further with respect to the Attorney General's powers as follows:

Provisions relating to the office of the Attorney General appear in article 5 of the Michigan Constitution, which delineates the executive branch of government in Michigan. Article 5, § 3 states that "[t]he single executives heading principal departments shall include a secretary of state, a state treasurer

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<sup>1</sup> The legislative history of the MCFA noted that the bill addressed "a crisis of confidence in elected officials among voters today, and the growing influence of 'big money' in increasingly expensive political campaigns." House Legislative Analysis, SB 1570, December 17, 1976, p 1. See *Michigan Education Ass'n Political Action Committee v Secretary of State*, 241 Mich App 432, 442; 616 NW2d 234 (2000).

<sup>2</sup> See *People v O'Hara*, 278 Mich 281; 270 NW 298 (1936) in which the Court recognized in an early common law election fraud case that the Attorney General can prosecute a case without the county prosecuting attorney's involvement because the Attorney General has the right to intervene in any civil or criminal proceeding when in his judgment the interests of the state so require.

and an attorney general,' and article 5, § 9 provides that the '[s]ingle executives heading principal departments . . . shall . . . perform duties prescribed by law.' 'The office of the attorney general enjoys a wide range of powers, derived from both the common law and, later, statutory enactments.' *Michigan Beer & Wine Wholesalers Ass'n v Attorney General*, 142 Mich App 294, 300; 370 NW2d 328 (1985). 'The most basic purpose of [the Attorney General's] office is to litigate matters on behalf of the people of the state. Accordingly, it is widely acknowledged that Michigan's Attorney General has broad authority to bring actions that are in the interest of the state of Michigan.' *In re Certified Question (Wayne Co v Phillip Morris, Inc)*, 465 Mich 537, 543; 638 NW2d 409 (2002), citing MCL 14.28. [Citations omitted.]

As this Court further observed in *People v Karalla*, 35 Mich App 541, 544; 192 NW2d 676 (1971), 'the Attorney General possesses all the powers of a prosecuting attorney unless that power has been specifically withdrawn by the Legislature.' Pursuant to MCL 49.153, prosecuting attorneys in Michigan possess broad discretion to investigate criminal wrongdoing, determine which applicable charges a defendant should face, and initiate and conduct criminal proceedings. *People v O'Shea*, 149 Mich App 268, 276; 385 NW2d 768 (1986); *Bloss v Williams*, 15 Mich App 228, 233-235; 166 NW2d 520 (1968). [Emphasis added.]

In *Huron Valley Schools v Secretary of State*, 266 Mich App 638; 702 NW2d 862 (2005) appeal denied 474 Mich 1085, a school brought a declaratory judgment action against the Secretary of State, alleging violations of the MCFA and contractual and constitutional rights in connection with directions from the secretary of state prohibiting the expenditure of school and public funds on certain ballot proposals. The circuit court granted summary disposition and declaratory judgment in favor of the school on the MCFA count and summary disposition for the secretary of state on the contractual and constitutional claims. There were cross-appeals filed.

The Court of Appeals found that the circuit court lacked jurisdiction over the declaratory judgment action for alleged violations of the MCFA because the dispute was within the exclusive jurisdiction of an administrative agency. The Court said:

Whether the trial court has subject-matter jurisdiction is a question of law. *Rudolph Steiner School of Ann Arbor v Ann Arbor Charter Twp*, 237 Mich App 721, 730; 605 NW2d 18 (1999); *W A Foote Memorial Hosp v Dep't of Public Health*, 210 Mich App 516, 522; 534 NW2d 206 (1995). . . If the Legislature has expressed an intent to make an administrative tribunal's jurisdiction exclusive, then the circuit court cannot exercise jurisdiction over those same areas. MCL §600.605; *Universal Am-Can, supra*.

Therefore, the Legislature, having vested exclusive jurisdiction in the Secretary of State to investigate and resolve campaign violations or to refer them to the Attorney General for criminal prosecution, the Prosecuting Attorney has no statutory jurisdiction to investigate or prosecute violations. By the same token, this Court did not have jurisdiction to issue the subpoenas at issue or rule on the pending motions. Ironically, the Secretary of State does not have authority to request investigative subpoenas. It seems she will rely on the cooperation of those she is investigating to produce documents, and at this point, full document production has not been made. It seems, then, unlikely that the Secretary of State can adequately and fairly investigate this case without the Attorney General's assistance. Prudence would suggest she enlist his aid.

It should be noted, though, that there is nothing in the grant of exclusive authority to the Secretary of State to investigate violations of the MCFA that precludes a county prosecutor from investigating crimes which may have been committed outside of that act. Perjury, subornation of perjury and obstruction of justice are crimes commonly investigated and prosecuted by county prosecutors. The conspiracy to commit crimes other than violations of the Campaign Finance Act would also be an area subject to investigation that is not prohibited by the Secretary of State's exclusive jurisdiction.

#### Potential Bias

The Legislature has vested the authority to investigate and resolve violations of the MCFA exclusively in the Secretary of State. Only the Secretary of State can refer alleged campaign law violations to the Attorney General for criminal prosecution. The question has been raised whether the Secretary of State will be biased in this matter because of campaign contributions that she may have received from the Corporation.

Pursuant to Subsection (12) of the MCFA, "[a] final decision and order issued by the secretary of state is subject to judicial review." In the meantime, mere speculation that the Secretary of State will act a certain way is insufficient to allow this Court to usurp her authority. See, *L&L Wine and Liquor Corp v Liquor Control Comm*, 274 Mich 354; 733 NW2d 107 (2007). The Court lacks jurisdiction to compel the Secretary of State to exercise



her authority in a particular way. Const 1963, art. 3, §2; *Randall v Meridian Twp Bd*, 342 Mich 605, 608; 70 NW2d 728 (1955).

### Conclusion

The Legislature has clearly expressed an intent to make the Secretary of State's jurisdiction over violations of the MCFA exclusive and to give her the sole discretion to refer criminal violations to the Attorney General for investigation and prosecution.<sup>3</sup> Therefore, this Court cannot exercise jurisdiction over this same area. The Court should not have authorized the subject investigative subpoenas for the Prosecuting Attorney and cannot entertain the instant motions. Ironically, the Secretary of State has no authority to request investigative subpoenas and this case will never be fully investigated unless it is referred to the Attorney General.

In reaching these conclusions, the Court is compelled to express its distaste for the public policy implicit in a legislative determination that campaign finance violations would be within the exclusive province of the Secretary of State. While all other citizens are subject to the full brunt of the justice system for their alleged crimes, the Legislature has created a "political class" of those who are elected or would be elected to office and exempted their alleged campaign crimes from scrutiny by experienced county prosecutors. While the Court is confident that the civil servants within the office of the Secretary of State have some degree of expertise, there is nothing about violations of the MCFA which mandates a public policy that favors resolving disputes by conciliation rather than prosecution.

Quite to the contrary, we live in a democratic government and expect those who run for office to act like leaders, exhibit the highest ethics and follow the laws associated with their election. If we expect every other citizen to be held accountable for their errors, there seems no reason why well-funded and well-educated politicians and corporations should not suffer the same consequences. Hypocrisy is every bit as great a danger to democracy as actual graft or corruption. Both breed contempt for the rule of law and our elected officials.

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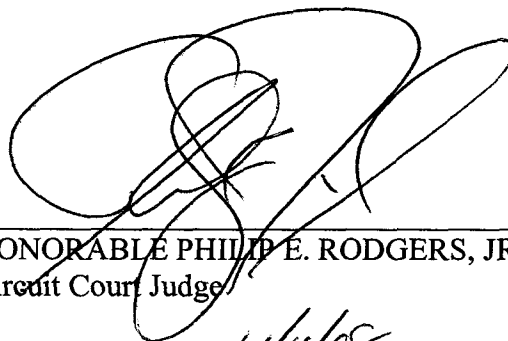
<sup>3</sup> This does not preclude the Attorney General from referring an investigation and prosecution to a county prosecuting attorney should he decide to do so.

This Court is well aware that its obligation is to follow the law and that it has no role in the determination of public policy. For these reasons, the Court can only express its concerns and trust they will be considered by others in a more appropriate forum.

This Court must dismiss this matter for lack of subject matter jurisdiction.

IT IS SO ORDERED.

This decision and order resolves the last pending claim and closes the case.



HONORABLE PHILIP E. RODGERS, JR.  
Circuit Court Judge

Dated: \_\_\_\_\_

4/11/08