



DenverDA

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NEWS RELEASE

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INVESTIGATION CONCLUDES

Denver District Attorney Mitch Morrissey announced today that the investigation into allegations of the misuse of funds by Scott Gessler has concluded and no charges will be filed.

The allegations were made last fall, and as they involved a public official and the use of public funds, they were taken into the Denver Grand Jury in February for further investigation. After the conclusion of evidence, the Grand Jury did not find probable cause that a crime had occurred.

As allowed under state law, this Grand Jury voted to write a report and submit it to the court. The court approved the report for release today.

The conclusion of the Grand Jury investigation and the adoption of its report complete the criminal investigation into these allegations.

DENVER STATUTORY GRAND JURY

REPORT

Investigation of the use of the Discretionary Fund by Secretary of State Scott Gessler

Scope of the Investigation

The 2013 Denver Statutory Grand Jury- Panel A, investigated the use of monies by Secretary of State Scott Gessler (Secretary of State) which were allocated to him by Colorado Revised Statute (C.R.S.) §24-9-105 (hereafter Discretionary Fund). The investigation focused on whether the Secretary of State misused monies allocated to him in the Discretionary Fund by attending the Republican National Lawyers Association (RNLA) conference in Tampa, Florida in August 2012, and receiving two lump sum payments at the end of fiscal years 2011 and 2012.

The Process

The Grand Jury accepted this case for investigation on February 27, 2013. The evidence was presented by the Denver District Attorney's Office. The Grand Jury subpoenaed witnesses and documents from the Secretary of State. The witnesses testified under oath. The witnesses were questioned by a Chief Deputy District Attorney and by the Grand Jury. All witnesses cooperated with the investigation and answered every question asked of them.

After all of the evidence was presented, the Grand Jury deliberated. The Grand Jury decided to issue a No True Bill and a public report. This Report represents the independent conclusions of nine or more members of the Grand Jury.

The Evidence

This case was presented during five Grand Jury sessions. The Grand Jury heard the testimony of Colorado Ethics Watch Director Luis Toro, Secretary of State Chief Financial Officer Heather Lizotte, and Secretary of State Chief of Staff Gary Zimmerman. In addition to the testimony, the Grand Jury reviewed thousands of pages of e-mail communications, expense reports, financial documents, conference brochures, Secretary of State Employee Handbooks, and other written documents.

Report in the Public Interest

The Grand Jury finds that it is in the public interest that this Report be released. This Report is permitted pursuant to one statutory provision found at C.R.S. §16-5-205.5 (5)(a), because this investigation addresses “allegations of the misuse or misallocation of public funds.”

Findings of Fact

Discretionary Fund Statutory Authorization

The Grand Jury makes the following findings of fact based on a review of all the evidence presented:

In November of 2010 Scott Gessler was elected as Colorado’s 37th Secretary of State, and was sworn into office in January 2011(hereafter Secretary of State). The Colorado Department of State was and is located at 1700 Broadway, City and County of Denver, State of Colorado. The Secretary of State is a licensed attorney in the State of Colorado, although that is not a requirement to hold the position. The annual salary and allowances for the Secretary of State is set by statute at \$68,500.00 per a year. (C.R.S. § 24-9-101(1)(e)).

As an elected official the Secretary of State is reimbursed for mileage allowances pursuant to C.R.S. §24-9-104 and other travel related expenses which are a result of official State business.

The Secretary of State is also provided access to an additional \$5000.00 pursuant to C.R.S. §24-9-105 (hereafter Discretionary Fund) and it states:

(1) Beginning with the fiscal year commencing July 1, 1985, and for each fiscal year thereafter, subject to annual appropriation by the general assembly, there is hereby available the following amounts for elected state officials for expenditure in pursuance of official business as each elected official sees fit:

- (a) Governor, twenty thousand dollars;
- (b) Lieutenant governor, five thousand dollars;
- (c) Attorney general, five thousand dollars;
- (d) Secretary of state, five thousand dollars;
- (e) State treasurer, five thousand dollars.

(2) The appropriations made by paragraphs (a), (b), (c), and (e) of subsection (1) of this section shall be out of any moneys in the general fund not otherwise

appropriated, and the appropriation made by paragraph (d) of subsection (1) of this section shall be out of any moneys in the department of state cash fund not otherwise appropriated.

Use of Discretionary Fund – Historical Practices

The Grand Jury received and reviewed documents and testimony regarding the use of the Discretionary Fund by prior Secretaries of State. The Grand Jury finds that money from the Discretionary Fund was used for a wide variety of purposes, that record keeping practices varied from meticulous to almost non-existent, and that prior Secretaries of State exercised very broad discretion in making expenditures from the fund.

Secretary of State Scott Gessler’s Use of the Discretionary Fund

The Grand Jury received and reviewed documents and testimony related not only to Secretary of State Gessler’s use of the discretionary fund, but also of travel and phone reimbursements, credit card records for the entire department, and copies of the operative employee handbooks. The Grand Jury finds that, except for the Discretionary Fund, established protocols were followed and proper documentation of the expenses that were reimbursed were maintained by Secretary of State Gessler and the staff of the Department of State.

The Grand Jury finds that Secretary of State Gessler employed three different methods of requesting and receiving funds from the Discretionary Fund. In some instances, such as a request for reimbursement for expenses of \$701.78 dated August 22, 2011, Secretary of State Gessler provided a memorandum to Ms. Lizotte and full documentation for the amount requested. Secretary of State Gessler included receipts from various businesses with that request for reimbursement. In other instances, such as a May 23, 2102, memorandum to Ms. Lizotte requesting \$445.76 reimbursement for office related expenses, Secretary of State Gessler provided only a spreadsheet listing of expenses with no underlying documentation. In other instances, Secretary of State Gessler provided memoranda to Ms. Lizotte requesting reimbursement without any supporting documentation, including the two following examples.

End of Fiscal Year Lump Sum Payments

On July 12, 2011, the Secretary of State sent a memorandum to Ms. Lizotte which stated: “I respectfully request reimbursement for any remaining discretionary funds. Feel free to see me if you have any questions or need additional information.” Nothing was attached to the request and no receipts, credit card statements, or documentation was provided to support the disbursement of the remaining amount, approximately \$1,400.00, to the Secretary of State. Ms. Lizotte testified that she asked for some form of documentation from the Secretary of State for this reimbursement but none was provided, the reimbursement was processed and the Secretary of State received all remaining funds.

A similar request was made by the Secretary of State on July 5, 2012, in which he asked Ms. Lizotte for “reimbursement for any remaining discretionary funds.” In this request he, again, provided no receipts, credit card statements or documentation to justify these expenses. The total remaining was a little over \$117.00.

The Grand Jury finds that the lack of protocols, policies, or standard procedures for payments from the Discretionary Fund raised concerns within the Department of State. In response to an inquiry by Chief of Staff Gary Zimmerman, on November 8, 2011, Chief Financial Officer Heather Lizotte sent an e-mail to the then Deputy Secretary of State and to Chief of Staff Gary Zimmerman in regards to the Discretionary Fund and a conversation she had had with the State Controller’s Office. In the e-mail Ms. Lizotte indicates to the Deputy Secretary of State and Mr. Zimmerman that the past practices of “Elected Officials” using the Discretionary Funds “in any way they wanted to use it” was no longer acceptable and that better documentation needed to be put in place because of tighter budgets and that expenditures are “more closely scrutinized.” The recommendations from the State Controller’s Office were as follows:

- All expenditures should have supporting documentation. (for example meal receipts etc . . .)
- A memo should only be written for reimbursement of expenditures incurred for “XYZ expenditures,” or to justify expenditures for an event. (in other words no memo just for blanket reimbursement).
- Expenses should be in “Pursuance of Official [State] Business” (not personal use).

In response to the e-mail the then Deputy Secretary of State thanked Ms. Lizotte and commented “Good Explanation.” Mr. Zimmerman testified before the grand jury that he received the e-mail, but did not forward it to the Secretary of State nor did they implement any of the recommendations from the State Controller’s Office. Mr. Zimmerman testified that other issues took a higher priority. The e-mails received from the Secretary of State’s Office revealed that it was not until November 6, 2012 that Ms. Lizotte’s November 8, 2011 e-mail resurfaced and became a discussion point in the Secretary of State’s Office.

The Grand Jury finds that there was no criminal conduct related to the above noted pay-outs from the Discretionary Fund. However, the Grand Jury herein expresses displeasure with the fact that Secretary of State Gessler did not provide any documentation to account for the lump sum pay out from the Discretionary Fund in 2011 and again in 2012, thus creating difficulty not only for Secretary of State Gessler, but also for the People of the State of Colorado. The difficulty arises from the apparent lack of transparency inherent in requesting and receiving money from the Discretionary Fund without the necessity of providing even the simplest form of documentation. The Discretionary Fund statute {(C.R.S.) §24-9-105} allows for such payments, and thereby allows the People of the State of Colorado to see how an elected official exercises his or her discretion.

Republican National Lawyer's Association

On August 23, 2012, the Secretary of State traveled to Tampa Bay, Florida to attend the Republican National Lawyers Association 2012 National Election Law Seminar (RNLA) which was being held in Sarasota, Florida through August 27, 2012. The agenda for the conference surrounded election law issues and the Secretary of State spoke at a panel on "The Department of Justice, the Role of States and Voter ID." The RNLA conference was approved for 12 general credits and 1.2 ethics credits by the Colorado Supreme Court. The Secretary of State certified on his Continuing Legal Education form that he attended the conference and was awarded 12 general credits and 1 ethics credit.

After attending the RNLA, the Secretary of State traveled to Tampa Bay, Florida and attended the Republican National Convention (RNC) from August 27, 2012 until his early departure on August 31, 2012. The Secretary of State returned early from the RNC due to threats the Secretary of State's Office had received concerning the Secretary of State and his family. Chief of Staff Gary Zimmerman authorized reimbursement to the Secretary of State for airfare change and hotel cancellation fees due to the threats and the need for the Secretary of State to return home to be with his family. The reimbursement did not come from the Discretionary Fund but instead from the Secretary of State's general expense fund.

On September 6, 2012, the Secretary of State sent a memorandum to Ms. Lizotte which stated:

I respectfully request reimbursement in the amount of \$1,452.52 from the Secretary of State Discretionary Fund for office related expenses. Enclosed is supporting document for expenses incurred in pursuance of state business. These expenses were incurred while meeting with constituents, county clerks, lobbyists, staff and legislators to discuss state business.

Attached to the memorandum was a typed table which began on July 3, 2012 and continued through August 26, 2012. Approximately \$1278.00 was expenses attributed to the RNLA conference, although the Secretary of State provided no receipts, credit card statements or other documentation to support the expenses.

Beginning on or about September 12, 2012, Colorado Ethics Watch issued several Colorado Open Records Act Requests (Records Requests) to the Secretary of State's Office in regards to the RNLA conference and the Discretionary Fund. The Secretary of State complied with those requests and provided the items requested.

On or about October 15, 2012, Director of Colorado Ethics Watch Luis Toro sent a letter to the Denver Police Department and the Denver District Attorney's Office requesting an investigation into the conduct of the Secretary of State. Colorado Ethics Watch alleged that the use of Discretionary Funds was improper, and possibly illegal, since the trip was "manifestly personal and political" and "not in pursuit of state

business.” Subsequent to that letter Colorado Ethics Watch further provided the District Attorney information concerning the two pay outs of the Discretionary Fund at the end of fiscal years 2011 and 2012.

In addition to the complaints filed with the Denver Police Department and Denver District Attorney’s Office, Colorado Ethics Watch filed an ethics complaint with The Independent Ethics Commission (Ethics Commission) against the Secretary of State (Case No. 12-07).

In a series of public statements and formal pleadings the Secretary of State responded to the allegations in the ethics complaint. Although many of the responses dealt with jurisdictional and procedural arguments, the Secretary of State did respond to the use of Discretionary Funds in regards to the RNLA conference, the trip home, and the pay outs in the end of fiscal years 2011 and 2012.

The Secretary of State indicated that his use of department funds to return home from the RNC was appropriate based on the threats against him and his family. The Grand Jury agrees.

As it relates to the use of Discretionary Funds to attend the RNLA and the end of the fiscal year’s pay out, the Secretary of State had several responses. First, the Secretary of State submitted that normal state accounting procedures do not govern discretionary expenditures because it is left to the discretion of the elected official to use “as the [official] sees fit” and that the practices of past elected officials demonstrated that his use of the Discretionary Funds to attend the RNLA was appropriate. Further, the Secretary of State submitted that many elected officials provided no explanation or receipts whatsoever to justify their expenses and that his failure to do so was not improper.

On May 22, 2013, the Secretary of State submitted a check to the Colorado Department of State/Finance in the amount of \$1,278.90 “[a]s repayment for discretionary funds received as reimbursement for my attendance at last August’s continuing legal education at the RNLA Conference.”

Chief of Staff Gary Zimmerman testified that after discussions with the Secretary of State and his own observations that he believed the Secretary of State paid back the discretionary fund on May 22, 2013 so that it could possibly minimize the distraction of the ethics complaint and grand jury investigation. However, Mr. Zimmerman further testified that the Secretary of State still maintains he did nothing wrong in regards to the Discretionary Fund.

The Grand Jury finds that there was no criminal conduct related to the use of Discretionary Funds to attend the RNLA conference, in light of the Secretary of State speaking on a panel, the election law training at the conference, and the accreditation by the Colorado Supreme Court for CLE. However, the Grand Jury believes that the Secretary of State’s decision regarding the use of Discretionary Funds in order to attend a

partisan and political conference like the RNLA was not prudent, especially when it was followed by a trip to the Republican National Convention.

The Conclusion

The Grand Jury finds no criminal conduct on the part of the Secretary of State or the staff of the Department of State and issues a No True Bill.

Adopted this 19th day of June, 2013

2013 Denver County Statutory Grand Jury, Panel A

(Signature Page of Foreperson and Other Grand Jurors Follows on Separate Page)