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EXECUTIVE BRANCH ETHICS COMMISSION
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Executive Branch Ethics Commission
ADVISORY OPINION 18-03
September 17, 2018

- RE:**
1. Does the Executive Branch Ethics Commission reaffirm Advisory Opinion 10-01?
 2. If so, would the Executive Branch Ethics Commission's advice provided in Advisory Opinion 10-01 change in light of the State Board of Elections' recent actions to grant the Secretary of State access to the personal information of all of the Commonwealth's registered voters, access to the personal information for all of the Commonwealth's precinct election officers, and day-to-day oversight of the regular operations and the staff of the State Board of Elections?

- DECISION:**
1. Yes
 2. Yes

This opinion is issued in response to various issues that have arisen by the recent actions taken by the Kentucky State Board of Elections ("State Board" or "SBE"). Pursuant to KRS 11A.110(1), the Executive Branch Ethics Commission (the "Commission") may "on its own initiative or upon a signed request in writing, issue and publish advisory opinions on the requirements of this chapter for those who wish to use the opinion to guide their own conduct." The matter was reviewed by the Commission at its meeting on September 17, 2018, and the following opinion is issued.

On March 19, 2010, the Commission issued Advisory Opinion 10-01. The question for review was whether the then Secretary of State could continue to fulfill his statutory role as chair of the State Board of Elections while also being a candidate for U.S. Senate. The issues

presented by the recent actions taken by the State Board and the Secretary of State call into question the factors relied upon by the Commission in its 2010 opinion.

In Advisory Opinion 10-01, the Commission, after a review of the election laws established at the time, determined that the Ethics Code did not require the then Secretary of State to recuse or abstain from his duties as chair of the State Board of Elections while he was a candidate for U.S. Senate because certain parameters were built into the law to decentralize the election process. The Commission stated:

. . . it is the Commission's opinion that it is highly unlikely that any one individual holding the office of Secretary of State could alter or influence the results of a statewide election merely from the powers invested in the office by the General Assembly without having the universal cooperation of election officials across the state. For this reason, it does not appear that the Secretary of State would be required by KRS 11A.030 to abstain from his official duties relating to the election. He quite simply, under normal circumstances, lacks the ability to affect the election's outcome. So long as the Secretary of State remains cognizant of the Executive Branch Code of Ethics during the election process, and there is no reason to believe he will do otherwise, it seems unlikely that his participation would affect the public's confidence in the integrity of the executive branch.

The Kentucky General Assembly designed Kentucky's election system to be decentralized and bipartisan so that no one individual has the ability to affect the outcome of a statewide election. From the ground up, the responsibilities for conducting statewide elections are dispersed on a bipartisan basis across Kentucky's 120 county clerks and county boards of elections and between the Secretary of State and the State Board. The Secretary of State is a partisan Constitutional officer elected in a statewide election and his or her duties with regards to elections are set by statute. The key elements of election law and the election process established at the time of the 2010 opinion that the Commission relied on in making its determination were as follows:

1. Pursuant to KRS 117.035, the county board of elections administers the election laws on the local level, supervises the registration and purgation of voters within the county, chooses and trains the precinct election officers, and acts under the supervision of the State Board.
2. Pursuant to KRS 117.015, the State Board consists of the Secretary of State, who by statute serves as Chair, and six members, three Republicans and three Democrats, appointed by the Governor from lists supplied by the state central executive committee of the two political parties in the Commonwealth. The State Board administers the election laws of the state and supervises the registration and purgation of voters within the state. KRS 117.015(1). The State Board administers the election laws contained in Kentucky Revised Statutes (KRS) Chapters 116, 117, 118, 118A, 119, and 120 and is responsible for establishing the administrative regulations in Title 31 of the Kentucky Administrative Regulations (KAR).

3. The Chair presides at the meetings and may vote; however, it was the practice of the Secretary of State in 2010 and his predecessors to abstain from voting unless a tie vote or quorum issues necessitated such a vote.
4. Pursuant to KRS 117.025, the State Board's staff consists of an executive director and an assistant director, who are of differing political parties and a staff, hired on a bipartisan basis, sufficient to carry out its duties. KRS 117.025(1) and (2).
5. The executive director serves as the "chief administrative officer" of the State Board designated to oversee the day-to-day operations of the agency.
6. Pursuant to KRS 117.015(2), the Secretary of State is Kentucky's Chief Election Official. As such, the Secretary of State, along with the State Board of Elections, is responsible for ensuring Kentucky complies with the following federal laws: the Voting Rights Act of 1965, the National Voter Registration Act of 1993 ("NVRA"), the Uniformed and Overseas Citizens Absentee Voting Act of 1986 ("UOCAVA"), the Help America Vote Act of 2002 ("HAVA"), and the Military and Overseas Voters Empowerment Act of 2009 ("MOVE").
7. The State Board is responsible for certifying the voting systems for use in the state of Kentucky. KRS 117.379 and 117.381.
8. The voting equipment in each county is chosen and purchased by the county fiscal courts, KRS 117.105-125, the custody of which is placed with the county clerk for protection and preservation between elections, KRS 117.135, and once prepared for the election, is delivered into the possession of the county board of elections, KRS 117.165. The county board of elections then ensures delivery of the voting equipment to the precincts on Election Day and places control of the voting equipment into the possession of the precinct election officers, KRS 117.195, who are also appointed by the county board of elections on a bipartisan basis, pursuant to KRS 117.045.
9. The only equipment used to record and tabulate the vote count with which the former Secretary of State came into contact was the voting machine upon which he cast his own ballot. The Secretary of State did not encounter the vote tabulation equipment or software, the control of which was maintained by the county board of elections and the county clerk.
10. At the close of the polls on Election Day, the precinct election officers are responsible for taking the tally of the votes in an open and public setting in the presence of media and candidates' representatives. KRS 117.275(1)-(3). The precinct election officers must then deliver the return sheets and all election supplies to the county board of elections. KRS 117.275(4). The county board of elections, in the presence of the media and candidate representatives, tabulates all votes cast in the election, including the absentee votes and write-in votes. See KRS 117.087, 117.265, and 117.275. The county board of elections certifies the results of the tally of the votes to the county clerk and the Secretary of State. KRS 117.275(7). For statewide races, the county board of elections provides this certification to the Secretary of State no later than 12 p.m., on the Friday following the election. KRS 118.425(4). The county board of elections sends the precinct-by-precinct results for all races to the State Board. KRS 117.275(4). No later than the third Monday after the election, the State Board meets, in an open and public meeting, to count and tabulate the vote as certified to the Secretary of State by the various county boards of elections. KRS 118.425(5). On election night, the unofficial results are reported by the county board of elections to

the State Board and posted on the State Board's website. Every document generated throughout the course of the election is an open and public record pursuant the Kentucky Open Records Act.

11. The State Board maintains the Statewide Voter Registration Database [now called the Voter Registration System or VRS], a roster of all qualified registered voters within the state by county and precinct. 117.025(3)(a). The State Board publishes the Precinct Signature Rosters for each precinct prior to each Election Day. KRS 117.025(3)(b)&(c). The State Board performs regular maintenance of the Voter Registration Database pursuant to KRS 116.112 and the NVRA and purges voters who have died, been declared incompetent, and been convicted of a felony offense under KRS 116.113. The State Board also furnishes precinct lists to duly qualified candidates, political party committees or officials thereof, any committee that advocates or opposes an amendment or public question, and others in its discretion. KRS 117.025(3)(h).
12. Neither the Secretary of State in 2010 nor any of his predecessors had access to the Statewide Voter Registration Database.
13. The State Board does not make rulings on whether an individual voter is eligible to be registered to vote and the Secretary of State had, in 2010, no authority to rule on a person's ability to register to vote.
14. In statewide races, the certification of the results of the election that the Secretary of State makes to the State Board is a compilation of the 120 certifications made by the county boards of elections.
15. In 2007, the former Secretary of State performed his duties as Secretary of State, Chair of the State Board of Elections, and Kentucky's Chief Election Official while a candidate for reelection as Secretary of State. Indeed, prior individuals who served as Secretary of State actively campaigned for various offices while performing their election-related duties.
16. The General Assembly contemplated that the Secretary of State would be responsible, along with the State Board, for carrying out and supervising the conduct elections, and did not contemplate that the individual serving as Secretary would be prohibited from performing those duties merely because he or she had filed as a candidate for office.

Finally, the Commission stated that

If any individual intended to affect the vote totals certified on the Secretary of State's certification, that person would have to change the certifications provided by the county boards of election. If any one individual had the intent to affect a statewide race, that person would need the complicity or acquiescence of a majority of the more than 14,300 precinct workers, or a majority of the 480 county board of elections members, or a majority of the State Board members, and commit such malfeasance under the observation of a bipartisan staff, candidates and their representatives, the media, and the public.

The Commission has observed three factors that have changed since 2010 in the administration of elections. The sitting Secretary of State now has: (1) access to the voter

registration data; (2) access to the precinct election officers data; and (3) power over the staff of the State Board. The Commission will address each of these areas in turn.

FACTOR #1: ACCESS TO VOTER REGISTRATION DATA

The voter data is collected through voter registrations entered by the offices of the county clerks through various sources into the Voter Registration System (“VRS”). In 2010, that system was called the Statewide Voter Registration Database and was housed in the Commonwealth Office of Technology, but maintained by the State Board. Since 2010, the State Board has initiated measures to create a new system in-house that is maintained by programmers and IT professionals on servers that are managed by the State Board. The VRS is used to create the precinct signature rosters sent to the precincts for election day and voter registration lists that are provided to certain individuals designated under KRS 117.025(3)(h) and 31 KAR 3:010 for a fee up to \$2000. Staff of the State Board have access to login to the VRS and are given different authority to read or amend the data in the database, as necessary as required by his or her individual job duties.

At the State Board’s meeting on August 28, 2018, the State Board issued a document entitled *Resolution Reaffirming Kentucky State Board of Elections Staffing and Oversight*. This document states the following:

WHEREAS, the Secretary of State as Chief Election official utilizes State Board of Elections’ systems, specifically the Voter Registration System, up to, on and after each election and throughout the regular course of business, to coordinate election inquiries and field complaints;

Section 2. That the Secretary of State, Chief Election Official, and Chair of the Kentucky State Board of Elections, is necessarily required to have access to information in order to carry out and fulfill the aforementioned state and federal statutory obligations.

If, by issuing this Resolution, the State Board has granted the Secretary of State the ability to access the VRS, then as a partisan candidate, he or she could have access to information and data not available to his or her opponents, which may include the full date of birth and social security number for each registrant. Furthermore, if the State Board has given the Secretary of State the ability to login and amend the data within the VRS, then he or she could have the opportunity to change a voter’s registration status, which could affect that voter’s ability to cast a ballot in the primary election of the voter’s choice. Furthermore, he or she could have the opportunity to alter a registration date to ensure that a voter was not eligible to vote in a General Election.

If, by issuing the Resolution, the State Board is providing the Secretary of State with a copy of the voter registration list that is generated for the parties and candidates according to KRS 117.025(3) or read only access to the VRS, the State Board is providing the Secretary of State with a benefit he or she would otherwise have had to purchase for up to \$2000 as a

candidate. If the State Board deems that the Secretary of State needs access to copies of the database to do his or her job, that would be outside of the practice of his or her predecessors.

Either way, the State Board, by its recent actions, has given the Secretary of State access to a system in a manner that materially differs from the access that was given to the Secretary of State when the Commission issued Advisory Opinion 10-01.

FACTOR #2: ACCESS TO THE PRECINCT ELECTION OFFICER DATA

At the February 27, 2018 meeting of the State Board, it voted to issue emergency and ordinary amendments to existing regulations concerning precinct election officers: 31 KAR 4:100 and 31 KAR 4:120. These amendments were later reissued at the June 21, 2018 meeting. The emergency amendments became effective immediately and the ordinary amendments are currently in the administrative regulation review process before the Legislature Research Commission. The new provisions of 31 KAR 4:100E require the county boards of elections to submit the “full name, address, phone number, and social security number of each person selected as a precinct election officer within three days of the appointment.” The new provisions of 31 KAR 4:120E grant the State Board the authority to deny a county board of elections request to appoint emergency precinct officers if it appears that the appointments would result in an imbalance between the political parties in a precinct. Furthermore, 31 KAR 4:120E grants the State Board with the ability to “appoint properly trained precinct election officers from within or outside county in order to insure a balance prescribed in KRS 117.045(4).”

At the April 16, 2018 meeting of the State Board, it voted “that for the 2018 Primary Election the Executive Director and Assistant to the Director be given authority to insure parity of Precinct Election Officers, pursuant to 31 KAR 4:100 and 4:120.” At the June 5, 2018 meeting, the Assistant to the Executive Director reported to the State Board about a new tool in the VRS that was created so that the county clerks can enter the precinct election officer data in real-time into the system.

Based on the meeting minutes issued for the August 21, 2018 State Board meeting, the Commission assumes that the Secretary of State now has access to the precinct election officer data from the Precinct Election Officer Tool. This materially differs from the data that was given to the Secretary of State when the Commission issued Advisory Opinion 10-01.

FACTOR #3: POWER OVER THE STAFF OF THE STATE BOARD OF ELECTIONS

Section 1 of the State Board’s Resolution states that

The Secretary of State, Chief Election Official and Chair of the Kentucky State Board of Elections, to carry out the Board’s statutory obligations and responsibilities in elections, is necessarily charged with the day-to-day oversight of regular operations of the Kentucky State Board of Elections and its staff, including the Executive Director and the Assistant to the Executive Director, who serve at the pleasure of the Board.

This provision of the Resolution materially alters the factors as relied upon by the Commission when it issued its 2010 Advisory Opinion. In Advisory Opinion 10-01, the Commission relied upon the language in KRS 117.025, which states in pertinent part:

- (1) The State Board of Elections shall appoint an executive director, who shall be the chief administrative officer for the board. The board shall also appoint an assistant to the director, who shall be of a different political party than the director. The salaries of the director and his assistant shall be set by the board.
- (2) The State Board of Elections shall employ, on a bipartisan basis, a staff sufficient to carry out the duties assigned to the board, including legal counsel and a training officer to provide assistance to the county clerks and the county boards of elections in their training of precinct election officers.

APPLICATION OF THE EXECUTIVE BRANCH CODE OF ETHICS

The change in circumstance discussed above may have implications in the event that a person holding the office of Secretary of State decides to file as a candidate for a future election while also serving as the Chair of the State Board.

KRS 11A.005(1) provides:

(1) It is the public policy of this Commonwealth that a public servant shall work for the benefit of the people of the Commonwealth. The principles of ethical behavior contained in this chapter recognize that public office is a public trust and that the proper operation of democratic government requires that:

- (a) A public servant be independent and impartial;
- (b) Government policy and decisions be made through the established processes of government;
- (c) A public servant not use public office to obtain private benefits; and
- (d) The public has confidence in the integrity of its government and public servants.

KRS 11A.020 provides in pertinent part:

- (1) No public servant, by himself or through others, shall knowingly:
 - (a) Use or attempt to use his influence in any matter which involves a substantial conflict between his personal or private interest and his duties in the public interest;
 - (b) Use or attempt to use any means to influence a public agency in derogation of the state at large;

- (c) Use his official position or office to obtain financial gain for himself or any members of the public servant's family; or
 - (d) Use or attempt to use his official position to secure or create privileges, exemptions, advantages, or treatment for himself or others in derogation of the public interest at large.
- (2) If a public servant appears before a state agency, he shall avoid all conduct which might in any way lead members of the general public to conclude that he is using his official position to further his professional or private interest.
- (3) When a public servant abstains from action on an official decision in which he has or may have a personal or private interest, he shall disclose that fact in writing to his superior, who shall cause the decision on these matters to be made by an impartial third party.

KRS 11A.030 provides:

In determining whether to abstain from action on an official decision because of a possible conflict of interest, a public servant should consider the following guidelines:

- (1) Whether a substantial threat to his independence of judgment has been created by his personal or private interest;
- (2) The effect of his participation on public confidence in the integrity of the executive branch;
- (3) Whether his participation is likely to have any significant effect on the disposition of the matter;
- (4) The need for his particular contribution, such as special knowledge of the subject matter, to the effective functioning of the executive branch; or
- (5) Whether the official decision will affect him in a manner differently from the public or will affect him as a member of a business, profession, occupation, or group to no greater extent generally than other members of such business, profession, occupation, or group. A public servant may request an advisory opinion from the Executive Branch Ethics Commission in accordance with the commission's rules of procedure.

9 KAR 1:025 further dictates that

Section 2. If a public servant engages in any of the following conduct, the commission may conduct an investigation in accordance with KRS 11A.080 of the conduct as a possible violation of KRS 11A.020 or KRS 11A.030:

- (4) A public servant uses state time, equipment, personnel, facilities, or other state resources for political campaign purposes.

In light of the foregoing analysis, Advisory Opinion 10-01 does not address the current situation as understood by the Commission and as described above. The Commission will issue additional advice as requested.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION



By Chair: CHRISTOPHER L. THACKER

ATTACHMENT: Advisory Opinion 10-01