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July 17, 2012

Senator Stan Adelstein
1999 West Boulevard
P.O. Box 2624
Rapid City, SD 57709-2624

RE: Requested Attorney General Review and DCI Investigation

Dear Senator Adelstein,

This letter serves as the Attorney General's response to your letter requests of June 17 and July 5 of 2012, concerning "allegations of impropriety, conflict of interest, and possibly illegal activity" in the South Dakota Secretary of State's Office. For the reasons set forth below, the scope of my review and the investigation by the Division of Criminal Investigation (DCI) is limited to potential criminal activity, and provisions of law that prohibit state officers from inappropriate financial activity.

Governing Constitutional Provisions and Statutes

State law provides the Attorney General with jurisdiction in any and all criminal proceedings in all courts of this state. SDCL § 23-3-3; see also 1-11-1(2). The duties of the Attorney General further include:

\ 1-11-1. General duties of attorney general. The duties of the attorney general shall be:

. . . .
(9) To prosecute state officers who neglect or refuse to comply with the provisions of statutes of this state prohibiting officers of the state from

accepting any money, fee, or perquisite other than salary for performance of duties connected with his office or paid because of holding such office and the statute requiring issue and delivery and filing of prenumbered duplicate receipts and accounting for money received for the state.

See also SDCL 3-8-3 (Salaried state officer retaining money received as theft). DCI is a division within the Attorney General's Office with statewide law enforcement jurisdiction to assist with criminal investigations pursuant to SDCL Ch. 23-3.

Your inquiry includes a request for a legal opinion on whether or not one who holds office as the Secretary of State is subject to impeachment or removal. Under South Dakota's Constitution, a Secretary of State is subject to impeachment by the Legislature, as opposed to removal by the Governor.

South Dakota Const. Art. 16, § 3 provides:

§ 3. Officers subject to impeachment--Grounds--Removal from office--Criminal prosecution. The Governor and other state and judicial officers, except county judges, justices of the peace and police magistrates, shall be liable to impeachment for drunkenness, crimes, corrupt conduct, or malfeasance or misdemeanor in office, but judgment in such cases shall not extend further than to removal from office and disqualification to hold any office of trust or profit under the state. The person accused whether convicted or acquitted shall nevertheless be liable to indictment, trial, judgment and punishment according to law.

Because § 3 provides for the impeachment of state officers under certain terms, SD Const. Art. 16, § 4 and SDCL 3-17-1 exclude a Secretary of State from removal by the Governor. SD Const. Art. 16, § 4 provides as follows:

§ 4. Removals of officers not subject to impeachment. All officers not liable to impeachment shall be subject to removal for misconduct or malfeasance or crime or misdemeanor in office, or for drunkenness or gross incompetency, in such manner as may be provided by law.

Section 4 is further complemented, rather than contradicted, by the Legislature in SDCL 3-17-1, which provides:

3-17-1. Removal of constitutional state officers by Governor--Grounds--Notice and hearing. All constitutional state officers not liable to impeachment may be removed by the Governor, after notice and hearing, for crimes, misconduct, or malfeasance in office or for drunkenness or gross incompetency.

In summary, the Attorney General's Office has conducted a review and an investigation by DCI of your concerns limited in scope to criminal activity and statutorily defined financial violations under SDCL 1-11-1(9). Your further concerns are matters for any legislative process that may be initiated pursuant to SD Const. Art. 16 § 3, as opposed to removal by the Governor under SD Const. Art. 16, § 4 and SDCL 3-17-1.

Investigation

At the completion of the Attorney General's Office initial review, DCI conducted the following investigation:

1. Interviewing of witnesses that are the subject of your concerns and who have relevant information to your inquiry.
2. A review and search of considerable documentation obtained under formal legal process including, but not limited to:
 - a) Review and search of over 60,000 e-mails from the Secretary of State's Office.
 - b) Review and search of over 150,000 internet usage entries from the Secretary of State's Office, which further included 2.6 million files.
 - c) Campaign Finance Reports, including additional expense documentation as provided by then candidate Jason Gant for Secretary of State. This also includes the design and computer service Mr. Pat Powers provided the Gant Campaign (JasonGant.com) prior to the 2010 general election.

- d) Corporate filings for the "Gant Group" including outside consulting documentation for computer programming.
- e) South Dakota Department of Revenue records for "Pat Powers Dakota Campaign Store" a/k/a "Dakota Campaign Store" and associated sales tax reporting from September 2010 through June 2012.
- f) Corporation filings for "Dakota Campaign Store" including fictitious business name filing of March 21, 2012. The documentation reviewed demonstrates that prior to March 21, 2012, Mr. Powers either openly and publically associated himself with "Dakota Campaign Store" or otherwise used the title "Pat Powers Dakota Campaign Store." Absent further information, said action would appear to be permissible under SDCL 37-11-1.

Conclusion

Based upon witness information and document review, I concur with DCI's determination that there exists no evidence of state criminal violations within the scope of this investigation. The voluminous e-mails, internet usage and computer files provided no evidence that the activities of Secretary Gant, Mr. Powers or "Dakota Campaign Store" were in violation of state criminal statutes.

I would like to again thank all interested persons and witnesses involved for their courtesy and their responsiveness to our office's inquiries. If you have any further questions or receive any additional information that you believe is evidence of criminal activity, please don't hesitate to contact me.

Sincerely,



Marty J. Jackley
ATTORNEY GENERAL

MJJ/lde

cc: Secretary of State Jason Gant