

## **ETHICS COMMISSION RESPONSE TO FY-09 Performance Review Questions**

- A. The Ethics Commission FY-09 Budget Request document lists increased funding for operating expenses, additional office space and improvements in information technology as the agency’s top three budget requests. Salary increases for existing staff and the hire of additional FTE make up the final four items in this prioritized listing.**
- i. Why did the Commission employ an estimated \$112,000 of the \$150,000 in new FY-09 funding to provide 30 percent raises to all but one of its employees, instead of applying the majority of the funds to the top three priorities as listed in the agency’s FY-09 Budget Request document?**

The Ethics Commission wishes to emphasize that its spending priorities, as budgeted for fiscal year 2009, were never changed. They were addressed precisely in their order of priority as is shown by the following:

- **Our first priority was increased funding for general operating expenses by program**
  - **Administration/Policy Review/Investigations** 20,000  
[Executive Director, General Counsel & Investigator]
  - **Registration Services/Hearings/Assessment Appeals** 55,000  
[Principal Assistant and Administrative Assistant I]

**75,000**

**Explanation.** In the FY-09 Budget Work Program, “other operating expenses” were increased from \$43,100 in FY-08 to \$82,257, an increase of \$39,157. While the Commission received a 30% budget increase, “other operating expenses” were increased 90.8%. The increase in “other operating expenses” permitted the lease of a new copier. The machine copies, scans, folds, acts as a network printer and serves as a backup fax machine. Our old copier served us many years, but its technology was obsolete.

- **Our second priority was to increase office space by 100%** **37,000**

**Explanation.** Other than an offer from Secretary of State Susan Savage to allow us space in her storage room, there has been no space allotted the Commission since 1988. While additional space would be valuable, it is not advisable until we receive approval for additional FTE. It would be unwise and costly for the Commission to relocate twice. We are therefore staying put at present. This was no longer a priority when the requested number of FTE was not granted.

- **Our third priority was for Information Technology Improvements expenses**
  - **Replace 7 workstations expenses** **17,500**  
**Explanation.** All seven workstations have been replaced in FY-09.
  - **Secure telecommunications/remote access expenses** **1,500**  
**Explanation.** Charles Knight, new Information Systems Network Administrator, disagreed with our former head of IT, Martin Miller, who requested this; Knight felt the Commission should not go in this direction. The program was therefore cancelled.
  - **Secure anti-virus update server expenses** **2,500**  
**Explanation.** Software was updated [Norton Corporate] in FY-09
  - **In house secure email service expenses** **3,000**  
**Explanation.** This expense is being paid to the Office of State Finance in FY-09.
  - **Extend warranty on current server expenses** **750**  
**Explanation.** Server is not currently being used. Instead, new software is needed.
  - **Purchase new server/use present for disaster recovery expenses** **12,500**  
**Explanation.** Charles Knight prefers to do weekly backups of all data rather than store the information on a new server. He does not feel a new server is cost-efficient.
  - **Scanning equipment/software for county candidate reports** **7,000**  
**Explanation.** New scanning equipment was purchased; Staff is looking into either new software or use of our content management system, used to maintain our website, for putting county candidate reports online.

**TOTAL IT BUDGET REQUEST FOR FY-2009** **44,750**

FY-2009 BUDGET FOR IT HARDWARE AND SOFTWARE

Already purchased:

Digital scanner	256.00
(7) Optiplex 755 computers	5,293.40
Wipe Drive Pro Software	<u>78.00</u>
	5,627.40

Current planned purchases:

PowerEdge 2410 - storage container for server	895.00
(7) WordPerfect Office X4 Professional Edition- License	1,995.00
(1) WordPerfect Office X4 Professional Edition - Media	25.00
(7) Office Professional Plus 2007 Single Microsoft Volume License	2,212.00
(1) Office Professional Plus 2007 Win32 English Disk Kit Microsoft Volume License CD	27.00
(1) Window Server Standard 2008 Single Microsoft Volume License	474.00
(1) Windows Server Standard 2008 32-bit/X64 English Disk Kit Microsoft Volume License	<u>27.00</u>
	<u>5,655.00</u>

TOTAL 11,282.40

- **Our fourth priority was for Pay for Performance Salary Increases for Existing Employees** **45,000**  
**Explanation.** Market-based 30% salary increases were given to six existing employees.

**Executive Director Salary.** The Executive Director’s salary was originally set not by the Commission but by the State Legislature. This was done in 1986 per 74 O.S. Supp. 1986, §4205. It was to equal that of a District Attorney [“DA”]. Under this statute, the Executive Director received mandatory pay raises the same as DAs through 1995 when that statute was repealed. This was supposedly because the Commission was then constitutional and should set the salary of its own director. The Commission adopted the statutory language of § 4205 as a policy that year. But, funds were never appropriated to cover the costs. Even with the recent pay increase, the Director is still paid 10% less than a DA.

**Authorization.** In the July 2008 meeting of the Ethics Commission the following same policy was renewed:

that the Executive Director [“ Director” ] be an attorney licensed to practice law , with not less than five years experience; that the Director be authorized to employ and set salaries of Commission staff within the limits authorized by the Legislature under the merit system; that the salary of the Director be set at a figure equal to that of a district attorney; and that the Director be responsible for the administrative operations of the Commission and perform such other duties as may be delegated.

and passed unanimously.

**General Counsel Salary.** In 1996 the Commission adopted the policy of paying the General Counsel 95% the salary of the Executive Director — the same as a First Assistant DA at that time. Counsel received a pay increase in 1997 bringing her up to 95% of the salary of the Director. But, since the Director has not been paid as a DA since 1995, the General Counsel has never been paid 95% of the salary for a DA. Her salary is also 10% below that level.

**Legislative Effort.** Former Senator Stratton Taylor, in his last year as a Legislator, included in the Commission’s appropriation bill provisions that would have again mandated that the Director be paid the same as a DA. Also included was a mandatory salary for the General Counsel at 95% that of the Executive Director. The State House removed the language before passage on the last day of the session.

**Pay for Performance.** The Commission has requested funding Pay for Performance increases since its passage approximately seven years ago. But, the Commission has never been appropriated funds to provide these raises. Staff members have qualified for the raises each year. None were given because there was no money for them in the budget.

- **Less than Five Percent per Year.** The 30% increase represents only 4.28% per year, less than the statutory 5 or 10%. Other than across-the-board state pay raises — that rarely cover more than increased health care costs — staff members have received no salary increases for more than ten years. The Commission felt this needed to be addressed.

- **Other Operating Expense Budget.** There have been many years when the Commission operated on less than \$50,000. When lean years came, this body was cut along with other state agencies. Our employees were furloughed the same as those working in large agencies. Had not a few people — especially Governor Brad Henry— come to its rescue, the Commission would have ceased to function. If the agency is cut 5% in FY-2010, it will again have a problem meeting its “other operating expenses” for printing, mailing and supplies.
- **Additional FTE.** The Commission heard it should have added employees this year instead of increasing salaries. But, that was statutorily impossible. In its FY-2009 appropriation bill, the Legislature limited the number of employees for the Commission to seven; therefore, hiring new employees was not an option.

Finally, we understand some Legislators will criticize the Commission for addressing staff salaries, which were not the top priority in our appropriation request. Since the Commission had met its operating needs — including those for information technology — and new office space was a priority *contingent upon* new FTE, it was entirely proper to go to the fourth priority — salary increases — especially since priorities 5 through 7, involving additional FTE, were unavailable.

- **Our fifth priority was to hire a Training Specialist** **52,000**  
**Explanation.** This was impossible due to the statutory limit on the number of FTE.
- **Our sixth priority was to hire an Auditor/Investigator** **56,000**  
**Explanation.** This was impossible due to the statutory limit on the number of FTE.
- **Our seventh priority was to hire an Attorney III** **78,000**  
**Explanation.** This was impossible due to the statutory limit on the number of FTE.

We therefore met — as far as circumstances permitted — all our priorities, and we met them in the order assigned them. We repeat, no changes were made on the spending priorities.

- ii. **Your top three requests...totaled \$157,000. However, when the employee raises are deducted from the additional funding, the agency has only \$38,000 left to meet its most pressing needs as detailed in the Ethics Commission FY-09 Budget Request document. Please explain.**

This was thoroughly explained in question (i).

- iii. **Was the decision to radically change the agency’s spending priorities taken by a formal vote of the Commission?**

As explained in question (i), spending priorities were not changed.

**iv. Why didn't the Commission notify the Legislature of the decision to change its spending priorities?**

The Commission's pending priorities were never changed.

**v. Is it possible that the Ethics Commission did not fully understand the importance of the Budget Request document as detailed above? If this is indeed the case, would the Commission consider eliminating the salary increases and applying the additional funding to the top priorities as listed in the FY-09 budget document?**

As noted, the Commission's spending priorities did not change. The first three priorities have been met. In House Bill 2286, the Commission was appropriated \$667,960, an increase of \$150,000 over our FY-2008 appropriation. Of that, \$50,000 was earmarked for FEC-type electronic filing software which the Governor vetoed. This left the Commission free to spend the funds as needed. Legislators from both Houses continually referred to the fact that the Commission had received a 30% increase in its appropriation, which we interpreted the increase was to be continued and was not intended just for one-time expenses.

Thus, the \$150,000 increase was for both personal services and other operating expenses for our two programs:

Administration/Policy Reviews/Investigations  
Registration Services/Hearings

The breakdown of our FY-09 Budget Work Program follows:

**PERSONAL SERVICES**

Salaries/longevity	\$477,096
Insurance - health, life, workers compensation	\$ 89,549
FICA-retirement, deferred compensation fee	\$107,523
Professional services - OPM fees, hearing officer	\$ 4,800
Interagency payments for personal services	<u>\$ 450</u>

**TOTAL PERSONAL SERVICES** \$679,418

**OTHER OPERATING EXPENSES**

Travel - reimbursements	\$ 6,000
Travel - agency direct payments	\$ 3,700
Rent expense - copier	\$ 4,000
Miscellaneous administrative expense (Printing, postage, telephone, liability insurance, etc.)	\$ 46,724

Maintenance and repair	\$ 5,050
General operating supplies	\$ 5,250
Office furniture and equipment	<u>\$ 11,533</u>

**TOTAL OPERATING EXPENSES** \$ 82,257

**TOTAL FY-2009 BUDGET WORK PROGRAM** **\$761,675**

**B. An argument advanced (explicitly and implicitly) throughout the Memorandum is that the agency requires additional funding because its workload has “increased at least five fold [since] the Constitutional Ethics Rules took effect in 1994.” Significantly, part of that increase is explained by the fact that the Director herself types virtually every document used by the Commissioners in their consideration of Rules changes.**

**i. Does staff prepare formal Fiscal Impact statements to assist the Commissioners in their consideration of proposed Rules changes? That is to say, does the agency calculate the potential costs in time and materials related to a change in the Rules? If so, is the Fiscal Impact statement made available to the Legislature for its deliberations? If not, please explain.**

Pursuant to Article 29 of the Oklahoma Constitution, the Ethics Commission promulgates rules of ethical conduct governing campaigns for elective state office and for initiatives and referenda, including civil penalties for violation of these rules. The only constitutional requirement is that they be promulgated “after public hearing”. These are not Administrative Procedures Act Rules. They are subject only to the requirements of the constitutional amendment. Fiscal impact statements, which are a product of APA rule requirements, are not required. None are prepared. None exist.

**ii. Among the initial Constitutional Rule changes was a reduction in the threshold for identifying individual contributors to state campaigns from \$200 to \$50.**

**1. Please explain the rationale that informed this significant reduction in the reporting threshold. How did you arrive at the \$50 figure? Were there complaints from the public about the \$200 limit.**

The original rules were patterned after the Model Act adopted by the Council on Governmental Ethics Laws [“COGEL”], an international body of ethics regulators. The across-the-board

disclosure threshold in this act was \$100. The original rule proposals set the \$100 threshold. However, just before the final vote on the 1994 rules, the multi-county grand jury in the David Walters case came down with several recommendations which they ask that the Commission consider.

One was that the disclosure limit be set at zero. [This resulted from evidence in the Walters case of \$20,000 in cash in an envelop with no contributors names assigned to the contributions.] This recommendation was considered, but the Commission agreed there should be small donations (such as those thrown in a punch bowl) that would not be subject to disclosure except in the aggregate. The disclosure limit was then set at \$50 as a compromise to accommodate the multi-county grand juries recommendations. It has since remained in the rules.

## **2. What is the County threshold? What is the Federal Election Commission (FEC) limit?**

The county disclosure threshold remains at \$200 which was the state threshold before promulgation of the Constitutional Ethics Rules. The FEC limit — we assume you mean disclosure threshold — is also \$200.

## **3. How does the \$50 threshold compare to those of other states?**

Benchmarking surrounding states, Texas, Kansas and Arkansas have the same \$50 threshold as Oklahoma. Arizona is lower at \$25. New Mexico is zero. Missouri is higher at \$100. The following information was taken from the Campaign Finance Law 2000 published by the Federal Election Commission:

Alabama	Information on all contributions and expenditures
Alaska	All contributions of more than \$100 and all expenditures itemized
Arizona	All contributions of more than \$25 and all expenditures itemized
Arkansas	Contributions and expenditures over \$50 itemized
California	Contributions or expenditures of \$100 or more itemized
Colorado	All contributions and expenditures over \$20 itemized
Connecticut	Contributions over \$30 itemized; info on all expenditures
Delaware	Contributions over \$100 itemized; info on all expenditures
Florida	Contributions over \$100 itemized; all expenditures itemized
Georgia	Contributions and expenditures of \$101 or more itemized;
Hawaii	Contributions of more than \$100 itemized; info on all expenditures
Idaho	Contributions of more than \$50 & expenditures of more than \$25 itemized
Illinois	Contributions and expenditures of more than \$150 itemized
Indiana	Contributions and expenditures over \$10 itemized (\$200 for regular party committee)
Iowa	Contributions over \$200 itemized for state party; \$50 for county statutory or other political committee; \$25 for any other office; all expenditures over \$5 itemized

Kansas	Contributions and expenditures over \$50 itemized
Michigan	Contributions over \$20 and expenditures over \$50 itemized
Minnesota	Contributions and expenditures over \$100 itemized
Mississippi	Contributions and expenditures over \$200 itemized
Missouri	Contributions and expenditures over \$100 itemized
Montana	Contributions and expenditures \$35 or more itemized
Nebraska	Contributions and expenditures over \$250 itemized
Nevada	Individual/cumulative contributions and expenditures over \$100 itemized
New Hampshire	Aggregate contributions over \$100 and all expenditures itemized
New Jersey	Contributions over \$300 itemized
New Mexico	All contributions and expenditures itemized
New York	Contributions over \$100 and expenditures over \$50 itemized
North Carolina	Contributions over \$100 and media and non-media expenses over \$50 itemized; all expenditures individually disclosed
North Dakota	Candidates — aggregate contributions over \$200 in calendar year itemized; Political committees — aggregate expenditures over \$200 itemized; Issue committees — aggregate contributions over \$100
Ohio	Contributions and expenditures over \$25 itemized; in-kind of \$250 or less from person at one activity excepted
Oregon	Contributions over 50 and all expenditures itemized
Pennsylvania	Aggregate contributions & expenditures over \$50 in reporting period itemized
Rhode Island	Contributions and expenditures over \$100 itemized
South Carolina	Contributions over \$100 and all expenditures itemized
South Dakota	Aggregate contributions & expenditures over \$100 in calendar year itemized
Tennessee	Contributions and expenditures over \$100 itemized
Texas	Aggregate contributions and expenditures over \$50 itemized
Utah	Aggregate contributions over \$50 and all expenditures itemized
Vermont	Contributions over \$100 itemized; info on expenditures
Virginia	Contributions over \$100 and all expenditures itemized
Washington	Contributions over \$25, expenditures over \$50 and aggregate contributions over \$100 itemized
West Virginia	All contributions and expenditures itemized
Wisconsin	Contributions and expenditures over \$20 itemized
Wyoming	Contributions over \$25 and all expenditures itemized

**4. Is it not true that the \$50 reporting threshold makes for a great deal of more work on the part of the staff? By how much would the agency's workload be reduced if the threshold was raised?**

A \$50 reporting threshold would require less data entry for those campaigns that are not required to file electronically. Currently, approximately 25% of the reporting committees file by paper. We can only estimate how many entries would be eliminated with a higher disclosure threshold,

but it would obviously result in less data entry time. The disclosure threshold, however, is a policy decision for the Ethics Commissioners, not the staff.

- iii. Is it not the case that at the inception of the Constitutional Ethics Commission the Legislature volunteered the services of its bill-drafting staff to assist the agency in writing proposed Rules? How much of the Director's time do you estimate would be saved by such a collaborative arrangement?**

Just as the Legislature has bill drafting staff in both Houses, the Commission in 1991 and since has assigned that duty to its own staff. Suggestions from legislative staff have always been treated with respect and courtesy. Their suggestions have many times been adopted. However, drafting the Constitutional Ethics Rules is the mandate of the Ethics Commission, not the Legislature or its staff. Drafting Rule language is primarily the duty of the Executive Director with review and legal input the secondary duty of the General Counsel. The Legislature might have sought assistance from the EC Staff in drafting House Bill 2110 or deciding where certain rule amendments should be codified, but it did not. There has always been a clear line of demarcation between the two which is constitutionally appropriate.

**C. Please be prepared to address questions related to Rule changes. Specifically:**

- i. Questions related to postage and filings.**

Rule 257:10-1-17(a) requires the Commission to provide a notice of obligation to file a report or statement by first class mail no less than 10 days before the due date. The Commission's APA Rule 257:25-1-4(a) requires the Commission to send a delinquency notice to the filer within 24 hours of the filing deadline by certified mail.

- ii. Questions related to the line-item disclosure of all campaign expenditures in excess of \$50.**

See answer to B(ii)(3) above.

- iii. Questions regarding Oklahoma Ethics Commission Contributor Statements.**

The Contributor Statement was another recommendation of the multi-county grand jury in the David Walters' case. The Commission adopted it as recommended. The provision has undergone amendments through the years such as easing compliance. The Rule now permits ten business days for obtaining the statement instead of immediately with the tender of a contribution of \$50 or more.

**D. Your memorandum states that the adoption of the Constitutional Rules required “expanded information [which] mandated expanded reports ... greatly inflat[ing] the volume coming through the repository...”**

- i. According to your Memorandum, there are 27 reporting forms under the Constitutional Rules, where formerly there were five. Why is this five-fold increase in forms a positive change? Would your workload be reduced if the number of forms was reduced? By how much? Would your workload be reduced if the number of schedules on the C-1R was reduced? By how much?**

The positive side of requiring more information — thus expanding the number of forms and schedules — is that it provides more openness, accountability and transparency in state government [e.g. the Statement of Financial Interest (Form F-1R’)] and state campaigns [the registration documents, contributor statement and various reporting forms]. A reduction in the number of forms and schedules would decrease staff time in processing, monitoring and assisting with compliance, but it would also reduce the amount of public disclosure our citizens and media have come to expect. How much a reduction in workload would depend upon the form. Until measured, there is no way to know. In any event, the number of schedules and reporting forms is a policy decision for the Ethics Commissioners.

- ii. Is it true that staff enters data for candidates and PACs with expenditures of less than \$20,000 into the Commission’s on-line reporting system when the Rules [Rule 257:10-1-9(d)(3)] only require electronic entry for campaigns above the \$20,000 threshold? If so, please explain. How much staff time would be saved if this activity was curtailed?**

As part of its constitutional mandate to write and enforce rules of ethical conduct for state campaigns, the Ethics Commissioners have sought to provide full and complete data, and to deliver it timely and in a meaningful context. To this end, the members promulgated a rule requiring electronic filing of campaign reports. Mindful of smaller campaigns, they exempted those for which electronic filing might constitute an undue burden [some of these, the members were told, lack computers and/or internet access]. The Commissioners, in their discretion, set the threshold of mandatory electronic filing of at \$20,000.

Excusing these filers from the use of the electronic system did not exempt them from disclosure, however. Campaigns which qualify — and choose to avail themselves of the “exemption” — file on paper.

In furtherance of its goal to provide full, instantaneous and cost-free access to all state campaign records, the Commission inputs data from those with less than \$20,000 in activity. Omitting the latter would result in incomplete electronic data on Oklahoma state campaigns. It would less

than complete and distort the picture. The Commission wants the complete picture available online. Members see that as an integral part of providing *full* disclosure.

Commission staff has not timed the inputting function. It would be difficult to do, in that the task has been spread among several of the seven staffers. For that reason, we are unable to assess how much time would be saved if the practice were curtailed. But, whether it is performed or not is again a policy decision which the Ethics Commissioners decide.

**iii. In the 2008 election cycle, how many registered campaigns under the \$20,000 threshold were filed? Of those, were they all entered on-line? How many were under \$5,000? Would it not save staff time if the threshold for electronic entry was lowered to \$5,000?**

Staff has conducted no study, but we estimate 25% of the 2008 state campaigns had less than \$20,000 in activity. However, many of those who qualified for paper reporting chose, instead, to file electronically. Without manually reviewing each candidate file, the Commission cannot determine how many campaigns under \$20,000 opted to file electronically that year, nor can we ascertain how many had \$5,000 or less in activity. We can say that Commission staff entered data for paper filers who had less than \$20,000 in activity.

It would perhaps save agency time if the threshold were lowered. But, setting the threshold is a policy decision within the discretion of the Ethics Commissioners.

**iv. Rule 257:10-1-14(a)(20) requires candidates or committee treasurers to file written verification after a report is filed electronically. Please be prepared to answer questions related to this Rule.**

Long before the Ethics Rules took effect, state law required verification of campaign reports like the statutory Campaign Contributions And Expenditures Report ("Form C-1"). Former Ethics Commissioner Jim Hamilton – who had previously served in the House and Senate (where he was President Pro Tempore) – authored this provision. His reasoning was that candidates should be held accountable for what is reported on their behalf and should not be insulated from liability by being able to claim ignorance. Verification was the means to this end. At the time when the system went online, paper verification was the recommended method. Verification is an enforcement tool.

**v. Rule 257:20-1-2(b), which was adopted in 2008, lowered the lobbyist disclosure threshold from \$50 for elective officers and \$25 for other state officers and employees, to \$10 in the aggregate for both during a six month period. By how much will this new Rule increase staff workload?**

As noted, we have no figures on the time it takes to input data; moreover, arriving at even an estimate is complicated by the fact that the task is spread among our employees, and the reports are of varying length. We can say that, in 2008, Commission staff performed most of the data entry in the Lobbyist Reporting System. However, many lobbyists are now doing their own electronic filing. Whether that trend will continue — and how much staff time will be required to input the balance of lobbyist data — is unknown at this time.

**vi. Your Budget Request documents of the past several fiscal years have included funding for additional office space due, in part, to a lack of document storage space.**

**1. Does the Commission microfilm any files or store files electronically? If not, could you have used part of the increased appropriation to purchase the necessary equipment?**

The Commission houses a number of records. Besides state campaign reports, it maintains county campaign records, financial disclosure statements (of around 5,000 state officers and employees who file annually), lobbyist registrations/reports, office records, as well as investigatory files. Since 2006, state campaigns — and now lobbyists — records are filed online; thus, they are “stored” electronically. Others — like the less-than-\$20,000 campaigns — come in on paper but are inputted online and electronically “stored,” as well. But, under the Ethics Rules, certain electronic reports require a paper verification which goes into regular files. Additionally, the current electronic files are predated by a number of years worth of paper reports.

The Commission maintains in its office [or in our interior hallway] originals of state and county campaigns reports going back to 2000.<sup>1</sup> These continue to be accessed by members of the public and media, who come into our office to research their contents. The agency is out of space for storage. We cannot figure out how to situate another file cabinet in our office. Moreover, the Oklahoma Department of Libraries/Office of Archives and Records [“Archives”] has currently notified us they cannot store any more of our files. They have also advised us of the following with regard to state and county campaign reports:

Retain in office six (6)years, then transfer to the state Records Center. **Destroy records when they become forty-two years old provided no legal actions are pending.** If legal action is pending destroy two(2) years after exhaustion of all legal remedies provided records meet all stipulated retention requirements. (Formerly 88-20, Series 1-3)  
RECORDS TRANSFER AUTHORIZATION FORM regarding Campaign Contributions And Expenditures Report [for candidates and their committees [C-1R (State Campaign Records)/C-1 (County Campaign Records)]. “ EXHIBIT A” , attached [emphasis added]

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<sup>1</sup>While the Archives require storing records only six years, the Commission houses campaign records for eight, owing to the fact that Archives cannot accept anymore at this time.

If we understand correctly, the Commission cannot destroy these records for 42 years. We will apparently be required to keep paper copies all that time. So, microfilming — even if we had the equipment and staff to carry out that task — would do us no good. It would exacerbate the situation by requiring the storage of both paper records *and* the microfilm. Moreover, there would be the problem of finding space for the equipment and an area where the public could view the film.

We have previously microfilmed data but found it unsatisfactory. The manufacturer ceased to service our camera and reader printer. When they needed repair, we were left with no way to read the film.

Investigatory records fall into a separate category. They are not public records and contain some of the most sensitive information in state government. They include witness statements, subpoenaed records, materials from outside prosecuting agencies and the like. These files stretch back to at least 1992. Some take up an entire box for one investigation, so storage of these records is an issue. For the protection of all involved, these materials should not be microfilmed, archived or stored electronically.

Other files, like employee records of our seven staff members, files containing the oath of office for the Ethics Commissioners, purchase orders, payroll matters and the like take up minimal space and do not warrant the purchase of microfilm equipment to store them. Nor is this the type of material which would warrant electronic storage.

**vii. In your Memorandum you say: “Staff believes the Commission operates the most accessed repository in state government.”  
Please be prepared to answer questions related to this claim.**

Those who work with the data know there is enormous demand for campaign records, both at the federal and state levels. Until electronic access became prevalent, commercial firms gathered the data, then compiled and sold it, showing there was a market for it. It would be interesting to view the client files of these companies to see who purchased their reports. Staff speculates — but cannot prove — that may go outside the country. We truly live in a global village and foreign nations are very interested in the political landscape of the world’s Super Power.

Prior to mandatory electronic filing, staff knew who requested our campaign data because they made oral and written copy requests. This demonstrated that interest in this data ranges far beyond the confines of Oklahoma. We received requests from various parts of the country. Among the requester were state and national party committees, federal and state PACs, think tanks, universities, commercial enterprises, the media, public interest groups like For Responsive Politics and the Center for Public Integrity, as well as other candidates — particularly opposing candidates. The demand was heavy. This is borne out by the fact that, during 2004 —

the last election year prior to mandatory electronic filing — copy fees netted the agency \$13,498, charging \$.25 per page. We calculate 53,992 pages of reports were copied that year.<sup>2</sup>

Most of that data is now online. Staff has no way of tracking who is viewing these records because our system does not count “hits.” The information is posted to the Internet where reports can be read anywhere in the world at any time of the day or night. We have been told that college students and others, who had not previously researched our records, now visit our website. They do this sometimes for school projects and sometimes just to be informed citizens.

We have never conducted a study of traffic on our repository versus that of any other state agency. We haven’t the time or the staff. And, since we cannot track viewers, we haven’t the means. That is why our Memorandum was couched in terms of our *belief*, not a statement of fact. But, we would be surprised if any other repository in state government holds records more widely viewed.

**E. The following questions relate to the Commission’s primary role in investigating and prosecuting alleged ethics violations.**

**i. You say that a “lack of FTE (attorneys and investigators) has forced the Commission to refer informations to outside prosecutorial agencies” which sometimes “decline to take the case . . . because of their own finite resources.” Furthermore, that some of these cases were characterized as “prosecution Warranted” which indicates “air tight cases.”**

**1. Without revealing names or office can you describe a situation where someone was not prosecuted because the Attorney General or a District Attorney or a federal prosecutor claimed a lack of resources? Isn’t it true that prosecutors decide not to pursue a case for a variety of reasons? That they assign priorities just as any other public official does?**

Over the years, the Ethics Commission has profited from the experience of at least six former prosecutors. John Luton [former Senate Majority Leader] was the County Attorney for Muskogee County; Tom Gruber was the District Attorney for the Twenty-Sixth Judicial District,

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<sup>2</sup>These figures are for the calendar year only, not the full election cycle. A more accurate count would include at least part of the preceding and succeeding years because campaign activity — and demand for paper copies of reports — typically range beyond just the election year. Including those years — or even portions of those years — would significantly boost the 53,992 figure.

[sitting in Woods County]; Don Bingham [current member] and Mark Lyons were felony prosecutors in the Fourteenth Judicial District [Tulsa County]; Martin Belsky was an Assistant District Attorney and then Chief Prosecutor in Philadelphia. All served at the state level. John Raley [current Chairman] was a federal prosecutor. He is a former United States Attorney for the Eastern District of Oklahoma.<sup>3</sup>

Three of the six headed their respective offices and worked directly with the budget. It was from them that we heard about finite resources.

All of them — together with Judge Shumate — know an “air tight” case when they see one. They are experts on what warrants taking a case to court.

It is true that prosecutors decline cases for a variety of reasons. An important one was expressed by former member Mark Lyons, who noted that in his day, the Tulsa County DA carried a heavy caseload. “We were good at prosecuting the garden variety of crimes; that is what we were trained to do, but,” he said, “having to learn a whole new area of the law in order to go after a criminal campaign violation would take a lot of time.” He predicted it would throw the office off schedule and cause them to spend too much time on a case that was not a murder, a rape or an armed robbery — cases which demand priority. That, alone, he thought, would give DAs pause.

As for the priority DAs assign to campaign violation cases, the Director conducted research in 1991. She found only one instance where a state DA had prosecuted such a case up to that point. Prosecution for public corruption cases instead falls to the federal authorities in most instances, except for those prosecuted by the Attorney General.<sup>4</sup>

If Oklahoma wants to prosecute violations with respect to campaign and ethics, it must look to the Ethics Commission. It was designed for that purpose.

**It is also important to note that when the Commission is forced to refer a case for criminal prosecution, it is giving up its constitutional mandate to enforce its own rules. The latter carry civil penalties only. The Ethics Commission has the sole authority to prosecute violations of those rules. A prosecutor can only proceed on the criminal aspect of a matter for which there is concurrent jurisdiction. He or she cannot prosecute a violation of civil penalty rules. DAs have no jurisdiction to do so.**

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<sup>3</sup> The Commission also counts on its membership roster a former District Court Judge, of Garvin, McClain and Cleveland Counties, Joe D. Shumate, who served on the Commission from 1996 through 1997.

<sup>4</sup> During the late 1980's through early 1990's, the AG teamed up with the federal authorities to prosecute some public corruption cases. When Drew Edmondson took office, he began a record of campaign-related criminal prosecutions. Edmondson prosecuted former Insurance Commissioner Carroll Fisher, together with former House member Tim Pope and former Oklahoma County Commissioner Brent Rhinehart. But, the job of prosecuting Gene Stipe, Mike Mass, McMahan and others has fallen to the United States Department of Justice.

When the Commission lacks the necessary resources, it has no choice but to refer any criminal violations to an outside prosecuting authority. It then has no control over whether that authority proceeds on its referral. It thereby loses the ability to perform its constitutional function of prosecuting civil penalty cases in district court.

**ii. The following question are related to you “Attachment B” which lists the duties of the Commission’s General Counsel.**

**1. The attachment states that the General Counsel assures the Commission operates in conformity with the Constitution, Commission Rules, the Political Subdivision Ethics Act, and the APA Rules. Aren’t all agencies required to comply with all of these whether or not they have an attorney on staff?**

All agencies comply with various laws. Some have in-house counsel. Others contract with, or rely upon, the Attorney General. That takes nothing away from the fact that our General Counsel spends a portion of her time providing these services to the Ethics Commission. That was what “Attachment B” was meant to show.

**2. Does the General Counsel represent the Commission in district court or before the Supreme Court?**

Our General Counsel spent more than 16 years in private practice before coming to the Commission. She many times appeared in District Court – including Tulsa, Osage, Washington, Garfield, Payne and Oklahoma Counties and the United States District Court for the Northern District of Oklahoma. With a specialty in appellate advocacy, she also represented clients before the Supreme Court of Oklahoma [including both appeals and original proceedings], the Court of Civil Appeals, the Oklahoma Court of Criminal Appeals and the United States Court of Appeals for the Tenth Circuit.

After coming to the Commission, our General Counsel appeared in Oklahoma County District Court as co-counsel with attorney Garvin Isaacs in three separate cases filed in 1997. Two involved then-Governor Frank Keating. The other was a suit against sitting Commissioner of Public Safety Bob Ricks.

On the appellate level, our Counsel co-counseled with Crowe Dunlevy attorneys Harvey Muchmore and Harvey Ellis in *Ethics Commission vs. Cullison*, a landmark decision filed as original proceedings in the Oklahoma Supreme Court in 1992. She then authored the Ethics Commission brief and along with Oklahoma City attorney David Lee, in *Ethics Commission v. Frank Keating*, a district court case removed to the Oklahoma Supreme Court for original proceedings.

Our Counsel was originally hired by the Commission for her court experience — in both civil and criminal matters. Of particular interest was her appellate work on constitutional issues. She

was meant to be the Commission's prosecutor of civil penalty cases in District Court. But, as our Memorandum sets forth, the Commission now needs her in the office as its General Counsel. Agency resources do not permit this attorney to prosecute cases in court — thus, the need for an additional attorney.

**3. Rather than hiring another lawyer, as the agency has requested, would it not be more cost effective to contract with outside counsel to prosecute Ethics Commission cases? If yes, then why didn't you use a portion of the additional FY-09 funding you received to contract with outside counsel to prosecute cases?**

The Commission has had experience in attempting to hire outside counsel. We interviewed five law firms to help on the Keating prosecution. Four of the five declined citing various reasons. Outside attorneys were reluctant to alienate their clients by taking on a controversial case — and every Commission prosecution is going to step on some toes; thus, it will, by definition, be a controversial case.

As to the cost-effectiveness of hiring outside counsel, the Commission could pay an attorney a year's salary for the time firm could spend on the case. We found that out when Muchmore and Ellis joined the General Counsel in *Ethics Commission vs. Cullison*. What was supposed to be a brief-in-chief grew to multiple reply, answer or response briefs. The firm waived any fee past the \$20,000 we were able to pay [stretched over two years of appropriations]. But, the time they spent on it would, we estimated, have well cost over \$100,000.

The Commission has never had sufficient funds to cover the cost of outside counsel on the several cases it has had over the years which merited prosecution.

**4. Does the General Counsel take notes and draft minutes for all Commission meetings and public hearings? If yes, is that appropriate work for the General Counsel? Couldn't a clerk do this?**

The open session of Ethics Commissions meetings/hearings are tape recorded, in accordance with the Open Meeting Act. The Counsel also takes notes. The minutes were for many years prepared by the Counsel from those. However, testimony has grown to the extent that minutes currently run 30 - 40 typed pages — too much for the Counsel to handle. For that reason, the Commission now adapts the transcribed recording as its minutes. The latter is prepared by the Principal Assistant, Patti Bryant. The General Counsel or the Executive Director reviews the transcript and makes corrections where needed.

The Commission Counsel must still take notes of open sessions from which she works [e.g. to note any assignment the Commissioners might order, which must be carried out before the recording can be transcribed]. She also makes adequate notes in case the recording device fails

— which has happened. The Commission deems those tasks appropriate for the General Counsel, particularly since the agency has no clerk.

Upon the advice of the Attorney General, the Commission does not record executive sessions. The General Counsel takes notes on these proceedings then drafts them into minutes. The latter are confidential records and are kept separately from the open session minutes.

MH:RA/mh:ra

Attachment: Exhibit “A”