

**STATE OF MINNESOTA
CAMPAIGN FINANCE AND PUBLIC DISCLOSURE BOARD**

**PROBABLE CAUSE
DETERMINATION**

IN THE MATTER OF THE COMPLAINT OF THE CENTER FOR MEDIA AND DEMOCRACY AND COMMON CAUSE MINNESOTA REGARDING THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL, SENATOR MARY KIFFMEYER, AND REPRESENTATIVE PAT GAROFALO

On July 27, 2021, the Campaign Finance and Public Disclosure Board received a complaint submitted by the Center for Media and Democracy and Common Cause Minnesota regarding the American Legislative Exchange Council (ALEC), Senator Mary Kiffmeyer, and Representative Pat Garofalo. ALEC is a national 501(c)(3) corporation that is not registered with the Board. It has dues-paying corporate and legislative members. Sen. Kiffmeyer and Rep. Garofalo are members of the Minnesota Legislature and ALEC's Minnesota state chairs. Both Sen. Kiffmeyer and Rep. Garofalo have a principal campaign committee registered with the Board.

The complaint concerns ALEC CARE (Constituent Analytics Research Exchange) software, which is customer relationship management software developed by the company Voter Gravity. The complaint and its attachments contain information purported to show that ALEC CARE refers to individuals as voters and includes data and features that could benefit candidates, such as a person's party affiliation, voting history, and election precinct, and the ability to create door-knocking and phone-calling lists as well as get-out-the-vote functions. Other information included with the complaint shows that Voter Gravity markets similar software to candidates as a voter contact tool for political campaigns.

The complaint includes information showing that legislative members of ALEC have free access to ALEC CARE. Other information provided with the complaint establishes that ALEC's legislative members pay dues of \$100 per year and that Sen. Kiffmeyer and Rep. Garofalo, as state chairs, are members of ALEC. The information also shows that ALEC has assigned a \$3,000 value to this member benefit and that purchasing comparable software from Voter Gravity would cost a state legislative campaign committee \$99 per month.

The complaint alleges that by providing free access to this type of voter management software as a member benefit, ALEC made in-kind campaign contributions to Sen. Kiffmeyer and Rep. Garofalo in violation of the corporate contribution prohibition in Minnesota Statutes section 211B.15, subdivision 2. The complaint maintains that if Sen. Kiffmeyer and Rep. Garofalo used the ALEC CARE software for their campaigns, then their campaign committees accepted a prohibited corporate contribution. Finally, the complaint alleges that if Sen. Kiffmeyer and Rep. Garofalo used the ALEC CARE software for their campaigns, they failed to disclose that in-kind contribution on their committees' campaign finance reports in violation of the reporting requirements in Minnesota Statutes section 10A.20, subdivision 3.

The complaint states that although ALEC provided free access to ALEC CARE to Sen. Kiffmeyer and Rep. Garofalo, the complainants did not have sufficient knowledge to determine whether the legislators used the software for their campaigns. The complaint provides that neither Sen. Kiffmeyer nor Rep. Garofalo have reported the receipt of the ALEC CARE software on their campaign finance reports.

On August 6, 2021, the Board chair determined that the complaint stated prima facie violations of the corporate contribution prohibition in Minnesota Statutes section 211B.15, subdivision 2, and the reporting requirements in Minnesota Statutes section 10A.20, subdivision 3. The complaint and the prima facie determination were provided to the respondents on August 6, 2021. On August 10, 2021, a letter seeking answers to four specific questions was sent to Sen. Kiffmeyer and Rep. Garofalo.

Sen. Kiffmeyer submitted a response on August 16, 2021. Sen. Kiffmeyer stated that neither she nor her committee had ever used the ALEC CARE software. On August 23, 2021, Reid LeBeau, counsel for Rep. Garofalo, submitted a response stating that neither Rep. Garofalo nor his committee had ever used the ALEC CARE software.

On September 7, 2021, Jason Torchinsky, counsel for ALEC, submitted ALEC's response to the complaint. In the response, ALEC states that ALEC CARE is constituent management software made available to ALEC members. The response contains a link to the ALEC website,¹ which describes the ALEC CARE software as follows:

CARE is a web-based system that helps you better communicate with your constituents, gain insight into your communities and enables you to know your district more intimately than anyone else.

ALEC members can utilize a suite of tools to improve legislative interactions, track district events, and solicit direct feedback from constituents with customized surveys through text messaging and automated phone calls.

The response also contains links to three short videos available on YouTube that briefly demonstrate how features of the ALEC CARE software can be used for constituent services.²

The response further provides that "as a condition of using the software, ALEC prohibits usage for election campaign purposes." ALEC states that there is a warning on the ALEC CARE login page that reads, "By signing in, you agree this system will not be used for any campaign related purpose." ALEC maintains that members cannot access the software without agreeing to this condition and that the organization emphasizes this condition in all of its ALEC CARE trainings

¹ <https://www.alec.org/membership-type/legislative-membership/>

² See What is a Digital Constituent Service? https://www.youtube.com/watch?v=uoBF9a4_ue8; What is ALEC CARE? <https://www.youtube.com/watch?v=sbOpHimIm0s>; ALEC CARE SMS <https://www.alec.org/app/uploads/2018/07/CARE-Video-SMS.mp4>; ALEC CARE TAGS <https://www.alec.org/app/uploads/2018/07/CARE-Video-Tags.mp4>

and onboarding processes. ALEC argues that because it prohibits its members from using ALEC CARE for campaign purposes, it has not made a contribution, or offered or agreed to make a contribution, to anyone to promote or defeat the election or nomination of a candidate as provided in Minnesota Statutes section 211B.15, subdivision 2.

The ALEC response also includes a sworn statement from an ALEC CARE administrator. The administrator states that ALEC CARE logs show that Sen. Kiffmeyer has never established an ALEC CARE account or used the system and that Rep. Garofalo has activated his ALEC CARE account but has never used that account or accessed the software. Based on this lack of use, ALEC argues that it has not made any contributions to the legislators.

Complainants supplemented the complaint with a joint memorandum submitted on September 13, 2021. In their memorandum, complainants argue that the main thrust of the complaint is against ALEC given the evidence of the electoral nature of the ALEC CARE software. The memorandum admits that the complainants lack direct evidence of who in Minnesota has used the software for their campaigns. Complainants also argue that ALEC uses ALEC CARE as a recruitment tool for new members. Attached to the memorandum is a copy of an email from ALEC to a new state legislative chair that describes ALEC CARE as “a CRM that allows legislators to communicate effectively with their constituents.” Another attachment is a sample recruitment letter that describes ALEC CARE as follows:

- Web-based system to encourage interaction between elected officials and constituents
- Customize constituent profiles, set up push text messages, and visualize data trends to better engage with your community
- Utilize CARE to improve legislative interactions, track district events, and solicit feedback from constituents

The Board considered this matter at its meeting on October 6, 2021. David Armiak, research director for the Center for Media and Democracy, and Arn Pearson, executive director of the Center for Media and Democracy, addressed the Board on behalf of the complainants. Annastacia Belladonna-Carrera, executive director of Common Cause Minnesota, appeared in support of the complaint. Mr. Armiak and Mr. Pearson argued that the sole purpose of the Voter Gravity software is to help candidates win elections, that the ALEC CARE software is virtually identical to the Voter Gravity software, and that, therefore, the sole purpose of the ALEC CARE software is to help legislators win re-election. The complainants maintained that ALEC’s claim that it limits the use of the software to non-campaign purposes was a pretext that should be disregarded by the Board. Finally, the complainants agreed that based on their review of the information submitted, there was not probable cause to believe that Sen. Kiffmeyer or Rep. Garofalo had violated the corporate contribution prohibition.

Jason Torchinsky and John Cycon, counsel for ALEC, appeared before the Board on ALEC’s behalf. Mr. Torchinsky argued that ALEC CARE was designed as a constituent management tool and that ALEC offers the ALEC CARE software to its members solely for that purpose. Mr. Torchinsky reiterated that ALEC emphasizes the limitation on the use of ALEC CARE in all

trainings and onboarding processes and requires users to certify at every login that the software will not be used for campaign purposes. Mr. Torchinsky stated that ALEC would need to stop any improper use of ALEC CARE for campaign purposes to be consistent with the organization's 501(c)(3) Internal Revenue Service tax status. Mr. Torchinsky further stated that any indication of the use of ALEC CARE for campaign purposes therefore would result, at a minimum, in the suspension of the member's ALEC CARE account and consultation with counsel to determine whether reimbursement was required. Mr. Torchinsky told Board members that ALEC had not needed to determine what other remedial measures should be taken for misuse of the software because ALEC had not had any reports of anyone in Minnesota, or in any other state, using ALEC CARE for campaign purposes.

After hearing the presentations, Board members wanted additional time to adequately review the written and oral submissions in the matter. The Board therefore determined under Minnesota Rules 4525.0150, subpart 4, that a continuance was necessary to equitably resolve the matter and laid the probable cause determination in this matter over to the next meeting.

Because the matter had been continued, all parties were given the opportunity to submit additional written and oral presentations to the Board. On October 14, 2021, complainants submitted information clarifying that Exhibit 12 provided with the complaint contained pictures of screens accessed within the ALEC CARE software. At the November 3, 2021, meeting, Mr. Armiak and Mr. Pearson made a presentation on behalf of complainants.

Analysis

When the Board chair makes a finding that a complaint raises a prima facie violation, the full Board then must determine whether probable cause exists to believe an alleged violation that warrants an investigation has occurred. Minn. Stat. § 10A.022, subd. 3 (d). A probable cause determination is not a complete examination of the evidence on both sides of the issue. Rather, it is a determination of whether, given the evidence available, there is sufficient justification to initiate a formal Board investigation of the allegations in the complaint.

Corporate contribution prohibition

Minnesota Statutes section 211B.15, subdivision 2, paragraph (a), provides as follows:

A corporation may not make a contribution or offer or agree to make a contribution directly or indirectly, of any money, property, free service of its officers, employees, or members, or thing of monetary value to a political party, organization, committee, or individual to promote or defeat the candidacy of an individual for nomination, election, or appointment to a political office.

The statute also prohibits a committee or individual from accepting a contribution that a corporation is prohibited from making. Minn. Stat. § 211B.15, subd. 2 (b).

For purposes of the corporate contribution prohibition, the term “corporation” includes “a non-profit corporation that carries out activities in this state.” Minn. Stat. § 211B.15, subd. 1. The term “contribution” includes “an expenditure to promote or defeat the election or nomination of a candidate to a political office that is made with the authorization or expressed or implied consent of, or in cooperation or in concert with, or at the request or suggestion of, a candidate . . .” Minn. Stat. § 211B.15, subd. 2 (c).³ Finally, the Board has jurisdiction only over alleged corporate contributions made to promote or defeat the candidacy of an individual for nomination, election, or appointment to a political office in Minnesota, and only to the extent that the individual is a candidate within the meaning of Minnesota Statutes Chapter 10A. Minn. Stat. § 10A.022, subd. 3.

Initially, the complaint and its attachments include information showing that ALEC is a non-profit corporation and that it has Minnesota members. These facts establish probable cause to believe that ALEC is an entity subject to the provisions in Minnesota Statutes section 211B.15.

The record also establishes probable cause to believe that the ALEC CARE software has monetary value, that Sen. Kiffmeyer and Rep. Garofalo are members of ALEC who have access to the software as a member benefit, and that the dues paid by the legislators do not cover the full value of the software.

The totality of the evidence in the record, however, does not establish probable cause to believe that ALEC made, or offered or agreed to make, a contribution to promote or defeat the candidacy of an individual for election to a political office in Minnesota. Complainants have submitted evidence showing that Voter Gravity is customer relationship management software designed for candidates, that ALEC CARE appears to be based on the Voter Gravity software, and that ALEC CARE therefore has information and contact features that could be useful to an election campaign. But the same information and contact features also could be useful to legislators for constituent services purposes. It is the nature of customer relationship management software that its customer information and communication features can be used for many purposes.

In addition, Minnesota Statutes section 211B.15, subdivision 2, does not focus solely on how the recipient could use the contribution in question to determine whether a violation has occurred. Instead, the statute looks at the contributor and provides that a violation occurs when the corporation makes, or offers or agrees to make, the contribution to promote or defeat the candidacy of an individual for election. Here, the communications attributed to ALEC, including

³ Minnesota Statutes section 10A.01, subdivision 11 (a), defines the term “contribution” in pertinent part to mean “money, a negotiable instrument, or a donation in kind that is given to a political committee, political fund, principal campaign committee, or a party unit.” The term “donation in kind” is defined in relevant part as “anything of value that is given, other than money or negotiable instruments.” Minn. Stat. § 10A.01, subd. 13. Although Chapter 211B does not incorporate by reference these definitions, the definition of contribution in Minnesota Statutes section 211B.15, subdivision 2, clearly covers in-kind contributions.

its website, the videos on the internet, the emails to its state chairs, the sample recruitment letter, and the ALEC CARE log in page, all state that the ALEC CARE software is a customer relationship management tool being offered to legislators to help them communicate with and serve their constituents. The record also contains information showing that ALEC consistently warns its members not to use the ALEC CARE software for campaign purposes and that members must agree to this condition every time that they log in to the software. ALEC also has a remedy in place, the loss of user privileges and reimbursement, for any member who violates the conditions of ALEC's software offer. The lack of any evidence in the record of any use of ALEC CARE for campaign purposes in Minnesota, or in any other state, suggests that these warnings and potential remedies have been effective in limiting the use of ALEC CARE to the terms of ALEC's offer.

Complainants argue that because ALEC CARE is a version of Voter Gravity, which is campaign software, ALEC's condition that the ALEC CARE software be used only for non-campaign purposes must be a pretext that the Board should disregard. There may be some cases where the fact that an item can be used for only one campaign-related purpose may be dispositive. But here, it is the nature of the contribution in question, customer relationship management software, that it can be used for many purposes. Further, as stated above, ALEC's consistent description of the terms under which the software is offered to members, its repeated warnings not to use the software for campaign purposes, and the lack of any evidence showing that those warnings have been disregarded in Minnesota, or elsewhere, support ALEC's claim that it offers the ALEC CARE software to legislators only for non-campaign purposes. The Board therefore concludes that in this case, there is not probable cause to believe that that ALEC made, or offered or agreed to make, a contribution to promote or defeat the candidacy of an individual for nomination, election, or appointment to a political office in Minnesota.

Absent probable cause to believe that ALEC made, or offered or agreed to make, a prohibited corporate contribution, there is not probable cause to believe that either Sen. Kiffmeyer or Rep. Garofalo accepted a contribution that ALEC was prohibited from making. In addition, the record shows that Sen. Kiffmeyer never accessed the ALEC CARE software and that Rep. Garofalo never accessed the software after initially creating his account. The fact that a candidate did not use an item is not always dispositive of whether the candidate accepted that item as an in-kind contribution.⁴ Some factors that the Board may consider in determining whether a candidate accepted an in-kind contribution may be taking possession of the in-kind contribution, exercising dominion over the in-kind contribution, storage of the in-kind contribution, and publication of the in-kind contribution. In this case the legislators' nonexistent or very limited interactions with the ALEC CARE software show that neither of them accepted that member

⁴ *In the Matter of People PAC (MN), The People PAC, and 15 Principal Campaign Committees*, (Nov. 6, 2019), the Board determined that a video posted independently by its producer was a contribution to a candidate even though she had rejected the finished product and never used it in her campaign. This decision was based on the fact that the candidate agreed to the production of the video and participated in the video shoot. Consequently, under Chapter 10A, the costs related to the video became approved expenditures, and therefore in-kind contributions, at the time when she agreed to those expenditures, not when the video was completed or posted.

benefit for any purpose. Consequently, there is not probable cause to believe that either Sen. Kiffmeyer or Rep. Garofalo accepted a prohibited contribution from ALEC.

Reporting

Minnesota Statutes section 10A.20, subdivision 3, requires candidate committees to report all contributions received on their campaign finance reports, including in-kind contributions that exceed \$20. As determined above, neither Sen. Kiffmeyer nor Rep. Garofalo received any contributions from ALEC. Because the legislators had no contributions from ALEC to disclose on their committee's campaign finance reports, there is not probable cause to believe that any reporting violations occurred in this matter.

Order:

1. The allegation that the American Legislative Exchange Council violated the corporate contribution prohibition in Minnesota Statutes section 211B.15, subdivision 2, is dismissed without prejudice because there is not probable cause to believe that this violation occurred.
2. The allegation that Senator Mary Kiffmeyer and Representative Pat Garofalo accepted a corporate contribution in violation of Minnesota Statutes section 211B.15, subdivision 2, is dismissed without prejudice because there is not probable cause to believe that this violation occurred.
3. The allegation that Senator Mary Kiffmeyer and Representative Pat Garofalo violated the reporting requirements in Minnesota Statutes section 10A.20, subdivision 3, is dismissed without prejudice because there is not probable cause to believe that this violation occurred.

/s/ Stephen Swanson
Stephen Swanson, Chair
Campaign Finance and Public Disclosure Board

Date: November 3, 2021