8-11-1995

State of Maine

DEPARTMENT OF ATTORNEY GENERAL

MEMORANDUM

To: Linda Pistner, Chief Deputy Attorney General

From: Tom Warren, Director, Litigation Unit
Charles K. Leadbetter, Chief, Criminal Appellate Section
Brian MacMaster, Director, Investigations Unit

Date: August 11, 1995

Subject: Possible Violations of 5 M.R.S.A. § 1890-B

At your request, we are summarizing our concerns relating to the interpretation of 5 M.R.S.A. § 1890-B (Supp. 1994) in light of the facts surrounding the specific documents evidencing possible violations of section 1890-B that were furnished to this office on January 9 and February 6,1995. This is addressed to you since Attorney General Ketterer has recused himself from any role in reviewing this case because one of the documents in question concerned the campaign of another candidate for Attorney General.

Sections 1 and 2 of 5 M.R.S.A. § 1890-B (Supp. 1994) provide as follows:

> **§ 1890-B. Misuse of computer information systems**
>
> 1. **Violation.** No person may knowingly use a computer information system operated by a state department or agency or the Legislature, for the express purpose of:
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> A. Advocating, directly to voters eligible to vote, the election or defeat of a clearly identified candidate for elective state or county office; or

B. Soliciting contributions reportable under Title 21-A, chapter 13.

2. **Penalty.** A violation of subsection 1 is a Class C crime.

An issue that arises at the outset is what § 1890-B(1) means when it requires the use of a computer information system "for the express purpose" of advocating to voters or soliciting contributions. Taken literally, this might be construed to require that a violation of the statute would require an express statement of a purpose specified in subsection (A) or (B) (in other words, no violation unless someone expressly says or writes that he or she is using a state computer for the purpose of advocating to voters or soliciting contributions). It is, however, more logical to interpret the statute as requiring that there must be either express advocacy of the election or defeat of a clearly identified candidate or an express solicitation of contributions.

The documents found on computers at the Legislature that have been provided to this office as evidencing possible violations of § 1890-B fall into four categories:

1. The first category consists of documents created on a legislative computer that are political in nature but that did not involve either any direct communication to voters expressly advocating the election or defeat of a clearly identified candidate or any express solicitation of contributions. On their face, such documents do not involve any violation of § 1890-B.

2. The second category consists of documents created on a legislative computer that relate to a proposed political fundraising scheme. The scheme appears to have contemplated mailings from a legislative computer, and the documents include a sample fundraising letter. The computer directory indicates, however, that these documents were created before the enactment of § 1890-B in its present form.

Moreover, there is also no evidence that the fundraising scheme in question was ever implemented or that any fundraising letters were ever sent. Indeed, all the evidence is to the contrary. For reasons discussed in more detail below, we believe that it would be likely that a court would find that there is no violation of § 1890-B unless a state computer system is actually used to communicate with voters or to solicit contributions.

3. The third category consists of documents created on legislative computers that advocated the election or defeat of certain candidates for offices that

are filled by a legislative vote (such as the Attorney General), rather than by a vote of the electorate.[1] The dispositive issue here is whether legislators are included as "voters" within the meaning of § 1890-B(1)(A).

In our view, where § 1890-B(1)(A) refers to the use of a computer system for the express purpose of "advocating, directly to voters eligible to vote," the term "voters" should be interpreted to be consistent with the definition of "voter" contained in 21-A M.R.S.A. § 1(47) (1993), which is "persons registered to vote"-- i.e., citizens. Particularly given the rule that criminal statutes are strictly construed against the prosecution, we doubt that a court would sustain an interpretation of § 1890-B that would cover elections to positions voted on by members of the Legislature rather than ordinary citizens.

Moreover, we also doubt that the statute was ever intended to cover elections for offices that are filled by a vote of the Legislature. It is part of the official function of the Legislature to vote on such offices as Speaker of the House and President of the Senate. Interpreting § 1890-B to cover such elections would preclude the use of legislative computers to advocate on behalf of candidates for those offices. In our view, at least absent clearer statutory language, § 1890-B(1)(A) should be limited to communications to the general electorate involving legislative, gubernatorial, or county candidates.

In our view, therefore, the third category of documents described above would not constitute a prosecutable violation of § 1890-B.

4. The fourth category of documents consists of drafts of two radio advertisements and a fundraising letter which were created on a legislative computer by a partisan legislative staff member. The scripts of the draft radio spots urged voters to elect a specified candidate to the Legislature. The draft fundraising letter was created for the same candidate.

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[1]One of these documents was a draft letter to legislators created on a stand-alone personal computer assigned to partisan legislative staff. This raises the issue, discussed further below, of whether such a stand-alone computer constitutes a "computer information system" within the meaning of the statute. In addition, this document was not sent "directly" to legislators from a state computer. Instead, the final version went out from a word processor that did not belong to a state department or agency or to the Legislature. This raises the additional issue, discussed further below, of whether the use of a state computer under these circumstances involved advocacy "directly" to voters even if the reference to voters in subsection 1(A) of § 1890-B were interpreted to include legislators. (There is no evidence that the candidate in question had any reason to know that the original draft was created on a state computer, but the person or persons involved in creating the document could still be prosecuted if the requisites of the statute were otherwise met).

A preliminary issue here is that the documents in question were created on a stand-alone personal computer rather than on a computer or terminal which was part of a computer network. Section 1890-B(1) refers to the use of a "computer information system," and there is a question whether a stand-alone personal computer constitutes such a system. We believe that a "computer information system" could be interpreted to include a single stand-alone computer together with its software based on the definition of "computer system" in the Criminal Code, 17-A M.R.S.A. § 431(7)(Supp. 1994). However, that definition is not expressly made applicable to § 1890-B. One might also ask whether, in specifically forbidding use of a "computer information system", the legislature was intending to address those feature of computers that might be particularly subject to abuses of the kind proscribed by § 1890-B -- i.e., the use of large data bases and "merge mailings" for mass fundraising or campaign letters.

In any event, the evidence indicates that the drafts in question had not been requested by the candidate but were sent to the candidate by the staff member on his own initiative. It does not appear that the candidate would have had any reason to know that the drafts were prepared on a state computer. Moreover, when the candidate in question was interviewed, he advised us that he did not even recall whether or not he had received the draft radio advertisements and draft fundraising letter from the staff member in question. In any event, the candidate stated that he did not make any use of either the draft radio spots or the draft fundraising letter. There is no evidence suggesting that the drafts were in fact used. Under these circumstances, there is a significant question as to whether a state computer was used "for the purpose of" advocating directly to voters or soliciting contributions.

While the staffer in question intended that his drafts would be used in this fashion -- even though they were not in fact so used -- section 1890-B is not phrased in terms of forbidding use of a state computer information system "with the intent" to advocate to voters or to solicit contributions. Given the rule that ambiguities in criminal statutes are to be construed against the prosecution, it is likely that a court would find that for a crime to be committed under § 1890-B, some communication with voters using a state computer or some solicitation of contributions using a state computer must actually take place.

With respect to the radio spots, even if they had been broadcast, there is also a question as to whether this would constitute the use of a state computer system to advocate "directly" to voters. Where a state computer is used to create a draft but is not itself used for direct communication to voters, there is a legitimate question as to whether the requirements of section 1890-B(1)(A) are met.

There is no comparable language suggesting that the solicitation of campaign contributions has to be direct. As a result, even though the investigation indicates

that the draft fundraising letter was never used, there is one other possible line of inquiry. By drafting the fundraising letter and providing it to the candidate, the legislative staff member may have engaged in an attempted crime. See 17-A M.R.S.A. § 152 (1983). The issue of whether the staff member could be found to be criminally liable for attempting to violate 5 M.R.S.A. § 1890-B would depend in part on whether his conduct in drafting the fundraising letter and furnishing it to the candidate would constitute a "substantial step" toward commission of the crime. See 17-A M.R.S.A. § 152(1)(1983). Whether or not the staff member's conduct would constitute such a substantial step, however, it is our view that, given all of the facts and the other problems with respect to section 1890-B that have been identified above, we should decline to pursue any prosecution for attempted use of a state computer information system in violation of section 1890-B of Title 5 and section 152(1) of the Criminal Code.

Accordingly, the fourth and final category of documents described above also would not constitute a prosecutable violation of § 1890-B.