

OFFICE OF  
FEDERAL COUNSEL

2019 OCT -7 PM 2: 03

William B. Canfield III  
Attorney at Law  
Suite 201  
6723 Whittier Avenue  
McLean, VA 22101

October 28, 2019

Federal Election Commission  
Office of Complaints Examination  
and Legal Administration  
ATTN: Christal Dennis  
1050 First Street, NW  
Washington, DC 20463

**Matter Under Review # 7645**

Ms. Dennis:

As you know, I represent Ms. Victoria Toensing, Esq. in the above captioned Matter Under Review. This will serve as my client's formal response to the unsubstantiated assertions made by Common Cause in this matter. For the reasons set forth below, I respectfully request that the Federal Election Commission (the "Commission") dismiss this complaint as to Ms. Toensing and take no further action against her.

**Assertions in the Complaint:** Common Cause "upon information and belief" alleges (1) that Ms. Toensing, among others, "solicited or provided substantial assistance in the solicitation of, a contribution from foreign nationals, in violation of the Federal Election Campaign Act"; (2) "violated the federal ban on soliciting a contribution from a foreign national...by meeting with Ukrainian officials and urging them to pursue investigations in connection with the 2020 U.S. presidential election and for the purpose of influencing the 2020 presidential election candidacy of Joe Biden."

**Facts:** The assertions contained in (1) and (2) above have **NO** basis in fact and represent nothing more than uninformed speculation gleaned by Common Cause from a selective reading of media "reporting" and commentary, which was, itself, not substantiated by any documentary support.

Ms. Toensing was, at all times relevant to this matter, an attorney and Member of the Bar of the District of Columbia. Contrary to the assertion made by Common Cause that Ms. Toensing was/is an "operative" of the 2020 Trump for President Committee, Ms. Toensing is not now and never has been

an employee of, consultant to or "operative" of such campaign, its principal campaign committee or any political action committee associated with or supporting the Trump for President Committee. Any assertion to the contrary made by Common Cause is unfounded, unsubstantiated, and is simply false.

In February, 2019, Ms. Toensing received a telephone call from another American attorney who stated that the attorney had been in contact with a Ukrainian citizen regarding a potential representation of that individual, in the United States, for potential meetings with U.S. Government officials regarding alleged corruption in Ukraine. The attorney informed Ms. Toensing that an existing client conflict precluded the attorney from accepting the proposed engagement. The attorney asked Ms. Toensing if she might be in a position to speak with the Ukrainian citizen and explore a potential representation of that individual in meetings to be held with US law enforcement officials. The attorney informed Ms. Toensing that the Ukrainian citizen appeared to have first-hand knowledge of misconduct by US Government officials in Ukraine but that officials at the US Embassy in Kiev had directed this individual not to provide such information.

Ms. Toensing informed the attorney that she did not have a conflict that would preclude such a representation and that a telephone call with the Ukrainian citizen would be appropriate as an initial contact to discuss the proposed representation.

Shortly thereafter, Ms. Toensing, who was in Washington, DC, and the Ukrainian citizen, who was in Kiev, connected by telephone. The telephone call lasted approximately twenty (20) minutes and the discussion focused entirely on the possibility that Ms. Toensing might represent the Ukrainian citizen if and when that individual travelled to the United States for meetings with US Government officials. At the conclusion of this telephone call, it was decided that Ms. Toensing would travel to Kiev in May 2019, to meet with this individual and formally enter into an engagement for legal services to be provided in the United States. The proposed May 2019 trip to Kiev did not occur, the Ukrainian citizen did not travel to the United States, and the proposed engagement never materialized.

Throughout this timeframe, Ms. Toensing was acting, at all times, as an attorney engaged in exploring the possibility of an engagement of her services, as a lawyer, to be provided in the United States. At no time, did Ms. Toensing solicit, receive, or transmit any information that could possibly be defined as "opposition research" on any federal candidate or campaign committee. She did not solicit, receive or transfer any information that could be construed as political "opposition research" for the simple reason that her efforts were exclusively focused on her legal representation of a whistleblower, who happened to be from a foreign country, and nothing more.

**The Law:** Although Ms. Toensing did not solicit or receive any "opposition research" information whatsoever, I will never the less address the legal "analysis" raised by the Complainant. Much speculation has occurred in the media about the definition of the term "opposition research" and whether that term meets the definition of a "contribution" as found in the Federal Election Campaign Act at 52 U.S.C. ¶30121(a)(1)(A). In fact, the theoretical basis upon which this Complaint is based on this definition.

Unfortunately for the Complainant, the Federal Election Commission has provided only limited guidance on the issue. For example, in Advisory Opinion 2007-22 the Commission discussed whether opposition research materials might meet the definition of a "contribution" and indicated that the valuation of such materials is problematic, at best, since "the value of these materials may be nominal or difficult to ascertain." To date, a consensus does not appear to exist as to whether political opposition research (particularly the type of opposition research that is oral rather than written) is an "other thing of value" and thus a "contribution" and, if so, how such a "thing" is actually valued for purposes of the statute.

As the Federal Election Commission knows, other agencies of the US Government have recently opined on this question and their pronouncements should be carefully reviewed and taken into consideration when evaluating the assertions made by the Complainant. I cite the following to illustrate that point:

The final report of Special Counsel Robert Mueller, at page 187, provides a useful analysis...

"A campaign can be assisted not only by the provision of funds, but also by the provision of derogatory information about an opponent. Political campaigns frequently conduct and pay for opposition research. A foreign entity engaged in such research and providing resulting information to a campaign could exert a greater effect on an election, and a greater tendency to ingratiate the donor to the candidate, than a gift of money or tangible things of value. At the same time, no judicial decision has treated the voluntary provision of uncompensated opposition research or similar information as a thing of value that could amount to a contribution under campaign finance law. Such an application could have implications beyond the foreign-source ban...and raise First Amendment questions. Those questions could be especially difficult where the information consists simply of the recounting of historically accurate facts. It is uncertain how courts would resolve those issues."

The Department of Justice has also looked into this issue, in the context of President Trump's July, 2019 telephone conversation with Ukrainian President Zelensky and the assertion in a whistle blower's complaint that the content of the telephone call represented a possible campaign finance violation. In reviewing the transcript of that telephone call and the whistle blower's complaint, Department of Justice spokesperson, Kerri Kupec, informed the media that...

"Relying on established procedures set forth in the Justice Manual, the Department's Criminal Division reviewed the official record of the call and determined, based on the facts And applicable law, that there was no campaign finance violation and that no further Action was warranted."

"All relevant components of the Department agreed with this legal conclusion and the Department has concluded this matter."

These quotations can be found in the September 25, 2019 issue of the National Review as well as September 26, 2019 edition of The Hill.

**Conclusion:** It is clear and unarguable that Ms. Toensing did not violate the Federal Election Campaign Act at any time during the period in which she was engaged in discussions involving a potential legal representation of a foreign national within the United States. She did not solicit, receive or transfer any

material that could be seen as political opposition research. She was not an is not an employee, consultant or "operative" of the 2020 Trump for President Committee or any political action committee supporting the reelection of the President. She was simply an attorney reviewing the potential for a representation that ultimately did not come to fruition. For these reasons, I ask the Commission to dismiss this Complaint as to Ms. Toensing and take no further action against her.

Sincerely,



William B. Canfield III  
Counsel to Victoria Toensing, Esq.