



U.S. ELECTION ASSISTANCE COMMISSION  
1225 NEW YORK AVENUE, N.W., SUITE 1100  
WASHINGTON, D.C. 20005

August 12, 2008

Honorable Mary Herrera  
New Mexico Secretary of State  
325 Don Gaspar  
Suite 300  
Santa Fe, New Mexico 87503

Dear Secretary of State Herrera:

Attached is the Management Decision of the U.S. Election Assistance Commission on the Office of Inspector General's audit of the administration of Help America Vote Act (HAVA) funds by the New Mexico Secretary of State (report no. E-HP-NM-01-07). The Decision is based upon information contained in the audit and the Office of the Secretary of State's response.

Please provide a reply to this letter by September 19, 2008. If you, or your staff, have any questions about the matter, please contact Mr. Edgardo Cortés, Acting Director, Division of HAVA Payments and Grants, at (202) 566-3126.

Sincerely,

A handwritten signature in black ink, appearing to read "T. Wilkey", written over the word "Sincerely," and extending below the name "Thomas R. Wilkey".

Thomas R. Wilkey  
Executive Director

Attachment

cc: Inspector General



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**EAC MANAGEMENT DECISION:**

*Resolution of Office of Inspector General Audit of HAVA Funds Administered by the New Mexico Secretary of State, Report No. E-HP-NM-01-07*

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**Summary of Decision**

To resolve the questioned costs of \$6,271,810 pertaining to the voter education contract, the Office of the Secretary of State must complete one of the three options listed below by September 16, 2008:

- (1) Implement Recommendations 1 through 4 applicable to this finding (see page 4);
- (2) Repay to the State Election fund the \$6,085,060, representing the amount of the questioned costs that was financed with HAVA Section 251 funds. We will inform the U.S. Department of Health and Human Services (HHS) about the remaining contract payment of \$186,750 that was financed with HAVA Section 261 funds; or
- (3) Offset the questioned costs with other State expenditures on HAVA Title III-related activities of \$6,085,060 that were not financed with HAVA funds, not part of the State's maintenance of effort, and not used as a matching contribution for Section 251 funds. (For example, in response to the finding pertaining to the "state five percent match," the Office of the Secretary of State said that \$11 million of state funds were appropriated and used to purchase voting equipment in 2006.) EAC must verify the eligibility of any proposed offset.<sup>1</sup>

To resolve the balance of the audit findings and recommendations, the Office of the Secretary of state must:

- (4) Provide a copy of the procedures implemented to ensure that it complies with applicable State procurement requirements.
- (5) Furnish documentation to substantiate that it either:

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<sup>1</sup> The OIG audit did not cover Section 261 funds because those funds are administered by HHS. The purpose of Section 261 funds is to assure access to polling places for individuals with disabilities. Therefore, to offset the \$186,750 of questioned costs attributable to Section 261 funds, the Office of the Secretary of State would have to identify state expenditures \$186,750 for improving the access to polling places and/or for other purposes authorized by Section 261 (b) of HAVA.

- (a) Repaid to the State Election fund \$36,540 plus applicable interest representing the unallowable preaward costs; or
  - (b) Offset the unallowable costs of \$36,540 with state expenditures on activities authorized by Section 101 of HAVA. These State expenditures must not have been also used to satisfy the maintenance of effort or matching requirement under Section 251 of HAVA.
- (6) Inform the EAC of when and how (a) the issues of ownership of and record keeping for the equipment delivered to the all counties is decided and (b) the difference between equipment purchased and delivered is resolved.
- (7) Substantiate that additional State matching funds totaling \$751,568 plus applicable interest have been deposited into the State Election Fund.
- (8) Continue to monitor the generation of program income by the State and its counties and report any net program income on the annual financial status reports (SF 269s) submitted to EAC.

## **BACKGROUND**

The U.S. Election Assistance Commission (EAC or Commission) is an independent, bipartisan agency created by the Help of America Vote Act of 2002 (HAVA). It assists and guides state and local election officials in improving the administration of elections for Federal office. This includes distributing HAVA funds to States for the acquisition of voting systems, the establishment of a statewide voter registration list, and other activities to improve the administration of elections for Federal office. EAC also monitors State use of HAVA funds to ensure funds distributed are being used for authorized purposes. To help fulfill this responsibility, the EAC determines the necessary corrective actions to resolve issues identified during Single Audit Act and Office of Inspector General (OIG) audits of state administration of HAVA funds. The EAC OIG has established a regular audit program to review the use of HAVA funds by states. The OIG's audit plan and audit reports can be found at [www.eac.gov](http://www.eac.gov).

The Audit Follow-up Policy approved by the Commission authorizes the EAC Executive Director to issue the management decision for audits of Federal funds to state and local governments, non-profit organizations, and for-profit organizations (external audits) and single audits conducted by state auditors and independent public accountants. The Executive Director has delegated the evaluation of final audit reports provided by the OIG and single audit reports to the EAC Election Administration Support Division (EASD). The EASD provides a recommended course of action to the Executive Director for resolving questioned costs, administrative deficiencies, and other issues identified during an audit. The EAC Executive Director issues the EAC Management Decision that

addresses the findings of the audit and details corrective measures to be taken by the state.

When an audit identifies questioned costs, the EAC considers not only whether the state followed proper procedures, but also whether the expenditures actually served to further the goals of HAVA. Generally, the EAC has identified three methods of resolution regarding questioned costs: (1) expenditures that were identified as permissible under HAVA and Federal cost principles, but did not follow appropriate procedures do not have to be repaid; (2) expenditures that may have been permissible under HAVA but lacked adequate documentation must be repaid to the state election fund, which was created in accordance with HAVA section 254(b)(1); and (3) expenditures that were clearly not permissible under HAVA or Federal cost principles must be repaid to the U.S. Treasury. In addition to repayment of funds, the EAC may require future reporting by a state to ensure that proper internal controls and procedures have been established to prevent future problems.

States may appeal the EAC management decision. The EAC Commissioners serve as the appeal authority. A state has 30 days to appeal the EAC management decision. All appeals must be made in writing to the Chair of the Commission. The Commission will render a decision on the appeal no later than 60 days following receipt of the appeal or, in the case where additional information is needed and requested, 60 days from the date that the information is received from the state. The appeal decision is final and binding.

## **AUDIT HISTORY**

The OIG issued an audit on the administration of HAVA funds by the New Mexico Secretary of State on May 27, 2008. The audit covered reported expenditures of \$8,121,734 of Section 101 through December 31, 2006 and \$6,001,737 of Section 251 funds through September 30, 2006. The report contained six findings and 12 recommendations.

## **AUDIT RESOLUTION**

The audit findings and the EAC decision for resolving the findings are as follows:

### **Finding - Voter Education Campaign Contract**

The OIG questioned all contract costs of \$6,271,810 because of uncertainty over the basis for paying the contractor (Gutierrez), the lack of contractor support for all costs billed, and the payment for services billed but not performed. To resolve this matter, the OIG recommended that the EAC require the Secretary of State to:

1. Obtain assistance from the New Mexico Attorney General's Office on the applicable contract provisions for determining the basis of payment to Gutierrez.
2. Based on the determination regarding the basis of payment to Gutierrez, calculate the amount that should be paid for the voter education services that were provided.
3. Return to the State Election Fund (Fund 903) any difference between the amounts Gutierrez should have been paid in recommendation 2 above and what he was actually paid.
4. Calculate and pay interest into the Election Fund on the amount returned to the election fund in recommendation 3 for the period that it was missing from the fund.
5. Establish and implement procedures to ensure that the SOS follows applicable procurement laws, regulations, policies and procedures, and contract provisions in the future.

### **EAC Management Decision**

It is clear that the Office of the Secretary of State received services under the voter education contract. Media buys under the contract included the purchase of 30-second and half-hour time spots on television channels and cable television and 60-second time spots on radio stations. The scripts for the spots were in English, Spanish, and Navajo. Approximately 44,000 total spots were aired on or before the 2004 general, the 2006 primary, and the 2006 general elections. What is not clear, however, is whether the amount paid to the contractor is fair and reasonable for services performed and whether the contractor was paid for services that were not performed.

In that regard, the OIG concluded that the payment provisions of the contract were not clear. For example, the former Secretary of State wrote that "Upon reviewing the task at hand I chose that the Contractor and the State would enter into a 'fixed price contract'." However, the request for proposals, the contract, and the modified basis of payment agreed to by the contractor and the former Secretary of State all indicate that the contract is a cost reimbursable arrangement. The request for proposals required prospective contractors to propose "one firm, fixed, fully loaded hourly rate per service category. . ." This indicates that payment will be based on hours incurred on the project at the agreed upon hourly rates. The payment provisions of the contract state that the contractor "shall transmit a detailed and certified statement of services, time, and charges, if any, to the Secretary of State within thirty days after the end of the month during with the services were performed. Expenses must be justified by receipts." These terms indicate

payment based on costs incurred. The Secretary of State and the contractor agreed to "a flat rate of 17% for administrative costs associated with the performance of our media services contract." If the contract was indeed fixed price, there would not be a need for a fee payment to cover administrative costs because under a fixed price contract, the contractor would be entitled to payment of the full contract amount if the contractor adequately performed all contract requirements.

The OIG asked the Office of Attorney General to examine the contract in April 2007. In July 2007, the Office of Attorney General responded that New Mexico law prevents it from giving an opinion to a non-New Mexico Government entity. Subsequently, on October 29, 2007, the Office of Secretary of State asked the Attorney General, based on an October 27, 2007 OIG notice of the above finding, for an opinion on the following questions:

1. Whether the contract referenced in the Inspector General's draft NFR [Notice of Finding and Recommendations] Number 7 was awarded in accordance with State requirements?
2. What is the appropriate amount to be paid to A. Gutierrez & Associates?

Based on a June 25, 2008 EAC follow up letter to the Secretary of State (Attachment 1) on the status of the Attorney General's opinion, the Chief Deputy Attorney General wrote to the Secretary of State (Attachment 2) that:

We continue to work on drafting a response to that request [request of October 29, 2007] which will address this issue in detail and will provide it to you upon its completion. Further, we believe that by issuing that request for an opinion to this office, you have fulfilled your obligation to respond to the Inspector General's Findings and Recommendations.

As noted on page 4 of this decision, the OIG addressed five recommendations to resolve this finding. Obtaining an opinion from the Attorney General was but one step in a series of steps to calculate the amount earned by the contractor and any amount to be returned to the State Election Fund based on any overpayments to the contractor.

Our June 25 letter also said that EAC would make a decision without the Attorney General's opinion if it was not provided by the end of July 2008 – one year after this finding was identified.

To resolve the questioned costs, the Office of the Secretary of State must complete one of the three options listed below by September 19, 2008:

- (4) Implement Recommendations 1 through 4;
- (5) Repay to the State Election fund the \$6,085,060, representing the amount of the questioned costs that was financed with HAVA Section 251 funds. We will inform the U.S. Department of Health and Human Services (HHS) about the remaining contract payment of \$186,750 that was financed with HAVA Section 261 funds; or
- (6) Offset the questioned costs with other State expenditures on HAVA Title III-related activities of \$6,085,060 that were not financed with HAVA funds, not part of the State's maintenance of effort, and not used as matching contribution for Section 251 funds. (For example, in response to the finding pertaining to the "state five percent match," the Office of the Secretary of State said that \$11 million of state funds were appropriated and used to purchase voting equipment in 2006.) EAC must verify the eligibility of any proposed offset.<sup>2</sup>

These actions address recommendations 1 through 4.

For Recommendation 5 concerning the procurement of goods and services by the Office of the Secretary of State, provide a copy of the procedures implemented to ensure that the Office complies with applicable State procurement requirements.

#### **Finding - Preaward Costs**

The Office of the Secretary of State used HAVA Section 101 funds of \$36,540 to pay for costs that were incurred prior to the period for which funds were available. The \$36,540 was paid to San Juan County for costs incurred in 2000 related to implementing the Voter Registration and Election Management System. The OIG recommended that \$36,540, plus interest, be deposited in the State Election fund to cover the questioned costs.

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<sup>2</sup> The OIG audit did not cover Section 261 funds because those funds are administered by HHS. The purpose of Section 261 funds is to assure access to polling places for individuals with disabilities. Therefore, to offset the \$186,750 of questioned costs attributable to Section 261 funds, the Office of the Secretary of State would have to identify state expenditures \$186,750 to improve access to polling places and/or for other purposes authorized by Section 261 (b) of HAVA.

The Office of the Secretary of State agreed with the finding and recommendation.

### **EAC Management Decision**

EAC agrees with the finding and recommendation. To resolve this finding, the Office of the Secretary of State must furnish documentation to substantiate that it either:

- (a) Repaid to the State Election fund \$36,540 plus applicable interest representing the unallowable preaward costs; or
- (b) Offset the unallowable costs of \$36,540 with state expenditures on activities authorized by Section 101 of HAVA. These State expenditures must not have been also used to satisfy the maintenance of effort or matching requirement under Section 251 of HAVA.

### **Finding - Property Management, Equipment**

The OIG found that the voting equipment purchased by the State with HAVA funds and delivered to counties was not adequately accounted for in accordance with Federal requirements (41 CFR 105-71.132(d) (1)). The main issue was that the State did not transfer title to the equipment to the counties upon delivery of the equipment to the counties. As a result, in most cases, neither the counties nor the state was keeping property records. In addition, the Office of the Secretary of State response to the draft OIG report said that in following up on this matter the State found a difference between equipment purchased and equipment delivered to counties. The OIG recommended that equipment records be maintained in accordance with requirements and that the difference between equipment purchased and delivered be resolved.

In response to this matter, the Office of the Secretary of State indicated that 10 of 33 counties had accepted ownership of the equipment. The Office also said that it had been advised by the New Mexico Attorney General that this matter may require a legislative remedy. Further, although the response identified a difference between equipment purchased and delivered, it did not indicate how this matter was to be decided.

### **EAC Management Decision**

EAC agrees with the findings and recommendations. The Office of the Secretary of State must inform the EAC of when and how (1) the issues of ownership of and record keeping for the equipment delivered to the all counties is decided and (2) the difference between equipment purchased and delivered is resolved.



### **Finding - State Five Percent Match**

The OIG reported that New Mexico did not deposit into the State's Election Fund state matching funds of \$751,568. The deposit of the matching funds is one of the conditions for receiving HAVA Section 251 requirements payments - \$14,279,790 for New Mexico. The OIG recommended that the Secretary of State specify the source of funds for the \$751,568.

The Office of the Secretary of State responded that that the former administrator did not comply with the matching requirement and that through July 2, 2007, transfers from the State General Fund to the Election Fund totaled \$536,604 and interest deposits totaled \$165,100. The response also said that \$11 million of state funds were appropriated and used to purchase voting equipment in 2006. Finally, the Office of the Secretary of State said that it will work with the State Treasurer and the Department of Finance and Administration to satisfy the matching requirement plus appropriate interest.

### **EAC Management Decision**

EAC agrees with the finding and recommendation. The Office of the Secretary of State must furnish documentation to substantiate that State funds totaling \$751,568 plus applicable interest have been deposited into the State Election Fund.

### **Finding - Interest**

The OIG estimated the interest of \$147,799 that should have been earned on deposits into the State Election Fund was not deposited into the Fund. The Office of the Secretary of State responded that State Treasurer indicated that the interest earned on the HAVA funds have now been deposited into the HAVA fund.

The OIG recommended that the Executive Director confirm that the \$147,799 has been deposited into the Election Fund.

### **EAC Management Decision**

EAC agrees with the finding and recommendation. Documentation submitted with the Secretary of State response confirmed that the State deposited the appropriate amount of interest into the State Election Fund. This matter is closed.

### **Finding - Program Income**

The OIG reported that program income had not been properly computed or reported. Specifically, the Office of the Secretary of State generated program

income from charging for statistics on registered voters generated from using the HAVA-funded statewide voter registration database and counties generated program income from leasing HAVA-financed voting machines to local governments.

The OIG also reported that the Secretary of State provided to the OIG a listing of all program income generated using HAVA equipment. The listing also contained costs incurred by the counties to generate the program income. It disclosed that the costs associated with the generation of program income far exceeded gross program income received. In response to the draft audit report, the Office of the Secretary of State also said that it had worked with all 33 counties for fiscal years 2007 and 2008 and found that there was no program income to report.

The OIG recommended that the Executive Director of the EAC require the Secretary of State to continue to obtain from the County Clerks gross program income and the cost of producing that income. If any net income is reported, the SOS should direct the County Clerks to use the income for HAVA activities.

### **EAC Management Decision**

We agree with the finding and recommendation. Under the *Uniform Administrative Requirements for Grants and Cooperative Agreements with State and Local Governments* (41 CFR 105-71.125), program income means gross income received by the grantee or subgrantee directly generated by a grant supported activity during the grant period and includes items such as fees from the use or rental of real or personal property acquired with grant funds. The Uniform Administrative Requirements also stipulate, in part, that the costs incident to the generation of program income may be deducted from gross income to determine net program income, if authorized by Federal regulations or the grant agreement.

EAC authorizes the Office of the Secretary of State to deduct costs incident to the generation of program income to determine whether there is any net reportable program income. The Office of the Secretary of State determined that New Mexico has not net reportable program income through the current period. However, the Office of the Secretary of State must continue to monitor the generation of program income by the State and its counties and report any net program income on the annual financial status reports (SF 269s) submitted to EAC. EAC Advisory 2007-002, Program Income and Set-Off of Cost Incident to Program Income, provides guidance on this matter and is available on the EAC website at [www.eac.gov](http://www.eac.gov).

## **STATE RIGHTS OF APPEAL**

If the Office of Secretary of State believes that anything in this final management decision is an adverse action and the state does not agree, the state shall have 30 days to appeal EAC's management decision. The appeal must be made in writing to the Chairman of the EAC. Within 30 days of receiving the appeal, the EAC may hold a hearing to consider the appeal, take evidence or testimony related to the appeal, and render a decision on the appeal, if appropriate at that time. The EAC will render a final and binding decision on the appeal no later than 60 days following the receipt of the appeal or the receipt of any requested additional information. If the state does not file an appeal, this decision will become final and binding at the expiration of the appeal period.

Attachments (2)



U.S. ELECTION ASSISTANCE COMMISSION  
1225 NEW YORK AVENUE, N.W., SUITE 1100  
WASHINGTON, D.C. 20005

June 25, 2008

Honorable Mary Herrera  
New Mexico Secretary of State  
325 Don Gaspar  
Suite 300  
Santa Fe, New Mexico 87503

Dear Secretary Herrera:

As you know, the U.S. Election Assistance Commission (EAC) has been directed by the EAC Office of the Inspector General to respond to the recommendations in the final audit report on the Administration of Help America Vote Act funds by the New Mexico Secretary of State (Report No. E-HP-NM-01-07) by August 8, 2008. The principal finding in the audit report is that costs of \$6,271,810 paid to A. Gutierrez and Associates for a voter education campaign were questioned. The audit questioned the costs because of uncertainty over the basis for paying Gutierrez, the lack of contractor support for all costs billed, and the payment for services billed but not performed. The key to determining eligible contract costs is an opinion from the New Mexico Office of Attorney General as to the applicable contract provisions for determining the basis of payment to Gutierrez. The purpose of this letter is to request that you provide us with an opinion from the Office of Attorney General by July 28, 2008.

The EAC Office of Inspector General attempted to obtain an opinion on this matter from the Office of Attorney General in April 2007. In July 2007, the Office of Attorney General responded to the EAC Office of Inspector General that New Mexico law prevents it from giving an opinion to a non-New Mexico Government entity. On October 27, 2007, the EAC Office of Inspector General issued a written notice of finding and recommendations regarding the Gutierrez contract to the Office of the Secretary of State. Subsequently, on October 29, 2007, you asked the Attorney General for an opinion on the following questions:

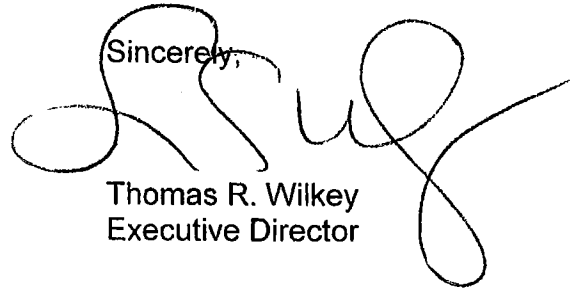
1. Whether the contract referenced in the Inspector General's draft NFR [Notice of Finding and Recommendations] Number 7 was awarded in accordance with State requirements?
2. What is the appropriate amount to be paid to A. Gutierrez & Associates?

Thus, the EAC Office of Inspector General notified the Attorney General's Office of this matter over 1 year ago and a request for an opinion from your office on the amounts payable to Gutierrez has been pending with the Attorney General for approximately 8 months.

If we do not receive the opinion from the New Mexico Office of Attorney General, we will be forced to decide how to resolve this finding based on the information currently available. We appreciate your assistance in this matter.

If you, or your staff, have any questions about the letter, please contact me at (202) 566-3109.

Sincerely,

A handwritten signature in black ink, appearing to read 'Tom Wilkey', with a large, stylized flourish extending to the right.

Thomas R. Wilkey  
Executive Director

cc: New Mexico Attorney General  
EAC Inspector General

Attachment 2

RECEIVED  
Office of  
Secretary of State

2008 JUL 21 AM 10:07

**Attorney General of New Mexico****GARY K. KING**  
Attorney General**ALBERT J. LAMA**  
Chief Deputy Attorney General

July 16, 2008

The Honorable Mary Herrera  
Secretary of State  
325 Don Gaspar, Suite 300  
Santa Fe, NM 87503**ATTORNEY-CLIENT PRIVILEGED  
CONFIDENTIAL**Re: Request for Assistance – U.S. Election Assistance Commission Audit Report

Dear Secretary Herrera:

The Attorney General's Office ("AGO") has received your request for assistance dated June 13, 2008, concerning the issues identified in the U.S. Election Assistance Commission's ("EAC") Final Report on the Administration of Help America Vote Act Funds by the New Mexico Secretary of State. Attorney General King has asked me to respond on his behalf.

With regard to the Report's finding concerning questionable payments to a contractor for the creation of a public education campaign on voting matters which you identify in your letter, we remind you that on November 2, 2007 we acknowledged receipt of your request for an Attorney General's Opinion concerning the Inspector General's Confidential Findings and Recommendations which appear to implicate the same issue. As our letter stated, your request was assigned to an Assistant Attorney General for review. We continue to work on drafting a response to that request which will address this issue in detail and will provide it to you upon its completion. Further, we believe that by issuing that request for an opinion to this office, you have fulfilled your obligation to respond to the Inspector General's Findings and Recommendations.

You further requested assistance concerning the apparent lack of an adequate accounting of equipment purchased with HAVA funds. Pursuant to the Final Report issued by the EAC, the Secretary of State should: "ensure that equipment located at the counties is properly recorded" and "resolve...the differences between equipment purchased and equipment delivered." The Secretary of State's Response reads: "[t]he SOS discovered that the vendor did not deliver all of the equipment that was purchased with HAVA funds. The SOS is currently working with the vendor to resolve the matter." Therefore, assuming that information is correct, it appears to be within the jurisdiction of the Secretary of State's office to work with the counties and the vendor

Attachment 2


The Honorable Mary Herrera  
July 16, 2008  
Page 2

to determine the number of machines ordered and received and resolve the issue. This appears to be an auditing issue, rather than a legal issue at this time. Nevertheless, we are prepared to assist in the event that any legal matters should arise concerning this or any other matter.

The Secretary of State's Response further reads: "the Office of the Secretary of State was working with the Attorney General's Office to complete the transfer of the property to the counties." As we have indicated to members of your staff on numerous prior occasions, the dispute between the SOS and counties over ownership and payment issues likely requires a legislative solution. Although traditionally the counties have been responsible for ownership and maintenance costs, when the former Secretary of State purchased the machines directly from the vendor and not via the State Board of Finance, she abandoned the statutory structure and created this issue. While the SOS has a credible, but not irrefutable, legal argument that the counties should accept ownership of these machines, we suggest, rather than delivering additional legal ownership documents to the clerks, that the SOS invite the Governor's office, Sheryl Nichols (County Clerk Representative), Rep. Rhonda King and Rep. Jose Campos to meet and strategize on an approach for the 2009 legislative session.

Thank you for affording us this opportunity to be of assistance. We hope this letter provides significant clarification concerning the issues you raise and the position of this office. As stated before, we are happy to assist you with any legal issues arising from the EAC's Final Report.

Sincerely,



ALBERT J. LAMA  
Chief Deputy Attorney General

cc: Zachary Shandler, Assistant Attorney General, AGO  
Elizabeth A. Glenn, Civil Division Director, AGO