CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
25 MARKET STREET
PO BOX 112
TRENTON, NJ 08625-0112

PAULA T. DOW
Attorney General

ROBERT M. HANNA
Director

February 15, 2011

VIA ELECTRONIC MAIL
Hon. Jack Tarditi, Chairman
and the Council Members
State of New Jersey
Council on Local Mandates
135 West Hanover Street, 4th Floor
P.O. Box 627
Trenton, NJ 08625-0627

Re: In the Matter of Complaint filed by the County of Atlantic (12-10)

Letter on Behalf of Department of State in Opposition to Atlantic County's Request for Summary Judgment and in Support of the Department's Motion to Dismiss the Complaint

Dear Chairman Tarditi and Council Members:

Please accept this letter on behalf of the Department of State (the "State") in opposition to the request for summary judgment contained in the County of Atlantic's (the "County") February 9, 2011 letter to the Council on Local Mandates.[1] The Council should deny summary judgment to Atlantic County and,

[1] The County did not serve the State with a motion for summary judgment, and there is no indication that such a motion has been filed with the Council.

instead, grant the State's motion to dismiss the County's complaint because the seal-use protocol training at issue here has been ordered by a court and, therefore, no statute, rule or regulation has imposed an impermissible, unfunded State mandate, as required by the Constitution and the Local Mandates Act.

PLEADING SUMMARY

The State opposes the County's request for summary judgment; instead, the Council should grant the State's motion to dismiss the County's complaint. None of the arguments advanced by the County in its February 9, 2011 letter changes the inescapable conclusion that the seal-use protocol training that is the subject of the County's complaint is required by court order and, therefore, no statute, rule or regulation has imposed an impermissible, unfunded State mandate. Accordingly, the Council should grant the State's motion to dismiss the complaint and deny the County's request for summary judgment.

ARGUMENT

The County advances three principal arguments in support of the request for summary judgment and in opposition to the State's motion to dismiss the complaint. The County argues first that the court in the Gusciora case perhaps did not order seal-use protocol training but, instead, may have only recommended that training. This argument must be rejected because it ignores the

plain language of the Court's order expressly directing the State to "develop a seal-use protocol for the tamper-evident seals on the State's voting machines, and that such protocol shall include a training curriculum", as well as standardized procedures for recording and maintaining seal serial numbers. See Department's January 24, 2011 Letter in Support of Motion to Dismiss, Exhibit B at p. 3. It is precisely this seal-use protocol training that is the subject of the Giles memorandum challenged here by the County. As the memorandum itself states, "by way of the March 8, 2010 Order in the matter of Gusciora, et al. v. Corzine, et al., the State is required to implement a seal-use protocol for the security enhancement used on all voting machines in the 21 counties. This protocol must include training." Id., Exhibit A at p. 1. Thus, there can be no question that the Giles memorandum merely notifies the County of the training ordered by the Court.

In stark contrast, the training recommendation contained in the Court's order speaks to quite different training on other aspects of the election process. Indeed, the recommendation that the County points to here refers to custody and recordkeeping training for a variety of election records and documents, such as poll books, ballots, cartridges, seals and serial numbers, and voting machine tapes and printouts. See Exhibit C, Specific Requirements and Recommendations, ¶6 at p. 206. While clearly a

part of the overall security of the election process, this training recommended by the court deals with ensuring the proper custody and identification of all election records. On the other hand, the court-ordered training on the seal use protocol, which addresses the limited and discrete tasks of the actual installation of tamper-evident seals in the voting machines and their continuing inspection while installed in the machines, is unquestionably separate from the recommended training cited by the County. Id., ¶4 at pp. 205-06; Exhibit A at p.1 (training applies to individuals, except district board workers, with "access to the internal components of a voting machine"). Hence, the recommendation cited by the County contemplates training on subjects distinct from the seal-use protocol training ordered by the Court and, the Giles memorandum merely notified the County of the seal-use protocol training that the Gusciora court had ordered.[2]

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[2] For this reason, the Council does not need to address the County's second argument that the Giles memorandum is a "rule" within the meaning of the Local Mandates Act. In any event, the County mistakenly relies on In the Matter of Complaints filed by the Counties of Morris, Warren, Monmouth and Middlesex. There, the Council determined that a press release announcing a change in the policy of the Department of Environmental Protection, which was embodied in the agency's regulation concerning the removal of deer carcasses, constituted a "rule" for the purpose of the Local Mandates Act. In the present case, unlike Morris, the Giles memorandum does not interpret or change any agency regulation or policy and, instead, is a one-time response to a court order to provide seal-use protocol training. Clearly, the Giles memorandum

Finally, the County contends that the Gusciora court's order is a "law" within the meaning of the Local Mandates Act and, therefore, that the Council has jurisdiction to declare the court's order an unfunded State mandate. This contention is absurd. The language of the constitutional provision that prohibits unfunded mandates makes abundantly plain that it applies "to any provision of a law enacted on or after January 17, 1996" or a rule or regulation implementing that law. N.J. Const. Art. 8, §2, ¶5(a)(emphasis added). The Council's enabling legislation contains identical language. N.J.S.A. 52:13H-2. The use of the word "enacted" in both the Constitution and the enabling legislation makes it unmistakably clear that the Council may not consider a court order to be a "law" within its jurisdiction because a court does not "enact" orders - only a legislative body enacts a law.

To be sure, the Council's opinion in In the Matter of the Complaint filed by the Township of Branchburg teaches this very lesson. There, the Council declined to hear a challenge to a court's opinion concerning copying costs under the Open Public Records Act because Branchburg's complaint did not "place the [OPRA] statute squarely before us as the constitution requires. Thus, the Council correctly recognized that a court's judgment is

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cannot be compared with the DEP's regulatory shift in Morris and, thus, is not a "rule" within the meaning of the Local Mandates Act.

not a law as contemplated by the Constitution or the Local Mandates Act; otherwise, the Council presumably would have assumed jurisdiction in Branchburg. Therefore, the Gusciora court's order in the present case is not a law that the Council may consider.

In sum, the Giles memorandum concerning seal-use protocol training merely carries out a court order and is neither a statute, rule or regulation that imposes an impermissible, unfunded State mandate. Hence, the Council should grant the State's motion, deny the County's request for summary judgment, and dismiss the complaint.

Respectfully submitted,

PAULA T. DOW
ATTORNEY GENERAL OF NEW JERSEY

Todd A. Wigder
Deputy Attorney General

fsl
c: Maneesha S. Joshi, Esq.
Assistant County Counsel
Robert F. Giles, Director
Division of Elections