

ROSS & GREEN

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

1010 Vermont Avenue, NW, Suite 811, Washington, DC 20005 • Telephone: 202-638-4858 • Fax: 202-638-4857

OCT 11 10 00 AM '94

FAX COVER SHEET

OCT 7 3 12 PM '94
FEDERAL ELECTION
COMMISSION
OFFICE OF THE
SECRETARY

To: N. Bradley Litchfield

Organization: Federal Election Commission

Fax #: 202-219-3923 (219-0260)

From: Nancy Ross

Date: October 7, 1994

Pages (including cover): 4

MESSAGE:

ROSS & GREEN

1010 Vermont Avenue, NW, Suite 811, Washington, DC 20005 • Telephone: 202-638-4858 • Fax: 202-638-4857

October 7, 1994

N. Bradley Litchfield
Associate General Counsel
Federal Election Commission
999 E Street N.W.
Washington, DC 20463

Comment On
AOR 1994-32

Oct 7 3 12 PM '94
FEDERAL ELECTION
COMMISSION
OFFICE OF THE
GENERAL COUNSEL

Re: Advisory Opinion Request 1994-32

Dear Mr. Litchfield:

Ross and Green is a private lobbying firm that specializes in democracy issues in the United States and in other parts of the world. We have a particular interest in how election laws and regulations impact upon participation of third party, independent and insurgent candidates.

The regulatory and law enforcement authority of the Federal Election Commission poses important and complex questions about how such powers can be used to make the election process more fair, without violating the First Amendment rights of candidates and others. The AOR of Kellie Gasink intersects some of these issues, and we are submitting herewith our comments.

At the outset, we would note that the Gasink query does not appear to be a proper subject for the issuance of an advisory opinion. A feature article in the Washington City Paper edition of July 8, 1994, stated that Gasink had given her MUR complaint to the newspaper, and reported at length on the allegations in the complaint. Hence, Gasink is actually asking for advice about actions she already has taken rather than about actions she merely is contemplating for the future.

Background

Congress limited the powers of the Commission to investigate the activities of candidates and their associates engaging in the quintessential First Amendment activity of waging election campaigns. The Commission's jurisdiction is structured quite differently from that of other federal regulatory agencies with civil law enforcement responsibilities, such as the Securities and Exchange Commission or the Internal Revenue Service. Other agencies are free to follow up investigative leads coming from a variety of sources of differing initial credibility: press reports, anonymous tips, unsworn complaints, etc. The FEC has no such roving investigatory powers.

N. Bradley Litchfield
October 7, 1994
Page 2

Congress has created two main safeguards against third party abuse of the FEC's investigatory and law enforcement powers. First, is the requirement that private complaints must be signed and verified. Second, is the requirement that the FEC's review of the sworn allegations and the materials in the MUR file remain confidential until the review is completed and the FEC votes upon and releases its decision in the case.

In Federal Election Commission v. Machinists Non-Partisan Political League, 655 F.2d 380 (D.C. Cir. 1981), the District of Columbia Court of Appeals explicated the history and rationale for limited FEC investigatory powers. Then it specifically noted that FEC investigations

may begin only if an individual first files a signed, sworn, notarized complaint with the Commission. The Commission's duty thereafter is "expeditiously" to conduct a confidential investigation of the complainant. 2 U.S.C. 437g(a)(3). Plainly, mere "official curiosity" will not suffice as the basis for FEC investigations, as it might in others.

(footnotes and citations omitted; emphasis supplied) Id. at 388.

An obvious concern of Congress in passing this legislation, was that in the political arena, and particularly in the heat of an election campaign, a political adversary may injure his or her opponent by triggering an FEC investigation of the opponent on the basis of charges that are so insubstantial that the accuser will not even swear to the truth of them. Or, an accuser might file a sworn complaint and then publicize that the FEC is "investigating" the candidate in order to put him or her in a bad light and to try to get the media to focus its reporting of the candidacy on the allegations and the federal government investigation rather than to the substantive issues the candidate is trying to raise in his or her campaign.

The Gasink AOR

The statute was intended to protect participants in electoral politics from exactly the kind of conduct in which Gasink appears to be engaging. An article published on November 5, 1993, in the New York Daily News, "Fringe party funds investigated" was based upon a leak to the reporter of an investigation by the Manhattan DA of allegations made by Gasink. Subsequently, she filed her FEC complaint. Months later, she

N. Bradley Litchfield
October 7, 1994
Page 3

gave a copy of her confidential FEC complaint to a journalist writing for the City Paper, spoke to him about the MUR proceedings, and that became the core of its lengthy feature article/cover story in the edition of July 8, 1994. This suggests a pattern of playing off the news media and law enforcement agencies to generate publicity for Gasink's allegations.

In light of this history, we believe that the Commission should decline to issue an advisory opinion in this matter. Because Gasink already has given a copy of her letter to the Manhattan District Attorney to journalist(s), the facts alleged in her AOR relate to activity that already has taken place. This kind of a question does not qualify for an advisory opinion. See 11 C.F.R. § 112.1(b); AOR 1994-24.

If the Commission does give Gasink advice, it should answer in the negative. Because she has instigated the public disclosure of the fact that her "letter" is a complaint (or part of a complaint) before the FEC in a pending MUR, any proposed disclosure of the letter is a disclosure of a document that not only is in the investigative file, but also will be recognized by others as being part of the confidential FEC file.

If the Commission needs copies of any of the news clippings referred to in this letter, please let us know and we will provide them. Thank you for your consideration of these comments.

Very truly yours,

Nancy Ross

Nancy Ross