

October 3, 2003

NOTICE AO DRAFT COMMENT PROCEDURES

The Commission has approved a revision in its advisory opinion procedures that permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2003-24 is available for public comments under this procedure. It was requested by counsel, Michael B. Trister on behalf of the National Center for Tobacco Free Kids ("NCTFK"). The draft may be obtained from the Public Disclosure Division of the Commission.

Proposed Advisory Opinion 2003-24 will be on the Commission's agenda for its public meeting of Thursday October 9, 2003.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (EDT) on October 8, 2003.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case by case basis in special circumstances.

4) All comments timely received will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Disclosure Division.

CONTACTS

Press inquiries: Ron Harris (202) 694-1220

Acting Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copy of draft AO 2003-24 contact Public Records Office-
Public Disclosure Division (202) 694-1120, or 800-424-9530.

For questions about comment submission procedure contact
N. Bradley Litchfield, Associate General Counsel, (202) 694-1650.

ADDRESSES

Submit single copy of written comments to:

**Commission Secretary
Federal Election Commission
999 E Street NW
Washington, DC 20463**



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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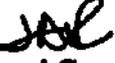
AGENDA ITEM
For Meeting of: 10-09-03
SUBMITTED LATE

MEMORANDUM

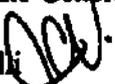
TO: The Commission

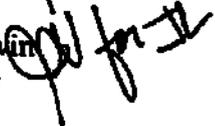
THROUGH: James A. Pehrkon 
Staff Director

FROM: Lawrence H. Norton 
General Counsel

James Kahl 
Deputy General Counsel

Rosemary C. Smith 
Acting Associate General Counsel

John C. Vergelli 
Acting Assistant General Counsel

Jonathan M. Levin 
Senior Attorney

Subject: Draft AO 2003-24

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for October 9, 2003.

Attachment

1 **ADVISORY OPINION 2003-24**

2 **Michael B. Trister, Esq.**
3 **Lichtman, Trister & Ross**
4 **1666 Connecticut Avenue, N.W.**
5 **Suite 500**
6 **Washington, DC 20009**

DRAFT

7
8 **Dear Mr. Trister:**

9 **This responds to your letters dated June 26 and August 5, 2003, requesting an**
10 **advisory opinion on behalf of the National Center for Tobacco-Free Kids ("NCTFK"),**
11 **concerning the application of the Federal Election Campaign Act of 1971, as amended**
12 **("the Act"), and Commission regulations to the use of contributor information contained in**
13 **the disclosure reports that candidate and other political committees file with the**
14 **Commission.**

15 ***Background***

16 **You state that NCTFK is a corporation organized under 26 U.S.C. 501(c)(3) that**
17 **engages in public education and advocacy concerning the effects of smoking, the efforts of**
18 **the tobacco industry to market tobacco products to young people, and public policies to**
19 **limit the use of tobacco products. NCTFK is funded by grants from private foundations,**
20 **corporations, and individuals. You assert that it does not participate or intervene in any**
21 **political campaign on behalf of, or in opposition to, any political candidate. NCTFK**
22 **frequently uses direct mail communications to educate members of the public concerning**
23 **the above-mentioned issues.**

24 **You state that NCTFK would like to obtain from disclosure reports filed with the**
25 **Commission the names of those individuals who make contributions to political**

1 committees in order to send NCTFK information to them via direct mail. Such
2 communications will discuss the health effects of smoking, and provide information about
3 efforts to control tobacco use, such as higher State tobacco taxes, FDA regulation of
4 marketing, and smoking cessation and prevention programs. You provide examples of
5 your communications in your request. Some of the communications will also include what
6 you describe as a "call-to-action" urging recipients to contact Federal or State legislators
7 and other public officials in support of specific tobacco-control initiatives. Other
8 communications may refer to the Federal candidate to whom the recipient contributed and
9 include a "call-to-action" to contact that officeholder to express an opinion about the need
10 to adopt effective tobacco controls. You state that none of the communications sent to
11 such individuals will expressly advocate the election or defeat of any candidate, nor will
12 such communications constitute electioneering communications as defined in 2 U.S.C.
13 434(f)(3).

14 You state that the communications sent to these individuals are not themselves
15 intended to raise funds for NCTFK or any other organization, and will themselves not
16 contain a solicitation for donations to NCTFK or any other organization.

17 You state that NCTFK does not currently sell, lease or exchange names from its
18 general mailing list to, or with, other organizations, businesses or individuals. You
19 indicate that if this practice should change, NCTFK will ensure that no names initially
20 obtained from FEC records would be sold, leased, or exchanged unless the name has also
21 been added to the general mailing list independently of the direct mail communications to
22 individuals whose names were obtained from the FEC records. The Commission assumes

1 that this means that, if any such name is used, it is because it was obtained from another
2 source and that no information obtained from FEC reports would be used to update or
3 otherwise clarify any information as to the person.

4 You state that NCTFK is planning to allow certain allied organizations to send
5 messages to subsets of NCTFK's general mailing list in furtherance of NCTFK's charitable
6 and educational purposes. All such communications would be done subject to NCTFK's
7 review and approval, and no fee (or exchange) would be charged for such use. Neither
8 NCTFK nor the allied organizations would use any communications to individuals on the
9 NCTFK FEC contributor list to sell literature or other items, or to raise any funds. Further,
10 allied organizations would not use the information for fundraising or membership
11 solicitation purposes.

12 You state that neither NCTFK nor any allied organization would use names
13 obtained from reports filed with the Commission to update or enhance mailing lists used
14 for rental, sales, or exchanges, or for the receipt of sales offers.

15 You ask a series of questions about whether NCTFK may make certain
16 communications to the individuals whose names it would obtain from FEC reports.

17 ***Questions Presented***

18 1. May NCTFK use information from FEC reports to communicate with contributors
19 to candidates and political committees, where such communications are limited to
20 providing information about issues and policies and do not contain any form of call-to-
21 action?

- 1 **2. May NCTFK use information from FEC reports to communicate with contributors**
2 **to candidates and political committees, where such communications contain both**
3 **information about issues and policies and a generic call-to-action urging recipients to**
4 **contact Federal officeholders and other public officials concerning the subject of the**
5 **communication?**
- 6 **3. May NCTFK use information from FEC reports to communicate with contributors**
7 **to candidates and political committees, where such communications contain both**
8 **information about issues and policies and a specific call-to-action urging recipients to**
9 **contact a named Federal officeholder to whom they previously contributed concerning the**
10 **subject of the communications?**
- 11 **4. May any of the communications described in questions 1 through 3 include a pre-**
12 **addressed postcard through which recipients of the communication may indicate their**
13 **interest in receiving additional information from NCTFK, which would result in**
14 **respondents being put on a broader list of people to whom NCTFK periodically sends**
15 **various educational and advocacy communications that could sometimes include a**
16 **solicitation for donations (the "general mailing list")?**
- 17 **5. May any of the communications described in questions 1 through 3 direct interested**
18 **persons to NCTFK websites through which they may choose to send messages to their**
19 **elected representatives or others regarding various tobacco control issues?**
- 20 **6. If the answer to question 5 is yes, may NCTFK include the names and contact**
21 **information of those who take action through an NCTFK website on NCTFK's general**

1 mailing list of persons who will receive future communications from NCTFK which could
2 include a solicitation for donations to NCTFK as described above?

3 7. If the answer to question 4 or 6 is no, may persons who return the postcards or take
4 action on NCTFK websites be included in NCTFK's general mailing list of persons who
5 may be solicited for donations by NCTFK after a reasonable period, such as one year?

6 *Legal Analysis and Conclusions*

7 Your questions fall into three categories. Questions 1, 2, and 3 present
8 communications that are permissible. The communication in question 5 is permissible if
9 certain conditions are met to preclude the possibility of later solicitation. The
10 communications in questions 4, 6, and 7 are impermissible because they will lead directly
11 to solicitation.

12 The Act provides that the Commission shall make reports and statements filed with
13 it available to the public for inspection and copying within 48 hours after receipt. 2 U.S.C.
14 438(a)(4). No information copied from such reports or statements, however, may be sold
15 or used by any person for the purpose of soliciting contributions or for any commercial
16 purpose, other than using the name and address of any political committee to solicit
17 contributions from such committee. 2 U.S.C. 438(a)(4); 11 CFR 104.15(a). Under
18 Commission regulations, "soliciting contributions" includes soliciting any type of
19 contribution or donation, such as political or charitable contributions. 11 CFR 104.15(b).

20 Based on the legislative history of the Act, the Commission has previously stated
21 that the principal purpose of restricting the sale or use of information copied from reports is
22 to protect individual contributors from having their names sold or used for commercial

1 purposes. See Advisory Opinions 1998-4, 1995-9, 1995-5, 1989-19, 1984-2, and 1980-
2 101. The prohibition against the use of these names for commercial purposes extends to
3 encompass all kinds of solicitations, "i.e., not merely for solicitations for 'contributions',
4 but solicitations for cars, credit cards, magazine subscriptions, cheap vacations, and the
5 like." *Federal Election Commission v. Political Contributions Data, Inc.*, 943 F.2d 190,
6 197 (2d Cir. 1991). The Commission applied this reasoning in Advisory Opinion 1995-5
7 where it concluded that an organization could not send its bulletin to persons whose names
8 and addresses were obtained from FEC reports when the bulletin offered more bulletin
9 copies for sale and solicited donations.

10 The Commission has determined that the Act permits the use of other items of
11 information from reports for solicitation or for commercial purposes. For example,
12 candidate names and addresses may be used to solicit ads from them. Solicitation of
13 information and subscriptions may be sent to persons who receive committee expenditures.
14 Candidate solicitation letters may use expenditure totals obtained from reports filed by
15 other candidates. See Advisory Opinions 1983-44, 1981-38, and 1980-78. The
16 Commission has also determined that the Act permits communications to persons whose
17 names were obtained from reports of contributors as long as no solicitation or commercial
18 purpose is involved. For example, a candidate was permitted to contact contributors to an
19 unauthorized campaign committee to tell those contributors that the committee was
20 unauthorized and to suggest that they seek refunds, but was not permitted to solicit
21 contributions to the authorized committee. See Advisory Opinion 1984-2. A candidate was

1 also permitted to send a letter to his opponent's contributors to correct allegedly defamatory
2 statements made by his opponent. See Advisory Opinion 1981-5.

3 *Application to your proposed communications.*

4 Questions 1, 2, and 3, present communications that would provide the recipient
5 with information about NCTFK's causes and, in the case of questions 2 and 3, a plea for
6 the recipient to contact directly elected officials and to voice his or her opinion regarding
7 such causes. These communications neither require the recipient to respond to NCTFK in
8 order to "take action," nor do they require the recipient to provide any personal information
9 to NCTFK. Because these communications would not result in any contributor
10 information being added to NCTFK's general mailing list for future solicitation, and would
11 not result in any offers for the sale of literature or any other item to the recipient, they are
12 allowable uses of the contributor information taken from FEC reports.

13 Question 5 presents a communication that, on its face, would appear to be similar to
14 those communications presented in questions 1, 2, and 3. However, upon examining the
15 websites you identify,¹ the Commission notes that sending messages through some of these
16 websites requires the user to provide personal information in order to send electronically a
17 form letter to an elected official, and that doing so would automatically add the user
18 sending the form letter to NCTFK's general mailing list, which in turn is likely to result in

¹ As well as the NCTFK websites mentioned in your request, tobaccofreekids.org and voicesagainsttobacco.org, you have specifically identified six other websites in communications with the Office of General Counsel. These are philipmorriscanhide.org, dontpardonbigtobacco.org, kidsbeforeprofits.org, saveamericaskids.org, protectamericaskids.org, and keepnewyorksmokefree.org. NCTFK has and will set up other such websites as well.

1 the eventual solicitation of donations to NCTFK and other organizations. In order for this
2 type of communication to be acceptable, your websites must conform, or must be modified,
3 to meet the following conditions:

4 Condition 1. The web page referred to in the communication must not require the
5 individual to submit personal information that would automatically put the individual on
6 NCTFK's general mailing list. Similarly, if the web page asks for personal information
7 while allowing the person to subscribe to a free newsletter, submitting the information
8 must not automatically put the person on NCTFK's general mailing list.

9 Condition 2. The web page referred to in the communication must not contain any
10 solicitation for donations to NCTFK or any other organization, or allow the recipient to
11 donate to NCTFK or any other organization, either using the web page or otherwise. For
12 example, the web page must not generate a pop-up window stating, "Click here to help
13 NCTFK," nor may it have a "Donate" link.

14 Condition 3. The web page referred to in the communication must not contain any
15 commercial offers. For example, there must not be a pop-up ad offering the recipient a
16 subscription to a newsletter at a cost.

17 The communications described in questions 4 and 6 would provide either a pre-
18 addressed post card (question 4) or would refer to a web page that the recipient could visit
19 to "take action" and send a form letter to elected officials (question 6). If the recipient
20 responds by providing personal information either on the postcard or on the web page, this
21 response would place the person on NCTFK's general mailing list, which is used for
22 solicitation purposes. Because being placed on NCTFK's general mailing list would

1 ultimately result in a solicitation, this is not a permissible use of FEC contributor
2 information. Thus, the answers to questions 4 and 6 are no.

3 Question 7 asks, if questions 4 and 6 are answered in the negative, whether
4 solicitations would be acceptable after a period of 1 year. The Commission notes that there
5 is no "cooling off" period or "waiting period" in the Act or in Commission regulations with
6 regard to the use of contributor information derived from filed reports and statements.
7 Therefore, the answer to question 7 is no.

8 *Selling, Leasing, or Exchanging Contributor Information from FEC Records*

9 The Commission notes with approval your representation that neither NCTFK nor
10 any allied organization will sell, lease or exchange the contributor information you take
11 from FEC records. This condition is essential to the Commission's conclusion in this
12 advisory opinion.

13 This response constitutes an advisory opinion concerning the application of the Act
14 and Commission regulations to the specific transaction or activity set forth in your request.
15 See 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the
16 facts or assumptions presented, and such facts or assumptions are material to a conclusion

17

1 presented in this opinion, then the requestor may not rely on that conclusion as support for
2 its proposed activity.

3 Sincerely,

4

5 Ellen L. Weintraub
6 Chair

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8 Enclosures (AOs 1998-4, 1995-9, 1995-5, 1989-19, 1984-2, 1983-44, 1981-38, 1981-5,
9 1980-101, and 1980-78)