



FEDERAL ELECTION COMMISSION
Washington, DC 20463

October 31, 2013

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2013-11

William J. Olson, Esq.
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Dear Mr. Olson:

We are responding to your advisory opinion request on behalf of Citizens for Joe Miller (the “Committee”) concerning the application of the Federal Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations to the use of campaign funds for litigation purposes. The requestor asks whether the Committee may use campaign funds to post a cash deposit in lieu of a supersedeas bond on appeal from an Alaska state court judgment against former Senate candidate Joseph Miller and/or to pay the final judgment should Miller be unsuccessful in his appeal. The Commission concludes that the Committee may use campaign funds as discussed herein because the lawsuit would not have existed irrespective of Miller’s campaign.

Background

The facts presented in this advisory opinion are based on your submissions received on July 10, July 18, and August 1, 2013, and court records from the litigation at issue, *Fairbanks Daily News Miner v. Fairbanks North Star Borough*, Case No. 4FA-10-02886CI (Alaska Super. Ct.).¹

Joseph Miller was a candidate for U.S. Senate from Alaska in 2010. Prior to becoming a candidate, Miller had worked as an attorney for the Fairbanks North Star Borough (the “Borough”), a municipal corporation and political subdivision in Alaska. In 2010, four media outlets — the Fairbanks Daily News-Miner, the Alaska Dispatch, the Associated Press, and the Anchorage Daily News — sought access to Miller’s employment records by filing public document requests with the Borough. The Borough

¹ Unless otherwise noted, the court documents cited herein were submitted as part of the advisory opinion request and are available at www.fec.gov/searchao.

refused to release certain requested records without Miller's consent, which he declined to give.

In October 2010, the media entities filed suit against the Borough in Alaska state court to obtain Miller's employment records. The plaintiffs argued that pre-election disclosure of the relevant personnel records was necessary to further "the electorate's right to truthful and full disclosure of information relating to a political candidate." Compl. for Access to Public Records ¶ 11 (Oct. 11, 2010) (complaint of Fairbanks Daily News-Miner); *see also* Compl. for Access to Public Records Concerning U.S. Senate Candidate Joe Miller (Oct. 11, 2010) (complaint of Alaska Dispatch). Miller intervened as a defendant in the litigation on the grounds that he was an indispensable party because only he could protect his privacy interests. Miller also filed cross-claims against the Borough for alleged violations of Miller's privacy, and he filed a similar third-party claim against the Borough's mayor.

On October 23, 2010, the trial court issued an opinion ordering the Borough to disclose Miller's employment records. The court ruled that "although Mr. Miller has a legitimate expectation of privacy in those documents, Mr. Miller's right to privacy is . . . outweighed by the public's significant interest in the background of a public figure that is running for U.S. Senate." Transcript of Status Hearing at 119 (Oct. 23, 2010). This opinion essentially resolved the media entities' original suit. All of the media outlets except the Alaska Dispatch then waived their rights to fees and costs in exchange for Miller's agreement to dismiss them from the case. Alaska Dispatch continued to participate in the case "in light of Miller's ongoing attempts to identify the newspaper's source of the information about his Borough employment." *See* Order Granting Motion for Attorney's Fees and Costs at 10 (May 16, 2013).² During this post-election phase of the litigation, some depositions were taken and numerous motions were filed. Alaska Dispatch was an "active participant" in these motions. *Id.* at 9.

The litigation regarding Miller's cross-claims and third-party claims against the Borough and its mayor continued until August 29, 2012, when the court entered a final judgment in favor of Miller against the Borough and its mayor, jointly and severally, in the amount of \$5,000. The Alaska Dispatch moved against Miller for an award of attorneys' fees and costs, the majority of which the Alaska Dispatch had incurred during the post-election phase of the litigation. On May 16, 2013, the court found that the "principal dispositive issue in the case — the release of the documents" had been resolved in favor of Alaska Dispatch. *See id.* at 12. The court therefore determined that the Alaska Dispatch was the prevailing party "for the entirety of the case" and awarded it reimbursement of a portion of the fees and costs incurred in the litigation, including an award of \$85,435 against Miller. *Id.* at 26-27. This award included an enhancement based on the court's finding that the Alaska Dispatch had incurred fees in support of "significant matters," *i.e.*, "the public's right to make informed decisions concerning electoral candidates." *Id.* at 25.

² Available at <http://www.alaskadispatch.com/sites/default/files/Miller-to-pay-Alaska-Dispatch-85k.pdf>.

On July 15, 2013, Miller filed a timely appeal of the award against him. The relevant civil rules require him to post with the court a cash deposit or supersedeas bond pending appeal. *See* Alaska R. App. P. 602(f), (g).

Question Presented

May the Committee use campaign funds to post with the court a cash deposit pending Miller's appeal of the court's decision and/or to pay the judgment should his appeal be unsuccessful?

Legal Analysis and Conclusions

Yes, the Committee may use campaign funds as discussed herein because the lawsuit would not have existed irrespective of Miller's campaign.

The Act identifies six categories of permissible uses of contributions accepted by a federal candidate. 2 U.S.C. § 439a(a); *see also* 11 C.F.R. Part 113. These permissible uses include: (1) "otherwise authorized expenditures in connection with the [candidate's] campaign for Federal office,"; (2) "ordinary and necessary expenses incurred in connection with the duties of the individual as a holder of Federal office"; and (3) "any other lawful purpose" that does not constitute conversion to "personal use." 2 U.S.C. § 439a(a)(1), (2), (6), (b); *see also* 11 C.F.R. § 113.2. Conversion to personal use occurs when campaign funds are used "to fulfill any commitment, obligation or expense . . . that would exist irrespective of the candidate's election campaign or . . . duties as a holder of Federal office." 2 U.S.C. § 439a(b)(2); *see also* 11 C.F.R. § 113.1(g). Commission regulations provide that the Commission determines on a case-by-case basis whether the use of campaign funds to pay "legal expenses" falls within the definition of "personal use." 11 C.F.R. § 113.1(g)(1)(ii)(A).

The Commission has long provided that if a candidate "can reasonably show that the expenses at issue resulted from campaign or officeholder activities, the Commission will not consider the use to be personal use." Expenditures; Reports by Political Committees; Personal Use of Campaign Funds, 60 Fed. Reg. 7862, 7867 (Feb. 9, 1995). Legal fees and expenses, however, "will not be treated as though they are campaign or officeholder related merely because the underlying proceedings have some impact on the campaign or the officeholder's status." *Id.* at 7868. The Commission has therefore concluded that campaign funds may be used to pay for legal expenses incurred in proceedings that directly relate to the candidate's campaign activities or officeholder duties. *See e.g.*, Advisory Opinion 2011-07 (Fleischmann) (permitting use of campaign funds to pay legal expenses incurred by campaign consultant in defending lawsuit alleging that consultant had defamed competing candidate's staffer and improperly disclosed employment materials); Advisory Opinion 2009-20 (Visclosky) (concluding that campaign funds could be used to pay legal expenses incurred by former congressional staffers in connection with federal investigation of contributions to Representative's campaign); Advisory Opinion 2009-12 (Coleman) at 7-8 (concluding

that campaign funds could be used to pay legal expenses incurred to monitor, preserve documents for, and prepare for officeholder's possible involvement in third-party lawsuits regarding alleged scheme to "divert money" for Senator's benefit). On the other hand, "legal expenses associated with a divorce or charges of driving under the influence of alcohol will be treated as personal, rather than campaign or officeholder related." *See* 60 Fed. Reg. at 7868.

Here, the Alaska media outlets' suit to obtain Miller's personnel records, as well as the court's order granting that relief, directly related to his federal campaign. The plaintiffs asserted in their civil complaints that the disclosure of these records was necessary for the Alaska electorate to be able to "fully, fairly, and timely consider matters relevant to Mr. Miller's candidacy." Complaint for Access to Public Records Concerning U.S. Senate Candidate Joe Miller ¶ 20 (Oct. 11, 2010). The plaintiffs alleged that "[w]ithout full and timely disclosure of the documents pertaining to Mr. Miller's former employment with the Borough the public [would] be left with an incomplete picture about the employment history, and the integrity and truthfulness of a potential holder of one of the state's highest political offices." *Id.*; *see also* Complaint for Access to Public Records ¶¶ 10-11 (Oct. 11, 2010). The court then ordered the Borough to disclose the documents because the public's interest in them outweighed Miller's right to privacy "since he is now a candidate for the U.S. Senate." *See* Transcript of Status Hearing at 118-19 (Oct. 23, 2010). The court record thus makes clear that the lawsuit was directly and explicitly related to Miller's candidacy and would not have existed irrespective of his campaign.

Although most of the fees and costs awarded against Miller were incurred in the post-election phase of the litigation, *see* Alaska Dispatch, Comment on AOR 2013-11 (Aug. 27, 2013); Response and Qualified Objection of Alaska Dispatch to Defendant Joe Miller's Notice of Cas[h] Deposit in Lieu of Bonds at 4-7 (July 2, 2013), whether a claim is litigated before or after an election is not dispositive. Lawsuits involving election campaigns are often litigated after the election, and the Commission has never barred the use of campaign funds to pay for legal expenses on this temporal ground. Indeed, on more than one occasion the Commission has allowed campaign funds to be used to pay for lawsuits that were not filed until after the election. *See, e.g.*, Advisory Opinion 2011-07 (Fleischmann) (allowing use of campaign funds to defend suit filed in 2011 regarding 2010 campaign); Advisory Opinion 1995-23 (Shays).

Moreover, although the cross-claim here was litigated after the election, under Alaska Rules of Civil Procedure a cross-claim must "[arise] out of the transaction or occurrence that is the subject matter of the original action." *See* Alaska R. Civ. P. 13(g). The original action, which was directly related to Miller's candidacy and litigated before the election, concerned the release of Miller's employment records. Miller intervened in the original action to defend his privacy interests in the release of those records. His cross-claim against the Borough, a party to the original action, was related to the disclosure of those records. The Borough's mayor, although not an original party, was joined to the original action by Miller's cross-claim. *See* Alaska R. Civ. P. 13(h). Miller's third-party claim against the mayor similarly related to the disclosure of Miller's

employment records that were the subject of the original action. The fact that the Alaska court allowed the cross-claim and third-party claim to be joined to the original action means that the court necessarily determined that these claims arose out of the same transaction or occurrence that was the subject matter of the original action.

Because the post-election phase of the litigation was inextricably linked to the initial lawsuit to release the documents, the Commission concludes that the post-election phase of the litigation would not have arisen irrespective of his candidacy. Thus, the post-election timing of some of the litigation — including the portion accounting for most of the judgment against him — has no bearing on Miller’s ability to use campaign funds for his cash deposit.³ Once that deposit is posted, the Commission recognizes that under the relevant court rules Alaska Dispatch would have the right to apply the deposited funds in satisfaction of the judgment if Miller’s appeal were unsuccessful.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. § 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. § 437f(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law, including, but not limited to, statutes, regulations, advisory opinions, and case law. The cited advisory opinions are available on the Commission’s website, www.fec.gov, or directly from the Commission’s Advisory Opinion searchable database at www.fec.gov/searchao.

On behalf of the Commission,

(signed)
Ellen L. Weintraub
Chair

³ The Commission notes that when using campaign funds for costs resulting from offensive litigation, there must be “no direct or indirect . . . financial benefit to the requestor as a result of the award and use of” awarded damages. Advisory Opinion 1997-27 (Boehner). Miller’s appeal challenges the award of fees and costs against him; it does not appear to seek damages. *See* Response and Qualified Objection of Alaska Dispatch at 2 n.1 (July 2, 2013).