

CONCURRING OPINION IN ADVISORY OPINION 2003-24

of

COMMISSIONER MICHAEL E. TONER

I voted to approve the draft advisory opinion denying the National Center for Tobacco Free Kid's (NCTFK) request to use contributor information from the FEC's public disclosure database because I believe that the Commission's disclosure database should not be used for any private or political purpose, even if such use is not solely for fundraising or commercial activities.

While this conclusion rests on an admittedly broad reading of the statutory prohibition at 2 U.S.C. § 438(a)(4) on the use of contributor information obtained from FEC reports, the legislative history indicates that Congress, in enacting the provision, sought to broadly protect the privacy rights of contributors whose names and personal information FECA mandates be collected by the federal government and disclosed to the public. I also believe that such a broad reading of § 438(a)(4) is consistent with the Supreme Court's concern about protecting the privacy interests of contributors who are required to reveal personal information to the government and have that information disseminated to the public.

Reasonable people can differ over whether the activity the requestor here seeks to undertake is barred by § 438(a)(4). However, I believe it is appropriate to broadly construe § 438(a)(4) and err on the side of protecting individual privacy rights rather than allowing a government mandated disclosure database to be used for political purposes. If the Commission's decision today strikes the wrong balance, Congress can take legislative action to clarify the proper scope of § 438(a)(4).

The Act states that "any information copied from [FEC] reports or statements may not be sold or used by any person for the purpose of soliciting contributions or for commercial purposes." 2 U.S.C. § 438(a)(4). The Commission's Regulations state that "any information copied, or otherwise obtained, from any [FEC] report or statement, or any copy, reproduction, or publication thereof, filed under the Act, shall not be sold or used by any person for the purpose of soliciting contributions or for any commercial purpose." 11 CFR § 104.15(a).

The legislative history behind § 438(a)(4) indicates that Congress was committed to safeguarding the privacy rights of contributors in a broad fashion:

The purpose of this amendment is to protect the privacy of the generally very public-spirited citizens who may make a contribution to a political campaign or a political party. We all know how much of a business the matter of selling lists and list brokering has become. These names would certainly be prime prospects for all kinds of solicitations, and I am of the opinion that unless this amendment is adopted, we will open up the citizens who are generous and public spirited enough to support our political activities to all kinds of harassment, and in that way tend to discourage them from helping out as we need to have them do. 117 Cong. Rec. 30057-58 (1971) (statement of Senator Bellmon).

NCTFK seeks to use names and contact information obtained from FEC disclosure reports to send direct mail communications to "educate members of the public concerning the health effects of smoking, the activities of the tobacco industry, and public policy issues of importance to controlling the use of tobacco." Request at 2. NCTFK further states that it would like to use the names and addresses of contributors because it is an efficient way to identify politically active individuals. *Id.* NCTFK also states that the information sent to individuals obtained from the FEC database would not expressly advocate the election or defeat of any candidate for federal or state office but would include a call to action urging recipients to contact federal or state legislators and other public officials. *Id.* NCTFK states that the communications will not contain a solicitation for contributions to NCTFK or any other organization. *Id.*

I believe that NCTFK's request to use FEC disclosure reports to contact contributors in this manner raises serious concerns about protecting the privacy of individuals who are required under FECA to disclose personal information about themselves that may not be publicly available or otherwise as easily ascertainable. The Supreme Court in *Buckley v. Valeo* emphasized that "compelled disclosure in itself may seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 64 (1976). The Court made clear that "in some instances, disclosure may even expose contributors to harassment or retaliation. These are not insignificant burdens on individual rights." *Id.* at 68.

To permit private interests to use the names and addresses of individuals compiled under government mandate would burden the privacy interests of contributors by potentially exposing them to targeted mailings and other communications, arising solely as a result of their decision to contribute to and associate with certain federal candidates. Furthermore, such targeted communications could potentially lead to harassment or be viewed as retaliation for contributions to certain candidates who support different political and policy views.

The Supreme Court in *Buckley* upheld the constitutionality of FECA's mandatory disclosure provisions, but only to the extent that such disclosures are necessary to prevent corruption or the appearance of corruption. *See Buckley*, 424 U.S. at 67 (1976). However, this governmental interest is not served by allowing private interests to access and use a government mandated and funded database to contact contributors. Allowing such use does not educate the electorate on the sources of candidate contributions, nor does it generate any information necessary to promote enforcement of the contribution limits and prohibitions. Rather, it would allow a private group to target specific contributors based on their decision to support a federal candidate. The governmental interests in disclosure that were recognized in *Buckley* would not be advanced by such activities, and the privacy rights of contributors would be directly burdened.

In light of the foregoing, I voted with a majority of the Commission to deny the request by NCTFK to use the FEC's contributor information for the purposes set out in the advisory opinion request. I believe this decision is consistent with the broad contributor privacy interests that underlie § 438(a)(4) and with the teachings of *Buckley*.

October 27, 2003

Michael E. Toner, Commissioner