



State of New Jersey

ELECTION LAW ENFORCEMENT COMMISSION

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March 16, 2005

BY FAX AND FIRST CLASS MAIL

Angelo C. Morresi, Esq.
DiGaetano for Governor, Inc.
P.O. Box 9216
Lyndhurst, New Jersey 07071

Advisory Opinion No. 01-2005

Dear Mr. Morresi:

The Commission has considered your request for an advisory opinion and directed me to issue this response. You are counsel to DiGaetano for Governor, Inc., the 2005 primary election candidate committee of publicly-financed gubernatorial candidate Paul DiGaetano, and your questions concern the permissible uses of gubernatorial public matching funds. The Commission notes that the New Jersey Campaign Contributions and Expenditures Reporting Act, N.J.S.A. 19:44A-1 et seq. (hereafter, the Campaign Reporting Act), and Commission regulations specifically limit the use of public matching funds to seven enumerated purposes, which include paying for the costs of voter communications (including media time, outdoor signs, billboards, newspaper and magazine advertisements, and printing and mailing of campaign literature), legal and accounting costs incurred in complying with the public financing provisions of the Campaign Reporting Act and Commission regulations, and specified telephone costs; see N.J.S.A. 19:44A-35 and N.J.A.C. 19:25-16.25.

Questions Presented

You have asked whether or not gubernatorial public matching funds may be used to pay for the following: “development and operation of an Internet Web Site,” producing and placing electronic communications on the Internet, sending “email messages to New Jersey voters,” and purchasing “email lists of potential New Jersey voters for communication over the Internet.”

Commission Response

For the reasons discussed below, the Commission advises you that, with the exception of the campaign’s costs to develop and operate the Internet web site, as constrained below, it is permissible to use gubernatorial public matching funds for the purposes you have described.

Submitted Facts

Paul DiGaetano is a candidate for nomination for election to the office of Governor in the 2005 primary election and has applied for and been determined to be qualified to receive public matching funds, pursuant to the Campaign Reporting Act, specifically N.J.S.A. 19:44A-3m and N.J.A.C. 19:25-16.3. Public matching funds in the amount of \$418,800.00 have to date been deposited into Candidate DiGaetano's public funds account established pursuant to N.J.A.C. 19:25-16.20. You have stated that public matching funds have not been used by the DiGaetano candidate committee to date for any of the purposes that are the subject of this request, and that the "web site, email messages, and email lists will not be used for fund raising purposes."

Discussion

Web Site Communications

The Commission concurs with your characterization of an Internet web site as "an important method for a gubernatorial candidate to communicate with New Jersey voters," and concludes that a candidate's messages, communicated on the candidate's Internet web site, serve the same purpose as and are the functional equivalent of campaign literature and brochures, which may be paid for with public matching funds; see N.J.S.A. 19:44A-35a(5) and N.J.A.C. 19:25-16.25(a)5. The purpose of each is to communicate the candidate's message to voters. The Internet is a technological method of delivery of the candidate's message that was not contemplated when the public financing provisions of the Campaign Reporting Act were enacted.

As you have noted, the Commission has addressed the incorporation of new technology in gubernatorial campaigns. In Advisory Opinion 09-2001, the Commission was asked whether or not a gubernatorial campaign could use public matching funds to pay for Internet banner advertisements, which are a form of advertising available to readers of on-line newspapers and periodicals. The Commission concluded that Internet banner advertisements "serve the same purpose of voter communication as advertisements in newspapers or regularly published periodicals that may be purchased by a candidate committee, and that the extension of the use of public matching funds to include this purpose is consistent with the intent of Section 35 [N.J.S.A. 19:44A-35]." The Commission similarly believes that the costs of producing and placing electronic communications on a candidate's Internet web site are purposes consistent with the voter communication uses of public matching funds because they are the equivalent of costs to print and mail campaign literature; see N.J.S.A. 19:44A-35a(5) and N.J.A.C. 19:25-16.25(a)5.

While you have indicated that the web site will not be used for fund raising purposes, the Commission advises you that costs to develop and operate the candidate's web site may only be paid with public matching funds to the extent they relate directly to communication of a candidate's message to voters. For example, if the website is used for fundraising purposes to solicit and receive contributions, web site development and operation costs attributable to such purposes may not be paid with public matching funds. This result is consistent with the uses of matching funds specifically enumerated in the Campaign Reporting Act because there is no mention that matching funds may be used for fundraising activities; see N.J.S.A. 19:44A-35.

Email Communications

The Commission further concludes that email messages sent by a publicly-financed gubernatorial candidate to New Jersey voters serve the same purpose as campaign literature and brochures, discussed above, and as telephone communications to voters. The Campaign Reporting Act not only permits the use of public funds to pay the costs of printing and mailing campaign literature, but also permits payment of telephone deposits, installation charges, and "monthly billings in excess of deposits" as permissible uses of public matching funds; see N.J.S.A. 19:44A-35a(7) and N.J.A.C. 19:25-16.25(a)7. As you noted in your request, the difference between an email message to a voter and a telephone call "is the device on which the New Jersey voter receives the campaign communication, namely a computer monitor." The Commission finds that it is permissible to use public matching funds to pay the costs of producing and sending email communications that deliver a candidate's message to voters.

Purchase of Email Lists

You have also asked whether or not it is permissible to use public matching funds to purchase lists of email addresses to permit the campaign to conduct email communications with voters. In Advisory Opinion 13-1981, a publicly-financed gubernatorial campaign was advised that it was permissible to use matching funds to purchase “tapes and lists from a direct mail agency in order to obtain names for mailing campaign literature.” The Commission similarly believes that a list of email addresses serves the same function for a gubernatorial campaign in 2005 as a mailing list purchased in 1981 from a direct mail agency. Each list is necessary to the distribution of campaign literature “under the name of any qualified candidate”; see N.J.S.A. 19:44A-35a(5) and N.J.A.C. 19:25-16.25(a)5. You are therefore advised that it is permissible to use public matching funds to purchase an email list.

Political Identification

In your inquiry you indicate that the campaign “web site and email messages will include the political identification requirements of N.J.S.A. 19:44A-22.3 and N.J.A.C. 19:25-13.1 *et. seq.*” N.J.S.A. 19:44A-22.3 and N.J.A.C. 19:25-13.2(a) require that any communication financed by Candidate DiGaetano’s candidate committee include the name and address of the committee as the information appears on the Single Candidate Committee - Certificate of Organization and Designation of Campaign Treasurer and Depository (Form D-1) filed with the Commission by the candidate committee. In defining the communications which must include political identification information, N.J.A.C. 19:25-13.1 includes a communication “accessed by electronic means, including, but not limited to, the Internet.” The Commission therefore reiterates the importance of including political identification information on all communications issued by Candidate DiGaetano’s candidate committee, including electronic communications such as the web site and email, which permit the recipient to identify the campaign as the source of the communication.

Thank you for submitting this request and for your interest in the work of the Commission.

Very truly yours,

ELECTION LAW ENFORCEMENT
COMMISSION

By: _____
NEDDA G. MASSAR, ESQ.

MAR 01 2005



ADVISORY OPINION REQUEST

A person, committee or entity subject to, or reasonably believing he, she or it may be subject to, any provision or requirement of the Campaign Reporting Act may request that the Commission provide an advisory opinion pursuant to N.J.S.A. 19:44A-6. Such request must be in writing (please type or print) and must include the following:

1. This request for an Advisory Opinion is being submitted on behalf of:

Full Name of Person, Committee or Entity
DiGaetano for Governor, Inc.

Mailing Address
P.O. Box 9216

Lyndhurst, NJ 07071

*Day Telephone No.
201-896-0107

*Evening Telephone No.
201-896-0107

2. Indicate if the above named person, committee or entity currently files reports with the Commission:

Yes No

a. If yes, indicate in what capacity it is filing:

- | | | | |
|----------------------------------|-------------------------------------|---|--------------------------|
| Candidate committee | <input checked="" type="checkbox"/> | Recall committee | <input type="checkbox"/> |
| Joint candidates committee | <input type="checkbox"/> | Recall defense committee | <input type="checkbox"/> |
| Political committee | <input type="checkbox"/> | Lobbyist | <input type="checkbox"/> |
| Continuing political committee | <input type="checkbox"/> | Legislative agent | <input type="checkbox"/> |
| Political party committee | <input type="checkbox"/> | Personal financial disclosure statement | <input type="checkbox"/> |
| Legislative leadership committee | <input type="checkbox"/> | Other (please describe): _____ | <input type="checkbox"/> |

b. If no, indicate if the above named person, committee or entity has in the past filed reports with the Commission, giving elections (i.e., 1992 general election) or calendar years, and identify filing capacity:

N/A

c. If reports are or were filed under a different name than that appearing in 1 above, provide that name:

N/A

3. Please provide below a statement of the cognizable question of law arising under the Campaign Reporting Act, including specific citations to pertinent sections of the Campaign Reporting Act and Commission regulations (if known).

See Attached.

*Leave this field blank if your telephone number is unlisted. Pursuant to N.J.S.A. 47:1A-1.1, an unlisted telephone number is not a public record and must not be provided on this form.

4. Please provide below a full and complete statement of all pertinent facts and contemplated activities that are the subject of the inquiry. Your statement must affirmatively state that the contemplated activities have not already been undertaken by the person, committee or entity requesting the opinion, and that the person, committee or entity has standing to seek the opinion, that is the opinion will affect the person's or committee's reporting or other requirements under the Act. (Attach additional sheets if necessary).

Statement of Facts:

See Attached.

5. Please provide below a statement of the result that the person, committee, or entity seeks, and a statement of the reasoning supporting that result.

See Attached.

6. Person who is submitting request on behalf of committee or entity listed in Item 1 above:

Full Name:

Angelo C. Morresi

Mailing Address:

43 Bennett Avenue

Cedar Grove, NJ 07009

*Day Telephone No.
973-239-5626

*Evening Telephone No.
973-239-5626

Fax Number:
973-857-9778

a. Official Capacity of Person Requesting Opinion:

Candidate

Treasurer

Organizational Treasurer

New Jersey Attorney representing requesting person, committee or entity

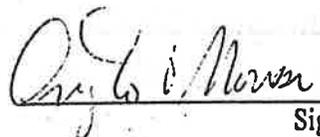
Other (please describe): _____

7. I hereby consent to an extension of the 10-day response period provided in N.J.S.A. 19:44A-6f to a 30-day period for Commission response, which period shall start on the date of Commission receipt of the completed advisory opinion request. (CROSS OUT THIS PARAGRAPH IF CONSENT IS WITHHELD).

8. A request for an advisory opinion will not be considered filed until a fully completed and signed application is received by the Commission.

February 28, 2005

Dated:



Angelo C. Morresi

Signature

I am an attorney representing DiGaetano for Governor, Inc. and am submitting this request for an advisory opinion to the Election Law Enforcement Commission (hereinafter, Commission) on behalf of DiGaetano for Governor, Inc., the candidate committee of the 2005 primary election publicly-financed gubernatorial campaign of candidate Paul DiGaetano.

Paul DiGaetano, the Republican candidate for Governor in the 2005 primary election, has applied for and been determined to be qualified to receive public matching funds, pursuant to the New Jersey Campaign Contributions and Expenditures Reporting Act, N.J.S.A. 19:44A-1 et seq. (hereafter, the Campaign Reporting Act), specifically N.J.S.A. 19:44A-3m and Commission regulation N.J.A.C. 19:25-16.3. Public matching funds in the amount of \$418,800 have to date been deposited into Candidate DiGaetano's public funds account established pursuant to N.J.A.C. 19:25-16.20. As a result of the receipt of these funds DiGaetano for Governor, Inc. has standing to seek this Advisory Opinion. This Advisory Opinion will affect DiGaetano for Governor, Inc.'s reporting or other requirements under The Campaign Reporting Act. The Campaign Reporting Act and Commission regulations strictly limit the use by Candidate DiGaetano of these public matching funds to an enumerated list of permitted purposes, (N.J.S.A. 19:44A-35a(1-7) and N.J.A.C. 19:25-25(a)(1-7)) which purposes include

1. The purchase of time on radio and television stations;
2. Purchase of rental space on outdoor signs or billboards;
3. Purchase of advertising space in newspapers and regularly published magazines and periodicals;
4. Payment of the cost of producing the material aired or displayed on radio, television, outdoor signs or billboards, and in newspapers, regularly published magazines and periodicals;
5. Payment of the cost of printing and mailing campaign literature and brochures distributed under the name of the candidate;

6. Payment of the cost of legal and accounting expenses incurred in complying with the public financing regulations of the commission and with the public financing provisions of the act;

7. Payment of the cost of telephone deposits, and installation charges and monthly billings in excess of deposits. Within six months after the primary election, a candidate shall return to the commission the amount of any public funds used to pay telephone deposits which are later returned.

In addition, the Commission, in Advisory Opinion 09-2001, found that airplane banner advertisements and Internet banner advertisements are included in the scope of voter communication contemplated by N.J.S.A. 19:44A-35 of the Campaign Reporting Act.

Public matching funds have not been used to date to pay for any of the purposes for which this advisory opinion is requested.

Question Presented

Pursuant to the Campaign Reporting Act and Commission regulations, may gubernatorial Candidate Paul DiGaetano use public matching funds to pay for the costs of development and operation of an Internet Web Site and related costs of producing and placing such electronic communication on the Internet including the sending of email messages to New Jersey voters? In addition may gubernatorial Candidate Paul DiGaetano use public matching funds to pay for the purchase of email lists of potential New Jersey voters for communication over the Internet purposes? The web site, the email messages, and email lists will not be used for fund raising purposes. The web site and email messages will include the political identification requirements of N.J.S.A. 19:44A-22.3 and N.J.A.C. 19:25-13.1 et. seq.

Discussion

We believe the intent of the Campaign Reporting Act is to allow the communication of all candidates' messages to the broadest numbers of New Jersey voters in the most cost

effective manner. Internet communication levels the playing field, in some respects, with regard to the amount money necessary to run an effective campaign.

As noted above, The Campaign Reporting Act and Commission regulations specifically limit the use of public matching funds to paying for the costs of voter communications (including media time, outdoor signs, billboards, newspaper and magazine advertisements, and printing and mailing of campaign literature), legal and accounting costs incurred in complying with the public financing provisions of the Campaign Reporting Act and Commission regulations, and telephone costs.

An Internet web site is an important method for a gubernatorial candidate to communicate with New Jersey voters. At the time the Campaign Reporting Act was enacted the Internet and its communication potential was not and could not be contemplated by the legislature. However, in 2005, in general, it has become a significant communications tool for businesses, the public and governmental to transmit all types of communications including advertising. Specifically for gubernatorial campaigns it has become imperative. A web site allows a candidate to communicate with millions of potential voters, on their time, with an unlimited amount of information, at a fraction of the cost of the traditional communication methods. Information and background on the candidate that heretofore would be impossible or prohibitively costly to deliver to New Jersey voters is now easily accessible by New Jersey voters. Further a web site is significantly more cost effective than television or radio advertisements in that monies are not wasted on attempting to reach New Jersey voters via the New York and Philadelphia media markets where the message is delivered to a large portion of disinterested New York and Pennsylvania voters in 30 second sound bytes.

The use of the Internet is a logical and seamless extension of the intent of the Campaign Reporting Act. The Commission has recognized this issue previously when it provided for the use of public matching funds for "internet banner advertising." (Advisory Opinion

09-2001) This "change in technology" type of extension of the Campaign Reporting Act has several other precedents. The Commission accepted cable television advertising as a suitable use of public matching funds even though when the Campaign Reporting Act was enacted there was little or no cable television advertising (i.e., most, if not all, advertising was via the broadcast media). The use of cable television communications for campaigns was not considered distinct from broadcast television communications. In addition, at the time of enactment there were little or no computer generated automated telephone communications and this is a commonly used communication tool today. Telephone costs and cable television advertising costs for voter communications are included in the list of costs that can be paid for by public matching funds.

The argument to include web site development and operation and email communication in the list of costs that can be paid for by public matching funds can be put very simply: Cable television line and telephone line communications are a technology to deliver communications that are already included in the list of acceptable public matching funds costs. An Internet Web Site is a communication tool, a 24 hour/day, 7 day/week, communication. An email message delivers a communication as any telephone call or postage mailing would. Web site and email communications use the very same cable and telephone lines to deliver a communication as the television and the telephone. The only difference is the device on which the New Jersey voter receives the campaign communication, namely a computer monitor. This difference is blurred further in that in many instances the television is used for Internet service so the reception device is the same, and cellular telephones can receive text messages via a telephone call.

The use of the Internet has become an important instrument of national, state and local election campaigns. A gubernatorial campaign requires this type of communication and its usage will continue to grow. It is a cost effective and extremely efficient method of communicating with the New Jersey voter and a proper use of public matching funds, particularly in the costly New Jersey media market.

Purchase of email address list

In addition to the above arguments, the purchase of lists of email addresses for the purpose of communicating via the Internet with New Jersey voters is an appropriate use of public matching funds for the following reasons.

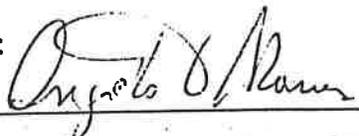
1. The United States Congress continues to regulate the Internet and recently enacted the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, or the CAN-SPAM Act of 2003 and it provides for specific limitations on the gathering of and sending to email addresses. In brief, this law, among other things, prohibits the use of email lists obtained by automated means from another web site, randomly generated email lists and email lists that include the addresses of recipients who were informed by their online service that their address would not be given, sold, or otherwise transferred. Therefore, in order to legally communicate with large numbers of New Jersey voters via the Internet, the purchase of a valid and in compliance email list of such New Jersey voters is essential.
2. The alternative to the purchase of the email list is the compilation of an email list on a one by one basis. While this may be some what effective for an established candidate or incumbent, who has had a web site for his/her constituents over a period of time, it is impractical for a new candidate in a statewide election (i.e., there are only three offices held statewide in New Jersey). It would require that a candidate obtain each email address as a result of some prior meeting, solicitation or media exposure including advertising that caused a New Jersey voter to go to the candidate's web site and register to receive email. It would essentially defeat the purpose of using the Internet as a cost effective communication tool, since monies would have to be spent on traditional forms of advertising in order to advertise the candidate and to develop the email address list.

3. The purchase of an email list and sending a detailed message about the candidate via the Internet is similar to the purchase of cable television advertising except it is extraordinarily less costly. In effect when public matching funds are used to purchase cable television advertising time, they purchase the subscriber list of the cable company. This is clearly the case since the amount of money the cable company charges to deliver the communication increases with the number of subscribers a candidate wishes to reach (i.e., Bergen County vs. all of North Jersey). The cable company then delivers the advertisement over its cable wires to the subscriber(s) who may or may not want to listen to the 30 seconds message. The cost of this subscriber list is amortized within the cost of the advertisement by the cable company.

Take note: The email message travels along the same cable line, in accordance with all state and federal laws and regulations, including the Commission's, at a fraction of the cost, (i.e., no actors, studio, media consultant or other production costs except a computer and a writer). The difference is the email addresses are purchased separately rather than included in the advertisement costs.

Based on the above discussion the DiGaetano for Governor, Inc. candidate committee believes the Commission can respond favorably to the questions presented.

Submitted by:



Angelo C. Morresi, Attorney at Law of NJ