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LEGAL MEMORANDUM

TO: Senator Josh Penry
FROM: Office of Legislative Legal Services
DATE: October 17, 2008
SUBJECT: Use of an e-mail database for election campaign communications.¹

I. Background

It is our understanding that legislators oftentimes create a database containing the e-mail addresses of constituents and other persons that have sent e-mail to the legislator on legislation and other legislative matters. The database is utilized to send e-mail messages in furtherance of the legislator's official responsibilities. These messages are ordinarily sent via a legislator's private e-mail service provider that is maintained at the legislator's expense. A question has arisen of whether it is permissible for a legislator to use his or her e-mail database to send messages, on the legislator's own time and at his or her own expense, to persons that relate to an election campaign.

II. Issue Presented

Is it permissible for a legislator, on the legislator's own time and at his or her own expense, to use an e-mail database of constituents and other persons that was created in the course of the legislator's official duties for the purpose of sending them election campaign related messages?

III. Conclusion

Yes. Although there appears to be no judicial precedent directly

¹ This legal memorandum results from a request made to the Office of Legislative Legal Services (OLLS), a staff agency of the General Assembly. OLLS legal memoranda do not represent an official legal position of the General Assembly or the State of Colorado and do not bind the members of the General Assembly. They are intended for use in the legislative process and as information to assist the members in the performance of their legislative duties.

addressing this particular question, it is reasonable to conclude that use of an e-mail database that was created in furtherance of the legislator's official responsibilities to subsequently send election campaign related messages by means of a private e-mail service provider and on the legislator's own time is not violative of the Fair Campaign Practices Act (the "FCPA") or other law or rule.

IV. Analysis

A. **The FCPA prohibits a state department or agency from making a contribution in a candidate campaign or expending public moneys or making a contribution to support or oppose a ballot measure.**

Initially, there appears to be no judicial or ALJ decision directly addressing the question presented here. The FCPA prohibits an agency or department of the state from making a contribution to an election campaign involving a candidate and from expending public monies or making contributions in support of or opposition to any ballot measure.² However, a legislator is not prohibited from expressing a "personal opinion" on a ballot measure or from expending personal funds, making contributions, or using personal time to urge electors to vote in favor of such a measure.³

Accordingly, the elements necessary to prove that the activity of a state legislator or legislative staff person violates this FCPA prohibition are:

1. That the General Assembly is a department of the state. (Section 1-45-117, C.R.S., unambiguously applies only to public entities and not to individuals. *In the Matter of the Complaint Filed by Bill Smith Regarding Alleged Campaign and Political Finance Violations by Mayor Steve Burkholder, City Manager Mike Rock, and Councilman Bob Murphy*, OS 20050026, decided November 17, 2005 (Norwood ALJ);
2. That the General Assembly made a contribution in a candidate election campaign; **OR**
3. That the General Assembly expended public moneys or made a contribution to urge electors to vote for a statewide ballot issue or referred

² Section 1-45-117 (1)(a), C.R.S.

³ Section 1-45-117 (1)(b)(II) and (III)(C), C.R.S.

measure.

With regard to the first element, the General Assembly can be characterized as a department of the state for purposes of applying the FCPA.

B. Use of the e-mail database to send messages related to a candidate election campaign does not appear to be a "contribution" in that campaign.

For the second element, the Colorado constitution defines "contribution" as:

- The payment, loan, pledge, gift, or advance of money, or guarantee of a loan, made to any candidate committee, issue committee, political committee, small donor committee, or political party;
- Any payment made to a third party for the benefit of any candidate committee, issue committee, political committee, small donor committee, or political party; or
- The fair market value of any gift or loan of property made to any candidate committee, issue committee, political committee, small donor committee or political party.⁴

The time spent by a legislator or his or her staff during business hours and the state equipment utilized to create an e-mail database for the primary purpose of communicating with constituents and other persons in furtherance of the legislator's official role may involve an incidental "payment" of public moneys attributable to the cost of salaries or use of state equipment. However, it is difficult to conclude that the use of state resources for this purpose becomes a payment to a candidate committee, payment to a third party for the benefit of a candidate committee, or gift or loan of property to a candidate committee, if the database is later used by the legislator to send campaign-related e-mail messages on his or her own time and at his or her own expense.

The recent decision of *In the Matter of the Complaint Filed by Colorado Ethics Watch Regarding Alleged Campaign and Political Finance Violations By the City and County of Broomfield*, OS 2007-0019, decided

⁴ Colo. const. art. XXVIII, sec. 2 (5).

January 16, 2008 (Spencer, ALJ), although not directly on point here, seems relevant. In that case, Colorado Ethics Watch alleged that Broomfield violated the FCPA by providing answers to a candidate's questionnaire in advance of a candidate forum where the questionnaire was to be discussed. The focus was on whether under the definition of "contribution", the time spent by Broomfield's employees in responding to the candidate's questionnaire was "for the purpose of promoting" the election of that candidate. The ALJ concluded that the staff responses to the candidate "were not generated for the purpose of promoting [the candidate's] or anyone else's election to office. Although the 'state machinery' may have been activated as a result of [the candidate's] request, as long as it was not activated for the purpose of influencing the election, there is no violation of the FCPA."

The e-mail database under consideration here was created during a legislator's term and in connection with his or her role as an elected official and not for the purpose of sending messages supporting or opposing a candidate in an election campaign. If a legislator subsequently utilizes the database to send messages related to a candidate election campaign at his or her own expense and on his or her own personal time, that usage does not amount to a "contribution" in that campaign by the General Assembly in violation of the FCPA. Conversely, the FCPA would probably be directly implicated if the legislator or his or her staff had generated the mailing list on state time and utilizing state resources for the express purpose of urging electors to vote for or against a candidate or ballot measure.

C. Use of a legislator's e-mail database to send messages related to a ballot measure campaign would not appear to equate with expending public monies or making a contribution in support or opposition to that measure.

Under the third element described in section A., there is a violation of the FCPA if public moneys are expended or a contribution is made to urge electors to vote in favor of or against a ballot measure. Based on the preceding analysis in section B., the time and resources of legislator or legislative staff, if any, utilized to create an e-mail database for legislative use is not transformed into such an expenditure or contribution if the legislator subsequently utilizes the database to send messages relating to a ballot measure campaign. Specifically, the fourth element requires a showing that the expenditure or contribution was to urge electors to vote in favor of or against a statewide ballot issue or referred measure. It is well-settled that the purpose of this FCPA provision is to prevent state agencies or political

subdivisions from devoting public resources to persuade voters during an election. *Coffman v. Colorado Common Cause*, 102 P.3d 999 (Colo. 2004). The majority of judicial and administrative decisions involving this statute deal with clear-cut factual situations involving utilization of staff time or public resources to generate mailings, press releases, videos, etc., in connection with the support of or opposition to a candidate or ballot issue. Here, the hypothetical facts do not involve such a direct connection between the governmental activity at issue and support of or opposition to a ballot measure at an upcoming election. See also: *In the Matter of the Complaint Filed by Douglas Bruce Regarding the Alleged Violations of the Fair Campaign Practices Act by Governor Bill Owens, et al.*, OS 99-05, decided August 31, 1999 (Stuber, ALJ) ["One cannot readily distinguish the governor's official versus political versus personal time. The critical legal distinction is between the governor expressing his opinion and the governor utilizing the coercive power of government to support a ballot issue." citing *Colorado Taxpayers Union, Inc. v. Romer*, 750 F.Supp. 1041 (D.Colo. 1990).

D. Other grounds supporting the conclusion that use of a legislator's e-mail database in an election campaign does not violate the FCPA.

There are additional grounds for concluding that the use of a legislator's e-mail database to send messages in an election campaign is not violative of the FCPA or other law:

- As noted above, with regard to a ballot measure campaign, the FCPA specifically allows a legislator to express an opinion on any ballot measure. Use of a legislator's database to send messages in a ballot measure campaign could under certain circumstances be reasonably characterized as such an expression of an opinion.
- Again, relative to a ballot measure campaign, a legislator may expend personal funds or use personal time to urge electors to vote for or against a measure. Since the type of e-mail database in question would be created from an e-mail account maintained at the legislator's own expense, any ballot measure campaign message sent utilizing that database arguably involves an expenditure of the legislator's personal funds or use of personal time.
- Finally, it seems reasonable to conclude that the information in any such a database generated during a legislator's public tenure

and service belongs to that legislator to utilize for his or her purposes, regardless of whether a portion of it was compiled by the legislator or staff during business hours.

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