



State of New Jersey

ELECTION LAW ENFORCEMENT COMMISSION

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May 4, 2005

Peter G. Sheridan, Esq.
Forrester for Governor, Inc.
c/o Graham, Curtin & Sheridan
50 West State Street, Suite 1008
Trenton, New Jersey 08608

Advisory Opinion No. 02-2005

Dear Mr. Sheridan:

The Commission has considered your request for an advisory opinion and directed me to issue this response. You are counsel to Forrester for Governor, Inc., the 2005 primary election candidate committee of gubernatorial candidate Douglas R. Forrester. You have asked whether or not 2005 gubernatorial primary election candidate Douglas Forrester, "who has elected not to accept public funding, but who has deposited and expended in excess of \$300,000 of his personal funds on campaign expenses," is eligible to participate in the two debates for 2005 primary election Republican gubernatorial candidates conducted pursuant to N.J.S.A. 19:44A-45a (Section 45a).

Your inquiry requires application of the gubernatorial debate provisions of the New Jersey Campaign Contributions and Expenditures Reporting Act, N.J.S.A. 19:44A-1, *et seq.* (the "Act"), specifically Section 45a, to a gubernatorial primary election candidate who is not seeking public matching funds, and the Commission has not previously addressed this issue.

The Commission notes that on January 18, 2005, Mr. Forrester filed a Report of Contributions and Expenditures (Form R-1) reporting on Schedule C, Loans Received in Excess of \$400, that he had made loans to his campaign totaling \$1,784,569.65, and on Schedule 1(D), Disbursements, that he had made expenditures totaling \$720,417.97. You indicated in your inquiry, dated March 31, 2005, that Mr. Forrester has now received "approximately 554 contributions" and that "the total of these contributions is less than \$300,000."

Commission Response

The Commission concludes that to determine whether or not Mr. Forrester has met the criteria for qualification to participate in the two 2005 gubernatorial primary election candidates' debates, established by N.J.S.A. 19:44A-45a, he may count the entire amount deposited and expended by him of his own personal funds toward the \$300,000 qualification threshold.

Discussion

The public financing provisions of the Act provide for the payment of public matching funds to each gubernatorial primary election candidate who is a "qualified candidate," as defined in N.J.S.A. 19:44A-3m. Section 45a further requires each primary election publicly financed gubernatorial candidate to participate in two debates as a condition of receipt of public matching funds. Mr. Forrester, who has chosen not to receive matching funds, may nevertheless elect to participate in the two primary election candidates' debates if he is a "qualified candidate," pursuant to N.J.S.A. 19:44A-3m. To be a "qualified candidate" in the 2005 primary election, a candidate must have "deposited and expended" \$300,000; see N.J.S.A. 19:44A-3m, as adjusted pursuant to N.J.S.A. 19:44A-7.1c(2).

The Commission notes that because Mr. Forrester is not accepting public matching funds, he is permitted to use an unlimited amount of his own funds to pay for campaign expenses; see N.J.S.A. 19:44A-29a and N.J.A.C. 19:25-16.8. Also see Buckley v. Valeo, 424 U.S. 1 (1976).

Section 45a of the Act is silent with regard to the amount of a candidate's own funds that may be used to calculate the \$300,000 debate qualification threshold. The Commission therefore concludes that Section 45a does not expressly apply to Mr. Forrester, who seeks to use an unlimited amount of his own funds to meet the \$300,000 threshold amount. Moreover, there is no Commission regulation that expressly prohibits him from entering the debates. Further, the Commission finds that N.J.A.C. 19:25-16.9, which restricts the use of personal funds by a publicly financed candidate, does not apply to Mr. Forrester because the rule does not address the use of personal funds by a non-publicly financed candidate.

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.

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) 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

Forrester for Governor, Inc.

Mailing Address

Peter G. Sheridan, Esq.
c/o Graham, Curtin & Sheridan
50 West State Street
Trenton, New Jersey 08608

Day Telephone No.
(609) 695-0098

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

Yes X No

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

Candidate Committee	<u> X </u>	Recall Committee	<u> </u>
Joint Candidate Committee	<u> </u>	Recall Defense Committee	<u> </u>
Political Committee	<u> </u>	Lobbyist	<u> </u>
Continuing Political	<u> </u>	Legislative Agent	<u> </u>
Political Party Committee	<u> </u>	Personal Financial Disclosure statement	<u> </u>
Legislative Leadership	<u> </u>	Other (please describe)	<u> </u>

- 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.

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

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

Whether Douglas Forrester, a candidate in the Republican primary for Office of Governor who has elected not to accept public funding, but who has deposited and expended in excess of \$300,000 of his personal funds on campaign expenses, may participate in the two interactive gubernatorial debates for Republican candidates pursuant to N.J.S.A. 19:44A-45.

- 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 reporting or other requirements under the Act (attach additional sheets if necessary).**

Statement of Facts

On or about November 18, 2004, Forrester for Governor, Inc. filed as a candidate committee ("Committee") with the Election Law Enforcement Commission (Commission). Mr. Ronald Gravino is Treasurer (form D-1 attached as Exhibit A). Mr. Forrester has elected not to accept public funds in the Republican primary election.

As of December 31, 2004, Mr. Forrester loaned the Committee approximately \$1.8 million, and said monies were deposited into an account opened by the Committee in accordance with Commission regulations. As of that same date, the Committee had expended approximately \$720,000 (see report attached as Exhibit B) in campaign related expenses. In addition to these monies, the committee has received approximately 554 contributions; however, the total of these contributions is less than \$300,000.

Forrester has or will file with the Commission written notice of his intent to participate in the interactive debates prior to the April, 2005 deadline in a form satisfactory to the Commission.

Mr. Forrester enjoys broad support among Republican voters. He has been endorsed by the Atlantic, Burlington, Camden, Cumberland, Essex, Gloucester, Mercer, Middlesex and Union County Parties, as well as many influential elected officials and Republican leaders. The latest Quinnipiac University poll confirms that Forrester is leading the field.

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

A. Statement of Result

Doug Forrester who has elected not to accept public funding in the Republican primary election may participate in the two interactive gubernatorial debates for Republican candidates.

B. Statement of Reasoning

LEGISLATIVE HISTORY

In 1973, the legislature enacted the New Jersey Campaign Contribution and Expenditures Reporting Act (Act). N.J.S.A. 19:44A-1. Among other things, it created a system to publicly fund the campaigns of qualified candidates for the Office of Governor in the general election. N.J.S.A. 19:44A-27, et. seq. The purpose of publicly financing gubernatorial elections is to allow candidates to “conduct campaigns free from improper influence,” (N.J.S.A. 19:44A-27) and “to mitigate the corrupting effect of money on the electoral process.” Friends of Tom Kean v. Election Law Enforcement Commission, 114 N.J. 33, 35 (1989). New Jersey was the first state to publicly finance gubernatorial campaigns. Its system was modeled on the Federal Election Campaign Act of 1971 (federal law) which publicly financed presidential campaigns. Since the federal law, like the New

Jersey scheme had, *inter alia*, limited the monetary amount of contributions a person could make to a candidate, the federal law was challenged on constitutional grounds. In broad terms, it was argued that the federal law breached the First Amendment rights of freedom of speech and freedom of association of contributors and candidates. See, Buckley v. Valeo, 424 U.S. 1 (1976)¹. Although the Supreme Court upheld the validity of the federal law for the most part, the Court struck down the law in two respects. That is the law as it applied to truly independent expenditures, and as it concerned the ceiling on the amount of personal funds a candidate could use on their own campaign were declared unconstitutional². In its analysis, the court acknowledged the legitimate goal of the federal law was to limit the “actuality and appearance of corruption resulting from large individual contributors”. See, Buckley, supra 426 U.S. at 25. See also, McConnell v. FEC, 540 U.S. 93, 117 (2003). In instances where truly independent expenditures were made, and where candidates funded their own campaigns, the Court could find no proof that such corruption existed. Since the First Amendment rights were at stake, the court strictly construed the law in order to preserve First Amendment rights. Congress failed to show any evidence or rationale to support any limitation on independent expenditures, and limits on use of personal funds by candidates. First Amendment rights could not be abridged under such circumstances. Buckley, supra, 426 U.S. at 55-57 (1976). See also, Friends of Tom Kean v. New Jersey Election Law Enforcement Commission, 114 N.J. 33,

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The Buckley decision has been vitiated, to some degree, by McConnell v. FEC, 540 U.S. 93 (2003).

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The Bi-Partisan Campaign Reform Act (BCRA) does not alter the rubric that a candidate may spend his personal funds without limit. The remedy under BCRA is to permit waiver of contribution limits in certain instances when this occurs (millionaire’s exception). See, BCRA §§ 304, 316 and 319.

39-40 (1989). The constitutional prohibition against limitation of use of personal funds by candidates in their own campaign is germane to the matter at hand.

Since the Buckley decision, the Commission has recognized and integrated into its regulations the prohibition against limiting the use of personal funds by candidates. More specifically, the Commission adopted general regulation prohibiting any such a contribution limit.

The regulation states in pertinent part:

(b) Notwithstanding the contribution limits set forth in N.J.A.C. 19:25-11.2 above, a candidate, or a corporation one hundred percent of the stock of which is owned by the candidate, or by the candidate's spouse, child, parent or sibling residing in the candidate's household, may make contributions without limit to a candidate committee established by that candidate, or to a joint candidates committee established by that candidate.

Subject to this limitation, publicly financed campaigns of gubernatorial candidates in general elections operated smoothly in New Jersey throughout the eighties.

In 1989, the legislature enacted the first major revisions to the Act (P.L. 1989, Ch. 4). These amendments included a provision to extend publicly financed gubernatorial campaigns to the primary election, and to establish interactive gubernatorial debates among candidates in both the primary and general election. Although there is little legislative history concerning these amendments, Senator Byron Baer, sponsor of the senate bill, declared that the interactive debates were required because "the people . . . deserve more than a campaign of sound bites and glossy literature." (Philadelphia Inquirer, January 24, 1989).

INTERACTIVE DEBATES

Prior to the 1989 amendments, there was only one section of the Act which related to a public discussion of issues in gubernatorial elections. The legislature required the New Jersey Public Broadcast Authority to "promote full discussions of public issues by the candidates for nomination

for election to the Office of Governor on the ballot in any primary or general election.” N.J.S.A. 19:44A-39. The provision does not require all gubernatorial candidates be granted equal time on public television; but it does require the Authority to cover election issues with “balance, fairness and equity”. McGlynn v. N.J. Public Broadcast Authority, 88 N.J. 112, 127-28 (1981). The statute must be read “inclusively”, and this standard can not be met if “candidates are continually excluded”. McGlynn, supra 88 N.J. at 130. Arons v. Donovan, 882 F. Supp. 379, 385-86 (DCNJ 1995). As stated above, the 1989 amendments required interactive gubernatorial debates in both the general and primary elections; and it vested the Commission with the authority to select debate sponsors. N.J.S.A. 19:44A-45, 46. The amendments expressly permit both candidates who accept public funding and those who do not accept public funding to participate in the interactive debates. More specifically, the statute allows candidates who do not accept public funding to elect to participate in the debates so long as “the candidate has deposited and expended the amount necessary [\$300,000] . . . to be deemed a qualified candidate.” N.J.S.A. 19:44A-45³.

AN ISSUE OF FIRST IMPRESSION

The issue of first impression presented here is that Forrester is the first gubernatorial candidate to decline public funding and to elect to participate in the interactive debate. Hence, there is no precedent for the request. Although it is clear to the Committee that Forrester qualifies to participate in the interactive debates based on the law, this advisory opinion is sought due to the unique circumstances. The issue which Commission staff has expressed uncertainty about is whether Forrester must comply with the same standards as candidates who are accepting public funds in order to participate in the interactive debates. That is, whether Forrester is required to raise

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The candidate must also give written notice of intent to participate in the debates to the Commission.

at least \$300,000 and the maximum contribution can not exceed \$3,000 in order to participate in the debates. The answer is a resounding no, for the reasons presented below.

THE COMMISSION MUST ENFORCE THE PLAIN
LANGUAGE OF THE STATUTE

In order for a candidate who declines public financing to elect to participate in the interactive debates the candidate must have “deposited and expended the amount necessary under paragraph (3) or paragraph (4) of subsection (m) of the Act” (N.J.S.A. 19:44A-45). The amount necessary under paragraph 3 is \$300,000. The regulation implementing the statute is clear. It states, in pertinent part, that candidate who does not accept public financing may elect to participate in the debates by (a) notifying the Commission of his intent to participate and (b) filing a statement of qualification containing evidence that \$300,000 “has been deposited and expended.”⁴ N.J.A.C. 19:25-16.38.

Where a statute is clear and unambiguous on its face, no further judicial inquiry is required. Licata v. Postal Service, 33 F. 3d 259 (3rd Cir. 1994). The Commission must give full force and effect to a statute that is clear on its face. Charles v. Reno, 117 F. Supp. 2d 412 (DCNJ 2000). The statute and the regulations are clear. Forrester must “deposit and expend” \$300,000 in order to elect to participate in the debates. Deposit means “to place for safekeeping, as money deposited in a bank.” Webster’s Dictionary (10th edition, 1995). Forrester loaned, and the Committee deposited the funds in an account which conforms with Commission regulations. Obviously, Forrester complied with the plain language of the statute. There is no requirement in section 45 of the Act that Forrester must raise the monies in conformance to the standard required by those accepting public

The Committee is in the process of filing the appropriate statement of qualifications; but Forrester has deposited and expended sums beyond that threshold. (See, Exhibit B).

funds in order to participate in the debates. The statutes succinctly and clearly state that he must “deposit and expend” \$300,000.

For one to argue that Forrester must raise \$300,000 in contributions of \$3,000 or less in order to participate in the debates clearly misinterprets the statute and legislative intent. There is simply no such requirement. He must raise the money in accordance with law. Since there is no limit on use of personal funds, it meets that standard.

As noted in the previous section, since the Buckley decision the Commission has adopted as its policy that contribution limits do not apply to candidates who use personal funds. N.J.A.C. 19:25-11.3(b). There is a regulation which specifically enumerates which regulations do not apply to gubernatorial candidates who do not accept public funding in the primary election. Such a candidate is (a) not subject to the overall campaign expenditure limit, (b) is not subject to the \$25,000 limit on use of ones personal funds, (c) is not subject to the \$50,000 limit on bank loans, and (d) is not limited on the amount of bank loans the candidate may personally guarantee. N.J.A.C. 19:25-16.8 (emphasis added). There is nothing in that regulation which limits a candidate’s right to elect to participate in the interactive debates, due to the exercise of the constitutionally protected right to use his personal funds. The only limitation is that the candidate must “deposit and expend” more than \$300,000 as set forth in N.J.A.C. 19:25-16.38. Arguably, the Commission has a right to review any personal funds or loans to make certain they are not in fact from third parties. Absent such a finding, the personal funds that Forrester deposited are permissible, and they may be used to meet “the deposit and expend” test.

PRIMARY TASK OF THE COMMISSION IS
TO DISCERN AND EFFECTUATE THE
LEGISLATIVE INTENT

In 1989, the legislature instituted interactive debates as an integral part of both the primary and general election for the Office of Governor. The legislature devised a legislative scheme in which a candidate who opted out of public funding could participate in the interactive debates. N.J.S.A. 19:44A-45. In order to effectuate that intent, it directed that the Act be “construed liberally and applied so as to promote the purposes expressed herein.” N.J.S.A. 19:44A-42. It vested authority in the Commission to select sponsors for the interactive debates. N.J.S.A. 19:44A-46. The Commission, in light of that mandate, has implemented regulations which select sponsorship on the basis of widest broadcast viewership and print circulation. N.J.A.C. 19:25-16.39 through 16.43. The obvious intent of the legislature is that the interactive debates should be inclusionary in order to inform voters about all candidates and their platform. See, McGlynn supra 88 N.J. at 146-47. The Commission should apply the statute and rules in common sense fashion to effectuate the legislative intent. Matters of statutory construction “will not turn of literalisms, technisms or on formal rules of interpretation, it will justly turn on the breadth of the objectives of the legislation and the common sense of the situation.” LaFage v. Jani, 166 N.J. 412 (2001). In this case, the statute is clear and the policy is evident. Forrester should be permitted to participate in the debates.

In New Jersey, the court construes election statutes liberally “to allow the greatest scope of public participation in the electoral process, to allow candidates on the ballot, and most importantly to allow the voters a choice on election day.” New Jersey Democratic Party, Inc. v. Samson, 175 N.J. 172, 175-76 (2002). The Commission’s role is “to preserve the paramount right of the voters to exercise the said franchise” to vote. Samson supra 175 N.J. at 191. To reasonably and responsibly exercise the franchise, the electorate should be informed on the policies and issues which

each candidate champions. Our founding fathers recognized the need for an informed electorate.

James Madison wrote:

The value and efficacy of this right [to vote] depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively. Harte-Hanks Communication v. Connaughton, 491 U.S. 657 (1989).

Participation in the debates promotes that goal. The Commission is obligated to construe the applicable statute and regulations in a fashion which promotes inclusion of candidates such as Forrester in the interactive debates.

TO DENY FORRESTER'S RIGHT TO PARTICIPATE
IN THE INTERACTIVE DEBATES VIOLATES HIS
FIRST AND FOURTEENTH AMENDMENT RIGHTS

The courts have consistently held that to place a ceiling on personal expenditures by a candidate "imposes a substantial restraint on the ability of persons to engage in protected First Amendment expression". Buckley v. Valeo, 424 U.S. 1, 51-52. "Candidates have a right to vigorously and tirelessly to advocate their own election." Buckley, supra 424 U.S. at 52. "Public discussion is a political duty." Whitney v. California, 274 U.S. 357, 375 (1927). If the Commission interprets the statute (N.J.S.A. 19:44A-45) in a manner that denies a self-funded candidate the opportunity to participate in government sanctioned interactive debate, it clearly and directly interferes with that candidate's First Amendment right to expression and equal protection of law.

To assess the constitutionality of a state law, the court must examine whether it burdens rights protected by the First and Fourteenth Amendments, and if yes, then the law can survive only if a compelling state interest is advanced, and it is narrowly tailored to serve that intent. Lautenberg

v. Kelly, 280 N.J. Super. 76 (Law. Div. 1994)⁵. In this instance, there is a recognized First Amendment right to use personal funds without limit to fund one's campaign. Having established that right, then the Commission must determine what compelling state interest is advanced by denying Forrester the right to participate in government established interactive debates. The only state interest is the practical concern that not every candidate is viable. That concern is satisfied by the "deposit and expend" test. See generally, Arons v. Donovan, 882 F. Supp. 379, 388 (DCNJ 1994). Granted there may be some government interest in limiting the number of candidates who participate in debates; but this is not the case here. Forrester is leading in the polls, and he has earned the endorsement of many county parties. Accordingly, he should be given the opportunity to debate.

Finally, statutes that are challenged on the basis that they do not meet constitutional muster are to be construed in a manner to avoid constitutional defects, if the statute is reasonably susceptible to such construction. Mechanical Contractor's Association v. State, 255 N.J. Super. 448 (App. Div. 1992). Statutes should be interpreted, where possible, to promote its constitutionality. Baylor v. Human Services, 235 N.J. Super. 22 (App. Div.) aff'd 127 N.J. 286 (1989). In this case, the Commission is bound to interpret the statute in a manner that promotes the statute's constitutionality and safeguards Forrester's constitutional right to free speech. That is, the Commission must permit Forrester to participate in the interactive debates.

CONCLUSION

Based on the foregoing facts and law, the Forrester for Governor committee respectfully requests that an Advisory Opinion permitting his participation in the interactive debates.

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McConnell, supra. at 93 may change the test from strict scrutiny to closely drawn scrutiny; but it is of no consequence here where the result would be the same.

6. **Person who is submitting request on behalf of committee or entity listed in item 1 above;**

Full name:

Day Telephone:

Peter G. Sheridan, Esq.

609-695-0098

Mailing Address:

Evening Telephone:

Graham, Curtin & Sheridan, P.A.
50 West State Street, Suite 1008
Trenton, NJ 08608

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Fax No.:

609-695-1298

a. **Official capacity of person requesting opinion:**

- Candidate
- Treasurer
- Organizational Treasurer
- New Jersey Attorney representing person, committee or entity:

Other _____

7. ~~I hereby consent to an extension of the 10-day response period provided in N.J.S.A. 19:44A-8F 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 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**

Dated:

3/31/05



Peter G. Sheridan, Esq.