

NEW JERSEY ELECTION LAW ENFORCEMENT COMMISSION

PUBLIC SESSION MINUTES

FEBRUARY 23, 1983

PRESENT

Andrew C. Axtell, Chairman  
M. Robert DeCotiis, Member  
Haydn Proctor, Member  
Alexander P. Waugh, Jr., Member  
Scott A. Weiner, Executive Director  
William R. Schmidt, Asst. Executive Director  
Gregory E. Nagy, Staff Counsel\*  
Edward J. Farrell, General Counsel  
Sidney Goldmann, Consultant

\* Mr. Nagy attended a portion of the Executive Session.

Chairman Axtell called the meeting to order and announced that pursuant to the Open Public Meetings Law, L. 1975, c. 231, annual notice of the meetings of the Commission, as amended, has been filed with the Secretary of State's office, and that copies have been filed in the State House Annex, and mailed to the Newark Star Ledger, and the entire State House Press Corps.

The meeting convened at 10:05 a.m. at the office of the Commission, Trenton, New Jersey.

1. Approval of Minutes of Public Session of Commission Meeting of February 14, 1983

The Commission reviewed the minutes which had been distributed. Former Chairman Goldman noted an error on page 2, first paragraph, line 9 that the word "dispositive" was misspelled and that the phrase should read "... will be dispositive of ...". On a motion by Commissioner Proctor, seconded by Commissioner DeCotiis and a vote of 3-0, with Commissioner Waugh abstaining because he was absent from the February 14, 1983 meeting, the Commission approved the minutes, as amended, of the public session of February 14, 1983.

2. Advisory Opinion 03-1983 Friends of Peter Shapiro

The Commission continued its review of Advisory Opinion Request 03-1983, a January 24, 1983 letter and advisory opinion request from Stephen J. Edelstein, Esq., on behalf of Friends of Peter Shapiro. The Commission had deferred this advisory opinion request from its last meeting, February 14, 1983, and had asked General Legal Counsel Farrell to prepare a memorandum on "testing the waters" and the ability of the Commission to regulate pre-candidacy activity.

Mr. Farrell distributed his five-page February 23, 1983 memorandum to the Commission. To his memorandum, Mr. Farrell attached FEC regulation 100.7 and FEC Advisory Opinion 1981-32 as found on pages 10,782 through 10,786 of the Commerce Clearing House, Inc., "Federal Election Campaign Financing Guide" dated October 15, 1981.

Mr. Farrell said that the federal law and regulations permit someone to raise money for "testing the waters" for the office of Presidency and the regulations impose no limits on the contributions or expenditures. However, if the individual becomes a candidate then he or she has ten days to purge the contributions of amounts in excess of the federal contribution limit; furthermore, such contributions are then matchable under the federal program of public financing for Presidential candidates. Mr. Farrell said that the regulations had gone to the Congress twice and have not been challenged. He noted that the FEC regulations represent a practical solution to the problem.

Mr. Farrell then discussed the New Jersey law and noted that the Act regulates activities which "aid or promote the nomination, election or defeat of any candidate". Conceivably, "testing the waters" activities are not subject to disclosure because the person on whose behalf the activities are being conducted is not yet a candidate. On the other hand, Mr. Farrell noted that the Buckley decision, upholding the constitutionality of disclosure, rested in part on the basis that disclosure provides a basis for allowing enforcement of the other provisions of the law. In addition, the Act has no prohibition against the Commission regulating "testing the waters" activities. Therefore, the Commission could require the disclosure of contributions and expenditures associated with "testing the waters". Mr. Farrell also noted that the Legislature did enact contribution limits and disclosure requirements for inaugural affairs after the experience following the 1977 gubernatorial election wherein both candidates received public funds and the winner, Governor Byrne, raised funds during his inauguration and the contribution amounts were not limited.

Mr. Weiner said that the Commission could require disclosure of "testing the waters activities". Commissioner DeCotiis noted that he was more comfortable without disclosure. Mr. Farrell identified the technical problem faced by the Commission, namely, when is an individual "testing the waters".

Former Chairman Goldmann noted the difficult problems of identifying when the line is crossed from "testing the waters" into "candidacy". Commissioner Waugh said that part of "testing the waters" is developing name recognition and conducting polls. Mr. Farrell noted that the Commission, in the Kramer case from the 1981 primary, spent a great deal of time reviewing the poll conducted

on behalf of Candidate Kramer to decide if the poll represented "testing the waters".

Former Chairman Goldmann referred to the FEC Advisory Opinion 1981-32 wherein the requesting party had listed 14 types of expenditures related to the potential candidate's effort to decide if he would become a Presidential candidate for 1984. Former Chairman Goldmann noted that the FEC, on page 10,785 had expressed its particular concern about three specific activities, namely, employment of a public relations consultant, preparation and use of letterhead stationery, and preparation and printing of a biographical brochure, because those activities envisioned considerable public contact and could entail an active effort to gain possible political benefit.

Commissioner Proctor noted the next to the last paragraph in the FEC advisory opinion wherein the Commission stressed that if any of the activities take place in a factual context which indicate that the potential candidate has moved beyond the process of deciding to become a candidate then the activities would cease to be "testing the waters" and a candidacy would arise.

Commissioner DeCotiis asked what a candidate would have to do after he has announced for the Governor. Mr. Weiner said that under New Jersey law the candidate would simply file his first pre-election report 25 days before the date of the election but in that report the candidate would disclose contributions and expenditures all the way back to the beginning of the "testing the waters" activities. Commissioner DeCotiis then asked what would be the disclosure requirements if the candidate decided not to run. Mr. Weiner responded that he would have to report nothing because the candidacy never arose. He then said that the Commission does not have to end up at the same position as the FEC and that the Commission could require reporting of "testing the waters" at an earlier point in time or even if the individual does not subsequently become a candidate. Mr. Farrell concurred and noted that the Buckley decision would give the Commission a basis for requiring the reporting of contributions and expenditures by those who are "testing the waters". But Mr. Farrell noted that there is no important State interest in the activities of a person who does not run for office. Thus, the staff suggest that the Commission only require the disclosure of "testing the waters" activities when an individual becomes a candidate. Mr. Farrell said that this would avoid the problem for the Commission of identifying who is "testing the waters" and who is simply spending money to be in the public eye.

Chairman Axtell asked what about those who "test the waters" but do not run for Governor but then run for the Assembly or the State Senate. Mr. Farrell said the State and the Commission have less interest in such an individual because there are no

contribution and expenditure limits imposed on candidates other than gubernatorial candidates. Mr. Weiner said that the Commission had recommended that the law be amended to require the disclosure of "testing the water" activities in its recommendations to the Legislature; Mr. Weiner said that all three bills that have been introduced in the Legislature have incorporated the "testing the waters" recommendation.

Mr. Weiner summarized the staff proposal for Advisory Opinion 03-1983. He said the first question Mr. Edelstein asked was what are the reporting requirements for Friends of Peter Shapiro. To that question the staff recommend the following: to the extent Friends of Peter Shapiro is a "political committee" and supports candidates or spends money on behalf of public issues, then Friends of Peter Shapiro would file pre- and post-election reports as any other political committee would do. If Friends of Peter Shapiro establishes a separate segregated "testing the waters" account, then Friends of Peter Shapiro would have no reporting requirements until and if Mr. Shapiro became a candidate for Governor. If, however, Friends of Peter Shapiro makes expenditures from an account for both "testing the waters" activities and for other activities, some or all of which require disclosure in a campaign setting, then the entire account's activities would have to be disclosed. In addition, the staff recommended requiring a separate account.

Concerning Mr. Edelstein's second question about setting up a separate account for a potential gubernatorial race, the staff recommend that such a separate account is permissible. Commissioner DeCotiis asked what would happen if John Doe gave \$1,000 to Friends of Peter Shapiro and \$500 was placed in the gubernatorial account and \$500 into the other account. If this were done, would this be alright under the staff proposal. Mr. Weiner responded that it would be.

Finally, Mr. Edelstein asked whether the expenditures for "testing the waters" would fall within the contribution limit for gubernatorial candidates and the proposed staff response is that expenditures would be within the expenditure limit if Mr. Shapiro becomes a candidate for Governor.

Mr. Weiner said that he had discussed the proposed staff recommendation with various interested parties and that their initial reaction was that the proposal was fair.

Commissioner DeCotiis asked if the Commission could require disclosure of "testing the waters" activities, contributions and expenditures, but not count the expenditures against the expenditure limit? Mr. Farrell said the Commission could do so and noted that the Commission had ruled compliance costs outside of the expenditure limit and could do so with "testing the waters". Mr. Weiner suggested that the Commission consider Commissioner DeCotiis' suggestion during the Commission's deliberations on revised regulations.

He noted that the proposal to exclude "testing the waters" activities from the expenditure limit would require the Commission to define "testing the waters".

Mr. Weiner said that he had met with Assembly Speaker Karcher and had advised the Speaker of the importance for the Legislature to deal with amending the public financing law. Mr. Weiner said that Speaker Karcher said that it was unlikely that the Legislature would act until after the Legislature had considered the appropriations bill this spring.

Commissioner DeCotiis moved that the Commission adopt the staff recommendation but exclude "testing the waters" activities from the expenditure limit. Commissioner Proctor asked why "testing the waters" activities should be excluded from the expenditure limit. Commissioner DeCotiis responded that this gave the Commission an opportunity to open up the expenditure limit; furthermore, Commissioner DeCotiis said that he did not want the Commission to discourage "testing the waters" activities. Commissioner Waugh expressed his opposition to the proposal because it represented a piecemeal removal of the expenditure limit when the Commission has recommended strongly that the Legislature and the Governor repeal the expenditure limit.

Mr. Weiner suggested the Commission adopt the FEC approach and permit a response to Mr. Edelstein. Mr. Farrell said the Commission would be on stronger ground to exclude "testing the waters" activities from the expenditure limit by regulation because the regulation adoption process calls for a public hearing, rather than doing so through an advisory opinion. Commissioner DeCotiis' motion failed for lack of a second.

On a motion by Commissioner DeCotiis, seconded by Commissioner Waugh and a vote of 4-0, the Commission accepted the staff recommendation to the advisory opinion request of Mr. Edelstein.

Commissioner Waugh thereafter left the Commission meeting due to scheduled litigation that required his attendance.

3. Report of Activity Associated with the Filing of 1982 Annual Reports by Lobbyists and Legislative Agents

Mr. Weiner distributed a three-page February 22, 1983 memorandum and report from Juana M. Schultz, Director of Compliance and Review. In her report, Ms. Schultz summarized data from the 1981 and the 1982 filings by 231 and 255 reporting entities, respectively. Mr. Weiner noted that Ms. Schultz and her staff had prepared the analysis and handled the entire filing manually without any aid from the computer. He said the effort involved an extraordinary amount of work which was very well done by Ms. Schultz and her staff.

Mr. Weiner said that there had been some press stories and he specifically mentioned articles published in the Philadelphia Inquirer and the Trenton Times. Mr. Weiner also pointed out the article which appeared in the Newark Star Ledger on February 17, 1983, a copy of which was distributed to the Commission prior to the meeting.

Chairman Axtell expressed his concern that the newspaper articles leave the impression that the lobbyists are running the state. Mr. Weiner noted that the Commission in its report on the Lobbyist Disclosure Act had stressed the important positive role played by lobbyists in the development of legislation. Mr. Weiner said that the lobbyists' concern is with the press and not with the Commission. He also noted that he advised various lobbyists that the more they resist disclosure, the more they perpetuate the myth that they are running the state. Chairman Axtell urged Mr. Weiner that the positive role of lobbyists in the governmental process be emphasized more.

#### 4. Report on Pending Legislation

Mr. Weiner said that he had met with Assembly Speaker Karcher the day before and that Speaker Karcher said it was not realistic to push for amending the Reporting Act in time for the 1983 primary but that it was realistic to expect that the Act would be amended in time for the 1983 general election.

Mr. Weiner reported on the appropriation process. He said the Legislature was recessing on March 15 and it was expected that the Legislature would return in early May. He said there is a general expectation that the appropriations process will not take as long as it did last year because of the enactment of tax increases at the end of 1982.

Mr. Weiner reported on Senate Bill 1195 (Senator Perskie) which would require the disclosure of office accounts and prohibit the personal use of campaign contributions. Mr. Weiner noted that the O'Byrne case had reignited interest in the personal use issue. Mr. Weiner said that it was his impression that some action would be taken on S-1195 in this session of the Legislature.

#### 5. Executive Director's Report

Mr. Weiner distributed his two-page February 16, 1983 memorandum addressed to Edward G. Hofgesang, Director, Bureau of Budget and Accounting which summarized Mr. Weiner's meeting with Mr. Hofgesang on February 15, 1983 concerning the projected deficit for data processing services provided to the Commission during Fiscal Year 1983 by the Bureau of Data Processing.

---

Mr. Weiner said that he is attempting to secure approval for an evaluation of our data processing needs. Former Chairman Goldmann asked if the Commission would have to pay for such an evaluation. Mr. Weiner responded "yes". Mr. Weiner also noted, however, that Governor Kean has proposed a \$20 million data processing fund. He said that the \$20 million falls far short of the state's data processing needs but nevertheless he is preparing an application on behalf of the Commission for a portion of that money. Mr. Weiner said that he is also alerting others about how critical the Commission's data processing needs are becoming.

#### Executive Session

On a motion by Commissioner DeCotiis, seconded by Commissioner Proctor and a vote of 3-0, the Commission voted to resolve to go into Executive Session to review the Executive Session minutes of February 14, 1983 and to discuss investigations and enforcement actions, the results of which will be made public at their conclusion.

#### 7. Adjournment

After returning to Public Session, on a motion by Commissioner Proctor, seconded by Commissioner DeCotiis and a vote of 3-0, the Commission voted to adjourn.

Respectfully submitted,



SCOTT A. WEINER  
Executive Director