

**DE 94-18 - October 3, 1994**

**Public Financing**

**Sections 106.06(2); 106.07(1)(b); 106.22(6); 106.32; 106.34; 106.355; 106.36; 120.54(9); Fla. Admin. Code R. 1S-2.019; and Ch. 91-107, Laws of Fla.**

*TO: Mr. Robert N. Brochin, Counsel for Chiles Gubernatorial Campaign, Morgan, Lewis and Bockius, 5300 First Union Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131-2339*

*Prepared by: Division of Elections*

This is in response to your request for an advisory opinion regarding public financing. In addition, by separate letter to Secretary of State Jim Smith you have requested matching funds from the Election Campaign Financing Trust Fund (Fund) equal to the amount by which Jeb Bush exceeded the expenditure limit of \$5-million. Both requests will be handled in the opinion. As you are the counsel to Governor Lawton Chiles in his gubernatorial campaign, the Division of Elections (division) has authority under Section 106.23(2), Florida Statutes, to issue this opinion to you relating to the Florida Election Code, Chapters 97-106, Florida Statutes.

The "Florida Election Campaign Financing Act" (Act) is contained in Sections 106.30-106.36, Florida Statutes. The act provides that "the Department of States shall, within 7 days after a request by a participating candidate, provide such candidate with funds from the Election Campaign Financing Trust Fund equal to the amount by which the nonparticipating candidate exceeded the expenditure limit..." S 106.355, Fla. Stat. Your inquiry is centered on how the division will process and provide funds pursuant to a request under Section 106.355, Florida Statutes.

You asked the following questions:

1. What information will the Department rely upon when it receives a request for excess funds from a participating candidate under 106.355 of the Florida Statutes?
2. Does section 106.355 require the participating candidate to provide any information with a request pursuant thereto? If yes, what is the required information and what is the basis for requiring it?
3. Will the Department under section 106.06 conduct inspections of the "detailed accounts" of "all expenditures" of the nonparticipating candidate's accounts to determine the amount of the excess funds to be provided pursuant to section 106.355?
4. What will the Department's procedure for and the operative dates of a request for excess funds by a participating candidate under section 106.355?

In reference to your first question, the department will rely on campaign finance reports files by

candidates pursuant to Section 106.07(1)(b), Florida Statutes, when it receives a request for excess funds from a participating candidate under Section 106.355, Florida Statutes, of the Act. This section provides that in statewide races where there is a candidate who is participating in public financing, all candidates in this race must file reports on the 4th, 11th, 18th, 25th, and 32nd days prior to the first primary and general election and on the 4th, 11th, 18th, and 25th days prior to the second primary.

While public financing was originally adopted by the Florida Legislature in 1986, the original funding was insufficient to attract candidates who could approach the spending limits. Most candidates would not agree to limit their expenditures when they knew there were insufficient funds in the Fund to find numerous viable candidates for governor or cabinet. In 1991, the Legislature enacted Chapter 91-107, Laws of Florida, which amended Section 106.32, Florida Statutes, to provide that in the event the Fund did not contain sufficient funds to fund qualifying candidates, additional funds could be transferred from general revenue.

Thus, this year has been the first year where the majority of statewide candidates for gubernatorial and cabinet positions have participated in public financing. At the same time this funding change was made, the Florida Legislature amended the reporting requirements contained in Section 106.07(1)(b), Florida Statutes. Prior to this change, campaign treasurer's reports were due on the 32nd, 18th, and 4th days preceding the first primary and on the 18th and 4th days preceding the second primary and general elections.

In reference to your second question, Section 106.355, Florida Statutes, does not require the participating candidate to provide any information with a request for excess funds under Section 106.36, Florida Statutes.

In reference to your third question, the department will not routinely conduct inspections of a candidate's account to determine the amount of the excess funds to be provided pursuant to Section 106.355, Florida Statutes.

The Legislature specifically requires accelerated reporting of both participating and nonparticipating candidates in races where a candidate has requested funds under public financing so that the division can readily determine when and to what amount a nonparticipating candidate has exceeded his spending limits. To change this reporting requirement would require that the division enact a rule which, at this late date, would necessarily need to be an emergency rule. *See* S 120.54(9), Fla. Stat. In addition, it is well established in Florida law that agency rulemaking may not extend, modify, or conflict with any law of the state or have reasonable implications thereof. *State of Florida, Department of Insurance v. Insurance Services Office*, 434 So. 2d 908 (Fla. 1st DCA 1983), *petition for rev. denied* by 444 So. 2d 416 (Fla. 1984).

Also, Section 106.22(6), Florida Statutes, which provides the audit and field investigation authority to the division, limits this authority "to reports and statements filed under the provision of this chapter and ... to alleged failures to file any report statement required under the provision of the chapter." (Emphasis added.) The plain reading of the words shows that this authority extends only to reports already on file with the division or reports which should have been on file with the division.

This subsection is not prospective in nature. While Section 106.06(2), Florida Statutes, does allow the division to inspect accounts under "reasonable circumstance" before, during, or after an election, we believe this must be read with Section 106.22(6), Florida Statutes, which limits the audit and field investigation authority "to reports and statements filed under the provisions of this chapter."

In reference to your fourth question, the department's procedure for the operative dates of a request for excess funds by a participating candidate under Section 106.355, Florida Statutes, will be that when such a request is received by the division, the division will check the most recent campaign treasurer's report on file by the nonparticipating candidate to see if the candidate has exceeded the spending limit contained in Section 106.34, Florida Statutes. This limit is \$5-million for the governor and lieutenant governor candidates and \$2-million for cabinet candidates. If the nonparticipating candidate has not exceeded this limit, the request will be retained on file until the nonparticipating candidate's campaign treasurer's reports indicate that the candidate has exceeded the spending limit, and disbursement will be made to the participating candidate within seven days pursuant to Section 106.355, Florida Statutes. Once a nonparticipating candidate has exceeded the limit, each report filed thereafter by that candidate will be checked by the division to determine if additional moneys are due participating candidates. These moneys may not exceed two times the maximum expenditure limits contained in Section 106.34, Florida Statutes.

In a nonparticipating candidate does not timely file his campaign treasurer's report as required by section 106.071(1)(b), Florida Statutes, the division will at that time conduct an audit and field investigation pursuant to Section 106.22(6), Florida Statutes. If for some reason this is not possible, then the division will disburse funds to which the participating candidate otherwise reasonably demonstrates entitlement.

The division has not established a procedure of general applicability to deal with such a situation and would entertain reasonable approaches offered by participating candidates if such a situation presents itself. It might be that such a demonstration could be in the form of a sworn statement by the candidate or the candidate's treasurer of the amount to which the candidate is entitled. It is possible, of course, that the participating candidate must be mindful of the requirements of Section 106.355 and 106.36, Florida Statutes, as well as Rule 1S-2.019, Florida Administrative Code. It is further the division's opinion that any doubts in this type of situation should be resolved against the nonparticipating candidate who has not timely filed a report.

It may be that expenditures are made in the last few days of the campaign and not reported to the division until after the campaign especially since candidates are allowed to mail in the last campaign treasurer's report which is due on Friday preceding the general election. However, the legislature was well aware of these possibilities when it adopted the expedited reporting system now contained in Section 106.07(1)(b), Florida Statutes.

If the Legislature had wanted to require candidates to file campaign treasurer's reports more than once a week, it could have done so, but it chose the reporting cycle contained in Section 106.07(1)(b), Florida Statutes. After the Legislature is able to review the provisions of public financing with viable candidates, it may well wish to make changes in the Act. However, such changes must be made by the

Legislature and not the division.

## **SUMMARY**

The department will rely on campaign finance reports filed by candidates pursuant to Section 106.01(1)(b), Florida Statutes, when it receives a request for excess funds from a participating candidate under Section 106.355, Florida Statutes, of the Act.

Section 106.355, Florida Statutes, does not require the participating candidate to provide any information with a request for excess funds under Section 106.355, Florida Statutes.

The department will not routinely conduct inspections of a candidate's account to determine the amount of excess funds to be provided pursuant to Section 106.355, Florida Statutes.

The department's procedure for and the operative dates of a request for excess funds by a participating candidate under Section 106.355, Florida Statutes, will be that when such a request is received by the division, the division will check the most recent campaign treasurer's report on file by the nonparticipating candidate to see if that candidate has exceeded the spending limit contained in Section 106.34, Florida Statutes. This limit is \$5-million for the governor and lieutenant governor candidates and \$2-million for the cabinet candidates. If the nonparticipating candidate has not exceeded this limit, the request will be retained on file until the nonparticipating candidate's campaign treasurer's reports indicate that the candidate has exceeded the spending limit, and disbursement will be made to the participating candidate within seven days pursuant to Section 106.355, Florida Statutes. Once a nonparticipating candidate has exceeded the limit, each report filed thereafter by that candidate will be checked by the division to determine if additional moneys are due participating candidates. These moneys may not exceed two times the maximum expenditure limits contained in Section 106.34, Florida Statutes.