



FLORIDA DEPARTMENT *of* STATE

CHARLIE CRIST
Governor

KURT S. BROWNING
Secretary of State

August 4, 2009

Mr. Robert Novoa
Chair, Tell the Public the Facts, Inc.
8835 SW 107th Avenue # 135
Miami, Florida 33176

RE: DE 09-06
Electioneering Communications Organizations;
§§ 106.011(1)(b)3 and 106.011(3)(b), Florida
Statutes

Dear Mr. Novoa:

This letter responds to a request for an advisory opinion sought by the counsel for Tell the Public the Facts, Inc., an electioneering communications organization (ECO) of which you are the chairperson. Your counsel seeks information regarding the effect of the federal district court's entry of summary judgment in favor of the plaintiffs in *The Broward Coalition of Condominiums, et. al. v. Browning, et. al.*, Case No. 4:08cv445-SPM/WCS (N.D. Fla. May 22, 2009). Because you chair an organization that engages in political activity, the Division of Elections has the authority to issue you an opinion pursuant to section 106.23(2), Florida Statutes (2008).

The referenced district court decision found portions of chapter 106, Florida Statutes, unconstitutional and permanently enjoined the Secretary of State and members of the Florida Elections Commission, their officers, agents, servants, employees, and attorneys, as well as persons in active concert or participation with them, from enforcing the electioneering communications laws of Chapter 106.¹ The court's ruling has now become final.

Your attorney seeks answers to three questions, which we address in turn.

First, does an ECO have a continuing requirement to file periodic reports of contributions and expenditures with the Division of Elections or local filing officer, as applicable? The answer to

¹ The court found the following provisions unconstitutional: (a) All references to "electioneering communication(s)" in sections 106.011(3), 106.011(4)(a), 106.022(1), 106.04(5), 106.0705(2)(b), 106.071(1), 106.08(7), 106.1437, 106.147(1)(a), and 106.17; and (b) Sections 106.011(1)(b)3, 106.011(4)(b), 106.011(18), 106.011(19), 106.03(1)(b), 106.0703, 106.08(4)(b), 106.08(5)(d), 106.1439, and 106.147(1)(e) in their entirety.

this question is “no.” The court declared section 106.011(1)(b)3, Florida Statutes (2008), unconstitutional in its entirety. That section required ECOs to register and file reports of contributions and expenditures in the same manner, at the same time, as political committees supporting or opposing an issue or a legislative candidate. Because the section is unconstitutional and can no longer be enforced, an ECO need not file the previously required reports. The Division of Elections will continue to accept such filings if the ECO desires to file them; however, the Division will not take any action regarding a late filed report or a failure to file a report.

Second, if the reports are no longer required, what action should the ECO take to terminate its registration with the Division of Elections or the local filing officer? An ECO may terminate its registration with the applicable filing officer by providing a signed letter from the ECO’s chairperson or campaign treasurer to the filing officer informing the filing officer that the ECO is terminating its registration.

Third, if the ECO remains in existence as a tax exempt “political organization” under section 527 of the Internal Revenue Code, but does not remain registered with or report to the filing officer as an ECO, may it accept transfers of funds as addressed in section 106.011(3)(b), Florida Statutes (2008), from political committees and committees of continuous existence which are properly registered with the applicable Florida filing officer? We respond to this question based solely upon the provisions of Florida’s Election Code and do not address an organization’s status under the Internal Revenue Code.

In light of the court’s decision, an entity that once was registered and regulated as an ECO is now an entity outside the scope of chapter 106, Florida Statutes. Accordingly, chapter 106 clearly does not prohibit a former ECO from receiving funds from political committees or committees of continuous existence.

Of course, the former ECO must be alert to the requirement to register as a political committee if it accepts contributions during a calendar year in an aggregate amount exceeding \$500 for the purpose of: (1) making contributions to any candidate, political committee, committee of continuous existence, or political party, or (2) expressly advocating the election or defeat of a candidate or an issue.²

Additionally, the donating entity, *i.e.*, the committee of continuous existence or political committee, must continue to comply with regulations applicable to its conduct. For example, by definition in section 106.011(3), Florida Statutes (2008), and based upon its statement of organization filed pursuant to section 106.03, Florida Statutes (2008), a political committee may only make expenditures for the political committee’s registered activities and only for the

² §§ 106.011(1) and 106.03(1), Fla. Stat. (2008). These provisions also require an organization to register as a political committee if it makes expenditures exceeding \$500 in any calendar year that expressly advocate the election or defeat of a candidate/issue.

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purpose of influencing the results of an election.³ Only when the transfer of funds by the political committee to another organization satisfies these criteria does the Election Code permit the political committee to make the transfer.⁴

Finally, we take this opportunity to note that the following opinions must now be read in light of the court's ruling about the enforcement of electioneering communications laws in *The Broward Coalition of Condominiums, et. al. v. Browning, et. al.*, Case No. 4:08cv445-SPM/WCS (N.D. Fla. May 22, 2009): *Division of Elections Opinion* 05-04 (June 28, 2005); *Division of Elections Opinion* 05-06 (September 21, 2005); *Division of Elections Opinion* 06-05 (April 14, 2006); *Division of Elections Opinion* 06-06 (April 14, 2006); *Division of Elections Opinion* 06-09 (August 10, 2006); *Division of Elections Opinion* 07-01 (June 8, 2007); and *Division of Elections Opinion* 08-08 (June 18, 2008).

SUMMARY

As a result of *The Broward Coalition of Condominiums, et. al. v. Browning, et. al.*, Case No. 4:08cv445-SPM/WCS (N.D. Fla. May 22, 2009), a permanent injunction exists against the Secretary of State and members of the Florida Elections Commission, their officers, agents, servants, employees, and attorneys, as well as persons in active concert or participation with them, from enforcing the electioneering communications laws of Chapter 106. Electioneering communications organizations need not continue filing reports of their contributions and expenditures. They may terminate their registration status as an electioneering communication organization by providing a signed letter to the applicable filing officer informing him or her of the termination of the ECO's registration.

Nothing in the Election Code currently prohibits an organization that was formerly a registered ECO in Florida from receiving a transfer of funds from a committee of continuous existence. However, the former ECO must be alert to the requirement to register as a political committee if it accepts contributions during a calendar year that satisfy the statutory criteria for becoming a political committee. Additionally, the donating entity, *i.e.*, the committee of continuous existence or political committee, must continue to comply with regulations applicable to its conduct.

Sincerely,



Donald L. Palmer
Director, Division of Elections

cc: Ronald G. Meyer, Esq.

³ See *Division of Elections Opinion* 90-03 (January 11, 1990) ("A political committee may not make any expenditures which are not made for the purpose of influencing an election.").

⁴ The Election Code contains an exception for a political committee to make a contribution in lieu of flowers to a religious, charitable, civic, or other cause or organization established primarily for the public good in memory of a deceased person. § 106.08(5)(c)1, Fla. Stat. (2008).