



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

**TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE**

FROM: COMMISSION SECRETARY *MWD*

DATE: August 11, 2004

SUBJECT: COMMENT; PROPOSED AO 2004-24

Transmitted herewith is a timely submitted comment by J. Blair Richardson, General Counsel for Aristotle Publishing, regarding the above-captioned matter.

Proposed Advisory Opinion 2004-24 is on the agenda for Thursday, August 12, 2004.

Attachment

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COMMENT ON FEC DRAFT ADVISORY OPINION 2004-24**INTRODUCTION**

Aristotle Publishing respectfully files this comment on Draft Advisory Opinion 2004-24, which responds to a request filed by software seller NGP, Inc.

With this comment, Aristotle urges the Federal Election Commission to take two actions in the final version of Advisory Opinion 2004-24:

1. To reject unequivocally the request by NGP for permission to provide individual contributor data for purposes of unlawful solicitation of contributions and other unlawful uses.
2. To reiterate existing law, which is that the determination of whether a specific publication of FEC data is legal or illegal depends upon a variety of factors relating to the scope and context of such publication.

NGP's Request for Permission to Use FEC Data For Any Purpose

Claiming to be the "leading national software and technology consulting firm" for Democrats, NGP has proposed obviously illegal uses of FEC contributor data. In plain contravention of all relevant legal authority, NGP asks whether it can "sort and organize" FEC data into a client's database "based on the client's needs", including for the express purpose of "soliciting contributions". NGP also asks if it may provide data to its customers "regardless of intended use". See Advisory Opinion Request 2004-24.

Section 438(a)(4) Of The Federal Election Campaign Act

The law expressly prohibits individual contributor information copied from federal campaign reports or statements from being "sold or used by any person for the purpose of soliciting contributions or for commercial purposes". See Section

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438(a)(4) of the Federal Election Campaign Act (2 U.S.C §438(a)(4)). NGP's request to provide contributor data for unlimited uses –including both political and commercial solicitations – runs afoul of the plain language of the statute in two ways.

NGP's proposal violates the express prohibitions on use of the data for soliciting contributions, and on selling the data for any purpose ("regardless of intended use") so that it can be used for purposes such as commercial solicitation and other harassment of contributors. Having provided no other context or details, NGP's request may be dismissed without the need for further analysis.

Potential Overbreadth of Draft AO 2004-24

Aristotle's concern is that, because NGP has not made any serious effort to justify its misuse of FEC data, the FEC may overstate the law in rejecting NGP's meritless proposal. Instead of simply noting that NGP's proposed unlimited use of FEC data violates the plain language of 2 U.S.C §438(a)(4), the draft opinion states a somewhat different conclusion, and in doing so, states the applicable legal principles too broadly.

Of particular concern is the one statement that appears to be the heart of the FEC's rationale for rejecting NGP's request. Draft AO 2004-24 states that the mere inclusion of any individual contributor FEC data in campaign software is unlawful use "for a commercial purpose because NGP is a for-profit company that sells and services NGP Campaign Office for a profit."

However, it has been established in court that the mere use or publication of FEC data by a commercial entity is not a per se violation of the law. In Federal Election Comm'n v. Political Contributions Data, Inc., 943 F.2d 190 (2d Cir. 1991) ("PCD"), the Second Circuit reversed the lower court's finding that PCD, a for-profit company, had violated §438(a)(4) by selling the FEC data, even for lawful end-uses. (The lower court's finding had affirmed FEC AO 1986-25, which the FEC also relies upon in Draft AO 2004-24.)

The Second Circuit found that PCD was formed in order to assemble and disseminate FEC data at a profit. Rejecting the rationale of AO 1986-25, the court noted that that a literal application of the statute "would obviously impede, if not entirely frustrate, the underlying purpose of the disclosure provisions of the FECA", as it would "bar newspapers and other commercial purveyors of news from publishing information contained in those reports under any circumstances." Id., at 194.

As the FEC's own website summarizes the PCD decision:

PCD's sale of FEC information did not violate the commercial purposes prohibition: "The absence from PCD's reports of mailing addresses and phone numbers, as well as the caveat on each page against solicitation and commercial use, make it virtually

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certain that these reports will be used for informative purposes (similar to newspapers, magazines, and books...), not for commercial purposes (similar to soliciting contributions or selling cars)."

The court based this conclusion on its interpretation of the commercial purposes prohibition: "The §438(a)(4) prohibition is only violated by a use of FEC data which could subject the 'public-spirited' citizens who contribute to political campaigns to 'all kinds of solicitations,' such as commercial solicitations for magazine subscriptions or credit cards.

See <http://www.fec.gov/info/casums3.htm>

The FEC website summary further describes the PCD court as saying that "this reading of the prohibition balances the need to protect the privacy of individual contributors with statutory intent to promote public disclosure of campaign finance information." (emphasis added.)

A similar balancing test was adopted by the FEC in AO 1995-9, where the FEC cites PCD with approval, in analyzing the scope and manner in which FEC data was made available in a different context. In fact, in all of the Advisory Opinions cited in Draft AO 2004-24, analysis of whether or not there has been a violation of §438(a)(4) can depend on a variety of factors, including the nature of the medium for presentation of the individual contributor data, what data is involved, how much of the data is accessed, the intended purpose for which it is accessed, the format, the nature of the end use and the end user, the presence of adequate disclaimers, and a balancing of the privacy interests of individual contributors with statutory intent to promote public disclosure of campaign finance information.

It would be inconsistent with case law and other FEC Advisory Opinion precedent for the FEC now to rely on the rationale of AO 1986-25 to support an overly broad finding that any use, access, or publication by a for-profit campaign software provider is per se illegal.¹

Conclusion

Aristotle's comment thus encompasses two requests.

First, NGP purports to be designing a software package that will encourage the misuse of FEC individual contributor data for solicitation of contributions as well as any other use, without so much as the presence of an FEC disclaimer. NGP's

¹ The FEC had held in AO 1986-25 that, regardless of context, the mere sale of FEC information by a for-profit entity was unlawful. The Court in PCD found this to be "unreasonable" – a finding that led to the FEC's payment of PCD's attorney's fees after an unsuccessful appeal by the FEC to the U.S. Supreme Court.

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proposal violates the prohibition on use of the data for soliciting contributions, and violates the proscription on selling the data so that it can be used for commercial solicitation and other harassment of contributors. The lack of sophistication in NGP's blatantly illegal proposal for highly restricted FEC data is surprising for a self-professed "leading" technology consulting firm, and merits a swift and unequivocal denial on the basis of the plain language of the statute. .

Second, we urge the FEC to clarify that the legality or illegality of other types of use or publication of individual contributor data does not involve merely looking at the identity of the publisher. As, e.g., PCD and AO 1995-9 demonstrate, there are many factual and contextual considerations at issue in each case. It is possible for responsible entities, acting on the advice of competent counsel, to structure limited access to certain elements of the data in a way that balances the competing interests fairly and lawfully.

The fact that NGP has not made a serious effort to present a legitimate structure should not lead the FEC to issue a statement of the law in this context that would chill bona fide uses of FEC data for lawful purposes.

Respectfully submitted,



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Aristotle