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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

**AGENDA DOCUMENT NO. 13-41**  
**AGENDA ITEM**  
**For meeting of October 31, 2013**  
**SUBMITTED LATE**

October 25, 2013

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS*  
Assistant General Counsel

Adav Noti *LJS for AN*  
Acting Associate General Counsel

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Assistant General Counsel

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Attorney

Subject: Draft AO 2013-11 (Miller)

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 12:00 pm (Eastern Time) on October 30, 2013.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <http://www.fec.gov/law/draftaos.shtml>.

Attachment

1 ADVISORY OPINION 2013-11

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William J. Olson, Esq.  
William J. Olson, P.C.  
370 Maple Avenue West, Suite 4  
Vienna, VA 22180-5070

**DRAFT**

9 Dear Mr. Olson:

10 We are responding to your advisory opinion request on behalf of Citizens for Joe  
11 Miller (the “Committee”) concerning the application of the Federal Election Campaign  
12 Act of 1971, as amended (the “Act”), and Commission regulations to the use of campaign  
13 funds for litigation purposes. The requestor asks whether the Committee may use  
14 campaign funds to post a cash deposit in lieu of a supersedeas bond on appeal from an  
15 Alaska state court judgment against former Senate candidate Joseph Miller and/or to pay  
16 the final judgment should Miller be unsuccessful in his appeal. The Commission  
17 concludes that the Committee may use campaign funds for these purposes because  
18 neither the lawsuit nor the judgment would have existed irrespective of Miller’s  
19 campaign.

20 ***Background***

21 The facts presented in this advisory opinion are based on your submissions  
22 received on July 10, July 18, and August 1, 2013, and court records from the litigation at  
23 issue, *Fairbanks Daily News Miner v. Fairbanks North Star Borough*, Case No. 4FA-10-  
24 02886CI (Alaska Super. Ct.).<sup>1</sup>

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<sup>1</sup> Unless otherwise noted, the court documents cited herein were submitted as part of the advisory opinion request and are available at [www.fec.gov/searchao](http://www.fec.gov/searchao).

1           Joseph Miller was a candidate for U.S. Senate from Alaska in 2010. Prior to  
2 becoming a candidate, Miller had worked as an attorney for the Fairbanks North Star  
3 Borough (the “Borough”), a municipal corporation and political subdivision in Alaska.  
4 In 2010, four media outlets — the Fairbanks Daily News-Miner, the Alaska Dispatch, the  
5 Associated Press, and the Anchorage Daily News — sought access to Miller’s  
6 employment records by filing public document requests with the Borough. The Borough  
7 refused to release certain requested records without Miller’s consent, which he declined  
8 to give.

9           In October 2010, the media entities filed suit against the Borough in Alaska state  
10 court to obtain Miller’s employment records. The plaintiffs argued that pre-election  
11 disclosure of the relevant personnel records was necessary to further “the electorate’s  
12 right to truthful and full disclosure of information relating to a political candidate.”  
13 Compl. for Access to Public Records ¶ 11 (Oct. 11, 2010) (complaint of Fairbanks Daily  
14 News-Miner); *see also* Compl. for Access to Public Records Concerning U.S. Senate  
15 Candidate Joe Miller (Oct. 11, 2010) (complaint of Alaska Dispatch). Miller intervened  
16 as a defendant in the litigation on the grounds that he was an indispensable party because  
17 only he could protect his privacy interests. Miller also filed cross-claims against the  
18 Borough for alleged violations of Miller’s privacy, and he filed a similar third-party claim  
19 against the Borough’s mayor.

20           On October 23, 2010, the trial court issued an opinion ordering the Borough to  
21 disclose Miller’s employment records. The court ruled that “although Mr. Miller has a  
22 legitimate expectation of privacy in those documents, Mr. Miller’s right to privacy is . . .  
23 outweighed by the public’s significant interest in the background of a public figure that is

1 running for U.S. Senate.” Transcript of Status Hearing at 119 (Oct. 23, 2010). This  
2 opinion essentially resolved the media entities’ original suit. All of the media outlets  
3 except the Alaska Dispatch then waived their rights to fees and costs in exchange for  
4 Miller’s agreement to dismiss them from the case. Alaska Dispatch continued to  
5 participate in the case “in light of Miller’s ongoing attempts to identify the newspaper’s  
6 source of the information about his Borough employment.” *See* Order Granting Motion  
7 for Attorney’s Fees and Costs at 10 (May 16, 2013).<sup>2</sup> During this post-election phase of  
8 the litigation, some depositions were taken and numerous motions were filed. Alaska  
9 Dispatch was an “active participant” in these motions. *Id.* at 9.

10 The litigation regarding Miller’s cross-claims and third-party claims against the  
11 Borough and its mayor continued until August 29, 2012, when the court entered a final  
12 judgment in favor of Miller against the Borough and its mayor, jointly and severally, in  
13 the amount of \$5,000. The Alaska Dispatch moved against Miller for an award of  
14 attorneys’ fees and costs, the majority of which the Alaska Dispatch had incurred during  
15 the post-election phase of the litigation. On May 16, 2013, the court found that the  
16 “principal dispositive issue in the case — the release of the documents” had been  
17 resolved in favor of Alaska Dispatch. *See id.* at 12. The court therefore determined that  
18 the Alaska Dispatch was the prevailing party “for the entirety of the case” and awarded it  
19 reimbursement of a portion of the fees and costs incurred in the litigation, including an  
20 award of \$85,435 against Miller. *Id.* at 26-27. This award included an enhancement  
21 based on the court’s finding that the Alaska Dispatch had incurred fees in support of

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<sup>2</sup> Available at <http://www.alaskadispatch.com/sites/default/files/Miller-to-pay-Alaska-Dispatch-85k.pdf>.

1 “significant matters,” *i.e.*, “the public’s right to make informed decisions concerning  
2 electoral candidates.” *Id.* at 25.

3 On July 15, 2013, Miller filed a timely appeal of the award against him. The  
4 relevant civil rules require him to post with the court a cash deposit or supersedeas bond  
5 pending appeal. *See* Alaska R. App. P. 602(f), (g).

6 ***Question Presented***

7 *May the Committee use campaign funds to post with the court a cash deposit*  
8 *pending Miller’s appeal of the court’s decision and/or to pay the judgment should his*  
9 *appeal be unsuccessful?*

10 ***Legal Analysis and Conclusions***

11 Yes, the Committee may use campaign funds to post a cash deposit pending  
12 Miller’s appeal of the court’s decision and/or to pay the judgment should his appeal be  
13 unsuccessful because the lawsuit and the judgment would not have existed irrespective of  
14 his campaign.

15 The Act identifies six categories of permissible uses of contributions accepted by  
16 a federal candidate. 2 U.S.C. § 439a(a); *see also* 11 C.F.R. Part 113. These permissible  
17 uses include: (1) “otherwise authorized expenditures in connection with the [candidate’s]  
18 campaign for Federal office,”; (2) “ordinary and necessary expenses incurred in  
19 connection with the duties of the individual as a holder of Federal office”; and (3) “any  
20 other lawful purpose” that does not constitute conversion to “personal use.”

21 2 U.S.C. § 439a(a)(1), (2), (6), (b); *see also* 11 C.F.R. § 113.2. Conversion to personal  
22 use occurs when campaign funds are used “to fulfill any commitment, obligation or  
23 expense . . . that would exist irrespective of the candidate’s election campaign or . . .

1 duties as a holder of Federal office.” 2 U.S.C. § 439a(b)(2); *see also* 11 C.F.R.  
2 § 113.1(g). Commission regulations provide that the Commission determines on a case-  
3 by-case basis whether the use of campaign funds to pay “legal expenses” falls within the  
4 definition of “personal use.” 11 C.F.R. § 113.1(g)(1)(ii)(A).

5         The Commission has long provided that if a candidate “can reasonably show that  
6 the expenses at issue resulted from campaign or officeholder activities, the Commission  
7 will not consider the use to be personal use.” Expenditures; Reports by Political  
8 Committees; Personal Use of Campaign Funds, 60 Fed. Reg. 7862, 7867 (Feb. 9, 1995).  
9 Legal fees and expenses, however, “will not be treated as though they are campaign or  
10 officeholder related merely because the underlying proceedings have some impact on the  
11 campaign or the officeholder’s status.” *Id.* at 7868. The Commission has therefore  
12 concluded that campaign funds may be used to pay for legal expenses incurred in  
13 proceedings that directly relate to the candidate’s campaign activities or officeholder  
14 duties. *See e.g.*, Advisory Opinion 2011-07 (Fleischmann) (permitting use of campaign  
15 funds to pay legal expenses incurred by campaign consultant in defending lawsuit  
16 alleging that consultant had defamed competing candidate’s staffer and improperly  
17 disclosed employment materials); Advisory Opinion 2009-20 (Visclosky) (concluding  
18 that campaign funds could be used to pay legal expenses incurred by former  
19 congressional staffers in connection with federal investigation of contributions to  
20 Representative’s campaign); Advisory Opinion 2009-12 (Coleman) at 7-8 (concluding  
21 that campaign funds could be used to pay legal expenses incurred to monitor, preserve  
22 documents for, and prepare for officeholder’s possible involvement in third-party  
23 lawsuits regarding alleged scheme to “divert money” for Senator’s benefit). On the other

1 hand, “legal expenses associated with a divorce or charges of driving under the influence  
2 of alcohol will be treated as personal, rather than campaign or officeholder related.” *See*  
3 60 Fed. Reg. at 7868.

4 Here, the Alaska media outlets’ suit to obtain Miller’s personnel records, as well  
5 as the court’s order granting that relief, directly related to his federal campaign. The  
6 plaintiffs asserted in their civil complaints that the disclosure of these records was  
7 necessary for the Alaska electorate to be able to “fully, fairly, and timely consider matters  
8 relevant to Mr. Miller’s candidacy.” *Complaint for Access to Public Records Concerning*  
9 *U.S. Senate Candidate Joe Miller* ¶ 20 (Oct. 11, 2010). The plaintiffs alleged that  
10 “[w]ithout full and timely disclosure of the documents pertaining to Mr. Miller’s former  
11 employment with the Borough the public [would] be left with an incomplete picture  
12 about the employment history, and the integrity and truthfulness of a potential holder of  
13 one of the state’s highest political offices.” *Id.*; *see Complaint for Access to Public*  
14 *Records* ¶¶ 10-11 (Oct. 11, 2010). The court then ordered the Borough to disclose the  
15 documents because the public’s interest in them outweighed Miller’s right to privacy  
16 “since he is now a candidate for the U.S. Senate.” *See Transcript of Status Hearing at*  
17 *118-19* (Oct. 23, 2010). The court record thus makes clear that the lawsuit was directly  
18 and explicitly related to Miller’s candidacy and would not have existed irrespective of his  
19 campaign.

20 Although most of the fees and costs awarded against Miller were incurred in the  
21 post-election phase of the litigation, *see Alaska Dispatch, Comment on AOR 2013-11*  
22 *(Aug. 27, 2013)*, <http://saos.nictusa.com/aodocs/1245315.pdf>; *Response and Qualified*  
23 *Objection of Alaska Dispatch to Defendant Joe Miller’s Notice of Cas[h] Deposit in Lieu*

1 of Bonds at 4-7 (July 2, 2013), whether a claim is litigated before or after an election is  
2 not dispositive. Lawsuits involving election campaigns are often litigated after the  
3 election, and the Commission has never barred the use of campaign funds to pay for legal  
4 expenses on this temporal ground. Indeed, on more than one occasion the Commission  
5 has allowed campaign funds to be used to pay for lawsuits that were not filed until after  
6 the election. *See, e.g.*, Advisory Opinion 2011-07 (Fleischmann) (allowing use of  
7 campaign funds to defend suit filed in 2011 regarding 2010 campaign); Advisory Opinion  
8 1995-23 (Shays).

9       Moreover, although the cross-claim here was litigated after the election, under  
10 Alaska Rules of Civil Procedure a cross-claim must “[arise] out of the transaction or  
11 occurrence that is the subject matter of the original action.” *See* Alaska R. Civ. P. 13(g).  
12 The original action, which was directly related to Miller’s candidacy and litigated before  
13 the election, concerned the release of Miller’s employment records. Miller intervened in  
14 the original action to defend his privacy interests in the release of those records. His  
15 cross-claim against the Borough, a party to the original action, was related to the  
16 disclosure of those records. The Borough’s mayor, although not an original party, was  
17 joined to the original action by Miller’s cross-claim. *See* Alaska R. Civ. P. 13(h).  
18 Miller’s third-party claim against the mayor similarly related to the disclosure of Miller’s  
19 employment records that were the subject of the original action. The fact that the Alaska  
20 court allowed the cross-claim and third-party claim to be joined to the original action  
21 means that the court necessarily determined that these claims arose out of the same  
22 transaction or occurrence that was the subject matter of the original action.

1           Because the post-election phase of the litigation was inextricably linked to the  
2 initial lawsuit to release the documents, the Commission concludes that the post-election  
3 phase of the litigation would not have arisen irrespective of his candidacy. Thus, the  
4 post-election timing of some of the litigation — including the portion accounting for  
5 most of the judgment against him — has no bearing on Miller’s ability to use campaign  
6 funds for his cash deposit.<sup>3</sup> Accordingly, Miller may also use campaign funds to pay the  
7 final judgment should he be unsuccessful on appeal.<sup>4</sup>

8           This response constitutes an advisory opinion concerning the application of the  
9 Act and Commission regulations to the specific transaction or activity set forth in your  
10 request. *See* 2 U.S.C. § 437f. The Commission emphasizes that, if there is a change in  
11 any of the facts or assumptions presented, and such facts or assumptions are material to a  
12 conclusion presented in this advisory opinion, then the requestor may not rely on that  
13 conclusion as support for its proposed activity. Any person involved in any specific  
14 transaction or activity which is indistinguishable in all its material aspects from the  
15 transaction or activity with respect to which this advisory opinion is rendered may rely on  
16 this advisory opinion. *See* 2 U.S.C. § 437f(c)(1)(B). Please note that the analysis or  
17 conclusions in this advisory opinion may be affected by subsequent developments in the  
18 law, including, but not limited to, statutes, regulations, advisory opinions, and case law.

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<sup>3</sup> The Commission notes that when using campaign funds for costs resulting from offensive litigation, there must be “no direct or indirect . . . financial benefit to the requestor as a result of the award and use of” awarded damages. Advisory Opinion 1997-27 (Boehner). Miller’s appeal challenges the award of fees and costs against him; it does not appear to seek damages. *See* Response and Qualified Objection of Alaska Dispatch at 2 n.1 (July 2, 2013).

<sup>4</sup> As noted above, the majority of the awarded fees were incurred by Alaska Dispatch during the post-election phase of the lawsuit that Miller won against the Borough and its mayor. The fees incurred are also inextricably linked to the initial lawsuit because Alaska Dispatch was an active participant in the case as Miller attempted to identify the newspaper’s source of the information about his Borough employment.

1 The cited advisory opinions are available on the Commission's website, [www.fec.gov](http://www.fec.gov), or  
2 directly from the Commission's Advisory Opinion searchable database at  
3 [www.fec.gov/searchao](http://www.fec.gov/searchao).

4 On behalf of the Commission,

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8 Ellen L. Weintraub  
9 Chair  
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