



FEDERAL ELECTION COMMISSION
Washington, DC 20463

October 2, 1981

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1981-32

Donald M. Middlebrooks
Steel Hector & Davis
Southeast First National Bank Building
Miami, Florida 33131

Dear Mr. Middlebrooks:

This refers to your letter of July 30, 1981, requesting an advisory opinion on behalf of Reubin Askew concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act") to various activities planned by Mr. Askew with a view to his possible candidacy for the Office of President of the United States.

Your letter indicates that Reubin Askew, a former governor of Florida, proposes to undertake a variety of activities to determine whether his candidacy for the Democratic nomination for President is feasible and desirable. You state that Governor Askew is not now a candidate and prefers to avoid at this time any action that would make him a candidate under the Act. He does, however, intend to file reports of all contributions and expenditures voluntarily with the Commission. Your request further explains that Governor Askew is not a public official and his usual duties with his law firm do not normally involve the amount of travel within the United States or the type of activities necessary to determine the viability of a presidential campaign. Your request lists numerous activities and proposals and asks whether they would be permissible under the exemptions in Commission regulations for "testing the waters" activity. The request further asks:

- a) Whether there is a point at which undertaking any or all of the activities specified will make Governor Askew a "candidate" under the Act even though he has not made a decision to become a candidate.
- b) Whether during the period when the described activities are pursued it is necessary for records to be maintained concerning "in kind contributions".

c) Whether any funds that remain in the account used for the described activities may be transferred to a principal campaign committee account in the event a decision is made to become a candidate.

Your request sets forth 14 specific planned activities and functions related to Governor Askew's effort to decide if he should become a presidential candidate for 1984. You ask whether these activities would be considered by the Commission as exempt under the regulations at 11 CFR 100.7(b)(1). These activities are:

1. Travel throughout the country for the purpose of speaking to political and non-political groups on a variety of public issues and meeting with opinion makers and others interested in public affairs for the purpose of determining whether potential political support exists for a national campaign.
2. Employment of political consultants for the purpose of assisting with advice on the potential and mechanics of constructing a national campaign organization.
3. Employment of a public relations consultant for the purpose of arranging and coordinating speaking engagements, disseminating copies of the Governor's speeches, and arranging for the publication of articles by the Governor in newspapers and periodicals.
4. Rental of office space.
5. Rental or purchase of office equipment for the purpose of compiling the names and addresses of individuals who indicate an interest in organizing a national campaign.
6. Preparation and use of letterhead stationery and correspondence with persons who have indicated an interest in a possible campaign by the Governor. It is understood that dissemination of information through mailings to the general public would not be appropriate "Testing the Waters" activity.
7. Supplementing the salary of a personal secretary who is employed by the Governor's law firm but will have the additional responsibility during the testing period of making travel arrangements, taking and placing telephone calls related to the testing activities, assisting in receiving and depositing the funds used to finance the testing, and assisting with general correspondence.
8. Reimbursement of the Governor's law firm for the activities of an associate attorney who is employed by the firm but will have the responsibility during the testing period of researching and preparing speeches, and coordinating the arrangement of interviews of the Governor by the news media, answering inquiries of the news media, arranging background briefings on various public issues, and traveling as an aide on some of the testing trips.

9. Reimbursement of the Governor's law firm for telephone costs, copying costs, and other incidental expenses which may be incurred.
10. Travel to other parts of the country in order to attend briefings on various public issues, and reimbursement of those who travel to Miami for the purpose of providing briefings on public issues.
11. Employment of a specialist in opinion research to conduct polls for the purpose of determining the feasibility of a national campaign.
12. Employment of an assistant to help coordinate travel arrangements and also travel as an aide on some of the testing trips.
13. Preparation and printing of a biographical brochure and possibly photographs to be used in connection with speaking appearances by Governor Askew. It is understood that such a brochure and such photographs would not be utilized in a general mailing.
14. Solicitation of contributions for the limited purpose of engaging in such "Testing the Water" activities as the foregoing. It is understood that this period would not be used for the purpose of raising funds for any possible later campaign.

As you are aware, Commission regulations set forth exemptions from the definition of contribution and expenditure which permit an individual to finance a variety of activities to assist in making a determination of whether to become a candidate for Federal office. Activities which are conducted within the exemption do not result in the occurrence of a contribution or expenditure, and therefore do not by themselves cause the person to become a candidate under the Act. If and when the individual becomes a candidate the regulation has a retroactive effect in that the financing of all activity coming within the exemption must be reported and otherwise treated as contributions and expenditures for purposes of the Act and regulations. The regulation which grants the exemption from the definition of contribution provides:

- (1) Funds received and payments made solely for the purpose of determining whether an individual should become a candidate are not contributions. Activities permissible under this exemption include, but are not limited to expenses incurred for conducting a poll, telephone calls and travel, to determine whether an individual should become a candidate. The individual shall keep records of all such funds received and payments made. If the individual subsequently becomes a candidate, the funds received and payments made are contributions and expenditures subject to the limitations, prohibitions and requirements of the Act. Such contributions and expenditures must be reported with the first report filed by the principal campaign committee of the candidate, regardless of the date the funds were received or the payments made. This exemption does not include funds received or payments made for general public political

advertising nor does this exemption include funds received or payments made for activities designed to amass campaign funds that would be spent after the individual becomes a candidate. 11 CFR 100.7(b)(1)

A parallel exemption is made to the definition of expenditure at 11 CFR 100.8(b)(1). (Another related regulation is 11 CFR 101.3.) These limited exceptions, commonly referred to as the "testing the waters" exemptions, were included in Commission regulations so that an individual would not be discouraged from pursuing a variety of activities to determine whether a candidacy for Federal office is feasible. The Commission has indicated that the exemptions are available to determine "political support" for a potential candidacy and that under the exemption funds may be spent to determine whether one should become a candidate. Advisory Opinion 1979-26. Another opinion of the Commission recognizes that the exemption would apply to funds spent during a time period when one is "evaluating" a candidacy for Federal office. See Advisory Opinion 1978-40. Accordingly, it is apparent that the regulations seek to draw a distinction between activities directed to an evaluation of the feasibility of one's candidacy, as distinguished from conduct signifying that a private decision to become a candidate has been made.

The actual language of the regulation limits the exception to activities designed to determine whether to run; it explicitly limits the activities to those "solely" for this purpose. Moreover, the regulation expressly provides that it is not designed to allow any activities to promote a campaign. Thus, the exemptions prohibit activity designed to accumulate funds to be spent at a date after the decision to become a candidate is made; nor is the exemption available for "general public political advertising." These restrictions demonstrate that the exemption becomes inapplicable once the public activities of the individual take on a partisan political quality which would indicate that a decision has been made to seek nomination for election, or election, to a Federal office. Conduct of this type is distinguished from continuing to deliberate whether one should actually seek elective Federal office.

The Commission concludes that the testing the waters exemptions of the regulations permit all of the 14 activities described in your request provided and only so long as Governor Askew in undertaking any single activity, or all the various activities, continues to deliberate his decision to become a presidential candidate for 1984, as distinguished from pursuing the activity as a means of seeking some affirmation or reinforcement of a private decision he has already made to be a candidate. In this respect the Commission cautions specifically that commencing or continuing the activities listed will fall outside the testing the waters exemption if they, in context, represent the establishment of a campaign organization. This means that any oral or written statements by Governor Askew, or by others who assist in any of the 14 activities, may not refer to him as a presidential candidate. For example, any name selected for the testing the waters effort must avoid expressions such as "Askew for President," or "Askew in '84," etc. Also, titles or headings used to identify an office (activity 4) and on letterhead stationery (activity 6) must avoid similar types of campaign connotations.

The Commission is particularly concerned with respect to activities listed as 3, 6, and 13, since they envisage considerable public contact and could entail a purposeful, active effort to gain all possible political benefit from those contacts. Activities 3 and 13 appear to project

Governor Askew to the public as a person qualified to be taken seriously as a presidential contender," rather than as a means to ascertain if he would be so perceived by the public. Also, with respect to activity 6, it appears that continuing correspondence would be directed to individuals who initially indicated an interest in a possible campaign by Governor Askew. The apparent reason for such correspondence with the individual is reinforcement of his or her initial indication of political support. As such, the activity appears less oriented to ascertaining whether there is an initial base of political support adequate to launch a campaign effort, and more oriented to shoring up a base already identified that will sustain an actual campaign effort. In addition, the Commission is concerned that other activities, 2 and 8 for example, may be carried out in a fashion indicating that a campaign organization is actually being established, rather than remaining a matter for consultation.

Accordingly, if activities 3, 6, and 13 or any other activities take place in a factual context indicating that Governor Askew has moved beyond the deliberative process of deciding to become a candidate, and into the process of planning and scheduling public activities designed to heighten his political appeal to the electorate, then it is the Commission's opinion that the activity would cease to be within the exemption, and candidacy would arise.

With respect to question a) from your request, the Commission refers you to the foregoing discussion as responsive. The question is too general and hypothetical to make an extensive response at this time. 11 CFR 112.1(b). The Commission notes, however, that the time period during which any or all of the listed activities occur may have relevance to the issue of whether the activity is within the exemption. For example, if Governor Askew engages in several of the activities during several months in 1982, the continuation of those activities beyond January 1, 1983, would be very significant in determining the applicability of the exemptions in 1983. A person who becomes a presidential candidate for 1984, and who establishes eligibility for matching Federal payments from the Presidential Election Campaign Fund (26 U.S.C. 9031 et seq.), may begin on January 1, 1983, to receive contributions that can later qualify for matching Federal payments. 26 U.S.C. 9034. Engaging in these activities over a protracted time period would appear to diminish their usefulness for testing the waters purposes and would conversely suggest that their effect as a means of building campaign support would be magnified.

In response to question b), the Commission concludes that in kind gifts or loans of goods or services provided in connection with Governor Askew's testing the waters activities would be contributions under the Act to the same extent as would cash gifts or loans. Aside from special reporting rules and the manner of ascertaining the appropriate valuation, contributions of "anything of value" are treated the same as contributions of money and are thus subject to the Act and Commission regulations. See 2 U.S.C. 431(8)(A)(i), 441b(b)(2), and 11 CFR 100.7 (a)(1)(iii), 104.13. Therefore records of such contributions should be retained during the testing the waters activity. The fact that the quoted regulation refers specifically to "funds received" was not intended to change the general rules as to what is meant by the term "contributions;" nor was the regulation language intended to deny the applicability of the exemption to "in kind" donations for testing the water activity. The fact that in kind goods or services are not expressly mentioned in the regulation exemption to the definition of contribution could arguably indicate that such in kind gifts would be viewed as contributions and thus trigger candidate status if they

aggregated in excess of \$5,000. The Commission does not interpret its regulations in that light and considers use of the phrase "funds received" as including the receiving and use of "anything of value."

In response to question c), the Commission concludes that so long as the funds (or in kind donations) are solicited and received to defray expenses for activity within the testing the waters exemption, then any funds obtained expressly for that purpose could be retained and transferred to Governor Askew's principal campaign committee within the first reporting period after he becomes a candidate. 11 CFR 101.2, 101.3. Such funds are considered contributions when the financing of activity within the exemption becomes subject to retrospective treatment as contributions and expenditures under the Act and Commission regulations. Of course, as the regulation states, a fundraising effort designed and implemented to amass campaign funds that would be used for expenditures after Governor Askew has become a candidate, is prohibited as a testing the waters activity. Accordingly, the critical factor is that to stay within the exemption, the funds must be raised for the purpose of financing the exempt activity. Funds received for testing the waters purposes that exceed what is reasonably expected to be spent for those purposes, would presumably have been raised for future campaign expenditures and thus would be viewed as contributions. As contributions they would count toward the \$5,000 threshold for candidate status unless returned to the donors within 15 days of receipt. The threshold for candidate status is receiving contributions or making expenditures that in either case aggregate over \$5,000. 2 U.S.C. 431(2), 11 CFR 100.3. Once an individual becomes a candidate he or she has 15 days to designate in writing a principal campaign committee by filing a Statement of Candidacy (FEC Form 2). 2 U.S.C. 432(e), 11 CFR 101.1. Accordingly, the return (within 15 days of receipt) of funds considered to be contributions, because they exceed amounts reasonably expected to be spent for activities within the testing the waters exemption, would be necessary to avoid the onset of candidate status.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. 437g.

Sincerely yours,

(signed)

John Warren McGarry
Chairman for the
Federal Election Commission