



## State of New Jersey

### ELECTION LAW ENFORCEMENT COMMISSION

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#### Advisory Opinion No. 18-1984

Dear Mr. Raymar:

Your letter to the Election Law Enforcement Commission requesting an Advisory Opinion on behalf of "Friends of John Russo, Inc." has been considered by the Commission and I have been directed to issue this response. You have asked several questions concerning the applicability of "New Jersey The Campaign Contributions and Expenditures Reporting Act," N.J.S.A. 19:44A-1 et seq. (hereafter, the Act) to activities planned by Senator Russo to assess the possibility of Senator Russo becoming a candidate for Governor. You have further inquired whether costs incurred by Senator Russo in his capacity of Senate Majority Leader and as a member of the State Senate are subject to reporting requirements under the Act.

You have written that you represent "Friends of John Russo, Inc.," an entity you state that has been established to undertake activities to determine whether Senator Russo should become a gubernatorial candidate in the 1985 gubernatorial election. Specifically, in your letter dated October 31, 1984 you have submitted the following list of activities for the Commission's consideration:

"1. Travel by Senator Russo and an aide throughout New Jersey for the purpose of meeting with political and non-political groups, community leaders, and others interested in public affairs, in order to determine whether Senator Russo is sufficiently attractive, in terms of personality, past record and political philosophy, to obtain significant support for any future gubernatorial campaign;

2. Engage a political consultant (and pay the consultant's expenses) to develop a strategic and financial plan and time-line which details the activities that Senator Russo would have to be prepared to fund, support and follow in order to wage a successful campaign if he decided to become a gubernatorial candidate;
3. Engage an assistant to make "testing the waters" travel arrangements, and to schedule meetings with, and to follow-up with, individuals having input into the process whereby Senator Russo decides whether or not to become a gubernatorial candidate;
4. Conduct public opinion polling and focus group interviews to determine whether or not Senator Russo's background, viewpoints and his votes in the State Senate are such as would attract or repel the support needed for him to wage a successful gubernatorial campaign; and from the data developed through such polling and interviews, produce data which targets those voters that Senator Russo would have to be prepared to strive to attract if he became a gubernatorial candidate;
5. Engage in fund raising activity designed to raise sufficient funds to conduct "testing the waters" activity, to reimburse Senator Russo for his use of his airplane or other vehicles on "testing the waters" trips, and to reimburse the Senator's law firm for xeroxing, postage, space and the like devoted to "testing the waters" activity;
6. Prepare and print a biographical brochure for Senator Russo, to be distributed in connection with "testing the waters" travel, meetings and correspondence, but not in any general public mailing or political advertising."

The Commission has in the past recognized a distinction between activity intended to assist an individual in assessing the feasibility of a possible candidacy by that individual (i.e., "testing the waters") and activities signifying that a private decision to undertake a candidacy has been reached; see Advisory Opinion No. 37-1976. If activity undertaken by an individual is exclusively for the purposes of "testing the waters," money received and payments made related to "testing the waters" do not become subject to the reporting requirements of the Act unless that

individual becomes a candidate within the meaning of N.J.S.A. 19:44A-3(c); see Advisory Opinion No. 3-1983. When an individual becomes a "candidate" all funds or other things of value received and spent for "testing the waters" activity become subject to the reporting requirements; see N.J.A.C. 19:25-11.6 and 19:25-12.6. Also, in the case of a gubernatorial candidacy, all "testing the waters" funds received must be conformed within 10 days to the gubernatorial election contribution limit and must comply with all other public financing restrictions; see N.J.A.C. 19:25-15.1 et seq. and 19:25-16.1 et seq.

The Commission has promulgated regulations specifically addressing "testing the waters" activity. Funds received and payments solely for the purpose of determining whether an individual should become a candidate are excluded from the definition of "contribution"; and from the definition of "expenditure"; see N.J.A.C. 19:25-1.7. The language of the regulation limits this exclusion to those activities which are designed to determine whether or not the individual should run for elective office. The activities that are contemplated to come within the exclusion are set forth in Commission regulation N.J.A.C. 19:25-3.1, which provides as follows:

"Funds received and payments made solely for the purpose of determining whether an individual should become a candidate are not contributions or expenditures. Activities contemplated 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 candidate or the campaign committee of the candidate, regardless of the date the funds were received or the payments made. This exemption does not apply to funds received or payments made for general public political advertising; nor does this exemption apply to funds received or payments made for activities designed to amass campaign funds that would be spent after the individual becomes a candidate."

The above regulation specifically provides that it does not apply to activities which promote a candidacy. Therefore, the exclusion is not applicable to activity which is designed to accumulate funds to be spent at a date after the decision to become a candidate is made. Further, funds received or payments made for the purpose of general public political

advertising do not come under the "testing the waters" exclusion. These restrictions demonstrate that the exclusion 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 State office.

The Commission concludes that the "testing the waters" exclusion of the regulations permits all of the six activities described in your inquiry provided that Senator Russo continues to deliberate his decision to become a gubernatorial candidate for 1985, as distinguished from pursuing any of these activities as a means of furthering a private decision he has already made to be a candidate. The Commission is particularly concerned with activities five and six because they appear to contemplate significant public contact and could reflect an effort to achieve political benefit from those contacts. Therefore, as to activity five which concerns fund raising activity for "testing the waters" purposes, the Commission cautions that funds received or payments made for activities designed to amass campaign funds that would be spent after Senator Russo became a candidate are specifically outside of the "testing the waters" exclusion. If funds are raised substantially in excess of the amount needed to conduct reasonable "testing the waters" activity, the "testing the waters" exclusion would not be applicable. Similarly, activity to prepare and print a biographical brochure for Senator Russo reaches perilously close to the general public political advertising activity set forth in N.J.A.C. 19:25-3.1. The Commission suggests that such a brochure cannot be widely distributed but must be targeted to persons who can reasonably be anticipated to play a critical role in assisting Senator Russo in reaching a decision on a possible gubernatorial candidacy. If any of these activities take place in a factual context indicating that Senator Russo has moved beyond the deliberative process of deciding to become a candidate, and the activities enter the process of planning and scheduling public activities designed to heighten his political appeal to the electorate, the Commission believes that the activity would no longer be an exclusion and a candidacy would arise.

You have also asked whether costs incurred by Senator Russo in his role as Senate Majority Leader and a member of the New Jersey Senate are subject to the reporting requirements of the Act. You have submitted by letter dated November 14, 1984 a list of activities undertaken by Senator Russo during the past two years which, in your judgment, are undertaken in connection with legislative responsibilities and are not relevant to "testing the waters" or candidate-related activity. These are:

- "1. Senator Russo has attended meetings of the State Legislature's leadership, not only in Trenton on legislative days, but elsewhere as well. Such meetings are necessary to discuss the State Legislature's agenda, legislative strategy and other matters important to the orderly functioning of the State

Legislature. Senator Russo recently attended numerous legislative leadership meetings in Princeton, New Brunswick, and elsewhere, and two days of meetings in Newark, during one of which Governor Thomas Kean was also in attendance.

2. Senator Russo has appeared throughout the State as a principal spokesman for the Democratic Party in opposition to certain policies pursued by Governor Kean and the Republican Party. This role of Senate Majority Leader exists more when the Governor is a member of the opposing party than when the Governor and Senate Majority Leader are of the same party. Such an added role can be seen nationally as well, when Congressman O'Neill or Senators Byrd and Kennedy performed a different function under President Reagan than under President Carter. In such a capacity, Senator Russo has attended numerous radio and television talk shows, and newspaper editorial board meetings. Similarly, Governor Kean has often been invited to functions as principal spokesman for his Administration's policies, and Advisory Opinion 12-1983 specifically addressed "his responsibilities as a leader of the Republican party [sic] in New Jersey."

3. Senator Russo has been invited to appear throughout the State at non-partisan or bi-partisan events, as one of the highest ranking Democratic Party Leaders, and not "in opposition" to anyone or any policies. Thus, Senator Russo as Senate Majority Leader was invited to attend and attended the National Organization of Women's Statewide Convention in Trenton eight months or so ago, and later, NOW's Statehouse [sic] Rally. Similarly, he has attended the State AFL-CIO convention, other individual labor union statewide conventions in Wildwood and Cranford, and the Police Benevolent Association's Annual Convention in Cherry Hill. Senator Russo has also addressed Chambers of Commerce, Better Business Bureau meetings, the Mortgage Bankers Association Convention, the New Jersey Bankers Association Convention, and the Savings and Loan Association Convention in this capacity.

4. Senator Russo has appeared throughout the State in support of or in honor of fellow Democratic senators and other Democratic officeholders. The Senate Majority Leader does so because his office and presence lend prestige and honor to other Democrats. He does so also because other senators elected -- and may reelect -- Senator Russo to the position of Senate Majority leader. In recent years, a member of the legislative leadership has been permitted to serve consecutive terms in the leadership position if the membership chooses to reelect the leader. Senator Russo has been elected -- and reelected -- Majority Leader in part because of his demonstrated willingness and effectiveness in assisting and honoring other State Senators in their own

districts. Thus, Senator Russo has attended -- and has been introduced as an honored guest -- at virtually every county's annual Democratic Victory Dinner or fundraiser, and at dozens of municipal Democratic Club functions.

5. Senator Russo has travelled throughout the State because, as Senate Majority Leader, he is a suitable substitute for other high ranking public officials who decline to attend events to which they have been invited. Thus, Senator Russo has been asked to substitute for -- and has substituted for -- the Senate President. As another example, former Commissioner of Labor Roger Bodman, a Republican, arranged for Senator Russo to appear at a speaking engagement concerning unemployment compensation.

6. Senator Russo has appeared throughout the State and the Nation as a State Senator with well-defined issues and positions who has added "cachette" [sic] as Senate Majority Leader. Thus, David Susskind invited Senator Russo to appear on a television show devoted to the death penalty (which Senator Russo has sponsored since 1975), and Senator Russo did appear. The PBA has recognized Senator Russo and invited him to functions as chief sponsor of "20 and out" pension legislation. Senator Russo has addressed the National Conference of State Legislatures at various sites throughout the State and country on the municipal "caps" law -- Senator Russo's bill became the first such law in the nation. Similarly, Senator Russo was invited to attend, and attended, the dedication of new Terminal "C" at Newark International Airport in 1983, in part as Majority Leader and in part as the sponsor of the Airport Redevelopment Act.

Finally, of course, Senator Russo has been invited to, and has attended, innumerable other events outside of his home election district because he is one of 40 State Senators, and not primarily because he is Senate Majority Leader. Thus, for the annual Ocean County Democratic Fundraising Dinner, every legislator in New Jersey is sent a complimentary ticket. Senator Russo receives the same sort of complimentary ticket from most other county committees. Depending upon distance, schedules, and friendship with the hosts, senators -- including Senator Russo -- have decided whether or not to attend such events in districts other than their own."

In Advisory Opinion No. 12-1983, the Commission was asked to consider whether a television advertisement during the 1983 legislative election campaign which consisted of a video featuring Governor Thomas Kean, together with an audio delineating pledges made by the Governor and Republican legislators generally, constituted a possible contribution to a potential reelection campaign for Governor Kean. The Commission

concluded that the cost of the television advertisement would not constitute a "contribution" and was not "testing the waters" activity. In reaching that conclusion, the Commission indicated that relevant to the determination of the issue was: Timing of the advertisement in relation to a gubernatorial election; whether an advertisement can be said to contain an unambiguous reference to a candidate or a potential candidate for the office of Governor; the individual or organization which is sponsoring or underwriting the cost of the advertisement; whether the advertisement arises in the context of an election in which the individual in question can be expected to play a role independent of a potential gubernatorial candidacy; whether the thrust of the advertisement is to promote the institutional interest of a state political party committee or the personal views of a candidate or potential candidate for the office of Governor.

The Commission assumes that none of the activity that you have described has been paid for by campaign contributions. Under that assumption, in regard to Item No. 1, the Commission agrees that costs associated with attendance would not be subject to the reporting requirements of the Act. As to Item No. 2, the definition of the term "expenditure" appearing in N.J.A.C. 19:25-1.7 contains the following pertinent paragraph:

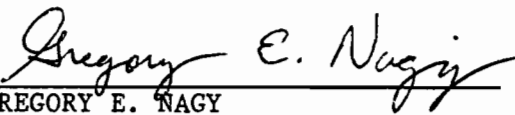
"Any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station, newspaper, magazine, or other periodical publication is not an expenditure, unless the facility is owned or controlled by any continuing political committee, political committee or candidate, in which case the cost for a news story i. which represents a bona fide news account communicated in a publication of general circulation or on a licensed broadcasting facility, and ii. which is part of a general pattern of campaign-related news accounts which give reasonably equal coverage to all opposing candidates in the circulation or listening areas, is not an expenditure."

As to Items No. 3, 4 and 5, the Commission believes that the activities described in these paragraphs could come within the ambit of "testing the waters" depending on the precise factual context in which costs are incurred. Your inquiry does not specify who, or what entity, will assume the cost associated with these activities. If such costs are incurred by a political party committee, for example, or a bi-partisan group that is conducting an informational function in which several different political viewpoints are being represented, the factual context is considerably different than if the cost is incurred by an entity providing a platform for Senator Russo to express partisan political views pertinent to his candidacy. Also, the Commission has stated that the timing of the cost can be a significant factor in determining whether or not it is related to "testing the waters" or furtherance of the candidacy. Therefore, the Commission notes that activities that have been undertaken in the past may now assume a "testing the waters" or candidate-related purpose that was not evident prior to the 1984 general election.

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The Commission believes that your inquiry cannot be answered conclusively because it is too general and hypothetical at this time. The Commission suggests that if Senator Russo does anticipate undertaking specific activity he believes is related exclusively or predominantly to his role as Senate Majority Leader or as a member of the State Senate, and costs associated with the activity are not to be paid for out of campaign contributions, that he submit to the Commission the particulars of the factual setting. Such particulars would include the date of the anticipated activity, the entities that will assume the costs, the nature of the activity, the anticipated audience, other speakers who may be appearing and any other information pertinent to the question of whether or not the activity can reasonably be anticipated to further a possible gubernatorial candidacy by Senator Russo.

ELECTION LAW ENFORCEMENT COMMISSION

BY:   
GREGORY E. NAGY  
Staff Counsel

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