



**City of Philadelphia
Law Department**

MEMORANDUM

TO: The Philadelphia Board of Ethics

FROM: Romulo L. Diaz, Jr., City Solicitor

DATE: December 9, 2005

SUBJECT: Chapter 20-1000 of the Philadelphia Code (“Campaign Contributions and Expenditures”)¹

You have requested an opinion regarding Chapter 20-1000 of The Philadelphia Code dealing with campaign finance limitations.² (This memorandum does *not* address issues raised by Chapter 17-1400 of the Philadelphia Code (Bill No. 040772-AA), the City’s recently adopted contract reform legislation, which includes certain contracting prohibitions based on the campaign contributions of potential contractors and others.)

Specifically, you have asked how the ordinance impacts the use of funds that are raised by someone prior to his or her declaration of candidacy once that person does declare his or her candidacy. In my view, once the person becomes a candidate, he or she can use money raised prior to becoming a candidate in support of his or her candidacy, but only to the extent that the money derives from contributions not in excess of the contribution limits imposed by the ordinance.³

¹ The analysis set forth in this opinion is substantially the same as that set forth in an October 7, 2004, memorandum from City Solicitor Pedro A. Ramos to Councilman Richard Mariano. The memorandum has been updated, however, to account for changes to the campaign finance ordinance made in 2005.

² In the original bill adopting the campaign finance restrictions, the new Code chapter was numbered 20-800. Because a Chapter 20-800 already existed in the Code at the time the bill was adopted, the Code editors renumbered the new chapter to Chapter 20-1000.

³ I note that my conclusion, and all that I discuss in this opinion, applies equally and identically to both incumbents and challengers. Both incumbents and challengers can raise unlimited amounts, unrestricted by the ordinance’s contribution limits, prior to becoming a

1. What is a Candidate?

Chapter 20-1000 set forth restrictions on the amount of contributions that can be made to, and the receipt of contributions by, *candidates* for primary, general and special elections. Specifically, with respect to contributions, the Code prohibits individuals from contributing more than \$2,500 per year to a candidate for one of the covered elected City offices and limits political committees, and persons (other than individuals), from contributing more than \$10,000 per year to such candidates.⁴

Chapter 20-1000 does not define the term “candidate.” Absent a definition of “candidate” in Chapter 20-1000, the term “candidate” would likely be interpreted by a court as referring to an individual who has *declared* his or her candidacy for a *particular* City office.

The courts have held, for purposes of the Home Rule Charter’s prohibition on City employees becoming a candidate for office other than for re-election, that “one becomes a candidate if he or she has filed nomination papers or publicly announced his candidacy for office.” *McMenamin v. Tartaglione*, 139 Pa. Commw. 269, 285 (Pa. Commw. Ct. 1991), *aff’d mem.*, 527 Pa. 286, 590 A.2d 753 (1991). Statements indicating a “willingness and availability to run for Mayor,” and inquiries “as to whether certain individuals would consider lending financial support to a campaign” are insufficient to make someone a candidate. *Id.* The term candidate, as used in Chapter 20-1000, would likely be construed to have the same meaning as the term candidate has when it is used in the Home Rule Charter.⁵

“candidate” for office; and both incumbents and challengers become limited in both contributions they can receive and in the expenditure of money raised pre-candidacy, once the incumbent or the challenger becomes a candidate for Council or Mayor.

⁴ Chapter 20-1000 also limits candidates to having one campaign committee and one checking account for the City office sought. All contributions and expenditures for the campaign for such office must be made into or from this account. Funds collected by the candidate in other political or non-political accounts may not be used by the candidate for his or her campaign. Code section 20-1003.

⁵ The definition of candidate used in the Pennsylvania Election Code is not particularly useful in interpreting the use of the term “candidate” in Chapter 20-1000. The Election Code defines a “candidate” as “any individual who seeks nomination or election” and states that “an individual shall be deemed to be seeking nomination or election...if he has [r]eceived a contribution or made an expenditure . . . whether or not the individual has made known the specific office for which he or she will seek nomination or election.” 25 P.S. § 3241. Fundraising by a local official (or prospective local official) could reflect an intention to run for one of the offices covered by Chapter 20-1000 . It could, however, also reflect an intention to run for a state-wide office, which the City does not have the power to regulate. Since the City does not (and almost certainly cannot) regulate fundraising for state-wide office; and since it is unknown, at the time an *undeclared* potential candidate raises money, for what office he or she will be running; it is unlikely a court would construe the word “candidate” under the Ordinance as broadly as that word is defined under the Election Code.

2. Use of Money Received Before a Declaration of Candidacy

The critical question in determining whether money raised *before* an individual's declaration of candidacy can be used by the person once that person becomes a candidate is what is meant by a "contribution" to a candidate. The Code dictates that "no political committee shall make total contributions per calendar year of more than ten thousand dollars (\$10,000) to a candidate" for one of the covered offices. Phila. Code § 20-1002(2). A contribution is defined by the ordinance as: "Money, gifts, forgiveness of debts, loans, or things having a monetary value incurred or received by a candidate or his/her agent for use in advocating or influencing the election of the candidate." Phila. Code § 20-1001(2). Prior to becoming a candidate for municipal office, a *potential* candidate is unrestricted by the ordinance with respect to his or her fundraising; he or she can raise funds in unlimited amounts, with no maximum contribution limit. The question arises whether these unlimited contributions can be used in support of the person's candidacy, once the person becomes a candidate. This question is best examined by setting forth an example involving a hypothetical situation.

Before Joe Smith declares his candidacy for a particular office, he already has a "political committee" (the "Joe Smith Political Committee") and an account in which the funds of the committee are held (the "Joe Smith Political Committee Account"). Because the contributions to that fund were not made to a "candidate" under the terms of the bill (as Smith remains undeclared), the \$2,500 and \$10,000 contribution limitations of Chapter 20-1000 do not apply. Smith has therefore collected in his political committee fund contributions from individuals and PACs in unlimited amounts (and in a total amount of, say, \$100,000). Smith is free to use this money for many purposes not covered by the ordinance, e.g., a run for State office, or disbursement to other candidates or causes.

Now Joe Smith declares his candidacy for a seat on City Council. On the day he declares his candidacy, Smith declares that the Joe Smith Political Committee Account that he has been using as his PAC is now going to be his campaign account from which he will make all his campaign expenditures and into which he will receive all campaign contributions. Smith has simply converted his general political committee account into his campaign committee account. This raises the question of whether the conversion, which effectively "starts" his campaign account with \$100,000 in it, constitutes a contribution by the Joe Smith Political Committee to Joe Smith, candidate, in which case, the contribution would be limited to \$10,000. I would not construe such a conversion as a contribution.

The ordinance, in my view, clearly proscribes the transfer of money in excess of \$10,000 from a committee controlled by a third party to an account controlled by a candidate, but no such transfer has taken place here. Therefore, in order to violate the ordinance's contribution limits, a political committee must, *at a minimum*, actually transfer more than \$10,000 from an account controlled by the committee to an account controlled by the candidate. In the foregoing hypothetical, no such transfer has taken place -- no money has changed hands or ownership; the \$100,000 previously was controlled entirely by Joe Smith, to be used at his discretion for political purposes, and now it still is controlled by Joe Smith, still to be used entirely at his discretion for political purposes.

The mere designation of the Joe Smith Political Committee Account as the single campaign account to be used by Joe Smith the candidate does not constitute the situation that the ordinance clearly is intended to address: the degree of influence by a single donor in the affairs of a candidate. Apparently, a third party PAC that makes a contribution of \$100,000 to a campaign would have been of concern to Council, as evinced by the \$10,000 contribution limit. Such a contribution, in the view of Council, could give an unfair measure of influence and thereby unfairly advantage some citizens over others; the ordinance plainly was enacted to avoid opening the door to such influence.⁶ However, no such concern is presented here, where the money that previously was controlled by Joe Smith continues to be controlled by Joe Smith. No “contribution” is made; no new outside influence is brought to bear.

Nonetheless, I believe a court is likely to look to the *source* of the \$100,000 in determining whether it constitutes a lawful contribution. In fact, the \$100,000 is made up of numerous smaller contributions collected by the Joe Smith Political Committee in the years prior to his becoming a candidate. Some of these contributions were in excess of the \$2,500/\$10,000 limits; others were not. If Joe Smith *the candidate* wishes to use these contributions in support of his campaign for municipal office, I believe the intent of the ordinance is to require that the candidate may only use those funds that could be lawfully contributed to a *candidate*, i.e., contributions within the \$2,500/\$10,000 limits. Put differently, we now know (although the contributor did not know with certainty at the time) that Joe Smith is a candidate; therefore, if Joe Smith the candidate is going to use the pre-candidacy money in support of his campaign for Mayor or City Council, contributions to that campaign may not exceed the \$2,500/\$10,000 limits set by the ordinance. This construction of the ordinance is entirely consistent with the aforementioned principle: limiting the extent of potential influence by any individual donor.

In sum, Joe Smith (or any declared candidate for Council or Mayor) may use, in support of his candidacy, moneys previously raised by him *prior to his or her becoming a candidate*, but only to the extent that the moneys were contributed in amounts not in excess of \$2,500 per contributing individual per year or \$10,000 per contributing political committee or person (other than individual) per year. Amounts contributed in excess of these limits may be used by the Joe Smith Political Committee for other lawful political purposes (*e.g.*, contributions to *other* candidates or political committees), but may not be used by Joe Smith *the candidate*, i.e., may not be used in support of the Joe Smith for Council campaign.

⁶ The sponsor of the original ordinance, Councilman Goode, in debate on the floor of City Council, argued that “[w]ealthy political contributors are consciously seeking to strip economically disadvantaged Americans of their political equality”; and, “[t]o paraphrase [the Supreme] Court, the influence of political money is corrupting our system of democratic government.” (Transcript, Meeting of City Council, Dec. 18, 2003, at 31.) *See also Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976) (“primary purpose” of federal contribution limits is “to limit the actuality and appearance of corruption resulting from large individual financial contributions”; “Congress could legitimately conclude that the avoidance of the appearance of improper influence ‘is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.’”) (citation omitted).

3. Practical Application

Money, of course, is fungible; hence it is almost impossible to expect that a candidate would separate each pre-candidacy contribution into amounts under \$2,500 (to be spent on the municipal candidacy) and amounts over \$2,500 (for expenditure on other political purposes). In my view, therefore, the intent of the ordinance is fully complied with so long as a candidate sets aside an amount equal to the sum total of all excess contributions received pre-candidacy, where the amount of a contribution that exceeds the \$2,500/\$10,000 limit is considered excess.

By way of example, therefore, if Joe Smith collected \$100,000 pre-candidacy and now wishes to use that money on his campaign for a seat on Council, he is precluded from using that portion of the \$100,000 that represents excess contributions. Thus, if he received from two individuals contributions of \$25,000 each in the calendar year before the year in which he declared candidacy, and twenty-five contributions of \$2,000 from twenty-five other individuals, he must set aside \$45,000 to be used for purposes other than his Council campaign (representing \$22,500 in excess contributions from each of his two large contributors). If Smith received twenty-five individual contributions of \$4,000 each, he would need to set aside \$1,500 on account of each of these contributions, and would be precluded from spending \$37,500 of the \$100,000 on his Council campaign. In this way, effectuating the intent of the ordinance, no individual donor to the campaign is able to increase the campaign's spending by more than \$2,500 per year.