

Katie Hobbs
Governor

Thomas M. Collins
Executive Director



Mark S. Kimble
Chair

Steve M. Titla
Amy B. Chan
Galen D. Paton
Christina Werther
Commissioners

State of Arizona
Citizens Clean Elections Commission

1110 W. Washington St. - Suite 250 - Phoenix, Arizona 85007 - Tel (602) 364-3477
Fax (602) 364-3487 - www.azcleelections.gov

June 27, 2024
Advisory Opinion 2024-05

Jonathan S. Berkon
Emma R. Anspach
Elias Law Group
250 Massachusetts Ave. NW, Suite 400
Washington, D.C. 20001

Dear Mr. Berkon:

We are responding to your advisory opinion request (“AOR”) on behalf of Star Spangled Media concerning whether activities by the company are “campaign media spending” and whether the company is a “covered person” under the Voter’s Right Know Act (the “Act” or the “VRKA”), A.R.S. §§ 16-971 to 16-979.

Question Presented¹

1. Is a news website that provides political and non-political coverage to the general public with a particular ideological point of view subject to the VRKA news story, commentary, and editorial exception from campaign media spending for its content and distribution plans?
2. Are grants provided to a for-profit company by nonprofits for the general underwriting of the company’s operations business income under the VRKA?

Summary answer

1. An entity that is not owned or controlled by a candidate, party, or political action committee that regularly provides news stories, commentary and editorial content is a press entity under the Federal Election Commission’s analysis, which

¹ The questions presented have been rewritten for clarity. The original questions were: 1. Is Star Spangled Media engaged in campaign media spending? and Is Star Spangled Media a covered person? AOR at 1.

the Clean Elections Commission applies here. However, considerations of form, including the limited content provided, could result in the entity becoming a covered person if it engages in campaign media spending.

2. Grants that generally underwrite a for-profit company's operations without any indicia of commercial exchange are not business income under the VRKA.

Background

The facts presented in this advisory opinion are based on your AOR received May 28, 2024 and publicly available information, including Clean Elections staff's review of the company's website themorningmirror.com.

Star Spangled Media is a for-profit limited liability company. AOR at 1. The Company operates a website called The Morning Mirror that includes "original news stories, commentaries, and editorials." *Id.* The company is not registered as a political action committee in any state. *Id.* The company is not owned, controlled or operated by any candidate, candidate's spouse, or committee and is not owned controlled or operated by a political party or political action committee. *Id.* It does not accept contributions as defined in Arizona's general regulations of campaign finances, A.R.S. § 16-901(11), but does receive "revenue derive[d] from grants from nonprofit organizations, which, the company says, is true of other "news entities."

The company states that its website maintains a "left-of-center" point of view and "frequently" publishes "content" about matters of public concern, elected officials and candidates. *Id.* It also "publishes content" on sports, pop culture, and weather. *Id.* It hires freelance and permanent writers to write articles, commentaries and editorials.

The company does not endorse candidates or parties. *Id.* at 1-2. And it does not solicit funds for candidates, parties, or other political organizations. *Id.* at 2. The company states that "puts a premium on its content being educational" and providing "sufficient information to allow readers to develop their own perspectives" regardless of the lean of the website itself. *Id.*

According to ICANN's lookup tool, the url themorningmirror.com was created on March 22, 2024. The website includes about nine stories on topics under the headings of business, health and wellness, lifestyle, and education. These include a story summarizing a Bank of America report on business attitudes, a report about left-handed baseball pitchers, and a report on how AI can help teachers

In its local section, The Morning Mirror has published a little more than 40 content items that include profile of elected officials and candidates for office, principally in Michigan and Pennsylvania. These articles appear to be written by culling quotes from the candidates from the candidates' own websites and other aggregators such as Ballotpedia and largely present those candidates biographical information along with statements about the candidate's campaign issues. It also includes links to source material, such as campaign and government websites.

Unlike many news sites, including left and right of center websites, The Morning Mirror includes no masthead, no bylines, no staff information, no contact information, no information about purchasing advertising or making donations, and no mailing or physical address. It's "[a]bout [u]s" page states "Welcome to the Morning Mirror—where reliability meets fresh insight. Stay informed with us as we deliver on the matters that impact your life." <https://www.themorningmirror.com/about-us> (last checked 6/23/2024). The website lacks a search function or any other indexing Clean Elections Commission staff could identify. Staff observed little to no indication of original reporting in the content provided.

In order to reach its audience, the company spends money to "boost" its content on social media sites like Facebook, search sites like Google, and other news websites. AOR at 2. This boosting "can include headlines, pull quotes, or graphics from Star Spangled Media's news stories or commentaries." *Id.* These boosts are paid for by the "same sources of revenue that it [uses] to retain content writers to publish the underlying content." *Id.* The only revenue the company mentions is nonprofit grants. *Id.* at 1-2.²

Legal analysis

Voters passed the VRKA as Proposition 211 at the 2022 General Election, and it was certified by Governor Doug Ducey in December 2022. The Act provides for reports by covered persons, that is, "any person whose total campaign media spending or acceptance of in-kind contributions to enable campaign media spending, or a combination of both, in an election cycle is more than \$50,000 in statewide campaigns or more than \$25,000 in any other type of campaigns." A.R.S. § 16-971(7)(a). "For the purposes of [the VRKA], the amount of a person's campaign media spending includes campaign media spending made by entities established, financed, maintained or controlled by that person." *Id.*

² A previous website that Commission staff believes to have been operated by Star Spangled Media, and reported on by the news site Axios, appears to be shuttered. Lachlan Markey, "Scoop: Progressives build massive, cloaked online powerhouse," Axios.com (March 27, 2022), <https://www.axios.com/2022/03/27/progressives-online-powerhouse-elections>.

Covered person does not include those who spend their own “business income,” a defined term that means “(a) Monies received by a person in commercial transactions in the ordinary course of the person's regular trade, business or investments [and] (b) [m]embership or union dues that do not exceed \$5,000 from any one person in a calendar year.” A.R.S. § 16-971(1)(a)-(b). And “[c]ampaign media spending” excludes “spending monies or accepting in-kind contributions to pay for . . . [a] news story, commentary or editorial by any broadcasting station, cable television operator, video service provider, programmer or producer, newspaper, magazine, website or other periodical publication that is not owned or operated by a candidate, a candidate’s spouse or a candidate committee, political party or political action committee.” A.R.S. § 16-971(2)(a), A.R.S. § 16-971(2)(b)(i).

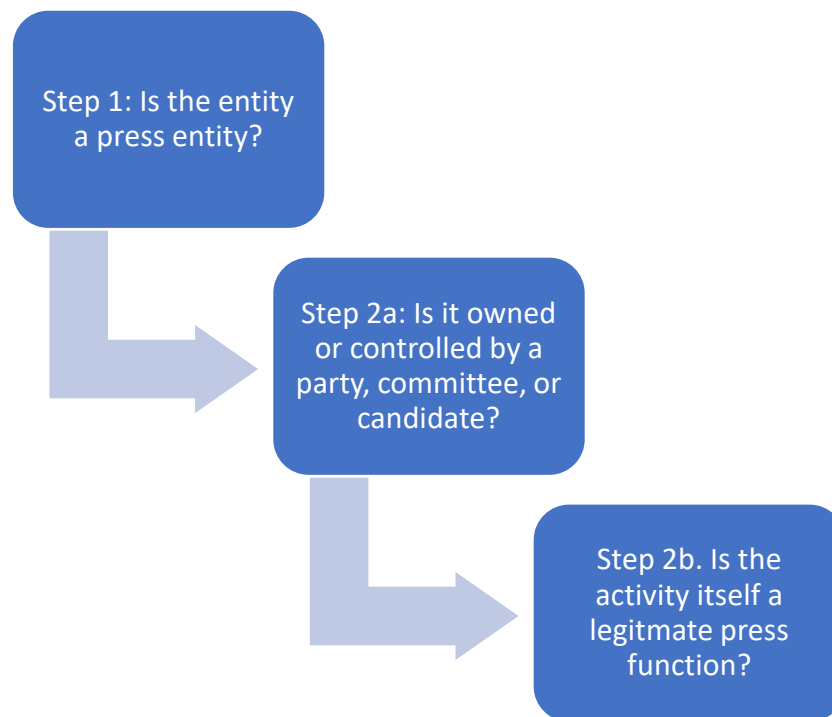
The AOR thus asks the Commission to determine whether Star Spangled Media is engaged in campaign media spending in its content and promotion and whether it is a covered person. But answering those questions turns on whether or the media exception applies.

The VRKA’s exemption for the publication of a “news story, commentary or editorial” is indistinguishable from the expenditure exception under the Federal Election Campaign Act. That exception provides that “any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate” is not an expenditure. 52 U.S.C. § 30101(9)(B)(i). Federal regulators have provided additional guidance on this definition in regulation. See 11 C.F.R. §§ 100.73, 100.132.

The company and the public comment the Commission received agree that, in the absence of another test or regulation, Clean Elections should follow the FEC’s test for determining whether or not activity is exempt. AOR at 3, Comments of the Campaign Legal Center at 4-5. The Commission concurs based that the FEC test should apply based on the VRKA’s statutory language.

The FEC test is complicated. It is a two-part test but the second part of the test itself has two parts. *See* Figure 1. Under that the test, “[f]irst, the Commission asks whether the entity engaging in the activity is a press entity.” FEC Advisory Op. 2011-11 at *5 (Colbert) (citations omitted). “Second, the Commission applies [a] two-part analysis . . . which requires it to determine: (A) Whether the entity is owned or controlled by a political party, political committee, or candidate; and (B) Whether the entity is acting as a press entity in conducting the activity at issue (i.e., whether the press entity is acting in its “legitimate press function”).” *Id.* (citations omitted).

Fig. 1.



The first inquiry, whether the entity is a press entity is met here based on the facts presented in the AOR and Staff’s review of The Morning Mirror. The company represents that it “regularly disseminates political *and* non-political news stories, commentaries, and editorials.” AOR at 3. While its offerings are limited, staff’s review of the website confirms that there are, in fact, news stories on non-political topics on the site as well as positive profiles about candidates and elected officials. Based on its current activities the Commission concludes The Morning Mirror is a press entity.³

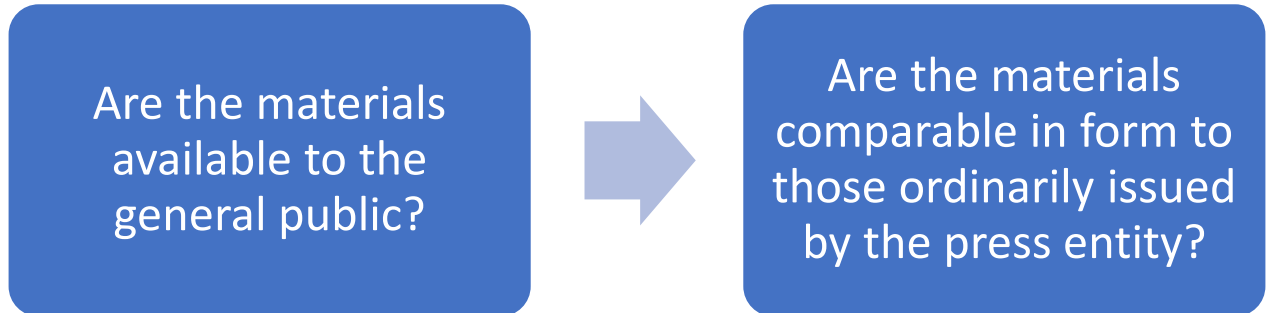
The second part of the test first requires the Commission to consider whether the entity is owned or controlled by a party, committee, or candidate. Here, based on the representations of the company, the Commission concludes none of those categories of persons owns or controls the company, meeting this part of the test.

The second prong of the second test asks whether the activity in question is a legitimate press function. This, in turn, involves an additional two-part inquiry. *See* Figure 2. “The Commission considers two factors in determining whether a press entity is acting in its legitimate press function. They are (1) whether the press entity’s

³ Ideology is not a factor for consideration under the FEC test. FEC Advisory Opinion 2008-14 at *4 (Melothe).

materials are available to the general public, and (2) whether the materials are comparable in form to those ordinarily issued by the press entity.” FEC Advisory Op. 2011-11 at *6.

Fig. 2.



The Morning Mirror is available to the general public. It is a public website freely available online. The first part of the inquiry is satisfied. The second part of this inquiry is more complicated.

In evaluating the second part of this inquiry, the FEC looks at “considerations of form” and recognizes that “[w]hile the press exemption covers press activity, it does not cover campaign activity, even if the campaign activity is conducted by a press entity.” *Id.* (citing *Fed. Elections Comm’n v. Mass. Citizens for Life (MCFL)*, 479 U.S. 238, 251 (1986)). For example, the Supreme Court has held that an organization’s newsletter was not subject to the press exception where it was not published in the organization’s ordinary course of business. Relevant factors included that different printing facilities and staff were used for the publication, and it was distributed to a far larger group than the newsletter ordinarily had been. *Id.* at 7.

To support the argument that the Company falls within the media exception, the AOR comments that “in a recent matter, the FEC determined that a progressive media outlet that boosted news stories featuring candidates acted with its legitimate press function.” AOR at 4. This oversimplifies the analysis of the FEC’s General Counsel. The General Counsel in that matter focused on the fact that the subject news site “in its day-to-day operations . . . appears to have conducted itself like a typical press entity, particularly by hiring experienced reporters and providing content focusing on both electoral and non-electoral issues.” FEC MUR 7789, First Gen. Counsel’s Rep. at 14-15, available at https://www.fec.gov/files/legal/murs/7789/7789_11.pdf.

The available facts do not indicate whether The Morning Mirror does any of these things. While the fact that a publication is new does disqualify it from the

media exception, the very limited non-political content compared to the larger body of political content makes it difficult to apply the FEC’s test. The profiles offer positive coverage of favored candidates and rely directly on candidate campaign websites and other candidate and official approved information. To put this in perspective, campaigns (both candidate and independent) devote significant resources to earned media. To secure a headline such as “Elizabeth Moro Pledges Lower Costs for Families, Economic Opportunities for Chester, Delaware Counties” would be a coup. <https://www.themorningmirror.com/local/elizabeth-moro-pledges-lower-costs-for-families-economic-opportunities-for-chester-delaware-counties>. A campaign that paid to “boost” that headline if it appeared in such a publication would be engaging in campaign media spending.

Because The Morning Mirror has extremely limited output, and there is no information available about its editorial process, it is impossible for the Commission to determine whether its political articles—many of which appear to be generated by using campaign created media—go through the same process as its non-political articles. In other words, under the “considerations of form” analysis, the Commission cannot conclude “there is no indication that those articles were not produced in the same manner, using the same people, and subject to the same review and distribution as its other articles.” FEC MUR 7789 at 19. Thus, the Morning Mirror may be engaged in campaign media spending, rather than acting within the press exception.

Because the Commission cannot conclude the press exception applies, the Commission cannot conclude that Star Spangled Media is not a covered person and does not intend to engage in campaign media spending. Equally importantly, however, the Commission is not concluding the opposite—simply put more facts about Star Spangled Media’s internal operations and news presence in Arizona would be necessary for the Commission to reach a reasoned conclusion about whether the press exception applies.

2. Business Income

An organization that spends only its own business income is not a covered person. A.R.S. 16-971(7)(b)(2). The relevant definition of business income for purposes of this request is “[m]onies received by a person in commercial transactions in the ordinary course of the person's regular trade, business or investments.” A.R.S. § 16-971(1)(a).

The company describes its revenue as “grants from nonprofit organizations that are interested in funding the type of news coverage that Star Spangled Media undertakes and building an audience for the news coverage via targeted advertising”

AOR at 4. This kind of general grant is akin to a gift and not a commercial transaction as contemplated by the VRKA. For example, the AOR provides no evidence, nor does the website provide any, that a grantor receives anything in exchange for their gift. This distinguishes the grants here from underwriting for nonprofit news stations, such as public radio and television affiliates. The mere fact that a grant is revenue for tax purposes is not enough to establish that the grant is a commercial transaction.

Conclusion

A Commission advisory opinion “may be relied upon by any person involved in the specific transaction or activity with respect to which such advisory opinion is rendered, and any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered.” Ariz. Admin. Code R2-20-808(C)(3). A “person who relies upon an advisory opinion and who acts in good faith in accordance with that advisory opinion shall not, as a result of any such act, be subject to any sanction provided in Chapter 6.1 of Title 16.” *Id.* at (C)(4). Advisory opinions may be affected by later events, including changes in law.

Sincerely,

Mark S. Kimble
Chair