

DEC 19 2008

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

| | MUR: 6053 | MUR: 6065 |
|---------------------------|-------------------------------------|---|
| DATE COMPLAINT FILED: | Aug. 19, 2008 | Aug. 26, 2008 |
| DATE OF NOTIFICATION: | Aug. 25, 2008 | Sept. 11, 2008 |
| LAST RESPONSE RECEIVED: | Sept. 9, 2008 | Oct. 2, 2008 |
| DATE ACTIVATED: | Oct. 7, 2008 | Oct. 7, 2008 |
| EXPIRATION OF SOL: | July 14, 2013 (ongoing activity) | July 29, 2013 (ongoing activity) |
| COMPLAINANT: | Victoria Coryelle | Charisse C. Wilson |
| RESPONDENTS: | HuffingtonPost.com | HuffingtonPost.com PoliticalBase.com |
| RELEVANT STATUTE: | 2 U.S.C. § 438(a)(4) | |
| INTERNAL REPORTS CHECKED: | Disclosure Reports | |
| FEDERAL AGENCIES CHECKED: | None | |

I. INTRODUCTION

These two complaints present the same basic facts and allegations. Both allege that www.HuffingtonPost.com is using contributor information from the Federal Election Commission campaign finance disclosure database for commercial purposes, in violation of 2 U.S.C. § 438(a)(4) and 11 C.F.R. § 104.15 of the Federal Election Campaign Act, as amended ("the Act"), and the Commission's implementing regulation, respectively. The complainant in MUR 6065 also alleges that www.PoliticalBase.com is violating the same provisions. As more fully set forth below, it appears that both respondents are covered by the media exemption to the commercial use provisions, and that neither is using FEC contributor information "for a commercial purpose," as that term has been interpreted. Accordingly, we recommend that the

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Commission find no reason to believe that HuffingtonPost.com or PoliticalBase.com violated 2 U.S.C. § 438(a)(4) and 11 C.F.R. § 104.15.

II. FACTUAL AND LEGAL ANALYSIS

A. Facts

Complainants Victoria Coryelle and Charisse Wilson made federal political contributions such that their names and other information are required to be disclosed by the recipient political committees in their publicly available FEC disclosure reports. See 2 U.S.C. §§ 432(c) and 434(b)(3)(A) and 11 C.F.R. § 104.8(a).

Respondents HuffingtonPost.com and PoliticalBase.com are news and opinion websites. Neither website charges a fee or requires users to subscribe to see the contributor information. HuffingtonPost.com accepts advertisements, but PoliticalBase.com does not at the present time. HuffingtonPost.com offers coverage of politics, media, business, entertainment, living and style, and has been on-line for three years. Staff writers and bloggers provide original content. PoliticalBase.com, owned and operated by Whiskey Media, focuses solely on politics and began operations this past summer. Its content is provided by employees, bloggers, and wire services.

Both sites obtain their data from the Commission's disclosure database and manipulate it to offer more ways to search it than available on the Commission website. For example, both sites offer users the ability to search federal political contributions in a variety of ways, including by occupation, address, employer, and name. In addition, both sites provide a mapping feature, which pinpoints and displays a contributor's address and location on a map.

Complainants allege that respondents' posting of their personal information violates the Act and makes them "prime prospects" for receiving solicitations. Complainants also allege that by publishing contributors' names, addresses, employers, and contribution amounts,

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HuffingtonPost.com and PoliticalBase.com's contributor information pages achieve a high search ranking on Google when using a person's name as the search term, and because the price for the banner ads on those web pages is based on the search ranking, the respondents are receiving revenue by using contributor information in a commercial manner. Finally, complainants allege that their privacy has been violated, and they request that the websites be disabled from using the FEC contributor information.

B. Legal Analysis

The Act and the Commission's regulations require that the Commission "make [reports and statements filed with it] available for public inspection, and copying, at the expense of the person requesting such copying, except that any information copied from such reports or statements may not be sold or used by any person for the purpose of soliciting contributions or for commercial purposes." 2 U.S.C. § 438(a)(4). "The § 438(a)(4) prohibition is . . . violated by a use of FEC data which could subject the 'public-spirited' citizens who contribute to political campaigns to 'all kinds of solicitations'." *Federal Election Comm'n v. Political Contributions Data, Inc.*, 943 F.2d 190, 197 (2d Cir. 1991) ("PCD").

The regulations, however, articulate a media exemption from the prohibition for the use of FEC data in "newspapers, magazines, books or other similar communications . . . as long as the principal purpose of such communications is not to communicate any contributor information listed on such reports for the purpose of soliciting contributions or for other commercial purposes." 11 C.F.R. § 104.15(c). In the *PCD* case, the court likened PCD's data collection service to a media organization's information disclosure function. *PCD*, 943 F.2d at 195. The court found that the information distributed by PCD was not organized in a manner designed to facilitate solicitations for contributions, and that there was no evidence that any of its customers

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were using it for that purpose. *Id.* at 196-97. Respondents claim that they come within the media exemption for newspapers, magazines and books and other similar communications. They argue that as news and opinion websites, publishing contributor information is not their principal purpose, much less a commercial purpose, and thus, they are not violating the Act.

1. Respondents are Similar to Newspapers and Magazines

Respondents claim to be news and opinion websites because they publish articles, commentary and other original content. A review of their websites shows that they have features commonly found on the websites of traditional media. *See* 11 C.F.R. § 104.15(c).

HuffingtonPost.com, like a daily newspaper, has different sections, small advertisements, photographs and video, and "breaking news" posts. Politicalbase.com is more like a single-subject magazine focusing on all things political, with wire stories, original articles, commentary, poll tracking and discussion forums. *Cf.* MUR 5928 (Kos Media, LLC) (Commission found no reason to believe respondent violated expenditure limitations of the Act because DailyKos "qualifies as a media entity ... DailyKos is available to the general public and is the online equivalent of a newspaper, magazine, or other periodical publication. Additionally, DailyKos is precisely the type of online media presence the Commission contemplated when revising the media exemption").¹

As communications "similar to" newspapers and other media, it also appears that contributor information is not the primary content on either website. *See* 11 C.F.R. § 104.15(c). On HuffingtonPost.com, it is not even apparent from the homepage that contributor data may be searched. To find the "fundrace" page, the user must click on the "politics" button at the top of

¹ In its "Internet Communications" Explanation and Justification, the Commission expanded the scope of the "expenditure" media exemption to include "media entities that cover or carry news stories, commentary, and editorials on the Internet." 71 Fed. Reg. 18589, 18608 (April 12, 2006).

the page and then click on "fundrace." On PoliticalBase.com, a search button at the very top of the page lists "contributors" as one of six ways to conduct a search, the others being "all," which is a general website search, "politicians," "issues," "images," and "video." The primary focus of the homepage, however, appears to be the content, taking up four-fifths of the screen and split down the middle in half.

2. Respondents are not Selling Contributor Information

Moreover, HuffingtonPost.com and PoliticalBase.com do not appear to be using the contributor information for a commercial purpose. See 2 U.S.C. § 438(a)(4). Respondents do not charge users a fee to view political contributor information on their websites. This distinguishes them from *FEC v. Legi-Tech*, 967 F. Supp. 523 (D.D.C. 1997) (selling donor information in list form for solicitation purpose violates Act) and MUR 5625 (Aristotle) (Commission found reason to believe that Aristotle knowingly and willfully violated Act by selling aggregate contributor information as part of software upgrade). Also, there is no indication that they are soliciting contributions on their websites.

In a similar situation, the Commission found that an analogous use of FEC data did not violate the Act. In MUR 5155 (*Friends for a Democratic White House et al.*), the Commission considered whether the Political Money Line website, which like HuffingtonPost.com and PoliticalBase.com, provided a free contributor search function on its website, was making commercial use of contribution data. The Commission determined that although Political Money Line did charge users for some services, the information available for a fee did not include any additional information with respect to individual donors that was not also readily available on the

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non-subscription side of the website.² It follows, therefore, that merely copying the FEC contributor information and letting users view it without charge is not a commercial purpose. *See also PCD*, 943 F.2d at 196 (even though PCD is selling information, its stated purpose – to further research and reporting on patterns of political contributions – is not a commercial use).

The complainant in MUR 6065 alleges that the posting of her address makes her a prime prospect for various solicitations such as cars, credit cards, magazine subscriptions and vacation trips.³ Complainant does not say whether she in fact received solicitations as a result of the information on respondents' websites and, if so, how she knows those websites were the source. Numerous on-line sources, including the FEC's website itself, and off-line sources, such as the Commission's Public Records Office, also allow users to view and obtain complainants' addresses.⁴ Moreover, although complainants point specifically to the mapping function on respondents' websites as particularly disturbing, the maps do not provide additional personal or otherwise useful information that is not available elsewhere.

Complainants also allege that HuffingtonPost.com's advertisements are viewed by more people because the contributor information pages achieve a high Google search ranking. They argue that the high search ranking generates more advertising revenue for HuffingtonPost.com,

² After an investigation, the Commission took no further action as to TRKC, Inc., the operator of Political Money Line.

³ The Commission may be considering a new policy whereby a contributor concerned about his or her personal safety may request that his or her home address be deleted from disclosure reports and other parts of the FEC database and replaced with a business or other address. The contributor would need to provide a clear indication of a threat or well-founded fear of bodily harm, though contributors in certain occupations, such as police officers, would automatically qualify. *See Memorandum on Draft Change of Address Policy* (June 16, 2008). Even if the Commission were to adopt such a policy, it would not appear to be applicable to complainants' concerns.

⁴ In its response, HuffingtonPost.com cites to several other websites that allow users to search for contributor information. However, none include contributors' addresses, although one, Congressional Quarterly, hyperlinks to the FEC disclosure report page where the contributor's address is found.

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and thus, the use of the contribution information is commercial. Respondents state that their current – HuffingtonPost.com – or future – PoliticalBase.com – for-profit natures do not convert the use of contributor data into a commercial use. Complainants have not offered any support for the claimed relationship between the contribution data pages and advertising revenue, and we have not located any information regarding such a relationship. Moreover, complainants are basically arguing that the for-profit status of HuffingtonPost.com makes its use of FEC contributor information a *per se* commercial use. Such an argument has already failed. See *PCD*, 943 F.2d at 196 (commercial use media exemption available to for-profit companies).

3. Conclusion

In sum, it appears that HuffingtonPost.com and PoliticalBase.com are similar to newspapers or magazines and their principal purpose in displaying the contributor information appears to be informational. See *PCD*, 943 F.2d at 196-97. Therefore, the respondents come within the exemption at 11 C.F.R. § 104.15(c) for using FEC contribution information. In addition, it does not appear that the respondents use FEC contributor information “for a commercial purpose,” as that term has been interpreted by the Commission and the U.S. Court of Appeals for the Second Circuit in the *PCD* case.

Based on the foregoing, we recommend that the Commission find no reason to believe that HuffingtonPost.com or PoliticalBase.com violated 2 U.S.C. § 438(a)(4).

III. RECOMMENDATIONS

1. Find no reason to believe that HuffingtonPost.com violated 2 U.S.C. § 438(a)(4).
2. Find no reason to believe that PoliticalBase.com violated 2 U.S.C. § 438(a)(4).
3. Approve the attached Factual and Legal Analyses.

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4. Approve the appropriate letters.
5. Close the files.

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12/19/08
Date

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