

*Hon. Paul D. Lopez*

Clerk and Recorder

*Audrey Kline*

Deputy Clerk and Recorder



*City and County of Denver*

OFFICE OF THE CLERK AND RECORDER

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March 6, 2023

**By email**

Mike Johnston  
mcjohnstonian@gmail.com

Sarah Mercer  
SMercer@BHFS.com

**Re: Your request for an advisory opinion**

Dear Mr. Johnston and Ms. Mercer:

The Denver Clerk and Recorder's Office received your request for an advisory opinion on February 17, 2023. Having reviewed your request and considered the factors in Election Rule 3.6.1, I decline to issue an advisory opinion on this matter. My reasoning follows.

In your request you asked:

“Can a municipal candidate’s federal candidate committee transfer unexpended funds to an entity that may make independent expenditures in support of the candidate without controlling or coordinating with that entity?”

The Clerk and Recorder considers three factors when determining whether to issue an advisory opinion.<sup>1</sup> Here, I discuss the two factors relevant to my decision.<sup>2</sup> The initial factor is whether “the advisory opinion will terminate a controversy or remove uncertainties as to the application of the requestor of any law.”<sup>3</sup> The other relevant factor is “whether the request seeks a ruling on a moot or hypothetical question.”<sup>4</sup> I have concluded that an advisory opinion on this matter would not terminate a controversy or remove uncertainties, and that your request seeks a ruling on a hypothetical question.

First, the transaction you propose—transferring funds from a federal candidate committee to an entity not currently regulated under Denver’s campaign finance law—is governed solely by federal law. My office has no role in regulating that type of transfer. Therefore, it would be inappropriate for my office to opine on its legality or attempt to resolve any related controversy or remove uncertainty as to the federal law’s application.

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<sup>1</sup> Election Rule 3.6.1 A. – C.

<sup>2</sup> Election Rule 3.6.1 B. asks whether “the request involves a subject, question, or issue that concerns a complaint currently pending before the clerk and recorder, a hearing officer, or court.” The Clerk’s office is not aware of any open complaint on this matter.

<sup>3</sup> Election Rule 3.6.1 A.

<sup>4</sup> Election Rule 3.6.1 C.

Furthermore, whether the transfer you propose would implicate Denver’s campaign finance law regarding control and coordination involves several hypothetical questions due to the fact-specific nature of the inquiry. An inquiry may involve a review of the independent expenditure itself including how it was or would be reported. It might also be relevant to understand the overall contributions and financing of the entity receiving the transfer.<sup>5</sup>

In addition, the application of Denver’s definition of “coordinated with or controlled by” would depend on the specifics of any interactions that may occur and cannot be determined in advance based on intent or descriptions of future conduct. For example, you state that “[o]ther than taking the necessary action to transfer the unexpended funds, neither Mike nor his candidate committee will interact with the entity.”<sup>6</sup> But the nature of that interaction itself may be probative in reviewing whether an independent expenditure was coordinated.

Finally, because Denver’s ordinance defines “controlled by or coordinated with” differently than both Colorado and federal law, in the absence of judicial guidance on the interpretation and application of those provisions my office cannot offer an opinion that would be sufficiently certain to terminate a controversy or remove uncertainty on the question.

As you state, the entity receiving the funds *may* make independent expenditures in support of Mr. Johnston’s bid for Denver Mayor. But it also might not, depending on how the circumstances unfold. My office cannot make the necessary fact-based analysis of whether an independent expenditure is controlled or coordinated by a candidate based on the information in your request.

For these reasons, I decline to issue an advisory opinion on this matter.

Sincerely,



Hon. Paul D. Lopez,  
Clerk and Recorder of the City and County of Denver

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<sup>5</sup> See note 15, “Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter,” *In the Matter of David Vitter et al.*, Federal Election Commission, MUR 6798 (Aug. 30, 2019); “Statement of Reasons of Chair Ellen L. Weintraub,” *In the Matter of David Vitter et al.*, Federal Election Commission at 2, MUR 6798 (May 3, 2019).

<sup>6</sup> Advisory Opinion Request, p. 4.