

January 11, 2006

SDEC Formal Advice Letter FA06-01

Advice Provided to:
James R. Sutton, Esq.
The Sutton Law Firm
150 Post Street, Suite 405
San Francisco, CA 94108

Re: Request for Advice Regarding Non-Profit Organization's Payment of
Mayoral Inauguration, Swearing-In, and Office Transition Expenses

Dear Mr. Sutton:

By way of footnote in a copy of a letter dated December 30, 2005, addressed to the Fair Political Practices Commission [FPPC], you have asked the Ethics Commission¹ for formal advice regarding whether or not a certain organization's proposed activities are governed by the City's campaign finance or ethics laws. Because the Mayoral inauguration is taking place on January 12, 2006, you have asked the Ethics Commission for an expedited response. This letter is in response to that request.

In your letter, you state that the subject organization will be a non-profit organization organized under section 501(c)(4) of the Internal Revenue Code and section 23701(f) of the California Revenue Taxation Code. According to your letter, it will be created "to promote the "social welfare" of the City of San Diego by organizing receptions in connection with the inauguration of the new Mayor and other activities related to the transition between Mayoral administrations, and by relieving the City of the cost of conducting these activities."

Among the facts you provide is that the organization has not yet been granted 501(c)(4) status by the Internal Revenue Service [IRS]. You cite, however, several IRS rulings supporting your belief that this status will be granted. You also describe the proposed make-up of the Board of Directors, which will not include the new Mayor. You also state that the Mayor will not be substantially involved in the day-to-day operations of the

¹ By way of the same footnote you also asked the City Attorney for advice on the same questions posed to the Ethics Commission.

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organization, and will not otherwise have control over the organization's activities. Additionally, no member of the Board of Directors will be a family member or agent of the Mayor; the tentative name of the organization does not include the Mayor's name; and the Mayor's only involvement with the organization will be attending the receptions it hosts.

You also state that the organization will file federal and state tax returns disclosing all of its financial activities. The budget of the organization is anticipated to be approximately \$35,000. It is also anticipated that the organization will voluntarily limit donations to \$1,000 per person and will voluntarily disclose its donors to the City Clerk. Lastly, you state that it is anticipated that the organization will be dissolved in less than six months, with any surplus funds going to San Diego-area charities.

Specifically, it is anticipated that the organization will pay the costs of three types of expenses that you describe in your letter as follows:

- (1) a large, public reception following the State of the City address on January 2, 2006, in honor of the Mayor's inauguration;
- (2) a small reception held in the Mayor's office before his swearing-in ceremony on December 5, 2005; and,
- (3) the transition expenses associated with the organization of the new administration, including office space, consulting fees, and press conference costs, which were incurred after the November 8, 2005, election and prior to the Mayor's swearing-in on December 5, 2005.

You want to know if the City's campaign finance laws or ethics laws would treat the organization as a "committee," and whether the donations to the organization, or the organization's above-described expenditures, would be treated as campaign contributions or gifts to Mayor Sanders.

ANALYSIS AND CONCLUSIONS

The questions you present require us to look at two of the City's ethics laws, namely, the Election Campaign Control Ordinance [ECCO], which is located in the San Diego Municipal Code [SDMC] at sections 27.2901 through 27.2991, and the Ethics Ordinance, which is located at SDMC sections 27.3501 through 27.3595. ECCO is largely patterned after the campaign finance laws in the state's Political Reform Act [PRA]. The PRA's and FPPC's definitions expressly apply to ECCO, unless otherwise clearly stated or implied by the context. SDMC § 27.2903. The Ethics Ordinance contains the City's rules governing gifts. Applicable definitions and provisions from the PRA and FPPC Regulations also expressly apply to the City's Ethics Ordinance. SDMC § 27.3503. We therefore turn to interpretations of state law from time to time for guidance in interpreting

ECCO and the City's Ethics Ordinance. These interpretations occur in the form of FPPC Regulations and FPPC advice letters.

A. Is the organization a "committee"?

The first question raised by your letter is whether the proposed 501(c)(4) organization is a "committee" for purposes of ECCO. The term "committee" is defined in SDMC section 27.2903 to include entities that accept contributions and make expenditures to support the candidacies of persons seeking local elective office. When determining whether an entity is making a "contribution," we may refer on the definition in ECCO that essentially mirrors the definition contained in the PRA, at Government Code section 82015. Both state and local law provide that a contribution is generally a payment made for a political purpose. In addition, both ECCO and the PRA limit the concept of "committees" to those entities whose actions are made for a "political purpose." ECCO defines "political purposes" to mean:

the purpose of influencing or attempting to influence the action of the voters for or against the nomination, election, defeat, or recall of any candidate or elected City officer, for or against the qualification of a City measure for the ballot, or for or against the adoption of defeat of any City measure.

SDMC § 27.2903.

State law, at FPPC Regulation 18215, provides additional guidance on the subject. According to one aspect of this regulation, a payment is made for political purpose if it is received by a candidate's controlled committee. FPPC Regulation 18217 establishes the parameters under which a non-profit organization may be considered a "controlled committee." According to this regulation, the organization identified in your letter would not be a controlled committee unless Mayor Sanders exercised a significant influence over its actions and decisions and the organization is operated for political purposes.

FPPC Regulation 18217 also establishes the presumption that a non-profit organization organized under section 501 of the Internal Revenue Code is not operating for political purposes if:

- (1) The organization does not make contributions to candidates.
- (2) The name of the organization does not include the name of the candidate.
- (3) The organization does not spend funds in excess of the amount permitted under Section 501(h) of the Internal Revenue Code to influence or attempt to influence legislative action.

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- (4) The organization does not spend funds to influence or attempt to influence the qualification or passage of any measure in an amount sufficient to qualify the organization as a committee under Section 82013 of the Government Code.

According to the facts you provided in your letter, the organization appears to be set up to comport with FPPC Regulation 18217 to ensure that the organization is not considered a “controlled committee” within the meaning of ECCO or the PRA. In particular, you have indicated that none of the organization’s activities are related to influencing voters with regard to the election of a candidate.

Note, however, that the above presumption may be rebutted by clear and convincing evidence that the committee is controlled by a candidate and operated for political purposes. FPPC Regulation 18217(d). Although the presumption may be rebutted by facts not stated in your letter, the Ethics Commission does not act as the arbiter of facts in providing advice. This issue is important to consider especially in light of your question regarding transition expenses. You have not provided the Ethics Commission with any details regarding the nature and scope of such expenses. Keep in mind that if any of the transition expenses are related to the Mayor’s election campaign (or, in other words, a “political purpose”) and payments for these expenses are controlled by or coordinated with the Mayor, the conclusions reached in this letter would be different.

- B. Are the donations to the organization a “gift” to Mayor Sanders? Are payments by the organization a “gift” to Mayor Sanders?

ECCO defines “gift” to mean “any payment that confers a personal benefit on the recipient, to the extent that consideration of equal or greater value is not received.” SDMC § 27.3593. State law is essentially identical. Cal. Gov’t Code § 82028. Although Mayor Sanders will be an attendee and honoree at the events you described in your letter, it does not appear that he will have any direction or control over the donations received by the organization or any ability to direct or control how the organization spends its money. As you stated in your letter, he will not sit on the organization’s board nor will he have any control over any of the organization’s activities.

It appears that the only personal benefit the Mayor will receive is his attendance at the events you describe in your letter. The FPPC has previously opined, however, that Governor Wilson’s admissions to his inaugural events were not a gift to the governor or his spouse because his appearances at the events were necessary for ceremonial purposes. *In re Bell*, FPPC Adv. Ltr. A-94-376. FPPC Regulation 18944.1(d). Thus, free admission to the inaugural events given to the Mayor and his spouse would be treated in the same manner. Note, however, that free admission to other City Officials would result in a reportable gift to those officials.

Notwithstanding the above, the Mayor may have some involvement in the planning of the inaugural events. To the extent that these events are being coordinated by the Mayor or

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an agent of the Mayor, they trigger certain reporting requirements under the Ethics Ordinance, even though the payments for such events are not considered gifts. SDMC section 27.3525(y) states that the following is not a gift:

Payments made at the behest of, at the request of, or in consultation or coordination with, an elected City Official, that are made to co-sponsor an event that is principally legislative, governmental, or charitable in nature, although such payments made to an elected City Official by a single source totaling \$5,000 or more in a calendar year for this type of event must be reported in accordance with California Government Code section 82015(b).

Under this provision, which substantially mirrors the state law set forth at California Government Code section 82015(b)(2)(B)(iii), any individual donations to the organization and the subsequent payment of the costs associated the events described in your letter will be subject to reporting obligations if they exceed \$5,000. You indicate in your letter that the organization will only be accepting donations that do not exceed \$1,000. Such donations, therefore, would not need to be reported. On the other hand, you indicate that the organization will be paying approximately \$35,000 for the activities mentioned in your letter. To the extent that the payments made by the organization meet or exceed \$5,000 for “governmental purpose” events at the Mayor’s behest, such payments will have to be reported to the City Clerk.

The findings made in this letter are in accord with the findings in the formal advice letter issued by the FPPC in 1994 pertaining to a non-profit organization that was set up to sponsor the governor’s inauguration and related activities. *In re Bell*, FPPC Adv. Ltr A-94-376. More importantly, this letter is consistent with the FPPC advice letter issued to you yesterday on the same facts discussed herein. *In re Sutton*, FPPC Adv. Ltr. A-05-256. Ultimately, there is nothing in ECCO or the Ethics Ordinance that provides any additional restrictions to those in the PRA with regard to the activities at issue. Because state law and local law treat the subject organization is substantially the same way, our advice to you is intended to be consistent with that just issued by the FPPC.

Sincerely,

Stacey Fulhorst
Executive Director