



**Minutes for Meeting of
Thursday, May 8, 2014**

Item 1: Call to Order

Commission Vice-Chair O'Neill called the meeting to order at approximately 5:00 p.m.

Item 2: Roll Call

Present – Commission Vice-Chair John O'Neill, Commissioners Deborah Cochran, Faye Detsky-Weil, Clyde Fuller, Alex Kreit, Andrew Poat, and Greg Zinser

Staff – Executive Director Stacey Fulhorst, General Counsel Christina Cameron, Program Manager Steve Ross, Investigator Lauri Davis, Auditor Rosalba Gomez, and Administrative Aide Jennifer Duarte

Item 3: Approval of Commission Minutes

Approval of Ethics Commission Minutes of April 10, 2014

Motion: Approve
Moved/Seconded: Zinser/Poat
Vote: Carried Unanimously

Item 4: Non-Agenda Public Comment

April Boling addressed the Commission about the expanded 24-hour reporting obligation that went into effect on January 1, 2013. The new law requires reporting of contributions and independent expenditures of \$1,000 or more within 24 hours during the 90 day period preceding an election. Ms. Boling related that the new law is very onerous to comply with and, as a result, she plans to reduce her client base and increase her fees. Ms. Boling acknowledged that the expanded 24-hour filing requirement is a state law, but said that the associated increase in workload is exacerbated by the local law that requires committees to disclose the top two donors

of \$10,000 or more on campaign advertisements. According to Ms. Boling, the \$10,000 threshold is more difficult to comply with than the state threshold of \$50,000 because there are more \$10,000 donors to track. Additionally, she has to ask the committee consultants whether they are in favor of a particular major donor appearing in a disclosure on a campaign ad, and has to ask the major donors if they are amenable to being included in the disclosure. If there are objections, she has to return the contribution to the donor.

Ms. Fulhorst provided some background on the comments made by Ms. Boling. She explained that the state legislature amended the statute to expand the 24-hour reporting period from 16 days before the election to 90 days before the election. Because this is a state law, the City does not have any control over its application to local elections. With respect to the \$10,000 major donor disclosure on campaign ads, Ms. Fulhorst reported that this law was the result of extensive discussions at Commission meetings concerning the level of financial activity in some of the smaller Council races and the difference between a \$50,000 contribution to support a state candidate versus a \$10,000 contribution to support a local candidate.

John Nienstedt with Competitive Edge Research and Communication addressed the Commission about the City law that requires "paid for by disclosures" on telephone communications to 500 or more people. He stated that he is in favor of the disclosure requirement when he is conducting advocacy efforts on behalf of a client, but disagrees with its application to neutral surveys. He acknowledged that some surveys are conducted to test negative and positive messages, but denied that these calls are designed to change voter opinions. Even if the disclosure is made at the end of the call and won't affect the current survey, it could affect future surveys according to Mr. Nienstedt. In addition, he pointed out that the interviewer will know who paid for the survey, and that all "high-quality research" is conducted in a "double blind" situation in which neither the interviewer nor the interviewee know who paid for the survey. He asked the Commission to consider amending the current law to exempt neutral surveys.

Attorney Jim Sutton also asked the Commission to consider amending the City's campaign laws to eliminate the disclosure requirements for neutral surveys, and he distributed copies of a letter outlining his position. He stated that, to the best of his knowledge, San Diego is the only jurisdiction in the country that requires a "paid for by" disclosure on neutral surveys. According to Mr. Sutton, the disclosure destroys the reliability and accuracy of the survey. In addition, he expressed his opinion that it is not legally permissible to require a disclosure on a communication that does not expressly advocate for the election or defeat of a candidate or measure. Mr. Sutton stated that the Commission staff encouraged the Commission to require this disclosure on all telephone communications because there are push polls masquerading as neutral surveys and the staff felt it was too difficult to distinguish between the two. Mr. Sutton submitted that it is the responsibility of the Commission staff to make this distinction. He asked the Commission to consider this issue as part of its ongoing discussion concerning potential amendments of other campaign laws.

Ms. Fulhorst advised the Commission that she received Mr. Sutton's letter via email on Wednesday, May 7, at approximately 2:00 p.m., asking that this issue be included on the Commission's docket for this meeting. After conferring with Ms. Cameron, she advised Mr. Sutton that it was not permissible to include this matter on the docket because the Brown Act requires 72 hours notice to the public concerning items that will be discussed at the meeting. Ms. Fulhorst added that Mr. Sutton's letter was forwarded to Vice-Chair O'Neill who is currently working with staff to consider all relevant legal and policy issues and determine if and when the matter should be docketed for Commission consideration. With respect to the history of the current law, Ms. Fulhorst recounted that the Commission, not staff, decided that it did not want to be in the position of evaluating a poll to determine whether a series of negative messages was a push poll or a neutral survey testing negative messages. She recalled that it was former Commission Chair Gil Cabrera who lead the discussion on this issue and suggested that a disclosure made at the end of a call should not affect the integrity of a poll.

Item 5: Commissioner Comment

Commission Vice-Chair O'Neill explained that the Commission Chair and Vice Chair positions are typically elected at the June meeting, and he has asked Commissioners Cochran and Zinser to serve on a nominating committee. They will be meeting over the next month and will provide their recommendations to the Commission at the June meeting.

Commissioner Poat asked about a process to solicit input for amendments to the City's campaign laws to take effect before the next election cycle. Ms. Fulhorst responded that the Commission always endeavors to ensure changes take effect on January 1 of an odd-numbered year to ensure that new laws don't go into effect in the midst of an election cycle. She explained that the campaign laws have been amended at least four times since the Commission's inception, and that the amendments resulted from numerous workshops and public input. Additionally, she noted that the staff regularly receives suggestions during the course of its advisory and enforcement activities, and forwards these recommendations to the Chair for docketing consideration.

Commissioner Poat asked about an association of groups like the Ethics Commission that might collectively recommend changes to the state legislature to address issues like those raised by Ms. Boling. Ms. Fulhorst noted that staff resources are very limited, but staff does routinely monitor and communicate with the FPPC concerning state legislation. In addition, Ms. Fulhorst recalled that the Mayor and Council previously asked that all state lobbying efforts be channeled through the City's intergovernmental relations staff. Commissioner Poat questioned why the Commission could not make recommendations to City staff that they advocate for certain changes. Ms. Fulhorst responded that the Chair can consider docketing any such recommendations; however, she noted that the new law expanding 24-hour reporting was sponsored by the FPPC and consequently it is probably not a good use of government resources to pursue legislation to overturn it.

Item 6: Executive Director Comment

None

Item 7: General Counsel Comment

None

Item 8: Proposed Amendments to the Election Campaign Control Ordinance

Ms. Fulhorst summarized the proposed amendments to the Election Campaign Control Ordinance drafted by staff. She explained that several out-of-town campaign treasurers have asked the Commission to consider expanding the current law that requires campaign bank accounts be established at a bank located in San Diego to permit the use of banks located anywhere in California. She explained that the rationale for the current law was to enable the Commission to serve document subpoenas at local banks; however, she noted that such subpoenas have rarely been necessary. Ms. Fulhorst also related that the out-of-town treasurers have been extremely cooperative during the course of campaign audits and have mailed or emailed documents to the Commission's Auditor thereby saving the Commission the expense of sending the Auditor out of town to conduct the audits. She added that the proposed amendment would harmonize local law with state law.

With respect to committee duplication of candidate materials, Ms. Fulhorst reported that the staff attempted to draft the proposed amendments in the simplest manner possible based on input received at the last Commission meeting. In particular, the draft amendments delineate a fifty percent duplication threshold for three different types of media components: graphic content in non-video advertisement, graphic content in video advertisements, and text and audio content. Ms. Fulhorst summarize the measuring criteria for each component. She noted that the draft amendments mirror an aspect of federal law that applies the duplication rules to committees, but not to candidates who have no control over committees that duplicate their materials. Finally, she explained the rationale underlying the exemptions for member communications and campaign advertisements that clearly advocate the defeat of a candidate.

In accordance with suggestions made at the last meeting, Ms. Fulhorst reported that staff prepared a draft disclosure form for committees that duplicate candidate materials; however, she noted that the City is permitted to impose additional filing requirements only on City committees. As a result, the proposed disclosure form would not apply to county or state committees that duplicate candidate materials.

The previous staff suggestions concerning expanded recordkeeping requirements have been tabled according to Ms. Fulhorst. She explained that the Commission may impose additional recordkeeping requirements only on City committees, and not on county or state committees that make independent expenditures supporting or opposing City candidates or measures. Additionally, as discussed at the last

meeting, many campaign vendors are located outside California and it would therefore be extremely difficult to regulate their retention of records.

Ms. Fulhorst explained that the vendor credit portion of the amendments have been narrowly tailored so as to apply only to situations that have been identified as problematic. In particular, the prohibition on vendor credit would apply only to committees primarily formed to support or oppose candidates or measures because it is only these "drive by" committees, which appear right before an election and disappear shortly thereafter, that appear to be engaging in the practice of commissioning campaign ads on credit in order to avoid the disclosure of major donors. Ms. Fulhorst added that the proposed amendments would not apply to candidate-controlled committees because they are not subject to the \$10,000 major donor advertising disclosures.

With respect to the proposed amendment to exempt member communications from the "paid for by" disclosure in telephone communications, Ms. Fulhorst explained that this was an oversight in prior drafting that needs to be corrected in order to be consistent with state law.

Ms. Fulhorst reiterated the basis for the proposed amendment to the electioneering communication section: to correct an unintended consequence that enabled political committees to disseminate issue ads without including a "paid for by" disclosure.

April Boling addressed the Commission regarding the proposed amendments concerning vendor credit. She commented that this issue arose because the City implemented its \$10,000 major donor disclosure law. According to Ms. Boling, vendors won't extend a large amount of credit to a committee, so the problem would not exist if the threshold for major donors was higher than \$10,000. She also advised the Commission that it can take a week for credit card contributions to be transferred to the committee's bank account; consequently, if committees are required to have cash on hand to pay for advertisements, they would have to delay their advertising until the funds are transferred.

Ms. Fulhorst responded to Ms. Boling's concerns by suggesting that an exemption for the credit card situation could be incorporated into the draft amendments. Vice-Chair O'Neill concurred and suggested that the exemption be included in section 27.2959(b)(2).

Commissioner Fuller stated that he has concerns about the duplication portion of the proposed amendments. Ms. Fulhorst reminded the Commission that this issue was docketed in response to complaints received about duplication of candidate materials during the last election.

With respect to the proposed disclosure form for duplication of candidate materials, Commissioner Kreit reiterated that he believes the form will assist with enforcement. Commissioner Cochran suggested that the disclosure form include the source of the candidate materials, as well as information regarding where and when the materials were accessed. Vice-Chair O'Neill asked if there is a system in place to enforce this

disclosure form and Ms. Fulhorst responded that it would have to be incorporated into the Municipal Code.

Commissioner Zinser commented that there are two ways to regulate the duplication of candidate materials: set guidelines and be very specific about how this issue will be regulated, or make a general statement that duplication is not allowed. He expressed his opinion that neither one is right or wrong and noted that he is not strongly in favor of setting specific guidelines. Commissioner Detsky-Weil responded that she prefers specific guidelines in order to avoid subjectivity. Commissioner Zinser replied that guidelines can be a slippery slope.

Vice-Chair O'Neill credited Program Manager Steve Ross for drafting proposed amendments that are clear and capture the suggestions made at the previous meeting by Commissioner Zinser. He expressed concern, however, with the language concerning text and audio and asked staff to revise this section to make it clearer. Commissioner Zinser expressed concurrence with Vice-Chair O'Neill's comments.

Ms. Fulhorst submitted that some forms of media content will be more difficult to regulate than others and suggested that it might be appropriate to consider a law that governs only certain kinds of communications. For example, she questioned whether duplication of a phrase used by a candidate is as important to regulate as paying to duplicate a candidate video in a television commercial. Vice-Chair O'Neill commented that it is difficult to differentiate between text that appears on a candidate's website and portions of a candidate's speech. Ms. Fulhorst agreed and explained that this is why she suggested the Commission might want to consider whether or not all types of candidate materials merit regulation in terms of duplication.

Commissioner Zinser suggested using the number of seconds to measure both audio and video, and noted he plans to review rules regarding plagiarism to determine if there is a useful application to the duplication of phrases. Ms. Fulhorst commented that duplication of audio is somewhat similar to duplication of video in that committees might duplicate audio recorded personally by the candidate. She noted that her colleagues in the City of New York have reported a trend in which candidates make audio recordings available on their websites in the hope that committees will use them to pay for radio commercials. Commissioner Kreit expressed his view that it is appropriate to make distinctions between different types of candidate materials. He added that a candidate is clearly receiving an in-kind contribution when a committee reproduces an audio or video that the candidate recorded. On the other hand, he believes the candidate receives a different type of benefit when a committee simply uses language similar to that used in a candidate's speech.

Commissioner Poat expressed concern that the regulation guidelines might be too specific and said he would like to hear more suggestions from practitioners before making a decision. He asked about inviting practitioners to speak at future meetings. Ms. Fulhorst noted that the staff previously used the Commission's

“Interested Persons” email list to invite people to attend the past few meetings. Commissioner Poat clarified that he was suggesting personal invitations and Ms. Fulhorst responded that the staff does not have sufficient resources to personally contact all practitioners and invite them to attend.

Commissioner Cochran suggested that the Commission should table the duplication of candidate materials but take action with respect to the remainder of the proposed amendments.

Motion: Approve Proposed Amendments to SDMC §27.2916 - Re: Campaign Contribution Checking Accounts
Moved/Seconded: Cochran/Detsky-Weil
Vote: Carried Unanimously

Motion: Approve Proposed Amendments to SDMC §27.2971 - Re: Telephone Communications
Moved/Seconded: Cochran/Kreit
Vote: Carried Unanimously

Motion: Approve Proposed Amendments to SDMC §27.2980 - Re: Disclosure of Electioneering Communications
Moved/Seconded: Cochran/Kreit
Vote: Carried Unanimously

Ms. Fulhorst stated that the staff will send another email inviting people to attend the next meeting to discuss the duplication issue. Commissioner Poat reiterated his request that staff personally invite practitioners to participate in a panel discussion. Commissioner Detsky-Weil asked Commissioner Poat if he was looking for participation from candidates, officeholders, or campaign vendors. Commissioner Poat replied that he would like to invite “people in the business and people that routinely contract with campaigns.” Commissioner Fuller responded that he has served on the Commission for several years and that, in his experience, people in the campaign business are well aware of the issues discussed at Commission meetings. He added that, although the staff has invited and encouraged them to attend on numerous occasions, they rarely do so.

Item 9: Proposed Amendments to Ethics Commission Conflict of Interest Code

Ms. Fulhorst noted that this item was continued from the last Commission meeting in order to obtain feedback concerning the potential amendments from the City Attorney’s Office. Deputy City Attorney Catherine Bradley recently issued a memo which was distributed to the Commission. In it, she opines that the amendments should be considered by the City Council as a policy decision and that it is not appropriate for the City Attorney to provide a legal analysis. Ms. Bradley attended the meeting to answer any questions from the Commissioners. Commissioner Kreit thanked Ms. Bradley for preparing the memo and asked her to comment on her research regarding the approach taken by other jurisdictions. Ms. Bradley responded that her memo includes an overview of disclosures required by other

jurisdictions as this might be relevant to a policy determination regarding any proposed changes to the Commission's disclosure categories.

Deliberations concerning this item were effectively concluded due to lack of a motion to recommend any changes.

Item 10: Presentation of Final Audit Report Regarding the San Diegans for Bob Filner Committee.

Motion: Accept Final Audit Report
Moved/Seconded: Zinser/Fuller
Vote: Carried Unanimously

Item 11: Presentation of Final Audit Report Regarding Too Extreme for San Diego – a committee to oppose Carl DeMaio for Mayor 2012

Motion: Accept Final Audit Report
Moved/Seconded: Fuller/Cochran
Vote: Carried Unanimously

Item 12: Adjourn to Closed Session

Commission Vice-Chair O'Neill adjourned the meeting to closed session at approximately 6:40 p.m. He stated the Commission would reconvene into open session following the conclusion of closed session in order to report any action taken during the closed session portion of the meeting.

Reconvene to Open Session

Commission Vice-Chair O'Neill called the meeting back into open session at approximately 7:30 p.m.

Reporting Results of Closed Session Meeting of May 8, 2014:

Ms. Cameron reported the results of the closed session meeting of May 8, 2014:

Item-1: Conference with Legal Counsel (7 potential matters)

Case No. 2014-13, 2014-17 through 2014-19 - In Re: Alleged Failure to Timely Register as a Lobbying Firm

Motion: Dismiss
Moved/Seconded: Zinser/Fuller
Vote: Carried Unanimously

Case No. 2014-14 - In Re: Alleged Failure to File Behested Payment Report

Motion: Initiate Investigation

Moved/Seconded: Fuller/Cochran
Vote: Carried Unanimously

Case No. 2014-15 - In Re: Alleged Failure to File Expenditure Lobbyist Quarterly Report

Motion: Initiate Investigation
Moved/Seconded: Fuller/Cochran
Vote: 6-1 (Poat Opposed)

Case No. 2014-16 - In Re: Alleged Failure to Timely Amend Lobbyist Registration

Motion: Dismiss
Moved/Seconded: Fuller/Cochran
Vote: Carried Unanimously

Item-2: Conference with Legal Counsel (7 potential matters)

One item withdrawn (Case No. 2014-05)

Case No. 2013-28 - In Re: Alleged Acceptance of Unlawful Gifts

Motion: Dismiss
Moved/Seconded: O'Neill/Fuller
Vote: Carried Unanimously

Case No. 2013-37 - In Re: Alleged Failure to Include Proper Identification Disclosure on Large Form of Campaign Advertising

Motion: Dismiss
Moved/Seconded: Fuller/O'Neill
Vote: Carried Unanimously

Case No. 2014-06 - In Re: Alleged Failure to Include Proper Identification Disclosure on Mass Campaign Literature

Motion: Dismiss
Moved/Seconded: O'Neill/Fuller
Vote: Carried Unanimously

Case No. 2014-10 - In Re: Alleged Failure to Properly Identify Sponsor on Campaign Advertisements and Campaign Statements

Motion: Dismiss
Moved/Seconded: Poat/O'Neill
Vote: Carried Unanimously
Recused: Kreit

Case No. 2014-11 - In Re: Alleged Failure to Include Proper Identification Disclosure on Mass Campaign Literature

Motion: Dismiss
Moved/Seconded: Fuller/Detsky-Weil
Vote: Carried Unanimously

Case No. 2014-12 - In Re: Alleged Failure of Registered Lobbying Firm to Properly File Quarterly Disclosure Report

Motion: Dismiss
Moved/Seconded: O'Neill/Poat
Vote: Carried Unanimously
Abstain: Cochran

Adjournment

The meeting adjourned at approximately 7:35 p.m.

[REDACTED]

John C. O'Neill, Commission Vice-Chair
Ethics Commission

[REDACTED]

Jennifer Duarte, Administrative Aide
Ethics Commission

THIS INFORMATION WILL BE MADE AVAILABLE IN ALTERNATIVE FORMATS UPON REQUEST.