

December 16, 2008

SDEC Formal Advice Letter No. FA08-08

Councilmember Carl DeMaio
City Council District 5
202 "C" St., 10th Floor
San Diego, CA 92101

Re: Request for Advice Regarding Use of Funds for Telephone Town Halls and
Constituent Outreach Materials

Dear Councilmember DeMaio:

This advice letter responds to the December 5, 2008, memorandum you sent to the Ethics Commission through Jaymie Bradford, your Chief of Staff. You seek advice from the Ethics Commission concerning the provisions of the City's Ethics Ordinance and Election Campaign Control Ordinance [ECCO], both which are contained in the San Diego Municipal Code [SDMC]. In particular, your questions relate to the allowable use of the funds in the possession of your candidate-controlled general purpose recipient committee, San Diego Citizens for Accountable Government [SDCAG]. Your questions also pertain to the allowable use of City funds.

QUESTIONS

1. Is it appropriate to use SDCAG funds or City funds to set up Telephone Town Hall Meetings?
2. Is it appropriate to use SDCAG funds or City funds to send follow-up letters to those who participated in a Telephone Town Hall Meeting?
3. What are the limitations on the use of City funds with regard to the content and distribution of printed materials that solicit public input on a variety of Citywide and community issues?
4. May SDCAG funds be used to pay for the content and distribution of printed materials that solicit public input on a variety of Citywide and community issues?

5. With regard to questions 3 and 4:
 - (a) May the materials include information regarding upcoming civic events and/or community meetings that you will be attending?
 - (b) May the materials be distributed by your staff during city business hours or while on personal time?
 - (c) May the materials be placed at civic meetings that you and/or your staff will attend?
6. Does work performed by a Council District 5 intern for SDCAG outside of his City duties implicate any concerns in the Ethics Ordinance?

SHORT ANSWERS

1. Although SDCAG may use its funds to support or oppose City ballot measures, it may not use those funds to pay expenses associated with holding your District 5 office. You may not use SDCAG as if it were an officeholder account committee. Accordingly, SDCAG funds may not be used to set up Telephone Town Hall Meetings to provide a virtual venue for you to discuss various City issues with constituents. With regard to using public dollars to set up town hall meetings, such use of public funds is not regulated by the Ethics Ordinance and is outside the jurisdiction of the Ethics Commission.
2. See the response to question 1. SDCAG funds may not be used to send follow-up letters to those who participated in a Telephone Town Hall Meeting. With regard to using public funds to send follow-up letters, such activities fall outside the scope of the Ethics Ordinance and the jurisdiction of the Ethics Commission. These letters may, however, be subject to the “mass mailing” restrictions contained in state law.
3. The Ethics Ordinance does not prohibit or limit the use of City funds with regard to the content or distribution of printed materials that solicit public input on Citywide or community issues. Such communications may, however, be subject to the “mass mailing” restrictions contained in state law. In addition, you should be aware that there are state law prohibitions against using public funds to expressly advocate for or against a ballot measure.
4. For the reasons discussed in the answers to questions 1 and 2, SDCAG funds may be used solely for ballot measure purposes. They may not be used to pay for the content and distribution of printed materials that solicit public input on Citywide and community issues that are not related to a proposed or actual ballot measure.

5. With regard to questions 3 and 4:
 - (a) Printed materials containing information pertaining to upcoming civic events and/or community meetings that you will be attending may not be created or distributed at SDCAG's expense. Although the use of public funds to create and distribute such materials is not prohibited by the Ethics Ordinance (assuming that the materials do not in any way support or oppose a City candidate), such activities are likely subject to the state's mass mailing regulations.
 - (b) See answer to 5(a). Because we have determined that SDCAG may not create or distribute the materials in question, and because we cannot opine on the lawfulness of the use of public funds for the purpose identified, we cannot squarely address your use of City staff to distribute such materials. In general, however, the City's Ethics Ordinance does not prohibit you from using your District 5 staff to distribute materials relating to City business, except that materials supporting or opposing a City candidate may not be distributed by City Officials who are on "City time." Neither the Ethics Ordinance nor ECCO regulate the political activities of your City staff on their personal time.
 - (c) See answer to 5(a). Because we have determined that SDCAG may not create or distribute the materials in question, and because we cannot opine on the lawfulness of the use of public funds for the purpose identified, we cannot squarely address the placement of such materials at events that you or your staff will attend. In general, however, the City's Ethics Ordinance does not prohibit the placement of any materials at particular locations, except that City Officials may not distribute materials that support or oppose a City candidate at a City facility.
6. Because Council interns are generally not considered "City Officials" under the Ethics Ordinance, any individual you hire in this capacity will not be not subject to the restrictions and prohibitions of the Ethics Ordinance. You are, however, subject to the Ethics Ordinance, and accordingly you may not instruct any person, including an intern, to engage in campaign-related activities while on City time. On the other hand, under ECCO, services the intern performs for SDCAG must be related to one or more ballot measures; SDCAG may not use its funds to pay the intern for general services relating to the office you hold.

BACKGROUND

The above questions primarily pertain to (a) funds in the possession of SDCAG, which you established as a city general purpose recipient committee five years ago, and (b) City funds that will be under the budgetary control of Council District 5. According to your December 5, 2008, memorandum, SDCAG has a history of engaging in issue advocacy and sponsoring ballot

measures, and was not created to support or oppose any candidates for public office. In its Statement of Organization [FPPC Form 410], SDCAG describes its activities as follows: “to inform San Diego citizens on the condition of their government; to advocate reforms; to engage voters by educating them on ballot initiatives and positions of candidates for elected office.” In November of 2007, SDCAG amended its Form 410 to acknowledge that it had become a “candidate-controlled” committee.

Your office has been approached by a vendor with regard to setting up Telephone Town Hall Meetings as a means of facilitating your communications with constituents. Constituents would use an 800 number to dial in and join the call. Your questions concern the permissible use of SDCAG funds and City funds to pay for these virtual meetings. Your questions also pertain to the use of SDCAG funds and City funds to pay for printed materials designed to communicate with and solicit input from constituents on a variety of Citywide and community issues. Finally, you stated that District 5 plans to hire an intern on an hourly basis to perform City-related duties. Outside of his City employment, the intern will work as an independent contractor for SDCAG.

ANALYSIS

Your questions involve provisions of ECCO that are derived from the state’s Political Reform Act (Cal. Gov’t Code §§ 81000, et seq.), and accordingly we interpret our rules to be consistent with those set forth at the state level. In addition, the state’s Fair Political Practices Commission [FPPC] has adopted regulations and issued advice letters that interpret state law, and we therefore look to these resources when analyzing your questions.

A. Questions 1, 2, and 4 – SDCAG Funds

You describe the Telephone Town Hall Meeting as a means by which constituents may communicate with you concerning Citywide and community affairs. You anticipate sending follow-up letters to constituents who participate in these virtual meetings. Similarly, you hope to create and distribute printed materials to solicit public input on a variety of Citywide and community issues. You have questioned whether SDCAG funds may be used to finance these activities.

As indicated above, SDCAG is currently a city general purpose recipient committee that is controlled by you. A general purpose committee is a political entity that receives contributions to support more than one candidate or ballot measure. Cal. Gov’t Code § 82027.5(a). Typically, general purpose recipient committees may make expenditures for any matter that is “reasonably related to a political, legislative, or governmental purpose.” Cal. Gov’t Code § 89512.5(a). When such committees are controlled by a candidate, however, additional restrictions are present to ensure that a candidate’s control of a committee does not circumvent the restrictions and limitations lawfully imposed on candidates. Under state and local law, for example, candidate controlled committees are expressly precluded from making independent expenditures on behalf of a candidate, and from making contributions to a City candidate. Cal. Gov’t Code § 85501; SDMC §§ 27.2917, 27.2950.

You are considered a “candidate” while running for office, and for the entire time you hold office. Cal. Gov’t Code § 82007. Because you are now controlling SDCAG as a candidate, the activities of the committee are subject to more restrictions than was previously the case. Specifically, as discussed in greater detail below, the funds collected by SDCAG may not be used for purposes related to holding elective office. Because it is difficult to imagine any Citywide or community issues that are entirely unrelated to your elective office, you may no longer use SDCAG funds to engage in issues advocacy unless such advocacy is truly related to ballot measure activity.

State law prohibits candidates from having more than one bank account for the purpose of accepting contributions and making expenditures associated with seeking and holding an elective office. Cal. Gov’t Code § 85201, 89510. When you established the Reform City Hall with Carl DeMaio committee (identification no. 1297980), you created a candidate controlled committee and a corresponding bank account for the purpose of seeking and holding a four-year term as the Councilmember for Council District 5. Therefore, you may not create or maintain any other accounts for the purpose of seeking or holding this office.^{1, 2} It is relevant to note that any funds left over from your primary election campaign may lawfully be used to pay officeholder type expenses. Thus, the funds remaining in the Reform City Hall with Carl DeMaio committee bank account may be used to pay for town hall meetings and other forms of communications with constituents. (Note that because you prevailed in the primary election, any funds collected for the general election must be returned to contributors.)

According to the FPPC, the one-account rule “preserves the Act’s contribution limits by prohibiting the use of a committee not subject to such limits (such as a ballot measure committee) as a fundraising vehicle for another committee that is subject to contribution limits.” *In re Bauer*, FPPC Adv. Ltr. A-03-292. Thus, all contributions that are under your control and used for expenses associated with holding elective office are subject to the City’s contribution limits and must be deposited in your election campaign committee account, not SDCAG’s account. *In re Knight*, FPPC Adv. Ltr. A-04-088. (Note that, at this post-election point in time, your election campaign account may no longer accept contributions except for the purpose of retiring outstanding loans and debt. SDMC § 27.2938(b).) Any interpretation of campaign laws that permits you to use SDCAG funds for purposes related to holding office would conflict with the purpose and intent behind the City’s adoption of contribution limits. For more than thirty years, ECCO has imposed limitations on the amount of money that a person may give to a candidate³. SDMC § 27.2935 (formerly § 27.2941). These limitations serve the City’s interest in reducing the potentially corrupting impact of giving unlimited sums of money to a candidate.

¹ As of January 1, 2009, there will be an exception for legal defense fund funds, which can reside in a “professional expense committee” separate and distinct from your election campaign committee. SDMC § 27.2965-27.2969.

² Although some local jurisdictions allow “officeholder accounts,” such accounts are maintained within the officeholder’s election campaign committee and are subject to contribution limits. In any event, the City of San Diego does not allow elected officials to maintain “officeholder accounts.”

³ In 2008, the City’s contribution limits were \$270 for district candidates and \$320 for citywide candidates. Both district and citywide candidates seeking office in future elections will be able to accept contributions of up to \$500 per election. SDMC § 27.2935(a) (effective January 1, 2009).

On the other hand, ECCO does not impose any dollar limits on contributions to ballot measure committees. No limits exist because the funds collected by ballot measure committees are for ballot measure purposes, and are not intended to inure to the benefit of a candidate. The U.S. Supreme Court held in *Citizens Against Rent Control v. Berkeley*, 424 U.S. 290 (1981), that although contribution limits in candidate elections are constitutional, limitations on contributions to ballot measure committees are not justified by any governmental interest in preventing large contributions from corrupting the initiative process. “The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue.” *Id.* at 298. The risk of corruption would reappear, however, if unlimited contributions to a candidate-controlled ballot measure committee could be channeled away from ballot measure purposes and used instead by the candidate for expenses related to holding office. Accordingly, the unlimited contributions that SDCAG may accept must not be used in a manner that would make ECCO’s candidate contribution limits obsolete or superfluous. In other words, SDCAG’s funds must be used to advocate for or against ballot measures, not for officeholder type expenses.

You may, therefore, continue to control a general purpose committee that has as its sole purpose the support or opposition of ballot measures. The SDCAG funds under your control, however, may not be used to pay the expenses that are lawfully the expenses of the committee you created to obtain and hold your current office. Although any of the constituent outreach efforts you have in mind may theoretically be the subject of a future City ballot measure, SDCAG funds may be used only for efforts that are truly intended to qualify a measure for the ballot or to support or oppose a measure already on the ballot.

B. Questions 1, 2, and 3 – Public Funds

You have also asked whether public funds may be used to set up Telephone Town Hall Meetings, send follow-up letters to those who participate in such meetings, and generally seek input from constituents on Citywide and community issues. The use of public funds to support these activities falls outside the scope of ECCO. In addition, the Ethics Ordinance does not prohibit or limit the use of City funds with regard to the content or distribution of printed materials that pertain to Citywide or community issues.

The City’s Ethics Ordinance, at SDMC section 27.3564, contains language addressing the misuse of City resources, but the limited scope of this section does not extend to the types of payments contemplated by the questions you have raised. For example, SDMC section 27.3564 precludes you from using City resources to support a candidate for elective office (SDMC section 27.3564(b)), but does not otherwise prohibit or limit your use of the District 5 funds that will be under your discretion and control.

As indicated in the previous section, however, constituent communications may be subject to the “mass mailing” restrictions contained in state law (Cal. Gov’t Code § 89001 and FPPC Regulation 18901). In addition, although the Ethics Ordinance acknowledges the permissible use of City resources to provide impartial facts to the public concerning ballot measures (SDMC § 27.3564(f)), you should be aware that there are state law prohibitions against using public funds to expressly advocate for or against a ballot measure. These laws are not under the jurisdiction of

the City's Ethics Commission, and accordingly we recommend that you consult the City Attorney's Office for additional assistance.

C. Question 5 – Use of City Staff and City Resources

Your December 5, 2008, memorandum also questions the use of City staff and other City resources in connection with your planned constituent outreach activities. Your questions are made in the context of outreach materials paid for by SDCAG and/or public funds. Based on the conclusions reached earlier in this letter, printed materials containing information pertaining to upcoming civic events and/or community meetings that you will be attending may not be created or distributed at SDCAG's expense. Although the use of public funds to create and distribute such materials is not prohibited by the Ethics Ordinance (assuming that the materials do not in any way support or oppose a City candidate), such activities are likely subject to the state's mass mailing regulations. Because of the concerns we've identified with regard to the lawfulness of payments for the materials in question, we cannot squarely address the use of City staff and other City resources in connection with those materials.

In general, however, the City's Ethics Ordinance does not prohibit you from using your District 5 staff to distribute materials relating to City issues. Your staff may not, however, distribute any political materials that support or oppose a City candidate while on "City time." Under the City's Ethics Ordinance, "it is unlawful for any City Official to engage in campaign-related activities . . . for a campaign for any elective office using City facilities, equipment, supplies, or other City resources." SDMC § 27.3564(b). Most of the members of your City staff are considered "City Officials" and accordingly they may participate in campaign-related activities only on their personal time. Staff members who are not "City Officials" (e.g., interns) are considered "City resources" for purposes of SDMC section 27.3564(b) and may not be given campaign-related assignments while on City time. With regard to the placement of outreach materials at civic meetings that you and your staff may attend, we can say that, in general, the City's Ethics Ordinance does not prohibit the placement of any materials at particular locations, except that City Officials may not distribute at City facilities any written materials that support or oppose a City candidate. *Id.*

Again, for assistance pertaining to the use of public funds to pay for your constituent outreach efforts, we urge you to contact the City Attorney's Office.

D. Question 6 – District 5 Intern

You have indicated that you will be hiring an intern on an hourly basis to serve District 5. Outside of his hourly City employment, this individual will perform services for SDCAG. You have asked whether there are any ethical issues raised by this type of employment arrangement.

The Ethics Commission regulates the conduct of "City Officials" through its Ethics Ordinance. The Ethics Ordinance defines the term "City Official" to include City officers and employees who file Statements of Economic Interests [Form 700]. City interns do not typically file a Form 700. In particular, the Conflict of Interest Code for City Council offices does not list any disclosure categories for interns. Thus, on the basis that the intern in question will not file a Form

700, he will not be a “City Official,” and the provisions of the City’s Ethics Ordinance will not apply to his activities. Because the Ethics Ordinance applies to you, however, you may not, as stated above, use the authority of your office to instruct this intern to perform campaign-related services while on City time. SDMC § 27.3564(b). You may also not use your City position to induce or coerce the intern to provide you with anything of value that would accrue to your private advantage (e.g., you could not instruct the intern to run personal errands for you). SDMC § 27.3564(a).

On the other hand, the City’s campaign laws apply to SDCAG, and accordingly they will apply to any SDCAG payments made to the intern. As discussed earlier in this letter, SDCAG funds may be used only with respect to ballot measures, i.e., qualifying a matter for the ballot and supporting or opposing matters that are on the ballot. Thus, to the extent that the intern is performing services that are related to one or more City ballot measures, SDCAG payments will be permissible under the City’s campaign laws. On the other hand, payments by SDCAG for matters unrelated to ballot measures, and that pertain instead to the office you hold (e.g., your general communications with constituents on various City issues), would be impermissible.

E. Expenditure Lobbying

Although not directly related to the questions you’ve posed, you should be aware that SDCAG’s constituent outreach efforts could fall within the scope of the City’s Lobbying Ordinance if those efforts are designed to influence “municipal decisions,” a term that includes City Council decisions to put particular issues on the ballot. An “expenditure lobbyist” is defined in the Lobbying Ordinance as “any person who makes expenditures for public relations, media relations, advertising, public outreach, research, investigation, reports, analyses, studies, or similar activities designed to influence one or more municipal decisions, to the extent that such payments total \$5,000 or more within a calendar quarter.” SDMC § 27.4002. The term “person” is defined to mean “any individual, business entity, trust, corporation, association, committee, or any other organization or group of persons acting in concert.” *Id.* Thus, SDCAG is a “person” and will also be an “expenditure lobbyist” if it spends \$5,000 or more in a calendar quarter to engage in indirect lobbying efforts.

Note that the \$5,000 threshold applies to all municipal decisions that SDCAG seeks to influence in a calendar quarter. It is not a “\$5,000 per-decision” threshold. For example, SDCAG will become an expenditure lobbyist if it spends \$2,000 to distribute mailers to City residents asking them to support a Council decision to put a particular matter on the ballot, and in the same quarter spends \$3,000 on radio advertising urging the public to oppose a different ballot measure issue before the Council.

Under the Lobbying Ordinance, an expenditure lobbyist is not required to register as a lobbying entity with the City Clerk, but is required to file a Quarterly Disclosure Report for any calendar quarter in which it reaches the \$5,000 threshold. SDMC § 27.4015(b). Please consult the Ethics Commission for additional information regarding expenditure lobbying.

CONCLUSION

The activities you have proposed (Telephone Town Hall Meetings, communications with constituents on various City and community issues) may be paid with leftover funds in the possession of your election campaign committee, but may not be paid with SDCAG funds. In other words, SDCAG may not use its funds to pay for the expenses associated with you holding office. SDCAG funds may be used only for efforts that are truly intended to qualify a measure for the ballot or to support or oppose a measure already on the ballot.

The use of public funds for your constituent outreach efforts largely falls outside the scope of the City's campaign laws and the City's Ethics Ordinance. Accordingly, we urge you to seek advice from the City Attorney's Office with regard to matters involving the use of public funds.

With regard to the District 5 employment of an intern who will also be providing services to SDCAG, we observe that such an individual is likely not a "City Official" and thus would not be subject to the provisions of the City's Ethics Ordinance. You, however, are subject to the Ethics Ordinance and may not use the authority of your office to instruct the intern to perform campaign-related services while on City time or otherwise engage in activities that would accrue to your private advantage. With regard to ECCO, any payments to this individual by SDCAG must be related to a proposed or actual ballot measure.

Please note that this advice letter is being issued by the Ethics Commission solely as technical assistance from a regulatory agency as provided by SDMC section 26.0414(b). It is not to be construed as legal advice from an attorney to a client. Moreover, the advice contained in this letter is not binding on any other governmental or law enforcement agency.

Sincerely,

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General Counsel

By: Stephen Ross
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