



**Minutes for Meeting of
Thursday, March 13, 2014**

Item 1: Call to Order

Commission Vice-Chair O'Neill called the meeting to order at approximately 5:30 p.m.

Item 2: Roll Call

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

Excused – Commissioner Deborah Cochran

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 February 13, 2014

Motion:	Approve
Moved/Seconded:	Fuller/Poat
Vote:	Carried Unanimously
Excused:	Cochran
Abstained:	Detsky-Weil

Item 4: Non-Agenda Public Comment

None

Item 5: Commissioner Comment

None

Item 6: Executive Director Comment

None

Item 7: General Counsel Comment

None

Item 8: Proposed Amendments to the Election Campaign Control Ordinance

Attorney Stephen Kaufman addressed the Commission regarding committee duplication of campaign materials. He urged the Commission to apply caution in tackling this issue. He believes most people would agree that complete reproduction of candidate materials should be prohibited, but what falls short of complete duplication is the issue. He noted that, in Los Angeles, if a committee reproduces candidate materials in whole or in substantial part, it is considered to be an in-kind contribution to the candidate, which has led to questions about the meaning of the term "substantial." He expressed his opinion that an effort to compile a comprehensive list of criteria that constitute coordination could be "sticky" as it is a very subjective area.

Mr. Kaufman also addressed record retention. He pointed out that state law currently requires maintenance of records that support a committee's expenditures, and suggested that any failure to maintain relevant records should be addressed through enforcement rather than legislation. He noted that current recordkeeping requirements apply to candidates and their committees, and commented that expanding these requirements to vendors is going too far. With respect to vendor debt issues, Mr. Kaufman reported that he has not observed the problem described in the staff memo; however, if someone is attempting to avoid disclosure by making campaign expenditures on credit, he believes there is a remedy under existing state law for enforcement purposes.

Executive Director Fulhorst responded to Mr. Kaufman's comments. She noted that she attended a meeting with other local agencies at the Fair Political Practices Commission last year, and that vendor record retention was one of the main topics of conversation. She explained that existing laws require the retention of accounting-related records, but not the retention of communications reflecting the identity of people in charge of a particular committee or the details of goods and services provided. She pointed out that, in the last two election cycles, the Commission encountered several "ghost" committees that were apparently run by no one, that simply appeared, spent money to support candidates, and then disappeared. In these cases, the individuals involved in the committees deleted their email records shortly after the election, and the vendors who provided goods and services could not recall who retained their services or approved their bills for payment.

Ms. Fulhorst noted that the Commission had received input via email from Tom Sheppard, a prominent campaign consultant, who made a very relevant point about the difficulty of regulating the vast majority of vendors who are located out of state. Staff's recommendation, therefore, is to enhance the existing recordkeeping requirements for candidates and committees, as opposed to extending them to campaign vendors.

In addition to vendor record retention, Ms. Fulhorst reported that another key issue discussed at the FPPC meeting was a new trend in which committees make expenditures to support candidates on credit in order to avoid disclosing major donors on their campaign advertisements. She explained that existing laws governing an "enforceable promise to make a payment" only apply to promises made in writing.

Attorney Gil Cabrera told the Commission that he believes the duplication of candidate materials by independent expenditure committees is a growing issue. He referenced the duplication regulations in Los Angeles and expressed his view that adopting similar laws in San Diego will be problematic from an enforcement perspective because subjective judgment calls will be required. Instead, he recommended that the Commission consider "bright line" rules with certain exceptions, such as allowing duplication of a photograph but banning duplication of a video. Mr. Cabrera pointed out that the duplication issue has arisen because independent committees may now accept and spend unlimited funds whereas candidate committees are subject to contribution limits. He said that, when he served on the Ethics Commission, he was a firm believer in contribution limits and public financing of campaigns; however, in a post *Citizens United* world, he is no longer certain that contribution limits make sense. He suggested that eliminating limits might cause funding to move back to the candidates, which would result in increased disclosure.

With respect to vendor records, Mr. Cabrera pointed out that in civil litigation there is a presumption that exists if a party deletes evidence, and suggested the Commission might consider incorporating this approach. Finally, with respect to the enforceable promise issue, Mr. Cabrera noted that in the business world an oral promise is enforceable. He suggested the Commission consider this approach, although he acknowledged that there could be difficulties obtaining evidence.

Simon Mayeski urged the Commission to seriously consider regulating the duplication of candidate materials. He stated that he disagrees with Mr. Cabrera regarding the elimination of contribution limits. With respect to vendor recordkeeping, he suggested that the Commission should specify the mechanism and parties responsible for the retention of such records.

Lori Saldaña asked the Commission to consider public financing of City campaigns in order to eliminate the fundraising components from local elections.

Director Fulhorst addressed the potential subjectivity involved in enforcing a law that prohibits the substantial duplication of candidate materials. She pointed out that the Commission currently enforces other types of campaign laws that are similarly subjective, and that the Commission has historically applied a “reasonable person” standard. By way of example, she pointed out that the disclosures required on campaign advertisements must be legible and printed in a contrasting color. She recalled that, in recommending these somewhat subjective disclosure guidelines, the Commission previously decided that they were preferable to a lengthy list of detailed criteria.

Ms. Fulhorst advised the Commission that Paul Ryan with the Campaign Legal Center in Washington, D.C. has agreed to assist the Commission in developing regulations for duplication of candidate materials. He is a nationally-recognized expert on campaign finance laws and is very familiar with the federal laws concerning duplication. She noted that, in Mr. Ryan’s view, the federal model can withstand judicial scrutiny in a post *Citizens United* world. He will prepare a memo outlining his legal analysis of any proposals the Commission decides to recommend.

Commissioner Fuller asked Mr. Kaufman if he was aware of any pending court cases concerning the duplication of candidate materials. Mr. Kaufman said he was unaware of any such cases, but added that he was familiar with an instance of duplication that took place in the recent mayoral special election. He told the Commission that in his experience independent committees typically use a candidate photo or quote in their advertisements, but acknowledged that wholesale duplication of candidate video and audio material is becoming more prevalent. He also pointed out that the current laws regarding duplication at the federal level and local level in Los Angeles place the compliance burden on the independent committee, and not the candidate.

Commission Vice-Chair O’Neill asked if there is a way to tighten up the rebuttable presumption that currently exists in FPPC Regulations regarding duplication of candidate materials. Ms. Fulhorst explained that in a recent case a committee duplicated a candidate video and rebutted the presumption of coordination by simply asserting that the candidate was not involved in the duplication effort. Mr. Kaufman said that he does not have a surefire solution to this situation, and noted that many of these laws pre-date the Internet.

Commissioner Detsky-Weil questioned whether or not copyrighting plays a role in the duplication issue and asked if the candidate’s materials are purposely not being copyrighted. Both Ms. Fulhorst and Mr. Kaufman responded that they have never seen a candidate copyright campaign materials.

Commissioner Kreit asked Mr. Kaufman to identify the harm caused by allowing independent committees to duplicate candidate materials. Mr. Kaufman responded that perspectives may differ, but that some might consider it harmful for a candidate to benefit from a committee spending millions of dollars on advertising costs that the candidate could not afford. Commissioner Kreit also questioned the value of a prohibition on duplication if an independent committee could simply use other

means of determining what a candidate wanted in terms of advertising support without actually duplicating the candidate's materials. Mr. Kaufman responded that there is nothing preventing an independent expenditure committee from going to an event and taking photographs of a candidate and using them to produce their own campaign material.

Commissioner Zinser commented that the duplication issue seems to be related to the circumvention of contribution limits. He asked if there are any other jurisdictions in California that have attempted to clarify what substantial duplication means or to otherwise draw bright lines for duplication regulations. Mr. Kaufman responded that he is not aware of any jurisdictions that have gone beyond the "substantial duplication" regulation.

Commissioner Poat commented that the policy question is directly related to the framework established by *Citizens United* and asked about the viability of duplication laws in light of this Supreme Court decision. Ms. Fulhorst responded that the federal duplication laws pre-date the court decision, and that they have never been challenged. Moreover, she indicated that experts on political law would likely have differing opinions about whether duplication prohibitions, without any evidence of actual coordination, would survive a legal challenge. She added that many attorneys will be weighing in on any potential regulations considered by the Commission, including the Commission's General Counsel and the City Attorney's Office. Commissioner Poat asked if any other agencies were considering this issue. Ms. Fulhorst responded that, according to Paul Ryan, several states were looking into the issue but no one has developed any regulations at this point.

Commissioner Kreit expressed reservations about expanding the current record retention laws in light of concerns he has heard from campaign treasurers indicating that they are hesitant to work for City candidates because of the requirements in local laws. He asked the speakers if they had any ideas about concerns that might arise if the Commission decides to impose additional requirements.

Mr. Mayeski responded that he has served as a treasurer for several City candidates and has not found the City's campaign laws any more difficult to comply with than County laws, although he has heard similar concerns. He added that the City also has the Commission staff who are available to answer questions and provide assistance.

Ms. Fulhorst provided the Commission with some background information on this issue. She explained that historically the City has had only two professional treasurers, and that staff has engaged in extensive outreach to encourage treasurers outside of San Diego to work for local candidates. When speaking to the California Political Treasurers Association, she was told that our contribution limits – which at the time were \$250 – prevented candidates from paying them enough to do the compliance work required, and they were concerned that a mistake regarding compliance with local laws could result in a substantial fine. The staff has tried to remedy this misconception and encourage treasurers to work here. She noted that the efforts were seemingly successful as several additional treasurers have started

working for local candidates, including three or four out-of-town treasurers who worked on campaigns in the 2012 and 2013 election cycles.

Director Fulhorst asked the Commission if there were any issues they would like the staff to research in preparation for the discussion at the next Commission meeting. Commissioner Poat said he would be interested in an outline of options available in light of the *Citizens United* ruling.

Commissioner Kreit asked if staff could look into the specific aspects of the City's laws that might be discouraging treasurer participation. Ms. Fulhorst responded that she addressed this issue with the treasurers at two of their recent annual meetings. Their perception was that local laws were much more difficult to comply with than those in other cities; however, after discussing the specific laws unique to San Diego, the treasurers agreed that the laws relevant to treasurer duties weren't that onerous. Ms. Fulhorst noted that Mr. Kaufman's law firm has recently started providing treasurer services in San Diego, and she asked about his experience complying with local campaign laws.

Mr. Kaufman explained that, although his practice is in Los Angeles, the firm represents candidates and committees at all levels of government and they are therefore familiar with federal, state, and local laws in various jurisdictions. He acknowledged that there has been a perception that San Diego's laws are difficult and added that people are shying away from working in cities like San Diego and Los Angeles because they have more regulations than other jurisdictions. He pointed out that campaigns go to great lengths to comply and are concerned that the Commission will levy a harsh penalty in the event of an inevitable mistake. That said, he noted that there are instances in which people should be fined for violating the law.

Commissioner Kreit asked if staff would prepare some hypothetical scenarios in which campaign vendors are willing to work on credit, and Ms. Fulhorst indicated that they would do so. She noted that in recent investigations the vendors agreed to provide goods and services on credit because they were told that a particular donor was "good for it" and they concluded there was a high likelihood they would get paid; however, because the donor's promise was not made in writing, it was not considered a contribution that had to be disclosed on campaign statements and advertisements.

Commissioner Detsky-Weil asked if other laws governing record retention, such as tax laws, would be relevant. Ms. Fulhorst responded that, to her knowledge, the only laws relevant to political committees are those that currently exist in state campaign laws.

Item 9-11: Presentation of Final Audit Reports Regarding the Audits of:

- **City Attorney Jan Goldsmith 2012 Committee**
- **San Diegans for Reform in Opposition to Bob Filner – Mayor 2012 Committee**

- **Taxpayers for Carl DeMaio – Mayor 2012 Committee.**

Motion: Accept Final Audit Reports
Moved/Seconded: Fuller/Detsky-Weil
Vote: Carried Unanimously
Excused: Cochran

Item 12: Adjourn to Closed Session

Commission Vice-Chair O'Neill adjourned the meeting to closed session at approximately 6:30 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 6:50 p.m.

Reporting Results of Closed Session Meeting of March 13, 2014:

Ms. Cameron reported the results of the closed session meeting of March 13, 2014:

Item-1: Conference with Legal Counsel (2 potential matters)

Case No. 2014-07 - In Re: Alleged Failure to Include Proper Identification Disclosure on Mass Campaign Literature

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

Case No. 2014-08 - In Re: Alleged Failure to Pay Registration Fees and File Lobbyist Quarterly Disclosure Report

Motion: Initiate Investigation
Moved/Seconded: Detsky-Weil/Zinser
Vote: Carried Unanimously
Excused: Cochran

Item-2: Conference with Legal Counsel (6 potential matter)

Case Nos. 2013-15, 2013-16 and 2013-17 – In Re: Alleged Making of Contribution in the Name of Another Person

No Reportable Action

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

No Reportable Action

Case No. 2014-02 - In Re: Alleged Failure to Include Proper Identification Disclosure on Mass Campaign Literature

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

Case No. 2014-04 - In Re: Alleged Failure to Timely Amend Lobbyist Registration

Motion: Approve Stipulation
Moved/Seconded: Poat/Fuller
Vote: Carried Unanimously
Excused: Cochran

Item-3: Conference with Legal Counsel (1 potential matter)

**BD Howard v. San Diego Ethics Commission, Fourth District Court of Appeal
Case No. D065520 – In Re: Alleged Failure to File Campaign Statements**

No Reportable Action

Adjournment

The meeting adjourned at approximately 6:55 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.