



**Minutes for Meeting of
Thursday, April 10, 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, and Administrative Aide Jennifer Duarte

Item 3: Approval of Commission Minutes

Approval of Ethics Commission Minutes of March 13, 2014

Motion:	Approve
Moved/Seconded:	Zinser/Fuller
Vote:	Carried Unanimously
Abstained:	Cochran

Item 4: Non-Agenda Public Comment

None

Item 5: Commissioner Comment

None

Item 6: Executive Director Comment

None

Item 7: General Counsel Comment

Ms. Cameron reported on the Supreme Court ruling in the *McCutcheon v. FEC* case. She explained that the Court decided that individuals have the right to give the maximum contribution amount to an unlimited number of congressional and presidential candidates, as well as certain independent expenditure committees, and that aggregate limits on such contributions are unconstitutional. She noted that the ruling will not affect local campaign laws because San Diego does not have aggregate limits on contributions.

Item 8: Proposed Amendments to the Election Campaign Control Ordinance

Director Fulhorst provided some background concerning the City's campaign laws. She explained that they were adopted in the 1970's following the Yellow Cab scandal in which seven Councilmembers and the Mayor were indicted for allegedly agreeing to raise taxi rates in exchange for campaign contributions from the taxi industry. Because of the public perception that unlimited contributions from a special interest create an appearance of corruption, the City adopted contribution limits. She added that, since the 1970's, San Diego has continued to experience scandals involving political corruption. During the 2010-2011 challenge to the City's campaign laws in the *Thalheimer* case, the Ninth Circuit issued an opinion noting that there were "vivid illustrations of corruption" in San Diego politics involving campaign contributions from donors with business pending before the City.

Ms. Fulhorst explained that, by definition, a contribution has always included money that is not given directly to the candidate but is spent in coordination with the candidate. From a public policy perspective there is no discernible difference between giving a candidate \$100,000 and giving \$100,000 to a committee that uses the money to pay for a campaign ad requested by the candidate. The landscape changed dramatically in 2010 when the Supreme Court issued its decision in the *Citizens United* case. For the first time, the Supreme Court ruled that there is no appearance of corruption if a contribution is made to a committee that operates independently of a candidate. As a result, there was a dramatic increase in the number of independent committees. In particular, San Diego has seen a host of "primarily formed committees" or "drive-by committees" that pop up right before an election and disappear right after the election.

According to Ms. Fulhorst, government agencies throughout the country are now refocusing on the criteria that constitute coordination. As illustrated in recent media coverage, the reproduction of candidate materials has become a national phenomenon; there are now eight candidates for U.S. Senate who have posted

soundless video on their websites in the hope that independent committees will use them for television commercials. Although the federal campaign laws prohibit the reproduction of candidate materials, the Federal Election Commission is politically polarized and there is a three-three split among the Commissioners regarding enforcement in this area. During recent election cycles, the Commission received a series of complaints associated with the duplication of candidate materials. Essentially, the complainants asserted that committees were circumventing contribution limits by using candidate videos and paying for candidates' television advertisements. As a result, the Chair asked staff to conduct research to determine if there is a viable means of addressing this issue from a legislative perspective.

Ms. Fulhorst also explained how record retention and vendor debt issues are related to these new independent committees. Because committees usually have names like "Patriots for Powell," it is not immediately apparent who is responsible for the committee's advertising. In order to address this issue, the law requires committees to disclose the entities that are sponsoring them and the individuals who are serving as their principal officers. Ms. Fulhorst noted that this is the number one issue that voters complain about; they want to know who is responsible for specific campaign advertisements. In recent election cycles, there has been an explosion of "ghost committees" that spend a substantial amount of money to influence an election with no recognizable person or entity in charge. Major donors do not remember who solicited their contributions and vendors who prepared the campaign ads do not remember who authorized them. In at least one case, individuals involved in a committee deleted all of their emails to prevent the Commission from gathering evidence about the identity of individuals and entities operating the committee. In staff's experience, the vast majority of people involved in campaigns maintain copies of their emails. Ms. Fulhorst explained that staff has recommended expanding the recordkeeping requirements to include email and correspondence to ensure that those who are not well-intentioned are not permitted to destroy important evidence.

With respect to record retention, Ms. Fulhorst recalled that Commissioner Kreit stated at the previous meeting that he's been told professional treasurers do not want to work in San Diego, and that he is therefore concerned that additional recordkeeping requirements might further discourage them. She reported that she contacted three out-of-town professional treasurers who worked for San Diego candidates in the 2012 cycle, and all confirmed that they did not experience problems complying with the City's laws. She asked one of these treasurers if a local requirement concerning email retention would dissuade her from working in San Diego, and the treasurer responded that it would not as she already retains such records to demonstrate her compliance with the law.

With respect to the staff's suggested amendments concerning vendor credit, Ms. Fulhorst explained that existing law requires the disclosure of a committee's top two major donors on campaign advertisements so the public knows who is funding the ad. For example, a typical disclosure might read: "San Diegans for Smith with major funding from the Contractors Association." In recent election cycles, staff identified several committees that made substantial expenditures to support candidates without having any cash on hand. Vendors agreed to provide goods and services on

credit, and special interests made substantial contributions shortly after the election to pay the vendor debts. As a result, voters did not receive important information about the funding of campaign ads until after the election.

Commissioner Poat asked how long records must be maintained under current law and Ms. Fulhorst responded that they must be maintained for four years. Commissioner Poat asked if the Commission has ever taken enforcement action outside of an election cycle which he defined as a two year period. Ms. Fulhorst responded that she does not believe so, and added that generally the Commission is fairly efficient in addressing issues within the same election cycle.

Commissioner Zinser addressed the duplication of candidate materials. He noted that there are four types of media content in candidate advertisements: audio, video, photographs, and text. He suggested the Commission recommend a quantifiable way to measure each type of content, and consider a 50% threshold for permissible duplication.

Commissioner Kreit suggested that the Commission might want to consider a disclosure requirement for duplication of candidate materials. Vice-Chair O'Neill asked if Commissioner Kreit was suggesting a disclosure in a candidate advertisement indicating that portions of the ad were derived from candidate materials. Commissioner Kreit replied that he would like to consider this type of disclosure as well as a document submitted to the Commission disclosing the candidate material that was duplicated and the source where it was obtained.

Commissioner Fuller asked how the Commission would measure content for a 50% duplication threshold, and noted that a committee could add enough non-candidate material to stay under the threshold.

Vice-Chair O'Neill asked if it would be considered a violation if a committee duplicated 50% or more of any one type of media content. Commissioner Zinser initially replied that he contemplated the 50% threshold applying to an aggregate of all four types of media content. However, following additional discussion about the possibility of adding content to circumvent the law, Commissioner Zinser recommended that the threshold apply to each type of media content.

Commissioner Poat expressed his opinion that disclosure is the Commission's most potent tool. He noted that committees will find a way to go around whatever regulations the Commission recommends, and he suggested focusing on providing the voters with information that will help them make their decisions.

Commissioner Fuller questioned whether it would make a difference to the average voter if an independent committee used candidate material. Commissioner Poat concurred with Commissioner Fuller, and added that the average voter might not understand the disclosure information. Commissioner Kreit suggested that a supplemental disclosure submitted to the Commission might be preferable to a disclosure on a campaign ad. He noted that supplemental disclosures submitted to the Commission could be useful in gathering data that would help formulate

regulations in this area, and would also assist with investigations as committee would be required to disclose where they obtained any candidate material.

Commissioner Zinser stated that the supplemental disclosure requirement might cause people to ask questions and ultimately understand the duplication issue.

Vice-Chair O'Neill expressed concern that the duplication rules might be too complicated to implement or understand, and suggested the Commission keep this in mind during their deliberations.

Commissioner Kreit stated that he supports regulations to address the acquisition of goods and services on credit. Ms. Fulhorst noted that such regulations would have to be narrowly tailored to apply to situations in which the extension of credit affects major donor disclosure on campaign ads.

Commissioner Poat commented that early campaign contributions tend to generate more contributions. Therefore, a requirement that candidates have cash on hand to pay for advertisements will favor established candidates over grassroots candidates.

Commissioner Zinser asked whether disclosure was a possible remedy for the vendor credit issue. Ms. Fulhorst responded that committees are currently required to file campaign disclosure statements that include information regarding vendor debts. She added that vendor debt disclosure does not provide the voters with information regarding the sources of funding used to pay for the campaign advertisement.

Commissioner Poat commented that a vendor's decision to extend credit could be a business decision because the candidate might be more likely to use them in the future.

Commissioner Kreit asked whether it was feasible to include a ratio or threshold that would trigger a presumption that vendor credit was extended for the purpose of evading major donor disclosure. For example, he suggested that a small amount of cash on hand relative to the amount of credit would indicate possible circumvention of disclosure rules.

Commissioner Poat reiterated that a committee could have a reason to incur debts other than hiding its major donors. In his experience, vendors in this business rely on relationships and understand that they may have to extend credit without getting paid for months. He also reiterated his view that the Commission should exercise caution to ensure that the rules don't favor established incumbents over challengers.

In response, Commissioner Kreit pointed out that the vendor credit issues have more to do with independent committees than candidates because the independent committees are not subject to contribution limits.

Vice-Chair O'Neill expressed support for exploring the use of a ratio in connection with the vendor credit issue. He noted that a committee that has 95% of the cost of

an advertisement in its bank account is likely not attempting to evade disclosure laws by receiving credit from its vendors.

Ms. Fulhorst clarified that any regulations limiting vendor credit would apply to committees making independent expenditures and not to candidates because candidates do not have major donor disclosures since they are not permitted to accept contributions of \$10,000 or more.

Commissioner Zinser made some additional comments concerning duplication of candidate materials. He reiterated that the 50% duplication threshold should apply to any single category of media content. With respect to the different types of media content, he suggested that video and audio content should be measured in number of seconds, text should be measured in number of characters, and images should be measured in square inches.

Commissioner Fuller asked if it is legally permissible to prevent a committee from using candidate materials available in the public domain. Commissioner Kreit responded that he believes it would be constitutional to prohibit a committee from using candidate materials because doing so could be considered an in-kind contribution to the candidate.

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

Ms. Fulhorst explained that state law requires local jurisdictions to draft a Conflict of Interest Code for each of its departments and agencies to require disclosure of financial interests that could reasonably be expected to come before the department or agency. When the original Ethics Commission Code was adopted in 2001, the Ethics Commission looked at the Codes in place for other Ethics Commissions throughout the state as well as the disclosure categories for other high level City officials. Since that time, questions have periodically arisen regarding the broad nature of the Commission's Code. Ms. Fulhorst explained that the Code not only governs disclosure, it also implicates laws concerning gifts and honoraria. For example, the current Code prohibits acceptance of a gift worth more than the annual gift limit from anyone located in or doing business in the City of San Diego, even if the donor would never have any business before the Commission. Ms. Fulhorst noted it is fairly difficult to draft a more narrowly-tailored Code because almost any individual or entity could be involved in the City's campaign or lobbying laws.

According to Ms. Fulhorst, this item was docketed for Commission consideration at the request of Commissioner Kreit. In response to his request, staff drafted a proposed amended Code that describes financial interests that could reasonably be expected to have business before the Commission. She explained that any changes recommended by the Commission would have to first be approved by the City Attorney and then by the City Council. Although she asked the City Attorney's Office for a preliminary assessment of the proposed changes, they indicated they have not had sufficient time to consider them.

Ms. Fulhorst asked the Commissioners to be mindful of the fact that the disclosure categories in the proposed amended Code would require Commissioners to conduct

research to determine if any of their financial interests fall into any of the disclosure categories. For example, a Commissioner might have to determine whether a source of income to his or her family has paid a lobbyist in the City of San Diego in the past two years. She also advised the Commissioners that there should be a strong rationale for narrowing the disclosure categories as this will result in less information disclosed to the public.

Commissioner Kreit explained that this issue arose when he sought advice from staff about his ability to accept an honorarium. Although it was determined that an exemption applied to his acceptance of a payment for speaking at a community college, his questions concerning the broad nature of the current Code remained.

In reference to the proposed disclosure categories associated with lobbyists and lobbying, Commissioner Poat asked if there are legal definitions for these terms. Ms. Fulhorst replied that the terms are defined in the City's Lobbying Ordinance, and the definitions involve advocacy efforts that are compensated by a client or employer. General Counsel Cameron noted that it might be helpful to reference the Lobbying Ordinance in the proposed Code.

Simon Mayeski commented that the current disclosure categories are clear and simple, and the proposed changes would make them much more complicated. He therefore suggested that the Commission not recommend any amendments to the current Code.

Vice-Chair O'Neill asked about the rationale that must be provided in order to make changes to the Code, and how that rationale would be communicated to the City Council. In response, Ms. Fulhorst explained that the process is administered by the City Clerk who requests proposed amendments from all departments, reviews them with the City Attorney, and then submits them collectively for City Council approval. Ms. Fulhorst stated that she does not know what would happen if proposed changes were not approved by the City Attorney.

Vice-Chair O'Neill commented that, from the perspective of a Councilmember, it might not be clear why the Commission was requesting changes without an explanation from Commission staff. Additionally, he indicated he does not support reducing the level of transparency.

Ms. Fulhorst responded by reiterating that it is important for the Commission to have a strong rationale for recommending more narrowly-tailored disclosure categories.

Ms. Cameron noted that the City Clerk usually asks for proposed amendments in July, and the City Council approval process is usually completed by October.

The Commissioners collectively indicated that they would like to receive a preliminary assessment from the City Attorney's Office before proceeding further.

Item 10: 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 April 10, 2014:

Ms. Cameron reported the results of the closed session meeting of April 10, 2014:

Item-1: Conference with Legal Counsel (4 potential matters)

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

Motion: Initiate Investigation
Moved/Seconded: Fuller/Cochran
Vote: Carried Unanimously

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

Motion: Initiate Investigation
Moved/Seconded: Cochran/Fuller
Vote: Carried Unanimously
Recused: Kreit

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

Motion: Initiate Investigation
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 Reports

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

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

Case No. 2013-26 - In Re: Alleged Making a Contribution in the Name of Another Person

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

Case No. 2014-05 - In Re: Alleged Failure to Properly File Campaign Statements

Motion: Expand Investigation
Moved/Seconded: Detsky-Weil/Cochran
Vote: Carried Unanimously

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.