



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: RICHARD DOYLE
City Attorney

SUBJECT: Campaign Contributions

DATE: September 16, 2005

BACKGROUND

On February 2, 2005, Councilmember Reed requested that the San Jose Elections Commission determine whether the definition of a contribution under the City's Campaign Ordinance (Campaign Ordinance) was subject to the Political Reform Act (PRA) and Fair Political Practices Commission (FPPC) regulations. On April 7, 2005, the City Attorney's Office issued an Opinion to the Elections Commission stating that the terms and provisions of the Campaign Ordinance are interpreted in accordance with the PRA and FPPC Regulations. The Elections Commission did not recommend changes to the Campaign Ordinance at that time.

On April 19, 2005, Councilmember Reed requested that the Rules Committee place on the City Council Agenda a proposed amendment that would change the definition of a campaign contribution under the Campaign Ordinance.

On August 12, 2005, the City Attorney's Office issued a Memorandum addressing legal issues raised by the proposed amendment. The Memorandum concluded that while the PRA does not prohibit the City from enacting a broader definition of a contribution than exists under state law, the proposal to eliminate two exceptions to the definition of a contribution under state law - for vacation time and activities undertaken pursuant to a uniform policy - might raise constitutional concerns.

At a discussion of the issue at the August 16, 2005 City Council meeting, the Council considered the proposed amendment and whether to require all employer-compensated time spent rendering services for political purposes to be deemed a contribution of the employer, with an exception for vacation time.

The Council directed this Office to further address two issues raised by the proposed amendment, both of which involve the elimination of an exception to the definition of a contribution under state law. First is the exception for *de minimis* activities, defined by the FPPC regulations as less than 10% of an employee's compensated time in any calendar month ("***de minimis* exception**"). The second exception is when an employer consents to relieve the employee of normal working responsibilities pursuant to a

uniform policy that permits employees to engage in political activity of his or her own choosing (“**uniform policy exception**”).

DISCUSSION

A. The Proposed Amendment

Councilmember Reed’s proposed amendment is as follows:

1. Employers who pay their employees to work on political campaigns are subject to the City’s campaign contribution limits as if the payments were made directly to the campaign committee; and
2. Campaign committees who receive services from persons who are being paid while working on the campaign, must report those services as campaign contributions subject to the City’s contribution limits.

The first section of the proposed amendment, as noted above and discussed below, makes substantive changes to the definition of a contribution under the Campaign Ordinance and would result in a definition of contribution that differs from the FPPC regulations.

The second section of the proposed amendment reflects existing law and is not a substantive change. If the definition of contribution changed, obviously what would need to be reported would also change, but under both the Campaign Ordinance and FPPC regulations, a campaign or committee that receives services from an individual who is compensated for his or her time receives a contribution and must report the value of those services as a contribution. (SJMC §§ 12.06.050.A.3 and 12.06.910; 2 Cal. Adm. Code § 18215(b)(3).)

B. The Political Reform Act and Preemption

The PRA specifically provides that a local agency may impose additional requirements provided they do not prevent a person from complying with the PRA. (§ 81013.) This section establishes “the authority of local agencies to impose obligations beyond those set forth in the Act and makes clear that the Act is not intended to so occupy the field it regulates that state and local government agencies are powerless to enact additional requirements.” (CA FPPC Op. 0-01-112.) The PRA also provides that nothing in the PRA nullifies contributions limits or prohibitions of any local jurisdiction that apply to elections for local elective office (with one exception, which is addressed in Section C of this Memorandum). (§ 85703.) In light of these provisions, it is likely that the proposed amendment would not be found to conflict with the PRA.

Even if a conflict were found, however, Article XI, section 5 of the California Constitution grants to charter cities the authority to “make and enforce all ordinances and regulations in respect to municipal affairs.” With regard to municipal affairs, local provisions prevail over all other laws inconsistent with the charter. (Article XI, section 5, Subdivision (a); see CA FPPC Op. 0-01-112.)

Subdivision (b) of Article XI, section 5 of the California Constitution sets forth certain matters that are, by definition, municipal affairs. Among these are the conduct of city elections and authority over the manner of electing municipal officers. (See *Johnson v. Bradley* (1992) 4 Cal. 4th 389, 397 - 98.) This section has been interpreted to include within the definition of a municipal affair the regulation of those persons attempting to influence the outcome of a local election. (CA FPPC Op. 0-01-112.)

Thus, even if the proposed amendment were found to conflict with the PRA, since it pertains to matters within the constitutional definition of a municipal affair, it would be “beyond the reach” of, and not preempted by, the PRA. (CA FPPC Op. 0-01-112.)

C. FPPC Regulations Regarding Contributions

1. Contributions in General

The FPPC regulations define a contribution as “any . . . services received by or behested by a candidate or committee at no charge . . .” (2 Cal. Adm. Code § 12815 (b)(3).)

Volunteer services are specifically exempted from the definition of a contribution under City and state law. (SJMC § 12.06.050(b) and 2 Cal. Adm. Code § 18215(c) (2).) To the extent any business, organization, or employer is able to mobilize volunteers to work on local elections, those activities are not contributions and need not be reported under the Campaign Ordinance.

Also specifically excluded from the definition of a contribution are payments made for communications with members, employees, etc, for the purposes of supporting or opposing a candidate or ballot provided the payments are not made for general public advertising. (§ 85312.) Section 85312 specifically states that local regulations may not conflict with this section.

The PRA and the Campaign Ordinance provide that a contribution is “the payment of compensation by any person for the personal services or expenses of any other person if the services are rendered or expenses incurred on behalf of a candidate or committee without payment of full and adequate consideration.” (§ 82015; § 12.06.050.A.3.)

2. Contributions Attributable to An Employer

Section 18423 provides that the payment of salary, reimbursement for personal expenses, or other compensation by an employer to an employee who spends more than 10 % of his or her compensated time in a calendar month performing services for political purposes is a contribution or an expenditure of the employer if:

1. The employee renders services at the request or direction of the employer; or
2. The employee, with the consent of the employer, is relieved of any normal working responsibilities related to his or her employment in order to render the personal services, unless the “employee engages in political activity on bona fide, although compensable, vacation time or pursuant to a uniform policy allowing employees to engage in political activity.” (2 Cal. Adm. Code Section 18423).

This regulation sets forth three exceptions to the general rule that compensation paid to an employee is a contribution of the employer. One is for *de minimus* activities; if an employee spends less than 10% of his or her paid time in a given calendar month rendering services for political purposes, those services do not constitute a contribution of the employer. Another is when, with the employer’s consent, an employee is relieved of normal working activities to engage in political activities pursuant to a uniform policy allowing employees to engage in political activity. The third exception is for when an employee spends his or her vacation time working on a political campaign.

At the August 12th meeting, the Council appeared prepared to exclude vacation time from the definition of an employer contribution. This is consistent with federal law, which provides that “no contribution results where the time used by the employee to engage in political activity is bona fide, although compensable, vacation time or other leave time.” (11 CFR § 100.54(c).)

D. FPPC Exception for *De Minimus* Activities (Less Than 10%)

The elimination of *de minimus* exception should not prohibit compliance with the PRA; by reporting all employer-compensated time rendered by an employee for political activities, a candidate or committee would also comply with the FPPC requirement to report only compensated time over 10%. Even if a court were to find that a conflict did exist, because local elections are defined in the California Constitution as a municipal affair, a Campaign Ordinance provision that made no exception for *de minimus* activities with regard to local elections would prevail over different PRA provisions. (§ 81013; CA FPPC Op. 0-01-112.)

Furthermore, the elimination of the exception for activities constituting less than 10% of an employee's time within any given calendar month would appear to be consistent with both federal law and other state law. The federal regulation governing "compensation for personal services," which defines when an employee is compensated for political activity, does not have a *de minimus* exception. (11 C.F.R. § 100.54.) In addition, a search of other state statutes and regulations did not disclose any other state with a *de minimus*, or over 10%, requirement.

In light of the express provisions of the PRA, and that the regulation of local elections is a municipal affair, the Council has the authority to eliminate the *de minimus* exception.

E. FPPC Exception for Activities Pursuant to a Uniform Policy

In an advice letter to this Office, the FPPC stated its opinion that a uniform policy is one that allows all employees are "to spend some amount of their compensable time on political activities of their **own** (emphasis added) choosing," and that any limits on those activities by an employer would convert the services into a contribution of the employer under § 18423.

"Uniform policy" is not a term of art with regard to campaign contributions under federal law or the laws of other states. A federal regulation governing employee compensation for political services has no similar exception for an equivalent to a uniform policy (11 C.F.R. 100.54), and no other state statutes or regulations appear to have a similar exception for employer-compensated political activities of the employee's own choosing.

The initial analysis for the elimination of the uniform policy exception is the same as for the *de minimus* exception; in light of the express provisions of the PRA, and that local elections are by definition a municipal affair, the Council has the authority to eliminate the uniform policy exception.

Regulations governing municipal affairs, however, must satisfy the guarantees of the state and federal constitutions. (88 Ops. Cal. Atty. Gen. 71; see *Johnson v. Bradley* (1992) 4 Cal.4th 389, 403, fn. 15.) Campaign disclosure requirements can "seriously infringe on privacy of association and belief guaranteed by the First Amendment," and governmental interests subject to "exacting scrutiny" must justify any significant encroachments of these rights. In addition, a relevant correlation must exist between the governmental interests and the required disclosure. (*Buckley v. Valeo* (1975) 424 U.S. 1, 64.) This applies whether the deterrent effect on First Amendment rights arises through direct government regulation or "indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure." (*Id.*, at p. 65.)

In *Buckley*, the Supreme Court recognized three categories of governmental interests underlying campaign disclosure laws: 1) providing the electorate with information as to

the source of political campaign money to aid voters in evaluating candidates, 2) deterring corruption and avoiding the appearance of corruption by making public large contributions and expenditures, and 3) record keeping for detecting violations of contribution limits.

Although in general disclosure requirements are the least restrictive means of protecting the election process, the Court in *Buckley* noted that “there may be a case . . . where the threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial” that disclosure requirements could not be constitutionally applied. (*Id.* at 71.) For example, if a minor party could show that the disclosure of contributors’ names would subject contributors to threats, harassment, or reprisals from either government officials or private parties, a proper balancing of the interests might require a different result. However the evidence presented in *Buckley*, that due to the possibility of disclosure a few people refused to make contributions, was insufficient to outweigh the public interest in disclosure. (*Id.* 71 – 72.)

For two reasons, if an employer maintained, and an employee participated in, a uniform policy, the reporting of a contribution under that policy would present a fairly unique set of facts and might warrant an exception to the general rule that governmental interests in disclosure trump the infringement of personal privacy rights.

First, the elimination of the uniform policy exception would bear no correlation to the interest in informing the electorate of the supporters of a particular candidate. An employee acting pursuant to a uniform policy, in theory at least, is engaged in political activities of his or own choosing, yet the contribution is reported as being one of the employer. Presumably this is why § 18423 provides that political services rendered pursuant to a uniform policy are not a contribution of the employer.

Second, without a uniform policy exception an employer who had a uniform policy would make a contribution for the services of the employee even if the employer did not support that candidate. This represents a unique scenario that might be found to violate the associational rights of the employer. In addition, without the exception for a uniform policy, an employee acting under a uniform policy would be required to report to his or her employer which candidate the employee worked for under the policy for reporting purposes, implicating the employee’s right of privacy and association.

If the uniform policy exception has created a loophole that has resulted in a wealth of unreported campaign contributions, then the other governmental issues underlying campaign disclosure laws, regarding deterring undue influence and accurate record keeping of campaign contribution limits, would have a strong correlation to the elimination of the uniform policy exception. However in the absence of evidence regarding the strengths of these governmental interests or the infringement of personal

constitutional rights, it is difficult to anticipate how a court might balance the competing interests in this unique context.

CONCLUSION

The Council has the authority to eliminate both the *de minimis* and the uniform policy exceptions found in FPPC Regulation § 18423. However, in the absence of specific evidence regarding governmental interests at risk or First Amendment rights infringed by the elimination of the uniform policy exception, it is not possible to state definitely that no constitutional issues could be raised by eliminating the uniform policy exception.

To protect constitutionally granted and protected “municipal affair” status, the proposed amendment should state that it applies only to local elections, or only to the elections of City Council members and the Mayor. The proposed amendment should also provide that bona fide, although compensable, vacation time or other earned leave time is not a contribution under the Campaign Ordinance.

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cc: Del Borgsdorf
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