

March 4, 2009

cc: Lisa Herrick, Sr. Deputy City Attorney
Linus Li, MGT of America, Inc.
Lee Price, City Clerk

TO: San Jose Elections Commission
FROM: Michael A. Smith, Commissioner
SUBJECT: Subcommittee Report on Recommended Actions for Elections Commission
Follow-up to the 2006-07 Election Cycle Analysis Report

This memo is divided into four sections, with the first three sections addressing specific questions/issues and the fourth section identifying recommended actions.

I. YET-TO-BE-COMPLETED CITY COUNCIL REFERRALS WHICH MIGHT BE IMPACTED BY AN EVALUATION OF THE 2006-07 ELECTION CYCLE ANALYSIS REPORT

The unissued RFQ for a Legal Consultant listed, as goals, six questions to be evaluated based on the results of an audit of mayoral/council elections in 2002, 2004, 2005, 2006 and 2007 (subsequently reduced to an analysis of the 2006-07 elections). The six questions were:

1. Whether, and if so, how, the San Jose Municipal Code should be amended, or other action taken such as education or auditing, to address:
 - a. Accepting campaign contributions before the campaign contribution start date (SJMC § 12.06.290 and 12.06.330);
 - b. Failing to disclose names of contributors (Government Code § 85700 and SJMC § 12.06.910);
 - c. Failing to disclose expenditures made by subvendors (Government Code § 84303 and FPPC Reg. 18431);
 - d. Failing to disclose late expenditures in a timely manner (Government Code § 84204); and
 - e. Reporting contributions in excess of the \$500 per person limit (SJMC § 12.06.540).
2. Whether the San Jose Municipal Code should be amended to regulate political party expenditures to ensure full disclosure (comparable to the rules promulgated in the City of San Diego);
3. Whether the San Jose Municipal Code can be amended to impose limits on contributions to independent expenditure committees;
4. How the San Jose Municipal Code can be amended to prohibit unlimited contributions in the form of paid campaign workers;
5. Whether, and if so, how, the San Jose Municipal Code should be amended to address:
 - a. Requiring a committee spending money in San Jose to file a report in San Jose with the City Clerk's Office within 24 hours of making the expenditure;
 - b. Increasing penalties for violations of the campaign finance ordinance dramatically, possibly as much as the expenditure;
 - c. Increasing the budget and staff of the Elections Commission and allowing the Elections Commission to use the District Attorney's Office to investigate election complaints;

- d. Penalizing the consultant as well as the committee for failing to follow independent expenditure laws;
 - e. Prohibiting the coordination of candidate committees and party organizations in non-partisan races;
 - f. Requiring independent committees to disclose on written material a disclaimer that states "This piece was paid for by an independent committee with funds that were raised in amounts greater than the limits imposed on campaign committees" and requiring the same disclaimer to be read on all radio and television commercials; and
 - g. Prohibiting consultants from working for a candidate committee and an independent committee supporting the same candidate.
6. Whether implementing an Instant Run Off system could save the City money in future elections.

These questions can be correlated to the referrals listed in Lee Price's January 8, 2009 draft memo ("Status of City Council Referrals to the Elections Commission") as follows:

<u>Question #</u>	<u>Referral #</u>	<u>Status</u>
1	5a	Was held pending evaluation of election analysis results (Smith/Shepard subcommittee)
2	5b	Complete
3	2 and 4b	Was held pending appeal of COMPAC case (de Funiak/Smith subcommittee)
4	3	Complete
5a	4a	Complete
5b	4c	Complete
5c	4d	On hold until April 2009
5d	4e	Complete
5e	4f	Referred to City Attorney's Office for legal opinion
5f	4g	Complete
5g	4h	Referred to City Attorney's Office for legal opinion
6	4i	To be revisited in April 2009

From this, we can see that the only Council referral placed "on hold" pending evaluation of the 2006-07 election cycle analysis report was #5a:

- a. Review the City ordinance to determine any changes that need to be made, or any other steps that can be taken, such as education or auditing, to address the following problems which appeared in campaign reports filed in the last election:
 - i. Accepting campaign contributions prior to the campaign contribution start date. (Municipal Code Sections 12.06.290; 12.06.330)
 - ii. Failing to disclose names of contributors. (Government Code Section 85700, Municipal Code Section 12.06.910)
 - iii. Failing to disclose expenditures made by subvendors (Government Code Section 84303; FPPC Reg. 18431)
 - iv. Failing to disclose late expenditures in a timely manner. (Government Code Section 84204)
 - v. Reporting contributions in excess of the \$500 per person limit. (Municipal Code Section 12.06.540)

In addition, the only other Council referrals which might be impacted by an evaluation of the report are #2 and #4b, both of which relate to independent expenditure contribution limits.

The 2006-07 election cycle analysis report (Analysis of 2006 Election Cycle Activity: Final Report) was issued on August 8, 2008 by MGT of America. A review of the report indicates that the issues covered by referrals #2, #4b and #5a were addressed as follows:

<u>Referral #</u>	<u>Item #</u>	<u>Issue</u>	<u>Applicable Section of Report</u>
2 and 4b	-	Independent expenditure contribution limits	<ul style="list-style-type: none"> • Independent Committee Expenditure Analysis (pp. 29-33) • Complaints Analysis (pp. 34-36) • Conclusions and Future Considerations (pp. 37-38)
5	i	Accepting contributions prior to start date	<ul style="list-style-type: none"> • No issues identified in report
5	ii	Disclosure of contributors	<ul style="list-style-type: none"> • No issues identified in report
5	iii	Disclosure of expenditures by subvendors	<ul style="list-style-type: none"> • No issues identified in report
5	iv	Timely disclosure of late expenditures	<ul style="list-style-type: none"> • No issues identified in report
5	v	Reporting contributions in excess of limit	<ul style="list-style-type: none"> • Contributions in Excess of Allowed Amounts (p. 19) • Complaints Analysis (pp. 34-36)

From this, we can see that the only referrals potentially impacted by an evaluation of the report are: (1) independent expenditure contribution limits [referrals #2 and #4b]; and (2) reporting contributions in excess of the per person limit [referral #5a, part v].

II. VALIDITY OF CONCERNS IDENTIFIED REGARDING THE INDEPENDENT COMMITTEE EXPENDITURES ANALYSIS IN THE 2006-07 ELECTION CYCLE ANALYSIS REPORT

Two key points were made in the section of the 2006-07 election cycle analysis report titled "Independent Committee Expenditures Analysis":

- MGT's analysis of IC expenditures made on behalf of or against candidates within our review found similarly large expenditures made from ICs. MGT identified over \$3.3 million in expenditures made by ICs within the period of its review. This amount is more than 63 percent of total expenditures made directly by candidates on their own behalf. MGT cautions that this amount may be understated because our review only searched for these expenditures in selected reporting arenas, as disclosed in the Scope and Methodology.
- The team's review found that expenditures by ICs, as a percentage of total campaign expenditures, were not an indicator of campaign success. That is, as shown above, candidates who had large amounts expended on their behalf by outside groups had no more and no less of a chance of succeeding in their election campaign than those who had smaller percentages of expenditures.

The second observation is softened somewhat by a caveat included under "Conclusion and Future Considerations" (as shown in bold type below):

- As presented in the prior pages of this report, the team's analysis identified several trends that seemed associated with candidate success. For example, as discussed in the Expenditure section, successful candidates in the 2006 election cycle within San Jose seemed to be those who spent more on campaign consultants, campaign workers' salaries, and print advertisements and mailers, and less on television or radio advertisements or campaign paraphernalia. Additionally, as discussed in both the contributions and expenditures section, the candidate who collected the most contributions and made the most expenditures was not necessarily the candidate who was most likely to succeed. **However, the team points out that our conclusions were**

made solely on the basis of expenditure and contribution data. Several of the candidates running for election were already elected members serving in local government in the San Jose region. Therefore, success rates may be due to other factors than the types or amount of expenditures or contributions. These other factors would certainly include the candidate's prior performance while in another office and the public's favorable or unfavorable perception of how well the candidate had performed in that role.

In a memo dated January 24, 2009 from Craig Dunkerley, South Bay Coordinator for the California Clean Money Campaign, to Fred de Funiak, Chair of the San Jose Elections Commission, Mr. Dunkerley notes what he considers to be an incorrect conclusion – that independent committee expenditures (ICE's) have little or no effect on elections – resulting from an “unintentional misinterpretation of the data.”

It should first be noted that Mr. Dunkerley's memo was based on a review of the draft report dated July 3, 2008 (rather than the final report dated August 8, 2008), and that the caveat noted above was not included in the draft report. However, I have reviewed the relevant documents, and, based on my background in engineering analysis, it's clear to me that **Mr. Dunkerley is essentially correct in his concern about drawing valid conclusions regarding the impact of independent expenditures solely from an evaluation of data from the 2006-07 election cycle.** There are many factors/variables that can affect the outcome of an election, as noted in the report as well as in Mr. Dunkerley's memo, and it's not possible to draw valid conclusions about the impact of one variable (independent expenditures, in this case) unless the other variables have been properly controlled or neutralized.

III. OTHER ISSUES AND RECOMMENDATIONS IDENTIFIED IN THE 2006-07 ELECTION CYCLE ANALYSIS REPORT FOR WHICH FOLLOW-UP ACTION BY THE ELECTIONS COMMISSION MAY BE APPROPRIATE

Twelve issues dealing with the preparation, filing and processing of contribution and expenditure reports were identified in the report. These administrative issues are listed below (with identifying numbers assigned by me):

<u>No.</u>	<u>Issue</u>	<u>Section of Report</u>
I-1	Duplicate records in electronic file	Methodology (pp. 2-5)
I-2	Discrepancies between worksheets and summary page – FPPC Form 460	Methodology (pp. 2-5)
I-3	Calculation errors in summarizing worksheet data – FPPC Form 460	Methodology (pp. 2-5)
I-4	Electronic system may be incomplete – some candidate reports missing	Methodology (pp. 2-5)
I-5	Some reports filed electronically not included in Excel records on Clerk's website	Methodology (pp. 2-5)
I-6	Some Independent Committees may have filed in other jurisdictions, but not in San Jose	Methodology (pp. 2-5)
I-7	Incorrect reporting of contributor type	Contributions by Source (pp. 15-16)
I-8	Incomplete/incorrect data for "Occupation" and "Employer" – contributions	Contributions by Employer or Occupation (p. 19)
I-9	Expenditures misreported as contributions	Contributions in Excess of Allowed Amounts (p. 19)
I-10	Incorrect reporting of expenditure codes	Expenditures Analysis (pp. 20-21)
I-11	Incorrect/missing dates for expenditures	Expenditures by Date (p. 27)
I-12	Unreliable data for type of entity – expenditures	Expenditures by Entity Code (p. 28)

In addition, MGT made four specific recommendations for future administrative actions under "Conclusion and Future Considerations." These recommendations are listed below (with identifying numbers assigned by me), along with one additional recommendation that, while not explicitly stated in the report, follows directly from the identified issues. The recommendations are also cross-referenced to the issues:

<u>No.</u>	<u>Recommendation</u>	<u>Issue(s)</u>
R-1	The Elections Commission and City Clerk may wish to consider following up with Independent Committees who did not comply with the Municipal Code requirements related to IC filings. Continuing to remind ICs of the San Jose requirements and following up with the IC managers will improve the data available to the public as well as to the Elections Commission and the City Clerk.	I-6
R-2	The City Clerk may wish to conduct an analysis of the forms used by candidates to determine whether the inaccurate summaries identified on some of the reports are a result of errors in the FPPC's electronic form, or whether candidates are bypassing total fields and entering incorrect amounts in the summary table.	I-2, I-3
R-3	The City Clerk should also work with NetFile to determine why one candidate did not appear to have any filings, but subsequently had data in the electronic database, and to determine whether this problem affected other candidates in other elections.	I-4
R-4	The Elections Commission may wish to consider modifying current requirements related to campaign disclosure filings. Once the City Clerk and Elections Commission are satisfied that the electronic system is accurate and complete, the move to allow candidates to opt to choose to file solely through the electronic portal could reduce the amount of paper that the City Clerk's office must process and store, will be a more efficient method for candidates and ICs to submit their statements, and will increase the public's ability to access campaign disclosure reports and data.	I-1, I-5
R-5	<i>The Elections Commission and City Clerk may wish to consider steps that can be taken, such as education or auditing, to address common errors found in contribution and expenditure reports. (NOTE: This recommendation was not explicitly stated in the report.)</i>	I-7, I-8, I-9, I-10, I-11, I-12

IV. RECOMMENDED FOLLOW-UP ACTIONS FOR THE ELECTIONS COMMISSION

It is recommended that the Elections Commission take the following four actions:

- Initiate a small follow-up task for MGT to address identified concerns regarding the independent committee expenditures analysis in the 2006-07 election cycle analysis report. The purpose of this task would be to: (1) identify a possible approach, methodology and scope, including potential expansion to include additional election cycles, for an analysis to more rigorously assess the impact of independent expenditures on the outcome of elections in the City of San Jose; and (2) determine the possible need for an addendum to the original report addressing the identified concerns.
- Request the City Attorney's Office or the Elections Commission Evaluator to: (1) evaluate the 2006-07 election cycle analysis report with regard to independent expenditure contribution limits [referrals #2 and #4b] and reporting contributions in excess of the per person limit [referral #5a, part v]; and (2) make recommendations to the Elections Commission as to whether, and if so, how, the San Jose Municipal Code should be amended. I believe that this task can be more effectively and efficiently performed by the City Attorney's Office or the Evaluator than by a contracted legal consultant.

- Inform the City Council that no action is deemed necessary to address referral #5a, parts i, ii, iii and iv based on the results of the 2006-07 election cycle analysis report. Also make recommendations to the Council for any action(s) relative to referrals #2, #4b and #5a, part v after giving appropriate consideration to input received from the City Attorney's Office or the Elections Commission Evaluator.
- Request the City Clerk's Office to: (1) report to the Elections Commission on actions already taken or planned regarding administrative issues and recommendations identified in the 2006-07 election cycle analysis report; and (2) recommend actions to be taken by the Elections Commission regarding these issues and recommendations.