

MEMORANDUM

TO: San Jose Elections Commission

FROM: Hanson Bridgett LLP

DATE: November 8, 2010

RE: Citizen Complaint

Complainant: **Thomas Nguyen**

Respondents: **Ma Doan Trang, Hoang The Dan, Nguyen Khoi, Uong Thien Tang, Charlie Ly, Kim An, Robert Sandoval, et al.**

Alleged Violations: **Violation of the Campaign Ordinance: Failure to Register as a Committee; Failure to File Campaign Reports**

Complaint Filed: **October 7, 2010**

I. INTRODUCTION

Pursuant to a complaint filed on October 7, 2010 ("Complaint"), we have conducted an investigation to determine whether Ma Doan Trang, Hoang The Dan, Nguyen Khoi, Uong Thien Tang, Charlie Ly, Kim An, Robert Sandoval (collectively "Respondents") violated Title 12 of the San Jose City Municipal Code ("SJMC" or "Municipal Code").¹ The Complaint alleges that Respondents engaged in campaign activity but failed to register as a committee and failed to file campaign disclosures. The Complainant also alleges that the purported campaign activity was undertaken at the behest of Councilmember Nguyen. In the course of our investigation we uncovered evidence of a separate potential violation similar to the violation alleged in the Complaint.

As explained in more detail below, we conclude that the evidence fails to sustain the allegations in the Complaint. In addition, as to the other potential violation uncovered in the course of our investigation we have concluded that there is insufficient evidence to sustain a violation of the Municipal Code.

II. EXECUTIVE SUMMARY

During the course of the recall election in 2008 concerning the District 7 seat of Councilmember Madison Nguyen, Que Hong Radio (1120 AM) aired several programs during which speakers argued against the proposed recall and in favor of Madison Nguyen. The programs aired regularly during the week at the noon hour and on occasion were repeated later in the day. The programs aired under the title of "Voice of District 7" and were not identified as being sponsored by the recall campaign, the campaign of Madison Nguyen against the recall, or any other group. A similar radio program aired during the current District 7 Council election. Again, the programs supported the candidacy of Councilmember Nguyen.

A. The Evidence Shows that the Purported Campaign Activity Does Not Constitute An Expenditure Under the Municipal Code.

Generally, the Political Reform Act and Municipal Code require individuals or groups to register as campaign committees and report campaign activity – such as election communications – if they solicit contributions or make expenditures in excess of \$1000. However, the PRA excludes from the definition of expenditure "costs incurred for communications" by a "federally regulated broadcast outlet."

There is no evidence that any of the Respondents solicited contributions for campaign activity related to the recall election. The evidence also shows that the radio programs in question were aired by Que Hong Radio as part of its regular broadcast activity and were not solicited or instituted by any individual or group. Accordingly, there is no evidence of expenditures requiring disclosure of campaign activity.

¹ The investigation was conducted pursuant to Municipal Code §12.04.080 and City Council Resolution No. 75260.

B. The Evidence Fails to Show that the Radio Programs on Que Hong Radio were Made at the Behest of Councilmember Nguyen or in Coordination with Her Campaign Committee.

We find no evidence that Councilmember Nguyen participated directly or indirectly in the radio programming on Que Hong Radio; nor is there evidence that her controlled campaign committee participated in the radio programs.² Although it appears that certain campaign volunteers appeared on the radio programs, there is no evidence that their appearance was on behalf of or coordinated with Councilmember Nguyen's campaign committee. Accordingly, we find no evidence that Councilmember Nguyen failed to report campaign contributions or expenditures.

III. COMPLAINT/ALLEGATIONS

A copy of the Complaint is attached as **Exhibit A**. The Complaint alleged that in 2008 and more recently during the District 7 election, Respondents presented radio advertising against the proposed recall of Councilmember Madison Nguyen. The Complaint identified as Respondents a group known as "Voice of District 7" and also specified several individuals. Based on information provided in the initial interview of the complainant, Councilmember Nguyen was included as a Respondent..

In addition to the above allegation set forth in the Complaint, the complainant asserted other potential violations:³

- The complainant alleges that although there is no evidence that Councilmember Nguyen paid for the programming, complainant believes that the programming occurred at her behest or in coordination with her campaign committee.
- The complainant alleges that in 2008 a community newspaper contained an advertisement that was presented by the same group that presented the radio advertising.

In the course of our investigation, we determined that the complainant raised the following issues related to the allegations:

- failure to register as a campaign committee
- failure to report contributions and/or expenses (by an independent committee or by the campaign committee of Councilmember Nguyen); and
- failure to file campaign reports.

² Councilmember Nguyen purchased advertising time on Que Hong radio. These purchases/expenditures were reported by her campaign committee.

³ These additional allegations surfaced in the initial interview of the complainant and a witness and subsequent communications with the complainant. The complainant also asserted that Respondents are "violating the FCC law, [committing] hate crime and making accusation without any proof." As these types of allegations are not addressed by the Municipal Code, they were not included as part of our investigation.

**IV. JURISDICTION OVER THE COMPLAINT AND
DETERMINATION AS TO CAUSE FOR INVESTIGATION**

A. Evaluation of the Complaint.

Because of the nature of the allegations and the need to clarify the specifics of the Complaint, we did not attempt to contact the Respondents until after the initial interview of the complainant. The precise nature of the allegations was not clear from our initial reading of the Complaint. Likewise, it was unclear which of the Respondents were alleged to have engaged in which part of the activity complained about. Upon clarification of these issues, we provided a copy of the Complaint to the three principal Respondents in our initial meeting with them.

Pursuant to a review of the Complaint and the relevant statutory provisions, we determined that the Complaint and the supplemental issues alleged potential violations of the Municipal Code. Specifically, to the extent an individual or group of individuals presented radio advertising for or against a candidate or ballot measure such as the recall, the individual or group was required to register as a campaign committee if it received contributions or made expenditures in excess of a certain amount. In light of the allegations as to the number of presentations on the radio by the group called "Voice of District 7," there appeared to be a possible expenditure in excess of the threshold amount. Likewise, the newspaper advertisement presented a similar issue.

These allegations constituted a potential violation of §§12.06.050 and 12.06.910, and Title 12, Chapter 6, Part 7 of the Municipal Code.

B. Timeliness of the Complaint.

The Complaint sets forth allegations that relate, in part, to activity that occurred in the period October 2008-March 2009. Certain of the radio programs cited by the Complaint occurred during the period of the recall election set in October 2008 and held in March 2009. Similarly, the newspaper advertisement cited by the complainant is only alleged to have occurred during the recall. The complainant was aware of this activity at the time that it occurred. However, no action was taken at that time.

Upon discovery of the continuation of the radio programs in the current (2010) election, the complainant decided to file the complaint, including the allegations that related to the period of the recall election. Although the issue regarding the newspaper advertisement did not arise in the current election, the complainant included the allegation on that issue as part of this Complaint.

Under the Commission's regulations, a Complaint may address matters occurring within four (4) years of the filing of the Complaint.

C. Conduct of the Investigation.

Our investigation encompassed interviews of Respondents Khoi Nguyen, Councilmember Nguyen and Robert Sandoval and complainant/witnesses Thomas Nguyen and Paul Le. We also interviewed Jaime Abona and reviewed documents on file with the City Clerk.

With the assistance of a individual who understands spoken Vietnamese, we reviewed additional documentation provided by the witnesses and listened to excerpts of the radio programs at issue.

V. SUMMARY OF RELEVANT FACTS

A. Que Hong Radio Station Aired a Program that Featured Speakers Supporting Councilmember Nguyen in Her Recall Election.

In October 2008, a petition to recall Councilmember Nguyen qualified for the March 2009 ballot. The recall petition was pursued by the "Recall Madison Nguyen Committee" ("Recall Committee"). Paul Le served as Treasurer for the Recall Committee. (**Exhibit B**)

Beginning sometime in the late summer of 2008 and continuing through March 2009, a radio program aired on radio station 1120 AM, also known as Que Hong radio that featured speakers opposed to the recall.⁴ The program aired daily for approximately 30 minutes around the noon hour. On occasion, a tape of the program was repeated later in the day. New programs appeared only during the week and in the same time slot. The program was identified by the speakers as the "Voice of District 7." There was no regular host for the program, but several individuals appeared on multiple occasions as "hosts" for the program, introducing and questioning guests and providing commentary. Dan Hoang, Charlie Ly, Uong Tien Thang, and Kim An served in this capacity. A similar program appeared beginning in or about September 2010, with commentary on the current District 7 election. As in the period of the 2009 recall election, the commentary on the program supported Councilmember Nguyen. Kim An has been a regular host of this program.

A review of selected programs demonstrated the following:

- programs were typically just under 30 minutes in length,
- some programs featured guests; not all of the guests made comments after being introduced,
- a majority of the discussion centered on voting in the recall election, the controversy over the use of Little Saigon, statements regarding Councilmember Nguyen's political affiliation/background,⁵
- some discussion was not related to the recall or politics and centered on issues such as crime and economic conditions in the district; some of the guests commented on these issues.

Although the program supported Councilmember Nguyen, she did not appear as a guest on this program either during the period of the recall election or in 2010. Councilmember Nguyen purchased time for radio advertisements both during the recall election and in the 2010 election. (**Exhibit C**)

⁴ 1120 AM (KZSJ) is one of three Vietnamese-language radio stations operating in the San Jose area. The other two are 1430 AM (KVVN) and 1500 AM (KSJX).

⁵ In the course of the dispute over the use of "Little Saigon," Councilmember Nguyen was accused of being a "communist" or having communist sympathies; statements in some of the programs sought to dispute this characterization and explain her personal background.

B. The Radio Program at Issue Was a Time Slot Made Available By the Radio Station for Discussion of Community Issues and Open to the Public.

The manager for Que Hong Radio noted that the program in question was part of its regular programming. The station routinely set aside a period of time on its schedule for discussion of issues important to the community and members of the community were free to use the time slot for discussion of community issues. The policy of the station provided that the time slot was open to and could be used by any member of the community so long as the program concerned District 7. The program time slot was designated "Voice of District 7."

The radio station manager notes that during the period of the recall election, discussion in the programs using the time slot focused on the recall, support of Councilmember Nguyen and opposition to the recall. The station manager advised that he did not receive any requests from any other individuals or groups, in particular from individuals or groups supporting the recall or opposing Councilmember Nguyen, to present their views in that time period during the period of the recall election. Currently, Que Hong Radio has not had any request by other individuals or groups opposed to the candidacy of Councilmember Nguyen.⁶

C. During the Recall, a Newspaper was Printed that Included an Advertisement Opposing the Recall.

The complainant provided a copy of a newspaper titled "Quan Tam Cong Dong." (**Exhibit D**) The complainant asserts that the newspaper appeared beginning some time in the summer of 2008 through March 2009. Complainant recalls that the newspaper appeared periodically but was not sure of the frequency; the copy of the newspaper provided by complainant appears to be dated January 2009. Complainant states that the newspaper was distributed to homes and available at public places in the community.

The newspaper refers to a Committee for the Concerned Citizens and that the newspaper is published to "promote community participation in an orderly and constructive manner," "regain trust for the Vietnamese American community," "represent the spirit of openness and friendship," and to "clarify and fight against deceitful actions to mislead and to split our community." There are references in the newspaper's articles to the recall election and the issue of naming a business district that was central to the recall election. There is also an advertisement in the newspaper urging "registered voters in District 7 [to] exercise your right on 3/3/09 election, and vote NO on your ballot." The advertisement indicates a "no" vote means saving money for the City and enhancing the quality of life for the residents of the District.⁷ The advertisement does not mention any individuals.

None of the Respondents could recall having seen the newspaper or the advertisement. There is no evidence available of any other editions of the newspaper.

⁶ Recall Madison Nguyen Committee did not make any requests to Que Hong Radio for time to air its views.

⁷ The only issue to be decided by voters in the March 3, 2009 election was the issue of the recall. The ballot for that election only required voters to vote "yes" or "no" on the question of recall. (**Exhibit E**)

VI. LEGAL AUTHORITY

Relevant legal authority related to this investigation is found in the Political Reform Act, FPPC Regulations and the Municipal Code.

A. Political Reform Act ("PRA") and FPPC Regulations.

The following provisions of state law are relevant to this investigation:

1. **PRA § 82013. Committee.**

"Committee" means any person or combination of persons who directly or indirectly does any of the following:

(a) Receives contributions totaling one thousand dollars (\$1,000) or more in a calendar year;

(b) Makes independent expenditures totaling one thousand dollars (\$1,000) or more in a calendar year; or

(c) Makes contributions totaling ten thousand dollars (\$10,000) or more in a calendar year to or at the behest of candidates or committees. A person or combination of persons that becomes a committee shall retain its status as a committee until such time as that status is terminated pursuant to Section 84214.

2. **PRA § 82016. Controlled Committee.**

(a) "Controlled committee" means a committee that is controlled directly or indirectly by a candidate or state measure proponent or that acts jointly with a candidate, controlled committee, or state measure proponent in connection with the making of expenditures. A candidate or state measure proponent controls a committee if he or she, his or her agent, or any other committee he or she controls has a significant influence on the actions or decisions of the committee. . . .

3. **PRA § 82025. Expenditure.**

"Expenditure" means a payment, a forgiveness of a loan, a payment of a loan by a third party, or an enforceable promise to make a payment, unless it is clear from the surrounding circumstances that it is not made for political purposes. "Expenditure" does not include a candidate's use of his or her own money to pay for either a filing fee for a declaration of candidacy or a candidate statement prepared pursuant to Section 13307 of the Elections Code. An expenditure is made on the date the payment is made or on the date consideration, if any, is received, whichever is earlier.

4. PRA § 82015. Contribution.

(a) "Contribution" means a payment, a forgiveness of a loan, a payment of a loan by a third party, or an enforceable promise to make a payment except to the extent that full and adequate consideration is received, unless it is clear from the surrounding circumstances that it is not made for political purposes.

(b) (1) A payment made at the behest of a committee as defined in subdivision (a) of Section 82013 is a contribution to the committee unless full and adequate consideration is received from the committee for making the payment.

(2) A payment made at the behest of a candidate is a contribution to the candidate unless the criteria in either subparagraph (A) or (B) are satisfied

(A) Full and adequate consideration is received from the candidate.

(B) It is clear from the surrounding circumstances that the payment was made for purposes unrelated to his or her candidacy for elective office.

(c) "Contribution" includes the purchase of tickets for events such as dinners, luncheons, rallies, and similar fundraising events; the candidate's own money or property used on behalf of his or her candidacy other than personal funds of the candidate used to pay either a filing fee for a declaration of candidacy or a candidate statement prepared pursuant to Section 13307 of the Elections Code; the granting of discounts or rebates not extended to the public generally or the granting of discounts or rebates by television and radio stations and newspapers not extended on an equal basis to all candidates for the same office; 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.

5. PRA § 84101. Statement of Organization; Filing.

(a) A committee that is a committee by virtue of subdivision (a) of Section 82013 shall file with the Secretary of State a statement of organization within 10 days after it has qualified as a committee. . . .

6. PRA § 84104. Recordkeeping.

It shall be the duty of each candidate, treasurer, and elected officer to maintain detailed accounts, records, bills, and receipts necessary to prepare campaign statements, to establish that campaign statements were properly filed, and to otherwise comply with the provisions of this chapter. The detailed accounts, records, bills, and receipts shall be retained by the filer for a period specified by the commission. However, the commission shall not require retention of records for a period longer than the statute of limitations specified in Section 91000.5 or two years after the adoption of an audit report pursuant to Chapter 10 (commencing with Section 90000), whichever is less.

7. PRA § 84200. Semi-Annual Statements.

(a) Except as provided in paragraphs (1), (2), and (3), elected officers, candidates, and committees pursuant to subdivision (a) of Section 82013 shall file semiannual statements each year no later than July 31 for the period ending June 30, and no later than January 31 for the period ending December 31.

...

8. PRA § 84200.5. Preelection Statements.

In addition to the campaign statements required by Section 84200, elected officers, candidates, and committees shall file preelection statements as follows:

...

(b) During an even-numbered year, all candidates not specified in subdivision (a) who are being voted upon on the first Tuesday after the first Monday in June or November, their controlled committees, and committees primarily formed to support or oppose those candidates or a measure being voted upon on the first Tuesday after the first Monday in June or November of an even-numbered year shall file the preelection statements specified in subdivision (a) of Section 84200.7 in the case of a June election, or subdivision (b) of Section 84200.7 in the case of a November election.

9. FPPC Regulation § 18215. Contribution.

(a) A contribution is any payment made for political purposes for which full and adequate consideration is not made to the donor. A payment is made for political purposes if it is:

(1) For the purpose of influencing or attempting to influence the action of the voters for or against the nomination or election of a candidate or candidates, or the qualification or passage of any measure; or

(2) Received by or made at the behest of the following or any agent thereof:

(A) A candidate;

(B) A controlled committee;

(C) An official committee of a political party, including a state central committee, county central committee, assembly district committee or any subcommittee of such committee; or

(D) An organization formed or existing primarily for political purposes, including, but not limited to, a political action committee established by any membership organization, labor union or corporation.

(b) The term "contribution" includes:

(1) Any payment made to a person or organization other than a candidate or committee, when, at the time of making the payment, the donor knows or has reason to know that the payment, or funds with which the payment will be commingled, will be used to make contributions or expenditures. If the donor knows or has reason to know that only part of the payment will be used to make contributions or expenditures, the payment shall be apportioned on a reasonable basis in order to determine the amount of the contribution.

There shall be a presumption that the donor does not have reason to know that all or part of the payment will be used to make expenditures or contributions, unless the person or organization has made expenditures or contributions of at least one thousand dollars (\$1,000) in the aggregate during the calendar year in which the payment occurs, or any of the immediately preceding four calendar years.

(2) A candidate's own money or property used on behalf of his or her candidacy.

(3) Any goods or services received by or behested by a candidate or committee at no charge or at a discount from the fair market value, unless the discount is given in the regular course of business to members of the public.

(c) Notwithstanding any other provision of this section, the term "contribution" does not include:

. . . .

(8) A payment by:

(i) A regularly published newspaper, magazine or other periodical of general circulation which routinely carries news, articles, and commentary of general interest for the cost of publishing a news story, commentary or editorial; or

(ii) A federally regulated broadcast outlet for the cost of broadcasting a news story, commentary, or editorial.

. . . .

(10) A payment for a debate or other forum sponsored by a nonpartisan organization in which at least two candidates appearing on the ballot for the same elective office were invited to participate.

(11) A payment for a debate or other forum in which the proponent of a ballot measure and at least one opponent, or their respective representatives, were invited to participate in equal numbers.

10. FPPC Regulation § 18225. Expenditure.

(a) An expenditure is any monetary or nonmonetary payment made for political purposes. A payment is made for political purposes if it is:

(1) For the purpose of influencing or attempting to influence the action of the voters for or against the nomination or election of a candidate or candidates, or the qualification or passage of any measure; or

(2) Made by:

(A) A candidate, unless it is clear from surrounding circumstances that the payment was made for personal purposes unrelated to his or her candidacy or status as an office holder;

(B) A controlled committee;

(C) An official committee of a political party, including a state central committee, county central committee, assembly district committee or any subcommittee of such committee; or

(D) An organization formed or existing primarily for political purposes as defined in subsection (a)(1), including but not limited to a political action committee established by any membership organization, labor union or corporation.

(b) "Expenditure" includes any monetary or non-monetary payment made by any person, other than those persons or organizations described in subsection (a), that is used for communications which expressly advocate the nomination, election or defeat of a clearly identified candidate or candidates, or the qualification, passage or defeat of a clearly identified ballot measure.

(1) "Clearly identified" has the following meaning:

(A) A candidate is clearly identified if the communication states his name, makes unambiguous reference to his office or status as a candidate, or unambiguously describes him in any manner.

(B) A group of candidates is clearly identified if the communication makes unambiguous reference to some well-defined characteristic of the group, even if the communication does not name each candidate. A communication that clearly identifies a group of candidates and expressly advocates their election or defeat is reportable as an expenditure, but the expenditure need not be allocated among all members of the class or group on the campaign statement reporting the expenditure.

(C) A measure that has qualified to be placed on the ballot is clearly identified if the communication states a proposition number, official title or popular name associated with the measure. In addition, the measure is clearly identified if the

communication refers to the subject matter of the measure and either states that the measure is before the people for a vote or, taken as a whole and in context, unambiguously refers to the measure.

(D) A measure that has not qualified to be placed on the ballot is clearly identified if the communication refers to the subject matter of the measure and to the qualification drive.

. . . .

(4) Notwithstanding the provisions of this subsection, the term expenditure does not include costs incurred for communications which expressly advocate the nomination, election or defeat of a clearly identified candidate or candidates or the qualification, passage or defeat of a clearly identified measure or measures by:

(A) A regularly published newspaper, magazine or other periodical of general circulation which routinely carries news, articles and commentary of general interest.

(B) A federally regulated broadcast outlet.

. . . .

B. Municipal Code.

The Municipal Code contains the following provisions relevant to this investigation:

1. 12.04.13.00 – Findings.

A. The commission, by resolution, shall issue formal findings based on a preponderance of the evidence from the entire record of the commission's proceedings.

B. No finding of violation shall be made unless the person alleged to have committed the violation has been notified of the alleged violation and provided a copy of the regulations and procedures of the commission.

C. If the elections commission finds a violation of this title, the commission may:

1. Find mitigating circumstances and take no further action;
2. Issue a public statement or reprimand; or
3. Impose a civil penalty in accordance with this title.

2. 12.04.110 – Civil penalties.

A. Civil penalties shall be imposed by resolution of the commission.

B. Except as otherwise specified in Title 12, the commission may impose penalties of up to five thousand dollars (\$5,000) for each violation or three times the amount which a person or respondent failed to report properly or unlawfully contributed, expended, gave or received, whichever is greater.

C. If any civil penalty imposed by the commission is not timely paid, the city clerk shall refer the debt to the director of finance for collection.

3. 12.06.010 Definitions.

The following definitions used in this chapter shall have the meanings set forth below. Except as otherwise provided here, the terms and provisions of this chapter shall be interpreted in accordance with the applicable definitions and provisions of the Political Reform Act of 1974, as amended (Government Code Section 81000 et seq.) and the regulations of the California fair political practices commission, as amended.

4. 12.06.050 – Contribution.

A. "Contribution" means:

1. Any payment, loan, forgiveness or postponement of a loan, payment of a loan by a third party, or an enforceable promise to make a payment except to the extent that full and adequate consideration is received, or it is clear from the surrounding circumstances that the contribution is not made for political purposes.

2. An expenditure benefiting a candidate or committee made at the behest of a candidate, candidate controlled committee or elected officeholder is a contribution to the candidate, committee or elected officeholder unless full and adequate consideration is received for making the expenditure.

B. Contributions include the purchase of tickets for events such as dinners, luncheons, rallies and similar fund-raising events; the granting of discounts or rebates not extended to the public generally or the granting of discounts or rebates by television and radio stations and newspapers not extended on an equal basis to all candidates for the same office; the payment of compensation by any person for the personal services or expenses of any other person, if such services are rendered or expenses incurred on behalf of a candidate or committee without payment of full and adequate consideration; and the transfer of anything of value.

...

5. 12.06.060 Controlled committee.

"Controlled committee" shall mean a committee which is controlled directly or indirectly by a candidate or which acts jointly with a candidate or controlled committee in connection with the making of expenditures. A candidate controls a committee if such

candidate, his or her agent, or any other committee such candidate controls, has a significant influence on the actions or decisions of the committee.

6. 12.06.130 Independent expenditure.

"Independent expenditure" means an expenditure made by any person in connection with a communication which expressly advocates the election or defeat of a clearly identified candidate, or the qualification, passage or defeat of a clearly identified measure, or taken as a whole and in context, unambiguously urges a particular result in an election, but which is not made to or at the behest of the affected candidate or his or her controlled committee.

7. 12.06.910 – Statements and reporting requirements.

A. Each candidate, candidate controlled committee and independent committee receiving contributions or making expenditures in a City election must file with the City Clerk campaign disclosure statements in the form and at the times required by Chapter 12.06 and the Political Reform Act. The campaign disclosure statements must show the total amount of contributions accepted and expenditures made, including independent expenditures. The campaign disclosure statements may be completed on forms required to be filed by the regulations of the fair political practices commission so long as such forms are completed in sufficient detail to comply with the requirements of this chapter. The campaign disclosure statements must contain a declaration by the candidate or controlled committee treasurer that the candidate or committee has not accepted nor solicited any campaign contribution in violation of the requirements and limitations of this chapter.

B. When listing contributions, each candidate and candidate controlled committee receiving contributions or making expenditures in a city election must itemize all contributions accepted during the campaign contribution collection periods specified in this chapter including all amounts less than one hundred dollars (\$100).

C. The first and second campaign statements must be filed at the times prescribed for pre-election statements by the Political Reform Act as well as any other times prescribed in Chapter 12.06, for candidates, candidate controlled committees and independent committees for whom the city clerk is the regular filing official. If the city clerk is not the regular filing official for an independent committee receiving contributions and making expenditures in a city election, the independent committee must file campaign statements with the city clerk in accordance with this chapter.

D. Once an independent committee whose primary filing official is not the city clerk has filed a campaign disclosure statement with the city clerk, the committee must also file with the city clerk, within two business days, copies of campaign disclosure statements filed by the committee with its regular filing official for the previous twelve months.

E. Once an independent committee whose primary filing official is not the city clerk has filed a campaign disclosure statement with the city clerk, from that date forward, that committee's campaign disclosure statements must be filed with the city clerk in the form

and at the times required by Chapter 12.06, the California Political Reform Act and the California fair political practices commission until the committee terminates or has not received contributions or made expenditures, including independent expenditures, in an election in the City of San José for four years.

F. If any person files a campaign disclosure statement after any deadline imposed by this chapter, the city clerk must fine the person ten dollars (\$10.00) per day, starting the day after the filing deadline, until the statement is filed; however, no liability may exceed the cumulative amount of reported contributions or expenditures, or \$100, whichever is greater. The city clerk may reduce or waive the fine if he or she determines that the late filing was not willful and that enforcement will not further the purposes of this chapter.

C. Elections Commission Regulations.

Resolution 75620 contains the following provisions relevant to this investigation:

1. F. REVIEW OF COMPLAINTS BY EVALUATOR

. . . .

2. The Evaluator shall review every complaint to determine whether sufficient cause exists to conduct a preliminary investigation. Sufficient cause shall exist when a complaint identifies specific facts, which if proven, would be a violation of the Municipal Code. No investigation shall be conducted if the complaint does not contain sufficient facts to demonstrate a potential violation, if the facts would not amount to a violation of law or if identical allegations which have already been addressed in a prior investigation.

3. Complaints which allege violations which have occurred more than four years prior to the date of filing will not be considered by the Commission.

. . . .

2. K. ADMINISTRATIVE ORDERS AND PENALTIES

1. If the Commission finds a violation, the Commission may:
a. Find mitigating circumstances and take no further action;
b. Issue a public statement or reprimand;
c. Impose a penalty in accordance with Chapter 12.04 of the San Jose Municipal Code.

2. The votes of at least three Commission members are required to impose orders and penalties for a violation. In order to vote to impose any order or penalty for a violation, every Commissioner must certify that he or she has heard

(either in person or by listening to a recording) or read the transcript of the testimony.

3. In determining if penalties should be imposed for violations of Title 12 of the Municipal Code and the amount of any such penalties, the Commission shall consider all the relevant circumstances surrounding the case including:
- a. The severity of the violation;
 - b. The presence or absence of any intention to conceal, deceive, or mislead;
 - c. Whether the violation was deliberate, negligent or inadvertent;
 - d. Whether the violation was an isolated incident or pervasive enough to indicate a pattern of disregard for this Chapter;
 - e. Whether the Respondent has a prior record of violations of City law relating to campaign finance, lobbying, conflicts of interest, or governmental ethics;
 - f. The degree to which the Respondent cooperated with the investigation;
 - g. Whether or not corrective actions were taken, if appropriate, in accordance with the provisions of this Chapter.

3. L. REFERRALS TO OTHER ENFORCEMENT AGENCIES

At any time, the Evaluator or the Commission may refer the matter to another government agency or official if the Commission determines that the agency or official may more appropriately resolve the allegations in the complaint or enforce the applicable provisions of law. A copy of all information gathered must be sent by the City Clerk's Office or City Attorney's Office to the agency or official together with the referral.

VII. FACTUAL FINDINGS AND ANALYSIS OF ISSUES

A. Does the Evidence Show that the Programs on Que Hong Radio Constituted Expenditures by an Individual or Group of Individuals?

No.

FPPC Regulations (§ 18225(b)) clearly provide that an expenditure occurs where "any monetary or non-monetary payment [is] made by any person . . . that is used for communications which expressly advocate the nomination, election or defeat of a clearly identified candidate or candidates, or the qualification, passage or defeat of a clearly identified ballot measure." An "expenditure" as defined under the regulations is in most instances a contribution to or on behalf of the candidate or measure being supported.

In this instance, the evidence shows that "Voice of District 7" is/was a regularly scheduled program of Que Hong Radio devoted to discussion of issues affecting or related to District 7. The program was sponsored solely by the radio station, use of the time slot was not subject to payment, and station management did not restrict use of the time slot to any particular group or individuals. While it is clear that the program contained discussion that would constitute campaign activity and express advocacy in other contexts, it is equally clear

that the discussion occurred consistent with the assertion that the program time was for community purposes and open to the public. A review of the programs that ran in the time slot indicates discussion of a variety of issues beyond discussion of the recall in 2008 or the 2010 City Council election. The station manager did not receive requests to participate on the program from persons or organizations with a countervailing point of view.

The FPPC has specifically addressed the situation where a radio station offers free air time to political candidates. It is well-settled under the PRA (and, therefore, under the Municipal Code which adopts a similar definition of communications constituting campaign activity) that no contribution (in-kind or direct) or expenditure occurs if the time is "extended to all candidates for the same office" (or to both sides of an issue in the case of ballot measures). (See, FPPC A-88-293, dated September 14, 1988 (**Exhibit F(1)**)⁸)

One of the witnesses asserted in the investigation that proponents of the recall (and subsequently a candidate challenging Councilmember Nguyen) were restricted from using radio time to put forth their message. Specifically, they referred to a letter from radio station KVVN purporting to deny access to programming time. (**Exhibit G**) The evidence shows, however, that KVVN did not restrict a particular group from access to purchasing programming/advertising time, but, rather, its policy provided that it would decline requests from all candidates (or advocates in the case of ballot measures). In any case, KVVN is not the radio station hosting the program in question.

B. Does the Evidence Sustain the Allegation that an Individual or Group of Individuals Were Required to Register as a Committee?

No.

Because the programming did not qualify as an expenditure under the regulations and Municipal Code, the individuals participating in the activity were not required to register as a committee. (See, PRA § 82013)

C. Does the Evidence Sustain the Allegation that Radio Programs on Que Hong Radio Were Made at the Behest of Councilmember Nguyen?

No.

There is no evidence that Councilmember Nguyen solicited Que Hong Radio to run the Voice of District 7 program or to make time available for such a program. There is also no evidence that Councilmember Nguyen or any member of her campaign committee participated in the radio programs in a fashion that constituted coordination with her campaign. Although some of the participants in the radio programs volunteered time to the Nguyen campaign, none of those individuals held significant authority in the Nguyen campaign committee or were involved in strategy/planning for the Nguyen campaign.

⁸ The radio station itself is not alleged to have engaged in express advocacy. However, to the extent that such advocacy had occurred, such activity is excepted from the requirements of the PRA and Municipal Code. (See, FPPC Regulations 18225(b)(4)(B)) See also, Exhibits F(2), F(3), and F(4).

D. Is there Sufficient Evidence to Sustain the Allegation of a Violation with Respect to the Advertisement in the “Quan Tam Cong Dong” Newspaper?

No.

Under PRA § 82013, an individual or group that expends more than \$1000 is obligated to register as a campaign committee. As discussed above, “expenditures” for purposes of the PRA are strictly defined. In particular, the definition of expenditure only includes payments for “communications which expressly advocate the nomination, election or defeat of a clearly identified candidate or candidates, or the qualification, passage or defeat of a **clearly identified ballot measure.**” [emphasis added] In this instance, the advertisement in question does not mention a candidate or a specific ballot measure; there is in fact no direct reference to the matter being voted on (i.e., the recall). In addition, language in the advertisement refers to the “meaning” of the suggested vote, but that reference is neither specific nor directly related to the measure (recall).

Accordingly, there is some issue as to whether the advertisement advocates with respect to a “clearly identified ballot measure.” This term is defined by regulation under the following:

A measure that has qualified to be placed on the ballot is clearly identified if the communication states a **proposition number, official title or popular name associated with the measure.** In addition, the measure is clearly identified if the communication **refers to the subject matter of the measure** and either states that the measure is before the people for a vote or, taken as a whole and in context, unambiguously refers to the measure.

In this instance, the advertisement does not refer to a proposition number, the official title or the popular name of the measure (i.e., “the recall”).⁹ The word recall is not used in any context, nor are any similar references (e.g., removal, replacement, etc.) used. Likewise, there is nothing to reference the effect of Councilmember Nguyen being removed from office pursuant to the recommended “no” vote. Although the fact that the recall measure was the sole issue on the March 3, 2009 ballot suggests that including that date in the advertisement may have been sufficient to make clear that the advertisement opposed the recall, a reference to a date alone would not appear to meet the statutory definition without more context.

Even assuming there was no question as whether this item constituted an expenditure, there remains the issue of whether the expenditure established any liability under the PRA/Municipal Code. Under those statutes, the party responsible for placing the advertisement would have been obligated to register as a committee only if that expenditure and others exceeded the \$1000 threshold under PRA. Here, the delay in filing a complaint on this issue complicates the analysis. There is virtually no evidence to establish how many editions of this newspaper may have been published. The newspaper has not re-appeared in the nearly two year period that has elapsed since the recall election. Moreover, in the absence of other

⁹ As indicated in the official statement of the ballot measure, it was titled “Recall Election City of San Jose” and there was no proposition number or designation. (**Exhibit E**)

examples of the newspaper to review, there is no evidence that advertisements similar to Exhibit D appeared in any of those other editions.

Consequently, the evidence proves no more than one advertisement. This evidence is insufficient to establish an expenditure under § 18225.

VIII. CONCLUSIONS AND RECOMMENDATIONS

A. Findings/Conclusions.

1. The evidence fails to sustain the allegation that an individual or group of individuals was required to register as a campaign committee.
2. The evidence shows the programming on Que Hong Radio alleged in the Complaint was excepted from the requirements of the PRA and Municipal Code.
3. There is no evidence that programming on Que Hong Radio aired at the behest of or in coordination with Councilmember Nguyen or her campaign committee.
4. There is insufficient evidence to establish a violation of the Municipal Code with respect to the newspaper advertisement in Quan Tam Cong Dong.
5. The allegations of misrepresentation and violation of other statutory obligations (see footnote 4) are outside the jurisdiction conferred by the Municipal Code.

B. Recommendations.

1. **We recommend that the Elections Commission:**
 - a. Dismiss the Complaint and allegations related to programming on Que Hong Radio.
 - b. Find that further investigation of the allegation related to the "Quan Tam Cong Dong" newspaper is not warranted due to the lapse of time, the likelihood that further investigation – even if undertaken – is unlikely to discover a significant violation of the Municipal Code and, therefore, that the allegation should be dismissed.
 - c. Take no further action with respect allegations outside the jurisdiction of the Municipal Code.
 - d. Close the file in this matter.

2. We also recommend that the Elections Commission:

- a. Adopt the findings as set forth in this Report and its Attachments.
- b. Adopt the recommendations as set forth above.
- c. Find that because there are no disputed factual issues, this matter is appropriate for disposition without hearing.

Respectfully submitted,



M. D. Moye
Joan L. Cassman

EXHIBITS TO REPORT OF INVESTIGATION

- **Exhibit A** - Citizen Complaint, dated October 7, 2010, including Exhibit.
- **Exhibit B** - FPPC Form 410 - Statement of Organization (Recipient Committee), filed by "Recall Madison Nguyen Committee"
 - (1) April 10, 2008
 - (2) May 19, 2008
- **Exhibit C** -
 - (1) FPPC Form 410 - Statement of Organization (Recipient Committee), filed by "Friends of Madison Nguyen"/"No Recall of Madison Nguyen Committee"
 - (2) FPPC Form 460 - Campaign Disclosure Statement, February 2, 2009
 - (3) FPPC Form 460 - Campaign Disclosure Statement, February 19, 2009
 - (4) FPPC Form 460 - Campaign Disclosure Statement, June 30, 2010
- **Exhibit D** - Example of "Quan Tam Cong Dong" newspaper
- **Exhibit E** - Recall Election Ballot Statement
- **Exhibit F** - FPPC Advice/Informal Assistance Letters
 - (1) A-88-293 re: Definition of Contribution; Free Radio Time
 - (2) A-92-456 re: Expenditure "at the behest of a candidate"
 - (3) I-95-390 re: Definition of Contribution; Exception
 - (4) A-83-200 re: Definition of Contribution; Facilities
- **Exhibit G** - Letter from President, In-Language Radio, dated September 15, 2010, re: Political Advertising on Radio Station KVVN

Evaluator's Report
Complainant: Thomas Nguyen
Complaint Filed: October 7, 2010

**EXHIBITS ARE ON FILE
IN THE OFFICE OF
THE CITY CLERK**