Fair Political Practices Commission
MEMORANDUM

To: Chairman Randolph and Commissioners Blair, Downey, Huguenin and Remy

From: Andreas C. Rockas, Counsel, Legal Division
John Wallace, Assistant General Counsel
Luisa Menchaca, General Counsel

Date: April 20, 2006

Subject: *In re Pirayou* Opinion Request (19 FPPC Ops. 1; O-06-016)
Note On Powers of the Commission With Regard To Section 89519 of the Political Reform Act

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I. INTRODUCTION

At its April 13, 2006, meeting, the Commission requested that the Legal Division prepare a memorandum analyzing what equitable powers the Commission possesses with regard to section 89519 of the Political Reform Act ("Act").[1] This analysis serves as a supplement to the memorandum dated February 27, 2006, which analyzed a Request for Opinion ("Request") submitted by Ash Pirayou on behalf of Ellen Corbett, a former Assembly member now running for state Senate in 2006, and her campaign committees.

The Request asked whether the Commission would draft an opinion granting Ms. Corbett and her committees the right to transfer, with attribution, approximately $80,000 in "surplus campaign funds" held in her old Assembly campaign account, to fund her current campaign for state Senate, even though such a use is not provided for in section 89519(b). The Request states that the monies at issue became "surplus campaign funds" pursuant to section 89519 due to the "gross negligence" of Ms. Corbett's treasurer.

II. QUESTION PRESENTED

Question: Is there legal authority providing that the Commission either has or lacks equitable power to allow a candidate to use her "surplus campaign funds" to fund her campaign for a different elected office, i.e., a use not provided for under section 89519(b)?

Short Answer: There is no published opinion, directly on point, which holds that the Commission has or does not have the equitable power to grant exceptions to

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[1] The Act is found in Government Code sections 81000 – 91014. Commission regulations appear at title 2, sections 18109 – 18997, of the California Code of Regulations. All further references to statutes and regulations are to the Government Code and title 2 of the California Code of Regulations, respectively.

section 89519. Nonetheless, other state agencies found to possess equitable powers have only been able to exercise such powers in narrow and specific contexts.

A. The Commission's Interpretative Powers

Legal arguments supportive of the Commission's authority to make exceptions to section 89519 are contained in the draft Opinion that the Legal Division presented at the March 14, 2006 Commission meeting. The draft opinion relies heavily upon an analysis of the Commission's authority to enact regulations as stated in *Watson v. FPPC* (1990) 217 Cal.App.3d 1059. As described in the draft opinion, the *Watson* court found that the Commission did have authority to interpret the intent of a 12-word statute (the plain meaning of which prohibited any mass mailings at public expense) in a way that resulted in a valid, 1,639-word regulation, full of "exceptions" that simply did not exist either explicitly or implicitly in the statute. The *Watson* opinion, therefore, demonstrates the great expanse of power the Commission has in "interpreting" statutes by regulation.

On the other hand, *Watson* is clearly not controlling in the current situation. The *Watson* case involved the literal application of a generally-worded statute which would have resulted in an absurdity despite the fact that there was strong evidence that the voters did not intend such an absurd result. In the case of section 89519, there is no controversy over the plain meaning and *express* wording of the statute.

Consequently, there is no explicit authority regarding the Commission's ability to grant the relief requested, either in favor or against.

B. Equity Powers

The cases which find that California state agencies have equitable powers generally involve agencies that, like the Commission, have been granted very broad authority. When an agency has been found to possess such powers, the courts have held that such powers are exercisable only in narrow circumstances. We base our analysis on a seminal California Supreme Court opinion regarding the powers of state agencies.

In *Consumers Lobby Against Monopolies v. Public Utilities Comm.* (1979) 25 Cal.3d 891, the California Supreme Court concluded that the Public Utilities Commission ("PUC") "possesses equitable power to award attorney fees under the common fund doctrine in quasi-judicial reparation actions." (*Id.* at pp. 907 & 908; see also *Sam Andrews' Sons v. ALRB* (1988) 47 Cal.3d 157, 172 fn.10, quoting the *Consumers Lobby* case, *supra*.)

Consumers Lobby examined two underlying cases, only one of which we need focus on here. Plaintiff lobby group hired a man to investigate/advocate the failure of the telephone company to collect required tariff charges on equipment of commercial customers. Plaintiff filed a complaint seeking reparations in a quasi-judicial proceeding before the PUC. Thereafter, the telephone company settled. The advocate for the successful plaintiff then sought to recover his costs and fees, even though the general fee

rule is that parties must pay their own fees in the absence of specific authorization by statute or private agreement. (*Consumers Lobby, supra,* at p.906; see Code of Civ. Proc. section 1021.) Because there was no applicable statute authorizing such a recovery, the PUC insisted that it lacked the power to award the requested fees and costs. The Court reversed, holding that the PUC had jurisdiction to award such fees and costs because, first, it was acting in its quasi-judicial capacity during the reparation proceedings, and second, it was appropriate to apply a well-established equitable exception to the general fee rule called the "common fund" doctrine.

The *Consumers Lobby* Court first pointed out that the PUC was a state agency with far-reaching duties, functions and powers. (*Id.* at p.905; Cal. Const., art. XII, §§ 1-6.) It also pointed out that the California Constitution conferred broad authority on the PUC to regulate utilities, including the power to fix rates, establish rules, hold various types of hearings, fashion various equitable remedies (e.g., the award of reparations), and establish its own procedures. (*Consumers Lobby, supra,* at p.905.) Much like the PUC, the Commission has broad authority under the Act. (See e.g., sections 81003 [stating that the Act should be liberally construed], 83111 [stating that the Commission has primary responsibility for the impartial, effective administration and implementation of the Act], and 83112 [stating that the Commission may adopt, amend and rescind rules and regulations to carry out the purposes and provisions of the Act, and to govern the procedures of the Commission].)

Accordingly, one can point to the *Consumers Lobby* case as one where the court held that the state agency had equitable powers. However, that does not mean a court would reach the same conclusion in this instance.

Even assuming the Commission is acting primarily in its quasi-judicial (as opposed to its quasi-legislative) capacity when it issues an opinion, the reparation proceedings before the PUC in *Consumers Lobby* were quite different from the Request at issue here. In *Consumers Lobby*, the PUC was evaluating whether its broad grant of authority conferred upon it the equitable power to grant attorney's fees even though there was no express statutory authorization to do so. (*Consumers Lobby, supra,* at p.906.) When the *Consumers Lobby* court found that the PUC did possess equitable powers, it did so only with regard to that narrow and specific context. In other words: (1) there were well-established equitable exceptions to the general rule at issue in that case, and (2) the general rule at issue was just that – general, i.e., it was not a detailed statute with a specific timeline requirement.

Unlike the PUC in the *Consumers Lobby* case, the Commission (with regard to section 89519) is not seeking to exercise any "well-established equitable exceptions" when it contemplates allowing Ms. Corbett and her committees to transfer their surplus campaign funds in apparent contravention of the plain language in section 89519(b). Moreover, while the Commission clearly has equitable powers in some circumstances, consistent with the PUC case, it is narrow in scope and limited to specific contexts. For example, though the Commission clearly has equitable powers when it adjudicates enforcement matters through procedures mirroring a court's procedures (e.g., presence of

identifiable parties plaintiff and defendant; Commission acts as trier of fact, applies rules of law to those facts, and renders a decision adjudicating vested interests in which there are clear prevailing and losing parties), the Commission arguably acts in a quasi-legislative capacity when it renders opinions pursuant to section 83114 and regulations 18320 et seq. (e.g., the Commission does not act as trier of fact, but accepts the facts as they are presented by the Requestor – see *In re Oglesby* (1975) 1 FPPC Ops. 71, 77 fn. 6 – and allows persons other than the requestor to comment and participate in the drafting of the opinions). (See *Consumers Lobby, supra,* at p.908.)