



California Fair Political Practices Commission

May 16, 1989

William L. Fazio
Assistant District Attorney
Homicide Division
880 Bryant
San Francisco, CA 94103

Re: Your Request for Advice
Our File No. A-89-218

Dear Mr. Fazio:

This is in response to your request for advice regarding your responsibilities under the campaign disclosure provisions of the Political Reform Act (the "Act").¹

QUESTIONS

1. Is a person seeking appointment to the remaining term of an elective office a "candidate" for purposes of the Act?
2. Are moneys received by an individual who seeks appointment to an elective office "contributions" for purposes of the Act?

CONCLUSIONS

1. A person seeking appointment to the remaining term of an elective office is not a "candidate" for that office for purposes of the Act unless he obtains contributions with the intent to eventually seek nomination or election to that office.
2. Moneys received by a person seeking appointment to the remaining term of an elective office are not contributions unless he obtains the moneys with the intent to eventually use those moneys to seek nomination or election to that office.

¹ Government Code Section 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

FACTS

The elected district attorney for the City and County of San Francisco has filed a statement of candidacy for the 1990 election for the position of State Attorney General. Should his candidacy be successful, the remainder of his unexpired term will be filled by appointment by the Mayor of San Francisco.

In an effort to secure your appointment to the unexpired term of district attorney, you wish to raise funds to meet certain expenses such as joining clubs, attending fund raising dinners, and engaging in similar activities to increase your visibility as a candidate for this appointment. Some of your acquaintances have suggested that they would contribute funds for this purpose.

ANALYSIS

Initially, we must determine whether you are a "candidate" for purposes of the Act. Section 82007 defines a "candidate" as:

...an individual who is listed on the ballot or who has qualified to have write-in votes on his or her behalf counted by election officials, for nomination for or election to any elective office, or who receives a contribution or makes an expenditure or gives his or her consent for any other person to receive a contribution or make an expenditure with a view to bringing about his or her nomination or election to any elective office, whether or not the specific elective office for which he or she will seek nomination or election is known at the time the contribution is received or the expenditure is made and whether or not he or she has announced his or her candidacy or filed a declaration of candidacy at such time....

(Section 82007, emphasis added).

The Act essentially defines a "contribution" as a payment for political purposes, except to the extent that full and adequate consideration is received. (Section 82015.) The Act also defines "expenditure" as 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. (Section 82025.) A payment is made for "political purposes" if it is received by a candidate or if it is for the purpose of influencing the action of the voters for or against the nomination or election of a candidate. (Regulation 18215, copy enclosed.) The question, therefore, is whether, in receiving money while seeking appointment to an elective office, you receive payments with a view to bringing about your nomination or election to an elective office.

"Elective office" means any state, regional, county, municipal, district or judicial office which is filled at an election. (Section 82023.) The office of the district attorney is a county office which is filled at an election and is thus an elective office.

The Act does not define the term "nomination." However, Elections Code Section 22836, applicable to local elections, provides for voter nomination of candidates for election through the process of gathering endorsing signatures in nomination papers filed prior to the municipal election. At this time, you do not intend to gather signatures to place your name on the ballot and thus you are not seeking nomination to office.

Furthermore, Section 82022 of the Act defines "election" as "any primary, general, special or recall election held in this state." If you are solely seeking an appointment to a vacant elective office, there is thus no "election" being sought under Section 82022.

Thus, based on these definitions, if you are only seeking an appointment to an elective office you are not a candidate for purposes of the Act and any moneys given to you for that purpose are not contributions.

However, if it is your intent to seek funds for the purpose of becoming a candidate and running for office at a later date, any sums collected will be considered contributions and are subject to the reporting requirements and contribution limitations of the Act. Moreover, if it is your intent to use any funds you receive for the purpose of seeking election to office at a later date, you should inform your donors that the funds may be used for political purposes and will be considered political contributions. Prior to soliciting or receiving any contribution, you must file a statement of intention to be a candidate (Form 501). (Section 85200.) You also are required to establish a campaign bank account and file a campaign bank account statement (Form 502). (Section 85201.) Copies of these forms and manuals explaining the laws on campaign disclosure and contribution limits are enclosed.

It is thus your intent which will ultimately determine whether you are a candidate for purposes of the Act and whether any moneys you receive will be deemed contributions. Should you receive donations only for the purpose of seeking an appointment to an elective office, then you are not a candidate and the moneys you receive are not contributions. Conversely, if it is your intent to seek nomination or election to the office of district attorney and use any funds received to further your campaign, any funds you may have accepted will be deemed contributions.

Finally, since you are a public official, please note that any of the funds in question that you receive which are not contributions, are gifts under the Act. The Act defines a gift as any payment to the extent that consideration of equal or greater

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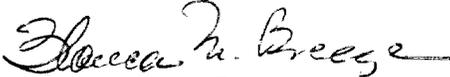
Page 4

value is not received. (Section 82028.) Gifts should be reported in your statement of economic interests. (Sections 87207 and 87302.)

I trust we have answered your questions satisfactorily. Should you wish to discuss the matter further, do not hesitate to call me at (916) 322-5901.

Sincerely,

Kathryn E. Donovan
General Counsel


By: Blanca M. Breeze
Counsel, Legal Division

KED:BMB:plh

Enclosures

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APR 12 7 24 AM '89

April 10, 1989

Blanca Breeze
F.P.P.C.
P.O. Box 807
Sacramento, California 95804

Dear Ms. Breeze:

Thank you for the information supplied to me relative to the Political Reform Act of 1974 as amended.

I am now seeking written opinion pursuant to Government Code Section 83114 (a) + (b).

The situation is as follows:

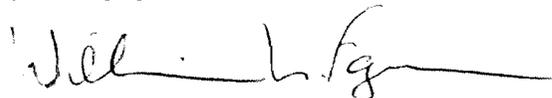
The District Attorney of San Francisco, Arlo Smith, has filed for the position of State Attorney General, election to be held in 1990. Upon taking office in 1991 the remainder of his unexpired term of District Attorney will be filled by appointment by the Mayor of San Francisco.

In an effort to position myself to secure a better opportunity of appointment to the unexpired term of District Attorney I wish to engage in fund raising to meet certain expenses, e.g. Joining clubs, attending fund raising dinners, and miscellaneous expenses. Since I am not seeking elected office I do not believe I am a "candidate" under Gov. Code Section 82007.

I believe we had a discussion on or about April 4, 1989 discussing the above facts and reaching the same conclusions. Since I wish to strictly comply with any governing boards or agencies I am seeking a formal opinion.

Please contact me if there are any questions or clarifications needed or required.

Very truly yours,



William L. Fazio
Assistant District Attorney
Homicide Division
San Francisco, California 94103
(415)553-1210

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California Fair Political Practices Commission

April 14, 1989

William L. Fazio
Assistant District Attorney
Homicide Division
850 Bryant Street
San Francisco, CA 94103

Re: Letter No. 89-218

Dear Mr. Fazio:

You have requested confirmation of advice under the Political Reform Act. We have reviewed your request and determined that it is not appropriate for response with a simple confirmation. Therefore, we will be preparing a fuller analysis of the issues raised in your letter to us. After the analysis has been prepared and approved, we will forward it to you as quickly as we can.

If you have any questions, you may contact me at (916) 322-5901.

Sincerely,

A handwritten signature in cursive script that reads "Blanca Breeze".

Blanca Breeze
Counsel, Legal Division

BB:plh:confadv2