

January 20, 2012

Christopher Reynolds  
Chief, Political Reform Division  
Office of the Secretary of State  
1500 11<sup>th</sup> Street, Room 495  
Sacramento, CA 95814

Re: Your Request for Advice  
**Our file No. I-12-010**

Dear Mr. Reynolds:

This letter responds to your request for assistance regarding the online disclosure provisions of the Political Reform Act (the "Act").<sup>1</sup> Our assistance is based solely on the provisions of the Act; we offer no opinion on the application, if any, of other bodies of law.<sup>2</sup> The Fair Political Practices Commission ("the Commission") does not act as a finder of fact (*In re Oglesby* (1975) 1 FPPC Ops. 71); therefore, our assistance is based only upon the facts you have provided.

### QUESTION

If the Secretary of State's CAL-ACCESS system were to become inoperable and thus unable to receive electronic filings due under the Political Reform Act by January 31, 2012, can the Secretary of State and filers satisfy the requirements of the Act by arranging for timely submission of required reports by other means and/or in alternative formats?

### CONCLUSION

Yes. If it is impossible for filers to file reports online with the Secretary of State due to a failure of the CAL-ACCESS system which cannot be repaired in time for filers to prepare and

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<sup>1</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. Associated regulations are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations.

<sup>2</sup> Informal assistance does not provide the requestor with the immunity given by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).) We limit ourselves to informal assistance in this instance because we do not have sufficient information or expertise to provide specific advice on particular technical decisions you may be required to make in to resolve technical problems you describe.

submit their reports online, the Secretary of State can comply with the Act's disclosure provisions by establishing alternative means by which filers can prepare and submit all required reports. Filers who submit complete reports on time, in the electronic and/or paper formats required by the Act, will thereby satisfy the Act's requirements during this emergency, even if they cannot file electronic reports via CAL-ACCESS. The Secretary of State will likewise comply with the Act in this emergency by timely providing satisfactory alternative electronic filing methods, and by making all reports available online as quickly and completely as possible under the circumstances.

## FACTS

In 1997 the Online Disclosure Act (codified at Sections 84600-84612) was enacted to take advantage of then-current advances in information technology, by requiring that disclosure statements and reports required by the Act be made available to the public online, so that the public (and other interested persons, such as journalists and professionals in a variety of the social sciences) would have easier and more timely access to information on political spending.<sup>3</sup> After a transition period enabling filers to comply with newly developed online filing requirements, Californians enjoyed fuller and more accessible information on spending by lobbyists and political campaigns made available via the CAL-ACCESS portal on the website of the Secretary of State.

A catastrophic equipment failure on November 30, 2011 took offline the information that had previously been available on the Secretary of State's website. After a month of intensive work, the system was restored on December 30, 2011, and there is reason to hope that a similar failure will not recur in the foreseeable future. The possibility of such a failure cannot be excluded from consideration, however, and you seek advice on the legal ramifications of another failure whereby it proves impossible for filers to submit electronic reports by the upcoming end-of-year filing deadline on January 31, 2012, or for the Secretary of State to display those reports as required by the Online Disclosure Act. You describe the background more fully, as follows.

CAL-ACCESS (the California Automated Lobbying and Campaign Contribution and Expenditure Search System) is a suite of applications developed in 13 different programming languages. CAL-ACCESS ran on a server cluster and associated components more than 12 years old, utilizing an uncommon version of the Unix operating system called Tru64.

On November 30, 2011, the disk array controller experienced a physical memory failure that led to the loss of its disk array configuration and the loss of three physical disk drives. The disk array contained a total of 90 disk drives with 15 disk drives installed in each of six drive enclosures. (The array configuration defines which combination of physical disk drives form the logical disk drive that is presented to the operating system.) When CAL-ACCESS was originally designed in 1999, it was common to locate the operating system on the disk array

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<sup>3</sup> Prior to online filing, reports mandated by the Act were available only in paper copies at certain government offices, the location varying according to the nature of the report.

rather than on locally attached disks. This configuration created a single point of failure in the array controller.

After replacing the failed memory equipment, your staff was able to reconfigure a very small portion of the disk array that permitted the server cluster to start. The portion of the disk array that housed the area where the databases reside was not immediately recovered because more time was needed to remap the entire disk array. To make the system available by Internet again as soon as possible, staff ported the server cluster to use an alternate network-attached storage device, using a backup to restore the data by December 7. The configuration functioned for about 30 hours before it failed again on December 9. Staff tried several other approaches to recover this configuration from December 9 to December 11.

On Monday, December 12, staff initiated three concurrent recovery methods to restore services:

1. Porting CAL-ACCESS off the Tru64 cluster to a modern hardware architecture, which involved modifying the database and reprogramming websites and applications in as many as 13 different coding languages.
2. Virtualizing the Tru64 Unix environment to move it off the aged equipment, which included building new servers and installing and configuring software that could emulate the DEC Alpha architecture to run on an Intel architecture. With that environment established, the Tru64 operating system could be installed and configured to match the old production environment, and the databases and applications would be restored from backup.
3. Rebuilding the original disk array.

Work on the first method began on December 12. The second and third methods required contract specialists. Ultimately, service was restored on December 30 from a “virtualized” environment that in essence moved the resident code to a “cloud” environment.

CAL-ACCESS is and remains an antiquated system, and few people in the United States are familiar with the technology used to build and operate it. It is also a very fragile system, a defect that led to its collapse on November 30. You believe that it now less fragile than it was before, but it is still a very old system sustained by ad-hoc repair work that could again fail before the upcoming filing deadline. To ensure that similar failures do not recur in the future, the system will have to be replaced by an entirely new one employing up-to-date hardware and design standards.

The challenges faced by your staff in effecting a recovery were both complex and unprecedented, making it difficult to forecast at this time how stable the new CAL-ACCESS environment will be. This core uncertainty makes it imprudent to assume that the system will be able to accept electronic reports that will soon be required from up to 13,000 filers, and that the Secretary of State’s office will be able to fully comply with its duty to present those reports to the public online in a readily accessible and searchable electronic format.

Your staff is now planning alternative methods for filing and publishing the reports required by the Online Disclosure Act, should CAL-ACCESS again become unavailable. At present, you believe that if CAL-ACCESS again becomes unavailable the Secretary of State will be able to promptly advise the regulated community how to input required information, most probably on “fillable” .pdf forms available on the Secretary of State’s website. The Secretary of State will place the data on its website, enabling the public to search for and retrieve the information. At present you anticipate that this emergency system will be more cumbersome for filers, and will not support the full range of search tools available on CAL-ACCESS, reducing to some degree the accessibility of campaign information to the public.

Depending on the timing of any subsequent failure of CAL-ACCESS, it is possible that some filers and the Secretary of State may be unable to comply with some of their duties under the Online Disclosure Act. You seek guidance from the Commission on the extent to which the Secretary of State may lawfully announce and implement alternative reporting methods that would enable all parties to comply with the law as fully as possible under the circumstances.

### ANALYSIS

Section 84601 states the goals of the Online Disclosure Act of 1997:

The Legislature finds and declares as follows:

- (a) The people of California enacted one of the nation’s most comprehensive campaign and lobbying financial disclosure laws when they voted for Proposition 9, the Political Reform Act of 1974, an initiative statute.
- (b) Public access to campaign and lobbying disclosure information is a vital and integral component of a fully informed electorate.
- (c) Advances in technology have made it viable for disclosure statements and reports required by the Political Reform Act to be filed online and placed on the Internet, thereby maximizing availability to the public.

The Online Disclosure Act itself (codified at Sections 84600-84612) does not contain a provision contemplating alternative methods of compliance with its provisions in the event of an inability of CAL-ACCESS to support required online filing and publication of reports, nor is such an eventuality expressly considered elsewhere in the Act. However, the Act does contain a rule of statutory construction that guides our interpretation of the law when we encounter circumstances not expressly addressed by statute or regulation. Section 81003 provides: “This title should be liberally construed to accomplish its purposes.”

The first purpose of the Act, stated at Section 81002(a), is disclosure of campaign receipts and expenditures “in order that the voters may be fully informed and improper practices may be inhibited.” The Online Disclosure Act was written to exploit recent advances in technology to further the Act’s original goal of providing public access to campaign finance and

lobbying information. Thus we interpret the provisions of the Act “liberally” as requiring full and timely disclosure of information that would in the ordinary course have been filed electronically and published via CAL-ACCESS. If existing channels for communicating this information suddenly become unavailable, the goals of the Act can best be served by providing this information as fully and quickly as possible.

Thus when it is impossible to timely file required reports via CAL-ACCESS, filers should submit their reports through an alternative channel that will enable online publication as fully and as quickly as circumstances permit, and the Secretary of State must act in a timely fashion to ensure that filers have the information and resources needed to facilitate the submission and publication of all required reports.

Our reading of the Act is consistent with established principles of extrinsic law. When it is not possible to comply with the strict mandate of a law, it has long been settled that “impossibility” relieves a party from the duty of strict compliance. This rule is codified as one of the Maxims of Jurisprudence at California Civil Code Section 3531: “The law never requires impossibilities.”

“Impossibility” here means not only strict impossibility but also impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved. (*Oosten v. Hay Haulers etc. Union* (1955) 45 Cal.2d 784, 788, 291 P.2d 17.) The law recognizes exceptions to statutory requirements due to impossibility of performance. *People v. Lake County* (1867) 33 Cal. 487, 492 and *County of San Diego v. Milotz* (1953) 119 Cal.App.2d Supp. 871, 883–884, 260 P.2d 282; see also 73 Am.Jur.2d, Statute, Section 15: “[W]here strict compliance with the terms of a statute is impossible, compliance as near as can be has been permitted on the principle that the law does not require impossibilities.”.)”

More recently, *Board of Supervisors of Butte County v. McMahon et al*, 219 Cal.App.3d 286, 300-303 (1990) considered the doctrine of impossibility when raised by a county as a defense to required implementation of a state-mandated program. Following *Sutro Heights Land Co. v. Merced Irr. Dist* (1931) 211 Cal. 670, the Third District Court of Appeals recognized that a public entity may raise a defense of impossibility when a legally required act is a “strict” impossibility, or is “impracticable” due to lack of funds and the ability to raise them. However, the majority also concluded that, given the evidence in that particular case, the county could not be excused from its duty of performance since the record showed that the county had had ample time to raise the needed funds, but had simply neglected to take measures necessary to enable its compliance with the state mandate.

Your account of the facts indicates that (1) on November 30, 2011 it became impossible for the Secretary of State and for filers to comply fully with requirements of the Online Disclosure Act due to the failure of the CAL-ACCESS system; (2) one month later CAL-ACCESS was restored to service, making compliance with the Online Disclosure Act possible; and (3) the age and instability of that system makes recurring failures foreseeable.

We conclude that, had CAL-ACCESS remained out of service during the month of January 2012, it would likely have been impossible for the filers and the Secretary of State to comply with the law, because it would likely have been impossible for filers to submit required reports as contemplated by the Online Disclosure Act, and for the Secretary of State to receive and publish the information as required by this law. Should CAL-ACCESS fail again in the near future, excuse from strict compliance with the provisions of the Online Disclosure Act would be warranted, if the Secretary of State provides filers with timely alternative means of filing reports, with as little harm as possible to the public interest in disclosure.<sup>4</sup>

We cannot advise on whether particular responses to a specific emergency would satisfy a requirement that the Secretary of State provide alternative reporting channels that are as effective as possible at minimizing loss or delay of required information. What is or is not “possible” in a given situation is a question of fact, which Commission staff are neither authorized nor competent (in cases that hinge on the complexities of information technology) to decide. We note, however, that case law suggests a public agency’s financial straits may not excuse performance that is not commensurate with the importance of its legal obligations.

We believe the best guidance on the Secretary of State’s continuing legal obligations may be found in study of pertinent judicial decisions, which teach that each such case is decided by close study of its peculiar facts and circumstances. Your account of the facts following the sudden failure of CAL-ACCESS suggests to us that your professional staff rendered exemplary service in restoring the system to operation in a virtualized environment. It seems clear also that development of contingency plans to minimize losses in the event of a further system failure is a prudent course of action.

For the longer term, *Butte County v. McMahon (supra)* introduces a cautionary note at 219 Cal.App. 3d, 301-303. Although recognizing that “the wheels of government turn slowly at times” (*id.* at 301) the court found that the County’s complete failure to prepare for an event foreseeable within five years’ time argued against an excuse for non-performance of a legal duty by reason of “impossibility.” At some point in the future, last year’s failure of CAL-ACCESS may appear to have put the Secretary of State on notice that a subsequent catastrophe could and should have been averted by timely replacement of an already aged system.

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<sup>4</sup> The fact that under some circumstances it may not be possible for filers to submit required electronic reports through CAL-ACCESS does not relieve them from an obligation to submit their reports in electronic format on or before the filing deadline. Thus, for example, if there were a sudden failure of CAL-ACCESS one or two days before a filing deadline, and the Secretary of State was unable to provide an alternative online filing path, filers would be expected, by the filing deadline, to transmit their reports to the Secretary of State via email or, if necessary, on portable storage devices such as thumb-drives. Any paper reports required by the Act would, of course, be delivered to the Secretary of State in the usual fashion.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini  
General Counsel

By: Lawrence T. Woodlock  
Senior Counsel, Legal Division

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